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AK Position Paper

Proposal for a Directive on package travel  
and assisted travel arrangements  
COM(2013) 512

## About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

## Executive Summary

The AK would like to provide an initial assessment on the present proposal for a EU Directive on package travel and assisted travel arrangements COM(2013) 512 final and to summarize some important points to begin with:

- The Package Travel Directive originates from 1990 and so far has not been updated. Hence, above all it has to be adapted to new developments in the online travel market.
- In this context, the AK welcomes in particular the expansion of scope and the intention to base the Directive on a broad understanding of the term 'package travel'. This will make internet portals, which similar to tour operators combine own holiday packages from the programmes of various service providers or various organisers, increasingly discharge their duties. However, current legal allocation problems of journeys, which will be arranged on behalf of the customer at the time of booking, will also be taken into account.
- The Directive proposal does not address all evident protection deficits resulting from eCommerce: it is quite incomprehensible that cancellation rights for consumers in respect of package travel contracts, which have been concluded as distance selling contracts and other contracts for tourist services are missing. Online bookings generate specific consumer problems with regard to concluding contracts, which could be alleviated by providing a cancellation right.
- Another shortcoming of the Directive proposal is not to insist on binding brochure details concerning travel price and travel services. The AK considers such details in catalogues and similarly detailed advertising material absolutely essential, as only this information enables consumers to compare package travel offers in detail and to make a considered and informed booking decision.
- Apart from that, the Directive proposal seriously intervenes in fundamental issues of general contract law. In doing so, it has overshoot the mark of a sector specific Directive. Combined with the planned full harmonisation, a blatant deterioration of the Austrian level of consumer protection (e.g. with regard to no-fault warranty resp. price reduction has to be feared; there is no notice of lack of conformity; subsequent service changes by the organiser are subject to more restrictive rules; etc.).
- At this point, the AK rejects the planned full harmonisation also for reasons of principle as it is one of its detrimental effects that it is no longer possible to react to national consumer problems.

- The AK also misses a comprehensive coordination of the Directive proposals with the Consumer Rights Directive. This leads to gaps in consumer protection, in particular in respect of package travel, as EU-wide safeguarding provisions of the Consumer Rights Directive, such as the button solution in electronic business transactions, the confirmation solution in case of contracts concluded by telephone or the cancellation right in case of contracts concluded outside the business premises do not apply. The comparison of all information obligations in these Directives is necessary.
- The expansion of insolvency protection for consumers by including travel agents of so-called assisted travel arrangements is positive. However, a detailed clarification of the exact scope of this obligation is still pending. The AK demands in this context that airlines have to be included in the expanded insolvency protection. Uniform deposit restrictions, which can make a significant contribution to improving the financial feasibility of insolvency insurance systems, should also be considered EU-wide.

# The AK position in detail

## 1. General considerations:

The European Commission uses the present draft to propose a revision of the Package Travel Directive 90/314/EEC. The BAK generally welcomes this proposal. The Package Travel Directive 90/314/EEC originates from 1990. Hence, it did not include all aspects of eCommerce when it came into force. However, in particular tourism services are not only suited for being displayed and edited on the Internet, but also for booking and conclusion of contract. Since then, the number of providers and offers in the World Wide Web has exploded. If in the initial stages, many consumers used the Internet mainly as a source of information, today booking their journeys via this medium is an everyday occurrence.

Apart from that, the Internet is perfect for consumers who want to put together offers and single services, trying out new variants in real time and who want to tailor their journey exactly to their requirements. In doing so, they are able to combine modules of one tour operator, but also single services of various providers. Hence, the lines between package travel in the narrow sense and other travel variants have shifted. Consumers rarely know the difference between tour operator and agent; they are equally unaware of the fact that in respect of package travel they enjoy special protection. Furthermore, the websites of providers fuel this misconception as they frequently give the impression of a travel service, where the organisation comes from one source and where the services are the responsibility of a single provider. Ho-

wever, consumers time and again have to put up with a reference to an agency clause in the smallprint.

Hence, the tasks for revising the Directive have been specified. What is needed is an adequate and above all coherent legal framework, which is well adapted to these developments. The innovation push concerning the sale of tourism services and package travel, which provides consumer with a wide range of offers and options in the travel market, but also entails significant risks, has to be accompanied by suitable consumer protection measures.

## 2. Updating the Directive

### Scope

It is positive that the Directive proposal expands the scope in several respects. In doing so, it reacts primarily to previous problems concerning journeys of the customer, which are only arranged at his request at the time of booking, taking developments in the online travel market into account at the same time.

