



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

10 July 2019*

(Reference for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights — Flight cancellation — Assistance — Right to reimbursement of the cost of the air ticket by the air carrier — Article 8(2) — Package tour — Directive 90/314/EEC — Insolvency of the tour organiser)

In Case C-163/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Noord-Nederland (District Court, Noord-Nederland, Netherlands), made by decision of 21 February 2018, received at the Court on 1 March 2018, in the proceedings

HQ,

IP, legally represented by **HQ,**

JO

v

Aegean Airlines SA,

THE COURT (Third Chamber),

composed of A. Prechal, President of Chamber, F. Biltgen, J. Malenovský (Rapporteur), C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, principal administrator,

having regard to the written procedure and further to the hearing on 16 January 2019,

after considering the observations submitted on behalf of:

- **HQ, IP,** legally represented by **HQ,** and **JO,** by I. Maertzdorff, advocaat, and by M. Duinkerke and M.J.R. Hannink,
- **Aegean Airlines SA,** by J. Croon and D. van Genderen, advocaten,
- the Czech Government, by M. Smolek and J. Vlácil and by A. Kasalická, acting as Agents,

* Language of the case: Dutch.

- the German Government, initially by T. Henze, and subsequently by M. Hellmann and A. Berg, acting as Agents,
 - the European Commission, by A. Nijenhuis and by C. Valero and N. Yerrell, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 28 March 2019,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 8(2) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1), in the light of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59).
- 2 The request has been made in proceedings between HQ, IP, represented legally by HQ, and JO ('HQ and Others') and the airline Aegean Airlines SA concerning reimbursement of the cost of air tickets sought by HQ and Others following the annulment of a flight forming part of a package tour.

Legal context

EU law

Regulation No 261/2004

- 3 Recitals 1, 2 and 16 of Regulation No 261/2004 state:
 - '(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.
 - (2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.
 - ...
 - (16) In cases where a package tour is cancelled for reasons other than the flight being cancelled, this Regulation should not apply.'
- 4 Article 1 of that regulation, entitled 'Subject', provides in paragraph 1:

'This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

 - (a) they are denied boarding against their will;
 - (b) their flight is cancelled;

(c) their flight is delayed.’

5 Article 3 of that regulation, entitled ‘Scope’, provides in paragraph 6:

‘This Regulation shall not affect the rights of passengers under Directive 90/314/EEC. This Regulation shall not apply in cases where a package tour is cancelled for reasons other than cancellation of the flight.’

6 Article 5 of Regulation No 261/2004, entitled ‘Cancellation’, provides in paragraph 1:

‘In case of cancellation of a flight, the passengers concerned shall:

- (a) be offered assistance by the operating air carrier in accordance with Article 8; and
- (b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
- (c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
 - (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
 - (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
 - (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.’

7 Article 8 of Regulation No 261/2004, entitled ‘Right to reimbursement or re-routing’, states in paragraphs 1 and 2:

‘1. Where reference is made to this Article, passengers shall be offered the choice between:

- (a) reimbursement within seven days ... of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant,
 - a return flight to the first point of departure, at the earliest opportunity;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
- (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger’s convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.’

Directive 90/314

8 The 21st recital of Directive 90/314 states:

‘Whereas both the consumer and the package travel industry would benefit if organisers and/or retailers were placed under an obligation to provide sufficient evidence of security in the event of insolvency’.

9 Article 1 of that directive provides:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community.’

10 Article 4(6) of Directive 90/314 provides:

‘If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organiser cancels the package before the agreed date of departure, the consumer shall be entitled:

(a) either to take a substitute package of equivalent or higher quality where the organiser and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organiser shall refund the difference in price to the consumer;

(b) or to be repaid as soon as possible all sums paid by him under the contract.

...’

11 Under Article 5(1) of that directive:

‘Member States shall take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services.’

12 Article 7 of Directive 90/314 provides:

‘The organiser and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.’

Netherlands law

13 At the time of the facts in the main proceedings, Directive 90/314 was implemented in Netherlands law in Title 7A, entitled ‘Travel contract’, of Book 7 of the Burgerlijk Wetboek (Civil Code).

14 Article 7:504(3) of the Civil Code allows a passenger, in the event of termination of the travel contract by the tour organiser, to request from that organiser, inter alia, reimbursement of the cost of the air tickets.

15 Article 7:512(1) of the Civil Code lays down an obligation for a tour organiser to take the necessary measures in advance to ensure that, if it can no longer meet its obligations towards a traveller due to insolvency, its obligations are assumed by someone else or the fare is reimbursed.

