Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements
Workshop with Member States 25 February 2015

Chair: Ms Veronica MANFREDI, Head of Unit, DG JUST E2, Consumers and Marketing Law.
Other participants from the Commission: Gösta Petri, Robert Mathiak, Tomasz Dolny (all DG JUST) and Iuliana Aluas (DG GROW, in the morning).
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 given by the Court of Justice of the European Union.

Welcome – purpose and objectives of the meeting

Ms. Veronica MANFREDI welcomed the experts nominated by the Member States to the first workshop on the transposition of the new Package Travel Directive (PTD), which is to be transposed by the Member States by 1 January 2018. The Directive will become applicable on 1 July 2018. **COM** further stated that it has to report on the provisions applying to online-bookings made at different points of sale by 1 January 2019, and that it is due to present a general report on the application of the Directive by 1 January 2021. Ms. Manfredi also thanked the Member States for their input to the meetings, which had helped **COM** when drafting the agenda and identifying the questions that should be addressed. She emphasised that **COM** services would like to help the MS as much as possible during the transposition process, and that it is in everybody's interest to avoid transposition problems at an early stage.

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

The Member States indicated the Ministries in charge of the transposition and indicated their time-table for the transposition process. The relevant ministries are:

Belgium: Ministry of Tourism and Competition
Czech Republic: Ministry of Regional Development.
Denmark: Ministry of Justice and Consumer Protection
Estonia: Ministry of Justice
Ireland: Ministry for Transport, Tourism and Sport
Greece: Ministry of Economy, Development and Tourism
Spain: Ministry for Health, Social Services and Equality, Ministry of Justice, Ministry of Economy and Competitiveness.
France: Ministry of Economy and Finance
Croatia: Ministry of Justice
Italy: Ministry of Cultural Heritage and Activities and Tourism, Ministry of Economy.
Latvia: Ministry for Economics
Lithuania: Ministry of Economy, Ministry of Justice
Luxembourg: Ministry of Economy
Malta: Ministry for Tourism
Netherlands: Ministry of Security and Justice, Ministry for Economic Affairs
Austria: Ministry of Justice

Poland: Ministry of Sport and Tourism
Romania: Department for Business
Sweden: Ministry of Finance
Finland: Ministry of Justice and Employment, Ministry of Economic Affairs
Slovakia: Ministry of Employment, Ministry of Justice
Portugal: Ministry of Economy
Hungary: Ministry for National Economy

Norway: Ministry of Children and Equality
Iceland: Ministry of the Interior, The Consumer Agency

Discussion on key issues

COM introduced the relevant topics and answered questions raised by the Member States prior to the meeting. Member States were invited to comment or raise additional questions, to which **COM** reacted.

ARTICLE 2 - SCOPE

Article 2 (2) b for packages and LTAs offered or facilitated "occasionally and on a not-for-profit basis"

For exclusion from the scope when packages and LTAs are offered or facilitated "occasionally and on a not-for-profit basis", these are the three cumulative criteria for the exclusion from the scope:

1) "not for profit"
2) "occasionally", and
3) "limited group of travellers".
Please see recital 19, Article 2(1) and Article 3 (7) on the definition of trader.

COM answered the following questions on Article 2 (2) (b):

1) ***Can MS make the exclusion in Article 2.2.b more precise, e.g. by specifying that the exclusion covers up to 9 trips per year or 1 trip per month or by limiting the territorial scope (e.g. only domestic trips)?***

The term “occasionally” is not very precise, but there was no agreement in the negotiations on a more specific criterion. Recital 19 gives at least a rough indication when referring to “trips organised not more than a few times a year …”. If MS considered that to be useful, that wording could be inserted in national legislation. However, it would be problematic for the uniform application of the Directive if different Member States laid down different specific thresholds in terms of numbers of trips per year or month in their legislation.

2) ***Are not-for profit packages and LTAs covered that are offered/facilitated regularly/more frequently and to the general public?***

Clearly such packages and LTAs are covered by the Directive, since only those combinations which are, at the same time, “not for profit “ and are offered only “occasionally” and “only to a limited group of travellers”, are outside its scope (see Article 2(2)(b).

3) ***Are organisers of social tourism (e.g. for scouts) traders in the sense of Article 3 (7)?***

The definition of trader (see Article 3 (7)) does not explicitly require the intention of making a profit. One may consider that it is sufficient for a trade, business, craft or profession that a regular activity is carried out with a certain level of organisation.

The fact that an organisation is structured as 'non-profit' is immaterial to the assessment of whether it qualifies as a trader for the purposes of the Directive. The same applies to public authorities, which may, depending on the circumstances, also qualify as a trader when carrying out commercial activities. In the *BKK Mobil Oil* case (Case C-59/12, BKK Mobil Oil, 3 October 2013) the Court confirmed that a public law body charged with a task of public interest such as managing a statutory health insurance fund, can qualify as a 'trader' as: '*the EU legislature has conferred a particularly broad meaning on the term 'trader', which refers to 'any natural or legal person' which carries out a gainful activity and does not exclude from its scope either bodies pursuing tasks of public interest or those which are governed by public law'*.

