

**Case C-328/23**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

25 May 2023

**Referring court:**

Oberster Gerichtshof (Austria)

**Date of the decision to refer:**

25 April 2023

**Applicants:**

J

A

**Defendants:**

Reisebüro GmbH

R GmbH

---

**Subject matter of the main proceedings**

Consumer protection – Package travel and linked travel arrangements – Directive (EU) 2015/2302 – Termination of the package travel contract and right of withdrawal before the start of the package – Termination on account of the occurrence of unavoidable and extraordinary circumstances at the travel destination – Pre-contractual information

**Subject matter and legal basis of the request for a preliminary ruling**

Interpretation of EU law, Article 267 TFEU

## Questions referred for a preliminary ruling

1. Must Article 12(2) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements (OJ 2015 L 326, p. 1) be interpreted as meaning that unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package or the carriage of persons to the destination, which entitle the consumer to terminate the package travel contract without paying a termination fee and on which the traveller relies, are to be understood as being ones which

- may permissibly already be present at the time when the package travel contract is concluded; or
- cannot permissibly yet be present at the time when the package travel contract is concluded, but occur for the first time only at some point between then and
  - the declaration of termination, or
  - when the package starts?

2. Must Article 12(2) of the aforementioned Directive (EU) 2015/2302 be interpreted as meaning that the unavoidable and extraordinary circumstances referred to therein are to be understood as being ones which

- are not known to the parties at the time when the travel contract is concluded; or
- may permissibly be known to the parties at the time when the travel contract is concluded; or
- are not foreseeable, as being generally or imminently likely to occur, by the parties at the time when the travel contract is concluded; or
- may permissibly be foreseeable, as being generally or imminently likely to occur, by the parties at the time when the travel contract is concluded – and, if so, on the basis of which specific criteria arising from the Directive; or
- are broadly known to the parties at the time when the package travel contract is concluded but the specific configuration of which cannot yet be predicted (or can be so with only some degree of probability at most) (which is to say, for example, whether, as a result of a pandemic [in this instance, COVID] which has been in existence for [in this, instance, more than ten] months, additional testing and/or lockdown measures will be prescribed at the holiday destination); or

– are to be assessed, entirely independently of the level of knowledge of the parties, exclusively on the basis of objective criteria – and, if so, on the basis of which specific criteria arising from the Directive?

3. Must Article 5 of the aforementioned Directive (EU) 2015/2302 be interpreted as meaning that the pre-contractual information to be provided to the traveller – in particular the information on ‘health formalities’ provided for in Article 5(1)(f) – is to be understood as also including that concerning the testing and lockdown measures to be complied with at the holiday destination on account of the pandemic.

If Question 3 is answered in the affirmative:

4. Must Article 5 of the aforementioned Directive (EU) 2015/2302 be interpreted as meaning that, in the event that the parties agree to amend (adjust; ‘reconfigure’) the terms of the package travel contract after it has been concluded – in relation, for example (as here), to individual travel services within the meaning of Article 5(1)(a), such as the transport arrangements, the itinerary or the date of travel –, the pre-contractual information to be provided to the traveller must be provided again or updated in full (even if it is not affected by the ‘reconfiguration’) or in part?

#### **Provisions of European Union law relied on**

Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, in particular Articles 5 and 12(2)

#### **Provisions of national law relied on**

Pauschalreisegesetz (Law on package travel) (PRG), in particular Paragraphs 2(12) 4(1) and 10

#### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The applicants are consumers and live near the German border in Austria. The first defendant runs a travel agency and, in early 2021, arranged for the applicants a package tour to Cuba that was organised by the second defendant.
- 2 On 20 January 2021, when a lockdown was imposed in Austria on account of the COVID pandemic, the applicants approached an employee of the first defendant travel agency whom they knew.