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

- 16 Aegean Airlines, a company established in Greece, entered into a charter contract with G. S. Charter Aviation Services Ltd ('G.S. Charter'), a company established in Cyprus, under which Aegean Airlines was to make available to G.S. Charter a certain number of seats, in return for payment of the charter price. G.S. Charter subsequently resold the seats to third parties, including to Hellas Travel BV ('Hellas'), a tour organiser established in the Netherlands.
- 17 G.S. Charter and Hellas concluded an agreement whereby, from 1 May to 24 September 2015, a return flight between Eelde (Netherlands) and Corfu (Greece) was to be operated every Friday, a deposit was to be paid to Aegean Airlines and the payment for the scheduled return flight on the following Friday was to be made every Monday.
- 18 On 19 March 2015, HQ and Others booked return flights between Eelde and Corfu through Hellas. Those flights formed part of a 'package tour', for the purposes of Directive 90/314, the price of which was paid to Hellas.
- 19 HQ and Others received electronic tickets bearing the logo of Aegean Airlines for those flights, scheduled for 17 and 24 July 2015, as well as documents referring to Hellas as the charterer.
- 20 As is apparent from the order for reference, a few days before the agreed departure date Hellas sent HQ and Others a letter and an email informing them that, because of both the slump in the level of bookings and cancellations of existing bookings, arising from 'uncertainties surrounding the situation in Greece' at that time, it was forced to cancel the flights agreed with Aegean Airlines since the latter had decided, as Hellas was no longer able to pay the agreed price to it, to no longer operate flights to and from Corfu as from 17 July 2015. Accordingly, Hellas informed HQ and Others that their package tour had been cancelled.
- 21 Hellas was declared insolvent on 3 August 2016. It did not reimburse to HQ and Others the cost of their air tickets.
- 22 HQ and Others brought proceedings before the Rechtbank Noord-Nederland (District Court, Noord-Nederland) requesting that Aegean Airlines be ordered to pay them compensation for the cancellation of the flight of 17 July 2015 and to reimburse to them the cost of the related tickets, pursuant, respectively, first, to Article 5(1)(c) of Regulation No 261/2004 and, secondly, to Article 8(1)(a) of that regulation.
- 23 Aegean Airlines alleged, primarily, that Regulation No 261/2004 was not applicable, in particular in the light of Article 3(6) thereof.
- 24 However, by interim decision of 14 November 2017, the Rechtbank Noord-Nederland (District Court, Noord-Nederland) rejected that defence plea on the ground that the applicability of Regulation No 261/2004 to passengers with a package tour is excluded under that provision only if the cancellation is independent of the willingness of the air carrier to operate the flight or flights forming part of that package tour, whereas this was not the case here. That court held, on the one hand, that the decision to cancel the flight was taken by Aegean Airlines, which was clearly prepared to operate the flight only if Hellas paid to it in advance the fixed fare for the flight, and, on the other hand, that it was neither pleaded nor demonstrated that Hellas had announced the cancellation of the package tour for reasons other than that decision by Aegean Airlines.
- 25 Accordingly, pursuant to Regulation No 261/2004, HQ and Others were awarded flat-rate compensation from Aegean Airlines on account of the cancellation of the flight in question. However, the Netherlands court did not rule on the request for reimbursement of the cost of the air tickets.

- 26 In that regard, Aegean Airlines argued, in the alternative, that, in so far as a package tour was at issue here, it resulted from Article 8(2) of Regulation No 261/2004 that it was not required to reimburse to HQ and Others the amount which they had paid to Hellas for the purchase of their air tickets.
- 27 In those circumstances, the Rechtbank Noord-Nederland (District Court, Noord-Nederland, Netherlands), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Must Article 8(2) of Regulation No 261/2004 be interpreted as meaning that a passenger who, under Directive 90/[314]/EEC on package travel (as implemented in national law), has the right to hold his tour organiser liable for reimbursement of the cost of his ticket, can no longer claim reimbursement from the air carrier?
 2. If the answer to Question 1 is in the affirmative, can a passenger nevertheless hold the air carrier liable for reimbursement of the cost of his ticket if it is to be assumed that his tour organiser, if it were to be held liable, would be financially incapable of actually reimbursing the cost of the ticket and that tour organiser has also not taken any safeguard measures to guarantee reimbursement?

Consideration of the questions referred

- 28 By its two questions, which it is appropriate to examine jointly, the referring court seeks to ascertain, in essence, whether Article 8(2) of Regulation No 261/2004 must be interpreted as meaning that a passenger who, under Directive 90/314, has the right to hold his tour organiser liable for reimbursement of the cost of his air ticket, can no longer claim reimbursement of the cost of that ticket from the air carrier, on the basis of that regulation, even where the tour organiser is financially incapable of reimbursing the cost of the ticket and has not taken any measures to guarantee such reimbursement.
- 29 As regards the question whether passengers who have the right to hold their tour organiser liable for reimbursement of the cost of their air tickets are also entitled to seek reimbursement of the cost of their tickets from the air carrier, the Court notes, first, that, in accordance with Article 8(1)(a) of Regulation No 261/2004, read in conjunction with Article 5(1)(a) of that regulation, the onus is on the air carrier, in the event of cancellation of a flight, to offer assistance to the passengers concerned in the form of offering them, *inter alia*, reimbursement of their ticket (see judgment of 12 September 2018, *Harms*, C-601/17, EU:C:2018:702, paragraph 12).
- 30 Second, Article 8(2) of that regulation states that the right to reimbursement of the cost of the ticket also applies to passengers whose flights form part of a package tour, except where such a right arises under Directive 90/314.
- 31 It is also apparent from the clear wording of Article 8(2) that the mere existence of a right to reimbursement, arising under Directive 90/314, is sufficient to rule out the possibility for a passenger, whose flight forms part of a package tour, to be able to claim reimbursement of the cost of his ticket, pursuant to Regulation No 261/2004, from the operating air carrier.
- 32 That interpretation is corroborated by the *travaux préparatoires* of Regulation No 261/2004. As stated by the Advocate General in points 43 and 44 of his Opinion, it is clear from those *travaux préparatoires* that, while the Union legislature did not intend to exclude entirely from the scope of the regulation passengers whose flight forms part of a package tour, it did, however, seek to maintain in their regard the effects of the adequate protection scheme which had previously been put in place by Directive 90/314.

