# JUDGMENT OF THE COURT

15 June 1999 *

In Case C-140/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesgericht Linz, Austria, for a preliminary ruling in the proceedings pending before that court between

**Walter Rechberger and Renate Greindl**

**Hermann Hofmeister and Others**

and

**Republic of Austria**

on the interpretation of Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59) and on the conditions under which a Member State incurs liability for loss or damage caused to individuals through a breach of Community law,

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, G. Hirsch and P. Jann, Presidents of Chambers, G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Rechberger and Ms Greindl, by Wolfgang Graziani-Weiss, of the Vienna Bar,

— Mr Hofmeister and others, by Christian Ebert, of the Vienna Bar,

— the Republic of Austria, by Harald Ropper, Hofrat at the Office of the Finanzprokuratur, Vienna,

— the French Government, by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Régine Loosli-Surrans, Chargée de Mission in the same directorate, acting as Agents,

— the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, assisted by Stephen Richards and Jon Turner, Barristers,

— the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, assisted by Maria Pflügl and Thomas Eilmansberger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Rechberger and Ms Greindl, represented by Wolfgang Graziani-Weiss; Mr Hofmeister and others, represented by Christian Ebert; the Republic of Austria, represented by Harald Ropper; the Swedish Government, represented by Erik Brattgård, Departementsråd of the Legal Secretariat (EU) of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Stephanie R. Ridley, assisted by Jon Turner and Philip Sales, Barristers; and the Commission, represented by Maria Pflügl and Thomas Eilmansberger, at the hearing on 5 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 June 1998,

gives the following

## Judgment

1 By order of 26 March 1997, received at the Court on 15 April 1997, the Landesgericht Linz (Regional Court, Linz) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, hereinafter 'the Directive') and on the conditions under which a Member State

incurs liability for loss or damage caused to individuals through a breach of Community law.

2 Those questions were raised in proceedings between Mr Rechberger, Ms Greindl, Mr Hofmeister and others and the Republic of Austria concerning the liability of the Republic of Austria for failure to transpose the Directive properly into national law, which prevented the plaintiffs from obtaining the reimbursement of money paid to a travel organiser who became insolvent.

3 The purpose the Directive, according to Article 1 thereof, 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.

4 Article 2 of the Directive provides:

'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.

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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;

...

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

...'

5 Articles 3 to 6 of the Directive contain provisions designed to protect the consumer against certain risks inherent in package travel, namely the risks relating to misleading information in descriptive matter concerning the package, the arrangements for payment of the package price and the spreading of responsibilities between the organiser and/or retailer of the package and the various providers of the services comprising the package.

6 Article 7 of the Directive provides that the organiser of the package tour or holiday is to provide 'sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency'.

7 According to Article 9, the Member States were to bring into force the measures necessary to comply with the Directive before 31 December 1992. However, in accordance with the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is based (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1), the Republic of Austria was required to implement the Directive by 1 January 1995.

8 The Directive was transposed into Austrian law by a series of legislative measures. As regards Article 7 of the Directive, the Austrian Government adopted, on 15 November 1994, the Reisebüro-Sicherungsverordnung (Regulation on security provided by travel agencies, BGBl. No 881 of 15 November 1994, p. 6501, hereinafter 'the Regulation'). Paragraph 3(1) of the Regulation provides that the travel organiser must, by entering into a contract of insurance with an insurance company authorised to operate in Austria, guarantee the traveller the refund of money paid over, in so far as the travel services have not been provided, whether wholly or in part, as a result of the organiser's insolvency and the refund of the costs of repatriation incurred as a result of the organiser's insolvency. Under Paragraph 4 of the Regulation the organiser may also guarantee the traveller the services mentioned above by setting up an irrevocable and unconditional bank guarantee issued by a credit institution authorised to conduct business in Austria, or by way of a similar declaration of guarantee issued by a body governed by public law.

9 Paragraph 3(2) of the Regulation provides that the value of the guarantee 'must be no less than 5% of the organiser's business turnover in the corresponding quarter of the previous calendar year. In the first year of business, the amount of cover is to be based on the estimated turnover from the intended activity. If the travel organiser receives deposits from customers of more than 10% of the price

of the trip or if he receives the balance of the price more than ten days prior to departure, the amount covered must be at least 10% of the reference value mentioned in the preceding sentence'.

