

## Case C-320/23

## Request for a preliminary ruling

**Date lodged:**

24 May 2023

**Referring court:**

Handelsgericht Wien (Austria)

**Date of the decision to refer:**

23 May 2023

**Appellant and defendant:**

DocLX Travel Events GmbH

**Respondent and applicant:**

Bundesarbeiterkammer

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[...]

In the case of **Bundesarbeiterkammer** (Federal Chamber of Labour), applicant, 1040 Vienna, [...], v **DocLX Travel Events GmbH**, defendant, 1010 Vienna, [...], concerning an action for EUR 407.80, the Handelsgericht Wien (Commercial Court, Vienna), exercising its appellate jurisdiction [...], has, in the appeal lodged by the defendant against the judgment of the Bezirksgerichtes für Handelssachen Wien (District Court for Commercial Matters, Vienna) of 4 January 2023, [...] made the following

**O r d e r:**

I. The following questions concerning Article 12 ('Termination of the package travel contract and the right of withdrawal before the start of the package') of 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 ('**the Directive**') are referred to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union (TFEU):

1. Must the reasonableness, and therefore the amount, of the termination fee be examined by reference to when the organiser's offer was made, when the package travel contract was concluded, when the traveller made a declaration of termination, when the package was scheduled to end, or some other point in time?
2. Must the reasonableness, and therefore the amount, of the termination fee be examined on the basis of a commercially and economically correct calculation of that amount or on the basis of other criteria, such as, for example, a standardised estimate based on a percentage of the price of the package?
3. Must that provision be interpreted as meaning that, where the termination fee agreed in the package travel contract is unreasonably high, the organiser retains his or her right to the payment of a reasonable termination fee (as determined by the answers to Questions 1 and 2) or must that fee be calculated specifically on the basis of the actual disadvantage to the organiser, or does the organiser lose that right altogether?
4. Is it possible, for the purposes of assessing the reasonableness of the termination fee, in particular where that fee was agreed on a standardised basis, to apply national law, inasmuch as this allows the court to set the amount of a claim at its own discretion if the proceedings are expected to be disproportionately expensive.

II. [...] [Stay of the proceedings]

### **Grounds:**

#### **I. Facts:**

In November 2020, the consumer booked with the defendant an 'X-Jam Maturareise' on the Laterna peninsula in Croatia for the period 25 June to 1 July 2022. Point 7 of the agreed booking conditions provides:

*'Traveller's right of withdrawal before the start of the package*

*In accordance with Paragraph 10 of the PRG (Law on Package Travel), the traveller has the right to terminate the contract at any time before the start of the package, in return for the payment of a standardised compensation fee.*

*The parties agree to the following reasonable standardised compensation fees, which are calculated on the basis of the time between the cancellation and the agreed start of the package, and apply in addition to the standardised handling fee (Z 3):*

*Up to 30 days before the start of the package – 40%*

...

*of the agreed price of the package’.*

In September 2021, the consumer declared that she was terminating the travel organisation contract and, by cancellation invoice issued by the defendant on 13 September 2021, was charged EUR 464.80, including EUR 378.80 by way of cancellation costs and a handling fee of EUR 29.

The consumer paid that amount under reserve and assigned her rights of recovery to the applicant.

## **II. The arguments of the parties:**

The applicant seeks repayment of the cancellation costs and the handling fee, that is to say EUR 407.80 plus interest. It submits that, in the light of Paragraph 10 of the Pauschalreisegesetz (Law on package travel) (PRG), Paragraph 879(3) of the Allgemeines Bürgerliches Gesetzbuch ([Austrian] General Civil Code) (ABGB) and Paragraph 6c of the Konsumentenschutzgesetz (Law on consumer protection) (KSchG), the agreed cancellation costs and the handling fee are void and grossly disadvantageous, in particular because the 2022 ‘X-Jam Maturareise’ was fully booked. The defendant has not suffered any damage at all. The handling fee is unreasonably high and grossly disadvantageous.

The defendant contested the applicant’s claim at length.

