Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements Workshop with Member States on 16 February 2017

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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. The replies to specific questions are based on statements by the relevant service in DG Justice and Consumers and do not necessarily reflect the official position of the Commission.

Whenever these minutes refer to articles and recitals without identifying a specific Directive, reference is made to Directive (EU) No 2015/2302.

Welcome – purpose and objectives of the meeting

Ms. Veronica MANFREDI welcomed the delegates from the Member States to the fourth expert meeting on the transposition of the new Package Travel Directive (PTD). She announced that no more than 2 additional workshops would take place, notably one in May and – subject to a clear request from the Member States - possibly a last one in early July 2017. She highlighted that, with regard to the information so far provided by the Member States, concerns have arisen regarding the level of penalties introduced for infringements of national provisions transposing the new Directive. In particular, she questioned whether fixed and rather modest lump-sums, which do not take into account the relevant companies' turnover, are sufficient to constitute "effective, proportionate and dissuasive" penalties, as required by the new Directive.

I. Exchange of information and discussion of issues arising in connection with the transposition of Directive (EU) No 2015/2302

Mr Andreas Renner (Swiss Re) delivered a presentation on insolvency protection from the point of view of an insurance company. Mr Renner provided an overview of the system of insolvency protection in Germany. All tour operators have to provide a valid contract for insurance, and with the so called “Sicherungsschein” (security certificate) tour operators give notice to their customers that the required protection is in place. The "Sicherungsschein" also gives information to the customer about the insurer (e.g. contact address, duration, scope of the insurance). In Germany, there is no central supervisory system with which the trade operator must be registered. The insurer is responsible for the claims-handling (e.g. for repatriation). The maximum liability for each tour operator and for

each insurer´s portfolio in one year is 110 million EUR. One insurance company left the German market in 2017, with four competitors remaining. At European level, important factors for an insurance company include: (1) Maximum liability: model with fixed parameters (% of the yearly turnover); estimated maximum risk as opposed to an open limit; (2) Claims Handling: official authority in place for claims handling vs claims handling done by the insurer/third party; (3) Beneficiary: travel bonding in favour of an official authority (such as in Scandinavia) or the final customer (such as in Germany); (4) External important topics: payment conditions (e.g. amount of advanced payments, which often ranges, in Swiss Re experience, from roughly 10% to 40%; period by which the final payment is due, which again, in Swiss Re experience, tends to range from 20 to 60 days before departure) as laid down either by national law or by contract and which are relevant for the evaluation of a theoretical loss.

In reply to a question from **Belgium**, Mr Renner stated that the "Sicherungsschein" is given to all customers on a mandatory basis; it is always in the same format and provides the contact details of the insurance company so that customers can seek any further needed information.

COM asked about the exact calculation of the risk assessment and the factors that are considered relevant, e.g. the business model of the operator. Mr Renner noted that an assessment includes a thorough analysis of the balance sheet, particularly the turnover, advance payments requested before departure, a risk estimation over 12 months and peaks during summer months. For larger companies such as TUI the statutory maximum liability is 110 million EUR; for smaller companies, the amounts vary, but the assessment procedure is the same. Mr Renner also noted that a maximum fixed liability amount would be an easier model for newcomers entering the market.

In reply to a question by the **COM** as to existing insolvency protection schemes which appear to be preferable in terms of clarity of the end-pricing for consumers, Mr Renner highlighted the UK system as a positive example where each traveller pays 2.5 GBP per trip for insolvency protection.

The Netherlands noted that small Dutch companies have encountered problems with obtaining insurance. Mr Renner noted that there is an insurance market for smaller companies. However, the solvability of the company is important. Concerning start-up companies, whose solvability could be problematic, Mr Renner was inclined to take a more conservative approach, which includes scrutiny of the company's business plan, shareholders etc.

Malta asked whether the insurance company is aware in case a traveller is stranded and in need of repatriation. Mr Renner noted that when there is a tour operator failure foreseeable, the insurance company would try to shift the failure out of the peak season into a period with lower guests abroad and expected lower loss. As an example in the cruise segment, the insurance company could pay fuel and port costs for the struggling cruise company that they can operate a little longer to come into the low season. The cruise ship

should also arrive at the final port that the guest can fly back with the original booked airplane. But if there is a failure, the insurance company would pay for the repatriation costs and try as best as possible to reduce the repatriation costs. In this context, the insurance company cooperates with other tour operators and airlines.

Latvia asked whether insurance companies have already considered how to estimate the necessary cover for LTA situations. Mr Renner indicated that – understandably, since the new Directive is not yet in force - they have not yet had any experience with covering LTAs; they are however confident that the necessary cover would be determined together with the client. In case the insurable amount is not easily foreseeable, the insurance company is likely to be more conservative.

Questions raised by the Member States regarding insolvency protection and administrative cooperation

1) Art. 17(1) - Could the Commission or MS give examples of when the "continuation of the package" could be offered?

The sentence means that, instead of bringing travellers home as quickly as possible, travellers may be offered the possibility to finish their holiday. That will usually mean that somebody assumes the role of the organiser instead of the insolvent organiser.

Concerning the term "establish" (Article 17(1) and Article 3(10)) - according to Estonian laws, a branch of a foreign company is not a legal person and the foreign company is liable for the obligations arising from the activities of the branch. We consider branches to be established in the foreign company´s establishment country and it has to comply with the requirements of that country. Could the Commission confirm if such understanding is correct? The situation would be different in case the foreign company establishes another company (legal person who acts in its name) in Estonia.

According to Article 3 (10), 'establishment' means, in line with point 5 of Article 4 of Directive 2006/123/EC (the "Services Directive") "the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out". That definition, which was not included in the Commission proposal, would appear to be very broad and include also branch offices without their own legal personality. However, practically and legally, insolvency protection can only be arranged by entities with legal personality. Therefore, the Estonian approach seems to be correct and for establishment in the sense of Articles 17 and 18 PTD one would have to look at the place(s) where operators are registered.