In particular the definition of package travel makes it clear that the combination of at least two travel services at the request or in accordance with the pre-selection of the customer prior to concluding a contract is covered by it. In doing so, it refers to the Club Tour ruling ECJ C-400/00. However, bookings of at least two different travel services in spite of separate contracts are covered, if an offer described as package or similar has been advertised or if such an arrangement has been advertised or invoiced at an all-in or total price. Ano-

ther criterion refers to booking the combination of at least two travel services via a point of sale in one booking process. Also covered is the procurement of such arrangements in a linked online booking process, when customer data is passed on to the provider of a further subsequently booked travel service. Thus, when certain key criteria have been met - i.e. when the impression of a package offer has been created - the consumer protection provisions of the Directive will be asserted.

Consumer protection will also be improved for so-called assisted travel arrangements, i.e. in respect of journeys, where at least two travel services are combined, which are subject to separate bookings and separate contracts. Another requirement is that bookings have been made during the course of a visit or a contact or where in case of a linked online booking process additional travel services have been booked at the confirmation of the booking of the first travel service at the latest. The agent of such assisted travel arrangements shall be obliged to inform in particular about differences to package travel. However, one does not leave it at this information obligation: in case of insolvency of the travel agent (or a service provider?) the consumer shall be promptly refunded with all deposits he has made; he also shall have the right to repatriation regardless of their place of residence, the place of departure or where the package or assisted travel arrangement is sold.

Hence, these expansions depict, as far as one can tell, business models, which are currently practiced by the market. However, the variety and the number of offers is vast and constantly changing, making it difficult to predict whether this concept is fit for the future. Drawing the

line between package tours and assisted travel arrangements also seems somewhat arbitrary. If, for example, the booking process involves several points of sale, why is linking two websites not adequate? From the point of view of the consumer, passing on data is no more proof of the existence of a journey package than the fact that the sites have the same or a similar design, which means that the link between the sights is not really obvious. What is also not clear is how attempts to undermine this system are handled. Hence, it has to be clarified with the EU Commission, what, according to the new understanding, package travel really involves. It is probably better not to create a closed criteria system, but to regulate the scope more dynamically. Other offers on the market, which have not been covered directly, but which are either closer to the package travel definition or assisted travel arrangements should also be assignable and not just drop out of the scope. It should also be possible to integrate bypassing models, such as linked sites, whose design give the impression of a provider, into the scope.

In some respects the scope is not wide enough. For example, independent contracts for a single booked service are explicitly exempt from the Directive and only combinations of travel services, such as package tours and assisted travel arrangements have been regulated. However, it would make sense and would be desirable, if all or other tourism services would be included in a joint and uniform legal framework, for example a graded resp. coordinated catalogue of obligations. Consumers are increasingly departing from the idea of package tours, moving even closer towards booking single services; hence, the chosen concept only covers part of common practice.

### **Holiday home rentals**

The AK also wants to draw attention to the problem of holiday home rentals provided by a tour operator. In Austria, holiday home rentals are currently equal to package tours. However, these arrangements do not combine transport, overnight accommodation or a hired car with another tourism-related range of services, which is not only an ancillary service. Hence, they cannot be subsumed under the package travel definition of the Directive proposal. Even if the Austrian solution has not been altogether successful, its intention is significant. These products harbour a high potential of misleading consumers, as they are advertised using the same design as package tours, being "organised" by the same operator - hence, for consumers they are an undistinguishable part of a tour operator programme. This makes other legal consequences difficult to comprehend. Therefore, offers such as these should also be integrated in the Directive and become subject to a uniform EU-wide regulation. If this intention cannot be realized it is vital that at least Austria's level of protection, which is better, will be maintained. When implementing the Directive, in particular a regulation should be considered, which imposes the analogue application to holiday home rentals by a tour operator.

### **3. Cancellation right**

Whilst the EU Commission appreciates problems in respect of eCommerce and acts accordingly, it is completely unsatisfactory that consumers who book a package tour, assisted travel arrangements or single tourism services under distance selling arrangements, have absolutely no cancellation rights. The

triumphal march of eCommerce generates specific problems in particular in this area. These include particularly frequently rushed contract conclusions as well as unwanted or unintended contract conclusions, when consumers accidentally enter wrong details, such as a wrong date or if double bookings and similar problems are incurred, for example by technical faults or insufficient advice and information. A simple cancellation right would alleviate these problems on many occasions. Hence, in view of the revision of the Package Travel Directive, the AK would have expected reconsideration and a differentiated examination of this problem area.

