



Group of National
Travel Agents' and
Tour Operators'
Associations within
the EU



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Joint submission on the Working Document of the European Commission concerning the Directive 90/314/EEC on Package Travel

ECTAA, the Group of National Travel Agents' and Tour Operators' Associations within the EU, counts among its membership the national associations of travel agents and tour operators of 23 Member States, of all the candidate countries and of Norway and Switzerland.

GEBTA, the Guild of European Business Travel Agents, represents the interests of travel management companies in Germany, Italy, the Netherlands, Portugal, Spain, Ireland and the United Kingdom.

IFTO, the International Federation of Tour Operators, is the association representing tour operators from the major source markets of Europe.

All together, ECTAA, GEBTA and IFTO represent the interests of about 80 000 businesses in Europe, which are involved in the sale of travel services to consumers and are therefore affected by the European legislation on the protection of consumers. These businesses collectively take approximately 100 million customers on holidays each year, and the vast majority of sales by the tour operating members of the associations are subject to the obligations under the Package Travel Directive

The European Commission is preparing the review of the existing consumer acquis, composed of 8 Directives, among which the Directive 90/314/EEC on package travel, package holidays and package tours. ECTAA, GEBTA and IFTO welcome the analysis that is currently being undertaken by the European Commission, because it is essential that EU legislation suits current and foreseeable market developments in order to ensure fair competition within the EU and effective protection of consumers where appropriate. ECTAA, GEBTA and IFTO participated to the consultation on the Green Paper on the Review of the Acquis on Consumer Protection. In regard of travel services, it is considered in a number of Member States that the review of the consumer acquis comes at a very appropriate time for the sector, because the market of sale of package travel and, from a more general perspective, the market for sale of travel services, has undergone significant changes since the adoption of Directive 90/314 on Package Travel, Package Holidays and Package Tour.

Question 1: Is the current scope of the Directive adequate to ensure protection for consumers and a level playing field in today's holiday market?

At the time of the adoption of the Directive 90/314 on Package Travel consumers who wanted to travel abroad for their holidays were mainly buying package holidays put together by organisers. Bookings were most often made through travel agents, acting as intermediaries.

However, in recent years, bookings of genuine package travel holidays have been decreasing, consumers being more and more interested in buying separate travel services, whether those services are offered for sale by organisers or directly by travel service providers. For example, in the UK, the Civil Aviation Authority (CAA) reported that the proportion of leisure air travel protected by ATOL (which is largely analogous to the sale of package holidays) has reduced to 60% in 2005 from a peak of 98% in 1997. At present, the CAA estimates that over the year to March 2006, some 18.3 million air passengers travelled without ATOL protection. Similar trends have been observed in many Member States.

The change in consumers' buying habits is mainly due to the entry of low cost air carriers in the air travel market, combined with the rapid development of the Internet. The consumer has direct access to travel service providers as well as to numerous booking tools. He is thus able to compare offers and prices and it is well known that price has become one of the most decisive factors for the consumer.

This raises the following questions: Why are consumers increasingly choosing to purchase travel services that do not provide the protection offered by the current legislation? Is it that they are unaware of the lack of protection or that they do not consider it important?

If consumers are unaware of the lack of protection then there is a concern that they are purchasing travel services in the belief that they have protection when they do not. If they do not consider it important then there is a concern that a specific part of the travel industry is having to bear the costs and burdens of a regulated system which is not considered important by consumers.

If the situation remains largely unchanged then a specific part of the travel industry is being placed at a competitive disadvantage. If the protection offered by the current regulation is considered important, it should be provided to all consumers of all tourism services, not only restricted to purchasers of package holidays.

In the light of the changes to the market and in order to ensure fair competition between all market players and that all consumers have the same level of protection (at whatever level is considered appropriate), ECTAA, GEBTA and IFTO Members believe that a mixed approach as proposed in the Green Paper on the Review of the Consumer Acquis should be adopted. ECTAA, GEBTA and IFTO would be in favour of a mixed approach where a framework instrument would regulate issues that are common to all consumer contracts.

In this respect, ECTAA, GEBTA and IFTO welcome the report of the European Parliament of 6 September 2007 on the Green Paper on the Review of the Consumer Acquis. We support the European Parliament's preference for the adoption of a mixed approach and the recommendation that the horizontal instrument should be applied as widely as possible to all consumer contracts,

in order to avoid imposing different legal regimes on consumers depending on the nature of the transaction.

This mixed approach should include the adoption of a **horizontal legal instrument**, which would develop consistent definitions and impose **a full set of fundamental obligations to all providers/suppliers of services/goods, in any business sector, who sell or offer for sale their services or goods in their own name to consumers**, such as for instance general information obligations.

Such a horizontal instrument should mainly be **based on existing EU legislation** in the field of consumer protection and should be a full harmonisation instrument, in order to avoid implementation differences in the Member States.