2) Art. 17(1) - Concerning "refund for all the payments" - what happens in case of individual guarantee systems if the amount of the security is not enough? Will the State be liable for the difference or will the travellers receive only partial payments?

May a Member State set as a condition that the amount of the security shall be in the national currency?

According to Directive 2015/2302 (and already under Directive 90/314), the individual guarantee has to be sufficient. If there is no back-up system, e.g. through a fund, and the system is structurally inadequate to provide full protection or where there are inadequate control mechanisms, there is a risk that the MS will be liable under the principle of state liability for incompliance with EU law, as established by the CJEU case-law: for instance: Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer* and Others, Case C-140/97 *Rechberger* and Others and Case C-430/13 *Baradics* and Others. Article 17 (2) of the new Directive specifies that the security has to cover all reasonably foreseeable costs. Recital 40 explains that the insolvency protection does not have to take into account highly remote risks and that in such cases the guarantee *for refunds* may be limited. On that basis, MS should not be liable if refunds are only partial in cases of highly remote risks or where certain costs were not reasonably foreseeable.

Concerning the second issue, a MS may provide that the security has to be in the national currency for all those operators who take out insolvency protection under its law, but not in relation to operators procuring insolvency protection under the law of another Member State.

3) Recital 39 - "As a consequence of the organiser's liquidity problems" - Does this mean that the security shall be available and the traveller should receive a refund even though the organiser has not yet been declared bankrupt by authorities?
What is meant by the phrase "Where service providers require travellers to pay for them"?
Should the security also cover cases where the lack of performance of the travel services is not related to insolvency? E.g. the organiser does not provide a ticket to a concert although he is still solvent.

Insolvency will often coincide with a declaration of bankruptcy and the cessation of operations. However, the purpose of recital 39 is to clarify that repatriation cannot be refused simply because there is no official declaration of bankruptcy. Any delays in the procedure by the operator or national courts/authorities should not work to the disadvantage of stranded travellers, who need quick solutions. As the Court stated in paragraph 19 of Case C-364/96 *Verein für Konsumenteninformation*, "the purpose of the security for the 'repatriation of the consumer' is to ensure that the consumer does not become stranded, during the performance of the contract, at the place where he is staying, through the carrier refusing, on account of the organiser's insolvency, to supply the service of transporting the consumer back to his place of departure." For refunds there is less urgency. However, excessive delays in the insolvency proceedings should not lead to a refusal of refunds.

The phrase "Where service providers require travellers to pay for them" in recital 39 relates to Article 17 (4) and would cover, for instance, the situation where carriers and other service

providers did not receive money from the organiser and require travellers to pay for the services, e.g. travellers are threatened to be thrown out of the hotel if they do not pay directly to the hotel (although they already paid to the organiser). See, for instance, Case C-64/96 *Verein für Konsumenteninformation*.

However, if lack of performance is not related to insolvency this is not a matter for insolvency protection but rather of liability.

4) Article 17(1) - Is it possible for MS to exclude the costs of scheduled flights which can still be carried out despite the organiser's insolvency, when assessing the amount of a security? Charter flights would still be included in the amount of the security.

When establishing the insolvency protection needs for a given organiser, the organiser's business model and the associated risk exposure of travellers may be taken into account. The COM is aware that some MS distinguish in their legislation between charter flights and scheduled flights. Insofar as it is guaranteed that scheduled flights will be carried out despite the organiser's insolvency, this may be taken into account when calculating the required insolvency protection. However, MS have to ensure that, through their systems, all payments that may be affected by the organiser's insolvency are protected.

5) Article 17(2) – repatriation
Would it be up to each MS to determine how repatriation is performed?
If a MS has to repatriate a group of people, and the security which is in the form of individual security is not sufficient, regarding the cost of the repatriation, is the Member State liable and has to pay the difference?

As long as the requirements of Article 17 regarding repatriations are met, there is scope for different solutions. Organisation of repatriation by the insolvency protection entity or the relevant authorities will generally be the best way from the point of view of the traveller and will often be more cost-efficient, for instance because such entities can negotiate with carriers, but it is not the only way. Article 17 (4) requires that, when the package is affected by the organiser's insolvency, "the security shall be available (free of charge) to ensure repatriations and, if necessary, the financing of accommodation prior to the repatriation". That excludes that stranded travellers are left to their own devices and limited to seeking *ex post* reimbursement of the expenses incurred. See also recital 39 and Case C-364/96 *Verein für Konsumenteninformation*. The insolvency protection entity should, in any event, at least be immediately available to assist stranded travellers and pay for the return flight.

Regarding insufficient cover for repatriations, see question 2 above. In order to avoid liability, MS would have to show in particular that the actual repatriation costs exceed the reasonably foreseeable costs for repatriations and refunds (Article 17 (2) and recital 40).

6) Article 3(16) – definition of repatriation
Does "repatriation" also apply to travel situations that are exclusively domestic (e.g. travelling to another city within the same country)?

Yes, the definition of repatriation also includes domestic trips.

7) Recital 44 – "Member States should not be prevented from taking into account the special situation of smaller companies while ensuring the same level of protection for travellers". What is meant by the "special situation of smaller companies" in recital 44? Can a Member state lay down rules that discriminate companies by their sizes? What is the definition of "smaller companies"? Could COM provide further guidance to small companies?

Recital 44 reminds MS that they may take into account the situation of "smaller companies" when designing their insolvency protection systems. This could be reflected, for instance, in the contributions to be paid to a guarantee fund. An example of flexibility - as Norway presented at the last workshop – could also be a differentiation in the formula for calculating the guarantee amount to be paid depending on the company's turnover. In any event, the money to be paid for insolvency protection will generally have to be proportionate to a company's turnover in packages already under Article 17 (2). However, also smaller organisers are under the general obligation to ensure that full reimbursement to travellers, plus, where relevant, repatriation costs are covered.

