Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 21 September 2023 [1]

Case C-299/22

M. D.
v
'Tez Tour' UAB,
intervener:
'Fridmis' UAB

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Reference for a preliminary ruling – Approximation of national laws – Package travel and linked travel arrangements – Directive (EU) 2015/2302 – Termination of the package travel contract – Unavoidable and extraordinary circumstances – Place of destination classified as a high-risk area in the light of COVID-19 – Circumstances that could have been foreseen at the time of conclusion of the contract – Consideration of the objective or subjective circumstances – Scope of the concept of 'the place of destination or its immediate vicinity')

I. Introduction

1. The COVID-19 pandemic and the emergency measures adopted by governments worldwide to prevent the spread of the virus caused unprecedented disruption in all fields of human activity. Among the economic sectors most seriously affected was the travel and tourism industry. The disruptive effect of the pandemic was also manifest in the field of law and contractual performance. [2]

2. Package travel, which is governed by Directive (EU) 2015/2302, [3] is one of the fields of EU law formally governing the impact of 'unavoidable and extraordinary' circumstances on the package travel and the right to termination of the package travel contract. The present case is the first time the Court will explore the parameters and conditions under which the right to terminate the package travel contract can be exercised in the context of the COVID-19 pandemic.

1 Original language: English.

2 See, in general, Hondius, E., et al. (eds), *Coronavirus and the Law in Europe*, Intersentia, Cambridge, 2021.

3 Directive 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 (OJ 2015 L 326, p. 1).

II. Legal Framework

A. EU law

3. Recital 31 of Directive 2015/2302 states:

'(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 3 of Directive 2015/2302 reads:

'For the purposes 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 [.]'

5. 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 3:

'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.'

B. Lithuanian law

6. Entitled '*Force majeure*', Article 6.212 of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania; 'the Civil Code'), provides, in paragraph 1:

'A party shall be exempted from liability for non-performance of a contract if he or she proves that the non-performance was due to circumstances which were beyond his or her control and which could not have been reasonably foreseen by him or her at the time of the conclusion of the contract, and that the arising of such circumstances or consequences thereof could not have been prevented.'

7. Entitled 'Right of tourists to terminate the package travel contract and to withdraw from a package travel contract', Article 6.750(4) of the Civil Code provides:

'Tourists have the right to terminate the contract for an organised tourist trip, without paying the termination fee referred to in paragraph 2 of this article, in the following cases:

…

3. if circumstances of *force majeure* occur at the place of destination of the organised tourist trip or its immediate vicinity, which may make it impossible to carry out the organised tourist trip or the transportation of passengers to the destination of the trip. In this case, the traveller has the right to claim reimbursement of the payments made for the organised tourist trip, but shall not be entitled to additional compensation.'

III. Succinct presentation of the facts and procedure in the main proceedings

8. On 10 February 2020, M. D. concluded, with the tour operator Tez Tour, a package travel contract for himself and his family to the United Arab Emirates from 1 March 2020 to 8 March 2020. The package travel contract entered into included, inter alia, the outbound and return flight from Vilnius (Lithuania) to Dubai (United Arab Emirates) as well as seven nights in a hotel with all-inclusive catering. The price paid by M. D. was EUR 4 834.

9. On 27 February 2020, M. D. informed Tez Tour that he wished to terminate the package travel contract and requested that he be allowed to use the money paid for another trip when the risk of COVID-19 had decreased. That request was rejected by Tez Tour.

10. M. D. subsequently brought an action against Tez Tour, claiming that the contract had been terminated owing to the occurrence, at the place of destination or its immediate vicinity, of circumstances of *force majeure* which were liable to make it impossible to perform the trip. He also claimed reimbursement of all payments he had made.

11. In this context, M. D. submitted that the information published in February 2020 by both official authorities and the media in relation to the global outbreak of the COVID-19 pandemic constituted sufficient grounds to cast doubt on the safety of performing the trip and, more generally, on the feasibility of performing the trip. According to M. D., the circumstances of *force majeure* referred to in point 3 of paragraph 4 of Article 6.750 of the Civil Code – namely unavoidable and extraordinary circumstances – should be understood not as circumstances which make the trip completely impossible, but rather as unavoidable and extraordinary circumstances which, according to Article 12(2) of Directive 2015/2302, significantly affect the performance of the package or the carriage of passengers to the destination. Therefore, the fact that it is impossible to perform the trip should be interpreted not only as the inability to provide the services at the destination but also as the inability to ensure that the trip is safe without causing inconvenience or risk to the traveller.

12. In opposition to that submission made by M. D., Tez Tour argued that the spread of the COVID-19 virus was capable of being regarded as a circumstance which was beyond control but that it was not capable of being regarded as a circumstance which made it impossible to reach the destination safely.

13. Both the court at first instance and the appellate court held that there were no grounds for classifying the circumstances relied on by M. D. as circumstances of *force majeure* – that is to say, unavoidable and extraordinary circumstances – making performance of the contract impossible. On the one hand, those courts considered that M. D. had booked the trip at a time when information in relation to the adoption of restrictive measures was already available, and that the situation and the information on the risk associated with the trip had not changed between the date of reservation (namely, 10 February 2020) and the last day of the reserved trip (namely, 8 March 2020). Therefore, the traveller could not change his mind and terminate the contract only 17 days after the booking. On the other hand, those courts noted that the traveller did not provide evidence that it was on the date of the termination of the contract (namely, 27 February 2020) and not after that date that there were objective – as opposed to subjective – reasons establishing the impossibility to perform the travel contract during the relevant period (namely, from 1 to 8 March 2020).

14. Seised of an appeal on a point of law, the referring court considers it necessary to clarify the concept of 'unavoidable and extraordinary circumstances', within the meaning of Article 12(2) of Directive 2015/2302, and the conditions under which a traveller may rely on such circumstances, in particular in the context of the COVID-19 pandemic.

