OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 20 September 2001 [1]

1. Is the travel agent who sells a package holiday also responsible, in the event of the non-performance or improper performance of the contract, for non-material damage suffered by the tourist for loss of enjoyment of the holiday?

That is the question which, by the order of 6 April 2000, the Landesgericht (Regional Court) of Linz (Republic of Austria) referred to the Court pursuant to Article 234 EC seeking an interpretation of Article 5(2) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (hereinafter 'Directive 90/314' or 'the directive'). [2]

1 — Original language: Italian.

2 — OJ 1990 L 158, p. 159.

The relevant legal provisions

The Community provisions

2. As is well known, Directive 90/314 forms part of the broad context of consumer protection policy which, over several decades, has undergone interesting and significant developments not only in the Member States, but also at Community level. Originally based on sporadic and occasional measures adopted on the basis of Article 100 of the EC Treaty (now, after amendment, Article 94 EC), Community action on consumer protection was subsequently given, first in the Single European Act of 1986 and then in the Maastricht Treaty of 1992, express mention and a more transparent legal base in Article 100a (now Article 95 EC), finally being incorporated independently as one of the Community policies contained in Article 129a (now Article 153 EC). Thus in the course of time numerous important directives have been adopted, which have taken direct account of the need to protect consumers, in conjunction with directives geared to the implementation of the internal market and the progressive liberalisation of the move-

ment of goods and persons between the Member States. In particular, those directives have concentrated on specific aspects which occasionally require common regulation, notably in respect of contractual rights and civil liability. [3]

3. Directive 90/314, also adopted on the basis of Article 100a of the EC Treaty, clearly comes within that framework, [4] with specific regard to a sector which represents 'an essential part' (first recital) for the completion of the internal market, given the constant growth of the tourist industry in the economies of the Member States. In particular, the directive was prompted by the existing differences noted between the Member States in relation to operating practices and regulations in respect of package travel, package holidays and package tours (also referred to as 'packages'), which give rise to obstacles to the freedom to provide services and distortions of competition amongst operators established in different Member States (second recital). At the same time, however, it also fulfils, as stipulated in the third recital, the objective of enabling 'Community consumers to benefit from comparable conditions when buying a package in any Member State'. Moreover, the fact that the directive is based on the very objective of consumer protection, by means of adopting regulations for the protection of the individual, has also been confirmed by the Court's case-law. In *Dillenkofer* the Court held 'First, the recitals in the preamble to the Directive repeatedly refer to the purpose of protecting consumers. Secondly, the fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers. Indeed, according to Article 100a(3) of the Treaty, the Commission, in its proposals submitted pursuant to that article, concerning *inter alia* consumer protection, must take as a base a high level of protection'. [5]

3 — Without any claim to completeness, I note here, in particular, on the basis of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (hereinafter 'Directive 85/374'), to which I will return in greater detail later, the following acts: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31); Council Directive 87/102/EEC of 22 December 1986 on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), amended most recently by Directive 98/7/EC (OJ 1998 L 101, p. 17); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29); Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994 L 280, p. 83); Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19); Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

4 — See, in particular, the fourth, fifth and sixth recitals, which refer to the Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (OJ 1981 C 165, p. 24); the resolution of 10 April 1984 on a Community policy on tourism (OJ 1984 C 115, p. 1); the Commission communication to the Council entitled 'A New Impetus for Consumer Protection Policy', approved by the Council resolution of 6 May 1986 (OJ 1986 C 118, p. 28).

5 — Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 [1996] ECR I-4845, paragraph 39 and the Opinion of Advocate General Tesauro, paragraph 13.

4. In view of the stated objectives, the Directive specifies 'a minimum of common rules' to give a Community dimension to the package travel industry (seventh recital), rules concerning, in particular: the information to be given to the consumer, the regulation of package travel contracts, with specific regard to their content, conclusion and performance throughout the Member States, and the provision of a guarantee for consumers in the event that the organiser and/or retailer become insolvent or bankrupt. In particular, as regards contractual liability, the nature of the triangular relationship between the organiser and/or retailer, the consumer and the provider of services must be stipulated in order that, as a general rule, a single party amongst the former may be identified as liable for damage caused to the consumer by the non-performance or improper performance of the contract.

5. Coming to the specific provisions of the Directive, I note at the outset that Article 1 sets out its objectives, stating that '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' (Article 1).