On the point as to whether the Commission will provide guidance on the new Directive in particular for smaller companies, **COM** noted that there would have to be a robust call from the MS in this sense, as the European Commission is reluctant to issue Guidance documents before a new Directive has started applying. COM also stressed the role of well thought-through awareness-raising campaigns, which may benefit in particular smaller businesses. In this respect, COM announced that it may launch an EU-wide Awareness-Raising Campaign around the time when the national provisions transposing the Directive will start applying (July 2018).

8) Article 18(1) – mutual recognition

How can mutual recognition be performed if tour operators are established in another MS? Can MS provide in the national legislation the requirements for submission of any documents by the tour operator to check their compliance? What should be the procedure for checking the compliance and contacting relevant national authorities in another Member State?

The system should facilitate cross-border operations, but, in the interest of consumer protection and fair competition, there has to be effective control and an effective exchange of information between the MS. It would be appropriate to ask operators to notify host country authorities of their sales activity directed to their territory (as the COM stated at the workshop of 13 June 2016) and to inform them under the law of which country and through which insolvency protection entity they have arranged their insolvency protection. On that basis the host country authorities can make the necessary inquiries through the contact points and receive confirmation from the country of establishment that the operator has the

insolvency protection required under the law of the country of establishment and that sales of packages/LTAs in the host country are covered.

Regarding the system that could be used for this exchange of information, the Commission is considering different possibilities, including the mechanism developed by the Consumer Protection Cooperation network. More information will be provided at the next workshop.

9) Article 18 – central contact points

What particular features should the central contact points have and what requirements do they have to meet? How are they meant to function?

Who will check that the central contact points make available all necessary information and take care of the inventory? What will happen if a central contact point fails to respond?

MS have some discretion as to the authority that will act as a contact point and as to its way of working. However, the Directive lays down certain obligations. Above all, the contact point must be able to provide accurate information on the insolvency protection status of specific operators and to communicate quickly and effectively with other contact points. It may be useful that the contact point is part of the authority supervising organisers, retailers and LTA facilitators, but it may also be an existing contact point that is in charge also of other issues as long as effective communication with the supervisory authority is ensured. While translation facilities may be devised, some linguistic capabilities would facilitate the exchange of information.

COM noted that, in case of serious problems in the operation of a central contact point, this would amount to non-compliance with the Directive and should be signalled to the COM. If it is impossible to obtain, from the relevant operator or through the relevant other MS, adequate evidence that an operator has the required insolvency protection, a MS could consider restricting market access for that operator. The MSs are requested to consider and indicate at the next workshop what kind of information would be practically relevant for the practical operation of the mutual recognition mechanism.

10) Article 19 –LTAs - proof of insolvency protection

Could the MS introduce the obligation to conclude a contract between the trader facilitating linked travel arrangements and the traveller, or the obligation for the trader to present to the traveller a confirmation of the booking of the linked travel arrangements? Such proof would ensure the effectiveness of the financial security provided by traders facilitating linked travel arrangements in the case of their insolvency, and would constitute the basis for claiming the refund of the payments made.

According to Part I Q10 of the minutes of the workshop of 25 October 2016, COM considered that, although a certificate would in principle be useful, there is no explicit provision for it in the Directive, and invited MS to reflect on this question.

Poland reiterated concerns about the practical obstacles for travellers when trying to obtain a refund and asked whether an e-mail could serve as proof.

COM stated that, in order to demonstrate the existence of an LTA and thereby (in certain cases) entitlement to insolvency protection, travellers would indeed have to provide evidence for the booking process, e.g. through screenshots and e-mails they receive from traders. However, in addition to this, a confirmation by the trader on the entitlement to insolvency protection may still be useful in order to make the protection relevant in practice, and there should be a coordinated approach in this regard amongst the Member States. The Commission notes that so far no Member State has objected to this idea.

Germany considered that the "Sicherungsschein" would be an example of a special certificate which can serve as proof and which would be allowed under Recital 39.

11) Article 19(1) - examples regarding insolvency protection for LTAs

Example A: What is the protection if the hotel that facilitated the reservation of a golf course and received payment for all services goes bankrupt?

Example B: What happens if the golf club goes bankrupt?

Example C: What happens if the traveller pays only the amount for the hotel room to the hotel and pays directly to the golf club for the golf arrangement in case the hotel goes bankrupt?

A: Assuming this is an LTA, the traveller's money is protected also for the golf arrangement - as long as the hotel has not passed on the money. If the hotel passed on the money before going bankrupt, the traveller can still take advantage of the golf course anyway.

B: If the hotel has passed the money on to the golf club, that money will be lost, as there is no insolvency protection for service providers who do not facilitate an LTA.

C: Insolvency protection covers only the payments made to the hotel. In the example, the traveller suffers no damage regarding the golf arrangement as a consequence of the hotel's bankruptcy.

1. If a trader facilitating an LTA receives money only for its own service, does it have to take out protection (only) for its own insolvency?

Correct

2. Do all traders who may facilitate LTAs and may receive money from travellers have to take out insolvency protection?

Correct

12) Article 19(1) – party responsible for the carriage of passengers

Does the "party responsible for the carriage of passengers" refer only to the carrier or also the trader who receives payments from the traveller?

In relation to LTAs, insolvency protection covering repatriation has to be obtained by traders facilitating linked travel arrangements who receive payments from travellers *and* who are responsible for the carriage of passengers. This is confirmed by the standardised information sheets in Annex II, which make a distinction as to whether the trader facilitating an LTA is a

carrier or not. Typical example: carrier who, in addition to selling a flight or another transport ticket (with prepayment), offers a link to another travel service.

