Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements Workshop with Member States 13 June 2016

Chair: Ms Veronica MANFREDI, Head of Unit, DG JUST E2, Consumers and Marketing Law.
Other participants from DG JUST: Ms. Despina SPANOU (Director of Directorate E - Consumers), Gösta PETRI, Robert MATHIAK, Marlene MELPIGNANO, Mireille BUSSON, Katrín KVARAN (all from DG JUST E2).
Agenda: See agenda attached.

Disclaimer: While the Commission services are trying to assist Member States as much as possible in the transposition process, a binding interpretation of Directive (EU) No 2015/2302 can only be provided by the Court of Justice of the European Union.

Welcome – purpose and objectives of the meeting

Ms. Despina SPANOU formally welcomed the delegates from the Member States to the second expert meeting on the transposition of the new Package Travel Directive (PTD). She expressed how important it is to have workshops at an early stage of the transposition process. In relation to insolvency protection Ms. SPANOU stressed that this issue had given rise to difficulties in the past and that it is essential to ensure a common understanding on this point. She also referred to the ongoing REFIT exercise and to the Consumer Summit scheduled for 17/18 October 2016. Ms. SPANOU further stated that **COM,** at this point, does not yet know if it will produce guidelines for the new PTD. It would still have to be assessed whether such guidelines are necessary. Many questions could be resolved in the workshops. An awareness-raising campaign would in any event be useful. In this connection Ms. SPANOU emphasised the importance of involving the ECC-network.

Roundtable on Member States' progress and schedule in the transposition process

The Member States indicated their progress and schedule in the transposition process, and whether they at this point see problems in their national rules that should be addressed in the transposition process, in particular regarding insolvency protection.

Belgium will draft new provisions by the end of this year. In addition to the main fund GFG, which gave a presentation at the last workshop, there is an additional major travel guarantee fund in Belgium.

Bulgaria stated that the first meeting of the transposition working group had been last week. They will communicate more information in writing.

Czech Republic stated that some changes to its insolvency protection rules had already been adopted (e.g. possibility of a bank guarantee and tightened reporting duties), while others are being planned. E.g. there is now a monthly reporting obligation for organisers and an

obligation for insurers to inform the Ministry within 5 days if an operator shows signs of financial instability and insufficient protection. They will at a later stage have to ensure that LTAs are covered by the legislation. **Czech Republic** is planning an impact assessment regarding certain solutions, including the creation of a fund in addition to an insurance-based system.

Denmark indicated that they are organising meetings with Danish stakeholder so as to understand how the Directive could work in the real world. Only small changes to the current insolvency protection system are being envisaged. The plan is to have the transposition law adopted by Parliament in December 2017.

Germany indicated that they are planning some changes to the insolvency protection rules, e.g. specifying that the protection applies regardless of the traveller's residence, and inserting clearer rules e.g. on refunds.

Estonia reported that, while consultations of stakeholders are ongoing, they do not know yet what needs to be changed in their system. They will, however, most likely keep the current system as far as possible. Estonia sees some problems with the calculation of repatriation costs and the calculation of the security for LTAs. They are planning to have the transposition law adopted in the autumn of 2017.

Regarding their current insolvency protection system, **Ireland** praised the tables distributed by **COM**, and explained that they will *inter alia* consult the enforcement authorities in connection with the transposition.

Norway stated that the current insolvency protection system is working well so that no major changes are envisaged. It is planned to submit a legislative proposal to Parliament in spring 2017. A public hearing is planned for autumn 2017.

Spain explained that several meetings of a working group with relevant ministries have already taken place and that stakeholders have been consulted. **Spain** further indicated that it will probably set up a guarantee fund. Because of the general elections in June 2016, the process is currently suspended. The process of adapting the insolvency protection rules to the case law of the CJEU is still ongoing in the regions (Comunidades autónomas).

In **France** a consultation process had been launched (industry and other administrations involved), and it is planned to alter the tourism code at the end of 2016 or early in 2017. LTAs are the main issue raised by stakeholders at this stage. Since the beginning of 2016, all payments have to be covered by the insolvency protection. **COM** expressed that it would be helpful if France could provide the new rules.

Croatia reported that a transposition working group has been formed, which also includes business representatives, and that there have been no complaints so far regarding the current insolvency protection system.

Italy announced that they will submit information at a later stage as there was no representative from the relevant ministry.

Cyprus stated that they are planning a public hearing at the end of October 2016, and that they hope that the proposal can be sent to Parliament after the summer of 2017. Regarding insolvency protection, **Cyprus** is looking at necessary changes and best practices. However, they consider that the current system has been functioning well.

Latvia explained that a consultation process with stakeholders has been launched. Having had some problems with the current system, **Latvia** will make some changes. **Latvia** is considering a combined system, consisting of a guarantee fund and insurance policies. The calculation of the cover based on turnover, and compulsory insolvency protection for retailers are being considered. Results are expected after this summer and a draft law should be ready by the end of 2016, so that the proposal can go to Parliament in 2017.

In **Lithuania** a working group has been consulted stakeholders are being consulted. In light of many insolvencies Lithuania improved the system in 2015. **Lithuania** is considering further changes and is looking into different alternatives, including a guarantee fund, taking into account good solutions and best practices. In that respect, the comparative tables compiled by **COM** are seen as very helpful.

Luxembourg stated that consultations have started and that some operators are not pleased about the costs of insolvency protection when they are not at risk of going bankrupt. The amounts TAs should pay are being examined. **Luxembourg** would appreciate guidelines on the new PTD, especially on its scope. Replying to **COM**, **Luxemburg** explained that, in Luxembourg, all online businesses are registered as TAs, including air lines.

Hungary reported that there have been many discussions with stakeholders, including low-cost airlines. LTAs are said to pose particular difficulties. It is proposed to have a practical look in particular at the digital sphere at the next workshop. In **Hungary** insolvency protection is to be provided through an insurance policy, a bank guarantee or a cash deposit. Hungary would like to hear more about the funds in some other Member States. **COM** welcomed the idea of discussing the scope in relation to the digital market.

