



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

29 February 2024*

(Reference for a preliminary ruling – Package travel and linked services – Directive (EU) 2015/2302 – Article 12(2) – Right of a traveller to terminate a package travel contract without paying a termination fee – Unavoidable and extraordinary circumstances – Spread of COVID-19 – Consequences significantly affecting the performance of the package or the carriage of passengers to the destination – Foreseeability of the occurrence of those consequences at the date of the declaration of termination – Events occurring after the termination date but before the start of the package)

In Case C-584/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 2 August 2022, received at the Court on 5 September 2022, in the proceedings

QM

v

Kiwi Tours GmbH,

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, N. Wahl, J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: L. Medina,

Registrar: K. Hötzel, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2023,

after considering the observations submitted on behalf of:

- QM, by J. Kummer and P. Wassermann, Rechtsanwälte,
- Kiwi Tours GmbH, by S. Bergmann, Rechtsanwältin,

* Language of the case: German.

– the Greek Government, by A. Dimitrakopoulou, C. Kokkosi, S. Trekli and E. Tsaousi, acting as Agents,

– the European Commission, by J. Jokubauskaitė, B.-R. Killmann and I. Rubene, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2023,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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, amending Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015 L 326, p. 1).
- 2 The request has been made in proceedings between QM and Kiwi Tours GmbH concerning the right to a full refund of the payments made by the traveller concerned under his package travel contract, including a refund of the termination fees charged to him, following the termination of that contract by that traveller on account of the health risk associated with the spread of COVID-19.

Legal context

European Union law

- 3 Recitals 29 to 31 of Directive 2015/2302 read as follows:
 - ‘(29) Taking into account the specificities of package travel contracts, the rights and obligations of the contracting parties should be laid down for the period before and after the start of the package, in particular if the package is not properly performed or if particular circumstances change.
 - (30) Since packages are often purchased a long time before their performance, unforeseen events may occur. Therefore the traveller should, under certain conditions, be entitled to transfer a package travel contract to another traveller. In such situations, the organiser should be able to recover his expenses, for instance if a sub-contractor requires a fee for changing the name of the traveller or for cancelling a transport ticket and issuing a new one.
 - (31) Travellers should also 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. They should also have the right to terminate the package travel contract without paying any termination fee where unavoidable and extraordinary circumstances will significantly affect the performance of the package. This may cover for example warfare, other serious security problems such as terrorism, significant risks to

human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract.’

- 4 Article 1 of that directive, entitled ‘Subject matter’, provides:

‘The purpose of this Directive is to contribute to the proper functioning of the internal market and to the achievement of a high and as uniform as possible level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States in respect of contracts between travellers and traders relating to package travel and linked travel arrangements.’

- 5 Article 3 of that directive, entitled ‘Definitions’, provides:

‘For the purpose of this Directive, the following definitions apply:

...

12. “unavoidable and extraordinary circumstances” means a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken;

...’

- 6 Entitled ‘Termination of the package travel contract and the right of withdrawal before the start of the package’, Article 12 of Directive 2015/2302 provides, in paragraphs 1 to 4:

‘1. 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.

2. Notwithstanding paragraph 1, the traveller shall have the right to terminate the package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. In the event of termination of the package travel contract under this paragraph, the traveller shall be entitled to a full refund of any payments made for the package, but shall not be entitled to additional compensation.

3. The organiser may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package, but shall not be liable for additional compensation, if:

...

(b) the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.

4. The organiser shall provide any refunds required under paragraphs 2 and 3 or, with respect to paragraph 1, reimburse any payments made by or on behalf of the traveller for the package minus the appropriate termination fee. Such refunds or reimbursements shall be made to the traveller without undue delay and in any event not later than 14 days after the package travel contract is terminated.'

7 Article 23(2) of Directive 2015/2302 provides:

'Travellers may not waive the rights conferred on them by the national measures transposing this Directive.'

German law

8 Paragraph 651h of the Bürgerliches Gesetzbuch (Civil Code), in the version applicable to the dispute in the main proceedings ('the Civil Code'), entitled 'Termination before the start of the package', provides:

'1. The traveller may terminate the contract at any time before the start of the package. If the traveller terminates the contract, the organiser loses the right to the agreed price of the package. However, the organiser may claim reasonable compensation.