13) Articles 17 and 19 - insolvency

In the event of a fraudulent scheme, e. g. the operator sold the client a package but then disappeared with the traveller's money, claiming that he is insolvent, should the insolvency protection be activated?

Insolvency protection under Article 17 or 19 requires insolvency. So, without insolvency the protection will not be activated. If the organiser is insolvent, it does not matter how the insolvency came about, including in the event of inadequate business practices or fraudulent behaviour (see the CJEU's ruling in Case C-134/11 *Blödl* – referred to in the minutes of the workshop of 25 October 2016).

14) Article 20 – non-EEA organisers

What if the non-EEA organiser goes bankrupt? Will the retailer's insolvency protection be used, in any case? Or - as far as the retailer is subject to the obligations laid down for organisers - is the retailer responsible for the performance of the travel services included in the package travel in place of the non-EEA organiser?

1. If the retailer is not bankrupt, is it correct that there is no need to use his insolvency protection as he will take over the obligations of the bankrupt non-EEA organizer?

2. If also the retailer goes bankrupt, will his insolvency protection be used?

In the first place the non-EEA organiser is obliged to provide insolvency protection under Article 17 (2), second subparagraph. However, if the non-EEA organiser does not have the required insolvency protection, the EEA-retailer may not sell packages from such non-EEA organiser without procuring insolvency protection for the non-EEA organiser under Article 20.

If the non-EEA organiser has arranged his own insolvency protection and becomes insolvent, the non-EEA organiser's insolvency protection will be activated.

If the non-EEA organiser has not arranged insolvency protection and services are not performed because of his insolvency, the insolvency protection procured by the EEA-retailer for the non-EEA-organiser will kick in. While in cases other than insolvency, EEA-retailers are liable for the performance of the included services under Chapter IV if the non-EEA organiser does not address a lack of conformity, Article 20 should be read in such a way that, in the event of lack of performance because of the non-EEA organiser's insolvency, Chapter V (insolvency protection) applies, as it is the case in relation to EEA-organisers.

This is without prejudice to the second sub-paragraph of Article 13 (1).

If, in addition to the non-EEA organiser, also the EEA retailer goes bankrupt, the same principles apply.

Questions regarding packages and linked travel arrangements

1) Article 3(5)(a) provides: "'linked travel arrangement' means at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates:
(a) on the occasion of a single visit or contact with his point of sale, the separate selection and separate payment of each travel service by travellers;"
In the transposition of Article 3(5)(a), the German delegation proposed to add the case of a single payment: "[…] the separate selection and a) separate payment of each travel service by travellers; or b) single payment of the travel services, once the travellers have previously agreed separately to pay for each service […]." and explained their proposal.

COM referred to the minutes of the last workshop, including the legislator's assumption that a single payment for all services normally implies the creation of a package and that, in any event, before arriving at the examination of Article 3(5) – linked travel arrangement - it has to be established that there is no package - see Article 3(5): "not constituting a package". This means in particular that the traveller must have agreed to pay for at least one travel service, i.e. conclusion of the contract or completion of the booking process for one travel service, before a further travel service was selected.

At the same time, COM stressed that the fact that the traveller has explicitly agreed to pay for the booking of a first travel service but, for example, cannot materially do so (for example because he forgot his credit card), and then agrees to conclude, as the result of separate selections and booking processes, contracts on further travel services, such combination of travel services may still qualify as an LTA under Article 3 (5) (a), even if subsequently the traveller pays for all travel services in a single payment.

In other words, what is crucial, in the Commission services' view, is to what extent it can be established that a first contract had been effectively concluded, having regard also to relevant national contract law, before further services were selected.

Therefore, also the formulation "separate selection and separate payment **or agreement to pay** for each travel service" seems acceptable in the national laws transposing Article 3 (5) (a).

Luxembourg noted that, if there is a single payment, it is likely to be a package, rather than an LTA. **Belgium** stressed that, in any case, the trader should clarify to the consumers whether the transaction concerns a package or an LTA.

The COM confirmed that transparency for travellers is indeed essential.

2) Is the combination of travel services considered to be a package if only one of the conditions laid down in the Directive's Article 3(2)(b)(i)-(v) is met, or do all of the conditions have to be met jointly?

Article 3 (2) (b) (i), (ii), (iii), (iv) and (v) provide *alternative* criteria so that it is sufficient that the conditions laid down in *one* of those numbers are fulfilled for the creation of a "package" (see "or" and recital 10).

3) Can MS introduce a non-exhaustive catalogue of travel services a combination of which constitutes a package or a linked travel arrangement? The reason is that the tourism industry has significant difficulties in determining whether a specific service, provided to travellers, constitutes a travel service, despite the definitions included in Article 3(1), (2) and (5) of the Directive.

The Directive already provides considerable guidance, for instance in recitals 17 and 18. If MS include examples in their legislation, even in a non-exhaustive manner, they have to ensure that this will not lead to conflicts with the Directive.

4) Article 19(4) states: "Where a linked travel arrangement is the result of the conclusion of a contract between a traveller and a trader who does not facilitate the linked travel arrangement, that trader shall inform the trader facilitating the linked travel arrangement of the conclusion of the relevant contract". Does Article 19 (4) constitute an additional type of LTA and what kind of specific practical situation does it reflect?

LTAs are defined exclusively in Article 3 (5). Article 19 (4) does not refer to an additional situation constituting an LTA. It simply imposes, on the trader who is not the facilitator of the LTA (trader B), the obligation to inform the facilitator (trader A) that the second contract has been concluded. The purpose is to make the facilitator (trader A) aware that an LTA has been formed, thus obliging him to provide insolvency protection under Article 19 (1).

Questions concerning liability

1) Article 14(2) – compensation
In many cases, organisers offer as compensation a % discount for the traveller's future transactions with the same organizer. Could this be considered as compensation, taking into account that the organizer indirectly forces the consumer to purchase travel services from that organiser again?
If the above method of compensation is not considered acceptable, could MS include a provision in the law that prohibits this kind of compensation?