Malta is planning to adopt the new rules at the end of 2017. Regarding insolvency protection, changes would be necessary. **Malta** is considering the creation of a managing board that will manage the system, the establishment of a fund, the obligation for TOs to have a bank guarantee, and the provision that travellers will receive a certificate when buying a package/LTA. **Malta** sees LTAs as the main issue, and considers it challenging to identify LTAs and to enforce the rules. **COM** recognised that this is indeed a common concern for several Member States.

The Netherlands are planning a draft law for the end of this year, and are consulting stakeholders. Also Dutch stakeholders are said to have problems with the concept of LTAs. The Netherlands would like to keep the current insolvency protection system. Their fund

currently has significant assets, which is why the contributions of TOs are being reviewed, while making sure that there is enough money to cover insolvencies.

Austria could not yet give information on the timeframe for the transposition. Regarding insolvency protection, **Austria** is assessing what kind of changes may be necessary.

Poland found the documents compiled by **COM** very useful. There is a draft transposition law. The proposed changes encompass the creation of a complementary Tourist Guarantee Fund financed by operators, in addition to the existing system of bank guarantees and insurance policies. It will be activated if the cover of an insurance policy or bank guarantee is insufficient. The fund will be set up in the autumn of 2016. The transposition act is likely to be adopted in the autumn of 2017.

Portugal is currently evaluating their system.

In **Slovenia** it is planned to send the draft law to Parliament at the beginning of 2017.

Slovakia is currently conducting an impact assessment on three options for a new insolvency protection system: 1) insurance policies and bank guarantees, 2) a fund and 3) a combination of insurance/bank guarantee and fund. It is planned to send the proposed legislation to Parliament at the end of 2016.

Finland has established two working groups, one on insolvency protection and the other one on other issues. One problem in the current Finnish system is that refunds are too slow, and consumers do not always get full refunds. It is planned to back-up the system of individual guarantees by the State budget.

In **Sweden** two reports are being prepared: 1. report on all PTD issues except for insolvency protection – legislative proposal to be ready at the end of August 2016 to be followed by a public consultation. The 2. report concerns insolvency protection and will be ready at the end of November. The aim is to have a cost-efficient system for companies and the tax payer that is faster than the current system, more flexibility to adapt to changes, as well as more administrative sanctions with fines.

Iceland reported that there were problems after the financial crisis and that some TOs have insufficient security. Businesses, especially small and season TOs argue that they pay too much. Iceland is considering a travel guarantee fund, possibly inspired by the Norwegian and the Danish funds. Further, also scheduled flights will now be included. The definitions will also have to be reviewed. In addition to the revocation of the licence, administrative sanctions are considered where businesses do not submit the required documents.

UK indicated that they have a number of working groups, and a consultation next month. A proposal will be sent to Parliament in autumn 2017. The idea is to keep separate systems for packages with flights and packages without flights, but the scope and LTAs will have to be examined further.

Insolvency protection

COM reminded participants of the principles underlying insolvency protection:

Insolvency protection – effectiveness

- CJEU case law: "effective guarantee of the refund of all money paid over and repatriation"
- Article 17 (2) of Dir. 2015/2302: "The security … shall be effective and shall cover reasonably foreseeable costs". "It shall cover … payments made by or on behalf of travellers in respect of packages, taking into account the length of the period between down payments and final payments and the completion of the packages, as well as the estimated cost for repatriations in the event of the organiser's insolvency,"
- Recital 40: "sufficiently high percentage of the organiser's turnover"
- Factors: "type of packages sold, including the mode of transport, the travel destination, and any legal restrictions or the organiser's commitments regarding the amounts of pre-payments he may accept and their timing before the start of the package"
- Obligation to adapt the insolvency protection in the event of increased risks, including a significant increase in the sale of packages
- Limitation of guarantee for refund for "highly remote risks", for instance the simultaneous insolvency of several of the largest organisers
- Article 17 (4). Activation: performance of travel services is affected by the organiser's insolvency
- See also recital 39: "…Effectiveness implies that the protection should become available as soon as, as a consequence of the organiser's liquidity problems, travel services are not being performed, will not be or will only partially be performed, or where service providers require travellers to pay for them."

Insolvency protection in the Member States – Systems and cover

COM referred to the two documents sent round before the meeting and asked MS to make final checks within one week after the meeting. By way of a rough summary **COM** referred to the following aspects:

- Different systems, e.g. public fund, private fund, insurance policy, bank guarantee, trust account etc. and combinations of those
- Different approaches to the calculation of the required cover and to the level of detail in the laws and regulations – calculation by law, authorities, insurance company, fund etc.
- Principle of full cover for refunds and repatriations or specific amounts (percentages of turnover and/or absolute amounts) laid down in law, often also a combination of both.

Where specific amounts/percentages are laid down in law they may be

- *Maximum amounts* (regardless of prepayments/turnover)
    - Per organiser/retailer – Those are particularly problematic as they are incompatible with the idea of a full refund.

    - Per provider of the security (insurance company, bank, fund etc.) – to be assessed whether they cover "reasonably foreseeable costs" and other than "highly remote risks",
- *Minimum amounts* (can be problematic, in particular if too low and not based on the real extent of payments received etc.)
    - Important how those minimum amounts are determined + context

There may also be limitations in practice, e.g.

- limited resources of a guarantee fund and insufficient insurance cover (despite theoretical right to full refund)
- wrong calculation basis - payments received/turnover + cost of repatriations are underestimated and not updated

Prepayments

- Only a few Member States have specific rules on prepayments; however, in several Member States the amount and timing of prepayments is an important factor for the calculation of the cover.

Insolvency protection – aspects related to reporting and monitoring

- Licensing and other control systems, public registry
- Different system of information flow/reporting and checks involving organisers/retailers, insolvency protection entities and the authorities.
- Different rules on frequency and extent of checks
- Some Member States have explicit rules on notifying increases in turnover, and the obligation to adapt the security accordingly.
- **COM** stressed the importance of an effective monitoring system.

