

JUDGMENT OF THE COURT

8 October 1996^{*}

In Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landgericht (Regional Court) Bonn for a preliminary ruling in the proceedings pending before that court between

Erich Dillenkofer

Christian Erdmann

Hans-Jürgen Schulte

Anke Heuer

Werner, Ursula and Torsten Knor

and

Federal Republic of Germany

^{*} Language of the case: German.

on the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann (Rapporteur), D. A. O. Edward, J.-P. Puissechet, G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: G. Tesauero,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Anke Heuer, by Gert Meier, Rechtsanwalt, Cologne;

— the Federal Republic of Germany, by Karlheinz Stöhr, Ministerialrat at the Federal Ministry of Justice, Alfred Dittrich, Regierungsdirektor at the same Ministry, Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agents, and Dieter Sellner, Rechtsanwalt, Bonn;

— the Netherlands Government, by Adriaan Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent;

— the United Kingdom Government, by John Collins, Assistant Treasury Solicitor, acting as Agent, Stephen Richards and Rhodri Thomson, Barristers;

— the Commission of the European Communities, by Rolf Wägenbaur, Principal Legal Adviser, acting as Agent, and Barbara Rapp, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Erich Dillenkofer, represented by Roland Gappa, Rechtsanwalt, Dahn; Anke Heuer, represented by Gert Meier; Werner, Torsten and Ursula Knor, represented by Karin Schumacher-d'Hondt, Rechtsanwalt, Bonn; the Federal Republic of Germany, represented by Ernst Röder and Dieter Sellner; the Netherlands Government, represented by Marc Fierstra, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the French Government, represented by Catherine de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Stephen Richards; and the Commission, represented by Barbara Rapp, at the hearing on 17 October 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

By orders of 6 June 1994, received at the Court on 28 June 1994 in Cases C-178/94 and C-179/94 and on 1 July 1994 in Cases C-188/94, C-189/94 and C-190/94, the Landgericht Bonn referred to the Court for a preliminary ruling under Article 177 of the EC Treaty 12 questions on the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, hereinafter 'the Directive').

- 2 The questions have been raised in the course of actions for compensation which Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, and Werner, Torsten and Ursula Knor (hereinafter ‘the plaintiffs’) have brought against the Federal Republic of Germany for damage they suffered because the Directive was not transposed within the prescribed period.
- 3 The purpose of the Directive, according to Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States relating to package travel, package holidays and package tours sold or offered for sale in the territory of the Community.
- 4 Article 2 contains a number of definitions. It provides that:

‘For the purposes of this Directive:

1. “package” means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:
 - (a) transport;
 - (b) accommodation;
 - (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

...

2. "organizer" means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;
3. "retailer" means the person who sells or offers for sale the package put together by the organizer;
4. "consumer" means the person who takes or agrees to take the package ("the principal contractor"), or any person on whose behalf the principal contractor agrees to purchase the package ("the other beneficiaries") or any person to whom the principal contractor or any of the other beneficiaries transfers the package ("the transferee");

...'

5 Article 7 provides: 'The organizer 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.'

6 Article 8 states that Member States may adopt or maintain more stringent provisions in the field covered by the Directive to protect the consumer.

7 Article 9 requires Member States to bring into force the measures necessary to comply with the Directive before 31 December 1992.

8 On 24 June 1994, the German legislature adopted a Law implementing the Directive (*Bundesgesetzblatt* I, p. 1322). That law introduced into the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB') a new provision, Paragraph 651k, in terms of which:

'1. The travel organizer shall ensure that the package traveller obtains a refund of:

- (1) the travel price paid if the travel services are not provided as a result of the organizer's insolvency; and
- (2) necessary expenditure incurred by the traveller in respect of his repatriation following the organizer's insolvency.

The travel organizer can fulfil the obligations set out in (1) only:

- (1) by taking out insurance with a company authorized to operate within the scope of this Law; or
- (2) through a promise of payment from a credit institution authorized to operate within the scope of this Law.