A discount voucher falls short of the compensation travellers are entitled to under Article 14. Travellers are entitled to compensation without any conditions attached to it and, therefore, do not have to accept them as compensation. However, travellers *may* accept this as part of an amicable settlement of a dispute e.g. where the voucher is worth more than the actual damage sustained. If a MS considers it necessary to specify this, this may be acceptable.

2) Article 13(2) - responsibility for the performance of the package – without undue delay - Are MS allowed to introduce a provision setting a certain number of days for the traveller to inform the organiser, e.g. "immediately and in any case not later than 14 days after his return"?

As in other similar cases, this would be contrary to the full harmonisation character of the Directive and would lead to different rules and applications throughout the EU. "Without undue delay" gives more flexibility in light of the circumstances of the case, which is particularly important in this case e.g. where it is obvious that the organiser is aware of the problem, notification may be less urgent or even superfluous. Please note the last two sentences of recital 34, which refer to possible legal consequences, and Article 13 (4) second sentence.

3) Article 13(5) - responsibility for the performance of the package
It is not clear whether the phrase "(…), including where the traveller's return to the place of departure is not provided as agreed" refers to cases where a large proportion of the agreed travel services cannot be offered or to cases where alternative arrangements have been provided.

The phrase "including where the traveller's return to the place of departure is not provided as agreed" clarifies that, also in that case, it has to be considered that a significant proportion of the travel services cannot be provided as agreed, so that alternative arrangements are due.

Should the phrase "(…), including where the traveller's return to the place of departure is not provided as agreed" not be followed by the phrase "except for cases of unavoidable and unforeseen circumstances"? This would avoid that organisers have to bear excessive financial burden in the event of unavoidable and extraordinary circumstances.

No, this question is regulated differently in the Directive. Alternative arrangements are always due unless they are impossible or the traveller rejects them (Article 13 (6) (2)). In those cases the organiser has to grant price reduction or compensation, where appropriate. In relation to compensation the organiser can invoke unavoidable and extraordinary circumstances under Article 14 (3) (c). Furthermore, under Article 13 (7), the cost of additional accommodation is capped in case of unavoidable and extraordinary circumstances.

4) Article 14(1) - price reduction
There should be a certain limit as to what extent the price can be reduced. Does it correspond to 8% (see Recital 33), as in the case of the increase in price, or could the limit be further extended?

Price reduction corresponds to loss in value due to flaws in the performance. Unlike for compensation, the Directive does not provide for a limitation of such price reduction in

Article 14. Recital 33 relates to price changes before the start of the packages, which is regulated in Article 10. While a price increase of more than 8% triggers a termination right there is no limit for price reductions. There is, however, the possibility to deduct administrative expenses.

5) Article 14 – compensation

Example based on the Simone Leitner C-168/00 case: A family booked an all-inclusive package holiday to a summer resort in Turkey. However, two of their children got ill from salmonella after having dined at the hotel's restaurant. The children were hospitalized for one day. Is the family entitled to compensation according to Article 14?

Yes, the organiser should have to cover all expenses this incident implied, including medical expenses, the fact of not being able to use the agreed travel services in the relevant period and also non-material damage for the loss of enjoyment caused by the incident. Article 14(3) does not limit the kind of damage suffered. Furthermore, recital 34 states: "Compensation should also cover non-material damage, such as compensation for loss of enjoyment of the trip or holiday because of substantial problems in the performance of the relevant travel services."

6) Article 13(1) second subparagraph – "mutatis mutandis" in conjunction with Articles 7 (5) and 9 (3)

If a Member State maintains provisions under which the retailer is also responsible for the performance of the package, does this mean that both the retailer and the organiser must give the traveller all receipts, vouchers and tickets, and the information prescribed in Article 7 (5) or does the retailer have to do this only if this is not done by the organiser?

Regarding Article 9(3), - proof of the additional fees, charges and other costs arising from the transfer of the package travel contract - who has to provide the proof, the organiser and the retailer, the organiser or the retailer or only the retailer?

There is no point in both parties providing those documents and information mentioned in Article 7 (5) so that the traveller receives them twice. The point is that both organiser and retailer are responsible so that the organiser has to make sure that the traveller receives the relevant documents and information, either directly or through the retailer, and that the retailer is also responsible independently of the organiser. It is up to the traders to arrange who does what. If the retailer provides the documents then also the organiser has discharged his duty and vice versa. The same logic applies to Article 9 (3).

7) Article 14(5) provides: "Any right to compensation or price reduction under the Package Travel Directive shall not affect the rights of travellers under international conventions and EU Regulations. (…)". In addition, the interpretative Guidelines on Regulation (EC) No 261/2004 provide: "Neither the Regulation nor the Directive deals with the question of whether the package organiser or the operating air carrier ultimately has to bear the cost of their overlapping obligations. Resolving such a matter will thus depend on the contractual provisions between organisers and carriers and the applicable national law. (…)"

a) What is meant by the phrase "shall not affect" in Article 14(5)?
b) Shall the passenger's right to address his claim to either the package organiser or the air carrier be read as a right to keep the organiser liable, even if the organiser is not responsible for the lack of conformity under the passenger rights legislation?
c) Alternatively, shall the Interpretative Guidelines be read as a right to keep the organiser liable for the compensation only if the organiser is responsible for the lack of conformity under the passenger rights legislation?

a) "Shall not affect" means it shall not exclude or reduce rights against the carrier under the relevant instruments.
b) and c) The organiser's liability is determined exclusively by the PTD, unless the organiser is at the same time the carrier. The traveller can address his claim(s) to the carrier (under Regulation (EC) No 261/2004), the organiser (under the PTD) or both. However, the traveller cannot obtain compensation that would go beyond the damage sustained.
In its footnote 22, the Interpretative Guidelines on Regulation (EC) No 261/2004 refer to Article 22 concerning the organiser's right to of redress against third parties.

