



## Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

16 January 2014\*

(Article 99 of the Rules of Procedure of the Court of Justice — Package travel, package holidays and package tours — National legislation laying down minimum percentages for the security that a travel organiser must provide in order to refund, in the event of insolvency, money paid over by consumers)

In Case C-430/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Ítéltábla (Hungary), made by decision of 12 July 2013, received at the Court on 29 July 2013, in the proceedings,

**Ilona Baradics,**

**Adrienn Bóta,**

**Éva Emberné Stál,**

**Lászlóné György,**

**Sándor Halász,**

**Zita Harászi,**

**Zsanett Hideg,**

**Katalin Holtsuk,**

**Gábor Jancsó,**

**Mária Katona,**

**Gergely Kézdi,**

**László Korpás,**

**Ferencné Kovács,**

**Viola Kőrösi,**

**Tamás Kuzsel,**

**Attila Lajtai,**

\* Language of the case: Hungarian.

**Zsolt Lőrincz,**  
**Ákos Nagy,**  
**Attiláné Papp,**  
**Zsuzsanna Peller,**  
**Ágnes Petkovics,**  
**László Pongó,**  
**Zsolt Porpáczy,**  
**Zsuzsanna Rávai,**  
**László Román,**  
**Zsolt Schneck,**  
**Mihály Szabó,**  
**Péter Szabó,**  
**Zoltán Szalai,**  
**Erika Szemeréné Radó,**  
**Zsuzsanna Szigeti,**  
**Nikolett Szőke,**  
**Péter Tóth,**  
**Zsófia Várkonyi,**  
**Mónika Veress**

v

**QBE Insurance (Europe) Ltd Magyarországi Fióktelepe,**  
**Magyar Állam,**

THE COURT (Sixth Chamber),

composed of A. Borg Barthet (Rapporteur), President of the Chamber, M. Berger and S. Rodin, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

### Order

- 1 This request for a preliminary ruling concerns 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).
- 2 The request has been made in proceedings between, on the one hand, Ms Baradics and others, clients of a travel organiser, and, on the other hand, QBE Insurance (Europe) Ltd Magyarországi Fióktelepe ('QBE Insurance') and Magyar Állam, represented by Nemzeti Fejlesztési Minisztérium ('the Hungarian State'), concerning recovery of the payments made on account or of the total price paid by each of the appellants in the main proceedings for the purchase of a travel package.

### Legal context

#### *European Union ('EU') law*

- 3 The seventh, eighteenth, twenty-first and twenty-second recitals in the preamble to Directive 90/314 state:

'... tourism plays an increasingly important role in the economies of the Member States; ... the package system is a fundamental part of tourism; ... the package travel industry in Member States would be stimulated to greater growth and productivity if at least a minimum of common rules were adopted in order to give it a Community dimension; ...

...

... the organiser and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract; ... moreover, the organiser and/or retailer should be liable for the damage resulting for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services;

...

... 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;

... Member States should be at liberty to adopt, or retain, more stringent provisions relating to package travel for the purpose of protecting the consumer'.

- 4 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.'

5 Under Article 2 of Directive 90/314:

‘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.

The separate billing of various components of the same package shall not absolve the organiser or retailer from the obligations under this Directive;

2. “organiser” means the person who, other than occasionally, organises 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 organiser.’

6 Article 4(2) of Directive 90/314 provides:

‘Member States shall ensure that in relation to the contract the following principles apply:

- (a) depending on the particular package, the contract shall contain at least the elements listed in the Annex;
- (b) all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract; the consumer is given a copy of these terms;
- (c) the provision under (b) shall not preclude the belated conclusion of last-minute reservations or contracts.’

7 Under the first subparagraph of Article 4(6) of Directive 90/314:

‘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.’

8 Under Article 5(1) and (2) of that directive:

‘1. 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.

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organiser and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services ...

...’

9 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.’

10 Article 8 of that directive states:

‘Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer.’

11 Article 9 of Directive 90/314 provides:

‘1. Member States shall bring into force the measures necessary to comply with this Directive before 31 December 1992. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive. The Commission shall inform the other Member States thereof.’

