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SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Third Chamber)

18 March 2021 *

(Reference for a preliminary ruling – Directive 90/314/EEC – Article 5(2), third indent – Package travel, package holidays and package tours – Contract concerning package travel concluded between a travel organiser and a consumer – Liability of the travel organiser for the proper performance of obligations arising from the contract by other suppliers of services – Damage resulting from the acts of an employee of a supplier of services – Exemption from liability – Event that cannot be foreseen or forestalled by the travel organiser or the supplier of services – Concept of a ‘supplier of services’)

In Case C-578/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 24 July 2019, received at the Court on 30 July 2019, in the proceedings

X

v

Kuoni Travel Ltd,

intervener:

ABTA Ltd,

THE COURT (Third Chamber),

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

Advocate General: M. Szpunar,

* Language of the case: English.

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– X, by R. Weir QC and K. Deal QC, and by P. Banks, Solicitor,

– Kuoni Travel Ltd, by W. Audland QC, by N. Ross and A. Burin, Barristers, and by G. Tweddle, Solicitor,

– ABTA Ltd, by H. Stevens QC, by J. Hawkins, Barrister, and by T. Smith, Solicitor,

– the European Commission, by A. Lewis and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2020,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the third indent of Article 5(2) 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 X, a consumer residing in the United Kingdom, and Kuoni Travel Ltd ('Kuoni'), a travel organiser established in the United Kingdom, concerning the claim made by X for compensation for damage suffered as a result of the improper performance of the contract relating to package travel concluded between herself and Kuoni ('the contract at issue').

Legal context

EU law

3 Directive 90/314 states, in the first to third and the tenth recitals thereof:

'Whereas one of the main objectives of the [European Union] is to complete the internal market, of which the tourist sector is an essential part;

Whereas the national laws of Member States concerning package travel, package holidays and package tours … show many disparities and national practices in this field are markedly different, which gives rise to obstacles to the freedom to

provide services in respect of packages and distortions of competition amongst operators established in different Member States;

Whereas the establishment of common rules on packages will contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States and [EU] consumers to benefit from comparable conditions when buying a package in any Member State;

…

Whereas the consumer should have the benefit of the protection introduced by this Directive irrespective of whether he is a direct contracting party, a transferee or a member of a group on whose behalf another person has concluded a contract in respect of a package.'

4 Article 1 of Directive 90/314 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 [European Union].'

5 Article 2 of that directive states:

'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;

4. "consumer" means the person who takes or agrees to take the package …, or any person on whose behalf the principal contractor agrees to purchase the package … or any person to whom the principal contractor or any of the other beneficiaries transfers the package …

5. "contract" means the agreement linking the consumer to the organiser and/or the retailer.'

6 The second subparagraph of Article 4(6) of Directive 90/314 provides:

'In [the case where 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], he shall be entitled, if appropriate, to be compensated by either the organiser or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:

…

(ii) cancellation, excluding overbooking, is for reasons of *force majeure*, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.'

7 Article 5(1) to (3) of that directive provides:

'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, because:

– the failures which occur in the performance of the contract are attributable to the consumer,

– such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,

– such failures are due to a case of *force majeure* such as that defined in Article 4(6), second subparagraph (ii), or to an event which the organiser

and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

…

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.

…'

United Kingdom law

The 1992 Regulations

8 The Package Travel, Package Holidays and Package Tours Regulations 1992 of 22 December 1992 ('the 1992 Regulations') transposed Directive 90/314 into United Kingdom law.

9 Regulation 15(1), (2) and (5) of the 1992 Regulations provides:

'(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because -

(a) the failures which occur in the performance of the contract are attributable to the consumer,

(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or

(c) such failures are due to –

(i) unusual and unforeseeable circumstances beyond the control of the party by whom the exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or

(ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

…

(5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term.'

The 1982 Act

10 Pursuant to section 13 of the Supply of Goods and Services Act 1982 of 13 July 1982, in the version applicable to the facts at issue in the main proceedings, Kuoni was required to carry out the services promised under the contract with reasonable care and skill.