6. However, the provision of most importance in the present case is Article 5, which provides:

'(1) Member States shall take the necessary measures 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.

In the cases referred to in the second and third indents, the organiser and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damages other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

(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.

(4) The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organiser and/or retailer in writing or any other appropriate form at the earliest opportunity.

This obligation must be stated clearly and explicitly in the contract'.

7. However, Article 8 of the Directive provides:

'Member States may adopt or retain more stringent provisions in the field covered by this Directive to protect the consumer'.

8. Finally, I note that the Member States were obliged to adopt the necessary provisions to comply with the Directive by 31 December 1992 at the latest (Article 9).

The Austrian legislation

9. Directive 90/314 was transposed into the Austrian legal order by a series of regulatory provisions including, in particular, for our present purposes, Articles 31(b) to 31(f) of the Konsumentenschutzgesetz of 1993 (Law of Consumer Protection: the 'KSchG'). [6] Those provisions, which regulate the liability of operators in the sector, do not provide a right to compensation for non-material damage in the case of loss of benefit of holidays or in similar circumstances.

10. According to the information supplied by the national court and the Austrian Government in its written observations, legal opinion is divided as to whether, outside the cases expressly provided for in the aforementioned law, non-material damage may nevertheless be compensated on the basis of general rules. However, no doubt exists in the case-law of the Oberster Gerichtshof (Austrian Supreme Court), according to which non-material damage may be compensated only when expressly provided for by the law (as, for example, established by paragraph 1325 of the Allgemeines Bürgerliches Gesetzbuch (ABGB, Austrian Civil Code) for the *pretium doloris*); there is not even a single derogation (for example, in the event of physical harm, loss of liberty, sexual assaults etc.) which can be relied upon to infer the existence of a general rule on which to base compensation for non-material damage caused by the loss of enjoyment of a holiday. Moreover, since holidays and free time devoted to relaxation have no pecuniary value, the loss of their enjoyment does not cause any material loss to the individual concerned and thus it is contended that the damage they entail cannot give rise to financial compensation. On the other hand, given that the aforementioned provisions transposing Directive 90/314 neither preclude the recovery of non-material damage caused by the loss of benefit of a holiday, nor make explicit provision for that purpose, the Oberster Gerichtshof concludes that Austrian law does not contemplate the possibility of indemnifying such damage. [7]

The facts and the question referred for a preliminary ruling

11. The family of the plaintiff in the national proceedings, Simone Leitner,

6 — BGBl. No 247/1993, p. 247.

7 — See judgment Ob 592/88, (JBl. 1988, 779); 3 Ob 544/88 (SZ 62/77).

booked with the defendant, TUI Deutschland GmbH & Co KG (hereinafter 'TUI'), through the Austrian travel agent, KUONI, a package club holiday (all-inclusive stay) in the holiday village 'Robinson Club Pamfiliya' (hereinafter the 'club') in Side, Turkey, for the period from 4-18 July 1997.

12. On 4 July 1997, the Leitner family arrived at the club where they commenced their stay and took all their meals. However, about eight days after the start of the holiday, the plaintiff showed symptoms of salmonella poisoning caused by the food offered in the club. The illness, which lasted beyond the end of the holiday on 18 July 1997 and also affected many other guests in the club, manifested itself in a fever of up to 40 degrees over several days, circulatory difficulties, diarrhoea, vomiting and anxiety. Ms Leitner's condition was such as to require her parents' care for the remainder of the holiday.

13. A couple of weeks after the end of the holiday a letter seeking compensation was sent to TUI. No reply was received. On 17 July 1998, the plaintiff initiated proceedings against TUI seeking, *inter alia*, payment of damages in the sum of ATS 25 000. After obtaining expert opinion, the plaintiff included in that amount, over and above material damages (Schmerzengeld or *pretium doloris*), non-material damages in respect of loss of enjoyment of her holiday.

14. The court of first instance held that the plaintiff was entitled to compensation for pain and suffering in the amount of ATS 13 000 under paragraph 1325 of the ABGB. However, the claim for non-material damage was dismissed for the reasons indicated by the case-law of the Oberster Gerichtshof referred to above (see paragraph 10), whereby such damage may be compensated only where express provision is made by the law, which it is not in the present case.