### *Hungarian law*

12 Article 15(2) of Government Decree No 213/1996 of 21 December 1996 on the activity of travel organisers and retailers (az utazásszervező és -közvetítő tevékenységről szóló 213/1996. Korm. Rendelet; ‘Government Decree No 213/1996’) is intended to implement Article 2(1) to (3) and Article 7 of Directive 90/314.

13 Under Article 2 of Government Decree No 213/1996, the activity of travel organiser or retailer may be exercised in Hungary only by travel undertakings that satisfy the conditions laid down in that decree and which, upon application, have been entered in the official public register of the Magyar Kereskedelmi Engedélyezési Hivatal (Hungarian Trade Licensing Office; ‘the Office’). One of the conditions for entry in that register is that the undertaking has financial security in accordance with Article 8 of the decree.

14 Article 8(1) of Government Decree No 213/1996 provides that the financial security may take the form of:

‘(a) a bank guarantee;

- (b) insurance taken out with one or more insurers, which may be taken out on the basis of the number of travellers (for the direct benefit of each of them); or
- (c) a sum of money set aside in a separate account to be opened by the travel undertaking with a credit institution for the purposes referred to in Article 10(1) ...’.

The value of the financial security must correspond to a set percentage of anticipated net turnover from the sale of the travel package or reach a set minimum amount.

- 15 As the Fővárosi Ítéltábla (Budapest Court of Appeal or ‘the referring court’) explains, Article 8(7) of that decree provides that a travel undertaking must, where necessary, increase, by 31 May of each year at the latest, the financial security to correspond to the reference value based on net turnover from sales, calculated in accordance with Law C of 2000 on Accounting (a számvitelről szóló 2000. évi C. törvény) in the year in which the bank guarantee or insurance contract was concluded or the cash deposit made.
- 16 In accordance with Article 8(9) of Government Decree No 213/1996, read in conjunction with Article 10(1)(a) and (b) thereof, the financial security must, at all times, enable the costs, payments on account and prices paid for travel referred to in Article 10(1) of that decree to be covered, that is to say, the costs of assisting travellers who meet with an emergency, such as repatriation, and the costs of involuntary overnight stays, as well as the payments made on account and the prices paid for travel. If actual turnover exceeds by more than 10% the reference figure for determining the financial security, the travel undertaking must, within five working days, adjust the security to correspond to actual turnover, and provide supporting evidence of this to the Office without delay.
- 17 Article 8(11) of Government Decree No 213/1996 provides that the percentage or minimum amount is dependent on whether:
  - the travel package marketed comprises either journeys abroad from Hungary or between foreign countries, or journeys within Hungary;
  - seats are reserved on non-scheduled airliners (‘charter flights’), where the travel package comprises journeys abroad from Hungary or between foreign countries;
  - the value of the commitments arising from a guaranteed contract exceeds 25% of turnover. A contract is to be regarded as ‘guaranteed’ where it is no longer possible to withdraw from the agreed services, the travel undertaking then assuming an obligation to make periodic payments.

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

- 18 In 2009, the appellants in the main proceedings concluded travel contracts with 5 Kontinens Utazási kft. (‘the travel organiser’), under which they made payments on account or, in certain cases, paid the travel price in full.
- 19 The travel organiser became insolvent prior to the start of the trips at issue in the main proceedings.
- 20 Under the insurance policy providing financial security for travel organisers and retailers, which the travel organiser had taken out with QBE Insurance, the latter undertook, should an event insured against occur, to pay compensation in respect of the costs of travellers’ repatriation and involuntary overnight stays, as well as – if those costs had not exhausted the insured risks’ cover amount – the payments made on account and the prices paid for travel. The parties to that contract had set the maximum cover amount at HUF 40 million.