Insolvency protection – aspects related to activation + procedures

- Protection of travellers who are stranded at the holiday destination: Repatriation, hotel bills etc.
- Organisation of repatriation? Direct intervention? Security directly available?
- Before departure and after return: Formalities (evidence, forms etc.) and time-limits for requests and refunds.
- Who manages the procedure (fund, insurer, authority etc.)?
- Direct entitlement against provider of the security? Etc.

Insolvency protection – experience in the MS

COM*'s experience*

- Complaints, EU-pilot exchanges, infringement proceedings, preliminary rulings etc.
- Problems have been identified in terms of approach and/or implementation.
- A frequent problem was the insufficient cover provided by the security. Other problems included the need to first obtain a court judgment confirming the traveller's claim or delays in paying a refund.

*Experience of the **Member States***

- For further discussions **COM** invited Member States to report on problems they have encountered and how they have been resolved or will be resolved.

Finally, COM stressed some key points for the effectiveness of the insolvency protection

- Insolvency protection must be sufficient to cover all received payments and repatriation costs.
- It requires a sound calculation of the necessary protection, solid reporting and supervision, where necessary, adaptation of the security, and credible sanctions.
- Procedures must ensure that travellers can effectively benefit from the protection, i.e. no excessive procedural obstacles.

Insolvency protection – Questions from Member States submitted prior to the workshop

1) **Regarding the term "established" in Article 17(1), is an organiser whose infrastructure is in MS A but is selling his products online on a regular basis in MS B, considered to be established in A or in B?**

COM answered that the organiser is established in Member State A and not in B. Member State A is primarily responsible for supervision in that case, but may need assistance from the other Member State where the organiser sells packages.

2) **If an organiser is established in Member State A, but sells packages also in several other MS and has taken out insolvency protection in different Member States, is it the responsibility of Member State A to ensure that the organiser has effective protection for all its EEA-sales or would the organiser have to establish himself in each of the Member States?**

Each Member State of establishment has to ensure that the insolvency protection is sufficient also for cross-border sales. Article 17 (3): "An organiser's insolvency protection shall benefit travellers regardless of their place or residence, the place of departure or where the package is sold and irrespective of the Member State where the entity in charge of the insolvency protection is located." Exchange of information and cooperation via the contact points will be important. Organisers who want to sell in different Member States may, but do not have to formally establish themselves in all targeted Member States.

3) **Regarding Article 17(1), does "all payments" also mean such payments which are not part of the package, such as payments for visas and travel insurance etc.?**

The risk to be covered is related to the non-performance of travel services, which do not include costs for visas and travel insurance.

4) **May Member States lay down in their national law the limitation of the amount of down payments and final payments which the organiser may request, as well as on their timing, e.g. max. 20% as down payment and the balance not earlier than 30 days before departure?**

That is perfectly possible, given that this question is not regulated in the Directive. Furthermore, recital 40 refers to possible legal restrictions on pre-payments.

5) **Regarding Article 17 (2), how can the costs for repatriations be estimated, both in the case of pre-arranged packages and dynamic packages, where travellers may be stranded at different destinations?**

Costs have to be estimated in light of the types of package concerned and likely circumstances where the repatriation risk materialises. It may also depend on how repatriations are organised. A certain safety margin would seem appropriate. However, exceptionally high costs in very specific circumstances going beyond normal experience would arguably not be "reasonably foreseeable". In cases of dynamic packages, where travellers may be stranded at different destinations located near many different airports and are less concentrated than in the case of traditional packages, the repatriation costs may tend to be higher. Exchange of good practices between Member States on how repatriation costs should be calculated and on how they can be reduced would be useful.

6) **Regarding recital 44, how can MS take into account the special situation of smaller companies while ensuring the same level of protection for travellers?**

Full exemption of smaller companies will not be possible. As the necessary insolvency protection will depend on the prepayments received and on estimated costs for repatriations, the amounts to be covered will be smaller in cases of domestic tourism without transport and, in particular, without flight. In any event, costs for insolvency protection will be proportionate to the business volume (fewer sales = lower expenses for insolvency protection). Especially in a fund-based system, preferential rates for smaller companies (not leading to reduced protection) might be conceivable (question of choice). For insurance contracts that may be more difficult.

7) **Could Member States exempt:**
   - **Packages which are organised on a small scale and do not include carriage of passengers?**
   - **Packages where all services are provided in-house (e.g. hotel + spa)?**
   - **Packages where only very limited pre-payments are requested (e.g. 10-15%)?**

Full exemption will not be possible, but certain factors will lead to lower insolvency protection costs: no carriage of passengers, very limited pre-payments. The fact that different services are provided in-house services (e.g. hotel + spa) will not automatically lead to lower insolvency protection costs. However, it would have to be checked whether the relevant combinations are packages (or LTAs), e.g. whether other tourist services are not intrinsically part of another travel service and whether they constitute a significant proportion of a package (or LTA).

8) **How can the authorities of the Member States enforce the obligations of organisers not established in a Member State, especially where they sell directly, e.g. online?**

It is generally acknowledged that enforcement is more difficult in relation to non-EEA organisers. However, Council and Parliament wanted to avoid a discrimination of EEA-operators.

9) How can you determine if a package is sold or offered "in a" Member State or such an activity is "directed to a" Member State if the organiser provides all its services online?

This is a horizontal issue which has to be assessed and interpreted in line with the Brussels I (Regulation (EU) No 1215/2012) and Rome I Regulations (Regulation (EC) No 593/2008), as explained in recital 50. In this connection the case law of the CJEU on those regulations is relevant, in particular in Joined Cases C-585/08 Peter Pammer and C-144/09 Hotel Alpenhof points 47 – 94. It will be relevant, for instance, whether a trader's advertising is addressed to consumers in a different Member State. Regarding online advertisements, the following criteria (see paragraphs 81 – 84, in particular paragraphs 83 and 84 of the abovementioned ruling) may be relevant, according to the CJEU:

- The international nature of the activity at issue, such as certain tourist activities;
- Mention of telephone numbers with the international code;
- Use of a top-level domain name other than that of the Member State in which the trader is established, or use of neutral top-level domain names such as '.com' or '.eu';
- The description of itineraries from one or more other Member States to the place where the service is provided;
- Mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers;
- Use of language and currency not corresponding to those generally used in the Member State from which the trader pursues its activity.