The Consumer Rights Directive completely exempts package tours from its scope and the main part of passenger transport. Hence, it only covers services, overnight accommodation and hired cars as well as other leisure services. These in turn have been explicitly exempt from the general cancellation right. This exemption is justified by explaining that the organiser enters obligations for a special date or period, which means that he must have capacities available. This binds him to his schedules and a cancellation right would be an unfair burden. However, these possible disadvantages could be met with a slightly adapted cancellation right, which only applies to early bookings. In respect of consumers concluding a contract, this would solve a number of problems in a straightforward manner.

Also conceivable as a minimum variant would be a time for consideration of 48 hours following the conclusion of contract, during which the consumer would be able to check the booking and, if necessary, cancel it.



These cancellation rights should apply to all tourism services. If the proposed layout of the scope of the Directive remains unchanged and if more detailed safeguarding provisions under civil law are only contemplated for package tours and assisted travel arrangements, cancellation rights should be provided for at least these areas. The liability of retailers in case of faults in Article 19 is not suitable to compensate for risks and common problems related to online booking. From the point of view of the consumer, a cancellation right without stating a detailed reason within a certain period is the simpler legal instrument, which is far easier to apply, detached from the concrete state of evidence.

#### **4. Intervention in general contract law**

The proposal pretends only to regulate certain aspects of the legal and administrative provisions of package travel and assisted travel arrangements. However, a glance at the civil regulations in respect of the package tour contract shows that they clearly overshoot the mark of what is required. The result is serious intervention in general contract law, without at the same time dealing with travel law specifics. There is, for example, a confusion of compensation and warranty. Price reduction and compensation in case of non-conformity are tarred with the same brush; they shall not be granted, especially, if third parties have contributed to the event triggering compensation and if the event was unforeseeable and could not be avoided or if it was caused by exceptional, also unavoidable circumstances. Hence, the warranty is fault-based. The EU itself has still not harmonised warranty rights for services and compensation.

The AK rejects that this - above all also in association with the planned full harmonisation - as it will significantly reduce the level of Austrian consumer protection. We are also strictly opposed to any anticipation resp. any setting the course for a EU-wide regulation based on a sector specific Directive. Therefore, the Directive should refrain from these far-reaching interventions in general contract law; it must concentrate on the actual particularities of the travel contract.

#### **5. Full harmonisation**

At this point, the AK also rejects comprehensive full harmonisation, which is envisaged by the Directive proposal. Full harmonisation and its barrier effect result in the fact that reacting to national consumer problems is no longer possible. Any economic damage resulting from this would be at the cost of consumers. However, there is also the danger that consumer policy will come to an EU-wide halt. After all, the development of consumer rights in the Member States also animates the development of law in this area in the EU.

Apart from that, the AK also criticises the Directive proposal as it does not give clear instructions in respect of full harmonisation resp. an explicit regulation concerning the degree of harmonisation is lacking. The circumstance of full harmonisation can only be derived from explanations and indirectly from the fact that the Directive grants Member States regulation options in some points. The approach is detrimental to legal certainty.

#### **6. Reconciliation with Consumer Rights Directive**

Apart from that, the Directive proposal also shows deficits in respect of the



reconciliation with the existing EU Consumer Law acquis, above all with the Directive on Consumer Rights 2011/83/EU. This Directive completely excludes the existing Package Travel Directive 90/314/EEC from the scope. Passenger transport - with the exception of a few provisions - has also been excluded. However, by the same token the Directive applies to services in the areas of overnight accommodation and hired car and to other leisure services. In doing so, a patchwork has been created with regard to the legal framework and consumer protection for tourism services.

Hence, package tours are not subject to the provisions on general information obligations from the Consumer Rights Directive, the Doorstep Selling Regulations and the Distance Selling Regulations as well as the safeguarding provisions against their risks, such as the button solution for electronic contract conclusions or the confirmation solution in respect of contracts concluded by telephone, the safeguarding provisions for payments by using certain methods, to telephone communication and additional payments, whereas assisted travel arrangements are. The consequence of this is that in case of package tours there is no standard EU-wide cancellation right for consumers in the event of doorstep selling. There are no regulations concerning information obligations for passenger transport, such as flights and no safeguarding provisions exist in respect of special methods of selling such as doorstep selling and distance selling with the exception of the button solution; however, the safeguarding provisions for payments, using certain methods of payment as well as in respect of additional payments are taking effect.

On the other hand, special information obligations included in the present Directive proposal shall only apply to package tours. They do not apply to assisted travel arrangements; the agent is only obliged to explain that each service provider is responsible for his own fulfilment of the contract and that the traveller cannot claim any rights granted to users of package tours.

