

Case C-45/23**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

31 January 2023

Referring court:

Nederlandstalige Ondernemingsrechtbank Brussel (Belgium)

Date of the decision to refer:

19 January 2023

Appellants:

A

B

C

D

Respondent:

MS Amlin Insurance SE

Subject matter of the main proceedings

Action brought by the appellants against the respondent, the travel operator's insolvency insurer, seeking a refund of the travel price, increased by interest, which they paid to the travel operator with which they concluded a package travel contract, which was declared insolvent after the appellants terminated that contract on the ground of unavoidable and extraordinary circumstances, but before the sums due to the appellants were refunded. The appellants maintain that these sums are covered by the insurance contract concluded between the travel operator and the respondent. The respondent refuses to pay those sums on the ground that the package travel contract was not terminated by the insolvency of the travel operator but by the appellants.

Subject matter and legal basis of the request

Request pursuant to Article 267 TFEU.

Question referred for a preliminary ruling

Should Article 17(1) of Directive 2015/2302 of the European Parliament and the Council of 25 November 2015 on package travel and linked travel arrangements, 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, be interpreted as meaning that the security which it requires also applies to the refund of all sums already paid by travellers or on their behalf where the traveller terminates the package travel contract by reason of unavoidable and extraordinary circumstances within the meaning of Article 12(2) of that Directive and the organiser is declared insolvent after the termination of the package travel contract on that basis, but before those sums have actually been refunded to the traveller, as a result of which that traveller suffers a financial loss and consequently bears an economic risk in the event of the organiser's liquidation?

Provisions of European Union law relied on

Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, 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'), in particular recitals 1, 3, 39 and 40, Article 17(1) and Article 12(2);

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, in particular Article 7.

Provisions of national law relied on

The Belgian Law of 21 November 2017 on the sale of package travel, linked travel arrangements and travel services (*Moniteur belge* of 1 December 2017) ('Law on package travel'), in particular Section 30 and the first sentence of Section 54;

Royal Decree of 29 May 2018 on protection against insolvency as regards the sale of package travel, linked travel arrangements and travel services (*Moniteur belge* of 11 June 2018; 'RD'), in particular Article 10, Article 12(1) and Article 13(1).

Succinct presentation of the facts and the procedure in the main proceedings

- 1 The appellants are consumers, while the respondent is the insolvency insurer of Exclusive Destinations NV, the organiser.

- 2 On 13 November 2019, the first appellant concluded, through the reseller Selectair Inter-Sun Reizen BVBA, a package travel contract with Exclusive Destinations NV for the total travel price of EUR 36 832. The package travel was supposed to take place in March 2020.
- 3 The trip was rebooked for November 2020 due to the COVID-19 pandemic. According to the new order form, the adjusted travel price was EUR 46 428, and the original amount of EUR 36 832 had been paid to the organiser.
- 4 In October 2020, the reseller asked the appellants, at the organiser's request, whether they wished to postpone the trip again due to the COVID-19 measures. They did not wish to do so, whereupon the reseller requested the organiser to terminate the contract and give a full refund. The organiser confirmed that it would take the necessary steps.
- 5 By judgment of 8 December 2020, the Ondernemingsrechtbank Gent (Commercial Court, Ghent) declared the organiser insolvent.
- 6 On 9 December 2020, the reseller refunded the sum of EUR 4 151, which had not yet been forwarded to the organiser.
- 7 On 22 January 2021, the respondent was given formal notice to refund the travel price paid. The respondent refused to do so because the trip had been cancelled by the appellants and not as a result of the organiser's insolvency.
- 8 On 29 April 2021, the appellants sought recovery of the travel price paid before the referring court.
- 9 The respondent asks the referring court to dismiss the appellants' claim as unfounded.

The essential arguments of the parties in the main proceedings

- 10 In support of their claim, the appellants submit that it is clear from the wording of the insurance contract between MS Amlin Insurance SE and Exclusive Destinations NV that the non-refund is covered by the latter. In that regard, the appellants refer in particular to Article 1.1 of the General Conditions of Insurance, which define the purpose of the insurance as follows: '*the Insurance Contract has as its purpose, in accordance with the Law on package travel and the RD (Article 8), in the event of the insolvency of the Insured: a. to refund to the traveller the sums paid in the hands of the Insured on or after the conclusion of a package travel contract ...*'. According to the appellants, this provision means that all sums paid to the organiser and to be repaid by the organiser are covered by the insurance.

- 11 The respondent disputes that the appellant's situation is covered by that insurance contract, on the ground that the insurance cover applies only to refunds of the travel price if the trip cannot go ahead because of the organiser's insolvency.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 12 In order to determine whether the appellants' claim is covered by the insurance contract concluded between the respondent and the organiser, the referring court analyses the provisions of the Package Travel Directive and the national provisions relating to protection against insolvency.
- 13 First of all, the referring court refers to Article 17(1) of the Package Travel Directive, which requires Member States to ensure that organisers established in their territory guarantee the refund of all sums already paid by or on behalf of travellers, to the extent that the services in question are not performed due to the insolvency of those organisers. Furthermore, recitals 39 and 40 specify that Member States are free to determine how they will arrange protection in the event of insolvency, but they must ensure that such protection becomes available as soon as travel services are not performed or will not be performed, or will be performed only in part, due to the organiser's liquidity problems, and that it also covers the foreseen amounts of the payments affected by the organiser's insolvency.
- 14 The referring court concludes from this that the security enshrined in Article 17(1) of the Package Travel Directive is compulsory only in so far as the relevant services are not performed as a consequence of the organiser's insolvency. This Directive therefore does not provide for compulsory security where the services are not performed for any reason other than the organiser's insolvency, such as the termination of the package travel contract by the traveller referred to in Article 12(2) of that Directive, due to unavoidable and extraordinary circumstances occurring at or in the immediate vicinity of the destination, which have a significant impact on the execution of the package travel. In that case, the traveller is entitled to a full refund of all the sums paid for the package travel.
- 15 As regards the Law on package travel, which transposes the Package Travel Directive, the referring court notes, first of all, that the wording of the first sentence of Article 54, which determines that organisers and resellers established in Belgium must provide security for the refund of all sums already paid by travellers or on their behalf, in so far as the services in question are not performed because of their insolvency, corresponds to a large extent to that of Article 17(1) of the Package Travel Directive and that this provision does not provide for more extensive protection than that Directive. Next, the referring court refers to Article 30 of the Law on package travel, under which the traveller has the right to terminate the package travel contract 'in unavoidable and extraordinary circumstances occurring at or in the immediate vicinity of the destination which have a considerable impact on the execution of the package travel or the transport