- 21 Because of that cover ceiling, the refunds obtained by the appellants in the main proceedings amounted to only 22% of the payments made on account or the prices paid.
- 22 Consequently, they brought an action before the court of first instance seeking an order that QBE Insurance and the Hungarian State pay them by way of compensation the balance of the payments made on account or the prices paid.
- 23 They claimed that Government Decree No 213/1996 infringes Article 7 of Directive 90/314, and that, according to the case-law of the Court, the Member States have an obligation to make good damage caused where a directive has not been properly transposed into national law.
- 24 The court of first instance dismissed the action. It held in particular that the Hungarian State had properly transposed the directive into national law.
- 25 Hearing the appeal lodged by the appellants against the judgment at first instance, the referring court upheld that judgment so far as QBE Insurance was concerned.
- 26 In those circumstances, the Fővárosi Ítéltábla, doubtful as to whether Government Decree No 213/1996 is compatible with Directive 90/314, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Has the national legislature properly complied with Articles 7 and 9 of [Directive 90/314] – that is to say, has it ensured appropriate protection for individuals against the risk of insolvency on the part of travel organisers or retailers – in so far as it has made provision that the value of the financial security provided by the travel organiser or retailer is to correspond to a set percentage of anticipated net turnover from sales of the travel package or to a minimum amount?
  2. In so far as it may be found that there is an infringement on the part of the Hungarian State, is that infringement sufficiently serious as to entail liability affording a right to reparation?’

### **Consideration of the questions referred**

- 27 Pursuant to Article 99 of the Rules of Procedure, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.
- 28 That article must be applied in the present case.

#### *The first question referred*

- 29 By its first question, the referring court asks, in essence, whether Articles 7 and 9 of Directive 90/314 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, according to the referring court, sets the amount of the security that a travel organiser or retailer is required to provide simply by reference to a percentage to be determined of net turnover achieved on projected sales of travel packages in the course of the relevant accounting year or to a minimum amount to be determined.

- 30 In that connection, it should be noted that the cooperative arrangements established by Article 267 TFEU are based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of national rules with EU law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to rule on the compatibility of those national rules with EU law (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 37).
- 31 Although it is true that the literal wording of the questions referred for a preliminary ruling by the Fővárosi Ítéltábla calls on the Court to rule on the compatibility with EU law of a provision of national law, there is nothing to prevent the Court from giving an answer of use to the referring court by providing the latter with the guidance as to the interpretation of EU law necessary to enable that court to rule itself on the compatibility of the national rules with EU law (see, to that effect, Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 21, and judgment of 16 February 2012 in Case C-25/11 *Varzim Sol*, paragraph 28).
- 32 In that connection, it should first be borne in mind that Article 7 of Directive 90/314 places the travel organiser under an obligation to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency or bankruptcy, the purpose of that security being to protect consumers against the financial risks arising from the insolvency or bankruptcy of the travel organiser (see Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraphs 34 and 35).
- 33 Thus, the fundamental objective of that provision is to ensure that the repatriation of the consumer and the refund of money paid over are guaranteed in the event of insolvency or bankruptcy on the part of that travel organiser (see, to that effect, *Dillenkofer and Others*, paragraphs 35 and 36).
- 34 In the case before the referring court, it should be observed, first of all, that the appellants have found themselves exposed to the risks against which Article 7 of Directive 90/314 is intended to provide protection. In paying over money before departure, they exposed themselves to the risk of losing that money.
- 35 Next, it should be recalled that, in paragraph 74 of the judgment in Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, the Court ruled that Article 7 of Directive 90/314 imposes an obligation as to result, that result being to guarantee package travellers the refund of money paid over and their repatriation in the event of the travel organiser's bankruptcy, and that such a guarantee is specifically aimed at arming consumers against the consequences of the bankruptcy, whatever the causes of it may be.
- 36 Such an interpretation of Article 7 of Directive 90/314 is confirmed by the objective which that directive must pursue, which is to ensure a high level of protection for consumers (see *Dillenkofer and Others*, paragraph 39).
- 37 In that regard, the Court stated in paragraph 63 of the judgment in *Rechberger and Others* that there is no indication, either in the recitals in the preamble to Directive 90/314 or in the wording of Article 7, to suggest that the guarantee provided for in that article might be limited.