10) Regarding Article 20(2), can the COM give examples of the evidence that the retailer has to submit to prove that the organiser outside the EEA complies with the PTD?

Under Article 17 (1) second sub-paragraph, the third-country organiser has to take out insolvency protection under the rules of the relevant MS (s). This should be checked by the relevant MS. In addition, the retailer will have to insist that the third country organiser provides evidence to him that he has the required insolvency protection. The authorities could then obtain that evidence also via the retailer. If there is so such evidence, the retailer will have to provide protection for the insolvency of the organiser concerned.

Regarding liability issues, a reasonable interpretation would be that the retailer can avoid liability if the third country organiser, in the contract, accepts liability in accordance with Article 7 (2) (b) and provides this information in accordance with Article 5 (1) in conjunction with Annex I. This is obviously without prejudice to situations where the retailer is fully liable anyway under the law of the relevant Member State, in accordance with Article 13 (1) second subparagraph.

Insolvency protection – Questions/comments during the workshop

COM confirmed that, as long as their roles are clear, Member States can have two central contact points (Art.18.2).

Hungary asked how the cover should be calculated for new enterprises when there is no previous turnover to rely on and whether generally percentages or fixed amounts would be

preferable. **Hungary** also called for information and experience from Member States on how their guarantee funds function.

COM encouraged Member States with a guarantee fund to give feedback. It asked the Member States about their experience regarding start-ups. Regarding percentages vs. fixed amounts, **COM** did not express a general preference. Percentages are more adaptable to the actual sales volume, whereas fixed minimum amounts may be helpful in the absence of turnover data. It would be important to increase the security if the minimum amount turns out to be insufficient in light of the start-up's actual sales volume.

Lithuania expressed that, according to their experience with new enterprises, it is important to use minimum amounts since there is no previous data. In Lithuania, the minimum amount for security for new enterprises is € 200.000. Furthermore, new enterprises have to report on their sales volume. Maximum supervision of new enterprises would be necessary at the least during the first year.

Regarding the transposition of Article 17 (5), **Spain** is considering whether they should introduce a specific deadline for refund, and wondered what a sufficiently short deadline would be, e.g. 1 month?

COM answered that the co-legislators did not agree on a concrete deadline for the refund. There is, therefore, no obligation to introduce a specific deadline, and the introduction of different time-limits in different Member State would be incompatible with the harmonisation objective of the Directive. The correct transposition would be "without undue delay" after the traveller's request. More specific deadlines could be included in guidance documents.

Malta indicated that, for reimbursements, a court decision establishing the organiser's insolvency is necessary. That may be different with regard to repatriation, where quick intervention is necessary.

COM replied that, under Article 17 (4) and recital 39, it is necessary that the security becomes quickly available where travellers are stranded at the holiday destination. For refunds for travel services that have not been performed, refunds shall be provided "without undue delay" after the traveller's request (Article 17 (5)). In particular where a formal declaration of insolvency cannot be obtained quickly, refunds should not depend on such declaration.

France asked how the Directive's obligations on TOs from non-EU counties could be enforced. **COM** referred to the negotiations on the third country issue, and explained that the co-legislators' objective was to ensure fair competition, even though it was acknowledged that it would be difficult to enforce the provisions. **COM** referred to international collaboration, and that there are also soft means of enforcements, e.g. negotiation and bad publicity.

Malta asked what is meant with "established" in Article 17, e.g. when there are multiple citizenships involved and packages are sold only online without registration in the targeted MS. How can enforcement work in such cases?

Luxembourg explained that online companies have to provide proof on whether they have an office in Luxembourg. According to **COM**, the nationality of the company is not relevant, and for "establishment" Article 3 (10) refers to the definition in Article 4 (5) of the Services Directive. In cross-border cases cooperation between the Member States would be crucial. **COM** further referred to the CPC-regulation (Article 9 on coordination of market surveillance and enforcement activities). Replying to a question from **COM**, the **UK** considered that there are ways to deal with this question and that it has not given rise to problems in the **UK**.

Poland asked if they can keep a system with mandatory registration for cross-border providers, requiring evidence of insolvency protection, in a similar way as for domestic traders, which was justified by the need to ensure consumer protection in connection with the obligation to implement Directive 90/314/EEC. Alternatively, could a Member State introduce the obligation for entities from other EEA-countries to notify the competent authority of the provision of the services, without entry in the register of regulated activity?

COM stated that Member States should not create additional administrative burden for operators benefitting from the freedom to provide (cross-border) services, in particular since control is to be carried out by the Member State of establishment. However, a notification obligation may be justified in order to ensure supervision of organisers operating cross-border and to facilitate the exchange of information amongst the Member State.

Regarding the question of whether the PTD is applicable also to Switzerland, **COM** said that it would check the status of Switzerland in that respect.

Discussion on other issues identified by the Member States/EEA-States

<u>Scope and exceptions</u>

1) **Regarding Article 3(7), what constitutes a 'gainful activity', so as to make a person a trader?**

The Court may shed light on this question in Case C-147/16 - Karel de Grote Hogeschool. In the view of the COM services, 'gainful activity' should refer to the act of selling goods or services against remuneration (monetary payment or data provided by the consumer). This is the case even if the profit is used for charitable purposes.

2) **Regarding "not-for profit" packages as defined under Article 2(2)(b), does a package where one of the three conditions ("on a not-for-profit basis", "to a limited group of travellers" and "only occasionally") is missing fall outside the scope of the Directive?**

All three conditions are cumulative:

- on a not-for-profit basis
- to a limited group of travellers
- and (!) only occasionally

Hence, if any of these requirements is missing, the package concerned does fall within the scope of the Directive.

