

Case C-771/22

Request for a preliminary ruling

Date lodged:

19 December 2022

Referring court:

Bezirksgericht für Handelssachen Wien (Austria)

Date of the decision to refer:

17 October 2022

Applicant:

Bundesarbeitskammer

Defendant:

HDI Global SE

REPUBLIC OF AUSTRIA

BEZIRKSGERICHT FÜR HANDELSACHEN WIEN (District Court for
Commercial Matters, Vienna) ...

DECISION

IN THE CASE OF:

Applicant ...

Bundesarbeitskammer (Federal Chamber of Labour, Austria) ...

1040 Vienna, Austria ...

Defendant ...

HDI Global SE ...

... ...

30659 Hanover, Germany ...

Concerning:

The amount of EUR 4 500.00 plus interest and costs

I.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is Article 17 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel services, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC ('Directive 2015/2302') to be interpreted as meaning that payments made by a traveller to the travel organiser before the start of the trip or holiday are only covered where the trip or holiday does not take place as a result of the insolvency of that travel organiser, or are also payments made to the travel organiser before the opening of insolvency proceedings covered if the traveller terminates the contract before the occurrence of insolvency due to exceptional circumstances within the meaning of Article 12 of Directive 2015/2302?
2. Is Article 17 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel services, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC ('Directive 2015/2302') to be interpreted as meaning that payments made by a traveller to the travel organiser before the start of the trip or holiday are covered where, even before the occurrence of insolvency, the traveller terminates the contract due to exceptional circumstances within the meaning of Article 12 of that directive, but the insolvency occurred during the trip or holiday that had been booked?
3. Is Article 17 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel services, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC ('Directive 2015/2302') to be interpreted as meaning that payments made by a traveller to the travel organiser before the start of the trip or holiday are covered where, even before the occurrence of insolvency, the traveller terminates the contract due to exceptional circumstances within the meaning of Article 12 of that directive, and the insolvency of the travel organiser occurred due to those exceptional circumstances?

...

GROUNDS

Relevant provisions of Union law

[1] The request for a preliminary ruling serves for clarification of the interpretation of the following provisions of directives:

- Article 17 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel services, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (the Package Travel Directive).

The facts of the dispute in the main proceedings

[2] The Austrian consumer XY concluded a package travel contract on 3 March 2020 with Flamenco Sprachreisen GmbH ('Flamenco'), also established in Austria - as travel organiser for a trip or holiday to Las Palmas, Grand Canaries from 3 May 2020 to 2 June 2020.

[3] The EUR 2 656.00 price of the trip or holiday was paid by the consumer in its entirety on 9 March 2020. The consumer XY cancelled the trip or holiday with the organiser Flamenco on 16 March 2020 and justified this by the call by the Government to stay at home, the current level 6 travel warning for Spain and its neighbouring countries and the extension to his civilian service.

The right to terminate the contract for the trip or journey due to exceptional circumstances was agreed in the contract, and was therefore justified, and was also not challenged in the proceedings.

[4] Insolvency proceedings of Flamenco ... were opened on 20 May 2020 before the Landesgericht Linz (Regional Court, Linz, Austria). The undertaking ceased its operations. Following the final distribution [of the undertaking's assets] the insolvency was closed by order of 9 June 2022, which became final. The quota allocated to the -creditors in insolvency after the distribution was 51.11%.

The liquidator formally terminated the package travel contract on 8 June 2020.

[5] The first defendant, TVA-Tourismusversicherungsagentur GmbH, ..., as solely the liquidator of the claims, has already been released from the proceedings, due to its lack of standing to be sued. The second and now only defendant, HDI Global SE, is Flamenco's insurer. Both concluded a contract of insurance covering package travel insurance to cover risk, in accordance with Paragraphs 3 to 5 of the Verordnung der Bundesministerin für Digitalisierung und Wirtschaftsstandort über Pauschalreisen und verbundene Reiseleistungen (Decree

of the Federal Minister for Digital and Economic Affairs on package travel and related travel services ('the Decree on package travel') ... (more in paragraph 12).

Applicable EU law

[6] The legal and administrative provisions relating to contracts for package travel and associated travel services between travellers and traders are harmonised by means of various directives of the Council as well as by the European Parliament and the Council. Most recently, Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel services was adopted, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

[7] Article 7 of the above-mentioned Directive 90/314/EEC, now repealed, provided, in essence, that in the event of insolvency the contracting party (organiser or retailer) was to provide for the refund of money paid over and for the repatriation of the consumer.