10 In accordance with Paragraph 6 thereof, the Regulation applies to all packages booked after 1 January 1995 with a departure date of 1 May 1995 or later.

11 The plaintiffs in the main action are subscribers to the daily newspaper *Neue Kronenzeitung*. In November 1994 they received a letter from the publisher informing them that, to thank subscribers for their loyalty, the newspaper had arranged for the travel organiser Arena-Club-Reisen to offer them by way of gift (save for airport taxes) a four or seven day trip to one of four European destinations.

12 The offer included, in particular, the following services: flight with on-board refreshments, three or six nights' accommodation in a double room with breakfast in a four-star hotel, and guided tours. Persons travelling with subscribers were required to pay the price set out in a brochure. If a subscriber decided to travel alone, he was required to pay a single-room supplement of ATS 500.

13 Subscribers who accepted the offer received a confirmation of their booking from the travel organiser and were required to pay the organiser a deposit of 10% of the relevant charges, the balance being payable no later than ten days before the scheduled departure date.

14 The offer proved to be far more successful than the travel organiser had anticipated, and this caused the organiser logistical and financial difficulties which led it to apply, on 4 July 1995, for bankruptcy proceedings to be initiated against it. The advertising campaign organised by *Neue Kronenzeitung* was

subsequently held by the Austrian Supreme Court to be incompatible with national competition law.

15 The plaintiffs in the main action booked their trips between 19 November 1994 and 12 April 1995. Some of them were to travel alone, others in the company of one, two or three persons. They all paid the whole of the travel costs in advance. However, the trips, which were to take place between 10 April and 23 July 1995 according to the individual bookings, were cancelled for a number of reasons.

16 For three of the plaintiffs in the main action who made bookings in 1994 no guarantee was provided since the Regulation only applied to package travel booked after 1 January 1995. Two of the three registered their claims as creditors in the organising company's insolvency, but although they were admitted as creditors they failed to obtain any settlement from the available assets in the estate. The payments of another three of the plaintiffs who booked their trips after 1 January 1995 and were to leave after 1 May 1995 were in principle covered by a guarantee issued in accordance with the Regulation. However, the bank guarantee of ATS 4 000 000 issued by the travel organiser was insufficient to reimburse the travel costs they had paid, the final level of cover being only 25.38% of the amount paid.

17 The plaintiffs brought an action against the Republic of Austria before the Landesgericht Linz, before which they claimed that Austria was liable for its failure to transpose Article 7 of the Directive in good time and in full, in order to recover the full amount they had paid over, in so far as they had not yet been reimbursed. The Republic of Austria disputed its liability, arguing *inter alia* that the subscribers who had made bookings to travel alone did not fall within the scope of the Directive, that, given the date on which the Regulation entered into force and given the other measures adopted with a view to transposing the Directive, there had been no serious breach of Community law, and that there was no causal link in this case in that, quite aside from any liability on the part of the State, there were circumstances of fact, not ordinarily foreseeable, which had decisively contributed to the damage caused to the travellers.

18 In those circumstances, the national court decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the protective purpose of Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours also extend to trips for which, on the basis of the contract, the principal contractor has to pay

(a) if he travels alone, apart from airport security tax (departure tax), only a single-room supplement, or

(b) if he is accompanied by one or more persons paying the full price, only the airport security tax (departure tax)

and nothing in respect of the flight and accommodation in a room with two or more beds?

(2) Do such trips fall within the scope of the directive even when they are offered by the highest circulation daily newspaper of a Member State as a "gift" exclusively for its subscribers as part of an advertising campaign that constitutes an anti-competitive practice?

If the answers to Questions 1 and 2 are in the affirmative:

(3) Has Article 7 of the directive been transposed within the period prescribed if the national legislation published on 15 November 1994 only applies to package travel, package holidays and package tours booked after 1 January 1995 with a departure date of 1 May 1995 or later, particularly

(a) in view of the fact that the Republic of Austria became part of the European Economic Area on 1 January 1994, and

(b) taking into account the accession of the Republic of Austria to the European Union on 1 January 1995?

If the answer to Question 3 is in the negative:

(4) Does the failure to transpose a single article of the directive (Article 7) within the prescribed period constitute in itself a serious breach of Community law such as to give rise to a right to reparation for those who have sustained loss or damage where the Member State has adopted appropriate measures within the prescribed period to transpose all other provisions of the directive?