Article 2 (2) (b) was not in the COM proposal. However, **COM** would read Article 2 (2) (b) as expressing the will of the co-legislators that not-for-profit packages should be covered by the Directive unless they are offered only occasionally and only to a limited group of travellers. That means that packages (or LTAs) organised regularly by charities, including scouts' organisations, would have to be considered as covered by the Directive as long as such charities carry out a gainful activity. This is also confirmed by recital 19.

4) ***If such packages and LTAs are included, can the MSs introduce easier and simpler insolvency protection instruments for them?***

In relation to the insolvency protection regime for "regular not-for profit organisers" or, in other words, "traders who organise packages on a not-for-profit basis more than occasionally", Articles 17 and 19 as explained and illustrated in recitals 39, 40 and 44 (smaller companies) provide a certain degree of flexibility. However, the obligation that payments from travellers, plus, where relevant, repatriation, have to be fully covered, applies also to such organisers. Insofar as no long distances have to be covered, in particular by airplane, and if no prepayments or only very limited pre-payments are requested, the cost of insolvency protection should be manageable.

5) ***What about non-commercial packages organised occasionally by traders, e.g. for employees?***

It depends on the circumstances of each case whether the trader does, in fact, not aim to make a profit through offering packages, neither directly nor indirectly. However, if a trader organises packages without the intention of making a profit for the recreation of its employees and only occasionally, such trips would probably not be covered by the Directive on the basis of Article 2 (2) (b).

ROMANIA stated that the answers offered to this part were clear, but wondered whether "not-for-profit" meant that the traveller does not pay anything or just the "basic or a minimum price" and whether the size of the trader mattered.

COM answered that one would have to look at the individual cases and establish whether or not the organiser actually intends to make a profit or not. The size of the trader is not a criterion as such.

Article 2 (2) (c): business travel on the basis of a "general agreement"

On the exclusion from the scope of packages or linked travel arrangements purchased on the basis of a "general agreement", please see the explanations in recital 7, in particular the explanation that such agreements are "often concluded for numerous travel arrangements for a specified period, for instance with a travel agency."

COM answered the following questions on Article 2 (2) (c):

1) ***What is a "general agreement"? Examples?***

General agreements or framework contracts are often used to arrange business travel. **COM** took as an example its multi-year agreement with a given contractor on the basis of which the national experts had travelled to Brussels for the meeting.

2) ***May MS introduce in their national law a definition of general agreement and of business travel?***

COM expressed that it would not be good to define this in the national law because there is a risk of divergent definitions. Such definitions are particularly risky if they make the term broader and thereby narrow the scope of the national transposition compared to the Directive. However, it might be acceptable if MS decided to use some language from the recital, depending on the exact wording used.

ARTICLE 3 - DEFINITIONS

Article 3(1) - Definition of travel service

Similar to Dir. 90/314, there have to be at least two different types of travel service from the following list:

- Carriage of passengers;
- Accommodation;
- Rental of motor vehicles and heavy motorbikes (new category);
- "Other tourist services" if they constitute a significant proportion or an essential feature of a package or LTA or are advertised as such (Article 3 (2) second subparagraph (a) and Article 3 (5) second subparagraph).

Regarding "other tourist services", please see recitals 17 and 18. Recital 18 explains that "25% or more" constitutes a significant proportion.

Article 3(2) - Definition of package

Concerning Article 3 (2) (a), the wording "including at the request of or in accordance with the selection of the traveller", means that, unlike under Dir. 90/314, it is not required that packages have to be "pre-arranged".

On Article 3 (2) (b) (i), it is explained in recital 10 that **"before the traveller agrees to pay"** means "within the same booking process". **COM** gave as example bookings based on shopping baskets, i.e. cases where two or more travel services are assembled/collected before a contract is concluded or before the traveller makes a binding offer or before "the consumer places his order" in the sense of Article 8(2) of the Consumer Rights Directive in relation to one or more of those services. "Agreement to pay" can coincide with the actual payment or it can be the agreement to pay for a selected service later. By contrast, regarding LTAs, Article 3 (5) (a) refers to "separate selection and separate payment".

Regarding Article 3 (2) (b) (iii), please see recital 10 for explanations and examples.

For Article 3 (2) (iv), please see recital 11 with the typical example of "travel gift boxes (gift vouchers)".

COM reminded delegations that:

- The criteria in (a), (b) (i), (ii), (iii), (iv) and (v) are alternative criteria, which predominantly relate to the way in which the travel services are presented or purchased (see recital 10).
- Apart from (b) (v), they apply to both online and off-line situations (recital 9).
- In practice, the criteria of (b) (i) and (ii) will often coincide, but that is not required.

Article 3 (5) (a) and (b)- LTAs (also Annex II)

Regarding the distinction between packages and LTAs, it will have to be established, in light of the circumstances of each case and in application of the criteria referred to in Article 3 (2), whether particular combinations of travel services constitute a package, and, if that is not the case, whether it might be an LTA under Article 3 (5). Most likely there will be case-law on this issue. The trader has to inform the traveller whether he is offering a package travel or an LTA, so that, on the assumption that the trader correctly informs the traveller, things should be clear and transparent for travellers. Of course, supervision of traders and awareness-raising campaigns in relation to both businesses and travellers would be important.