[8] Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel (see, in that regard, paragraph 24 et seq.) has already given rise to a number of preliminary ruling procedures:

- judgment of 14 May 1998 in *- Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG*, C-364/96, ECLI:EU:C:1998:226,
- judgment of 15 June 1999 in *Rechberger and Others v Republik Österreich*, C-140/97, ECLI:EU:C:1999:306,
- judgment of 16 February 2012 in *Blödel-Pawlik v HanseMercur Reiseversicherung AG*, C-134/11, ECLI:EU:C:2012:98,
- order of 16 January 2014 *Baradics and Others v QBE Insurance (Europe) Ltd Magyarországi Fiöktelepe and Magyar Állam*, C-430/13, ECLI:EU:C:1998:226

[9] Article 17 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel services, currently in force, provides:

'(1) Member States shall ensure that travel organisers established in their territory provide security for the refund of all payments made by or on behalf of travellers in so far as the relevant services are not performed as a consequence of the organiser's insolvency. If the carriage of passengers is included in the package travel contract, organisers shall also provide security for the travellers' repatriation. Continuation of the package may be offered.

Organisers not established in a Member State which sell or offer for sale packages in a Member State, or which by any means direct such activities to a Member State, shall be obliged to provide the security in accordance with the law of that Member State.

(2) The security referred to in paragraph 1 shall be effective and shall cover reasonably foreseeable costs. It shall cover the amounts of payments made by or on behalf of travellers in respect of packages, taking into account the length of the period between down payments and final payments and the completion of the packages, as well as the estimated cost for repatriations in the event of the organiser's insolvency.

(3) An organiser's insolvency protection shall benefit travellers regardless of their place of residence, the place of departure or where the package is sold and irrespective of the Member State where the entity in charge of the insolvency protection is located.

(4) When the performance of the package is affected by the organiser's insolvency, the security shall be available free of charge to ensure repatriations and, if necessary, the financing of accommodation prior to the repatriation.

(5) For travel services that have not been performed, refunds shall be provided without undue delay after the traveller's request.'

[10] In so far as the referring court can determine, the Court of Justice has not delivered any more recent judgments regarding Article 17 of Directive 2015/2302.

Applicable national law

[11] Article 17 of Directive 2015/2302 was substantially transposed in Austria by Paragraph 3 of the Verordnung der Bundesministerin für Digitalisierung und Wirtschaftsstandort über Pauschalreisen und verbundene Reiseleistungen (Decree of the Federal Minister for Digital and Economic Affairs on package travel and related travel services; 'Decree on package travel')

[12] Paragraph 3 of the Decree on package travel, which has not been amended, reads as follows:

'Paragraph 3. (1) Persons entitled to organise travel services must ensure that the traveller is compensated for:

I. payments already made (advance payments and the balance) in so far as, because of the insolvency of the person entitled to organise travel services, the travel services are not provided in whole or in part or if the supplier requires the traveller to pay for those services;

1. expenditure necessary for the return transport and, if necessary, the cost of accommodation before repatriation incurred as a result of the tour organiser's insolvency or, in the case of liability for the carriage of passengers, of travel services connected to the intermediary; and
2. where appropriate, reimbursement of the expenses necessary for the continuation of the package travel or the provision of ancillary travel.
...'

[13] Article 12 of Directive 2015/2302 of was transposed in Austria by Paragraph 10 of the Bundesgesetz über Pauschalreisen und verbundene Reiseleistungen (Federal Law on package travel and related travel services; 'Federal Law on package travel')

[14] Paragraph 10 of the Federal Law on package travel reads as follows:

'Paragraph 10.

(1) The traveller may at any time terminate the package travel contract before the commencement of the package tour without stating any justification for so doing. Where the traveller terminates the package travel contract under this paragraph, the tour organiser can require the traveller to pay an appropriate and reasonable termination fee. The package travel contract may specify reasonable standardised termination fees based on the duration between the termination of the contract and the expected start of the package tour and the expected cost savings and income from alternative use of the travel services. In the absence of specified standardised termination fees, the amount of the termination fee shall correspond to the price of the package tour minus the cost savings and income from alternative uses of the travel services. At the traveller's request the organiser shall provide reasons for the amount of compensation.

(2) Without prejudice to the right of termination provided for in subparagraph 1, the traveller may terminate the package travel contract before the start of the package without paying any compensation in the event of unavoidable and exceptional circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. If the traveller terminates the package travel contract under this subparagraph, he or she shall be entitled to a full refund of any payments made for the package, but shall not be entitled to additional compensation.

...

(4) In the event of termination as referred to in the preceding paragraphs, the organiser shall refund to the traveller, without delay and at the latest within 14 days of receipt of the notice of termination, all sums paid in

respect of the package tour by the latter or in the name of such traveller after deduction of the compensation provided for in paragraph 1.’

The first question referred

[15] This question is relevant in the present cases because the consumer terminated the travel contract before the start of the trip or holiday and the travel organiser became insolvent subsequently.