(5) Is Article 7 of the directive to be interpreted as meaning that its objectives are not attained where national legislation

(a) requires, for the coverage of risk, only an insurance contract or bank guarantee with a sum insured (cover) of no less than 5% of the organiser's turnover in the corresponding quarter of the previous calendar year,

(b) only requires the organiser, in his first year of business, for the purpose of determining the sum insured (cover), to base the amount of cover on his estimated turnover from his intended business as a travel organiser,

(c) does not in this connection take account of any increase in the organiser's turnover during the current year, and

(d) does not impose any duty on the Member State to monitor the sums required by way of security?

(6) Is there a direct causal link between late or incomplete transposition of Article 7 and loss or damage caused thereby to the consumer, such as to render the Member State liable to reimburse unsecured payments in full, where the Member State shows that unlawful conduct on the part of the organiser (a third party) or a wholly exceptional and unforeseeable increase in risk is the cause (or an essential contributory cause) of the loss or damage?'

## Preliminary observations

19 By these questions the national court is essentially asking whether it must grant the relief which the plaintiffs in the main action are seeking, on the basis of the Republic of Austria's liability under Community law, for loss or damage resulting from allegedly late and incomplete transposition of Article 7 of the Directive.

20 In this connection, the national court refers to the judgment in Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845 in which the Court, dealing with the issue of alleged failure to transpose Article 7 of the Directive, found it necessary to examine the circumstances which render a Member State liable under Community law, for loss or damage caused to individuals in cases where a directive has not been transposed within the prescribed period.

21 At paragraph 20 of that judgment, the Court held that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty and that the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage. The Court also held, at paragraph 21, that individuals who have suffered damage have a right to reparation where three conditions are met: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the individuals.

22 As to the first condition, the Court held, at paragraph 42 of the same judgment, that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organiser's insolvency. It also held, at paragraph 44, that the persons having rights under Article 7 are sufficiently

identified as consumers, as defined by Article 2 of the Directive, and that the same holds true of the content of those rights which consists in a guarantee that money paid over by purchasers of package travel will be refunded and that they will be repatriated in the event of the insolvency of the organiser. In those circumstances, the Court held, the purpose of Article 7 of the Directive must be to grant individuals rights whose content is determinable with sufficient precision.

23 Since the Court has already ruled, in *Dillenkofer*, that Article 7 confers rights on individuals the content of which can be defined, it follows that the questions referred for a preliminary ruling in the present case have been asked in order to enable the national court to form a view as to whether the Republic of Austria has failed to fulfil its obligations under Article 7 of the Directive with regard to the plaintiffs in the main action and, if necessary, whether that breach is sufficiently serious and, finally, whether there is a causal link.

## The first and second questions

24 By its first and second questions, which it is appropriate to consider together, the national court is essentially asking whether Article 7 applies to trips which are offered by a daily newspaper as a gift exclusively to its subscribers as part of an advertising campaign that contravenes national competition law and for which the principal contractor, if he travels alone, pays only airport taxes and a single-room supplement or, if he is accompanied by one or more persons paying the full rate, airport taxes only.

25 The plaintiffs in the main action, the French and United Kingdom Governments and the Commission all submit that that question must be answered in the affirmative.

26 The Austrian Government, on the other hand, argues that there can be said to be a package only where the consumer is required to pay, as consideration for all the services stipulated in the contract, a price which corresponds to the value, and is calculated on the basis, of all those services. If the person travelling is only required to pay a single-room supplement instead of a global price for a trip which is essentially offered free of charge (apart from minor ancillary costs) then it is not a package within the meaning of the Directive. Moreover, the scope of the Directive does not extend to trips which are neither sold nor offered for sale on the market to an unlimited number of potential customers but are instead offered as a gift only to a predetermined class of persons.

27 It must be borne in mind first of all that the purpose of Article 7 is to protect consumers against the risks arising from the insolvency of the organiser of the package travel. Those risks, inherent in the contract concluded between the purchaser and the organiser, stem from the payment in advance of the price of the package and from the spread of responsibilities between the travel organiser and the various providers of the services which, in combination, make up the package. Consequently, the result prescribed by Article 7 of the Directive entails the grant to the traveller of rights guaranteeing the refund of money that he has paid over and his repatriation in the event of the organiser's insolvency (Case C-364/96 *Verein für Konsumenteninformation* v *Österreichische Kreditversicherungs* [1998] ECR I-2949, paragraph 18).