15. The plaintiff lodged an appeal against that decision with the Landesgericht of Linz which held that the court of first instance had correctly interpreted the national case-law. Nevertheless, it asked whether Article 5 of Directive 90/314 might not produce a different solution. Indeed, according to the national court, in so far as the fourth paragraph of Article 5(2) of the Directive allows for a limitation under the contract of compensation for damage other than personal injury, where such limitation is not unreasonable, it would be permissible to conclude on the basis of the directive that in principle operators are liable also for non-material damage.

16. According to the Landesgericht, that doubt is reinforced by considerations of a comparative nature. Indeed, it notes that in the Federal Republic of Germany the combined provisions of paragraphs 253 and 651(f), No 2, of the Bürgeliches Gesetzbuch (BGB; German Civil Code) provide for compensation for non-material damage where a journey is prevented or significantly interfered with. However, the fact that in at least two Member States of the European Union the extent of liability is different for tour operators seems to be incompatible with the stated dual objectives of Directive 90/314 aimed at, on the one hand, eliminating disparities between the national laws of the Member States in order to abolish obstacles to the freedom to provide services and distortions of competition, and, on the other, to ensure a uniform level of consumer protection. It is therefore necessary to clear up the doubts surrounding the scope of the Directive.

17. However, even if it did entail compensation for non-material damage, the Directive could not be invoked against travel agents, given that Community case-law denies the direct horizontal effect of directives. Nevertheless, it could also impose an obligation on the national court to interpret national law in conformity with Community law. In this respect, the Landesgericht notes in particular the Court's judgment in *Silhouette*, which confirmed that even though a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, nevertheless the national court must interpret the provisions of its own law, as far as possible, in the light of the wording and the purpose of the Directive so as to achieve the result it has in view. [8]

18. Thus, considering interpretation of the Directive necessary in order to rule on the case before it, the Landesgericht has referred the following question for a preliminary ruling, pursuant to Article 234 EC, to the Court of Justice:

'Is Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours to be interpreted as meaning that compensation is in principle payable in respect of claims for damages for non-material damage?'

Legal arguments

Introduction

19. In the present proceedings for a preliminary ruling, in addition to the parties

8 — Case C-355/96 *Silhouette International Schmied* [1998] ECR I-4799, paragraph 36.

before the national court, the Austrian, Belgian, Finnish and French Governments and the Commission have submitted observations. Those observations reflect two different positions: the plaintiff, the Belgian Government and the Commission, relying on the purpose and the letter of Directive 90/314, maintain that Article 5 must be interpreted as meaning that the damage referred to in the Directive also includes non-material damage caused by loss of enjoyment of a holiday; the other parties, invoking the Directive's aim to provide a minimum level of harmonisation, contest that interpretation and contend that all that can be inferred from Article 5 is the mere right of Member States to provide in their laws for compensation for such damage.

20. Accordingly, from the point of view of this latter argument, the nature of the harmonisation provided for by the directive would appear to be of central importance for the purpose of answering the question referred by the Landesgericht. Thus, as a preliminary step that argument will be considered before proceeding to a detailed analysis of Article 5 of the directive and the obligations contained therein.

On the nature of the harmonisation achieved by the Directive

21. Albeit with certain minor differences of emphasis, TUI and the Austrian, Finnish and French Governments agree that the aim of the harmonisation of national legislation sought by the Directive is merely to define a minimum level of protection for consumers of package tours. Accordingly, it is contended that anything not expressly covered by the Directive, particularly the type of damage to be compensated, lies within the competence of national legislation. Indeed, according to that argument, if the Community had intended to achieve complete harmonisation, it would have adopted much more detailed provisions. On the contrary, the Directive merely sets out an essential core of common rules concerning the content, the conclusion and the performance of package tour contracts throughout the Member States, without exhaustively regulating the entire subject and, in particular, matters related to liability. Thus, in view of the lack of any explicit reference to compensation for non-material damage, it is argued that not only can such liability for compensation not be inferred, but also that such liability must be expressly precluded on the specific assumption that the Community legislator did not intend to regulate it through the application of common rules. On the other hand, the Austrian Government, in particular, notes that no other interpretation is offered by the text of the Directive, or the preparatory proceedings, or the report concerning the implementation of the Directive. [9]