2. Reasonable lump-sum compensation amounts may be stipulated in the contract, including by means of pre-formulated contractual terms and conditions, which shall be calculated as follows:

- (1) the period between the declaration of termination and the start of the package,
- (2) the expenses the organiser is expected to save, and
- (3) the expected gains resulting from an alternative deployment of the travel services.

If no lump-sum amounts of compensation are stipulated in the contract, the amount of compensation shall be determined according to the price of the package minus the value of the expenses saved by the organiser and minus what it receives through alternative deployment of the travel services. On demand by the traveller, the organiser is obliged to justify the amount of the compensation.

3. By way of derogation from the third sentence of subparagraph 1, the organiser may not claim compensation in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. Circumstances are unavoidable and extraordinary within the meaning of this subtitle if they are beyond the control of the party who invokes them and the consequences of which could not have been avoided even if all reasonable measures had been taken.'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 9 In January 2020, QM booked, for himself and his wife, a package tour with Kiwi Tours to Japan, which was to take place during the period from 3 to 12 April 2020. The total price of that package tour was EUR 6 148, as part of which QM paid a deposit of EUR 1 230.
- 10 Following a series of measures relating to the spread of COVID-19, adopted by the Japanese authorities, QM, by letter of 1 March 2020, terminated that package travel contract on account of the health risk represented by COVID-19.
- 11 Kiwi Tours issued a cancellation invoice, for an additional amount of EUR 307, which QM paid.
- 12 On 26 March 2020, Japan adopted an entry ban. QM then requested a refund of those termination fees from Kiwi Tours, which Kiwi Tours refused.
- 13 The Amtsgericht (Local Court, Germany), before which QM brought a claim for reimbursement, ordered Kiwi Tours to refund him all the termination fees which had been paid. The Landgericht (Regional Court, Germany), before which Kiwi Tours brought an appeal, dismissed that claim for reimbursement, taking the view that, on the date of termination of the package travel contract at issue in the main proceedings, it was not possible, on the basis of an *ex ante* examination, to consider that there were ‘unavoidable and extraordinary circumstances’ within the meaning of Paragraph 651h(3) of the Civil Code. QM was therefore not entitled to terminate that package travel contract without paying termination fees.
- 14 Hearing an appeal on a point of law brought by QM, the Bundesgerichtshof (Federal Court of Justice, Germany), which is the referring court, notes that the Landgericht (Regional Court) was fully entitled to hold, on appeal, that the conditions governing – in Paragraph 651h(3) of the Civil Code, a provision adopted for the purpose of transposing Article 12 of Directive 2015/2302 into national law – the right to terminate a package travel contract without paying termination fees were satisfied, in particular, where, according to a ‘prediction’ made before the start of the package concerned, the performance of that package would entail significant health risks for the traveller. However, the assessment made by the Landgericht (Regional Court) of the existence of such a risk is vitiated by errors of law. It cannot therefore be ruled out that, by carrying out a correct assessment of that risk, the Landgericht (Regional Court) would have come to the conclusion that a journey to Japan already entailed, on the date of termination of the travel contract at issue in the main proceedings, serious and grave risks to the health of travellers.
- 15 The referring court states that it must then, in principle, in accordance with German procedural law, refer the case back to the same Landgericht (Regional Court) for it to rule on that question. However, it could itself rule on the appeal brought against the judgment of the Amtsgericht (Local Court), dismissing it, if circumstances which arose only after the termination of the travel contract at issue in the main proceedings are also important for the purposes of assessing whether QM has the right to terminate his travel contract without paying termination fees. It is common ground that the performance of that package was ultimately not possible because of the adoption of the entry ban by the Japanese authorities on 26 March 2020, taking account of the spread of COVID 19.
- 16 In that regard, the referring court is inclined to take the view that, in accordance with Article 12(2) of Directive 2015/2302, account should also be taken of circumstances which arose only after the termination of the package travel contract concerned.