The rationale of LTAs is explained in recital 9. The main characteristics of LTAs:

- At least two different travel services purchased for the same trip or holiday,
- Not constituting a package (i.e. absence of the elements defining a package, e.g. not a single booking process or no inclusive or total price),
- Separate contracts with the service providers and a trader

> a) enables the traveller to make separate bookings through a single point of sale (online or offline) on the occasion of a single visit or contact with that point of sale,

b) or facilitates in a targeted manner the procurement of one or more *additional* travel service(s).

It is stated in recital 12 that online LTAs should be distinguished from linked websites "which do not have the objective of concluding a contract" with the traveller and from links through which travellers are "simply informed" about further travel services "in a general way", "for instance where a hotel or an organisation of an event includes on its website a list of all operators offering transport services to its location independently of any booking or if 'cookies' or meta data are used to place advertisements on websites." **COM** stressed that the facilitation has to be targeted and must be related to the booking of travel services, but that general information and mere advertising is not covered.

COM gave (on power point slides) some examples of online packages fulfilling Article 3 (2) (b) (ii) and (iii) and described certain offline situations and the criteria for the distinction between packages and LTAs, explaining that the same logic applies in online and off-line situations.

COM stated that:

- If several travel services are booked at a travel agent's and the booking of one travel service is not fully completed (e.g. flight), e.g. the traveller has not yet given her agreement that a specific amount is charged to her credit card for a specific flight before selecting a hotel, (b) (ii) is fulfilled. In other words, if the flight and the hotel have been selected by the traveller before the traveller agrees to pay (concludes the contract, gives permission to charge a specific amount to her credit card or actually pays) for at least one of the services, this will be a package, even if the payments are made separately.
- If the travel agent presents a single invoice or charges for the two services in one go, that will also be a package. However, separate payments cannot automatically lead to the avoidance of a package (see also Article 2 (1) of Dir. 90/314).

On the distinction between packages and LTAs, and before turning to specific questions from the Member States, **COM** reiterated the following general points:

- In order to avoid a package there has to be a **clear separation of the booking and selection processes**, i.e. one booking is fully concluded before the next service is selected.
- Whether there is a package or an LTA depends on **objective criteria** and cannot be determined subjectively by the trader, but traders can, of course, design the booking process.
- **Traders have to inform travellers clearly and prominently** whether they are offering a package or facilitating an LTA and have to provide standardised information on the rights applying to the relevant travel product.

COM answered the following questions on the definition of packages and LTAs:

1) ***Regarding Article 3 (2) (a) (i) and Article 3 (5) (a), could you please explain the terms "before the traveller agrees to pay" and "separate selection and separate payment" and give examples of what situations would be considered as a package or an LTA in different online or off-line situations?***

Recital 10: "before the traveller agrees to pay, that is to say within the same booking process". This means that, once a contract is concluded or the traveller has made a binding offer (e.g. has given agreement that a specific amount goes off her credit card for the selected flight), the booking process is completed. However, if the traveller has selected two services (e.g. a flight and a hotel) and only then concludes one or two of the contracts or makes the payment for one or two of the services this will be a package, since he/she had not agreed to pay before selecting the second service.

In contrast, regarding LTAs, Article 5 (a) refers to separate selection *and* separate payment, i.e. there is a clear separation of the booking processes: one booking process is completed (e.g. the flight has been booked and paid for and subsequently a second service is selected).

COM then responded to two examples given by Member States:

Example A) *The traveller wishes to buy a plane ticket; he concludes a contract and he agrees to pay for the ticket. Then, without leaving the travel agency and before making the payment for the plane ticket, he wishes to buy also an accommodation service for the same trip. He concludes a contract on an accommodation service and then agrees to pay for both services. Is it a package?*

COM understood that the first contract had been concluded or, in other words, the booking process regarding the flight had been completed (i.e. the traveller could no longer change his mind about the flight) before the traveller selected the accommodation service (i.e. the accommodation service had not gone into a shopping basket before the traveller agreed to pay for the flight), and that no inclusive or total price was offered or charged for both services and that the two services were not offered as a "package" or under a similar term. Under those circumstances, the two travel services would not constitute a package.

Example B) *The traveller wishes to buy a plane ticket, he concludes a contract and he makes a payment for the ticket. Then, without leaving the travel agency, he wishes to buy also an accommodation service. He concludes a contract on accommodation service and then pays separately for the second service. Is it a package or LTA?*

Under the same assumptions as in the previous example, this would be an LTA and not a package. Actually making a payment includes an agreement to pay.

2) ***What is a single visit or contact with a point of sale? What if the traveller returns to the travel agency or revisits the relevant booking site after 1 hour and makes a second booking?***

The criterion "single visit or contact" is not defined anywhere and will have to be interpreted by the courts. One may argue that there has to be **an interruption, and probably a clear interruption,** of the visit or contact in order to avoid the creation of an LTA under Article 3 (5) (a). However, this will have to be assessed in the circumstances of each case and probably not solely on the basis of the traveller leaving the travel agency for a specific period of time. (Furthermore, if there is more than one visit or contact, there might still be an LTA under Article 3 (5) (b)).