15. In that regard, the referring court observes, first, that the court of first instance and the appellate court considered the concept of *force majeure* laid down in national law and the concept of unavoidable and extraordinary circumstances under Directive 2015/2302 to have the same meaning. However, in the view of the referring court, the concept of unavoidable and extraordinary circumstances is broader than that of *force majeure*. As a broader concept, the referring court considers that the concept of unavoidable and extraordinary circumstances covers not only cases in which it is objectively impossible, either physically or legally, to perform

the contract, but also cases in which its performance is theoretically possible but complicated and/or economically inefficient in practice, or in which the traveller suffers the loss of enjoyment of the holiday.

16. In that context, the referring court seeks to ascertain, first, the relevance of official travel warnings for the purposes of establishing the existence of unavoidable and extraordinary circumstances. It considers that such warnings could be regarded as entailing a presumption of the existence of extraordinary circumstances which significantly affect the performance of the travel contract package. In the circumstances of the main proceedings, the referring court notes that the Lithuanian Ministry of Foreign Affairs had issued a travel recommendation on 12 March 2020 advising that all travel should be postponed and that no foreign country, including the United Arab Emirates, should be visited in the following months. The publication of that travel recommendation resulted from the World Health Organisation (WHO) changing the classification of the COVID-19 epidemic to a pandemic on 11 March 2020.

17. Second, the referring court considers that, for the purpose of establishing the consequences significantly affecting the performance of the package travel, those consequences must be probable for the average traveller, who is reasonably well-informed and reasonably observant and circumspect, having regard to the dates of the planned journey, the factual data available to the traveller and the information published at that time in relation to the travel. In that context, that court wonders whether unavoidable and extraordinary circumstances can be established only where they give rise to consequences which objectively make it impossible, either physically or legally, to perform the package travel, or whether they can also be established in cases where the performance of the package travel is theoretically possible but, in practice, complicated and/or economically inefficient under safe conditions, taking into account, where appropriate, the risk to the health and/or life of the traveller.

18. Third, the referring court wonders whether the fact that unavoidable and extraordinary circumstances already existed or were foreseeable to a certain extent before the conclusion of the contract should be regarded as a ground for excluding the traveller's right to terminate the contract without the obligation to pay a termination fee.

19. In the context of the criterion of reasonable foreseeability, the referring court notes that, although the Lithuanian Ministry of Foreign Affairs had already issued, on 8 January 2020, a recommendation to travellers seeking to travel to the United Arab Emirates advising them to take precautions, and the WHO had, on 30 January 2020, declared the COVID-19 epidemic to be a public health emergency of international concern, the progression and consequences of the pandemic were difficult to predict. More specifically, clear measures for managing and controlling the infection were not yet in place at that time; on the other hand, there was a clear acceleration in the spread of the virus between the date of entering into the package travel contract and the date of termination of that contract.

20. In this connection, the referring court recalls that a state of national emergency had been declared in Lithuania on 26 February 2020 because of the threat posed by the coronavirus pandemic. Moreover, the referring court notes that the applicant had provided evidence of information published in the press as from 25 February 2020 with regard to infections in the United Arab Emirates and the confinement measures imposed in hotels and, more broadly, with regard to the rapid changes in the spread of the virus worldwide.

21. Fourth, the referring court observes that Article 12(2) of Directive 2015/2302 links the traveller's right to terminate the package travel contract to the occurrence of unavoidable and extraordinary circumstances 'at the place of destination or its immediate vicinity'. The referring court takes the view that it follows from that expression that, in the context of the COVID-19 pandemic, the assessment of the circumstances at the date of termination of the package travel contract could not be limited only to an assessment of the circumstances at the final destination. That court wishes to know whether, given the nature of the event invoked, the latter expression is also likely to encompass the place of departure, as well as the various points related to going on and returning from the trip.

22. In those circumstances the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it necessary for there to be an official warning of the authorities of the State of departure and/or arrival to refrain from unnecessary travel and/or classification of the country of destination (and possibly also the country of departure) as belonging to a risk area in order for it to be considered that unavoidable and extraordinary circumstances have occurred at the place of destination or its immediate vicinity within the meaning of the first sentence of Article 12(2) of Directive (EU) 2015/2302?

(2) When assessing whether unavoidable and extraordinary circumstances exist at the place of destination or its immediate vicinity at the time of termination of a package travel contract and whether they significantly affect the performance of the package: (i) should account be taken only of objective circumstances, that is to say, is a significant effect on the performance of the package related only to objective impossibility and must it be interpreted as only covering cases where the performance of the contract becomes both physically and legally impossible, or does it nevertheless also cover cases where performance of the contract is not impossible but (in this case, owing to the well-founded fear of becoming infected with COVID-19) becomes complicated and/or economically inefficient (in terms of the safety of the travellers, risk to their health and/or life, the possibility of achieving the objectives of the holiday travel); (ii) are subjective factors relevant, such as adults travelling together with children under 14 years of age, or belonging to a higher-risk group owing to the traveller's age or state of health, and so forth? Does the traveller have the right to terminate the package travel contract if, as a result of the pandemic and related circumstances, in the opinion of the average traveller, travel to and from the destination becomes unsafe, gives rise to inconvenience to the traveller or causes him or her to have a well-founded fear of a risk to health or of infection with a dangerous virus?

(3) Does the fact that the circumstances on which the traveller relies had already arisen or were at least already presupposed/likely when the trip was booked affect in some way the right to terminate the contract without paying a termination fee (for example by that right being denied, by stricter criteria being applied for assessing the negative effect on the performance of the package, and so forth)? When applying the criterion of reasonable foreseeability in the context of the pandemic, should account be taken of the fact that, although the WHO had already published information on the spread of the virus at the moment when the package travel contract was concluded, nevertheless the course and consequences of the pandemic were difficult to predict, there were no clear measures for managing and controlling the infection or sufficient data on the infection itself, and the increasing development of infections from the time of booking the trip until its termination was evident?

(4) When assessing whether unavoidable and extraordinary circumstances exist at the place of destination or its immediate vicinity at the time of termination of a package travel contract and whether they significantly affect the performance of the package, does the concept of "the place of destination or its immediate vicinity" cover only the State of arrival or, taking into account the nature of the unavoidable and extraordinary circumstance, that is to say, a contagious viral infection, also the State of departure as well as points related to going on and returning from the trip (transfer points, certain means of transport, and so forth)?'