The analysis of the Package Travel Directive indeed shows that, with the exception of repatriation, all other issues that it addresses could be dealt with at horizontal level, very often under existing EU legal instruments:

a) Provision of information (Article 3, Article 4, (1) and (2)): Directive 2005/29 concerning unfair business-to-consumer commercial practices already includes rules ensuring that the consumer receives all appropriate information on the service to be purchased, notably the main characteristics of the product and the price or manner in which it is calculated, and as well as information on the trader. The Directive on Unfair Commercial Practices also ensures that consumers will have effective recourses against any unfair commercial practice, including cessation of an existing practice or prohibition of an imminent practice. In addition, Member States will lay down penalties to sanction unfair commercial practices.

b) Alteration of the contract (Article 4 (3) to (7)): a contract may be altered either by the consumer (transfer of booking) or by the organiser (price variation and inability to provide all or part of the services contracted for before and after departure). The main aim of such provisions is to ensure that the organiser does not unfairly cancel or alter the services that had been contracted for.

Points 1 (j) and (k) of the Annex to the Directive 93/13 on unfair terms in consumer contracts also prohibit terms which would enable the seller or the supplier to alter unilaterally the terms of the contract and any characteristics of the service to be provided without a valid reason. Point 1 (l) of this Annex also prohibits unfair variation of the price provided in the contract.

c) Proper performance of the contract (Article 5). It is a general contract law principle that a party to a contract is liable for the proper performance of its obligations under the contract. Therefore, the organiser who sells or offers for sale package travel services in its own name as well as any service providers selling services in their own name will be liable, under their national contract law, for the proper performance of the services contracted for.

Concerning the limitations of liability, which are currently regulated under Article 5 (2), §§ 3 and 4 of the Package Travel Directive, the consumer is protected under European law, since point 1 (b) of Directive 93/13 on unfair terms in consumer contracts prohibits terms inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the supplier in the event of non or improper performance of the contract.

Concerning the protection of prepayments made by consumers (Article 7 of the Package Travel Directive), ECTAA, GEBTA and IFTO underline that other suppliers and providers of goods and services, who also receive advance payments from consumers, are not subject to such a requirement to provide a financial guarantee to ensure that consumers will obtain a reimbursement of their prepayment if they go bankrupt. However, the risk that those providers might fail financially is as high as the risk that an organiser/retailer might fail. In some cases, the risk could even be higher. For instance air carriers, which carry similar risks as travel organisers concerning the length of time between reception of payments and performance of services, and in terms of uncertainty that the products in which investment were made several months or years before will meet demand, frequently have precarious finances.

Therefore, the reimbursement of money paid over by consumers in case of a supplier's bankruptcy should be addressed at horizontal level. When drafting the horizontal framework instrument, ECTAA, GEBTA and IFTO would recommend that the Commission take the following into account:

- In order to ensure a level playing field, no service providers should be excluded from the scope of the horizontal instrument. In particular, it is of major importance that providers of transport services are also subject to all provisions of the horizontal instrument.
- If a matter is regulated in a horizontal instrument, the existing Directives must be amended accordingly in order to withdraw the provisions that would regulate the same issue. This is essential to avoid that increased and/or contradictory obligations are imposed on professionals and to improve legal certainty.
- In some instances, while the horizontal instrument may provide the general principles to be applied, their legal consequences may have to be regulated in specific sectoral Directives, to be adapted to the needs and specificities of a given sector and/or contract.

If it is considered that the protection of prepayments in the travel sector warrants specific regulation, then any such regulation should not be restricted to package travel but also to all holiday service providers, since all consumers deserve to be treated in the same way, whether they purchased their services from a tour operator or directly from the service provider.

Concerning repatriation, there may be a specific need to protect consumers who purchase travel services in order to ensure that they are repatriated to their point of departure when a travel service provider is unable to perform its operation because he becomes insolvent or goes bankrupt. A specific and sectoral legal instrument regulating the issue of repatriation could thus be adopted, in order to supplement the horizontal one. However, such sectoral EU legislation should not be restricted to package travel but should also apply to all travel service providers, since all consumers deserve to be treated in the same way, irrespective of the undertaking from whom they purchased the travel service..

Should the mixed approach recommended by ECTAA, GEBTA and IFTO not be retained in part or in full, or if the Commission opts for a sectoral instrument applicable to package travel or for a vertical approach where the Package Travel Directive would be individually revised, ECTAA, GEBTA and IFTO consider that the notion of package travel should be extended.

This would be necessary in view of the developments mentioned above. With the emergence of Internet and of low cost carriers, the consumer has increasingly the ability to book directly with other travel service providers. When the consumer makes his booking, those providers offer him the possibility to have access to other selected suppliers of travel services. This is what is usually called dynamic packaging. The consumer puts various travel services together as if it were a package but all services are contracted with various service providers. The consumer is often not aware that the dynamic combination of services is not a package travel and is not covered by the legal provisions on package travel.

The practice of dynamic package also creates distortions of competition against organisers, who have to comply with many stringent obligations, which are costly, the most important ones being the liability for the proper performance of the contract as well as the obligation to provide a financial guarantee.

ECTAA, GEBTA and IFTO thus consider that the definition of the notion of package should be amended in order to cover both genuine packages and dynamic packages. ECTAA, GEBTA and IFTO recall that under the horizontal fresh approach presented above, it would not be necessary to determine an extended definition of package travel. Should the approach finally chosen require to determine a definition of package travel, ECTAA, GEBTA and IFTO would be happy to contribute to this exercise.