3) ***What does "facilitation" imply in a travel agency or in a web store?***

The concept "facilitation" is broad and includes the idea of "enabling", "making it possible to", "encouraging" and similar ideas. However, the additional criteria under Article 3 (2) (a) ("a single visit or contact") and Article 3 (2) (b) ("in a targeted manner" etc.) make the definitions narrower. A further limitation is the 24 time-limit between the confirmation of the first booking and the conclusion of the second contract.

4) ***Please explain "in a targeted manner".***

The purpose of the element *"in a targeted manner"* is to distinguish LTAs from mere information or advertising of travel services not linked to a booking, as also expressed in recitals 12 and 13. Furthermore, the phrase "procuring an *additional* travel service" indicates that the facilitation has to take place in connection with the booking of a first travel service. Those are the elements on which the co-legislators agreed and the Member States, therefore, have to transpose them.

5) ***Should only the offering of additional services via e-mail or social media be considered as "targeted"? Should facilitators of online-advertising always be excluded from the scope of the new Directive?***

The fact that certain activities are described or referred to as "advertising" cannot automatically remove them from the scope of LTAs. What matters in connection with Article 3 (5) (b) is whether, based on the booking of one travel service, the traveller is invited to book one or more additional travel services for the same trip or holiday, in particular by receiving a link to a booking site for other travel services. This is not limited to e-mail or social media and will have to be assessed on a case-by-case basis.

6) ***Does Article 3 (5) (b) also apply to off-line situations, e.g. where the traveller books a first service, is informed about a second service, but books it only the next day (within 24 hours)?***

Under the **COM** proposal, Article 3 (5) (b) aimed exclusively at online situations. However, the final text of Article 3 (5) (b) is not limited to online situations, and, therefore, appears to apply both online and off-line, although recital 13 has not been adapted accordingly. So, if the elements of Article 3 (5) (b) are met in an off-line situation, then this will be an LTA (unless the additional criteria of a package are fulfilled).

7) ***Can a trader decide whether he facilitates an LTA or organises a package?***

Traders are free to decide what kind of business model they wish to follow, i.e. whether they want to offer packages, LTA, or only individual (stand-alone) travel services and the legal assessment will largely be influenced by the way in which they design the booking process they offer to travellers (see recital 10) . However, the question of whether, in concrete cases, they are actually offering a package, an LTA or a single service, is based on the presence of objective criteria, i.e. traders cannot decide arbitrarily whether they follow the rules on packages or LTAs. Furthermore, traders have to inform travellers correctly on what kind of travel product they are offering and on the associated key rights of travellers.

8) ***How can consumers understand whether there is a package or an LTA-situation?***

Traders are obliged to inform travellers on what kind of travel product they are offering and on the associated key rights of travellers, and so that travellers can make an informed decision.

To ensure that traders inform travellers correctly it will be crucial to make traders fully aware of the new rules well before they will start applying, and, subsequently, to supervise their information policy.

In addition, awareness of the new rules should also be raised amongst consumers and they should be advised to well document the booking processes, for instance through screen shots when booking online, so that they can prove that they are entitled to protection under the rules for packages or LTAs as appropriate.

LUXEMBOURG suggested devising online tools through which companies and travellers can check by which rules the product is covered, as well as the organisation of an awareness-raising campaign.

COM expressed that the Directive already provides that travellers are clearly and prominently informed about whether they are being offered a package or an LTA and prescribes the use of standardised information forms. Awareness-raising first in relation to businesses (who have to provide correct information to travellers) and then in relation to travellers will be important. If there were to be a broader interest for an EU-wide awareness raising campaign, **COM** may consider that.

Article 3 (8) - Definition of organiser

On the definition of "organiser", please see the wording of Article 3 (8) and recital 22: "The main characteristic of a package is that there is one trader responsible as an organiser for the proper performance of the package as a whole. […] Whether a trader is acting as an organiser […] should depend on that trader's involvement in the creation of the package, and not on how the trader describes his business. […]".

COM answered the following questions:

1) ***Who is considered an organiser in cases where separate contracts with individual travel service providers are concluded as referred to in Art 3 (2) (b)?***

The organiser is the trader that enables the combination and purchase of the relevant travel services within a single booking process (i.e. who organises the booking process), at an inclusive or total price or under the term "package" or a similar term etc. Organisers have to provide pre-contractual information, including the standardised information in Annex I and have to specify that they are responsible for the proper performance of the package as a whole. In that way, the traveller will have clarity on the identity of the organiser.

2) ***What is meant by the phrase "with another trader"?***

The wording "together with another trader" is in the text to cover different types of cooperation between traders, e.g. in the event of Article 3 (2) (v) (click-through packages). In the case of Article 3 (2) (v), it is clarified that the organiser is the trader who transmits the relevant data.

FINLAND referred to the situation where there is a chain of links, e.g. the first trader has a link to the second trader and the second trader has, in turn, a link to a third trader, etc. Is the first trader the organiser in relation to all services or can there be different organisers?