## **III. The course of the proceedings to date:**

By judgment of 4 January 2023, the Bezirksgericht für Handelssachen Wien (District Court for Commercial Matters, Vienna), upheld the action in its entirety. It stated in law that the aforementioned cancellation agreement is impermissible. No distinction is drawn on the basis of whether the travel package is cancelled one year or only slightly more than one month before it is due to take place. Neither is any account taken of the fact that the defendant actually resold travel packages via its waiting list, the likelihood of its being able to do so being higher in the case of packages cancelled in the year before their start date than in the case of those cancelled after the turn of the year. In fact, the defendant charges a cancellation fee under that clause even if it does not suffer any damage because it has resold the package. The agreement reached does not ensure that the compensation corresponds to the price of the package minus the cost savings and income from alternative deployment of the travel services. That clause must therefore be regarded as grossly disadvantageous within the meaning of Paragraph 879(3) of the ABGB, and is, in addition, contrary to Paragraph 10 of the PRG. The court of first instance further argues that, since the ‘blue pencilling’ (*geltungserhaltende Reduktion* – saving reduction) of non-negotiated unfair terms in individual proceedings concerning a consumer transaction is no longer an option, the question of a judicial moderation of the agreed cancellation fee no longer arises.

Since the defendant travel organiser has not suffered any damage, it cannot base its claim on the fourth sentence of Paragraph 10(1) of the PRG.

The defendant has appealed that judgment to the Handelsgericht Wien (Commercial Court, Vienna).

**IV. Present appeal:**

[...] [Matters of procedural law]

As permissible grounds of appeal, the appellant cites procedural defects, incorrect findings of fact owing to an incorrect evaluation of the evidence and an incorrect legal assessment. It submits inter alia that the reasonableness of the termination fee must be reviewed by reference to the time of conclusion of the contract.

In the response to the appeal, the applicant defends the legal position adopted by the court of first instance and also permissibly submits that the court of first instance made incorrect findings of fact on account of an incorrect evaluation of the evidence.

**V. The questions referred for a preliminary ruling:**

**General:**

In the present case, the consumer did not terminate the package travel contract for any of the reasons referred to in Article 12(2) of the Directive.

Article 12(1) of the Directive reads:

*‘Termination of the package travel contract and the right of withdrawal before the start of the package*

*Member States shall ensure that the traveller may terminate the package travel contract at any time before the start of the package. Where the traveller terminates the package travel contract under this paragraph, the traveller may be required to pay an appropriate and justifiable termination fee to the organiser. The package travel contract may specify reasonable standardised termination fees based on the time of the termination of the contract before the start of the package and the expected cost savings and income from alternative deployment of the travel services. In the absence of standardised termination fees, the amount of the termination fee shall correspond to the price of the package minus the cost savings and income from alternative deployment of the travel services. At the traveller's request the organiser shall provide a justification for the amount of the termination fees’.*

Austria transposed that directive by enacting the Bundesgesetz über Pauschalreisen und verbundene Reiseleistungen (Federal Law on package travel and linked travel arrangements) (PRG), Paragraph 10(1) of which provides:

*'Termination of the travel package contract before the start of the [package]*

*The traveller may terminate the package travel contract at any time before the start of the package without giving any reasons. Where the traveller terminates the package travel contract under this subparagraph, the traveller may be required to pay appropriate and justifiable compensation to the organiser. The package travel contract may specify reasonable standardised compensation fees based on the time of the cancellation before the scheduled start of the package and on the expected cost savings and income from alternative deployment of the travel services. Where the contract did not specify any standardised compensation fee, the compensation must correspond to the price of the package minus the cost savings and income from alternative deployment of the travel services. At the traveller's request, the organiser shall provide a justification for the amount of the compensation'.*

The present proceedings are governed by the Gesetz über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO) (Law on judicial proceedings in civil-law disputes (Code of Civil Procedure – ZPO)), Paragraph 273(1) of which provides:

*'Where it is established that a party is entitled to compensation for damage or for interest, or that that party is otherwise entitled to make a claim, but proof of the contested amount of the compensable damage or interest or of the claim cannot be furnished or can be furnished only with disproportionate difficulty, the court may, on request or of its own motion, disregard any evidence offered by the party and determine that amount itself on the basis of its own conviction. The determination of the aforementioned amount may also be preceded by the examination under oath of one of the parties with respect to the circumstances relevant to the determination of that amount'.*

According to recital 31 of the Directive, travellers should be able to terminate the package travel contract at any time before the start of the package in return for payment of an appropriate and justifiable termination fee, taking into account expected cost savings and income from alternative deployment of the travel services.