Concerning the notion of organizer, a sectoral instrument applicable to combinations of travel services should clarify that the organiser is the person who sells or offers for sale at least one of the combined services included in the package in its own name and who gives access by whatever means to the other travel services included in the combination.

The notion of “selling or offering for sale in its own name” is central to this definition because it will allow differentiating an organiser from a retailer, who acts as an intermediary in the sale of travel services and who must remain outside the scope of the Directive.

ECTAA, GEBTA and IFTO suggest the following definition of the notion of organiser:

“A person who sells or offers for sale at least one of the services forming the package in its own name, or through an intermediary under its effective control, and who gives access to the other service(s) of the same package”

The notion of “intermediary under effective control” aims at avoiding that a travel service provider creates a subsidiary that would act as an intermediary for the sale of that provider’s services and through which the consumer would also be given access to other selected service providers. Would it be the case, the travel service provider would not be considered as “giving access to the other services of the same package” and would thus fall outside the scope of the Package Travel Directive. The notion of control could be defined with reference to Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

The proposed definition of organiser is of course not intended to interfere with the Member States’ legislation on access to the profession of organiser or retailer. Each Member State

remains free to lay down the conditions that a business has to comply with in order to exercise the profession of organiser and of retailer.

Question 2: Do any of the definitions or notions used in the Directive cause problems? If so, please describe them.

The major difficulty arising from definitions has been the definition of package holiday itself. In particular the concepts of "pre-arranged" and "inclusive price".

These concepts have all given rise to litigation which is not the sign of effective and clear regulation.

Of course, were the fresh approach to travel industry regulation proposed in our response to Question 1 to be adopted, the notion of a package holiday will not be the subject of specific regulation and a definition will not be required.

If regulation is to be retained in respect of sales of combinations of travel services, the appropriate definition will be a matter to be decided once the question of the scope of such regulation is decided. ECTAA, GEBTA and IFTO will be pleased to contribute to that exercise.

The definition of contract causes uncertainty across a number of Member States. The definition can be interpreted as creating contractual relations where none exist or are intended within the domestic legal environment. This in particular the case between intermediaries acting on behalf of the organiser, and the consumer. ECTAA, GEBTA and IFTO therefore recommend the following definition of contract, in order to restore a genuine notion of contract:

“Contract means the agreement linking both the consumer and the organiser (whether dealing directly with the consumer or through an intermediary)”

In respect of this definition of contract, it is important to note that any given undertaking does not have a frozen appellation. An undertaking selling a combination of travel services to a consumer on behalf of an organiser is not party to this package travel contract. However, if the same undertaking puts together a combination of travel services and sells it in its own name to a consumer, it is covered by the definition of organiser and is a party to the contract.

Concerning the notion of inclusive price, the Working Document mentions that in the framework of the Regulation proposal on Common Rules for the Operation of Air Transport Services in the Community, air carriers could be subject to new obligations to provide comprehensive information on the ticket price. In practice, the price of a package sold at a single inclusive price is most often not the aggregate of the prices for which each component within the combination would have been sold or offered for sale if each component had been sold or offered for sale as a separate service outside the combination. That may be because some of the components would not be available as a separate service outside the combination. Or it may be because some of the components can be provided more cheaply if provided in conjunction with other components. Or it may be that in order to sell the package, the organiser will price attractively. Therefore, where a package is offered at a single inclusive price, ECTAA, GEBTA and IFTO believe that there should be no obligation to provide the price of each component of the package. Under the proposed Regulation on air transport, we understand that the aim of the information requirements is to ensure that consumers can compare prices of flights. However, if the consumer is aiming at

purchasing a package travel, his knowledge of the price of one component, when the inclusive price is not the sum of the price of each component will not be helpful. The fact that consumers must be provided with the price for the whole package was confirmed, when the European Commission organised in 2001 a *Table Ronde* on best practices for package travel and holiday tours. This group of experts concluded concerning the price that “*The information and contract terms must state the price in its entirety*”.

Question 3: Have you encountered problems with the definition of organiser or retailer and their respective obligations under the Directive, for instance concerning organisers who occasionally put together packages? If so, please describe them.

The Directive is not clear on application to organisers or retailers, since it uses the terms “organiser and/or retailer”, every Member State being free to decide whether a specific obligation falls on the organiser or on the retailer or on both.

Therefore currently, both organisers and retailers can fall under the scope of the Package Travel Directive. However, their activities differ in many ways. While the organiser is the person who gives access to the elements of the package and sells or offers for sale in its own name to the consumer, the retailer is only acting as an intermediary for the sale of the package travel. The retailer does not put the package together and is not party to the package travel contract. Consequently, only the organiser should be responsible for compliance with the sectoral instrument applicable to travel services, whether the package is sold or offered for sale directly or through a retailer.

ECTAA, GEBTA and IFTO thus consider that only the organiser must fall under the scope of a sectoral instrument applicable to travel services, the retailer being fully excluded. This entails the deletion of all references to the notion of retailer in a sectoral instrument applicable to travel services.