28 In the present case, is should first be observed that the plaintiffs in the main action found themselves exposed to precisely those risks against which Article 7 was intended to provide protection. First, when the plaintiffs paid over money before their departure, they were exposed to the risk of losing that money; secondly, they were exposed to the risk of being stranded at their destination should the organiser become insolvent during their trip and the carrier refuse, because of that insolvency, to provide the service required for the return journey.

29 It must also be borne in mind that, according to Article 2(1) of the Directive, all that is needed to constitute a package is the pre-arranged combination of at least

two of the three components mentioned in that paragraph, when sold or offered for sale at an inclusive price.

30 Taking into account the objective of Article 7, and having regard to that definition of 'package', it must be held that Article 7 applies even if the consideration the purchaser is required to pay does not correspond to the total value of the package or relates only to a single component of it.

31 Next, it must be observed that there is no basis in the text of the Directive for limiting its scope to packages offered to a potentially unlimited number of consumers and that it would be contrary to the purpose of the Directive to do so. In order for the Directive to apply, it is sufficient if the package is sold or offered for sale within the territory of the Community at an inclusive price and includes at least two of the components mentioned in Article 2(1) of the Directive.

32 Lastly, it must be noted that the fact that the advertising campaign consisting in the offer of free trips by the daily newspaper *Neue Kronenzeitung* was found to be incompatible with national competition law cannot prevent those trips from constituting package travel within the meaning of the Directive.

33 In those circumstances, the answer to the first and second questions must be that Article 7 of the Directive applies to trips which are offered by a daily newspaper as a gift exclusively to its subscribers as part of an advertising campaign that contravenes national competition law and for which the principal contractor, if he travels alone, pays airport taxes and a single-room supplement or, if he is accompanied by one or more persons paying the full rate, airport taxes only.

## The third question

34 By its third question the national court expresses its uncertainty as to the Republic of Austria's obligations concerning the time-limit for providing the security prescribed in Article 7 of the Directive.

35 Referring to the fact that the Regulation applies only to package travel booked after 1 January 1995 with a departure date of 1 May 1995 or later, the national court asks, *inter alia*, what could be the effect, in this context, of the Republic of Austria's becoming, as from 1 January 1994, a party to the Agreement on the European Economic Area.

36 It must be borne in mind first of all that, in accordance with Article 7 of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, signed in Oporto on 2 May 1992 (OJ 1994 L 1, p. 3, hereinafter 'the EEA Agreement'), in conjunction with section 11 of Protocol 1 to the EEA Agreement, the Republic of Austria was required to transpose the Directive as soon as the EEA Agreement entered into force, that is to say, on 1 January 1994.

37 The national court therefore asks itself whether the Republic of Austria may be liable under the EEA Agreement for loss or damage caused to individuals as a result of a failure on its part to comply with that obligation.

38 In this connection, it is sufficient to observe that, as the Swedish Government and the Commission have pointed out and as is clear from paragraphs 28 to 31 of the judgment of the Court of today's date in Case C-321/97 *Andersson* [1999] ECR I-3551, the Court does not have jurisdiction, either under Article 177 of the Treaty or under the EEA Agreement, to rule on the interpretation of the EEA Agreement as regards its application by the Republic of Austria during the period prior to the accession of that Member State to the European Union.

39 Moreover, in view of the objective of uniform interpretation and application which informs the EEA Agreement, it should be pointed out that the principles governing the liability of an EFTA State for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdóttir* (E-9/97, not yet published in the *EFTA Court Reports*).

40 Accordingly, the Court only has jurisdiction to rule on the question whether a Member State which acceded to the European Union on 1 January 1995 has properly transposed Article 7 of the Directive if it has adopted legislation which protects travellers who booked package travel after 1 January 1995 but limits that protection to trips with a departure date of 1 May 1995 or later.

41 The plaintiffs in the main action maintain that Article 7 of the Directive was not transposed in good time given that the Member State ought to have transposed it into national law in such a way that that provision became fully effective as from 1 January 1995.

42 The Republic of Austria contends that, where a Member State has adopted, within the time allowed to it for transposing a directive, measures which are compatible with the objective of that directive and which enter into force upon the expiry of the prescribed period, there can be no question of the directive's not having been transposed in good time.