A uniform, fully harmonised and definitive body of rules relating to the law governing package travel was adopted on the basis of the TFEU, in particular Article 114 thereof (Articles 1 and 4 of the Directive).

The answers to the questions raised by the appeal court are of crucial importance to the outcome of the case pending before it. This appeal court is unaware of any case-law of the Court of Justice of the European Union, to which the present request is made, concerning the interpretation of Article 12(1) of the Directive in

the terms indicated. Case C-287/21 (request for a preliminary ruling from the Landesgericht Salzburg (Regional Court, Salzburg)) was removed from the register.

The first question:

In the case at issue, there are long intervals between the offer and conclusion of a package travel contract (summer 2020), the booking (November 2020), the declaration of termination (September 2021) and the period of travel (summer 2022). The Directive does not make clear which of these points in time must be taken into account.

The second question:

In travel law, the amount of the termination fee ('cancellation costs') is in practice generally determined on the basis of a standardised percentage of the price of the package, calibrated according to when the traveller made the declaration of termination. An exact economically evidenced calculation is not used in the [travel] industry.

The [Austrian] national supreme court has not yet established any case-law in this regard. The German BGH (Federal Court of Justice) appears, so far as concerns the determination of the amount of the termination fee, to take as the point of reference an economic calculation based on the last three business years [...]. It does not recognise the traveller's right to information and considers the burdens of allegation and proof to lie with the organiser [...].

The third question:

By judgment of 8 December 2022 in Case C-625/21, the Court of Justice held that Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, where a compensation clause in a contract of sale is declared to be unfair and therefore void, but the contract in question is nonetheless capable of continuing in existence without that clause, they preclude the commercial seller who imposed that clause from claiming, in the context of an action for damages based exclusively on a supplementary provision of the national law of obligations, compensation as provided for in that provision, which would have been applicable had it not been for the aforementioned clause.

The question as to whether that judgment is also relevant to the interpretation of Article 12(1) of the Directive, in particular to the validity of the last sentence thereof in relation to the previous sentences, cannot be answered beyond any doubt by the referring appeal court itself, because long periods of time elapsed between the offer to conclude a package travel contract (summer 2020), the booking (November 2020) and the declaration of termination (September 2021).

The fourth question:

Laws must be interpreted effectively and the Directive seeks to contribute towards a high level of consumer protection (recital 51). In the view of the referring appeal court, this also includes the effective enforceability of laws, the average costs of which must be reasonably proportionate to the value of the dispute. This also follows from the recitals (in particular recital 7) of Regulation (EC) No 961/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure.

In proceedings concerning claims for damages or other claims, the applicant may have great difficulty in proving the amount of the claim. Under the aforementioned national procedural provision contained in Paragraph 273 of the ZPO, the applicant is placed at an advantage if he or she has proved that the claim is still in existence under the strict rules of evidential procedure. The procedural costs associated with determining that amount must be kept within reasonable limits and enforcement of the applicant's intrinsically justified claim must not be unduly delayed. Consequently, in cases where proof of the amount of the claim cannot be furnished or can be furnished only with disproportionate difficulty, that provision allows the court, of its own motion or on request, to determine the contested amount on the basis of its own conviction. In such cases, the court is therefore released from the obligation to prove the facts material to the amount of the claim and, consequently, can even decline any requests for proof which the parties might make in this regard. That provision does not release the applicant from its burden of allegation or from its obligation to specify the exact amount of the claim in its application [...].

The referring appeal court would wish to apply that national procedural provision, not least because an effective, inexpensive and swift resolution of the dispute is in the interests of both the traveller and the organiser. However, the Directive could be understood differently.

6. The obligation to stay the proceedings and submit a request for a preliminary ruling:

[...] [Stay of the proceedings]

**Handelsgericht Wien**

**(Commercial Court, Vienna)**

[...] Vienna, [...]

23 May 2023

[...]