3) Can a "general agreement" be concluded for one travel arrangement? (Art.2.2.c and recital 7)

One trip only cannot be a general agreement.

Definitions

Definitions (Article 3) – Questions from Member States and replies given by the COM services

1) Regarding Article 3(1) on "travel service", can Member States have a specific limit in law (e.g.3 months) from which accommodation is for residential purposes?

No, since there is a risk of different national rules if every Member State lays down specific time-limits.

2) Regarding Article 3(2) (b) on "package", does it happen in practice that separate contracts are concluded at a single point of sale?

Yes, it happens quite frequently, e.g. in relation to online dynamic packages.

3) In which cases is the PTD applicable to cruises?

The Directive generally applies to cruises, as they are a combination of carriage of passengers and accommodation and sometimes additional travel services, unless they are shorter than 24 hours and do not include overnight accommodation (Article 2 (2) (a)). *Recital 17* clarifies that a mere trip in an overnight ferry or an overnight train/coach where the main component is clearly transport, does not constitute a package, but distinguishes that situation from cruises. Where the purpose is to get from point A to point B and staying on board overnight is a necessary part of that journey, such trip should not be a package. However, if staying on board has a touristic value in itself, it will be a package, as in the event of a cruise. In its ruling of 7 December 2010 in Joined Cases C 585/08 and C 144/09, Pammer (in particular in points 44-46) the Court stated that a voyage by freighter, fulfils the necessary conditions for a 'package' within the meaning of Article 2(1) of Directive 90/314 when, apart from transport, it involves (for an inclusive price) accommodation too and that the voyage is for a period of more than 24 hours.

4) **Can/should recitals 17 and 18 be used as detailed rules in Member States' legislation, including the reference to 25% as representing a significant proportion?**

Recitals contain explanations, examples and sometimes quasi-provisions. The answer depends on *what* is inserted in national legislation and on *how* this is done. E.g. examples should not become exhaustive lists. The 25%-criterion in recital 18 is a quasi-provision and could be included in a national provision, thereby adding clarity and transparency. At the same time, **COM** cannot force Member States to include this criterion. The Member States are welcome to consult **COM** on specific plans and to indicate to the other Member States where they consider it useful to insert wording from the recitals.

5) **Regarding Article 3(9) on "retailer" - according to the current definition of "retailer" in Article 3(9), is a retailer only entitled to sell/offer packages or could the term be used for a trader facilitating an LTA?**

It is decisive what function a particular trader carries out, i. e. whether he puts together and sells a package (organiser), sells a package put together by an organiser (retailer), or whether he facilitates an LTA ("trader facilitating an LTA"). A travel agency can be an organiser, a retailer or a trader facilitating an LTA, depending on the circumstances. As traders facilitating an LTA will often be service providers, the term "retailer" is likely to create confusion in this context. In any event, the Member States have to use the definitions of the Directive.

6) **Regarding Articles 3 (2) (b) (iv), 3 (7) and 3 (9), in relation to packages in the sense of Article 3 (2) (b) (iv), who is the organiser and who is the retailer?**

The notion of "organiser" is very broad: "combining and selling or offering for sale packages, either directly or through another trader, or together with another trader". Furthermore, *recital 22* states that where there is a package there must be an organiser, and the Directive obliges traders to clearly identify in pre-contractual information and in the contract who is the organiser. Even if companies such as Bongo and Vivabox use the services of other parties in order to put together packages (outsourcing) they generally appear as the contracting party. They could act as a mere retailer only if the trader assisting them in putting together the travel services declared himself as an organiser. Therefore, Bongo/Vivabox would appear to be organisers, whereas the shop where travellers buy a "travel box" is the retailer.

COM confirmed that, in addition to the organiser, the retailer (e.g. a department store or supermarket) is responsible for providing the correct pre-contractual information. However, if the required pre-contractual information, including the standard information of Annex 1, is clearly visible on the travel gift boxes, this could arguably mean that the retailer has no further information duties. That would however depend on the completeness and visibility of the information at the retailers' point of sale.

7) Regarding Article 3(16) on "repatriation", could the other place chosen by the traveller be a complete different location which has no relevance to the trip or the traveller?

The parties have to agree on the other place. The traveller cannot determine it unilaterally.

Scope/exceptions and definitions - Questions/comments during the workshop

Poland asked whether trips organised by churches, scouts movements and sports clubs, fall within the scope of the Directive. **COM** referred to the minutes of the previous workshop and reiterated that the three cumulative criteria (1) on a not-for-profit basis, 2) to a limited group of travellers, and 3) only occasionally, have to be assessed for each individual case. If one of them is missing, the package concerned does fall within the scope of the Directive. **COM** confirmed that, subject to a case-by-case assessment, the "not –for-profit" criterion is likely to be fulfilled where the amount paid covers only the incurred expenses, as well as where the profit is marginal and serves charitable/humanitarian purposes.

Responding to questions from **Sweden**, **COM** pointed out that the definition of "point of sale" in Article 3(15) is based on the CRD-definition of "point of sale". In addition, it aims to ensure that, where different facilities (including websites) are presented in such a way that travellers are under the impression that there is a single facility, this is considered to be a single facility. Where a consumer calls an organiser by phone, he would deal with a single point of sale.

Luxembourg asked whether the limitation period in Article 14(6), concerns the submission of a claim to a court or to the relevant trader. Having looked at this point after the workshop, **COM** takes the view that Article 14(6) relates to prescription periods for court action only. From a substantive law viewpoint, it is important to stress that, under Article 13(2), the traveller has the duty to inform the organiser "without undue delay, taking into account the circumstances of the case," of any lack of conformity which he perceives during the performance of a travel service included in the package travel contract. Article 14 (6) is there to prevent Member States from introducing any unduly short procedural periods for the parties to plead their case in court, in case no satisfactory solution could be found out-of-court.

Linked Travel Arrangements (LTAs)

Definitions (Article 3.5)

Can national provisions make a clearer distinction between packages and LTAs? Can COM provide more examples?