22. Of course, I do not contest — and I have already anticipated — the fact that the aim of the Directive in question is not to achieve a complete harmonisation of the

9 — Report on the implementation of Directive 90/314/EEC on package travel, package holidays and package tours in the national legislation of the Member States of the EU, SEC (1999) 1800 final.

relevant national legislation, but merely a so-called minimal harmonisation with the intention, in other words, of defining a basic standard of consumer protection containing an essential core of common rules for the purpose of regulating certain fundamental aspects of the matter. Despite that, nothing decisive has yet been said for the purpose of answering the specific question for a preliminary ruling. Although limited to 'a minimum of common rules', the Directive nonetheless still requires legislative harmonisation and the Member States obviously must comply with that obligation, albeit retaining the power to maintain in force more stringent provisions to protect the consumer (Article 8). In other words, minimal harmonisation does not mean no harmonisation or still less, that the provisions of the directive have no regulatory force or that such regulatory force applies solely to matters governed by a completely uniform regulation. However, in my opinion, the abovementioned argument falls into this ambiguity when, on the basis solely of the fact that the directive in question does not contain such rules in respect of compensation for damage, it infers that the directive was not intended to deal with the question of the extent of liability and that question therefore remains within the competence of each Member State.

23. Nevertheless, it is true that the issue which must be raised, in order to answer the question referred by the national court, is precisely that of defining the effective scope of the harmonisation intended by the Directive. In other words, identifying the minimum regulatory content established by the Directive in order to ascertain whether it covers compensation for non-material damage, whilst noting that, in this context, obligations imposed on Member States may be derogated from, but only in one direction: the direction of greater protection for the consumer. If, as I believe, that is the case as far as the area covered by the provisions of the Directive is concerned, then the problem is not that there may be discrepancies between national laws (like that encountered by the Landesgericht between Austrian and German legislation), but rather that, if such were the case, one of those laws would have failed to comply with the obligations imposed by the Directive.

The scope of Article 5 of Directive 90/314

24. Examining the regulatory scope of the Directive for our present purposes, it must immediately be noted that, although some of its provisions leave a margin of discretion to the Member States, Article 5 nevertheless lays down a number of provisions concerning liability for damage to the consumer which set out, even on a cursory reading, detailed and precise rules. It does so, despite the fact that the provision does not clarify whether the 'damage resulting for the consumer from the failure to perform or improper performance of the [package] contract', referred to in the first paragraph of Article 5(2), encompasses

non-material damage or whether the Member States are therefore obliged to make provision also for the liability of the organiser and/or retailer of the package tour contract for such damage. The problem therefore arises of defining the scope of the concept of 'damage' employed by that provision. In other words, it is a typical problem concerning the interpretation of Community law, which must be resolved in accordance with the usual criteria followed in such cases.

25. To this end, I note that, according to the well-known case-law of the Court, 'the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community' [10], having regard to the context of the provision and of the intended aim of the act contained therein. Thus, in such cases, any recourse to individual national laws is precluded because 'the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect'. [11]

26. More specifically, I note that, in the event of any doubt, the provisions of the Directive in question must be interpreted in the manner most favourable to the person whom they are intended to protect, namely the consumer of the tourism service. That may be inferred not only from the systematic analysis of the text and aims of the Directive, but also from the abovementioned fact that it was adopted pursuant to Article 100a, paragraph 3 of which requires that harmonisation measures in respect of consumer protection should be based on a high level of protection. [12]

The concept of damage in Directive 90/314

27. That said, it seems to me that numerous arguments of a textual and systematic nature tend towards a broad interpretation of the concept in question and thus a

10 — See Cases C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26; C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; C-327/82 *Ekro* [1984] ECR 107, paragraph 11; also, with specific reference to the area of private law, C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 34; C-441/93 *Pafatis* [1996] ECR I-1347, paragraphs 68 to 70.

11 — See Case C-296/95 *EMU Tabac et al.* [1998] ECR 1651, paragraph 30; but also see Cases C-64/81 *Corman* [1982] ECR 13, paragraph 8 and T-41/89 *Schwedler* v *Parliament* [1990] ECR II-79, paragraph 27.

12 — On this interpretation, see the opinion of Advocate General Saggio in Case C-140/97 *Rechberger et al.* [1999] ECR I-3499, paragraph 17.

positive answer to the question referred by the Landesgericht.