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

11 X and her husband entered into the contract at issue with Kuoni under which the latter agreed to provide them with a package holiday in Sri Lanka, which included return flights from the United Kingdom and 15 nights' all-inclusive accommodation at a hotel, between 8 and 23 July 2010.

12 Clause 2.2 of that contract provides:

'Your contract is with [Kuoni]. We will arrange to provide you with the various services which form part of the holiday you book with us.'

13 Clause 5.10(b) of that contract provides, first, that Kuoni accepts responsibility if 'due to fault on [that company's] part, or that of [its] agents or suppliers, any part of [the] holiday arrangements booked before … departure from the UK is not as described in the brochure, or not of a reasonable standard, or if [the other contracting party] or any member of [his or her] party is killed or injured as a result of an activity forming part of those holiday arrangements' and, secondly, that Kuoni does not 'accept responsibility if and to the extent that any failure of [the] holiday arrangements, or death or injury is not caused by any fault [on the part of the company], or [that of its] agents or suppliers; is caused by [the other contracting party] … or is due to unforeseen circumstances which, even with all due care, [the company] or [its] agents or suppliers could not have anticipated or avoided'.

14 On 17 July 2010, whilst making her way to the reception of the hotel where she was staying, X came upon N, an electrician and hotel employee, who was on duty and wearing the uniform of the staff members of that hotel. After offering to show X a shortcut to reception, N lured her into an engineering room where he raped and assaulted her.

15 In the dispute in the main proceedings, X claimed damages against Kuoni in respect of the rape and assault suffered, on the ground that these were the result of the improper performance of the contract at issue as well as a breach of the 1992 Regulations. Kuoni denied that the rape and assault committed by N constituted a breach of the obligations owed by it to X under the contract or the 1992

Regulations. In support of that argument, Kuoni relied on clause 5.10(b) of the contract and Regulation 15(2)(c)(ii) of the 1992 Regulations.

16 The High Court of Justice (England & Wales) (United Kingdom) dismissed X's action for damages on the ground that the 'holiday arrangements' referred to in clause 5.10(b) of the contract at issue did not include a member of the maintenance staff conducting a guest to reception. In addition, it held, *obiter*, that Kuoni would in any event have been able to rely on the ground for exemption from liability laid down in Regulation 15(2)(c)(ii) of the 1992 Regulations.

17 On appeal, the Court of Appeal (England & Wales) (United Kingdom) also dismissed X's appeal. That court held that a member of the hotel's maintenance staff, known to be such to the guest and who conducted that guest to the hotel's reception, did not fall within the scope of clause 5.10(b) of the contract at issue. It also found that the 1992 Regulations were not designed to facilitate a claim against a travel organiser for wrongful conduct by an employee of a supplier of services where that conduct was not part 'of the role in which he was employed' and where that supplier was not vicariously liable either under the domestic law applicable to the consumer or the foreign law applicable to that supplier. Lastly, it held, *obiter*, that Kuoni was not liable under either clause 5.10(b) of the contract or pursuant to Regulation 15 of the 1992 Regulations, because N was not a 'supplier' within the meaning of those provisions.

18 In a dissenting opinion, a judge of the Court of Appeal (England & Wales) nevertheless expressed doubts as to the assessment that the hotel was not liable, under English law, for a rape committed by an employee in uniform and represented to the public as a reliable employee. The judge considered that, under English law, the person who undertakes contractual liability retains liability for his or her side of the bargain even if he or she performs it through others. He considered that the purpose of Directive 90/314 together with the 1992 Regulations was essentially to give the holidaymaker whose holiday had been ruined a remedy against the other party to the contract. In his view, it should be left to the travel organiser to sort out the consequences of the ruined holiday with those with whom it had itself contracted, who could then sort things out further down the line, whether with their own employees or independent contractors. Furthermore, he reasoned that there was no justification for concluding that the concept of 'supplier' should stop with the hotel in the case of an independent contractor or an employee. He added that there could be no doubt that some employees should be regarded as suppliers.