- 17 First of all, although paragraph 2 of Article 12 of that directive formally provides for a case of termination separate from that provided for in paragraph 1 of that article, such a distinction is relevant, as regards the substance, only in order to determine the legal consequences of the termination concerned, since Article 12(2) provides, by way of derogation from paragraph 1 of that article, that there is no right to payment of the termination fee. Those legal consequences depend, under Article 12(2), not on the grounds on which the traveller concerned relied in order to cancel his or her package, but solely on the actual existence of circumstances having significant consequences on the performance of that package.
- 18 Next, the purpose of paying the termination fee supports such an interpretation, whether those costs are regarded as a ‘compensation-like payment’ or as a ‘substitute for the price of the package concerned’. In the event that it transpires, after the termination of the concluded package travel contract, that the performance of that travel is affected and that the organiser of that travel would then, in any event, have been required to refund in full the price of that travel even if the traveller concerned had not terminated his or her travel contract, there would be neither damage caused by that termination nor a right to payment of a substitute for the travel price concerned, since such a right would have been justified only in so far as, without that termination, that organiser would have been entitled to payment of the price of that travel.
- 19 Finally, considerations of consumer protection also militate in favour of taking into account circumstances which arose only after the termination of the package travel contract concerned. According to the referring court, a high level of protection for travellers requires that, even where the travel contract is terminated at an early stage, the traveller concerned is not required to make payments for a package whose performance subsequently proves to be significantly affected. In uncertain situations, those travellers could be discouraged from exercising their right of termination in time without paying any fees. Such a possibility of termination without paying fees would not, moreover, have the effect of allowing those travellers to speculate on the persistence of an emerging crisis. On the other hand, to make that right of termination, without paying fees, depend on the date of termination would in fact encourage speculative behaviour, in particular on the part of the organiser concerned, which might be led to refrain from terminating the travel contract until a short time before the start of the contract, thus leaving open the possibility that travellers may terminate their journey while paying termination fees, which would be financially favourable to the organiser.
- 20 The referring court considers that the foregoing grounds are not called into question by the maximum refund period of 14 days after termination, as provided for in Article 12(4) of Directive 2015/2302. It cannot be inferred from that provision that the amount of the termination fees must be definitively established at the latest on the expiry of that period. Similarly, that court considers that Article 12(1) and (2) of that directive should not be interpreted as providing for a rule and an exception respectively, since the purpose of those paragraphs is rather to strike an appropriate balance between the legitimate interest of the organiser in being remunerated and the objective of a high level of protection for travellers.
- 21 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 12(2) of [Directive 2015/2302] to be interpreted as meaning that the assessment of the justification of the termination [of the package travel contract concerned] must be based solely on such unavoidable and extraordinary circumstances as have already occurred at the time of

termination, or as meaning that it is also necessary to take into account unavoidable and extraordinary circumstances that actually occur after the termination but before the planned start of the journey?’

Consideration of the question referred

- 22 By its question, the referring court asks, in essence, whether Article 12(2) of Directive 2015/2302 must be interpreted as meaning that, in order to determine whether ‘unavoidable and extraordinary circumstances’ which have consequences ‘significantly affecting the performance of the package or which significantly affect the carriage of passengers to the destination’, within the meaning of that provision, account must be taken only of the situation prevailing on the date on which that traveller terminated his or her travel contract, or indeed also of unavoidable and extraordinary circumstances arising after that date, but before the start of the package concerned.
- 23 In that regard, it should be recalled that Article 12(2) of Directive 2015/2302 provides that, ‘in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination’, a traveller has the right to terminate a package travel contract before the start of that package without paying termination fees and thus to obtain a full refund of the payments made in respect of that package.
- 24 The concept of ‘unavoidable and extraordinary circumstances’, within the meaning of Article 12(2) of Directive 2015/2302, is defined in point 12 of Article 3 of that directive as being ‘a situation beyond the control of the party who invokes such a situation, the consequences of which could not have been avoided even if all reasonable measures had been taken’.
- 25 Recital 31 of the directive clarifies the scope of that concept, stating that ‘[it] may cover for example warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract’.
- 26 In the first place, it follows from the wording of Article 12(2) of Directive 2015/2302 that the right to terminate the package travel contract without paying termination fees is imperatively exercised ‘before the start of the package’.
- 27 In so far as the exercise of that right is subject to the condition that ‘exceptional and unavoidable circumstances ... [that have consequences] significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination’, that condition must necessarily be satisfied on the date of such termination, that is to say, ‘before the start of the package’.
- 28 Therefore, in order to assess whether that condition is satisfied, it is appropriate, from a temporal point of view, to take as a point of reference the date of termination of the package travel contract concerned.
- 29 Consequently, first, in so far as the same condition requires the occurrence of ‘unavoidable and extraordinary circumstances’, that condition must be regarded as being satisfied where such circumstances actually occurred on the date of termination of the package travel contract