28. Starting from a literal analysis of the Directive, I note immediately that both the text and the preamble repeatedly employ the term 'damage' in a general sense, whilst the fourth paragraph of Article 5(2) alone refers specifically to a provision for a certain category of damage 'other than personal injury'.

29. In view of the fact that the Directive employs the term 'damage' in a general sense without any restrictive connotation, it must be inferred — and on this point I find myself in agreement with the observations of the Commission and the Belgian Government — that the concept should be interpreted widely, that is to say in favour of the argument that, at least in principle, the scope of the Directive was intended to cover all types of damage which have any causal link with the non-performance or improper performance of the contract.

30. However, the distinct reference in the fourth paragraph of Article 5(2) to 'damage other than personal injury' also indirectly supports that interpretation. Indeed, logically speaking, on the basis of that reference it must be concluded that the concept of damage, as referred to by the Directive, includes both material and non-material damage. Thus, albeit with the caution required in a matter which, even at the terminological level, is marked by a notable inconsistency between — and even within — different legal authorities,[13] I think one can say, along with the Commission, that 'material damage' is damage to the person, in other words both physical and psychological damage, in the sense of the psychological distress suffered as a result of physical damage (*pretium doloris*, Schmerzengeld). Thus, this concept covers the idea of compensation for non-material damage. However, there are more convincing grounds for claiming that that idea is covered by the concept of 'damage other than personal injury', to which the Directive also refers, but not in a restrictive sense, so that it includes *all* damage, whether material or non-material. It follows, as the Commission observes, that, particularly in the latter case, the Directive does not preclude the non-material aspect of damage, as confirmed by the fact it was intended to leave that concept open. It is not clear therefore why, in cases concerning the loss of enjoyment of holidays, compensation for non -material damage should be precluded or limited to specific circumstances (*pretium doloris*), given that in

13 — It notes a recent study by the European Parliament, cited in the communication from the Commission to the Council and the European Parliament on European contract law of 11 July 2001, COM(2001) 398 fin., p. 11 that: 'The European rules governing liability do not yet have a reasonably uniform concept of damage or an idea as regards its definition, which naturally risks undermining efforts to draw up European directives in the sector'. More specifically, but in the same vein, it refers to authoritative legal opinion that liability for non-material damage is a subject marked by extremely diverse and confused assessment criteria. Heads of liability vary greatly from one system to another, being classified in one system as material damage and in another as non-material damage: see G. Alpa, Il danno alla persona nella prospettiva europea, in A. Tizzano (ed.), Il diritto privato dell'Unione europea, Turin 2000, vol. I, p. 787 et seq., p. 803.

those cases there is ample possibility for such damage to be verified.

31. In that respect, it appears significant to me that the Ddirective should provide different rules for the two categories of damage mentioned solely in respect of compensation. However, for damage in general, Member States may, pursuant to Article 5(2), limit compensation only in accordance with the international conventions governing such services (third paragraph), in respect of damage other than material damage. Contractual damages may also be limited, provided that such limitation is not unreasonable (fourth paragraph) having regard, as the Belgian Government points out, to the subjective nature of non-material damage which is difficult to quantify, and thus to the possibility of allowing compensation within reasonable limits.

32. This provision, in my opinion, provides a valid argument in support of the idea that the concept of damage enshrined in the Directive is far-reaching and includes non-material damage. Indeed, paragraph four, Article 5(2) of the Directive, in establishing the abovementioned limitation, at the same time implicitly acknowledges the existence of the right to compensation for damage other than material damage. Compensation may be limited, in part and within reason, but it may not be refused completely because failure to allow such compensation would clearly go beyond in a negative sense any test of reasonableness.

33. In concluding this point and to restate an observation made during the case, I should like to add that against the argument in favour of compensation for non-material damage it cannot be contended that this would leave an excessively broad margin of uncertainty, since theDdirective sanctions the principle of compensation for such damage without specifying any other necessary conditions, particularly — and notwithstanding the aforementioned comments — as regards indemnification. Such an argument goes too far because the Directive does not even provide such details vis-à-vis material damage, in respect of which compensation is not in doubt. Furthermore, I note that as regards liability, apart from certain fundamental rules, the criteria governing the definition of damage and the relevant systems for assessing and quantifying damage vary immensely from Member State to Member State ranging, as a rule, from the complete discretion of the court to the point where the criteria to be applied are compulsorily laid down in calculation tables. For this reason also, there is a demand for the Community to intervene in this field in response to the discrepancies, if not the flagrant inequalities, resulting from what has been referred to as real 'assessment chaos'. [14]

14 — According to G. Alpa, op. and loc. cit. For the need to which I refer in the text, also see the Commission communication cited in the previous footnote, particularly Chapter 3.