COM answered that this question was discussed in the negotiations, but doubted that it would be a significant problem in practice, inter alia in light of the specific criteria in Article 3 (2) (b) (v) for the required data transfer. However, when looking at the text, there is a package where one trader transfers the relevant data to a second trader. If the second trader transfers the same data to a third trader, then another package might be created. According to Article 3 (8), organisers would then be those traders who transmit the data mentioned in Article 3 (2) (b) (v) and those traders (the first and the second trader) would be responsible for the two services included in their packages. In the case of the second service, which would be part of two packages, consumers could then theoretically turn to both organisers.

ITALY wondered whether for the same package, it was possible to have more than one organiser.

COM confirmed that that could be the case in the specific situation where packages are created through the transmission of the required data from A to B and from B to C.

BELGIUM wanted to know how, in connection with click-through-packages, a trader becomes an organiser and has to inform consumers accordingly.

COM explained that, under Article 5 (2), the organiser and the other trader shall ensure that each of them provides information in so far as it is relevant to the service they offer before the traveller is bound. The organiser (the trader who transmits the relevant data) is, in addition, obliged to provide, at the same time, the standard form of Annex II Part C.

ARTICLE 12 (1) AND (2) – TERMINATION OF THE PACKAGE TRAVEL CONTRACT

- Termination fees
- Termination in the event of unavoidable and extraordinary circumstances

Article 12 (1) about termination of the contract *with a fee*:

- […] the traveller may terminate the package travel contract at any time before the start of the package.
- Where the traveller terminates the package travel contract […], the traveller may be required to pay an **appropriate and justifiable termination fee** to the organiser.

> - The package travel contract may specify reasonable standardised termination fees based on the time of the termination of the contract before the start of the package and the expected cost savings and income from alternative deployment of the travel services.
> - In the absence of standardised termination fees, the amount of the termination fee shall

correspond to the price of the package minus the cost savings and income from alternative deployment of the travel services.

- At the traveller's request the organiser shall provide a justification for the amount of the termination fees.

COM reminded delegations of the elements applying to the traveller's right to terminate the contract under Article 12 (2) *without* having to pay a *termination fee*:

- […] the traveller shall have the right to terminate the package travel contract before the start of the package without paying any termination fee **in the event of unavoidable and extraordinary circumstances**

  - occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or
  - which significantly affect the carriage of passengers to the destination.

- In the event of termination […] under this paragraph, the traveller shall be entitled to a full refund of any payments made for the package, but shall not be entitled to additional compensation.

Recital 31 contains examples of unavoidable and extraordinary circumstances which can significantly affect the performance of the package: warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract.

COM answered the following questions:

1) ***Given that sometimes economy class tickets cannot be changed or cancelled after the purchase, is it in line with the Directive that, in case of cancellation, the traveller needs to pay a fee that includes the full amount of the flight ticket?***

If the organiser cannot cancel the air ticket and, therefore, cannot redeploy it, it would appear to be justifiable not to reimburse the amount corresponding to the flight. However, the justification has to be assessed based on the circumstances of each case.

2) ***In case of unavoidable and extraordinary circumstances the traveller has the right to terminate the package without any termination fee. Does it mean that the organiser has no right to charge a fee for services already offered (e.g. office expenses, visas)?***

Article 12(3) talks about a **full** refund. This means that the organiser cannot subtract fees for administrative expenses. Visas will normally be obtained by the traveller and at his/her own expenses and such fees will then not be covered by the right to receive a full refund, which is directed at the organiser. However, if the organiser takes care of the visas and those costs are part of the package, the relevant amounts will be covered by the right to a refund.

3) ***Which party needs to demonstrate that the travel destination is directly exposed to extraordinary factors?***

Unlike in Chapter II, there are no specific rules on the burden of proof. So the normal rules on burden of proof under national law will apply, e.g. if the traveller wants his money back he will generally have to prove the relevant facts (i.e. that there is a war in country X or the outbreak of a serious disease in country Y or a particular part of it). However, such facts may generally be known and there may be rules that alleviate the burden of proof to the benefit of travellers. Recital 31 lists some typical examples of unavoidable and extraordinary circumstances. In practice, questions such as whether the unavoidable and extraordinary circumstances prevail "in the immediate vicinity" of the travel destination and whether they significantly affect the performance of the package will depend on an in-depth appreciation of facts. Such questions are likely to be subject to case law.

ROMANIA asked whether the Directive gives traders the right to specify standard termination fees, and if percentages or ceilings could be laid down in legislation. Romania further wanted to know what is meant by cost savings and income from alternative employment and how it can be determined.

COM answered that, according to the Directive, the contract may set out standardised termination fees. So, it would appear that national law can lay down the criteria for standardised termination fees, in accordance with the Directive, but not percentages as such. Cost savings are costs that the organiser saves due to the termination, e.g. costs that he no longer has to pay to a third party, e.g. a service provider. Alternative deployment means that the organiser has been able to use the freed capacity otherwise, e. g. by selling the package or parts thereof to another traveller.

ITALY asked whether **COM** was planning to issue further criteria to assist market operators when drafting their contracts.