23. The Czech, Greek, and Lithuanian Governments as well as the European Commission submitted written observations. A hearing was held on 7 June 2023, in which the parties to the main proceedings, the Greek and Lithuanian Governments as well as the Commission participated.

IV. Assessment

Preliminary observations on the concept of 'unavoidable and extraordinary circumstances'

24. The referring court observes that the right to terminate the contract in the event of 'unavoidable and extraordinary circumstances' is laid down in Article 6.750(4)(3) of the Civil Code, which refers to '*force majeure*'. That court explains that the lower courts seised of the case relied on the definition of '*force majeure*' as provided for in national law and considered that concept and the concept of 'unavoidable and extraordinary circumstances', used in EU law, to be synonymous. However, the referring court takes the view that 'unavoidable and extraordinary circumstances' is an autonomous concept of EU law which has a broader scope than the concept of '*force majeure*'.

25. In order to provide the referring court with a useful answer in relation to its doubts concerning the transposition of the concept of 'unavoidable and extraordinary circumstances' into national law and concerning the relationship of that concept with the concept of '*force majeure*', within the specific context of Directive 2015/2302, it is important to make the following observations.

26. In the first place, it must be borne in mind that the concept of 'unavoidable and extraordinary circumstances' replaced that of '*force majeure*' which appeared in Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59), which was repealed and replaced by Directive 2015/2302. [4]

27. In Article 3(12) thereof, Directive 2015/2302 defines the concept of 'unavoidable and extraordinary circumstances' as meaning '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'. Recital 31 of the directive further clarifies the scope of that concept, stating that '[it] may cover for example […] 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] See, to that effect, judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 55).

28. In the definition of that concept there is no reference to the meaning and scope to be given to the concept by the law of the Member States. The term 'unavoidable and extraordinary circumstances' must therefore be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union. [5]

29. The Court has held that the concept of 'unavoidable and extraordinary circumstances', within the meaning of Article 12(2) and (3)(b) of Directive 2015/2302, is akin to the concept of '*force majeure*' as defined in well-established case-law, namely as referring to circumstances beyond the control of the party claiming '*force majeure*', which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence. [6] Thus, according to the Court, despite the absence of any reference to *force majeure* in that directive, the concept of 'unavoidable and extraordinary circumstances' gives *concrete expression* to the concept of '*force majeure*' in the context of that directive, constituting an *exhaustive implementation* of the concept for the purposes of that directive. [7]

30. In the second place, the Court has clarified that the outbreak of a global health crisis such as the COVID-19 pandemic must, as such, be regarded as capable of falling within the scope of the concept of 'unavoidable and extraordinary circumstances', within the meaning of that directive. [8] Such an event is clearly beyond all control and its consequences could not have been avoided even if all reasonable measures had been taken. That event also entails the existence of 'significant risks to human health' referred to in recital 31 of that directive. [9]

31. The provision of Article 12(2) and 3(b) of Directive 2015/2302 may therefore be applied to terminations of package travel contracts where those terminations are based on the consequences caused by the outbreak of a global health crisis such as the COVID-19 pandemic. [10]

32. In view of the above, it follows that the concept of 'unavoidable and extraordinary circumstances' gives concrete expression to the concept of '*force majeure*' in the context of Directive 2015/2302 and that it is capable of covering the outbreak of a global health crisis linked to the COVID-19 pandemic.

The first question

33. By its first question for a preliminary ruling, the referring court asks, essentially, whether the establishment of 'unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity', within the meaning of the first sentence of Article 12(2) of Directive 2015/2302, depends on the issuance of an official warning from the authorities of the State of departure and/or arrival to refrain from unnecessary travel and/or classification of the country of destination (and possibly also the country of departure) as belonging to a risk area.

5 See, to that effect, judgment of 13 October 2022, *Gemeinde Bodman-Ludwigshafen* (C-256/21, EU:C:2022:786, paragraph 33 and the case-law cited).

6 Judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraphs 54 and the case-law cited).

7 See, to that effect, judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraphs 54 and 56, emphasis added).

8 See, to that effect, judgments of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 45) and *Commission* v *Slovakia (Right of termination without fees)* (C-540/21, EU:C:2023:450, paragraph 59).

9 See, to that effect, judgments of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 46) and *Commission* v *Slovakia (Right of termination without fees)* (C-540/21, EU:C:2023:450, paragraph 49).

10 Judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 51).

34. In this connection, it should be observed that Article 12(2) of Directive 2015/2302 does not refer to travel warnings or advice. The issuance of travel warnings or advice is not harmonised at EU level and remains a competence of the Member States. The Commission noted in its written observations that the preamble to its proposal for the directive [11] referred to recommendations issued by Member State authorities and gave them particular weight. Their issuance constituted a rebuttable presumption for the establishment of 'unavoidable and extraordinary circumstances'. [12] However, as the Commission acknowledged in its report on the application of Directive 2015/2302, some Member States were 'strongly opposed' [13] to any reference to official travel advice in the directive. It appears from the legislative history of Directive 2015/2302 that its silence with regard to the legal value of travel warnings or advice issued by governments is deliberate. Therefore, as was observed by the Czech Government in its written submissions, such warnings or advice may not constitute a necessary or sufficient condition for the establishment of 'unavoidable and extraordinary circumstances' within the meaning of Article 12(2) of that directive.