19 On further appeal, the Supreme Court of the United Kingdom found that two main questions had been brought before it: the first concerning whether the rape and assault of X constitute improper performance of Kuoni's obligations under the contract at issue, and the second concerning whether, in the event that the first question were answered in the affirmative, Kuoni can avoid its liability in respect of N's conduct by reliance on clause 5.10(b) of that contract and, where appropriate, Regulation 15(2)(c) of the 1992 Regulations.

20 In order to rule on the second question in the appeal, the Supreme Court of the United Kingdom found that a reference had to be made to the Court of Justice for a preliminary ruling.

21 For the purposes of that reference, the referring court stated that it should be assumed that guidance by a member of the hotel's staff of X to the reception was a service falling within the scope of the 'holiday arrangements' which Kuoni had agreed to provide and that the rape and assault constituted improper performance of the contract at issue.

22 In those circumstances, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organiser or retailer with a consumer to provide a package holiday to which [Directive 90/314] applies, and that failure to perform or improper performance is the result of the actions of an employee of a hotel company which is a provider of services to which that contract relates:

(a) is there scope for the application of the defence set out in the second part of the third alinea to Article 5(2) [of Directive 90/314]; and, if so,

(b) by which criteria is the national court to assess whether that defence applies?

(2) Where an organiser or retailer enters into a contract with a consumer to provide a package holiday to which [Directive 90/314] applies, and where a hotel company provides services to which that contract relates, is an employee of that hotel company himself to be considered a "supplier of services" for the purposes of the defence under Article 5(2), third alinea of [Directive 90/314]?'

The application to have the oral part of the procedure reopened

23 Following the delivery of the Advocate General's Opinion, Kuoni, by document lodged at the Registry of the Court on 3 December 2020, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

24 Kuoni states in that application that such a reopening must be ordered in the event that the Court considers that the present case must be decided on the basis of an interpretation of the word 'event', as given by the Advocate General in points 78 to 84 of his Opinion.

25 By virtue of Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the oral part of the procedure to be reopened, in particular if it considers that it lacks sufficient information, or where a party, after the close of that part of the procedure, has submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated.

26 However, it must be borne in mind that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 3 September 2020, *Czech Republic* v *Commission*, C-742/18 P, EU:C:2020:628, paragraph 25 and the case-law cited).

27 Furthermore, the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the submission of observations in response to the Advocate General's Opinion. Disagreement with the Advocate General's Opinion cannot, therefore, in itself constitute grounds justifying the reopening of the oral procedure (judgment of 3 September 2020, *Czech Republic* v *Commission*, C-742/18 P, EU:C:2020:628, paragraph 26 and the case-law cited).

28 In the present case, the parties to the main proceedings and the other interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union were able to submit their observations on the scope of the word 'event' set out in the third indent of Article 5(2) of Directive 90/314.

29 In the context of the first question, which concerns the interpretation of that provision and therefore the interpretation of each of the words thereof, the parties were able to submit written observations to the Court, and Kuoni and other parties have submitted such observations. Some parties have, moreover, specifically expressed a view on the word 'event' in their written observations. Furthermore, in response to the seventh written question put by the Court to the parties, they again had the opportunity to express their views on the scope of that provision.

30 In those circumstances, the Court considers, having heard the Advocate General, that all the relevant factors for assessing the questions referred to it by the referring court have been able to be debated before it, and there is, therefore, no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

31 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether the third indent of Article 5(2) of Directive 90/314, in so far as it provides for a ground for exemption of an organiser of package travel from liability for the proper performance of the obligations arising from a

contract relating to such travel, concluded between that organiser and a consumer and governed by that directive, must be interpreted as meaning that, in the event of non-performance or improper performance of those obligations as a result of the actions of an employee of a supplier of services performing that contract (i) that employee must be regarded as a supplier of services for the purposes of applying that provision and (ii) the organiser can avoid its liability arising from such non-performance or improper performance, pursuant to that provision.

32 As regards that first part of the questions put by the referring court, it should be observed that the aim of Directive 90/314 is, as set out in Article 1 thereof, 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 European Union.