8) Article 13(7) and (8) – the duty to bear the cost of accommodation
Does the limitation of the organiser's costs to the costs of accommodation for the period of 3 nights apply to persons who become persons with special needs during the package, e.g. find out during that period that they are pregnant?

Article 13(8) makes the exemption from the limitation dependent on the notification of at least 48h before the start of the package, so does not give any flexibility in that respect.

9) Article 14(5) – What does it mean that the compensation or price reduction granted under certain Regulations and international conventions "shall be deducted from each other in order to avoid overcompensation"?
Example: A traveller has booked five nights at a hotel for a total of € 2 500 (€500/night). He receives compensation of € 250 for a six-hour delay of the flight getting him there under Regulation (EC) No 261/2004 (APRR). Articles 13 and 14 provide for different remedies, including alternative arrangements, termination with refund, price reduction and compensation. Can all those remedies be combined with the € 250 under the Air Passenger Rights Regulation or is there a limit of € 500?

The amount of € 250 under the APRR constitutes flat rate compensation. Price reduction and compensation under Article 14 PTD depend on the circumstances of the case and the actual damage sustained by the traveller. For instance, if the traveller loses a night at the hotel due to the delay, he will be entitled to a price reduction of € 500. If he wasn't able to sleep at night due to very belated arrival at the hotel and/or couldn't enjoy the guided tour or the diving course scheduled the next morning etc. this will constitute further damage. When establishing the overall compensation to be paid by the organiser, the € 250 flat-rate compensation received from the air carrier would have to be taken into account. While the €250 will, at least to some extent, compensate for the inconvenience caused by the delay, they will not, for instance cover further damage such as the lost night at the hotel or the

missed guided tour/diving course etc. While those are matters of interpretation and assessment of facts to be carried out ultimately by the courts, the overall compensation will not necessarily be limited to €500.

Questions regarding pre-contractual information requirements and content of the PT contract

1) Article 5(1)(a)(vii) – other tourist services
Does the wording "other tourist services" mean the same as in Article 3(1)(d)? Unlike the second subparagraphs of Article 3(2) and (5) of the Directive, Article 5(1)(a)(vii) does not include the clarification "as referred to in point (d) of point 1".

Yes, Article 5(1)(a)(vii) refers to other tourist services in the sense of Article 3(1)(d). It will typically be relevant to services such as guided tours or childcare and certain other services where the language used is very important.

2) Article 5 – exhaustive list of information
Recital 27 states that the information requirements laid down in the Directive are "exhaustive", but should be without prejudice to the information requirements laid down in other applicable Union legislation. Taking that into consideration, is it possible for a retailer or organizer to provide more information than that stipulated?

Yes, exhaustive means that MS cannot add additional information requirements, but traders are free to provide additional information.

3) Article 5(1)(a)(ii) – information on the approximate time of departure and return
Is it possible for MS to clarify the time-limit as to when a change of departure or arrival time should be communicated to the traveller by the organizer, so that this change of time does not entitle the traveller to terminate the package travel?

Changes in the departure time are regulated in Article 11 (Alteration of other package travel contract terms). Article 5(1)(a)(ii) is about the level of detail to be provided before the conclusion of the contract. Where the more detailed departure time implies a significant contract change in the sense of Article 11(2) (see recital 33), the consequences are governed by Article 11 (2) – (5). According to Article 7 (5), the organiser shall provide the traveller inter alia with information on the scheduled times of departure and arrival "in good time before the start of the package". An additional time-limit for the scheduled departure time (although positive for travellers, of course) would, therefore, appear to interfere with the rules of the Directive.

4) Article 5 – right of withdrawal
If a MS provides that the traveller has the right to withdraw from the package travel contract within a period of 14 days without giving any reason with respect to off-premises

contracts (Article 12 (5)), would it be appropriate to indicate this right of the traveller in the list of information to be provided before conclusion of the contract?

Even though the PTD is a full harmonisation directive (Article 4), and MS shall not introduce more stringent provisions which would lead to a different level of consumer protection, it opens in Article 12(5) the possibility for MS to provide for a right of withdrawal with respect to off-premises contracts. The right of the MS to include such right of withdrawal in the list of compulsory pre-contractual information appears to be an annex to this right.

5) Article 7(2) – content of the package travel contract

1. Should a package travel contract, in every case, contain all the information referred to in Article 5(1) (a through h), given that, in the light of Article 6(1), most of those information items are given to the traveller before the conclusion of the package travel contract, e.g. in a brochure which constitutes an integral part of the contract (Article 6(1))? Or, is it necessary to include this information in the contract only in the case this information has changed?

2. What about cases in which the organiser takes part in a tender where the model package travel contract is determined (to be concluded later, with the trader selected in the tender), but this model contract does not meet the requirements laid down in the Directive (Article 7 and the Annexes)? In such a situation, is the trader responsible for the fulfilment of the information obligations towards the customers?

1. Article 6 (1) ensures that pre-contractual information is not changed, unless the parties expressly agree otherwise in the contract, and that it becomes part of the contract. The purpose of Article 7 (2) is to make sure that all relevant information is included in the package travel contract, even if the information was previously provided in a brochure.

2. Article 23 sets out the imperative nature of the PTD. In particular, paragraph 3 states that contractual arrangements directly or indirectly waiving rights are not binding on the traveller. This is the case even where the initiative for this waiver came from the side of the traveller, e.g. by using non-conform model contracts in a tender. Thus, the information requirement of Article 7 and the Annexes apply in any case.

6) Article 5 and Article 7 – language requirements + information

Can MS make provisions in their national legislation that the information provided in accordance with Article 5 and the package contract (in accordance with Article 7) should be provided in the language of the consumer?