43 The Commission contends that legislation adopted by a Member State which acceded to the European Union on 1 January 1995 and protecting only travellers who made their bookings after 1 January 1995 and whose departures were scheduled for 1 May 1995 or later has not properly transposed Article 7 of the Directive.

44 As regards the Republic of Austria's obligation under Community law to implement the Directive after its accession to the European Union on 1 January

1995, it should be observed that, in *Dillenkofer and Others*, at paragraph 50, the Court held that, in order to ensure full implementation of Article 7 of the Directive, the Member States should have adopted, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from the date specified for implementation of the Directive, they would be refunded money paid over and be repatriated in the event of the organiser's insolvency.

45 Accordingly, the security prescribed by Article 7 of the Directive must cover all contracts for package travel entered into from 1 January 1995 onwards and relating to trips to be taken after that date, which means that a provision implementing that article but only protecting travellers whose departure has been scheduled for 1 May 1995 or later is incompatible with the Directive.

46 It must, however, be pointed out that the Member States' obligation to adopt the measures necessary to guarantee purchasers of package travel, as from the date prescribed for transposition of the Directive, the protection required by Article 7 does not extend to contracts concluded before the date prescribed for transposition of the Directive. Given that there is no basis in Article 9 of the Directive, which specifies the date for implementation of the Directive, for an obligation to extend such a guarantee to contracts already in force on that date, the protection for consumers laid down in Article 7 cannot be extended to a period in which the guarantee arrangements did not yet have to be introduced.

47 In that context, it should be observed that the arrangements prescribed by Article 7 provide protection for the consumer in the case of contracts for package travel and that the consumer cannot count on the protection accorded to him under the guarantee arrangements — the costs of which must ordinarily be borne by himself — until they have been introduced.

48 In view of the foregoing, the answer to the third question must be that a Member State which acceded to the European Union on 1 January 1995 has not properly transposed Article 7 of the Directive if it has adopted legislation which protects travellers who have booked package travel after 1 January 1995 but limits that protection to trips with a departure date of 1 May 1995 or later.

## The fourth question

49 By its fourth question the national court is essentially asking whether such defective transposition of Article 7 of the Directive constitutes a sufficiently serious breach of Community law to give rise to a right to reparation where, as is the case here, all the other provisions of the Directive have been implemented.

50 According to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers. Factors which the competent court may take into consideration include the clarity and precision of the rule breached (Case C-392/93 *The Queen* v *H.M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631, paragraph 42).

51 In the present case it must be held that neither Article 7 nor any other provision of the Directive may be interpreted as conferring a right upon the Member States to limit the application of Article 7 to trips taken on a date later than the time-limit prescribed for transposition of the Directive. The Member State in question here enjoyed no margin of discretion as to the entry into force, in its own law, of the provisions of Article 7. That being so, the limitation of the protection prescribed by Article 7 to trips with a departure date of 1 May 1995 or later is manifestly incompatible with the obligations under the Directive and thus constitutes a sufficiently serious breach of Community law.

52 The fact that the Member State has implemented all the other provisions of the Directive does not alter that finding.

53 In view of the foregoing the answer to the fourth question must be that transposition of Article 7 of the Directive in a way that limits the protection prescribed by that provision to trips with a departure date four months or more after the expiry of the period prescribed for transposing the Directive constitutes a sufficiently serious breach of Community law, even where the Member State has implemented all the other provisions of the Directive.

## The fifth question

54 By its fifth question the national court asks whether Article 7 of the Directive has been properly transposed where national legislation does no more than require, for the coverage of the risk, a contract of insurance or a bank guarantee under which the amount of cover provided must be no less than 5% of the organiser's turnover in the corresponding quarter of the previous calendar year, and which requires an organiser just starting up in business to base the amount of cover on his estimated turnover from his intended business as a travel organiser, takes no account of any increase in the organiser's turnover during the current year and does not impose any duty on the Member State to monitor the sums required by way of security.

55 The French Government and the Commission submit that, because Article 7 of the Directive imposes an obligation of result, it must be interpreted as meaning that its objectives are not attained if the national legislature does not take the appropriate measures to ensure the refund of all money paid over and the repatriation of consumers in the event of the organiser's insolvency.

56 The United Kingdom Government contends that it is for the Member State to satisfy itself, having regard to the particular conditions prevailing within its territory in the travel market, that the amount covered by the guarantee prescribed by its national legislation attains the objectives of Article 7 of the Directive.