2. ...

3. In order to satisfy the requirement set out in (1), the organizer must provide for the traveller to have a direct remedy against the insurer or the credit institution and be responsible for furnishing evidence thereof by way of an attestation issued by the said company (security document).

4. Apart from a deposit of up to 10% of the travel price, subject, however, to a maximum of DM 500, the organizer may demand or accept payment towards the travel price before completion of the travel only if he has given the traveller a security document.

...'

9 That law entered into force on 1 July 1994. It applies to travel contracts which were concluded after that date and under whose terms the travel was to commence after 31 October 1994.

10 The plaintiffs in the main proceedings are purchasers of package travel who, following the insolvency in 1993 of the two operators from whom they had bought their packages, either never left for their destination or had to return from their holiday location at their own expense. They have not succeeded in obtaining reimbursement of the sums they paid to the operators or of the expenses they incurred in returning home.

11 The plaintiffs have brought actions for compensation against the Federal Republic of Germany on the ground that if Article 7 of the Directive had been transposed into German law within the prescribed period, that is to say by 31 December 1992, they would have been protected against the insolvency of the operators from whom they had purchased their package travel.

12 They rely in particular on the judgment of the Court of Justice of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357, paragraphs 39 and 40, according to which, where a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation, provided that the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis

of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties. According to the applicants, those conditions are satisfied in this case. They therefore claim refund of sums paid for travel never undertaken or expenses incurred in their repatriation.

13 The German Government contests the claims. It considers that the conditions laid down in *Francovich* are not satisfied in these cases and that in any event failure to transpose a directive within the prescribed period cannot render a Member State liable to pay damages unless there has been a serious, that is to say manifest and grave, breach of Community law, for which it can be held responsible.

14 The Landgericht Bonn found that German law did not afford any basis for upholding the claims for compensation but having doubts regarding the consequences of the *Francovich* judgment it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is the EC Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC) intended to grant individual package travellers, via national transposing provisions, the individual right to security for money paid and repatriation costs in the event of the insolvency of the travel organizer (see paragraph 40 of the judgment in Joined Cases C-6/90 and C-9/90 *Francovich*)?’

(2) Is the content of that right sufficiently identified on the basis of that Directive?

(3) What are the minimum requirements for the “necessary measures” to be taken by the Member States within the meaning of Article 9 of the Directive?

- (4) In particular, did it satisfy Article 9 of the Directive if the national legislature by 31 December 1992 provided the legislative framework for imposing a legal obligation on the travel organizer and/or retailer to take measures for security within the meaning of Article 7 of the Directive?

Or did the necessary change in the law, taking into account the lead times involved in consultation of the travel, insurance and credit sectors, have to come into effect sufficiently in advance of 31 December 1992 for that security actually to function in the package travel market from 1 January 1993?

- (5) Is the protective purpose, if any, of the Directive satisfied if the Member State allows the travel organizer only to require a deposit towards the travel price of up to 10% of the travel price with a maximum of DM 500 before documents of value are handed over?
- (6) To what extent are the Member States obliged under the Directive to act (by legislating) in order to protect package travellers against their own negligence?
- (7) (a) Could the Federal Republic of Germany, in view of the “advance payment” judgment (*Vorkasse-Urteil*) of the Bundesgerichtshof (BGH) of 12 March 1987 (BGHZ 100, 157; NJW 86, 1613), have omitted altogether to transpose Article 7 of the Directive by means of legislation?
- (b) Is there no “security” within the meaning of Article 7 of the Directive even where, on payment of the travel price, travellers were in possession of documents of value confirming a right to performance against those responsible for providing particular services (airline companies, hotel operators)?