Comparison with Directive 85/374

34. The preceding considerations do not seem to me to be refuted by the argument against them adopted by the Austrian and French Governments on the basis of Article 9 of Directive 85/374 concerning liability for damage caused by a defective product, which explicitly leaves the Member States free to regulate the aspects of civil liability connected with non-material damage caused by defective products. [15] It seems to me rather that the argument in fact turns on the loss suffered by those who rely on it. There is certainly no disputing the fact that Directive 85/374 leaves to the Member States the power to which I have referred. However, that in no way means that the Directive in the present case allows the Member States the same freedom. In that respect, I merely note that the two Directives were not only adopted at different times and at different stages in relation to the evolving concept of liability, but that they also regulate different types of liability: Directive 85/374 regulates the non-contractual and objective liability (albeit restricted) of the producer, whilst Directive 90/314 governs the contractual liability for damage of the organiser and/or retailer of package tours. The basic principles and rules are therefore different, just as there is a major difference in their wording: Directive 85/374 is concerned with providing a precise definition of all the categories of damage to be compensated, whether to persons or to objects, with explicit reference to national law as regards non-material damage; [16] Directive 90/314, on the other hand, avoids any specific categorisation and employs the concept of damage in a general and undifferentiated manner.

35. Thus, the different wording chosen for each of the two directives is anything but accidental. Indeed, it is clear that where the Community legislature wished to draw a distinction, as in Directive 85/374, between damages for which the producer is to be held liable and those which are to be regulated by the Member States, has done so explicitly. On the other hand, where, in the subsequent Directive 90/314, has decided to refer in a general and non-specific manner to the concept of 'damage', it is to be inferred that it has done so in order to include within that concept all possible types of damage connected with the non-performance of contractual obligations, that is to say the inference must be drawn that the adoption of a broad and all-encompassing concept of damage was intentional.

15 — After Article 1 of the Directive, which states 'the producer shall be liable for damage caused by a defect in his product', Article 9 states that 'damage' means:
'(a) damage caused by death or by personal injuries,
(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of ECU 500, provided that the item of property:
(i) is of a type ordinarily intended for private use or consumption, and
(ii) was used by the injured person mainly for his own private use or consumption.
This Article shall be without prejudice to national provisions relating to non-material damage'.

16 — On that point, see Case C-203/99 *Henning Veedfald* [2001] ECR I-3569, paragraph 32.

36. In light of the above, I am therefore bound to conclude that the concept of damage for which the organiser and/or the retailer must be held liable as a result of the non-performance or improper performance of a package tour contract, referred to in Article 5 of Directive 90/314, also includes non-material damage arising from loss of enjoyment of the holiday.

Further arguments in support of compensation for non-material damage

37. This conclusion is also, in my opinion, directly or indirectly corroborated by other arguments: notably, by the Community's own case-law, by certain relevant international conventions on the subject, and by current developments in the legislation and case-law of the Member States.

38. As regards Community case-law, I must point out that, albeit in respect of the Community's non-contractual liability, clear positions have been adopted in favour of extending the concept of damage to include non-material damage. On several occasions, in fact, the Court of First Instance has recognised that such liability may be extended to non-material damage provided that genuine quantifiable damage has occurred: thus, at least in principle, damage arising from the loss of the opportunity to study, and damage connected with loss of a company's image and reputation have been considered liable for compensation. [17]

39. As regards indications provided by international treaties, I note that, although they are mainly concerned with issues related to transport or material objects and thus are not of direct relevance for the purpose of compensation for damage arising out of a ruined holiday, the Warsaw Convention of 1929 on International Carriage by Air, [18] the Berne Convention of 1961 on Carriage by Rail, the Athens Convention of 1974 on Carriage by Sea and the Paris Convention of 1962 on the Liability of Hotel-keepers for items brought by clients into hotels — all referred to in the eighteenth recital of Directive 90/314 — refer to a general concept of damage and therefore do not preclude non-material damage. Further, of even more specific interest is the International

17 — See, in particular, Cases T-230/94 *Farrugia* v *Commision* [1996] ECR II-195, paragraph 46; T-230/95 *BAI* v *Commission* [1999] ECR II-123, paragraph 38, and T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 77.