This shows how little consequent and how inconsistently the civil legal framework has been conceived. The AK therefore demands individual Directives to be better coordinated; overlaps must be avoided and existing gaps in consumer protection have to be closed to the greatest possible extent. A Directive which would cover all tourism services would definitely be an option.

## **7. Binding price and performance specifications in brochures and online**

The Package Travel Directive 90/314/EEC also includes regulations for travel brochures and other detailed advertising material. On the one hand, it has been made clear that information aimed at consumers may not contain any misleading statements. However, on the other hand the Directive does not oblige organisers to provide concrete binding information, in particular on the price, but also on the main performance characteristics and contract terms for offers advertised. Such regulations are not part of the present proposal. Not only are the obligations at issue well-practiced; they are a key element of consumer protection in respect of travel and ensure transparency of cost and performance. This enables consumers to compare prices and services in detail and to make an informed booking decision on this basis.

If one dispenses with these information obligations resp. statements in brochures and similar detailed advertising material, it is to be expected that misleading advertising practices will be on the increase again. This intended change also means for the individual consumer that he has to form an initial opinion without having all information required for the conclusion of the contract, in particular reliable information on cost at hand. This represents a particular disadvantage if he books his journey or holiday in a stationary travel agency: it could easily happen that the consumer contemplates a travel package based on false information in a brochure, deciding in its favour and that he only at the travel agency - shortly before he signs the contract - is to his surprise confronted with new or changed facts, for example a higher price. This puts him generally under pressure. Given these circumstances, one can no longer assume a considered and informed booking decision.

Hence, the AK considers the existing provisions on binding prices and other statements in brochures absolutely essential. Otherwise, the legal situation for consumers would be deteriorating. The AK is also in favour of extending the existing obligations to detailed tour offers on the Internet.

## 8. Insolvency protection

The Directive proposal does not only assume an obligation for package tour operators to take out insolvency insurance, but it now includes travel agents providing assisted travel arrangements. We generally welcome the intention of the EU Commission to improve insolvency protection for consumers. When booking package tours, assisted travel arrangements and other

tourism services, consumers are paying a deposit, often long before the service is provided, thereby generally carrying the full insolvency risk.

However, when it comes to the scope of this obligation, the Directive proposal is inconsistent, i.e. it is not clear whether an insolvency insurance only applies to their own insolvency or whether travel agents, have to ensure, also in case of insolvency of the service provider, that the consumer will be refunded with all payments he has already made and that he will be promptly repatriated should the need arise, provided transport is part of the assisted travel arrangements. This would also mean to organise and pay for a return flight if an airline has become insolvent or to refund tickets for which an initial payment has been made.

No doubt, implementing insolvency insurance for travel agents providing assisted travel arrangements will not be easy. In Austria, even realizing an insolvency insurance system for package tour operators was a difficult undertaking. For example, one has never succeeded to fully comply with the Directive provisions and to ensure full compensation for travellers via the insolvency insurance. People, affected by tour operator insolvencies were partly forced to rely on state liability.

Hence, from the point of view of the AK the first step to be taken must be the exact clarification concern the scope of the planned regulation. This should be accompanied by various other measures, which could make a useful contribution to realise a more far-reaching insolvency protection. The AK therefore suggest providing for general EU-wide deposit restrictions. These would not only help to reduce the risks for consu-

mers, but they would also facilitate the financial feasibility of a comprehensive insolvency insurance system. The AK also considers it indispensable to include airlines in insolvency protection. So far, they have no such obligation within the EU.

The central national points of contact provided for in the proposal to facilitate monitoring and administrative cooperation will probably help to detect gaps in protection and insolvency insurance systems of individual organisers. However, from the point of view of the AK, it is also essential to inform consumers about insured companies. The AK therefore renews its demand for an EU-wide tour operator register (to which a register for agents of assisted travel arrangements should now be added). Another option would be that the central contact points communicate any authorized resp. insured providers to consumers.

### **On individual provisions of the Directive proposal:**

#### **On Article 2 "Scope"**

Only some Articles of the Directive proposal shall apply to assisted travel arrangements. These restrictions are unsatisfactory from the point of view of the AK. For example, the special information obligations for tour operators - if necessary in a slightly adapted form - would definitely make sense also for assisted travel arrangements agents. One would have expected that the revision of a sector specific Directive would have resulted in uniform information obligations tailor-made for the special requirements of the travel industry.