Via Article 27 of Directive 2015/2302 Article 6 (7) applies also to PT-contracts, i.e. "Member States may maintain or introduce in their national law language requirements regarding the contractual information, so as to ensure that such information is easily understood by the consumer."

Belgium asked whether there are any MS in which the contract must be provided in the language of the consumer. **Spain** indicated that they have such an obligation and the consumer may choose the language.

7) Timing of information on transfer fees

Referring to Article 9, at what time should the seller provide information about the additional fees, charges or other cost arising from a transfer of the package travel contract, before the contract (Article 5), in the contract (Article 7) or when the traveller informs the seller about his decision to transfer the contract?

In accordance with Article 5 (1) in conjunction with Annex I, travellers are informed that a transfer may imply additional costs, but further details do not need to be provided neither at the pre-contractual stage nor in the contract. However, the organiser has to inform travellers about the "actual" costs of the transfer before travellers take a final decision as to whether they wish to transfer the package.

8) Article 5(1) and (2) - What is meant by „any corresponding offer"? Does it include also an advertisement?

As under the Consumer Rights Directive, the idea is to cover binding offers made by the traveller which still have to be accepted by the organiser.

9) Article 6(1) and Recitals 26 and 17 – binding character of pre-contractual information (price in brochure)

1. Can an organiser publish a brochure without price?

2. Is it possible to publish a price indicating that modifications may arise? Such modifications can be communicated to the traveller when he goes to the travel agency and in case of his acceptance the contract is concluded a the modified price?

1. All sorts of brochures remain possible, but if there is no price, then Art. 5(1)(c) has to be complied with by different means before the traveller is bound by the contract.

2. As set out in Recital 26, information on the price, provided in advertisements, on the organiser's website or in brochures as part of the pre-contractual information, should be binding, unless the organiser reserves the right to make changes to those elements and unless such changes are clearly, comprehensibly and prominently communicated to the traveller before the conclusion of the package travel contract. It should always be possible to make changes to pre-contractual information where expressly agreed by both parties to the package travel contract.

Changes to the package travel contract and termination before the start of the package

1) Article 9 – transfer of the package travel contract to another traveller

Can MS provide in their law that after assignment of the package travel contract, the transferee shall become a new traveller on the date of receipt of the notification to the organiser?

Yes. However, please note the requirement in Article 9 (1) that the new traveller has to be a person who satisfies all the conditions applicable to that contract.

2) Article 9 - There might be situations when transfer of the package travel contract may not be possible because of the airlines policy, e.g. in case of airplane tickets purchased from particular air carriers. Is it possible to add a provision which would exclude transfers in such cases?

In such cases transfer will require the issuing of a new air ticket, generating the corresponding costs for the organiser, which he can be passed on to the traveller, who should, however, be informed about those costs. The exclusion of a transfer would not be compatible with the Directive. The right to request a transfer against payment for additional costs arising from the transfer is already laid down in Article 4 (3) of Directive 90/314/EEC.

3) Article 10(4) - alteration of the price
Is the price reduction confined to a maximum percentage of 8%, as provided for in Article 10(2) for price increases?
The time interval within which the traveller can ask for a price reduction is rather broad, given that the organiser may have already paid the travel service providers before the conclusion of the contract with the traveller.

The Directive only establishes a threshold for price *increases* that triggers a termination right. There are no limits to price *reductions* neither in terms of amount/percentage nor in relation to the timing.

4) Article 10(5) – administrative expenses
In the event of a price decrease, the organiser shall have the right to deduct actual administrative expenses from the refund owed to the traveller. What are actual administrative expenses? Do they include costs for employees?

This should normally cover the costs for recalculating the price and notifying the traveller, which may include the time spent by employees on those activities, based on their hourly wage, the cost of office material etc. and the cost of bank transfers related directly to the refund. At the traveller's request the organiser has to provide proof of the administrative expenses.

5) Article 11(2) – alteration of other contract terms
Does the phrase "the organiser is constrained" imply the situation that the alteration of the main characteristics of the travel service is made because of the circumstances that are beyond control of the organizer?

Alteration of terms does not require "unavoidable and extraordinary circumstances". On the other hand, being "constrained" suggests that the organiser cannot make changes arbitrarily. A typical case may be that a contract partner cannot perform the services as agreed in the contract so that the organiser offers to change the contract. This expression is

also used in Directive 90/314/EEC and there is no information that it has given rise to interpretation issues.

6) Article 11(3)(c) - Does the provision 'in accordance with applicable national law' mean that the period for responding to the proposed contract change may be specified in the national legislation?

No, such national rule would not be compatible with the Directive. 'In accordance with applicable national law' refers to the consequences of the traveller's failure to respond to the organiser's notification, i.e. the question of whether lack of reaction by the traveller should amount to agreement to the contract change or rather termination of the contract. It is for the organiser to determine a reasonable period within which he expects a reply from the traveller.

7) Article 11(2)(a) - Could the traveller's consent for accepting a substitute package be silent or does it need to be explicit?

Article 11 (2) (a) does not regulate the acceptance of the substitute package, but the acceptance of the proposed contract change. A substitute package may be offered when the original package travel contract has been terminated (because the traveller did not accept the contract change). The acceptance of a substitute package will depend on national contract law. Regarding the question of whether contract changes should be explicitly accepted or can be tacitly accepted, the compromise solution in Article 11(3)(c) provides that the organiser has to inform the traveller "of the effect of his failure to respond in accordance with applicable national law", i.e. whether the traveller's silence within the set time-limit has the effect that the contract change is considered to be accepted or rather that the contract is considered to be terminated. This has to be compatible with the applicable national law.

8) Article 12 (2) and Article 3(12) - termination of the contract due to unavoidable and extraordinary circumstances
As stated in Recital 31 "unavoidable and extraordinary circumstances" concern solely circumstances such as warfare, terrorism etc. and do not include circumstances which concern the traveller, such as sudden illness, death of family member etc. Are MS allowed to add a phrase which will specify/make explicit that the unavoidable and extraordinary circumstances do not include such circumstances regarding the traveller?