18 — This convention has been adapted by the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) of 28 May 1999, signed by the European Community on 9 December 1999 and approved by Council Decision of 5 April 2001, OJ L 194, p. 38.

Convention on Travel Contracts, [19] Article 13(1) of which states that the organiser's contractual liability for the travel covers 'tout préjudice causé au voyageur', ('all damage occasioned to the traveller') at the same time establishing, in subsequent Article 2, the ceilings for compensation in respect of non-material damage, material damage and all other types of damage. [19]

40. In my opinion, however, the most interesting developments are those provided by the legislation and case-law of the Member States which, notwithstanding the abovementioned range of solutions, have not only generally extended the possibilities of compensation for non-material damage, but more specifically have focused increasing attention in recent years on compensation for 'damage arising out of a ruined holiday', in the sense of non-material damage suffered by a tourist through not being able to derive full enjoyment, as the result of the tour operator's non-performance of the contract, from the benefits of a trip organised for the purpose of leisure and relaxation. Without embarking upon a comparative analysis of the matter, which the Commission in any event has done in very general terms, I merely note that, taking at least in part the results of that analysis as a reference point, the developments referred to in certain Member States have been formally sanctioned by legal provision, whilst in others they have been elucidated essentially by case-law.

41. Among the former, I make particular reference to Germany where, since 1979, a specific amendment to the Civil Code (paragraph 651 f, Abs 2, BGB) has conferred on the tourist, in the event of a cancelled or seriously disrupted holiday, the right to claim adequate compensation for the period of holiday time wasted. The case-law has, in turn, refined and progressively defined the concept of damage for a 'ruined holiday' by specifying a series of indicators for that purpose (distance from the sea, quality of the food, noise, lack of balconies and windows, etc.) Belgium, [20] Spain [21] and the Netherlands [22] also now have regulations which make provision for compensation for non-material damage.

42. As regards the other group of Member States, I must obviously mention first of all the United Kingdom, whose case-law is known to be the most open (although not as open as that of the United States) on the

19 — Convention internationale relative au contrat de voyage (CCV), signed in Brussels on 23 April 1970. It was adopted within the framework of Unidroit and entered into force on 24 February 1976, but has a limited number of signatories.

20 — Law of 16 February 1994 'régissant le contrat d'organisation de voyage et le contrat d'intermédiare de voyage', Article 19(4) and (5).

21 — Law No 21/95 of 6 July 1995 'reguladora de los viajes combinados', Article 11(2).

22 — Article 7:510 of the Civil Code (Burgerlijk Wetboek).

subject of compensation for non-material damage. [23] The position in Ireland is not dissimilar, but one also sees a similar development in Member States whose case-law is based on the civil law tradition. Thus, in France, although damage arising out of a ruined holiday is not expressly covered by regulatory provision, its case-law openly allows for compensation for such damage. [24] Such is also the case in Italy, where the question is governed by the circumstance that the Civil Code limits compensation for non-material damage to civil consequences of criminal act, save for exceptional cases provided for by the law, but despite that there are an increasing number of judgments that allow compensation for damage arising out of a ruined holiday. [25]

43. At the end of this brief excursus, it seems therefore that I can confirm my earlier comments about the existence of a widespread trend, which has made varied progress in the different legal systems, towards a wider concept of liability for this type of damage and, more specifically, for damage arising out of a ruined holiday. This trend is linked to the overall development of the subject of liability, but also, from a more general point of view, to the rapid development of tourism and to the fact that holidays, travel and leisure breaks are no longer the privilege of a limited sector of society, but are a consumer product for a growing number of people to which they devote part of their savings and their holidays from work or school. The very fact that holidays have assumed a specific socio-economic role and have become so important for an individual's quality of life, means that their full and effective enjoyment represents in itself an asset worth protecting.

23 — In that respect, the Commission mentions, in particular, Court of Appeal, *Jarvis* v *Swan Tours* (197) QB 233, 1973 All ER 71; *Jackson* v *Horizon Holidays* (1975) 1 WLR 1468, (1975) All ER 92.