ECTAA, GEBTA and IFTO consider important to repeat that any given undertaking does not have a frozen appellation. An undertaking selling a package to a consumer **on behalf of an organiser** is acting as a retailer not party to the package travel contract and should therefore not be subject to the sectoral instrument applicable to travel services. However, if the same undertaking puts together a package and sells it to a consumer in its own name, it is a party to the package travel contract, it is covered by the definition of organiser proposed by ECTAA, GEBTA and IFTO, and it would be subject to the obligations provided in a sectoral instrument applicable to travel services.

Concerning information obligations, retailers, acting as intermediaries, play an active role in the provision of information to the consumers. However organisers have contractual rights in their relations with retailers. Indeed today, in Member States where the obligations of the Directive are only on the organiser, the latter has contractual duties and rights, including to instruct agents on how to inform and market, as well as contractual recourses against the retailer if it does not act in accordance. It should also be noted that the Directive on Unfair Commercial Practices applies to any person acting for purposes relating to its trade and anyone acting in the name or on behalf of a trader. It will therefore apply to organisers and retailers. This Directive ensures that the consumer receives all appropriate information on the service to be purchased and on the “nature, attributes and rights of the trader or his agent”. Finally, if the retailer was made subject

to the same obligations as the organiser, it would be unfair to make the former responsible for performance of operations which are completely out of its control.

Would the proposal of ECTAA, GEBTA and IFTO for the scope of a sectoral instrument applicable to travel services including only organisers and excluding retailers not be retained, in order to avoid legal uncertainty created by the wording “*organiser and/or retailer*”, ECTAA, GEBTA and IFTO suggest that a sectoral instrument applicable to travel services only makes reference to “*the other party to the contract*”.

Occasional organisers are currently excluded from the scope of the Package Travel Directive. For the sake of ensuring that consumers are not deprived of the protection established by the future consumer protection legislation, and in view of establishing a level playing field between organisers, occasional organisers should not be excluded from the scope of application of the future consumer protection legislation, whether horizontal or vertical.

Question 4: Do you think that persons travelling exclusively for professional reasons should be excluded from the scope of the Directive?

Given the specificities of the business travel sector, and of the needs of business travellers, ECTAA, GEBTA and IFTO consider that persons travelling for professional reasons should be excluded from the scope of consumer protection legislation, whether horizontal or vertical.

Therefore, ECTAA, GEBTA and IFTO believe that in the context of the review of the consumer acquis, the notion of consumer should be harmonised as a natural person acting for purposes outside his trade, business or profession.

ECTAA, GEBTA and IFTO do not support the idea of blurring the distinction between consumers and non-consumers, notably by using the notion of “primarily” acting for certain purposes. This would not favour legal certainty and could thus generate disputes.

Question 5: Have you encountered problems with the pre-contractual information requirements? If yes, please give a short description.

Question 6: Is the list of information to include in travel brochures at Article 3.2 up to date?

Question 7: How should the information requirements be adapted to the increasing use of the internet? Should it be possible to provide less information, e.g. on the price, in the brochures, if that information is made available on the web?

Question 8: What information requirements, such as classification of the hotel or the passport or visa requirements, need to be separately regulated to respect the specifics of package travel?

A first remark is that the first paragraph of Article 3 that prohibits the provision of any misleading information to the consumer is redundant with Directive 2005/29 concerning unfair business-to-consumer commercial practices, which deals in detail with the matter.

More importantly, ECTAA, GEBTA and IFTO question the need for a list of information requirements specific to package travel. There is no reason to restrict the obligation of specific information to the providers of package travels. In addition, the relevant information varies from one product to the other. For instance, information on air conditioning equipment is relevant only in certain parts of the world and in certain seasons. Another example is information on ‘approval and tourist classification under the rules of the host Member State’. The obligation to include official ratings extends only to hotels or apartments within Member States of the EU. Significant numbers of travellers go to destinations outside the EU, and there is thus differential information requirements for the organiser dependent upon the end stay of the consumer. Furthermore, tourist classifications are not necessarily a denoter of quality or condition of property, and are often used as broad tax bands. ECTAA, GEBTA and IFTO therefore recommend not to provide a specific list of information requirement in a sectoral instrument applicable to travel services or in a vertically revised Directive on package travel.

In the framework of a horizontal approach, ECTAA, GEBTA and IFTO note that Directive 2005/29 concerning unfair business-to-consumer commercial practices already includes rules ensuring that the consumer receives all appropriate information on the service to be purchased, notably the main characteristics of the product, the price or manner in which it is calculated, and as well as information on the identity of the trader and its attributes. The Directive on Unfair Commercial Practices also ensures that consumers will have effective recourses against any unfair commercial practice, including cessation of an existing practice or prohibition of an imminent practice. In addition, Member States will lay down penalties to sanction unfair commercial practices.

If a list of pre-contractual information requirements was maintained in a sectoral instrument applicable to travel services or in a vertically revised Directive on package travel, ECTAA, GEBTA and IFTO have concerns about the current requirement in Article 3, §2 that the brochure must indicate the price in a legible, comprehensible and accurate manner. As a consequence of this requirement, once the brochure has been printed, the prices cannot be modified anymore. This requirement to publish the price in the brochure means in practice that package travel organisers determine the price one year or one year and a half before the sale without being in a position to adjust to market developments, demand, costs etc. Furthermore they cannot react to competition with online organisers and airlines, which have the means to change individual prices of specific products daily. Package travel organisers are in a particularly severe competitive disadvantage with the online sale channels. This is not only to the disadvantage of the traditional organisers, but also to the detriment of consumers who may prefer to use a paper brochure. As a consequence, ECTAA, GEBTA and IFTO consider that this requirement is no longer appropriate in the current business environment and should be deleted.