35. A different interpretation of Article 12(2) would restrict the right of travellers to terminate the package travel contract as it would subject the exercise of a harmonised right granted by the directive to the issuance of national acts, the content of which is not harmonised. The establishment of 'unavoidable and extraordinary circumstances' would then have to be subject to those circumstances being officially recognised. As the 'unavoidable and extraordinary circumstances' could possibly occur suddenly, there could be the risk, as noted by the Czech Government, that travellers would be deprived of their right to terminate the package travel contract when the official recognition of the 'unavoidable and extraordinary circumstances' is delayed or lacking. Furthermore, in the context of the beginning of the COVID-19 pandemic, there were no clear or common criteria for assessing the level of risk of transmission by area or country and the information was constantly changing. [14]

36. It follows that Article 12 of Directive 2015/2302 does not establish a mandatory link between the issuance of travel warnings or advice to avoid all unnecessary travelling and/or the classification of a country as a risk zone, on the one hand, and the establishment of 'unavoidable and extraordinary circumstances', on the other hand. That being said, as essentially submitted the parties in the main proceedings, the Lithuanian and the Greek Governments as well as the Commission, the travel warnings indicating the existence of a high level of risk and, a fortiori, a warning not to travel [15] constitute a strong indication of the existence of unavoidable and extraordinary circumstances. As such, they constitute an important element of proof for the traveller, who is expected to rely on official information.

[11] Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, COM(2013) 512 final ('the Commission Proposal on Package Travel').

[12] In recital 26 of the Commission Proposal on Package Travel, it was stated that such circumstances 'should in particular be deemed to exist where reliable and publicly available reports, such as recommendations issued by Member State authorities, advise against travelling to the place of destination'.

[13] Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements, COM(2021) 90 final, p. 19.

[14] A more coordinated approach was followed at a later stage of the COVID-19 pandemic when Member States agreed on a common map on the COVID-19 risk level in the European Union; see Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ 2021 L 36I, p. 1).

[15] If there is an official warning *not to travel*, the organiser will normally take the initiative to terminate the package travel contract in accordance with Article 12(3)(b) of Directive 2015/2302.

37. In this connection, in the absence of EU rules governing that matter, it is for each Member State to prescribe detailed rules in respect of administrative and judicial procedures, which cover the probative value of an official statement or act, intended to safeguard the rights which individuals derive from EU law, in accordance with the principles of equivalence and effectiveness, without undermining the effectiveness of EU law.[16] Therefore, in accordance with domestic procedural law, the national courts may take into account and freely assess the relevance of travel warnings or advice in the context of the overall assessment of the establishment of 'unavoidable and extraordinary circumstances' within the meaning of Article 12(2) of Directive 2015/2302. However, as pointed out above, those travel warnings or advice may not constitute a condition necessary for the establishment of those circumstances if such a condition would undermine the right of the traveller to terminate the package travel contract.

38. In view of the above, I consider that the establishment of 'unavoidable and extraordinary circumstances at the place of destination or its immediate vicinity', within the meaning of the first sentence of Article 12(2) of Directive 2015/2302, does not depend on the issuance of an official warning from the authorities of the State of departure and/or arrival to refrain from unnecessary travel and/or classification of the country of destination (and possibly also the country of departure) as belonging to a risk area. However, in accordance with domestic procedural law, the national courts may take into account official warnings indicating a high level of risk to the place of destination, provided that those warnings do not constitute a condition necessary for the establishment of such 'unavoidable and extraordinary circumstances'.

The second question

39. By its second question, the referring court asks, in essence, whether the significant effect of the 'unavoidable and extraordinary circumstances' on the performance of the package are to be assessed taking into account only the objective impossibility of performing the contract, or whether account must also be taken of the risks to the health and safety of travellers as well as of subjective factors related to the traveller's age, health condition or to whether minors are also travelling. The referring court also asks whether, in order to assess the consequences on the performance of the package, it is necessary to adopt the perspective of the average traveller.

40. It follows from the order for reference for a preliminary ruling that the second question relates to two main issues pertaining to the assessment of the occurrence of 'unavoidable and extraordinary circumstances' significantly affecting the performance of the package travel contract. The first issue concerns, in essence, the *objective or subjective nature* of the significant effect. The second issue concerns the *standard* applied in assessing the significant effect. More specifically, it follows from the order for reference that the referring court links that standard to an *ex ante* assessment or prediction – conducted by the average traveller, who is reasonably well-informed, observant and circumspect – as to the likelihood of the significant effect being materialised.

[16] See, to that effect, judgment of 2 April 2020, *PrivatBank* (C-480/18, EU:C:2020:274, paragraph 73 and the case-law cited).

(i) The objective or subjective nature of the assessment

41. As a preliminary remark, it should be recalled that Article 12(2) of Directive 2015/2302 recognises the right to termination, without the obligation to pay a fee, in the event of 'unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity'. It clearly follows from the wording of that provision that, by definition, the situations which are classified as 'unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity' cannot be related only to the person of the traveller (such as the occurrence of a serious accident). The legislative history of Article 12(2) of Directive 2015/2302 supports that interpretation. The Commission Staff Working Document accompanying the proposal to that directive states that 'some consumer advocates [had] argued that there should be a possibility to terminate the contract if there is a *force majeure* situation in relation to the traveller, e.g. serious illness or death in close family, which prevents the traveller from leaving for the holiday'. [17] However, the Commission noted that situations in relation to the traveller 'are … often covered by travel insurances the traveller might purchase'. [18]

42. With regard to the assessment of the impact of the 'unavoidable and extraordinary circumstances' on the performance of the package, it must be observed at the outset that Article 12(2) of Directive 2015/2302 requires that those circumstances *significantly affect* the performance of the package. The significant effect on the performance is a broader than the impossibility of the performance. Recital 31 of the directive refers to 'security problems' or 'significant risks to human health'. As the Commission notes, in such situations performance could legally or physically be possible but the safety of the travellers can no longer be ensured. Therefore, the *significant risk* to the health and safety of the traveller should amount to a significant effect on the performance of the contract. That interpretation is supported by the legislative history of Article 12(2) of Directive 2015/2302 to the extent that that provision recognised the right of the traveller to terminate the contract. Such a right did not exist under the repealed directive. As was observed in the Commission Staff Working Document on Package Travel, there can be situations – such as warfare or natural disasters – which are 'likely to have a negative impact on the *enjoyment* or the *safety* during the holiday and where the organiser does not take [the] initiative to cancel the package'. [19]

43. The significant effect of the 'extraordinary and unavoidable circumstances' on the performance of the package will necessarily be established when those circumstances are liable to lead to a 'lack of conformity', within the meaning of Article 3(13) of Directive 2015/2302, which substantially affects the performance of the package. In that regard, it should be recalled that, according to Article 13(6) of that directive, the traveller is entitled to terminate the package travel contract without paying a termination fee where a lack of conformity 'substantially affects the performance of the package'. The Court has ruled that the finding of a lack of conformity is objective in that it requires only a comparison between the services included in the package of the traveller concerned and those in fact provided to that person. [20] Similarly, the significant effect of the unavoidable and extraordinary circumstances relies on an *objective* assessment of the impact of such circumstances on the performance of the contract, taking into account the risks posed to the traveller.