- 3 The travel agency employee, who was working from home, invited the applicants to her home, where she explained to them that, at that time, travel was subject to ten-day period of self-isolation on return to Austria and to the taking of the necessary PCR tests, and would be easier at a later time, an option which the applicants refused to take up, however. She explained that flights to Cuba were available, which the second applicant was delighted to hear. The travel agency employee's question as to whether the second applicant was able to undertake such a trip at all, on account of her physical impairment (she is, inter alia, confined to a wheelchair), was answered in the affirmative by the second applicant. The travel agency employee and the applicants understood the website of the Austrian Ministry of Foreign Affairs (the BMEIA) to mean that travel to Cuba was still possible but that a PCR test had to be taken both prior to the flight and on arrival in Cuba. The travel agency employee informed the applicants that travellers would be taken to the hotel they had booked and would have to stay on the hotel premises until they received their test results. The travel agency employee did not mention that, even if their test results were negative, they would not be allowed to leave the hotel premises for a further five days.
- 4 On 20 January 2021, the applicants booked a package tour from 13 February 2021 to 3 March 2021, including flights from Munich to Varadero via Frankfurt (and back) and full-board hotel accommodation.
- 5 The travel documents e-mailed to the applicants on 20 January 2021 stated that travellers would need to be in possession of a medical certificate attesting to a negative coronavirus (COVID-19) PCR test result, issued no more than 72 hours prior to their arrival, and would have to take a further such test on their arrival. The following additional information was provided:

*'Owing to the spread of the coronavirus, a warning has been issued, effective from 19 December 2020 until further notice, advising against any leisure and non-essential travel. Travellers should continue to expect ongoing restrictions on air and other travel and extensive restrictions on life in public places.*

– *BMEIA homepage*

*Travel to Cuba: permitted.*

*Conditions: a negative PCR test for SARS-CoV-2 taken no more than 72 hours prior to arrival; a further chargeable test on arrival at the airport. No self-isolation. ...*

– *From 1 January 2021, a negative PCR test for SARS-Co V-2 taken no more than 72 hours beforehand must be presented on arrival. In addition, arriving passengers will be subjected to a COVID test at the airport, the results of which should be available within 24 to 48 hours. The test currently costs USD 30 per person (payable by credit card). Arriving travellers must give their address in Cuba. If they test positive, they will be removed from that address and taken to a*

*State facility to self-isolate. Those who test negative will be permitted to travel anywhere in the country without restriction. ...'*

- 6 Those documents also referred travellers to the current travel and health advice for Austrian citizens available on the BMEIA website. This stated that travellers must make enquiries in good time with the competent foreign representations. They must read the current security advice issued by the Auswärtiges Amt (German Foreign Office) in connection with the holiday region concerned no more than 48 hours prior to departure and make any necessary adjustments to their travel documentation. In some cases, it stated, different travel advice would apply to non-German nationals or to citizens from countries with a higher COVID risk. Travellers must follow the COVID-19 advice applicable to the flights they have booked. Information on such advice can be found on the website of the airline concerned.
- 7 On 22 January 2021, the travel agency employee gave the applicants their travel documents, pointing up the need for a PCR test prior to the flight and for a further PCR test at the airport in Cuba. It was not possible to ascertain whether mention was made of the travel warning level published by the BMEIA on that date, or of the fact that, when the booking was made on 20 January 2021, the travel warning for Cuba was at level 6; no mention was made of the requirement to self-isolate on the hotel premises for five days.
- 8 On 12 February 2021, the first applicant asked the travel agency employee whether what she had said about PCR test was still the case. After consulting the BMEIA website, the travel agency employee confirmed that it was. The travel advice for Cuba was also discussed, although the travel agency employee did not mention the reference, which had formed part of that advice since 6 February 2021, to the need to take a chargeable test on the fifth day following arrival. It was not possible to ascertain what tourists would be required to do or to refrain from doing during that time.
- 9 On 13 February 2021, the applicants went to Munich airport, where they were refused travel because they failed to produce a PCR test.
- 10 Following their return and the travel agency employee's reference to the standardised compensation fee in the amount of 85% of the price of the package that might be payable, the parties agreed to reschedule the date of travel to 20 February 2021, offsetting against the price payable the price previously paid for the package.
- 11 On 19 February 2021, the applicants received their travel documents from the first defendant. In those documents, reference was again made to the BMEIA website, and the applicants inferred from them that they were responsible for making their own way to Germany.
- 12 On 18 and 19 February 2021, the applicants carried out some research, in particular on both the BMEIA website in relation to Cuba, and various websites