COM answered that more specific criteria in keeping with Article 12 (1) might be laid down in guidelines and repeated that it is important not to lay down diverging specific termination fees in law.

LUXEMBOURG wondered whether this was not more a question of contract law and therefore a matter of national law under Article 2 (3) of the Directive.

COM explained that general contract law is left to the MS insofar as aspects of general contract law are not regulated in the Directive. However, many aspects of contract law are regulated by the Directive, including the parameters for standardised termination fees. If MS put additional specific criteria into their laws, this would lead to different rules and create problems for traders operating cross-border.

LUXEMBOURG asked further whether it would be possible to use a rebuttable presumption for situations where extraordinary circumstances prevail.

COM expressed that this may be possible since the Directive does not regulate the burden of proof in this respect.

ARTICLE 13 AND 14 – LIABILITY

- ***Liability of retailers***
- ***Article 13 (7) longer periods in passenger rights legislation***
- ***Article 14 (4) limitation of liability under international conventions***

Article 13 (1) second sub-paragraph, states: "Member States may maintain or introduce in their national law provisions under which the retailer is also responsible for the performance of the package. In that case the provisions of Article 7 and Chapter III, this Chapter and Chapter V which are applicable to the organiser shall also apply *mutatis mutandis* to the retailer."

Recital 23 reads: " […] Therefore, it should be clarified in this Directive that organisers are responsible for the performance of the travel services included in the package travel contract, unless national law provides that both the organiser and the retailer are liable".

On the obligation to provide accommodation in unavoidable and extraordinary circumstances, Article 13 (7) states:

"As long as it is impossible to ensure the traveller's return as agreed in the package travel contract because of unavoidable and extraordinary circumstances, the organiser shall bear the cost of necessary accommodation, if possible of equivalent category, for a period not exceeding three nights per traveller. Where longer periods are provided for in Union passenger rights legislation applicable to the relevant means of transport for the traveller's return, those periods shall apply."

On Article 14 (4) on limitation of compensation on the basis of international law and the contract, **COM** reminded delegations of the following rules:

- Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is to be paid by a provider carrying out a travel service which is part of a package, the same limitations shall apply to the organiser.
- Insofar as international conventions not binding the Union limit compensation to be paid by a service provider, Member States may limit compensation to be paid by the organiser accordingly.
- In other cases, the package travel contract may limit compensation to be paid by the organiser as long as that limitation does not apply to personal injury or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package.

COM answered the following questions on Articles 13 and 14:

1) ***Regarding the criterion "longer periods" in Art. 13 (7), the Union passenger rights legislation and the jurisprudence of the CJEU do not provide for a limitation of the right to care in case of 'extraordinary circumstances' concerning rail and air traffic. Does that constitute a "longer period" so that organisers could not invoke the three-night limitation of Article 13 (7) I relation to rail and air traffic?***

The criterion "longer periods" would also cover instances where no limitation at all is provided for in a specific passenger rights regulation.

2) ***Which international conventions binding/not binding the Union are referred to in Article 14 (4) that limits compensation?***

Examples are given in recital 35, e.g. the Montreal Convention of 1999 for air transport or the COTIF convention on rail transport (national laws do not have to mention them in an exhaustive manner and should not do so). For international conventions not binding the Union, this is to be checked by the MS who would like to use that limitation. MS had the possibility of limitation under international conventions already under Directive 90/314.

BELGIUM asked what would be the liability of organisers based outside of the EEA and of retailers if they were not to use the possibility of making the retailer and the organiser liable under Article 13(1) second subparagraph, and whether retailers can always be made liable along with 3rd country organisers.

COM answered that the liability of organisers based outside the EEA is determined as a consequence of the applicable law under the Rome I Regulation. In addition, the Directive clarifies in Article 17 (1) second subparagraph that third country organisers are also obliged to take out insolvency protection. The liability of retailers will also depend on the applicable national law. For those MS that opt for joint liability, retailers will, therefore, be fully liable independently of Article 20. If the organiser does not comply with his obligations, then the retailer has to step in under Article 20 even if the relevant national law does not provide for joint liability.

POLAND stated that, in connection with Article 13 (7), they would like to limit the liability of the organiser to three nights when the traveller's return is impossible in exceptional circumstances, in particular in order to protect SMEs.

COM answered that Article 13 (7) constitutes a compromise that Council and Parliament agreed on at the end of the "trilogues". Regarding passenger transport by air, the effect of Article 13 (7) depends on what is laid down in the Air Passenger Rights Regulation and the negotiations on a possible reform thereof. Under the current regime, one would have to conclude that there is no limit regarding the number of nights to be covered.

POLAND and GERMANY considered it to be problematic for organisers if under Article 13 (7) the outcome really depended on the content of the Air Passenger Rights Regulation so that the three-day limit would often not apply.

COM replied that it is aware that the Council preferred a limitation to 3 nights, which was also the solution under **COM** proposal. The final wording of Article 13 (7) is a compromise with Parliament, which for a long time had insisted on 5 nights. The idea is that package travellers should enjoy at least the same protection as other passengers. Currently airlines are liable without limitation in that kind of situation, and the compromise solution avoids that there is a discrepancy between the liability of airlines and organisers. The new rules will in any event be clearer than the current regime. Whether there will be a limitation in relation to packages including a flight will depend on the negotiations on a reform of the Air Passenger Rights Regulation.