[17] Commission Staff Working Document, Impact Assessment, Accompanying the document on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU and repealing Council Directive 90/314/EEC, SWD(2013) 263 final ('the Commission Staff Working Document on Package Travel'), p. 78.

[18] Commission Staff Working Document on Package Travel, p. 78.

[19] Ibid., emphasis added.

[20] See judgment of 12 January 2023, *FTI Touristik (Package travel to the Canary Islands)* (C-396/21, EU:C:2023:10, paragraph 22).

44. However, the assessment in particular of the significant risks to human health may under certain conditions require a *subjective* and *individualised* assessment. Directive 2015/2302 does not protect only those travellers who are strong, young and healthy. Indeed, the directive takes into account the particular needs of travellers with reduced mobility. In that regard, it must be noted that Article 5(1)(a)(viii) of the directive includes, among the main characteristics of the travel services, information on 'whether the trip or holiday is generally suitable for persons with reduced mobility and, upon the traveller's request, precise information on the suitability of the trip or holiday taking into account the traveller's needs'.

45. Disability of a physical nature is one form of *vulnerability*.[21] In the specific context of travelling, vulnerability in relation to one's physical state may concern a larger category of travellers who are more exposed to risk than other travellers. In the light of the importance which the European Union attaches to a high level of human health protection, recognised under Article 35 of the Charter of Fundamental Rights of the European Union, the traveller's *health condition* must also be taken into account for the purposes of the assessment of the significant effect of the 'unavoidable and extraordinary circumstances'. The needs of particular categories of travellers such as pregnant woman and minor children and their ability to enjoy a trip whilst remaining safe must also be taken into account. In the specific context of the COVID-19 pandemic, it was clear from the outset that persons belonging to specific groups – such as people with asthma, people who are immunocompromised, people with certain underlying medical conditions and pregnant women – were at a higher risk of developing severe illness and of dying in the event of infection with the virus.

46. The consideration of subjective factors for the purposes of the assessment of the impact of the 'unavoidable and extraordinary circumstances' should not be confused with mere feelings of fear or anxiety regarding the consequences of such circumstances. It must be possible to *verify* the traveller's needs depending on his or her health or family situation.

47. In view of the above, I consider that the significant effect of 'unavoidable and extraordinary circumstances' on the performance of the package travel contract can be considered to exist not only when that performance is impossible, but also when it entails significant risks to travellers' health and safety. The assessment of such consequences is objective. However, it is possible to take into account subjective factors related to the traveller's reduced mobility or vulnerability, provided that such factors can be verified.

(ii) The prospective nature of the assessment and the benchmark of the average traveller

48. With regard to the point in time at which the assessment of the significant effect of the 'unavoidable and extraordinary circumstances' needs to be carried out, Article 12(2) of Directive 2015/2302 recognises the right to termination of the package travel contract 'before the start of the package'. The use of the preposition 'before' indicates that there is a *time lapse* between the decision to terminate the package travel contract and the start of the package. It follows that the decision to terminate the contract is *prospective*. It relies on a prediction or *ex ante* assessment of the occurrence of 'unavoidable and extraordinary circumstances' and of their significant effect on the performance of the package or, in the event that those circumstances have already occurred, on the *persistence* of their significant effect. As the referring court observes, the evaluation made

[21] See Reich, N., 'Vulnerable Consumers in EU Law', in Leczykiewicz, D., and Weatherill, S. (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing, London, 2016, pp. 139-158, at p. 141. The author distinguishes three types of vulnerability in EU consumer contract law, namely physical disability, intellectual disability and economic disability. He also makes a distinction between consumer vulnerability and 'consumer weakness' in contractual situations.

by the traveller at the date of termination of the package travel contract implies an assessment of the likelihood that the 'unavoidable and extraordinary circumstances' will have a significant effect on the performance of the package.

49. Directive 2015/2302 does not set out specific time limits as to the evaluation of the likelihood that the 'unavoidable and extraordinary circumstances' will have a significant effect on the performance of the package. Furthermore, it does not impose a specific number of days, weeks or months before which it is not possible to make such an assessment and exercise the right to terminate the package travel contract without having to pay a termination fee. That being said, the more distant the date of termination is in relation to the package start date, the more difficult it will be for the traveller to prove that the significant effect will continue to exist on the date of travel. [22]

50. The determination of the likelihood will depend on the circumstances, the assessment of which is a matter for the national courts. [23] Thus, it does not appear appropriate to indicate a probability in the form of percentage of the likelihood that the 'unavoidable and extraordinary circumstances' will have a significant effect on the performance of the package. However, that assessment must be guided by the *exceptional nature* of the right to terminate the package travel contract without having to pay a termination fee. At the time of termination of the package travel contract, the traveller must *reasonably expect* that there is a *sufficiently high probability* that 'unavoidable and extraordinary circumstances' will significantly affect the performance of the package.