Were our proposal not retained, ECTAA, GEBTA and IFTO propose that a point is added to the elements of information listed in Article 3, §2, which would allow the manner in which the price is calculated or general information on where the consumer can obtain the applicable price to be sufficient.

In regard of the media to provide the applicable price, there is no single solution that fits the characteristics of the different markets in the EU, which vary considerably in terms of size, number of organisers, Internet penetration, etc. We underline that the system of a paper list of applicable prices may be a solution only for certain smaller markets, but it is definitely not

workable in the larger markets where there are hundreds of brochures. ECTAA, GEBTA and IFTO therefore recommend to allow flexibility on the media to provide applicable prices.

Regarding the binding nature of the precontractual information, ECTAA, GEBTA and IFTO believe that the flexibility provided in Article 3, §2, should remain unchanged. As long as the consumer has been duly informed before the conclusion of the contract, organisers must keep the possibility of amending the precontractual information until the conclusion of the contract. Any provision limiting the current flexibility would aggravate distortion of competition between online sales channels which can update information daily and traditional channels using paper brochures.

Considering that the brochure is not the only information mean on package travel anymore, many travel service providers providing information on the Internet, the same rules should be applicable to any information channel.

In respect of the issue raised in the Working Document on deviations between information requirements in national legislation, ECTAA, GEBTA and IFTO consider that minimum harmonisation creates difficulties for cross border transactions and distortions of competition between businesses. ECTAA, GEBTA and IFTO therefore recommend having the revised legislation, whether horizontal or sectoral, based on full harmonisation.

Question 9: Are the information requirements in article 4.1-2 and in the annex up to date?

For the reasons detailed under Question 1, ECTAA, GEBTA and IFTO believe that package travels should not be regulated differently from other travel services

Question 10: Have you encountered problems with the provisions on price variations?

The fourth paragraph of Article 4 allows revision of the price of the contract in a list of areas under strict conditions and prohibits any increase in the price 20 days prior to departure.

Those provisions are no longer appropriate in an increasingly unstable world and they put organisers at a competitive disadvantage compared to other providers of travel services, in particular when it comes to airfares.

Indeed, in the last years, airlines have been adding or increasing numerous surcharges to their airfares, without any reasonable prior notice, in order to cover additional insurance costs arising from aircrafts being used a weapon on 9.11., fuel increase, security costs, passenger services, etc. Similarly, great variations in airport surcharges have been noticed in the past years.

Too rigid a restriction on the areas for which price variation was possible has created some difficulties for organisers. We therefore believe that a future passenger protection instrument applicable to travel services should be drafted to allow for variations for unforeseen or un-costed events.

In addition, because of the prohibition to raise prices 20 days prior to departure, many organisers have to absorb the price increase at their own costs, while airlines have all freedom to modify

their prices at any time, even after the contract has been concluded. Therefore, in order to ensure a level playing field, ECTAA, GEBTA and IFTO believe that Article 4, (4), b) should be deleted.

However, would Article 4, (4), b) not be deleted, ECTAA, GEBTA and IFTO consider that it will be very important to make clear that this 20 days period is also binding for airlines, airports or public institutions that impose new taxes, as otherwise package travel providers are obliged to bear these price increases that cannot be charged to clients. If this period is not binding for airlines, airports or public institutions it cannot be binding for package travel providers either.

The wording of Article 4, (4), a) clearly indicates that the contract may expressly provide for upward **or** downward revisions. ECTAA, GEBTA and IFTO consider that this flexibility should be maintained and clarified, having regard to the principle of contractual freedom and because such flexibility provides an element of competition between actors in the market.

Question 11: Have you encountered problems with the provisions of Article 4.5-4.6, in particular the reference to “essential terms” and “substitute package”?

ECTAA, GEBTA and IFTO consider that the notions of “essential terms” and “substitute package” would be difficult to further define without losing the flexibility that is necessary to adapt to the various products on the market. ECTAA, GEBTA and IFTO therefore recommend not to further define those notions and leave any interpretation to the courts.

Question 12: Have you encountered problems with cancellation for the reason of an insufficient number of participants? Should the consumer be compensated in case of cancellation on the ground that there is an insufficient number of participants?

The current provisions should be maintained, without consumer compensation in case the package is cancelled for an insufficient number of participants. Under the current rules, the contractual conditions in relation to numbers of participants are clear. If the consumer is told in advance there is a requirement for a minimum number of participants, it should not be entitled to further compensation if the tour operator is unable to offer or operate a particular travel arrangement because of the insufficient number of participants. In addition, a modification of the system would not be in the interest of consumers, because organisers would no longer offer certain categories of products, e.g. educational journeys, adventure trips, etc. considering that the cost of performance with too low a number of participants or the cost of compensation, would make the offer of such products too risky.

Question 13: Do you think there is a need for a generalised method of calculation of compensation?