LUXEMBOURG commented that in Luxembourg there is currently already de facto unlimited liability, and that companies find solutions via insurance.

In reply to a question from **SWEDEN**, **COM** answered that the option for organisers to limit their liability is, in turn, limited according to the last sentence of Article 14 (4), which inter alia means that that they may not limit their liability to less than 3 times the price of the package (and not all in relation to personal injury or damage caused intentionally or with negligence).

ARTICLE 16 – OBLIGATION TO PROVIDE ASSISTANCE

Regarding the organiser's obligation to provide assistance, Article 16 states:

- Member States shall ensure that the organiser gives appropriate assistance without undue delay to the traveller in difficulty, including in the circumstances referred to in Article 13(7), in particular by:

> (a) providing appropriate information on health services, local authorities and consular assistance; and
>
> (b) assisting the traveller to make distance communications and helping the traveller to find alternative travel arrangements.

- The organiser shall be able to charge a reasonable fee for such assistance if the difficulty is caused intentionally by the traveller or through the traveller's negligence. That fee shall not in any event exceed the actual costs incurred by the organiser.

Regarding the question of what happens where the organiser, due to circumstances beyond his control, is not able to provide assistance, Article 16 gives examples of what kind of assistance has to be given. The term "appropriate", indicates that the circumstances of the case should be taken into account.

INSOLVENCY PROTECTION

Insolvency protection – effectiveness

Under the case law of the CJEU, Article 7 of Directive 90/314 requires an "effective guarantee of refund of all money paid over and repatriation".

Regarding Article 17 (2) of the new Directive, **COM** highlighted that the insolvency protection has to cover "reasonable foreseeable costs" and "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". **COM** drew attention to recital 40, which contains a number of further indications meant to ensure the "effectiveness" of the insolvency protection, such as the need to cover a "sufficiently high percentage of the organiser's turnover" and that it may depend on factors such as "the 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".

COM further highlighted:

- the obligation to adapt the insolvency protection in the event of increased risks, including a significant increase in the sale of packages and
- the limitation of the guarantee for refunds for "highly remote risks", for instance the simultaneous insolvency of several of the largest organisers.

Regarding the time when the insolvency protection should kick in, Article 17 (4) states that: "When the performance of travel services is affected by the organiser's insolvency, …", as well as to 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 – internal market/mutual recognition

Article 17 (3): "An organiser's insolvency protection shall benefit travellers regardless of their place of 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."

With reference to the rules on mutual recognition of insolvency protection, Article 18 states the need to:
- designate central contact points for administrative cooperation on insolvency protection requirements and inventories of compliant organisers (Article 18 (3)) and,
- in case of doubts about an organiser's insolvency protection, respond to requests from other MS as quickly as possible taking into account the urgency and complexity of the matter (Article 18 (4)).

Insolvency protection – LTAs

Regarding the insolvency protection requirement of traders facilitating an LTA under Article 19 (1), **COM** drew attention to the following elements:

- The refund covers payments for all travel services included in the LTA that the facilitator receives.
- The insolvency protection covers repatriation only if the facilitator provides carriage of passengers.
- Traders have to inform travellers
    - on insolvency protection,
    - as well as on the fact that LTA purchasers will not benefit from rights applying exclusively to packages and that service providers will be solely responsible for their own performance.

- Under Article 19 (4), the "second trader" is obliged to inform the facilitator of the conclusion of a contract giving rise to an LTA.

Insolvency protection – operators from third countries

Article 17 (1) second subparagraph: "Organisers not established in a Member State which sell or offer for sale packages in a Member State, or which by any means direct such activities to a Member State, shall be obliged to provide the security in accordance with the law of that Member State[.]". Article 20 states that retailers in the EU selling packages by third country organisers will have to provide insolvency protection, unless they provide evidence that the organiser does so.

COM answered the following questions:

1) ***Is their mutual recognition in case of multiple establishments?***

Articles 17 and 18 do not explicitly cover the situation of multiple establishments, but **COM** considered that mutual recognition should also apply where a trader has multiple establishments. The formulation "the Member State of his establishment" in Article 18 (1) can be read as "any of the MS where he has an establishment" and recital 42 states that "it is appropriate to lay down rules so as to prevent insolvency protection obligations from acting as an obstacle to the free movement of services **and the freedom of establishment**[.]" and refers to organisers and retailers "operating in different Member States." Since the insolvency protection requirements are harmonised, there is no reason not to apply mutual recognition to multiple establishments.

At the same time there is, in the case of multiple establishments, no *obligation* for an insolvency protection body/entity to arrange the insolvency protection for establishments in different Member States.

2) ***How should the insolvency protection for LTAs be calculated?***

The principles for calculating the necessary insolvency protection are the same – see Article 19 (1) third sentence. However, the different risks stemming from LTAs as opposed to packages and the type of LTA that a particular trader offers may be taken into account, e.g. whether or not the traders requests/accepts pre-payments and whether repatriation has to be covered or not. If a trader facilitating an LTA does not receive any money from a traveller, he does not need to offer insolvency protection.