The national transposition cannot add criteria and change the definitions that are the result of the legislative negotiations. The Member States are invited to submit, before the next

workshop, concrete examples to **COM** and the other Member States where they have doubts about the correct classification.

1) **Would it be possible to further specify "in a targeted manner"(Art. 3.5. b) in the text of the law?**

This would be problematic. There is a risk of being too rigid (changes in technology etc.) and to come to different results in the Member States. Member States have to use the definitions of the Directive. Practical examples, where Member States see difficulties, should be discussed at the next workshop.

2) **Are points a) and b) of Article 3 (5) both applicable to offline and online transactions?**

As mentioned at the last workshop, both types of LTAs are relevant for online and off-line bookings.

3) **How should Member States assess in practice if bookings have been made during <u>one</u> visit or during <u>several</u> visits (Art.3.5.a)? Is it necessary to measure the length of traveller's visit? When assessing whether travel services constitute an LTA ("single visit or contact"), is it relevant whether the consumer leaves the point of sale between different purchases? (Art.3.5.a)**

It is definitely relevant if the traveller leaves the point of sale between purchases since an interruption of the visit may indicate that there is no longer a single visit or contact. However, this should not be assessed mechanically and should take into account the circumstances of each case.

For instance, where this matters in particular for insolvency protection and the situation is not entirely clear, a judge would have to assess the facts as presented by the traveller and the facilitator.

4) **If the traveller makes the second booking while she is still at the travel agent's or still on the same website, is it an LTA? If she leaves and comes back after one hour is it not an LTA?**

1st situation: clearly the same visit.
2nd situation: the one-hour interruption may indicate that this is not an LTA under Article 3 (5) (a). However, where the two parties agree that the traveller will come back for the second booking and the contact is interrupted only artificially, this may be different. Furthermore, there can still be an LTA under Article 3 (5) (b) if a second booking is made within 24 hours.

Insolvency protection in LTAs

COM reminded delegations of the principles and then answered questions from the Member States:

Article 19 (1): Insolvency protection requirement on the LTA facilitator

- For the refund payments he receives from travellers
- Insofar as a travel service which is part of an LTA is not performed as a consequence of his insolvency
- Insolvency protection has to cover repatriation only if the facilitator is the party responsible for carriage of passengers

Information requirements in Article 19 (2) and Annex II Parts A – E

- on insolvency protection (in accordance with Art. 19 (1)
- that LTA purchasers will not benefit other rights linked to packages and that service providers are responsible for their own performance

1) **What is the meaning of "any corresponding offer"? Should this be read as an obligation to inform the traveller before the trader offers him/her a contract? (Art.19.2)**

This wording comes from the Consumer Rights Directive (CRD). The purpose is to cover the situation where the traveller's declaration leads to the conclusion of a contract, as well as the situation where the traveller, on the basis of the organiser's invitation to purchase, makes a binding offer.

2) **Is it relevant for insolvency protection whether the facilitator has received payments from the traveller? (Art.19.1)**

Yes. Insolvency protection is not needed if the facilitator does not receive any money from the traveller.

3) **If the trader has received the plane ticket and the hotel voucher, is it correct that no insolvency protection is needed? If the airline goes bankrupt and the traveller cannot use the plane ticket and the hotel voucher is it correct that the LTA facilitator does not have to reimburse payments (i.e. make sure that that event is covered by his insolvency protection)?**

The facilitator's (e.g. a travel agency's) insolvency protection will cover only payments *received and kept by the facilitator* at the moment of its insolvency. As soon as the facilitator has passed on the money to the service provider (e.g. an airline), the facilitator's insolvency can no longer affect the services, so that there is no longer a need for insolvency protection. The information form in Annex II specifies that the insolvency protection does not cover the

service provider's protection. The situation would be different if the airline is the trader facilitating of an LTA and receives pre-payments.

4) **If the trader facilitating an LTA does not receive any money from travellers because the traveller directly transfers the payments to the accounts of the travel service providers or to a trust account. May the trader facilitating the LTA delete/cross out the passages on insolvency protection from/in the forms or Annex II as there is no provision for cases where no money is received?**

If the traveller directly transfers payments to the accounts of the travel service providers or the traveller transfers the payments to a trust account which cannot be affected by the trader's insolvency, there is no reason for insolvency protection.

According to the standard information forms in Annex there is insolvency protection only where the facilitator receives money ("to refund your payments to XY") and where the services are not performed *because of that trader's* insolvency. That cannot be the case if the facilitator received no money from the traveller. **The forms also explain that the insolvency protection does not cover the insolvency of the service provider.**

Leaving out information on insolvency protection in cases where definitely no money goes to the facilitator would be simpler and would avoid the risk of confusion for travellers. According to the wording of Article 19 (2) second sub-para, one may argue that the facilitator has to use the information forms exactly as contained in the annexes. However, the purpose of the forms is to provide clear information to travellers. Therefore, one might consider it to be acceptable if the second para of the first box and the second box are omitted where the facilitator receives no money from the traveller for any of the included travel services.

<u>Pre-contractual information</u> (Article 5)

1) **How is the pre-contractual information to be given? When a contract is concluded via telephone, does the trader have to communicate the standard information to the traveller orally?**

The pre-contractual information may be given in any form. When a contract is concluded via telephone, the standard information can be communicated orally. There is a specific provision for contracts concluded by phone in Article 5 (2) second sub-paragraph.

2) **Can Member States introduce any form requirements in their national legislation?**

Taking into account the maximum harmonisation character of the Directive, Member States may not introduce any form requirements for pre-contractual information in their national legislation.

3) Does "geographical address" in Article 5 (1) b and "address" in Article 7(2) mean the same or not?

From the context it is clear that it means the same.

4) If e.g. accommodation or meal is not included in the package, is the retailer obliged to inform that there is "no accommodation"/"no meal"? (Article 5.1)

If it is clear from the context that no meal is included and there is no suggestion anywhere that a meal may be included, the explicit information "no meal" does not have to be given. Under general UCPD standards the information must not be misleading.

5) Why is there, under Article 5 (2) a specific article for pre-contractual information in case of "click-through" cases of Article 3(2)(b)(v), when the information requirements are the same as under Article 5(1)?