57 The Austrian Government maintains that the effectiveness and comprehensiveness of the measures by means of which Member States transpose directives into national law must be assessed by reference to the state of knowledge prevailing at the time of transposition. It is impossible, in that respect, to make an assessment *a posteriori*, especially where, with respect to the factual situations to be regulated, there was no legal instrument in existence and no previous experience at the time of transposition. For the purposes of the guarantee, the majority of Member States opted, like the Republic of Austria, for the conclusion of a contract of insurance or the provision of a bank guarantee by the travel organiser. The legal mechanism chosen is, on any view, an appropriate implementing measure and one which is consistent with the objective.

58 The Austrian Government then states that it is appropriate to link the amount of the sum secured to the travel organiser's turnover since this is indicative of the volume of activity and the risk of insolvency arising from it. Fixing the amount of the guarantee at 5% of the quarterly turnover achieved in the preceding calendar year constitutes in itself an implementing measure which is both consistent with the objective and adequate, since that method of calculation proved to be adequate in the case of a bankruptcy following on from the insolvency of a travel organiser who was unique in terms of the size of his business and had been operating in the market for several years. It is also legitimate, in the case of travel organisers new to the market, to link the amount of insurance cover to the estimated turnover, in the absence of other relevant parameters. The fact that in the main action the claims of the subscribers which fell within the scope of the Regulation were secured only as to 25.38% is not the direct result of imperfect transposition of the Directive, but of an exceptional and unforeseeable coincidence of unlawful acts on the part of third parties.

59 In this connection, it should be borne in mind that, as the Court has stated when examining the first two questions, the objective of Article 7 of the Directive is to

protect consumers against the risks arising from the insolvency of travel organisers.

60 According to the actual wording of Article 7 of the Directive, that provision prescribes, as the result of its implementation, an obligation for the organiser to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency (*Dillenkofer and Others*, paragraph 34).

61 Consequently, Article 7 is designed to safeguard all the consumer rights mentioned in that provision and thus to protect consumers against all the risks defined therein and resulting from the insolvency of travel organisers.

62 As Advocate General Saggio observed at section 48 of his Opinion, having regard to the fact that the sum secured is calculated on the basis of the turnover achieved by a given agency during the preceding year or, in the case of new travel organisers, on the basis of the turnover estimated by the organiser himself, the specific arrangements prescribed by the Austrian Government were inadequate given that the Regulation only requires a limited guarantee both in terms of the amount of cover and the basis on which that cover is calculated. That system therefore appears structurally incapable of catering for events in the economic sector in question, such as a significant increase in the number of bookings in relation to either the turnover for the previous year or the estimated turnover.

63 There is no indication, either in the recitals in the preamble to the Directive or in the wording of Article 7, to suggest that the guarantee prescribed by that provision might be limited, as it was when it was put into effect in Austria. Even if it is true, as the Austrian Government has observed, that practical difficulties

may attend the establishment of a guarantee system covering the whole of the risks defined in Article 7 of the Directive, the fact remains that it is a system of this kind that has been prescribed by the Community legislature.

64 It must therefore be held that national legislation properly transposes the obligations under Article 7 of the Directive only if, whatever may be the detailed rules laid down for its application, it achieves the result of providing the consumer with an effective guarantee of the refund of all money paid over and his repatriation in the event of the travel organiser's insolvency.

65 As to the question whether there is an obligation under Article 7 of the Directive for the Member States to establish a system for monitoring the sums secured, it should be observed, as the United Kingdom Government pointed out, that the Directive imposes no such obligation. Nor has it been shown that the introduction of a system for monitoring the sums secured is necessary for attaining the objectives of Article 7.

66 In light of the foregoing, the answer to the fifth question must be that Article 7 of the Directive has not been properly transposed where national legislation does no more than require, for the coverage of the risk, a contract of insurance or a bank guarantee under which the amount of cover provided must be no less than 5% of the organiser's turnover during the corresponding quarter of the previous calendar year, and which requires an organiser just starting up in business to base the amount of cover on his estimated turnover from his intended business as a travel organiser and does not take account of any increase in the organiser's turnover during the current year.

## The sixth question

67 By its sixth question the national court is essentially asking whether, where there is a direct causal link between the conduct of the State which has only partially transposed the directive and the loss or damage suffered by individuals, that causal link might not render that State liable if it shows that there was imprudent conduct on the part of the travel organiser or that exceptional or unforeseeable events occurred.