33 As is clear from Article 2 of Directive 90/314, the contracts covered by that directive are contracts concluded between a consumer, on the one hand, and an organiser or retailer, on the other, which concern a package consisting in the sale at an inclusive price of a service of more than 24 hours or including overnight accommodation, which combines at least two of the three following components: transport, accommodation and other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package ('package travel contracts').

34 In order to achieve the harmonisation set out in Article 1 thereof, Directive 90/314 establishes, inter alia, a system of contractual liability for package travel organisers in respect of consumers who have concluded a contract with them for such travel. In particular, Article 5(1) of Directive 90/314 provides that Member States are to 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 that contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services. Article 5(3) of that directive states, in addition, that there may be no exclusion from such liability by means of a contractual clause. The only exemptions therefrom which are allowed are those exhaustively set out in Article 5(2) of that directive.

35 Article 5(1) and (3) of Directive 90/314 thus limits the freedom of the parties to a package travel contract to determine the content of the contractual terms which apply to them, by making the organiser liable to the consumer in so far as concerns the proper performance of that contract. One of the special features of that liability is that it extends to the proper performance of the obligations arising under the package travel contract by suppliers of services. However, Directive 90/314 neither defines the concept of 'supplier of services', nor refers expressly to the law of the Member States in that regard.

36 In such a case, the need for a uniform application of EU law and the principle of equal treatment require that the wording of a provision of EU law must normally

be given an independent and uniform interpretation throughout the European Union (see, to that effect, judgment of 16 July 2020, *Novo Banco*, C-253/19, EU:C:2020:585, paragraph 17 and the case-law cited).

37 In that connection, it is settled case-law that the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (judgment of 10 March 2005, *EasyCar*, C-336/03, EU:C:2005:150, paragraph 21 and the case-law cited).

38 According to its usual meaning in everyday language, the phrase 'supplier of services', set out in Article 5 of Directive 90/314, refers to a natural or legal person who provides services for remuneration. As the Advocate General also observed in point 54 of his Opinion, that meaning is shared by various language versions of that provision.

39 Furthermore, that meaning is confirmed by the context of the provision at issue. As is clear from paragraph 33 above, the purpose of package travel contracts is the provision of a combination of transport, accommodation and other tourist services. The obligations arising from those contracts vis-à-vis the consumer, which are the subject of the system of contractual liability laid down in Article 5 of Directive 90/314, may be performed through natural or legal persons, who are distinct from the organiser and provide services for remuneration.

40 The objectives pursued by Directive 90/314, which consist, inter alia, pursuant to the first and third recitals thereof, in eliminating obstacles to the freedom to provide services and distortions of competition, and, according to the 10th recital of that directive, ensuring a high level of protection for consumers (judgment of 16 February 2012, *Blödel-Pawlik*, C-134/11, EU:C:2012:98, paragraph 24 and the case-law cited), also support such an interpretation of the words 'supplier of services', as it guarantees the uniform scope of the liability of the organiser to the consumer.

41 However, an employee of a supplier of services cannot himself or herself be classified as a supplier of services, within the meaning of Article 5 of Directive 90/314, in so far as he or she has not concluded any agreement with the package travel organiser for the purposes of providing services to the latter, but merely performs work on behalf of a supplier of services which has concluded such an agreement with that organiser, with the result that the employee's actions, when performing that work, are, in most cases, intended to contribute to the performance of the obligations which fall to the supplier of services employing that employee.

42 Furthermore, the word 'employee' refers to a person who performs his or her work in the context of a relationship of subordination with his or her employer and therefore under the latter's control. By definition, a supplier of services is not

subject to any relationship of subordination when he or she provides his or her services, with the result that an employee cannot be regarded as a supplier of services for the purposes of applying Article 5 of Directive 90/314.

43 Nevertheless, the fact that an employee of a supplier of services cannot himself or herself be regarded as a supplier of services in the context of the application of the system of contractual liability established in Article 5 of Directive 90/314 does not preclude that employee's acts or omissions from being treated, for the purposes of that system, in the same way as those of the supplier of services employing him or her.