(those of the BMEIA, the ÖAMTC (the Austrian Automobile, Motorcycle and Touring Club) and the German Federal Government) in relation to the conditions applicable to travel from the Tyrol region, which had been classified as an area affected by a coronavirus variant since 14 February 2021, to Bavaria for transit purposes, the information available with respect to whether and, if so, under what strict conditions, such a journey was possible being to some extent contradictory.

- 13 The BMEIA website as it appeared on 18 February 2021 contained, in addition to the general non-country-specific notice reproduced in paragraph 5, the following notice, which had not yet been posted when the travel contract was concluded on 20 January 2021: *‘With effect from 6 February 2022, a negative PCR test for SARS-Cov-2, taken not more than 72 hours beforehand, must be presented on arrival. In addition, arriving passengers will be subjected to a COVID test. This currently costs USD 30 (payable by credit card) per person. This will be followed by a compulsory period of chargeable self-isolation in a facility determined by the Cuban State (usually a hotel). A further chargeable test will be carried out on the fifth day after arrival. The results should be available within 48 to 72 hours’.*
- 14 On 19 February 2021, the travel agency employee, further to a question put to her by the second applicant concerning ‘self-isolation’ in Cuba, consulted the Austrian Embassy in Cuba about the travel advice. The Austrian Embassy stated that travellers must remain in the hotel until they had received the result of the locally conducted PCR test. During that period, however, their stay at the hotel, the premises of which they were in principle not permitted to leave after 8pm, would be free of charge. The travel agency employee shared this information with the second applicant, without first having asked the second defendant about any further self-isolation requirements. Whether the information concerning Cuba on the BMEIA website, in relation to the requirement for a second test on the fifth day after arrival, was correct, was not discussed. The applicants assumed that it was, however, because the entry registration form referred to the BMEIA website. They therefore took it to be the case that they would have to self-isolate for ten days in Cuba and henceforth considered the trip to be no longer practicable.
- 15 In an e-mail sent to the first defendant on 19 February 2021, the applicants stated that they would not be taking the trip ‘owing to unavoidable and extraordinary circumstances’ (cancellation owing to the cessation of existence of the basis of the transaction (‘Wegfall der Geschäftsgrundlage’)) and asked for a refund of the amount they had paid.
- 16 In any event, on 19 February 2021, the BMEIA’s travel warning for the whole of Cuba stood at level 6 (the highest level).

### **The essential arguments of the parties in the main proceedings**

- 17 The applicants seek the repayment by the defendants, as being jointly and severally liable therefor, of the full amount of the price of the travel package. They base that claim not only on a breach of the duty to explain and inform, and



defective advice and agency, but also on unavoidable and extraordinary circumstances which significantly affected the performance of the package and rendered it impracticable.