concerned, which implies that, on that date, a situation meeting the definition of the concept of ‘unavoidable and extraordinary circumstances’, as defined in point 12 of Article 3 of Directive 2015/2302 and illustrated in recital 31 of that directive, exists.

- 30 Secondly, in so far as those circumstances must have consequences ‘significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination’, those consequences become definitive only on the date scheduled for the performance of the package concerned; therefore the assessment of those consequences is necessarily prospective in nature.
- 31 It follows that that assessment must be based on a prediction as regards the likelihood that the unavoidable and extraordinary circumstances relied on by the traveller concerned will have consequences ‘significantly affecting the performance of the package’, within the meaning of Article 12(2) of Directive 2015/2302.
- 32 Furthermore, in order to assess the probability and the significance of those consequences, it is appropriate to view matters from the perspective of the average traveller who is reasonably well informed and reasonably observant and circumspect, in the sense that such a traveller could reasonably take the view that the unavoidable and extraordinary circumstances relied on by the traveller concerned would probably have consequences significantly affecting the performance of his or her package or for the transfer of passengers to the travel destination (see, to that effect, judgment of 29 February 2024, *Tez Tour*, C-299/22, EU:C:2024:xxx, paragraph 71).
- 33 In the second place, in respect of the effect which ‘unavoidable and extraordinary circumstances’, within the meaning of Article 12(2) of Directive 2015/2302, occurring after the termination of the contract, might have in that context, it must be held that such circumstances cannot be taken into consideration.
- 34 In that regard, first, contrary to what the referring court appears to suggest, the right to terminate a package travel contract without paying termination fees, provided for in Article 12(2), cannot depend, independently, both on the situation prevailing on the date of termination of that contract and on that existing on a date subsequent to that termination and before the start of the package.
- 35 Taking into consideration the situation on those different dates could lead to contradictory or even incongruous results. According to such an approach, the right to terminate a package travel contract without paying any fees could first, on the date of termination of the contract concerned, be acquired by the traveller concerned and then, after that termination, prove to have retroactively lapsed as a result of events which occurred subsequently. Conversely, that right could first be refused on that date to that traveller and then, on account of such events, be granted to him, as the Advocate General also observed in point 44 of her Opinion.
- 36 In addition, the context of Article 12(2) of Directive 2015/2302 supports the interpretation of that provision referred to in paragraph 33 above, since the relationship between paragraph 2 and paragraph 1 of Article 12 confirms the inconsistency of a solution such as that referred to in the preceding paragraph of the present judgment. Although those two provisions confer two separate rights of termination on that traveller, one and the same termination of the package travel contract concerned could, depending on the evolution of the situation after the termination of that travel contract, be covered, alternatively, by the first or the second of those two provisions.