There is a difference: "insofar as it is relevant for the respective travel services they offer", i.e. not necessarily information on the package as a whole has to be given. Only the organiser has to provide the form to the traveller. The organiser has to provide the information to the traveller, even though the contract between the traveller and the second trader is not concluded, or if it is concluded later than 24 hours after the confirmation of the first reservation. The form in Part C states "If you conclude a contract with company AB not later than 24 hour after [...]".

6) Please explain the information obligations of organisers under Article 5(2) in conjunction with Annex I Part C.

Only the organiser has to provide the form to the traveller. The information has to be provided, regardless of whether the second contract is concluded or whether it is concluded within 24 h. The form in Part C states explicitly "If you conclude a contract with company AB not later than 24 hour after [...]".

7) Regarding Article 5(1)a(iii), what type of information is to be provided: a hotel, a guest room, a rented flat etc., or is the retailer obliged to inform on the number of stars, or are both types of information required?

Both types of information are required.

8) Does recital 25 refer to Article 5(1)v(iii)?

Recital 25 is more general and is not reflected as such in the provisions. It relates to the way in which the information is provided. There is a certain link to Article 5 UCPD in that it reminds traders that they have to take into account the vulnerability of the consumer when providing information.

Austria asked whether the information requirements in Article 5 and in Article 7 mean that the information needs to be provided twice. **COM** explained that the situation is like under the Consumer Right Directive (CRD): the trader has to give pre-contractual information, and then also when the contract is concluded.

Unavoidable and extraordinary circumstances

Article 12(2) on Termination of the contract

1) **Where can relevant information about unavoidable and extraordinary circumstances in the destination country be found? Can the Member States regulate potential sources of information?**

COM stated that different sources of information, including official travel advice, can be used to establish whether there were unavoidable and extraordinary circumstances. Whether those circumstances are relevant, for instance for the termination of a contract, will, in the event of disputes, be decided by the courts, in light of the specific provisions.

2) **To what extent can the traveller's personal circumstances be taken into account when deciding if unavoidable and extraordinary circumstances have occurred?**

When assessing whether the situation affects the performance of the package under Article 11 (2), *certain personal circumstances may be relevant*, e.g. the fact that pregnant women will be more affected than other travellers by the Zika virus, and that homosexual travellers will be more affected by a death penalty for homosexual. This will require a case-by-case assessment by the courts.

3) **Is it important to take into account the time when these circumstances arise or become apparent to the parties? Does it matter that the circumstances were not foreseeable at the time of the conclusion of the contract?**

It may be argued that the criteria "extraordinary" and "unavoidable" "circumstances", justifying a cancellation, imply that it was not predictable/foreseeable at the time of the conclusion of the contract that the relevant event would occur at the travel destination at the agreed time of the trip. By contrast, if a specific situation is known at the time of booking (and does not get significantly worse) there would appear to be no justification for a deviation from the principle of *pacta sunt servanda*.

4) **Is the fact that the unavoidable and extraordinary circumstances are occurring at the place of destination or its immediate vicinity, only relevant for applying Article 12(2) or also e.g. in Article 12(3), Article 13(7), Article 14(3)c) or should the specification in Article 12(2) be used throughout the Directive?**

No, it should be applied only where it is mentioned.

What matters is the wording of the specific provision applied. In cases of Article 13 (7) (e. g. ash cloud like situation), the problem does not have to exist in the immediate vicinity of the travel destination.

Liability in case of unavoidable and extraordinary circumstances (Article 13.7 and Article 14.3.c)

1) **May the organiser terminate the contract due to extraordinary and unavoidable circumstances after the trip has already started? Are the Member States free to regulate this situation?**

No, the organiser cannot terminate the contract and thereby reduce his obligations. National rules allowing that would not be compatible with the directive.

2) **In connection with Article 13(6), who is responsible for covering the costs for repatriation (and possible extra costs) in case of extraordinary and unavoidable circumstances occurring during the holiday and the planned performance of the package is no longer possible?**

The organiser is responsible for covering the costs for repatriation and also any possible extra cost. Under Article 13 (6) it is clear that the organiser has to bear the costs for the return journey ("at no extra cost to the traveller").

Liability – (Article 13 and 14)

1) **Do Articles 13 and 14 aim to exhaustively regulate all the relevant pre-conditions for using remedies covered by Articles 13 and 14 against the organiser? Or are the general contract rules on the same remedies in Member States still applicable, insofar as they are not covered by Art.13/14? E.g. rules on the extent of compensation.**

The rules on remedies are exhaustive. Hence, there is normally no scope for additional national rules. Furthermore, recital 34 explains that there must be compensation also for non-material damage. Should additional rules in general contract law be necessary, these must not lead to conflicts with the Directive.

2) **Are all available remedies covered by Article 13 and 14?**

All the relevant remedies the traveller may use against the organiser are covered by Articles 13 and 14 of the Directive. Such remedies are exhaustive. There is no exception from the full harmonisation character.

3) **Should the inability to provide "a significant proportion of the travel service" within the meaning of Article 13(5) always be considered to "substantially affect the performance" within the meaning of Article 13(6)?**

"Lack of conformity substantially affecting the performance of the package" is broader as it also covers cases of bad performance, e.g. hotel or food at the hotel below standard. Where there is lack of conformity without substantially affecting the performance of the package, there is no right to termination but there will still be a right to price reduction and possibly compensation.

4) What specific EU legislation is referred to in Article 13(7), and what is the EU legislation on passengers' rights for those who plan more than 3 nights?

Air travel: Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91; Rail - Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations; Maritime travel - Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 + Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

5) Which international conventions does Article 14(4) refer to?

Recital 35 lists examples of international conventions that Article 14(4) refers to; the Montreal Convention of 1999, the COTIF of 1980, and the Athens Convention of 1974.

6) Do Member States have to allow organisers to limit liability in line with international conventions not binding the EU? (Article14.4)

There may be conventions to which only some Member States are party (exists already under Directive 90/314/EEC).