- 18 The defendants take the view that no unavoidable and extraordinary circumstances were present. The applicants were aware from the outset of the situation which had been caused by the pandemic, and no new circumstances arose. As a travel retailer, the first defendant does not have capacity to be sued.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 19 The court of first instance upheld the action in principle and found that the highest – level 6 – travel warning issued on 19 February 2021 permitted cancellation under Paragraph 10(2) of the PRG, because it gave rise to extraordinary circumstances, notwithstanding that the pandemic had already been in existence for a year. Furthermore, the applicants could not have foreseen what restrictions would apply to travel not only to Germany but also to Cuba, all of which rendered the trip impracticable. What is more, the defendants were responsible for breaches of contract rendering them liable for compensation and entitling the applicants to terminate the contract in question.
- 20 The appeal court set that judgment aside and referred the case back to the court of first instance for further proceedings and a fresh judgment. It stated that the conditions for termination without compensation are not met, on the ground that, since the applicants booked the package in the knowledge of the pandemic and of the warnings, issued because of it, against leisure and non-essential travel, they do not qualify for protection. The additional self-isolation following the test to be taken on arrival in Cuba is not an unavoidable and extraordinary circumstance significantly affecting the performance of the package. For any errors in the information which should have been provided to the applicants at the time of rebooking, liability will lie with the travel retailer and the travel organiser. The fact remains, however, that, from a contractual point of view, the applicants, who did not embark upon the second trip once in possession of the correct information, and who were themselves to blame for missing the first date of travel, are entitled to a refund of the price of the package only after deduction of the standardised compensation fee of 85% of the price of the travel services, but not to a refund of the airfare.
- 21 It now falls to the Oberster Gerichtshof (Supreme Court) to adjudicate on the appeal on a point of law which the applicants have brought against the setting aside of the judgment at first instance upholding their action with a view to having that judgment reinstated. As the court of last instance, the Oberster Gerichtshof (Supreme Court) has a duty to make a request for a preliminary ruling where the correct application of EU law is not so manifest as to leave no room for reasonable doubt. Such doubts are present in this instance.

- 22 Question 1: The decision on the dispute hangs crucially on the interpretation of Article 12(2) and Article 5 of Directive 2015/2302, which must in turn inform the interpretation of Paragraph 10(2) and Paragraph 4 of the PRG. Similar questions have already been referred to the Court of justice on a number of occasions.
- 23 Question 2: The interpretation of Article 12(2) of Directive 2015/2302, according to which a traveller is entitled to terminate a package travel contract without paying any termination fee in the event of unavoidable and extraordinary circumstances ‘occurring’ at the place of destination or its immediate vicinity, is the subject different views in German-language legal literature. While some authors regard it as immaterial whether the extraordinary circumstances are present when the contract is concluded, when the declaration of termination is made or not until shortly before the package starts, and consider that, where such circumstances obtain, a no-fee termination is intended to be available even if the traveller books a travel package in the knowledge of the existence of a pandemic – in the (ultimately disappointed) hope, for example, that the situation will have improved by the time the package starts –, others take the view that a no-fee termination is justifiable only on the basis of events that were unforeseeable at the time of booking, since foreseeable circumstances are not ‘unavoidable and extraordinary’. Others still argue, conversely, that that the circumstance creating an entitlement to termination does not have to have been unforeseeable. A number of other authors argue for their part that anyone booking a package despite being aware of the existence of a situation of risk no longer qualifies for protection.
- 24 Questions 3 and 4: The text and recitals of Directive 2015/2302 do not offer any clear indication of which obligations in respect of the provision of pre-contractual information are to be imposed on the travel organiser and/or the travel retailer in relation to the ‘health formalities’ referred to in Article 5(1)(f), and whether such formalities also include circumstances, relevant to the decision to be given in this instance, concerning measures imposed at the holiday destination on account of the pandemic.
- 25 On the one hand, Article 5(1)(f) of Directive 2015/2302 does not appear in the list of items of information, contained in Article 6(1), which have to form an ‘integral’ part of the package travel contract. On the other hand, Article 7(2) provides that the package travel contract must set out the full content of the agreement, including, inter alia, the information referred to in Article 5(1)(f).
- 26 According to Article 5(1) of Directive 2015/2302, the pre-contractual information is to be provided ‘before the traveller is bound by any package travel contract or any corresponding offer’. However, it is unclear from that wording whether any obligations in respect of the provision of information apply – and, if so, what those obligations are and how far they extend – in the case where, after the package travel contract has first been concluded, parts of it are renegotiated and subsequently agreed upon in an amended form (‘reconfigured’).