- 37 A specific date must therefore be taken into consideration in order to assess whether the termination of the package travel contract concerned occurred in ‘unavoidable and extraordinary circumstances’ within the meaning of Article 12(2) of Directive 2015/2302.
- 38 Secondly, as is apparent from the finding in paragraph 29 of the present judgment, that date is the date of termination of the travel contract concerned.
- 39 In that context, thirdly, an interpretation of Article 12(2) of Directive 2015/2302 precluding a date subsequent to that of the termination of the travel contract concerned from being taken into consideration is necessary for several reasons.
- 40 First of all, to accept that the exercise, by the traveller concerned, of the right to terminate a package travel contract without paying any termination fee, provided for in that provision, is subject to a condition which cannot ultimately be found to be satisfied a posteriori would be tantamount to rendering uncertain, from the point of view of that traveller, the link established by that provision between such a termination and the occurrence of ‘unavoidable and extraordinary circumstances’ within the meaning of that provision.
- 41 Next, Article 12(4) of Directive 2015/2302 imposes on the organiser the obligation to refund the traveller concerned the full amount paid in respect of that package, without undue delay and ‘in any event’ within 14 days at the latest after that termination, inter alia, following termination without charge as provided for in Article 12(2) of that directive. That period is intended to ensure that the traveller will, shortly after the termination of that contract, once again be able to dispose freely of the sum spent on the package. (judgment of 8 June 2023, *UFC – Que choisir and CLCV*, C-407/21, EU:C:2023:449, paragraph 30).
- 42 The imposition of such a maximum period suggests that that organiser should, in principle, be in a position to determine, immediately after the termination of the package travel contract concerned and therefore without waiting for subsequent developments in the situation, whether or not reliance by that traveller on the right to terminate his or her package travel contract without paying termination fees is justified and, if so, to take the necessary steps to ensure that a full refund of the payments made in respect of the package will take place within the prescribed period.
- 43 Lastly, the objective of Directive 2015/2302, which consists, under Article 1 thereof, in particular in ensuring a high level of consumer protection, supports such an interpretation.
- 44 First, in so far as Article 12(2) of that directive grants the traveller concerned, in the event of the occurrence of ‘unavoidable and extraordinary circumstances’, a right of termination specific to him or her, irrespective of the right of termination available to the organiser concerned under Article 12(3) of that directive, it is important that that traveller, in order to be able effectively to rely on his or her right, be, on the date of termination, in a position to assess whether the conditions governing the exercise of that right are satisfied.
- 45 On the other hand, to make the possibility of exercising that right dependent on developments occurring after the declaration of termination would leave a situation of uncertainty dispelled only on the date on which the package is scheduled to begin.

- 46 Secondly, it is true that to regard as decisive, for the purposes of exercising the right to terminate a package travel contract without paying termination fees, provided for in Article 12(2) of Directive 2015/2302, changes occurring after the termination of that contract, but before the start of the package concerned, could improve the protection of the traveller concerned in the event that they actually end up preventing the performance of that contract. However, the contrary would be equally true if it transpires, after the termination of that contract, that that package is nevertheless enforceable as a result of an unexpected improvement in the situation in question. In the latter case, that traveller would be deprived of any right to terminate his or her package travel contract without paying any termination fee, even though he or she had relied, on the date of termination of his or her travel contract, on a reasonable prediction of the probability of such a prevention.
- 47 In the present case, it is apparent from the explanations provided by the referring court that, in the main proceedings, it was by relying on the gradual spread of COVID-19 or even the COVID-19 pandemic as ‘unavoidable and extraordinary circumstances’, within the meaning of Article 12(2) of Directive 2015/2302, that the traveller concerned intended to terminate his package travel contract without paying termination fees.
- 48 In that regard, the Court held that a global health crisis such as the COVID-19 pandemic must, as such, be regarded as capable of falling within the concept of ‘unavoidable and extraordinary circumstances’ within the meaning of Article 12(2) of Directive 2015/2302 (judgment of 8 June 2023, *UFC – Que choisir and CLCV*, C-407/21, EU:C:2023:449, paragraph 45).
- 49 In the light of all the foregoing, the answer to the question referred is that Article 12(2) of Directive 2015/2302 must be interpreted as meaning that, in order to determine whether ‘unavoidable and extraordinary circumstances’ which have consequences ‘significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination’, within the meaning of that provision, account must be taken only of the situation prevailing on the date on which that traveller terminated his or her travel contract.

Costs

- 50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

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, amending Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC

must be interpreted as meaning that, to determine whether ‘unavoidable and extraordinary circumstances’ which have consequences ‘significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination’, within the meaning of that provision, account must be taken only of the situation prevailing on the date on which that traveller terminated his or her travel contract.

[Signatures]