- (8) (a) Does the mere fact that the time-limit specified in Article 9 of the Directive has been exceeded suffice to confer a right to compensation involving State liability as defined in the *Francovich* judgment of the Court of Justice, or can the Member State put forward the objection that the period for transposition proved to be inadequate?
- (b) If that objection fails, does the response to the previous question apply even where the Member State concerned cannot achieve the protective purpose of the Directive simply by a change in the law (as for instance with payments in lieu of wages to employees in the event of insolvency), the cooperation of private third parties (travel organizers, the insurance and credit sector) being essential?
- (9) Does liability on the part of a Member State for an infringement of Community law presuppose a serious, that is to say a manifest and grave, breach of obligations?
- (10) Is it a precondition of State liability that a judgment in infringement proceedings establishing a breach of Treaty obligations has been delivered before the event giving rise to damage?
- (11) Does it follow from the *Francovich* judgment of the Court of Justice that the right to compensation on grounds of breach of Community law is not dependent on a finding of fault in general, or at any rate of wrongful non-adoption of legislative measures, on the part of the Member State?

(12) If that conclusion is not correct,

could the "advance payment" judgment of the Bundesgerichtshof have been an acceptable reason justifying or excusing the Federal Republic of Germany for transposing the Directive, as defined in the answers of the Court of Justice to Questions 4 and 7, only after expiry of the time-limit specified in Article 9?

Conditions under which a Member State incurs liability (Questions 8, 9, 10, 11 and 12)

Questions 8, 9, 10, 11 and 12, concerning the conditions under which a State incurs liability towards individuals where a directive has not been transposed within the prescribed period, will be examined first.

The crux of these questions is whether a failure to transpose a directive within the prescribed period is sufficient *per se* to afford individuals who have suffered injury a right to reparation or whether other conditions must also be taken into consideration.

More specifically, the national court raises the question of the importance to be attached to the German Government's contention that the period prescribed for transposition of the Directive proved inadequate (Question 8). It asks, further, whether State liability requires a serious, that is to say, a manifest and grave, breach of Community obligations (Question 9), whether the breach must have been established in infringement proceedings before the loss or damage occurred (Question 10), whether liability presupposes the existence of fault, of either commission or omission, in the adoption of legislative measures by the Member State (Question 11) and, lastly, in the event that Question 11 is answered in the affirmative,

whether liability can be excluded by reason of a judgment such as the 'advance payment' judgment of the Bundesgerichtshof referred to in Question 7 (Question 12).

18 The German, Netherlands and United Kingdom Governments have submitted in particular that a State can incur liability for late transposition of a directive only if there has been a serious, that is to say, a manifest and grave, breach of Community law for which it can be held responsible. According to those Governments, this depends on the circumstances which caused the period for transposition to be exceeded.

19 In order to reply to those questions, reference must first be made to the Court's case-law on the individual's right to reparation of damage caused by a breach of Community law for which a Member State can be held responsible.

20 The Court has held that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (*Francovich*, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24). Furthermore, the Court has held that the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (*Francovich*, paragraph 38; *Brasserie du Pêcheur and Factortame*, paragraph 38, and *Hedley Lomas*, paragraph 24).

21 In *Brasserie du Pêcheur and Factortame*, at paragraphs 50 and 51, *British Telecommunications*, at paragraphs 39 and 40, and *Hedley Lomas*, at paragraphs 25 and 26, the Court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are

met: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

- 22 Moreover, it is clear from the *Francovich* case which, like these cases, concerned non-transposition of a directive within the prescribed period, that the full effectiveness of the third paragraph of Article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties.
- 23 In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case.
- 24 When the Court held that the conditions under which State liability gives rise to a right to reparation depended on the nature of the breach of Community law causing the damage, that meant that those conditions are to be applied according to each type of situation.
- 25 On the one hand, a breach of Community law is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (see Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others v Council and Commission* [1978] ECR 1209, paragraph 6; *Brasserie du Pêcheur and Factortame*, paragraph 55; and *British Telecommunications*, paragraph 42). On the other hand, if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no,

discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see *Hedley Lomas*, paragraph 28).

26 So where, as in *Francovich*, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.

27 Consequently, such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties: no other conditions need be taken into consideration.