51. In terms of the point of reference for the capacity of the traveller to make an *ex ante* assessment, the referring court and the Lithuanian Government suggest the benchmark of the average traveller, who is reasonably well-informed and reasonably observant and circumspect. As a starting point, I agree that the reference point for the assessment must be the traveller. That corresponds to the very aim of the right to termination of the package travel contract, to which the traveller is entitled. In that regard, it should be observed that both parties to the package travel contract have the right to terminate the contract in the event of 'unavoidable and extraordinary circumstances'. The right of the traveller is set out in Article 12(2) of Directive 2015/2302 and requires that those circumstances significantly affect 'the performance of the package or the carriage of passengers to the destination'. The right of the organiser is set out in Article 12(3)(b) and requires that 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'. The perspective of each party is decisive for the exercise of that party's own right. It would defeat the entire purpose of the recognition of a distinct right to the traveller if the exercise of his or her right were to depend on the perspective of the organiser.

52. It is also important to observe that Directive 2015/2302 corrected an asymmetry between the traveller and the organiser in the exercise of the right to terminate the package travel contract in the event of 'unavoidable and extraordinary circumstances'. That asymmetry had been exposed in the Commission Staff Working Document on Package Travel, in which it is noted that, under the previous regime, the organiser was entitled to cancel the package contract 'solely depending on

[22] See Tonner, K., 'BGH 651h, Rücktritt vor Reisebeginn', *Münchener Kommentar zum BGB*, 9th ed., C.H. Beck, Munich, 2023, paragraph 71.

[23] To give an illustration, if a traveller has booked a hiking trip in a forest in Canada and his or her trip is due to take place three months later, in the event that the forest is completely burned by a wild fire, it is impossible that the forest will be returned to its original state in three months' time. By contrast, if the traveller has booked a trip scheduled for three months later to an island where there are fires, it is more difficult to make a forecast of how the situation will evolve in the space of three months.

[its] assessment of the security situation', while the consumer did not have a similar right.[24] It therefore follows from the origins of Article 12(2) of Directive 2015/2302 that the traveller has the right to terminate the contract in the event of 'unavoidable and extraordinary circumstances' depending on his or her own assessment of the security situation.

53. With regard, more specifically, to the benchmark for the assessment of the significant effect, Directive 2015/2302 does not lay down the criterion of the 'average traveller'. However, as the Lithuanian Government submitted in its observations, in the light of the objective of the directive to achieve a high level of consumer protection,[25] it seems appropriate to have recourse to the well-known criterion of the 'average consumer who is reasonably well-informed and reasonably observant and circumspect'[26] and to interpret that criterion in the context of Directive 2015/2302. On the basis of that benchmark, the decision of an average traveller depends, first of all, on his or her level of knowledge. The standard of knowledge must be assessed in the light of the information that was available to the public when the traveller booked the trip and the information that became available when he or she decided to terminate the contract. The more knowledge the average consumer has in relation to a certain situation, the better placed he or she is to make an informed assessment as to the risk presented by a given situation. By contrast, when the traveller has no information on a particular situation, or when the information is conflicting and constantly changing, he or she has more limited capacity to make such an assessment.

54. This was particularly relevant in the context of the COVID-19 pandemic. As the referring court essentially suggests, in order to determine what the average traveller knew and his or her assessment of the likelihood of the occurrence of the significant effect on the performance of the contract, account should be taken of the *high uncertainty* and the *extremely rapidly evolving situation* at the beginning of the pandemic. Indeed, at that stage, there was no scientific clarity as to the risk of the virus; there was also a lot of uncertainty as regards the type and duration of the measures to contain the spread of the virus.

55. In the present case, according to the documents before the Court, the traveller made an assessment as to the risk posed by COVID-19 on the basis of information in the press regarding the place of destination or its vicinity, as well on the basis of the declaration of the state of national emergency in the country of departure, that declaration having been made in connection with the risk posed by the virus. Under such circumstances, it would appear reasonable for an average traveller to expect that the risk situation would continue to exist in the period of time between the termination of the contract and the start of the package, or even that it would deteriorate, thus having a significant effect on the performance of the contract.

56. With regard to the part of the benchmark relating to the average traveller being 'reasonably observant and circumspect', this suggests reasonable caution on the part of the traveller. An overly cautious traveller who decides to terminate the contract because he or she is anxious cannot be exempted from paying the termination fee in cases where the situation does not justify such a risk assessment. By contrast, the average traveller is expected to pay attention to official information or travel recommendations suggesting the exercise of a high level of caution. The pandemic had a significant impact on the perception of travelling as being a potential source for

[24] Commission Staff Working Document on Package Travel, p. 78.

[25] See recital 51 of Directive 2015/2302.

[26] By way of an example of use of the benchmark of the 'average consumer', taken from the field of unfair contract terms, see judgments of 16 March 2023, *Caixabank (Loan arrangement fees)* (C-565/21, EU:C:2023:212, paragraph 33 and the case-law cited), and of 18 November 2021, *A. S.A.* (C-212/20, EU:C:2021:934, paragraph 42). For a general overview, see Leczykiewicz, D., and Weatherill, S., op. cit. footnote 21.

the spread of the virus, which is liable to affect the perception of the 'reasonably observant and circumspect' traveller in such circumstances. Under normal circumstances, the risk assessment in relation to the termination of the contract relates, as a general principle, only to the traveller and to the persons travelling with him or her. However, in the context of the extremely high transmissibility of a dangerous virus, an infected traveller can put those at the travel destination in danger, as well as his or her fellow citizens upon return. In such circumstances, a simple choice to travel can have 'negative externalities'.[27] Even before the imposition of measures restricting travelling,[28] it cannot be expected that the average traveller would act as a "self-interested" individual who shows no concern for official information suggesting caution or, moreover, that he or she would act against guidance to avoid unnecessary gatherings, social contact and travel. In the context of the COVID-19 pandemic, it is therefore possible for the paradigm of the average traveller who is 'reasonably observant and circumspect' to include the *responsible traveller* who pays attention to official calls to be prudent and to show solidarity with his or her fellow citizens in order to contain the spread of the virus.

57. It follows that the assessment of the significant effect on the performance of the contract relies upon an *ex ante* assessment, conducted at the time of the termination of the contract, of the likelihood of the occurrence of that significant effect, that assessment being carried out by the average traveller who is 'reasonably well-informed and reasonably observant and circumspect'.