7) What is meant by "In other cases" in the third sentence of Article 14(4)?

What is meant is "Otherwise", "Apart from those cases …" i.e. where there are no limitations resulting from international conventions.

8) Is it correct that remedies for the trader are not regulated in the PTD?

Yes, correct.

9) In the circumstances of Article 13 (6) has also the organiser the right to terminate the contract? In that case who should organise the traveller's transport and bear any extra costs. Are MS free to regulate this in their national law?

No, the organiser cannot terminate the contract and thereby reduce his obligations. National rules allowing that would not be compatible with the Directive.

10) What is the difference between the compensation for necessary expenses needed to remedy the lack of conformity pursuant to Article 13(4) and compensation for damages pursuant to Article 14?

There is a close link between the two. In its proposal, **COM** covered everything under compensation and clarified in a recital that compensation would also cover cases where the traveller resolves the problem himself. However, the Council considered that the additional provision of 13 (4) was necessary in order to create a clear legal base for such scenarios.

<u>Transfers of the package travel contract before the start of the package</u> (Article 9) –

1) Could shorter time periods than 7 days be considered as reasonable? (Article 9.1)

Yes, one may consider that in cases where a change in the name of the traveller will not create problems, e.g. packages without carriage of passengers (in particular where there is no flight involved), also a shorter period may still be reasonable.

2) Is the organiser obliged to provide the transferor with proof of the additional fees pursuant to Article 9 (3) in all cases or is the organiser only obliged to do so upon the transferor's request?

Read literally, it seems that the proof of the additional fees etc. has to be provided as a matter of course.

Alternation of other package travel contract term (Article 11)

1) Could COM explain what the phrase "the organiser is constrained" in Article 11(2) means?

This wording came from the existing Directive, i.e. no change. In **COM**'s view, it suggests that the organiser cannot arbitrarily propose changes, i.e. they must be based on objective circumstances. E.g. if the chosen hotel is not available, the organiser may propose a different one. However, he cannot just propose a different hotel in order to increase his profit margin.

2) Is Article 6 (4) of the Rome I Regulation to be amended to make it clear that both packages and LTAs are within scope of the new PTD and are to be considered consumer contracts for the purposes of Article 6(1) of Rome I?

There are currently no plans to amend Rome I.

Information on UNWTO's work on an international convention on tourism

COM informed the Member States on the ongoing work of UNWTO on an international convention on tourism. **COM** expressed the following:

UNWTO Convention

- Work ongoing within the World Tourism Organisation (UNWTO) on a draft Convention on the protection of tourists and tourism service providers
- Background: Ash cloud crisis – UNWTO wishes to establish a framework for the protection of tourists in particular in emergency situations
- Working group established, participation of interested UNWTO members (from EU: FR, DE, HU, ES) – 7 meetings held so far

UNWTO Convention – coverage

- Chapeau which establishes the institutional framework: e.g. procedure for ratification, entry into force, amendments - distinction between standards (obligatory) and recommended practices
- Convention establishes minimum standards, allowing Parties to have more stringent national rules
- 3 annexes:
  - Annex I: Assistance obligations in case of force majeure / emergency situations
  - Annex II: Package travel issues
  - Annex III: Accommodation issues

Annex I: Assistance obligations in emergency situations

- Sets out what the authorities of the host country should do to assist tourists in emergency situations (like the ash cloud crisis):
  - E.g. providing temporary shelters, food services, facilitating repatriation
  - Cooperation between the host country and the tourist's country of origin
- Relationship to EU legislation:
  - EU Civil Protection Mechanism (Decision No 1313/2013/EU based on Article 196 TFEU)
  - Link to passenger rights legislation
- EU has supportive competence, shared with MS

Annex II: Package travel issues

- Corresponds very closely to the EU Package Travel Directive, as revised by Directive (2015/2302):
  - Includes information requirements, rules on alteration of contract terms, contractual liability and insolvency protection
  - Covers also the notion of LTAs
- Exclusive EU competence, since the area is fully harmonised by Directive 2015/2302

Annex III: Accommodation issues

- Includes information obligations, rules on failure of performance or improper performance and assistance obligations in case of force majeure, for accommodation providers
- Information requirements partly corresponding to those of the Consumer Rights Directive – hence EU competence for those rules
- Rules on performance and assistance within MS competence

Timeline / follow-up

- UNWTO aims to finalise the working group discussions by the beginning of 2017, in order to adopt the Convention at its General Assembly in October 2017
- Are Member States – in particular those who have not been involved in the UNWTO Working Group – interested in the negotiations on this Convention?
- If so, Council would have to provide a negotiation mandate on behalf of the EU, on the basis of a recommendation from the Commission
- Negotiation mandate would not prejudge the subsequent decision whether EU should sign or accede to the Convention
- The Convention is open also to MS which are not UNWTO members
- The next UNWTO workshop will be held on 29 June 2016.

The UNWTO convention on the protection of tourist and tourism service providers - Questions/comments during the workshop

Germany shared their experience from the UNWTO negations, explaining that they did not participate in the last working group meetings because they were not sure about their competence regarding Annex II, where the EU may have exclusive competence and since they did not agree on the UNWTO's processes (negotiations to be completed in the working group) and time-table. **COM** expressed that they agree with **Germany** that the time-line of the UNWTO is ambitious, and that indeed **COM** considers that it can be problematic if Member States were to negotiate relating to issues where EU has exclusive competence. However, **COM** would still require a negotiation mandate from the Council in order to formally negotiate on behalf of the EU.

Reacting to a question from Austria, **COM** answered that the Convention should not have standards that go further than the PTD thereby forcing the EU to change the PTD.

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Closing remarks

COM thanked the Member States for their participation at the meeting, and their contributions and feedback on the tables on the insolvency protection systems. The next workshop is likely to be held in the second half of October (most likely on October 25th). Following up on **Hungary**'s suggestion, **COM** plans to discuss at the next meeting practical examples where MS have doubts whether they should be treated as packages or LTAs. The Member States are invited to provide examples by mid-September.