ECTAA, GEBTA and IFTO believe that for cases of cancellation by the consumer or by the organiser, no method of calculation should be introduced in consumer protection legislation. Legislation, which is generally frozen for several years, is too rigid to deal with compensation levels. Such aspects should be left to the courts and/or existing alternative dispute settlement bodies.

In case of cancellation by the organiser or significant alteration of the package (Article 4, (6)), in case a significant proportion of the package cannot be provided and no arrangements are possible (Article 4, (7)), or in case of non-performance of the contract (Article 5), when the organiser has to compensate the consumer, the organiser should be provided a right to reimbursement or compensation from the responsible suppliers of services irrespective of a decision on compensation of the consumer taken by a court, tribunal or alternative settlement system and including if the supplier is established in another country. Organisers experience indeed serious difficulties to recourse against undertakings supplying services included in the package, and to whom the cancellation, alteration or non-performance is attributable. This is notably the case when air carriers cause flight cancellations or long delays.

Concerning the provisions on compensation in case a significant proportion of the package cannot be provided and no arrangements are possible (Article 4, (7)), ECTAA, GEBTA and IFTO note that the wording does not limit the benefit of “*equivalent transport back to the place of departure*” to packages in which transport is included. The use of the word “equivalent transport” seems to indicate that the intention was to exclude products without transport. The implications of imposing on the organiser to provide equivalent transport, while it may have no transport arrangements in place, and while it has no control on the initial transport chosen by the consumer, would be very far-reaching. The wording should therefore be clarified to limit application to packages including transport.

Question 14: Does the liability of the retailer respectively the organiser need to be clarified?
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In line with comments already made under Question 3, ECTAA, GEBTA and IFTO consider that there should be no reference to the retailer in provisions on liability for performance of a contract, whether in the framework of a mixed or vertical approach. The retailer, who acts as an intermediary and is not party to the package travel contract and can thus not be held liable for the proper performance of a contract to which he is not party.

Any other solution is unfair, because the retailer does not have any control on the accuracy of the information provided by the organiser, on the services included in the package nor on the actual performance of the services contracted for. This is even more important, knowing that organisers already encounter increasing difficulties to find, at a reasonable price, appropriate insurance contracts that fully cover their professional liability, which is in essence unlimited and has been broadly interpreted by national courts over the years.

The current European legal system provides consumers with the necessary tools to obtain redress against the organiser in case of non performance of the contract, whether he bought the package directly from the organiser or through an intermediary, whether the organiser is established in the consumer’s Member State or in another Member State. Indeed, existing legal European instruments in the field of jurisdiction¹ and of the law applicable² provide for rules which allow the consumer to start legal action in his Member State of residence and to base his claim on his

¹ Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

² Rome Convention of 1980 on the law applicable to contractual obligations, to be transposed into Community Law by the proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM (2005) 650.

national consumer protection legislation. Furthermore, in case of cross border claims, through the European Consumer Centers Network, the consumer can get assistance and obtain information on existing alternative dispute resolution mechanisms or small claim procedures, which will soon be reinforced by the adoption of the proposal of the European Commission for a Regulation Establishing a European Small Claims Procedure³.

Article 5 (1) of the Package Travel Directive specifies that the organiser is liable for the proper performance of the contract, without prejudice to the right of the organiser to pursue the other providers of services. The ability of an organiser to have real effective recourse against providers is very problematic and should therefore be strengthened. The Directive should specify that the organiser has the right to pursue other services providers who must compensate the organiser in accordance with applicable relevant laws, irrespective of a decision on compensation of the consumer taken by a court, tribunal or alternative settlement system and including if the supplier is established in another country.

Indeed, there are many instances where the organiser has no effective control on the way service providers behave, for example, when a hotel is overbooked because the hotelkeeper decided to favour other contractual partners, when an airline unilaterally cancels a flight or when the delay of a flight affects the whole package travel to a point that the consumer has no interest in continuing the travel. In addition, organisers have concerns about duplication of potential liability between travel insurers (if the consumer contracted an insurance covering events occurring during the package) and organisers for compensating the consumer.

Question 15: Do you think that the notion of “damages” should be clarified, for instance regarding moral damage?

Concerning moral damages, ECTAA, GEBTA and IFTO consider that there is no need to include an express obligation to compensate moral damages, as it is already well understood in the Member States.

ECTAA, GEBTA and IFTO are also in favour of maintaining the possibility to reasonably limit by contract compensation for damages other than personal injury (Article 5 §2).

ECTAA, GEBTA and IFTO have concerns about the provision on the limitations of compensation. Under Article 5 (2), § 3 of the Package Travel Directive, Member States may allow compensation to be limited in accordance with the international conventions governing the services included in the package. This provision is problematic because:

- currently, only the compensation to be granted may be limited in accordance with international conventions but not the liability itself. If an organiser is held liable for improper performance of the contract on the basis of the Package Travel Directive, he will compensate the consumer and be substituted in his rights against the actual service supplier. However, when the tour operator will exercise a right of redress, the service provider will most certainly oppose the limitations of liability allowed by international

³ COM (2005) 87 final.

conventions. As a consequence, the organiser will have no effective right of redress and will in fact bear all costs.