- 38 Furthermore, the Court has held that national legislation properly transposes the obligations under Article 7 only if, whatever the detailed rules laid down in that legislation, it achieves the result of providing the consumer with an effective guarantee of the refund of all money paid over and repatriation in the event of the travel organiser's insolvency (see *Rechberger and Others*, paragraph 64).
- 39 However, it is apparent from the order for reference that, in the dispute before the referring court, only a fraction of the payments made by the appellants was covered by the security referred to in Article 7 of Directive 90/314.
- 40 It is for the referring court, which alone has jurisdiction to interpret and apply national law, to establish whether that situation was brought about by the fact that the specific rules for calculating the amount of the security to be provided have the effect of making the system established by the national legislature prescribe inadequate cover for the refund of money paid over by the consumer and for the costs of repatriation, inasmuch as that system is structurally incapable of adjustment to reflect events in the economic sector in question.
- 41 In light of the foregoing, the answer to the first question is that Article 7 of Directive 90/314 must be interpreted as precluding national legislation where the detailed rules laid down therein do not achieve the result of ensuring that the consumer is provided with an effective guarantee of the refund of all money paid over and repatriation in the event of insolvency on the part of the travel organiser. It is for the referring court to establish whether that is the case as regards the national legislation at issue in the dispute before it.

*The second question referred*

- 42 By its second question, the referring court asks in essence whether, to the extent that Article 7 of Directive 90/314 precludes national legislation under which the amount of the financial security provided by a travel organiser or retailer is to be set at a specified percentage of anticipated net turnover from sales of the travel package or at a minimum amount, such legislation constitutes a sufficiently serious infringement of EU law as to afford a right to reparation.
- 43 According to the case-law of the Court, an infringement is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers. Factors which the competent court may take into consideration include the clarity and precision of the rule breached (Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 42 and the case-law cited).
- 44 As was pointed out in paragraph 38 above, national legislation properly transposes the obligations under Article 7 of Directive 90/314 only if, whatever the detailed rules laid down in that legislation, it achieves the result of providing the consumer with an effective guarantee of the refund of all money paid over and repatriation in the event of the travel organiser's insolvency (see *Rechberger and Others*, paragraph 64).
- 45 It is for national courts to determine whether or not the conditions for State liability arising from breach of EU law are fulfilled.
- 46 In the present case, it is clear from the case-law of the Court that Article 7 of Directive 90/314 precludes national legislation that does not achieve the result of providing the consumer with an effective guarantee of the refund of all money paid over and repatriation in the event of insolvency on the part of the travel organiser. Since the Member State has no discretion as regards the ambit of the risks that fall to be covered by the security to be provided by the travel organiser or retailer for the benefit of consumers, criteria that would have the object or effect of limiting the ambit of that

security would clearly be incompatible with the obligations arising from Directive 90/314 and would accordingly constitute a sufficiently serious infringement of EU law, which, subject to a finding of a direct causal link, might give rise to liability on the part of the Member State concerned.

- 47 In the light of the foregoing, the answer to the second question is that Article 7 of Directive 90/314 must be interpreted as meaning that a Member State has no discretion as regards the ambit of the risks that fall to be covered by the security to be provided by the travel organiser or retailer for the benefit of consumers. It is for the referring court to determine whether the criteria laid down by the Member State concerned for setting the amount of the security have the object or effect of limiting the ambit of the risks that fall to be covered by the security, in which case they would clearly be incompatible with the obligations under Directive 90/314 and would constitute a sufficiently serious infringement of EU law, which, subject to a finding of a direct causal link, might give rise to liability on the part of the Member State concerned.

### **Costs**

- 48 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 (Sixth Chamber) hereby rules:

- 1. Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours must be interpreted as precluding national legislation where the detailed rules laid down therein do not achieve the result of ensuring that the consumer is provided with an effective guarantee of the refund of all money paid over and repatriation in the event of insolvency on the part of the travel organiser. It is for the referring court to establish whether that is the case as regards the national legislation at issue in the dispute before it.**
- 2. Article 7 of Directive 90/314 must be interpreted as meaning that a Member State has no discretion as regards the ambit of the risks that fall to be covered by the security to be provided by the travel organiser or retailer for the benefit of consumers. It is for the referring court to determine whether the criteria laid down by the Member State concerned for setting the amount of the security have the object or effect of limiting the ambit of the risks that fall to be covered by the security, in which case they would clearly be incompatible with the obligations under Directive 90/314 and would constitute a sufficiently serious infringement of European Union law which, subject to a finding of a direct causal link, might give rise to liability on the part of the Member State concerned.**

[Signatures]