28 In particular, reparation of that loss and damage cannot depend on a prior finding by the Court of an infringement of Community law attributable to the State (see *Brasserie du Pêcheur*, paragraphs 94 to 96), nor on the existence of intentional fault or negligence on the part of the organ of the State to which the infringement is attributable (see paragraphs 75 to 80 of the same judgment).

29 The reply to Questions 8, 9, 10, 11 and 12 must therefore be that failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes *per se* a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered.

Grant to individuals of rights whose content is sufficiently identifiable (Questions 1 and 2)

30 By its first two questions, the national court asks whether the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money paid over and repatriation in the event of the insolvency of the travel organizer and/or the retailer party to the contract (hereinafter 'the organizer'), and whether the content of those rights can be sufficiently identified.

31 According to the plaintiffs and the Commission, these two questions must be answered in the affirmative. Article 7, they say, clearly and unequivocally recognizes the right of the package traveller, *qua* consumer, to obtain a refund of money paid over and of the costs of repatriation in the event of the organizer's insolvency.

32 The German, Netherlands and United Kingdom Governments disagree with that point of view.

33 The question whether the result prescribed by Article 7 of the Directive entails the grant of rights to individuals must be examined first.

34 According to the actual wording of Article 7, this provision prescribes, as the result of its implementation, an obligation for the organizer to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.

35 Since the purpose of such security is to protect consumers against the financial risks arising from the insolvency of package travel organizers, the Community legislature has placed operators under an obligation to offer sufficient evidence of such security in order to protect consumers against those risks.

36 The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organizer from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of the security which organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated.

37 That result is, moreover, confirmed by the penultimate recital in the preamble to the Directive, according to which both the consumer and the package travel industry would benefit if organizers were placed under an obligation to provide sufficient evidence of security in the event of insolvency.

38 In that connection, the German and United Kingdom Governments' argument that the Directive, which is based on Article 100a of the Treaty, is aimed essentially at ensuring freedom to provide services and, more generally, freedom of competition cannot be valid.

39 First, the recitals in the preamble to the Directive repeatedly refer to the purpose of protecting consumers. Secondly, the fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers. Indeed, according to Article 100a(3) of the Treaty, the Commission, in its proposals submitted pursuant to that article, concerning *inter alia* consumer protection, must take as a base a high level of protection.

- 40 Similarly, the German and United Kingdom Governments' argument that the actual wording of Article 7 shows that this provision simply requires package travel organizers to provide sufficient evidence of security and that its lack of reference to any right of consumers to such security indicates that such a right is only an indirect and derived right must be rejected.
- 41 In this regard, it suffices to point out that the obligation to offer sufficient evidence of security necessarily implies that those having that obligation must actually take out such security. Indeed, the obligation laid down in Article 7 would be pointless in the absence of security actually enabling money paid over to be refunded or the consumer to be repatriated, should occasion arise.
- 42 Consequently, it must be concluded that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organizer's insolvency.
- 43 The next point to be examined is whether the content of the rights in question are identifiable on the basis of the provisions of the Directive alone.
- 44 The persons having rights under Article 7 are sufficiently identified as consumers, as defined by Article 2 of the Directive. The same holds true of the content of those rights. As explained above, those rights consist in a guarantee that money paid over by purchasers of package travel will be refunded and a guarantee that they will be repatriated in the event of the insolvency of the organizer. In those circumstances, the purpose of Article 7 of the Directive must be to grant to individuals rights whose content is determinable with sufficient precision.

45 That conclusion is not affected by the fact that, as the German Government points out, the Directive leaves the Member States considerable latitude as regards the choice of means for achieving the result it seeks. The fact that States may choose between a wide variety of means for achieving the result prescribed by a directive is of no importance if the purpose of the directive is to grant to individuals rights whose content is determinable with sufficient precision.

46 The reply to the first two questions must therefore be that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer's insolvency; the content of those rights is sufficiently identifiable.