58. In view of all the considerations mentioned above, I consider that the significant effect of the 'unavoidable and extraordinary circumstances' on the performance of the package travel contract can be established not only when that performance is impossible, but also when it entails significant risks to travellers' health and safety. The assessment of such consequences is objective. However, it is possible to take into account subjective factors related to the traveller's reduced mobility or vulnerability, provided that such factors can be verified. The assessment of the significant effect on the performance of the contract relies upon an *ex ante* assessment, conducted at the time of the termination of the contract, of the likelihood of the occurrence of that significant effect, that assessment being made by the average traveller who is reasonably well-informed and reasonably observant and circumspect.

The third question

59. By its third question, the referring court asks, in essence, whether the right of the traveller to terminate the contract without paying any termination fee, in accordance with Article 12(2) of Directive 2015/2302, is affected by the fact that the circumstances on which the traveller relies had already arisen or were at least already reasonably foreseeable at the time of the conclusion of the package travel contract. In that regard, the referring court asks whether, for the purposes of applying the criterion of reasonable foreseeability in the context of the COVID-19 pandemic, account should be taken of the difficulty to predict the course and consequences of the pandemic at the time of conclusion of the package travel contract.

[27] See Miller, L., 'Ethical Consumption and the Internal Market' in Leczykiewicz, D., and Weatherill, S., op. cit. footnote 21, p. 279, who develops the idea of the 'negative externalities' in the context of the environmental and social impact associated with consumption.

[28] The sense of responsibility is particularly relevant before the imposition of government measures restricting travelling. After the imposition of government measures, the traveller has to comply with the law in any event.

60. In that regard, it must be recalled, as has already been observed in the preliminary observations of this Opinion,[29] that the concept of 'unavoidable and extraordinary circumstances', within the meaning of Article 12(2) and (3)(b) of Directive 2015/2302, is akin to the concept of '*force majeure*' as defined in well-established case-law, namely as referring to circumstances beyond the control of the party claiming '*force majeure*', which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence.

61. It follows that the element of *unforeseeability* is an essential component of the classification of a situation as falling within 'unavoidable and extraordinary circumstances'. Events that have already arisen at the time of conclusion of the contract or that are likely to arise cannot constitute such circumstances, provided, however, that the traveller is also capable of predicting the normal consequences of such an event.

62. Indeed, as pointed out in academic literature, the concept of unforeseeability is relative.[30] It is also a dynamic one. In order to determine what is reasonably foreseeable account should be taken of the specific circumstances and of the evolution of human knowledge. In that regard, it is important to distinguish between the *unforeseeability of the event*, on the one hand, and the *unforeseeability of its effects* on the contract, on the other hand.[31] An event of which the traveller is aware and which, in the normal course of events, has some predictable consequences might progress into a situation falling within 'unavoidable and extraordinary circumstances' if its consequences substantially alter the nature of the event. Foreseeability can be assessed by means of a *comparison* between (i) the circumstances and the knowledge the traveller had of those circumstances and their consequences at the moment of conclusion of the contract (point A) and (ii) the circumstances and the knowledge the traveller had of those circumstances and their consequences at the moment of the termination of the contract (point B). For the purpose of that comparison, the number of days that have passed between point A and point B is not relevant. It is the *factual circumstances* and the *knowledge* possessed by the traveller which are decisive. If those elements have *significantly changed*, then the situation is different from the one of which the traveller was aware or which he or she could reasonably foresee.

63. In the context of the COVID-19 pandemic, the referring court explains that, at the moment of the conclusion of the package travel contract, the traveller was aware of the existence of the virus and of its impact, mainly in China but also in some other countries in an isolated manner. What the traveller did not know at that time was that the virus would eventually reach Europe and that the epidemic would evolve into a pandemic, the containment of which would require the adoption of unprecedented measures. The referring court emphasises the extreme uncertainty and the rapidly developing situation between the moment of conclusion of the package travel contract and the date of termination of that contract.

64. The reference for a preliminary ruling refers to the peculiar situation at the beginning of the COVID-19 pandemic. During the weeks preceding the official characterisation of COVID-19 as a pandemic by the WHO on 11 March 2020, an average person with normal access to official information would not have been able to foresee the pandemic's 'suddenness, scale and severity'[32]

[29] See point 29 above.

[30] Philippe, D., 'The Impact of the Coronavirus Crisis on the Analysis and Drafting of Contract Terms. Force Majeure, Hardship and Deferral of Obligations' in Hondius, E. et al. (eds.), *Coronavirus and the Law in Europe*, Intersentia, Cambridge, 2021, pp. 527-552, p. 532.

[31] Ibid.

[32] See 'Guidance on the right of travellers to terminate package travel contracts due to extraordinary circumstances resulting from COVID-19', issued by the Irish Government, Department of Enterprise, Trade and Employment on 26 March 2020, p. 5.

and the consequences the virus would subsequently have on travel and on the very exercise of the freedom of movement. The WHO itself acknowledged that 'we have never before seen a pandemic sparked by a coronavirus'.[33] Accordingly, it seems reasonable to suggest that the knowledge of the traveller in the case in the main proceedings between the point in time of concluding the package travel contract (at the beginning of February 2020) and the point in time of terminating the contract (at the end of February 2020) had evolved in a very significant way. If the national court makes that finding, the traveller cannot be prevented from invoking 'unavoidable and extraordinary circumstances' on the ground that those circumstances were foreseeable when he or she concluded the contract.

65. In view of the above, I consider that the right of the traveller to terminate the contract without paying any termination fee, in accordance with Article 12(2) of Directive 2015/2302, is affected by the fact that the circumstances on which the traveller relies had already arisen or were at least already reasonably foreseeable when the package travel contract was concluded unless, between the moment of conclusion of the contract and the moment of termination of the contract, there is a significant change in those circumstances as well as in the awareness, possessed by the traveller, of those circumstances and the consequences thereof. In that regard, for the purposes of applying the criterion of reasonable foreseeability in the context of the COVID-19 pandemic, account should be taken of the difficulty to predict the course and consequences of the pandemic at the time of conclusion of the package travel contract.