of passengers to the place of destination'. In that case, the traveller is also entitled under this provision to a full refund of the sums he or she has paid to the organiser. The wording is therefore comparable to that of Article 12(2) of the Package Travel Directive. Finally, the referring court notes that Article 13(1) of the RD limits refunds to 'all sums paid by the beneficiary to the professional in respect of the travel contract where that contract is not performed because of the professional's insolvency or to all sums paid for travel services which are not provided because of their insolvency'. In view of the above, the court concludes that the Law on package travel and the RD give the same content to the compulsory security in the event of insolvency as the Package Travel Directive.

- 16 The referring court therefore submits that, as the law currently stands, legal protection against insolvency does not apply to a traveller in the same situation as the appellants, in which the traveller is entitled to a refund of the travel price which he or she paid on account of termination of the package travel contract due to unavoidable and extraordinary circumstances, but does not obtain that refund because the organiser was declared insolvent after termination of that contract and before the refund of the travel price paid. It follows that the facts of the dispute do not constitute an insured claim, so that the claim would be unfounded.
- 17 However, the referring court has doubts about its previous analysis and the scope of the protection provided for in Article 17(1) of the Package Travel Directive.
- 18 In the light of the general objective of that directive of contributing to the attainment of a high level of consumer protection, the referring court asks, first of all, whether there is full protection against insolvency of the organiser, as referred to in recital 39 of that directive, which contributes to consumer protection.
- 19 Under Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, repealed by the Package Travel Directive, the Court of Justice of the European Union has ruled that the objective of protection against insolvency is to protect the consumer against the economic risks associated with the organiser's insolvency, resulting from the payment by the traveller of the travel price before the performance of the package travel contract. The result to be achieved in terms of protection is that, in the event of the organiser's insolvency, the traveller should be entitled to the refund of the sums he or she has already paid (see judgments of 8 October 1996, *Dillenkofer*, C-190/94, EU:C:1996:375, paragraph 42; of 14 May 1998, *Verein für Konsumenteninformation*, C-364/96, EU:C:1998:26, paragraph 18; of 16 February 2012, *Blödel-Pawlik*, C-134/11, EU:C:2012:98, paragraph 19; of 1 December 1998, *Rechberger and Others*, C-140/97, EU:C:1999:306, paragraph 74; and of 10 July 2019, *HQ and Others.*, C-163/18, EU:C:2019:585, paragraph 41). Furthermore, as regards Article 7 of Council Directive 90/314/EEC, the Court of Justice of the European Union has ruled that the 'guarantee relating to the refund of the sums already paid' covers cases in which the organiser's insolvency occurs after the conclusion of the package travel contract but before the start of its performance (see judgment of

14 May 1998, *Verein für Konsumenteninformation*, C-364/96, EU:C:1998:26, paragraph 19).

- 20 The referring court seeks to ascertain whether the absence of protection of the traveller against insolvency in the appellants' situation contributes to promoting the interests of consumers and ensuring a high level of consumer protection.
- 21 Second, according to the referring court, the question arises as to whether the current legislation does not give rise to unequal treatment.
- 22 It states that a traveller whose trip cannot go ahead as a result of the organiser becoming insolvent before the trip in principle suffers a financial loss, as he or she loses the travel price paid, but that a traveller who is entitled to a full refund of the travel price paid due to the termination of the package travel contract on the ground of unavoidable and extraordinary circumstances also suffers a financial loss where the organiser becomes insolvent after the termination of the package travel contract, but before the travel price has been refunded to the traveller.
- 23 Although both categories of travellers therefore bear the same risk, the Package Travel Directive provides that only the former may benefit from compulsory protection against the organiser's insolvency.
- 24 The referring court raises the question whether there is justified unequal treatment. In that regard, it observes that the situation of those two categories differs in certain respects, but that there are also overlaps. For example, an organiser's insolvency renders performance of the package travel contract permanently impossible, while the unavoidable and extraordinary circumstances are generally of a temporary nature. Furthermore, the non-performance of the package travel contract due to insolvency is a situation the traveller faces involuntarily and has no control over. The opposite is the case when the traveller decides to terminate the package travel contract due to unavoidable and extraordinary circumstances. That decision is, however, the consequence of a situation faced by the traveller which is unintended and unavoidable, as is the case with insolvency. Finally, in the first category of travellers there is an existing package travel contract, while in the second category the package travel contract is terminated before the organiser becomes insolvent. It is therefore not clear to the referring court whether or not these factors justify a difference in treatment.