24 — See, for example, among the precedents annexed to the observations submitted by the French Government in the present case, Tribunal d'instance de Paris 15ème, 17 May 1995, *M. Bleu* v *Nouvelles Frontières*; Tribunal d'instance de Paris, 4 January 1996, *S. Blanc* v *Nouvelles Frontières Touraventure*; Tribunal d'instance de Saint-Etienne, 30 April 1998, *Mme Kadiver* v *SA Havas Voyage*; Tribunal d'instance de Paris 6ème, 29 September 1998, *A. Bouchara* v *SA Forum Voyages*; Tribunal d'instance de Paris IXème, 26 July 1999, *Mme et M. Benabou* v *Compagnie AXA Assurance et al.*; Tribunal d'instance de Neuilly sur Seine, 26 May 1999, *Mme et M. Vasseur* v *Société SOVAP Atlantide 2000 Sarl.*

25 — See, for example, Tribunale di Roma, 6 October 1989, in Resp. civ. e prev., 1991, p. 512; Tribunale di Bologna, 15 October 1992, in I contratti, 1993, p. 327; Tribunale di Torino, 8 November 1996, in Resp. civ. e prev., 1997, p. 818; Pretore di Roma, 11 December 1996, in Nuova giur. civ. commentata, 1997; I, p. 875; Tribunale di Milano, 4 June 1998, in I contratti, 1999, p. 39; Giudice di pace di Siracusa, 26 March 1999, in Giust. Civ., 2000, I, p. 1205. In the opposite sense, however, see the recent Tribunale di Venezia, 24 September 2000, in I contratti, No 6/2001, p. 580, with a fully documented commentary by E. Guerinoni.

44. These are precisely the reasons, even if not the only ones, on which, as we have seen, Directive 90/314 was based: the more strictly economic aspect, constituted by the elimination of obstacles to the free provision of tourist services, goes hand in hand with protection for the consumer/tourist. Thus, even in Community law, enjoyment of a holiday is treated as an asset worth protecting and damage arising out of the

failure to enjoy it amounts to, in the context of a package contract, a specific loss which justifies compensation. From this point of view, an interpretation which precludes indemnification of such damage from the scope of the directive, besides having no basis in either the text or the objectives of Directive 90/314, could deprive the directive of part of its effectiveness and conflict with the stated intent of Article 95(3) EC, which requires that, as we have seen, harmonisation measures for the protection of consumers be based on a high level of protection.

45. I therefore consider that the reply to the Austrian Court should be that Article 5 of Directive 90/314 is to be interpreted as meaning that the organiser and/or retailer must be regarded as liable also for non-material damage caused to the consumer by the non-performance or improper performance of a package contract.

46. Before concluding, I must also say a few words on the question raised by the Landesgericht concerning the national court's obligation to interpret its own law in compliance with the Directive (see above, paragraph 17). Frankly, the answer to this question seems to me to be settled, given that the Court has established a substantial and unequivocal body of case-law on the matter from which there is no reason to depart in this case. [26] Indeed, I note that, as the Court confirmed in the judgment referred to by the Landesgericht itself, 'when applying domestic law, whether adopted before or after the Directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the Directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty'. [27] Accordingly, if the Court shares the views that I have set out above, it must conclude that, regardless of the fact that the applicants may invoke the direct effect of the directive, the national court is obliged to interpret Austrian law in the light of the letter and scope of the directive itself and is therefore obliged to recognise the consumer's right (provided the other conditions apply) to compensation for non-material damage caused by the non-performance or improper performance of a package contract on the part of the organiser and/or retailer.

26 — See, inter alia, Cases C-14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26; C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; C-232/94 *MPA Pharma* [1996] ECR I-3671, paragraph 12; C-355/96 *Silhouette International Schmied* [1998], cited above, paragraph 36; Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraphs 61 to 64.

27 — *Silhouette*, cited above, paragraph 36.

Conclusion

47. In light of the above considerations, I therefore propose that the question referred by the Landesgericht of Linz should be answered as follows:

Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours must be interpreted as meaning that the organiser and/or retailer are to be regarded as liable also for non-material damage caused to the consumer by the non-performance or improper performance of a package contract.