44 In order to determine whether they may be treated as such, it must be observed, in the first place, that the liability of the organiser laid down in Article 5 of Directive 90/314 relates solely to the obligations arising from the package travel contract as defined by that directive, which the organiser has concluded with that consumer. It does not, therefore, affect the liability of the parties to that contract or of third parties arising from other obligations or other systems of liability, such as that of criminal liability.

45 However, in view of the objective pursued by Directive 90/314 recalled in paragraph 40 above, which consists, inter alia, in ensuring a high level of consumer protection, the obligations arising from a package travel contract, the improper performance or non-performance of which renders the organiser liable, cannot be interpreted restrictively. Those obligations comprise all the obligations associated with the provision of transport, accommodation and tourism services arising from the purpose of the package travel contract, irrespective of whether those obligations are to be performed by the organiser itself or by suppliers of services.

46 To that extent, in order for the organiser's liability laid down in Article 5(1) of Directive 90/314 to be incurred – as the Advocate General also observed in point 40 of his Opinion – there must be a link between the act or omission which caused damage to that consumer and the organiser's obligations arising from the package travel contract.

47 In the second place, it should be borne in mind that the obligations arising from a package travel contract covered by Directive 90/314, such as those set out in paragraph 45 above, may be performed by suppliers of services who may themselves act through their employees, who are under their control. The performance or failure to perform certain actions by those employees may, therefore, constitute non-performance or improper performance of the obligations arising from the package travel contract.

48 Consequently, that non-performance or improper performance, although caused by acts committed by employees under the control of a supplier of services, is such as to render the organiser liable, in accordance with Article 5(1) of Directive 90/314.

49 That interpretation is borne out by the objective of consumer protection pursued by Directive 90/314. As the Advocate General also observed, in essence, in point 62 of his Opinion, in the absence of such liability, an unjustified distinction would be drawn between, first, the liability of organisers for acts committed by their suppliers of services, where those suppliers of services themselves perform obligations arising from a package travel contract and, secondly, the liability arising from the same acts, committed by employees of those suppliers of services performing those obligations, which would enable an organiser to avoid its liability.

50 Accordingly, under Article 5(1) of Directive 90/314, the non-performance or improper performance of an obligation, arising from a package travel contract, by an employee of a supplier of services renders the organiser of that package travel liable to the consumer with whom that organiser has concluded that contract, where that non-performance or improper performance has caused damage to that consumer.

51 In the present case, as is apparent from the request for a preliminary ruling, the referring court starts from the premiss that X being accompanied to reception by a member of the hotel staff was a service falling within the scope of the holiday arrangements which Kuoni contracted to provide under the contract at issue, and that the rape and assault committed by N on X constituted improper performance of that contract.

52 It follows that, in a situation such as that at issue in the main proceedings, a travel organiser such as Kuoni may be held liable to a consumer such as X for improper performance of the contract between the parties, where that improper performance has its origin in the conduct of an employee of a supplier of services performing the obligations arising from that contract.

53 As regards the second part of the referring court's questions, as set out in paragraph 31 above, it should be pointed out that Article 5(2) of Directive 90/314 provides for exemptions from liability for package travel organisers. Pursuant to that provision, the organiser is liable for damage suffered by the consumer as a result of the failure to perform or improper performance of the package travel contract, unless such failure to perform or improper performance is attributable neither to any fault of the organiser nor to that of another supplier of services because one of the grounds for exemption from liability contained in that provision applies to it.

54 Those grounds for exemption include that laid down in the third indent of Article 5(2) of Directive 90/314, which refers to situations in which the non-performance or improper performance of the contract is due to an event which the organiser or the supplier of services, even with all due care, could not foresee or forestall.

55 In the present case, as is clear from paragraphs 19 and 31 above, the referring court asks, in essence, whether, where a package travel organiser has entrusted to a supplier of hotel services the performance of a contract linking that organiser to two consumers, and an employee of that supplier of services has committed a rape and assault on one of the two consumers, that may constitute an event that cannot be foreseen or forestalled, within the meaning of the ground for exemption from liability in question.