It follows from the text of Article 12 (2) that personal circumstances not related to events at the travel destination should not give a termination right with a full refund, so that there seems no need to specify this further. If further text is added, this would have to be drafted carefully to avoid conflicts with the Directive, given that certain personal circumstances might be relevant when assessing the impact of "unavoidable and extraordinary circumstances" occurring at the travel destination on the performance of the package, e.g. the fact that pregnant women may be seriously affected by the outbreak of the Zika virus.

9) Article 12(2) – termination in case of terrorist attacks

Example: A Greek couple got married on 16 July 2016. They had already decided to spend their honeymoon in Nice, France. For this purpose, they had bought on 15 June 2016 a package consisting of air transport from Athens to Nice on 18 July and a room in a five-star hotel for one week. However, after the terrorist attack in Nice on 14 July, they decided to cancel their trip. Can the couple terminate the package travel contract without paying any termination fees and get a full refund?

If the organiser does not accept the termination, a judge will have to decide whether there were "unavoidable and extraordinary circumstances" and whether they significantly affected the performance of the package. Recital 31 explicitly mentions "serious security problems such as terrorism" amongst several examples of "unavoidable and extraordinary circumstances". Given the fact that the attack occurred only a few days before the due arrival, there may be a good chance that the judge recognises that this event significantly affected the performance of the package.

10) Article 12(2) – Is the option of terminating without cancellation fees also applicable to the existence of threats or the possibility of such circumstances at the travel destination?

Article 12 (2) requires a case-by-case assessment of the security situation in light of all relevant circumstances. It may not require an actual attack, but one can imagine that there must be a certain likelihood of an attack. Recital 31 refers to "serious security problems". It will have to be assessed whether the security situation at the travel destination significantly affects the performance of the package and is new or has significantly worsened after the conclusion of the contract.

11) Article 12(2) – role of public authorities

Is it possible for MS to also determine the role of relevant public authorities when implementing Article 12(2), to avoid wilful actions of contract parties? Can the existence of such circumstances be assessed by the trader, the traveller as well as relevant public authority? Alternatively, is the trader obliged to take into account recommendations of the relevant public authority?

The question of a reference to information by public authorities was very controversial during the legislative negotiations and, in the end, no reference was included for instance to foreign office travel warnings. It will normally be for the party invoking such circumstances to demonstrate the presence of unavoidable and extraordinary circumstances and that they significantly affect the performance of the package. Different sources of information, including official travel advice, may be relevant when establishing whether there were unavoidable and extraordinary circumstances and might be taken into account by judges when deciding on such matters.

12) Article 12(2) – What does "additional compensation" include?

The last half-sentence means that no compensation is due beyond the refund.

13) Article 12(5) – right of withdrawal for off-premises contracts
When does the "period of 14 days" start - on the day on which the contract is signed or on the day on which the performance starts? According to Article 2(8) of Directive 2011/83/EU the deadline commences on the day the contract is signed.
Do "off-premises contracts" - include only online contracts or also contracts signed manually outside the premises of the travel agencies?

Although the PTD does not specify the beginning of the withdrawal period it should, as under the Consumer Rights Directive 2011/83/EU (CRD), start from the conclusion of the contract. Furthermore, the title of Article 12 clearly refers to termination and right of withdrawal before the start of the package.
As there is no separate definition of "off-premises contracts" in the PTD, the legislators' intention was to use the same concept as in the CRD, meaning that face-to face contracts outside the trader's business premises are covered, but not distance, including online, contracts.

Other questions

1) Article 25 – penalties
Since the Directive does not indicate what kind of penalties should be provided for, maybe there should be some kind of guidance on what constitutes "effective, proportionate and dissuasive" penalties so as to ensure the uniform application of EU law in all MS.

The Directive does not prescribe the type of penalties. Nevertheless, the penalties must be sufficient to deter the traders from non-compliance. For instance, the model of Article 83 General Data Protection Regulation (Regulation (EU) 2016/679) is a good example - it describes criteria to be taken into account in the application of the fine and also sets the fines at a very high maximum level or as specific % of trader's turnover, whichever is highest.

COM noted that the adequacy of the level of penalties is also under assessment in the Fitness Check of EU consumer and marketing law.

2) Article 27 – amendments inter alia of Directive 2011/83/EU
Article 27 provides: "(…) 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 <u>of that Directive</u>." Does the phrase "of that Directive" refer to the Directive 2015/2302 or Directive 2011/83/EU?

It refers to Directive (EU) 2015/2302.

III. Suggestions for the remaining workshops

Several Member States have yet to provide **COM** with the information on the proposed insolvency protection systems. There will be further discussions concerning the insolvency protection systems, including inter alia the requirement for traders to provide information about insolvency protection. **Lithuania** agreed to present a possible list of requirements to be checked in order to determine whether a trader has secured adequate insolvency protection.

In response to several questions concerning the communication tools to be used by central contact points, **COM** will provide a presentation on the possible use of the Consumer Protection Cooperation network.

IV. The UNWTO's work on an international convention on tourism, including an annex on package travel

COM provided an update on the progress with the draft Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers. Participants were provided with a roadmap for the adoption of the Convention as proposed by the UNWTO-Secretariat.

France indicated that certain parts of this draft Convention need to be further discussed and noted that it would be useful to raise the awareness of other members of the UNWTO (including other EU Member States) as to this future instrument.

COM noted that it is difficult to tell at the moment how many members of the UNWTO would be willing to sign certain Annexes of the Convention.

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Closing remarks

COM thanked the Member States for their participation at the meeting, and asked for further contributions for the tables on the insolvency protection systems. The next workshop is likely to be held on 18 May 2017.