3) ***What happens if the "second trader" does not inform the facilitator of the conclusion of an LTA?***

The Directive does not regulate that issue. However, there will still be an LTA and the traveller is entitled to insolvency protection under the conditions of Article 19 (1). The chances of enforcing this right will increase if they have evidence of the booking process, in particular through screen shots. One can assume that the commercial agreements between traders participating in an LTA will regulate the B2B information obligation as well, and there will generally be a commercial interest in providing the necessary information. If nevertheless no such reporting takes place, the problem will be that the LTA-facilitator's insolvency protection may not be sufficient. Enforcement authorities or organisations entitled to seek injunctions could act against traders who persistently refuse to provide that information.

UK presentation on the insolvency protection system in the UK

The UK delegation made a presentation on their insolvency protection system and answered questions from other delegations and **COM**. The slides were made available to the other delegations shortly after the meeting.

Belgian presentation on the insolvency protection system in Belgium (GFG)

Then Belgium made a presentation on their insolvency protection system and answered questions from other delegations and **COM**. The slides were made available to the other delegations shortly after the meeting.

Tour de table

MS briefly described their systems and agreed to send more detailed information to **COM** in writing.

Continuation of the Commission's presentation – Insolvency Protection

COM acknowledged that it is harder to enforce the insolvency protection obligation in relation to third party operators compared to EU operators. Article 20 ensures enforcement where there is a retailer in the EU, but in other cases there also softer enforcement tools could be used such as bad publicity for those who do not conform.

SPAIN had a question regarding the calculation of the amount of the security and about what to do for new companies on the market. Since "high season" is not defined, they asked whether this could be defined at national level depending on the type of country. Spain also wondered whether MS would be able to maintain rules on professional liability insurance.

COM answered that the Directive provides criteria for the calculation of the necessary protection, but is not exhaustive. Member States have to ensure that the protection is effective. Some Member States use absolute minimum amounts for companies entering the market. The purpose of the reference to "peak season" in recital 40 is to ensure that the cover is sufficient for the periods where operators hold the largest amounts received from travellers. **COM** also considered that MS may maintain rules on professional liability insurance, given that that aspect is not regulated by the Directive.

Regarding the central contact points and exchange of information, **POLAND** stated that they benefit from the Internal Market Information System (IMI), and asked whether they could continue to use it in connection with insolvency protection.

COM answered that the Directive does not necessarily require MS to create new authorities and not to use existing information channels, as long as there are central contact points and the information is exchanged in accordance with Article 18.

ROMANIA required confirmation that under Article 18 (3) they are not obliged to have an inventory of organisers who are in compliance with their insolvency protection requirements.

COM answered that this is correct; Article 18 (3) refers to "any available inventory".

Standard information forms

COM referred to the wording of Article 5 (1), according to which "Member States shall ensure that, before the traveller is bound by any package travel contract or any corresponding offer, the organiser and, where the package is sold through a retailer, also the retailer shall provide the traveller with the standard information **by means of the relevant form as set out in Part A or Part B of Annex I** […],"

COM also pointed to similar wording in Article 19 (2) second subparagraph in relation to LTAs and Annex II.

On the question of whether *Art 5 (1) entails that Member States have to use the exact wording of the forms in Annexes I and II or whether they can deviate from them as long as the same information is used,* **COM** answered that Article 5 (1) does not give the Member States flexibility in that respect since the Directive provides for uniform standardised information forms. The same would be true for Article 19 (2) (2) in relation to LTAs. Variations would not be compatible with that idea. Small adjustments that would make sense in the context of a given Member State might be acceptable. However, this would have to be examined on a case-by-case basis.

Article 27 (2) - Application of certain CRD provisions

COM drew attention to the wording of Article 27 (2):

- "Point (g) of Article 3(3) of Directive 2011/83/EU is replaced by the following:

- '(g) on packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 of the European Parliament and of the Council (**).

- Article 6(7), Article 8(2) and (6) and Articles 19, 21 and 22 of this Directive shall apply *mutatis mutandis* to packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 in relation to travellers as defined in point 6 of Article 3 of that Directive."

On the question of whether *the amendment of the CRD relates only to travellers who are consumers or to all travellers (in light of Art. 3 (6) of the new Directive and Articles 1 and 3 (1) of the CRD),* **COM** answered that Article 27 (2) explicitly provides that selected articles of the CRD shall apply mutatis mutandis <u>in relation to travellers</u>, as defined in Article 3 (6) of the new Package Travel Directive. This implies that, in deviation from Articles 1 and 3 (1) of the CRD, the provisions of the CRD referred to in Article 27 of the new Package Travel Directive will apply not only to consumers but also to business travellers unless the relevant packages and LTAs are bought on the basis of a general agreement for the arrangement of business travel (Article 2(2)c)).

Ms. Veronica MANFREDI concluded the meeting, thanking all delegates for their active participation and announcing that the next workshop may take place in June.