- limiting the application of relevant international conventions for compensation only, is again placing organisers at a competitive disadvantage compared to other travel service providers, who may base themselves on international conventions to limit their liability and the compensation to be paid to the consumers.
- the choice left to the Member States to allow limitations has generated differences between the Member States and thus distortion of competition between EU organisers.

These problems can only be solved by imposing in a full harmonisation instrument an obligation on Member States to allow exclusion or limitation of both the liability and the compensation in accordance with international conventions. In the same way, when service providers are allowed to exclude or limit their liability or compensation under existing EU instruments, such as Regulation n° 261/2004 on Denied Boarding Compensation, organisers should also be allowed to invoke such EU instruments.

Concerning burden of proof, it should be clarified that the burden is on the consumer to prove improper performance of the obligations arising from the contract and the damage resulting from improper performance, while the burden is on the organiser to prove exemption from liability.

Question 16: Have you encountered problems with Article 6? Is there a need to clarify the meaning of the terms “prompt efforts” and “appropriate solutions”?

ECTAA, GEBTA and IFTO consider that the notions of “prompt efforts” and “appropriate solutions” would be difficult to further define without losing the flexibility that is necessary to adapt to the situations that may arise. ECTAA, GEBTA and IFTO therefore recommend not to further define those notions.

Regarding the communication of any failure by the consumer under Article 5,(4), and complaints under Article 6, the consumer’s obligation to communicate any failure in the performance of a contract should be better enforced, possibly by sanctioning non-compliance by reduction or exclusion of compensation.

Question 17: What are your experiences of the guarantee scheme system in your Member State and, when applicable, of the interaction between different Member States' systems? How could in your view the system be improved?

In line with the positions adopted under Question 3, ECTAA, GEBTA and IFTO consider that the financial guarantee must only be provided by travel service providers who act as organisers, and this requirement should not apply to the retailer.

Regarding the financial guarantee to be provided by organisers, under the definition of organiser proposed by ECTAA, GEBTA and IFTO in the answer to Question 1, which includes any person selling or offering for sale at least one of the combined services in its own name, ECTAA, GEBTA and IFTO believe that the following principles should apply in order to protect all EU Consumers:

- Organizers not established in the EU and selling or offering for sale in the EU should have a financial guarantee in at least one EU Member State. This solution should be in accordance with the Rome Convention and EU Regulation on competent jurisdiction.
- When organizers are established in the EU, 4 basic principles are recommended:
 1. The organizer established in the EU should be responsible for all sales, wherever its products are sold and disregarding the fact that they are sold directly or not.
 2. The organizer must be insured in accordance with the criteria provided for in the legislation of the Member State where it is established. Each Member State remains free to determine the national criteria applicable to the financial guarantee.
 3. All consumers must be protected irrespective of their place of residence in the EU.
 4. The organizer has an obligation to inform the consumer about his financial protection scheme and about the entity to contact in case of bankruptcy.

Each Member State remains free to determine the national criteria applicable to the financial guarantee. However, such criteria must be effective in ensuring that in the event of the financial failure of an organiser, any consumers currently undertaking their holidays should be repatriated at no additional cost to themselves and advanced payments to the organiser should be refunded to consumers without deduction. Besides, the criteria must not unproportionately partition the EU Internal Market.

Question 18: Does, in your view, the fact that scheduled airline business does not have such a guarantee scheme impact on market conditions?

ECTAA, GEBTA and IFTO have underlined under Question 1 that other suppliers and providers of goods and services, who also receive advance payments from consumers, are not subject to such a requirement to provide a financial guarantee to ensure that consumers will obtain a reimbursement of their prepayment if they go bankrupt. However, the risk that those providers might fail financially is as high as the risk that an organiser/retailer might fail. In some cases, the risk could even be higher. Therefore, the reimbursement of money paid over by consumers in case of a supplier's bankruptcy should be addressed at horizontal level.

If it is considered that the protection of prepayments in the travel sector warrants specific regulation, then any such regulation should not be restricted to package travel but also to all holiday service providers, since all consumers deserve to be treated in the same way, whether they purchased their services from a tour operator or directly from the service provider.

There may be a need to protect consumers who purchase travel services in order to ensure that they are repatriated to their point of departure when a travel service provider is unable to perform its operation because he becomes insolvent or goes bankrupt. A specific and sectoral legal instrument regulating the issue of repatriation could thus be adopted. However, such sectoral EU legislation should not be restricted to package travel but should also apply to all travel service providers, since all consumers deserve to be treated in the same way, irrespective of the undertaking from whom they purchased the travel service.

Concerning air carriers, they carry similar risks as travel organisers concerning the length of time between reception of payments and execution of services, in terms of uncertainty that the products in which investment were made several months or years before will meet demand, but they generally have significantly more precarious finances. Some may argue that airlines have voluntary arrangements between them to repatriate passengers, however experience shows that such arrangements provide no guaranty of repatriation, and that the effectiveness of those arrangements largely depend on the quality of the relations between airlines at local level. It is therefore crucial to deal with repatriation for all travel services.