The fourth question

66. By its fourth question, the referring court asks, in essence, whether, for the purpose of assessing the significant effect on the performance of the package travel contract, giving rise to the right to terminate the contract without paying any termination fee, in accordance with Article 12(2) of Directive 2015/2302, account should be taken not only of the situation at the place of destination or its immediate vicinity, but also of the situation at the place of departure as well as at the intermediary points related to the trip, including those related to the return journey.

67. In that regard, it is apparent from Article 12(2) of Directive 2015/2302 that 'unavoidable and extraordinary circumstances' may justify termination by the traveller, giving him or her a right to a full refund of any payments made for the package, only where those circumstances occur 'at the place of destination or its immediate vicinity' and 'significantly [affect] the performance of the package, or … significantly affect the carriage of passengers to the destination'. Furthermore, recital 31 of the directive illustrates the conditions for the application of that provision by using the example of the 'outbreak of a serious disease at the travel destination'.[34]

68. The Court has ruled that the illustration of the concept of 'unavoidable and extraordinary circumstances' by using the example of the 'outbreak of a serious disease at the travel destination' is intended not to restrict the scope of that concept to local events, but to make it clear that those circumstances must, in any event, arise in particular at the intended travel destination and, as such, significantly affect the performance of the package concerned.[35] The Court has also ruled that, if the spread of a serious disease at the relevant travel destination is capable of falling within

[33] Opening remarks of the Director-General of the WHO at the media briefing on COVID-19, 11 March 2020.

[34] See, to that effect, judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraphs 44 and 46).

[35] See, to that effect, judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 47).

the scope of the concept of 'unavoidable and extraordinary circumstances', the same must a fortiori be true of the spread of a serious disease on a global scale, since the effects of the latter will also be felt at the relevant travel destination. [36]

69. Since the scope of 'unavoidable and extraordinary circumstances' covers the spread of a serious disease on a global scale, it is logical to infer that the significant consequences of those circumstances vis-à-vis the performance of the package or the carriage of passengers to the destination can be assessed by taking into account the situation at the travel destination as well as the situation at the place of departure and the intermediary points related to the trip.

70. That conclusion is supported by a contextual interpretation of Article 12(2) of Directive 2015/2302. Article 5(1)(a) of that directive includes, among the main characteristics of the travel services, 'the means, characteristics and categories of transport, the points, dates and time of departure and return, the duration and places of intermediate stops and transport connections'. Under Article 7(2) of Directive 2015/2302, that information must be included in the package travel contract. As I observed in point 42 above, the significant risk to the health and safety of the traveller amounts to a significant effect on the performance of the package travel contract. The health and safety of the traveller relates to all the elements of the performance of the contract, including travel as such to the destination and the means of transport used. It follows that the existence of a significant risk at the level of transportation to the travel destination must therefore also be taken into account for the purposes of assessing the impact of the 'unavoidable and extraordinary circumstances' on the package travel contract.

71. Moreover, the measures adopted at the place of departure *as a consequence* of the circumstances prevailing at the place of destination can also form part of the assessment of the significant effect on the performance of the package travel contract. As the Lithuanian Government essentially observed, if the place of destination is classified as a high-risk zone and, due to that classification, travellers returning to the place of departure are subject to isolation measures (quarantine), this is a decisive factor for the existence of 'unavoidable and extraordinary circumstances significantly affecting the performance of the contract'.

72. In view of the above considerations, I take the view that, for the purpose of assessing the significant effect on the performance of the package travel contract, giving rise to the right to terminate the contract without paying any termination fee, in accordance with Article 12(2) of Directive 2015/2302, account should be taken of the situation at the place of destination or its immediate vicinity as well as of the situation at the place of departure and the intermediary points related to the trip, including those related to the return journey.

V. Conclusion

73. In the light of the foregoing considerations, I propose that the Court reply to the questions referred by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) as follows:

(1) The establishment of 'unavoidable and extraordinary circumstances at the place of destination or its immediate vicinity', within the meaning of the first sentence 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) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council

[36] See, to that effect, judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449, paragraph 48).

Directive 90/314/EEC, does not depend on the issuance of an official warning from the authorities of the State of departure and/or arrival to refrain from unnecessary travel and/or classification of the country of destination (and possibly also the country of departure) as belonging to a risk area. However, in accordance with domestic procedural law, the national courts may take into account official warnings indicating a high level of risk to the place of destination, provided that those warnings do not constitute a condition necessary for the establishment of such 'unavoidable and extraordinary circumstances'.

(2) The significant effect of 'unavoidable and extraordinary circumstances' on the performance of the package travel contract can be established not only when that performance is impossible, but also when it entails significant risks to travellers' health and safety. The assessment of such consequences is objective. However, it is possible to take into account subjective factors related to the traveller's reduced mobility or vulnerability, provided that such factors can be verified. The assessment of the significant effect on the performance of the contract relies upon an *ex ante* assessment, conducted at the time of the termination of the contract, of the likelihood of the occurrence of that significant effect, that assessment being made by the average traveller who is 'reasonably well-informed and reasonably observant and circumspect'.

(3) The right of the traveller to terminate the contract without paying any termination fee, in accordance with Article 12(2) of Directive 2015/2302, is affected by the fact that the circumstances on which the traveller relies had already arisen or were at least already reasonably foreseeable when the package travel contract was concluded unless, between the moment of conclusion of the contract and the moment of termination of the contract, there is a significant change in those circumstances as well as in the awareness, possessed by the traveller, of those circumstances and the consequences thereof. In that regard, for the purposes of applying the criterion of reasonable foreseeability in the context of the COVID-19 pandemic, account should be taken of the difficulty to predict the course and consequences of the pandemic at the time of conclusion of the package travel contract.

(4) For the purpose of assessing the significant effect on the performance of the package travel contract, giving rise to the right to terminate the contract without paying any termination fee, in accordance with Article 12(2) of Directive 2015/2302, account should be taken of the situation at the place of destination or its immediate vicinity as well as of the situation at the place of departure and the intermediary points related to the trip, including those related to the return journey.