The measures necessary for proper transposition of the Directive (Questions 3, 4, 5, 6 and 7)

Questions 3 and 4

47 By Questions 3 and 4, the national court is essentially asking the Court to specify what 'necessary measures' the Member States should have adopted in order to comply with Article 9 of the Directive.

48 First of all, according to settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty (Case C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 24).

49 Secondly, in providing that the Member States were to bring into force the measures necessary to comply with the Directive before 31 December 1992, Article 9 required the Member States to adopt all the measures necessary to ensure that the provisions of the Directive were fully effective and so guarantee achievement of the prescribed result.

50 In view of the reply given to the first two questions, it must therefore be held that, in order to ensure full implementation of Article 7 of the Directive, the Member States should have adopted, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from 1 January 1993, they would be refunded money paid over and be repatriated in the event of the organizer's insolvency.

51 It follows that Article 7 would not have been fully implemented if, within the prescribed period, the national legislature had done no more than adopt the necessary legal framework for requiring organizers by law to provide sufficient evidence of security.

52 According to the order for reference, the German Government claimed that the period prescribed for transposition of the Directive was too short, in particular because of the considerable difficulties which introduction of a system of security conforming with the Directive would create in Germany for the economic sector concerned. In that connection, the German Government pointed out that the Directive could not be implemented simply by enacting legislative amendments: it had to rely on the collaboration of third parties (travel organizers, insurers and credit institutions).

53 That kind of circumstance cannot justify a failure to transpose a directive within the prescribed period. It is settled case-law that a Member State may not rely on provisions, practices or situations prevailing in its own internal legal system to justify its failure to observe the obligations and time-limits laid down by a

directive (see, for instance, Case 283/86 *Commission v Belgium* [1988] ECR 3271, paragraph 7).

54 If the period allowed for the implementation of a directive does, indeed, prove to be too short, the only step compatible with Community law available to the Member State concerned is to take the appropriate initiatives within the Community in order to have the competent Community institution grant the necessary extension of the period (see Case 52/75 *Commission v Italy* [1976] ECR 277, paragraph 12).

55 The reply to Questions 3 and 4 must therefore be that, in order to comply with Article 9 of the Directive, the Member State should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of organizers' insolvency.

Question 5

56 By its fifth question, the national court asks whether the objective of consumer protection pursued by Article 7 of the Directive is satisfied if the Member State allows the travel organizer to require a deposit of up to 10% towards the travel price, with a maximum of DM 500, before handing over to his customer documents which the national court describes as 'documents of value', namely documents evidencing the consumer's right to the provision of the various services included in the travel package (by airlines or hotel companies).

- 57 It appears from the order for reference that this question refers to Paragraph 651k(4) of the BGB, reproduced at paragraph 8 above, and to the 'advance payment' judgment of the Bundesgerichtshof of 12 March 1987, referred to in Question 7, which annulled travel organizers' general business conditions in so far as they required travellers to pay a deposit equivalent to 10% of the travel price without receipt of documents of value.
- 58 It is also clear from the order for reference that by this question the national court is seeking to ascertain in substance whether it is in conformity with Article 7 for the national legislature to make the consumer bear the risk relating to such a deposit so that the deposit is left uncovered by the security mentioned in that provision.
- 59 As was found in relation to Questions 1 and 2, the purpose of Article 7 of the Directive is to protect the consumer against the risks defined by that provision arising from the insolvency of the organizer. It would be contrary to that purpose to limit that protection by leaving any deposit payment uncovered by the security for a refund or repatriation. The Directive contains no basis for any such limitation of the rights guaranteed by Article 7.
- 60 So a national rule allowing organizers to require travellers to pay a deposit will be in conformity with Article 7 of the Directive only if, in the event of the organizer's insolvency, refund of the deposit is also guaranteed.
- 61 The reply to Question 5 must therefore be that, if a Member State allows the travel organizer to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of the

Directive is not satisfied unless a refund of that deposit is also guaranteed in the event of the organizer's insolvency.