It is interesting to note that in the Regulation proposal on Common Rules for the Operation of Air Transport Services in the Community, the European Parliament has adopted in first reading an amendment to require as a condition to obtain the air carrier licence, “*evidence that [the carrier] has sufficient cover to be able to refund sums paid and to cover the costs of repatriating passengers in the event of it being unable to operate booked flights because of insolvency or revocation of its operating licence*”. ECTAA, GEBTA and IFTO welcome this amendment, as a step towards a more level playing field. However, it is uncertain that this amendment will be kept in the final Regulation. If it is not, considering that the proposed Regulation also ensures that licensing authorities will have reinforced obligations to suspend or remove the licence of an air carrier with unsound finances, it will in fact create difficult situations for passengers. In this respect, it is important to note that following the withdrawal of the air carrier “Air Madrid”’s licence by the Spanish authorities in December 2006, 13 millions euros have still not been reimbursed to passengers that could not fly and they may never be reimbursed, due to application of national bankruptcy law.

Such problems are not unusual. In its report to the European Commission, Functioning of the Internal Market for Air Transport (Contract No: TREN/04/MD/s07.36609) of November 2005, the Transport Studies Unit of the University of Oxford identified 50 European airlines that went bankrupt between 2000 and 2005.

These airlines represented 1,437,311 weekly seats and some 63,000 passengers were stranded as a result of the failures.

Almost half of those passengers were repatriated with some government help. This indicates that repatriation is not a problem that governments can legitimately leave to be solved by market solutions.

Likewise, the report states that the costs of returning home for stranded passengers following the EUJet bankruptcy in July 2005 averaged 575 euros for a family of four in terms of flights home and ground transfer.

The report comments that:

“The main reasoning at the time behind excluding airlines from the Directive 90/314 and only provide protection with respect to package holidays can be linked to the following assumptions: (1) scheduled airlines would not collapse because at the time most European airlines were state-owned and operating in largely protected markets; (2) individuals buying flights for leisure purposes would do so through a tour operator rather than from the airline directly.

In general, it should be acknowledged that these assumptions appear much less relevant today compared to in 1990. The general downturn in the world economy since 2001 has caused serious problems to many regular airlines and the evolution of fuel prices will exacerbate these problems in coming years. Decrease of public ownership in flag carriers and increased competition have allowed new airlines enter the market and largely reduced State influence. For these reasons, also scheduled airlines are no longer without risk of going bankrupt. In addition, purchase patterns have changed, a large majority of no-frills airlines specialise in selling directly to the customers (supported by the internet) and the proportion of holidays bought as packages has declined significantly in recent years.”

The report concludes:

“Therefore, there may be a case for introducing passenger protection mechanisms in this area. The international nature of air transport, and the need for coordination among countries, suggests that the intervention should be carried out at the European level, setting out at least some harmonisation standards that could later be extended by national legislation. The precise form of passenger protection can be implemented at different levels as outlined earlier and may involve a combination of measures. In this context, it may be advisable to adopt simpler mechanisms in order to minimise transaction costs and improve the information level of consumers.”

ECTAA, GEBTA and IFTO submit that the present imbalance in regulation is a distortion to market conditions that cannot be justified.

Question 19: Is/are there any other issue(s) or area(s) that require(s) to be explored further or addressed at EU level in the context of consumer protection? Are there market trends that in particular should be taken into account when considering a revision of the Directive and, in that case, what facts and/or figures exist confirming such a market development?
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1. The Package Travel Directive is an approximation Directive, since Member States are allowed to adopt more stringent provisions in the field covered by the Directive to protect the consumer. As a consequence, implementation legislations in the Member States show many divergences, which creates distortions of competition between organisers and retailers of the EU Member States. For example, some Member States, like Germany, allow limitations of compensation in accordance with international conventions, while others, like France, do not. In order to avoid distortions of competition within the EU, Member States must not be allowed to depart from the provisions of the Directive in order to adopt more stringent provisions. ECTAA, GEBTA and IFTO consider that full harmonisation should apply to a horizontal instrument as well as to sectoral /vertical instruments. If full harmonization is retained, ECTAA, GEBTA and IFTO insist on the fact that the level of protection of the consumer should not necessarily be determined with reference to the maximal protection that the consumer may benefit in a given Member State. A balance must be found between the need to protect the consumer and the need to ensure that businesses can trade in a favourable legal environment.

2. The provision of effective services requires in some instances that consumers comply with certain obligations. Such type of obligations can be found in Regulation n°1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, which provides that a disabled person or person with reduced mobility can be required to be accompanied by another person who is capable of providing the necessary assistance. Similarly in rail transport, the Community has recently adopted a Regulation on rail passengers' rights and obligations. In the framework of a sectoral instrument applicable to travel services or a vertical revision of the Package Travel Directive, the provision of travel services would be improved if consumers had the following obligations:

- Obligation to control validity of the travel documents, to bring the required passport/visa and to obey the organiser's reasonable demands of behaviour etc;
- The consumer must give total and correct information regarding its personal data and the data of other persons included in the booking. The consumer must not use any other passport during its journey than the one presented/referred to at the moment of purchase;
- If the consumer perceives a failure on which it would like to make a complaint, it must report the failure on the spot to the organizer or its representative.

3. Concerning transfer of bookings as provided under Article 4§3 of the Package Travel Directive, it must be recognized that such transfer is not always possible for reasons independent from the organiser's control, such as border control requirements, airlines' policies, etc. Therefore, an unconditional right to transfer bookings cannot be provided to consumers.

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