- 33 As is apparent, in that regard, from Article 3(6) of Regulation No 261/2004, that regulation does not affect the rights under Directive 90/314 of passengers who have purchased a package tour.
- 34 Article 8(2) of Regulation No 261/2004 thus implies that the right to reimbursement of the cost of the ticket, pursuant to that regulation and Directive 90/314 respectively, are not cumulative. If they were, furthermore, and as pointed out by the Advocate General in point 64 of his Opinion, the passengers concerned would receive unjustified overcompensation, which would be to the detriment of the operating air carrier, which, in that case, would risk having to assume part of the liability of the tour organiser towards its clients in accordance with the contract which it has entered into with them.
- 35 It is apparent from the foregoing considerations that passengers who are entitled, under Directive 90/314, to seek reimbursement of their air tickets from their tour organiser are not able to seek reimbursement from the air carrier on the basis on Regulation No 261/2004.
- 36 That conclusion remains unchanged also where the tour organiser is financially incapable of reimbursing the cost of the ticket and has not taken any measures to guarantee that reimbursement.
- 37 In the light of the clear wording of Article 8(2) of Regulation No 261/2004, it is, in fact, not relevant to ascertain whether the tour organiser is financially capable of reimbursing the cost of the ticket, whether it has taken measures or not to guarantee that reimbursement, or even whether those circumstances put at risk the execution of its obligation to reimburse the passengers concerned.
- 38 Such an interpretation of Article 8(2) of Regulation No 261/2004 is not called into question by the main objective pursued by that regulation, set out in recital 1 thereof, namely to ensure a high level of protection for passengers.
- 39 As is apparent from paragraph 32 above, the Union legislature took account precisely of the adequate protection scheme which had previously been put in place by Directive 90/314.
- 40 More specifically, Article 7 of that directive, read in the light of the 21st recital thereof, provides, *inter alia*, that tour organisers must provide sufficient evidence of security for the refund of money paid over in the event of insolvency.
- 41 The Court has held that Article 7 of Directive 90/314 imposes an obligation of result, namely to guarantee package travelers the refund of money paid over in the event of the travel organiser's bankruptcy, and that that guarantee is specifically aimed at arming consumers against the consequences of the bankruptcy, whatever the causes of it may be (see, to that effect, judgment of 15 June 1999, *Rechberger and Others*, C-140/97, EU:C:1999:306, paragraph 74, and order of 16 January 2014, *Baradics and Others*, C-430/13, EU:C:2014:32, paragraph 35).
- 42 The Court has also considered that national legislation properly transposes the obligations under Article 7 of the directive only if, whatever the detailed rules laid down in that legislation may be, it achieves the result of providing the consumer with an effective guarantee of the refund of all money paid over in the event of the travel organiser's insolvency (see, to that effect, judgment of 15 June 1999, *Rechberger and Others*, C-140/97, EU:C:1999:306, paragraph 64, and order of 16 January 2014, *Baradics and Others*, C-430/13, EU:C:2014:32, paragraph 38).
- 43 Failing that, as is apparent from settled case-law of the Court, the traveller concerned is entitled, in any event, to bring an action for damages against the Member State concerned for the loss incurred by him as a result of an infringement of EU law (see, to that effect, judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraphs 45 to 48 and the case-law cited).

- 44 In the light of all of the foregoing considerations, the answer to the questions referred is that Article 8(2) of Regulation No 261/2004 must be interpreted as meaning that a passenger who, under Directive 90/314, has the right to hold his tour organiser liable for reimbursement of the cost of his air ticket, can no longer claim reimbursement of the cost of that ticket from the air carrier, on the basis of that regulation, even where the tour organiser is financially incapable of reimbursing the cost of the ticket and has not taken any measures to guarantee such reimbursement.

Costs

- 45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

Article 8(2) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that a passenger who, under Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, has the right to hold his tour organiser liable for reimbursement of the cost of his air ticket, can no longer claim reimbursement of the cost of that ticket from the air carrier, on the basis of that regulation, even where the tour organiser is financially incapable of reimbursing the cost of the ticket and has not taken any measures to guarantee such reimbursement.

[Signatures]