Question 7

62 By Question 7(b) the national court asks whether the security of which organizers must 'provide sufficient evidence', in accordance with Article 7 of the Directive, is lacking even if, on payment of the travel price, travellers have documents of value.

63 According to the German Government, the protection guaranteed by Article 7 is not lacking if the traveller has documents guaranteeing a direct right against the actual provider of services (the airline company or the hotelier). In such a situation, the traveller is in fact in a position to require performance of the services, so that there is no risk that he will not receive the services because of the organizer's insolvency.

64 That argument cannot be accepted. The protection which Article 7 guarantees to consumers could be impaired if they were made to enforce credit vouchers against third parties who are not, in any event, required to honour them and who are likewise themselves exposed to the risks consequent on insolvency.

65 The reply to Question 7(b) must therefore be that Article 7 of the Directive is to be interpreted as meaning that the security of which organizers must 'provide sufficient evidence' is lacking even if, on payment of the travel price, travellers are in possession of documents of value.

- 66 In Question 7(a) the national court asks whether the Federal Republic of Germany could have omitted altogether to transpose Article 7 of the Directive in view of the Bundesgerichtshof's 'advance payment' judgment.
- 67 Quite apart from the question whether a judgment of a court of law could ensure proper transposition of the Directive, the reply to this question follows in any case from the replies given to Questions 5 and 7(b). Since the aim of Article 7 is to protect the consumer against the risks, set out in that provision, arising from the organizer's insolvency, a judgment such as the Bundesgerichtshof's 'advance payment' judgment cannot satisfy the requirements of the Directive if it requires the consumer to bear the risk of the organizer's insolvency as regards the deposit required and also the risk that, when the consumer has received documents of value, the actual provider of the services might not honour them or might become insolvent.
- 68 The reply to Question 7 must therefore be that Article 7 of the Directive is to be interpreted as meaning that the 'security' of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value and that the Federal Republic of Germany could not have omitted altogether to transpose the Directive on the basis of the Bundesgerichtshof's 'advance payment' judgment.

Question 6

- 69 By Question 6 the national court asks whether the Directive requires Member States to adopt specific measures to protect package travellers against their own negligence.

70 So framed, that question prompts the following three observations.

71 First, neither the objective of the Directive nor its specific provisions require the Member States to adopt specific provisions in relation to Article 7 to protect package travellers from their own negligence.

72 Secondly, according to the Court's case-law, in determining the loss or damage for which reparation may be granted, the national court may always inquire whether the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it (see, in particular, *Brasserie du Pêcheur and Factortame*, at paragraph 84).

73 Lastly, although that principle also applies in actions for damages based on non-transposition of a directive, such as those brought in this case, it follows from the replies given to Questions 5 and 7 that a package traveller who has paid the whole travel price cannot be regarded as acting negligently simply because he has not taken advantage of the possibility, which the 'advance payment' judgment affords him, of not paying more than 10% of the total travel price before obtaining documents of value.

74 The reply to Question 6 must therefore be that the Directive does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence.

Costs

75 The costs incurred by the German, Netherlands, French and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landgericht Bonn, by orders of 6 June 1994, hereby rules:

1. Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes *per se* a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered.

2. The result prescribed by Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer's insolvency; the content of those rights is sufficiently identifiable.

3. In order to comply with Article 9 of Directive 90/314, the Member States should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of the insolvency of the organizer and/or retailer party to the contract.

4. If a Member State allows the package travel organizer and/or retailer party to a contract to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of Directive 90/314 is not satisfied unless a refund of that deposit is also guaranteed in the event of the insolvency of the package travel organizer and/or retailer party to the contract.

5. Article 7 of Directive 90/314 is to be interpreted as meaning that the 'security' of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value and that the Federal Republic of Germany could not have omitted altogether to transpose Directive 90/314 on the basis of the Bundesgerichtshof's 'advance payment' judgment of 12 March 1987.

6. Directive 90/314 does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence.

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Delivered in open court in Luxembourg on 8 October 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President