56 In that connection, it should be noted that, since that ground for exemption from liability derogates from the rule laying down the liability of organisers, enshrined in Article 5(1) of Directive 90/314, it must be interpreted strictly (see, by analogy, judgment of 22 January 2020, *Pensionsversicherungsanstalt (Cessation of activity after reaching retirement age)*, C-32/19, EU:C:2020:25, paragraph 38 and the case-law cited).

57 Furthermore, it should be borne in mind that, in accordance with the case-law cited in paragraphs 36 and 37 above, that ground for exemption from liability must, in the absence of any reference to national law, be interpreted autonomously and uniformly, taking into account not only its wording but also its context and the objective pursued by Directive 90/314.

58 In that regard, first, it is apparent from the wording of the third indent of Article 5(2) of Directive 90/314 that the event which cannot be foreseen or forestalled, to which that provision refers, differs from the case of *force majeure*. *Force majeure* is in fact laid down in that provision as a separate ground for exemption from liability and is defined, by reference to second subparagraph (ii) of Article 4(6) of Directive 90/314, as meaning unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised. The disjunctive conjunction ‘or’ placed between *force majeure* referred to in the first part of the third indent of Article 5(2) of Directive 90/314 and the event which could not be foreseen or forestalled referred to in the second part of that provision precludes that event from being treated in the same way as a case of *force majeure*.

59 Secondly, the third indent of Article 5(2) of Directive 90/314 exempts the organiser from the obligation to compensate the consumer for damage resulting either from events which cannot be foreseen, irrespective of whether they are usual, or from events which cannot be forestalled, irrespective of whether they are foreseeable or usual.

60 Thirdly, it is apparent from Article 5(2) of Directive 90/314 that the grounds for exemption from liability listed in the various indents of that provision expressly set out the specific cases in which non-performance or improper performance of the obligations arising from a package travel contract is not attributable to either the organiser or another supplier of services because no fault can be attributed to them. That absence of fault means that the event which cannot be foreseen or

forestalled referred to in the third indent of Article 5(2) of Directive 90/314 must be interpreted as referring to a fact or incident which does not fall within the sphere of control of the organiser or the supplier of services.

61 Since, for the reasons set out in paragraph 48 above, the acts or omissions of an employee of a supplier of services, in the performance of obligations arising from a package travel contract, resulting in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer fall within that sphere of control, those acts or omissions cannot be regarded as events which cannot be foreseen or forestalled within the meaning of the third indent of Article 5(2) of Directive 90/314.

62 Consequently, it must be held that the third indent of Article 5(2) of Directive 90/314 cannot be relied on in order to exempt organisers from their obligation to make reparation for the damage suffered by consumers as a result of the non-performance or improper performance of obligations arising from package travel contracts concluded with those organisers, where those failures are the result of acts or omissions of employees of suppliers of services performing those obligations.

63 In the light of all the foregoing considerations, the answer to the questions referred is that the third indent of Article 5(2) of Directive 90/314, in so far as it provides for a ground for exemption from liability of an organiser of package travel for the proper performance of the obligations arising from a contract relating to such travel, concluded between that organiser and a consumer and governed by that directive, must be interpreted as meaning that, in the event of non-performance or improper performance of those obligations, which is the result of the actions of an employee of a supplier of services performing that contract:

– that employee cannot be regarded as a supplier of services for the purposes of the application of that provision, and

– the organiser cannot be exempted from its liability arising from such non-performance or improper performance, pursuant to that provision.

Costs

64 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:

The third indent of Article 5(2) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, in so far as it

provides for a ground for exemption from liability of an organiser of package travel for the proper performance of the obligations arising from a contract relating to such travel, concluded between that organiser and a consumer and governed by that directive, must be interpreted as meaning that, in the event of non-performance or improper performance of those obligations, which is the result of the actions of an employee of a supplier of services performing that contract:

– **that employee cannot be regarded as a supplier of services for the purposes of the application of that provision, and**

– **the organiser cannot be exempted from its liability arising from such non-performance or improper performance, pursuant to that provision.**

Prechal Wahl Biltgen

Rossi Passer

Delivered in open court in Luxembourg on 18 March 2021.

A. Calot Escobar A. Prechal

Registrar President of the Third Chamber