68 The plaintiffs in the main action maintain that unlawful conduct on the part of the travel organiser or any other third party cannot exempt the Member State concerned from liability. The question concerning exceptional and unforeseeable increase in risk is irrelevant in the present case since a substantial increase in turnover can never be unforeseeable and provision for it should in any event have been made by the national legislature.

69 The Republic of Austria argues that, in any event, there is no direct causal link between late or incomplete transposition of Article 7 of the Directive and the loss or damage suffered by consumers if the date and scope of the implementing measures can have contributed to the occurrence of the loss or damage only as a result of a chain of wholly exceptional and unforeseeable events.

70 According to the United Kingdom and Swedish Governments, it is for the national court to determine, according to the principles applicable under its national law, whether, in any given case, there is a direct causal link between, on the one hand, a Member State's failure to transpose Article 7 within the prescribed period or to do so adequately and, on the other hand, the loss or

damage suffered by the consumer, such as to render the Member State liable and to require it to reimburse the unsecured sums in full.

71 According to the Commission, that causal link should be held to exist even when the organiser's insolvency and its extent are to be attributed to wholly exceptional and unforeseeable causes.

72 In this connection, it should be observed that, as the Court held in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, at paragraph 65, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

73 In the present case, it should first be observed that the national court found that there was such a direct causal link between the conduct of the Member State which had failed to transpose the Directive in full and the damage sustained by the individuals.

74 Next, it should be pointed out that Article 7 of the Directive imposes an obligation of result, namely to guarantee package travellers the refund of money paid over and their repatriation in the event of the travel organiser's bankruptcy. Such a guarantee is specifically aimed at arming consumers against the consequences of the bankruptcy, whatever the causes of it may be.

75 In those circumstances, the Member State's liability for breach of Article 7 of the Directive cannot be precluded by imprudent conduct on the part of the

travel organiser or by the occurrence of exceptional and unforeseeable events.

76 Such circumstances, in as much as they would not have presented an obstacle to the refund of money paid over or the repatriation of consumers if the guarantee system had been implemented in accordance with Article 7 of the Directive, are not such as to preclude the existence of a direct causal link.

77 Consequently, the answer to the sixth question must be that once a direct causal link has been established a Member State's liability for breach of Article 7 of the Directive cannot be precluded by imprudent conduct on the part of the travel organiser or by the occurrence of exceptional or unforeseeable events.

## Costs

78 The costs incurred by the French, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landesgericht Linz by order of 26 March 1997, hereby rules:

1. Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours applies to trips which are offered by a daily newspaper as a gift exclusively to its subscribers as part of an advertising campaign that contravenes national competition law and for which the principal contractor, if he travels alone, pays airport taxes and a single-room supplement or, if he is accompanied by one or more persons paying the full rate, airport taxes only.

2. A Member State which acceded to the European Union on 1 January 1995 has not properly transposed Article 7 of Directive 90/314 if it has adopted legislation which protects travellers who have booked package travel after 1 January 1995 but limits that protection to trips with a departure date of 1 May 1995 or later.

3. Transposition of Article 7 of Directive 90/314 in a way that limits the protection prescribed by that provision to trips with a departure date four months or more after the expiry of the period prescribed for transposing the directive constitutes a sufficiently serious breach of Community law, even where the Member State has implemented all the other provisions of the directive.

4. Article 7 of Directive 90/314 has not been properly transposed where national legislation does no more than require, for the coverage of the risk, a contract of insurance or a bank guarantee under which the amount of cover provided must be no less than 5% of the organiser's turnover during the corresponding quarter of the previous calendar year, and which requires an organiser just starting up in business to base the amount of cover on his estimated turnover from his intended business as a travel organiser and does not take account of any increase in the organiser's turnover in the current year.

5. Once a direct causal link has been established, a Member State's liability for breach of Article 7 of Directive 90/314 cannot be precluded by imprudent conduct on the part of the travel organiser or by the occurrence of exceptional or unforeseeable events.

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|---|---|---|
| Rodríguez Iglesias | Kapteyn | Hirsch |
| Jann | Mancini | Moitinho de Almeida |
| Gulmann | Sevón | Wathelet |

Delivered in open court in Luxembourg on 15 June 1999.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President