Key Issues: **Package Holiday – Liability of Travel Company – Concept of "supplier of services" - Preliminary Ruling**

Case: **X v Kuoni Travel Ltd**

Reference: **Case C-578/19, CJEU (Third Chamber), 18 March 2021**

Legislation: **Directive 90/314/EEC**

Background

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

Clause 2.2 of that contract provides:

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

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

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

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

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

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

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

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

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

Consideration by CJEU

As regards that first part of the questions put by the referring court, the Court of Justice observed that the aim of Directive 90/314 is, as set out in Article 1 thereof, to approximate the laws, regulations and administrative provisions of the Member States relating to package travel, package holidays and package tours sold or offered for sale in the territory of the European Union.

As is clear from Article 2 of Directive 90/314, the contracts covered by that directive are contracts concluded between a consumer, on the one hand, and an organiser or retailer, on the other, which concern a package consisting in the sale at an inclusive price of a service of more than 24 hours or including overnight accommodation, which combines at least two of the three following components: transport, accommodation

and other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package (‘package travel contracts’).

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

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

In such a case, the need for a uniform application of EU law and the principle of equal treatment require that the wording of a provision of EU law must normally be given an independent and uniform interpretation throughout the European Union.

In that connection, the Court of Justice pointed out it is settled case-law that the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part.

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

The CJEU held that:

The third indent of Article 5(2) of Council Directive 90/314/EEC, in so far as it provides for a ground for exemption from liability of an organiser of package travel for the proper performance of the obligations arising from a contract relating to such travel, concluded between that organiser and a consumer and governed by that directive, must be interpreted as meaning that, in the event of non-performance or

improper performance of those obligations, which is the result of the actions of an employee of a supplier of services performing that contract:

- **that employee cannot be regarded as a supplier of services for the purposes of the application of that provision, and**
- **the organiser cannot be exempted from its liability arising from such non-performance or improper performance, pursuant to that provision.**

Why is this decision important?

The decision deals a significant blow to tour operators in limiting the circumstances in which they are able to avoid liability for the acts and omissions of employees of their suppliers. The acts or omissions of an employee of a supplier of services, in the performance of obligations arising from a package travel contract, resulting in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer cannot be regarded as events which cannot be foreseen or forestalled.

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