[16] The applicant takes the view that it follows from the intended protection of Article 17 of Directive 2015/2302 that, even in these cases, a traveller has a right to the insolvency protection. That could be inferred, in particular, from recital 39 on the basis of the following wording: ‘are fully protected’. Therefore, the existence of a causal link should not be decisive. Accordingly, if the traveller were to terminate the contract on the basis of becoming aware from the media of imminent insolvency, this would not be covered by the insolvency protection.

[17] The defendant is of the view that this question must be resolved exclusively at the level of national law. Furthermore, the wording of the directive militates in favour of a causal link. According to the defendant, the insolvency must therefore be the origin for non-provision or poor provision of the travel service.

[18] Both the wording of the national provision and the EU law provision suggest a causal link because of the prepositional phrases ‘in so far as’ and ‘as a consequence’, which would mean that claims for reimbursement as a result of an earlier termination due to insolvency are not covered by the insolvency protection. However, recital 39 of Directive 2015/2302 suggests otherwise, an extract of which states: ‘Member States ... should ensure that they provide security for the refund of all payments made by or on behalf of travellers and ... for the traveller’s repatriation in the event of the organiser’s insolvency’ This view is supported by the high level of consumer protection in the EU (Article 114(3) and Article 169 of the TFEU as well as Article 38 of the Charter of Fundamental Rights of the European Union).

[19] The question of the extent of the insolvency protection was already addressed with the Member States in a Commission workshop ... On the one hand, the Commission states that the legislature’s intention was not to reduce the protection by amending the wording ... Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel still used the wording ‘in the event of insolvency’, whereas Article 17 of Directive 2015/2302 uses the wording ‘in so far as the relevant services are not performed as a consequence of the organiser’s insolvency’. On the other hand, according to the Commission, there is expressly no entitlement where the contract came to an end before the occurrence of insolvency ...

[20] As regards the former law, the Court has already held, in the judgment of 16 February 2012 *Blödel-Pawlik v HanseMerkur Reiseversicherung AG*, C-134/11, ..., that the fundamental purpose of Article 7 of Council Directive

90/314/EEC of 13 June 1990 on package travel was to ‘ensure that the ... refund of money paid over [by the consumer] are guaranteed in the event of insolvency or bankruptcy on the part of a travel organiser’. Furthermore, ‘[it] d[id] not attach to the guarantee any specific condition regarding the causes of the travel organiser’s insolvency (judgment cited above, paragraph 20 et seq.).

[21] Already in 1999, in *Rechberger and Others v Republik Österreich* C-140/97, the Court held that Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel ‘imposes an obligation of result, namely to guarantee package travellers the refund of money paid over ... in the event of the travel organiser’s bankruptcy.’

[22] In the judgment of 14 May 1998 in *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG*, C-364/96, the Court held, however, that ‘the purpose of Article 7 [of Council Directive 90/314/EEC of 13 June 1990] is to protect consumers against the risks arising from the insolvency of the package holiday or tour organiser.’

[23] It is therefore necessary to examine the question of interpretation of whether the claims to refunds, which arise due to termination of the package travel contract before the occurrence of insolvency, are included in the insolvency protection for an insolvency occurring subsequently. In other words, whether a causal link between the insolvency and the non-provision or poor provision of the travel service must exist.

The second question referred

[24] If the answer to the first question is in the negative, this question is relevant as far as, in the circumstances of the present case, the insolvency proceedings were opened during the period of normal travel.

[25] Account being taken of the European idea of consumer protection the fact that, in a case such as the present one, the consumer could possibly have had a claim under the insolvency protection if he or she had taken the trip or holiday, but not if he or she had legitimately terminated the contract, would serve no purpose,

[26] It is therefore necessary to determine the question of the interpretation of whether, in such a case, reimbursement in respect of the insolvency protection is due.

The third question referred

[27] If the answer to the first question is in the negative, this question is relevant in so far as the reason for the termination and, indirectly, the insolvency is the same exceptional circumstance – the Covid-19 pandemic. Flamenco became insolvent because of the large number of terminations of contracts due to the pandemic.

[28] The applicant is of the view that the consumer's right to terminate under Article 12 of Directive 2015/2302 would be devalued, as in the event of insolvency due to exceptional circumstances a traveller would have to be concerned that he or she would not be covered. According to the applicant, the more serious the exceptional circumstances, the greater the risk of the travel organiser's insolvency. If the insolvency has its origin in the same exceptional circumstance as that of termination of the contract, it would, according to the applicant, be wiser, from the consumer's point of view, not to exercise the right of termination and to await the occurrence of insolvency.

[29] It is therefore necessary to clarify the question of interpretation of whether, at least where termination of the contact and the insolvency of the travel organiser have an indirect link in that both have their origin in the same exceptional circumstance, the right to reimbursement is covered by the insolvency protection.

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Vienna, 17 October 2022

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WORKING DOCUMENT