Experience shows that consumers booking online have only insufficient

information available. Apart from that, many travel agents, and not only those dealing with assisted travel arrangements, are acting as vicarious agents of the tour operators. The latter is then in any case obliged to ensure that any information obligations he has to comply with will also be observed by the travel agents. Extending information obligations to the entire travel industry would therefore make sense and provide consumers with a uniform level of protection.

The proposal excludes ancillary contracts covering financial services. This has to be problematised if no facultative travel insurances are offered, but are included in the service scope of the package tour. If these cases result in a price reduction, its amount in respect of the total price, including the insurance premium, has to be established. This should be ensured in future in spite of its exclusion from the scope.

Package tours and assisted travel arrangements, which have been purchased on the basis of a framework agreement between employer and an organiser, specialised in organising business trips, are not included. As this distinction is difficult to verify, it might be more advisable to exclude business trips in general and to concentrate on consumer business.

The Directive proposal does not apply to stand-alone contracts for single travel services. This frequently raises problems. Pure hotel services, based on the travel services definition in Article 2 paragraph 2 d) are not considered package travel even if they are combined with catering. However, if catering represents a significant part of the journey, for example in case of a Gourmet weekend in a hotel, these offers may be included in the scope. In the opinion of

the AK, this relevance should be reviewed individually on the basis of various criteria. Under no circumstances should it be assumed by stating a concrete percentage, as for example the figure of 20% mentioned in the reasons for the Directive under Point 17. Consumers do not have any opportunities in any case to obtain an insight in the cost calculation of an organiser.

Single touristic services added at a later stage are also not included in the scope. That leaves common additional offers by tour operators at the holiday resort in limbo, for example facultative components, such as excursions, which can only be booked at the holiday destination. Currently, the company has the option of assuming responsibility either in its capacity as operator or as agent; as a result, the sphere of obligation and the liability of the company vary. Their allocation depends on the fact of the exclusive agency characteristic has been made known in a clear manner or whether the impression of a travel service is given. According to consistent case-law, the reference to the agency characteristic in the smallprint is not adequate. It is therefore necessary to also address this problem when revising the Directive and to ensure an EU-wide regulation resp. adequate integration.

#### **On Article 3 “Definitions”**

The definition of packages covering packages combined in accordance with the ECJ ruling Club-Tour C-400/00 at the request or in accordance with the pre-selection by consumers, hence the classic variant of pre-fabricated packages, which are advertised in their entirety, as they were regulated in the existing Directive is no longer mentioned. This type of package must be included in the definition again.

The existing Package Travel Directive uses and defines the term force majeure. The general interpretation is “unusual circumstances, outside the control of the trader, the consequences of which, in spite of exercise of all due care could not have been avoided”. Overbooking is explicitly mentioned, whereby it has been made clear that this does not fall under force majeure. The reference point of the present proposal now relates to ‘unavoidable and extraordinary circumstances’; their definition follows the proposal of revised Regulation 261/2004 on air passenger rights. However, there are some differences. If ‘force majeure’ is now to become ‘extraordinary circumstances’ - which, from the point of view of the AK is not absolutely necessary -, it would, for reasons of legal certainty, be important that uniform definitions were used, where possible.

#### **On Article 4 “Pre-contractual information”**

In accordance with Article 4 paragraph 1 a) iii, the tour operator has to provide information on the main features of the location and tourist category of the accommodation. The existing Directive prescribes that information has to be provided on the type, location, category or comfort and main features as well as tourist category according to the provisions of the host country. One might take the view that the information obligations of the old version are hypertrophic and overlapping and that the planned streamlining therefore makes sense. Fact is that the content has not really been changed as the requirement to inform about main features means also to specify type or comfort resp. quality.

The official categorisation of the host country may mislead consumers. A uniform EU-wide assessment of tourist ac-

commodations does not exist. In turn, consumers probably just have an idea of Austrian Standards. However, these might be significantly different from those of the host country. Hence, this poses the question whether informing about the official categorisation of the host country cannot be dispensed with. Otherwise, it would have to be accompanied by an explicit explanation that the description refers to the categorisation in the host country and this might be different from any assessment in the home country.

The duty to provide information on prices follows the corresponding information obligation of the Consumer Rights Directive; however, it is not provided in its complete form. Hence, it should be added that costs cannot be calculated in advance and that the calculation method has to be stated.

As not all trips depend on achieving a minimum number of participants, the term "as appropriate" should be added.

Any ambiguities concerning are perpetuated by the present proposal. Tour operators interpret this obligation narrowly. Hence, they only provide information on those identification and visa requirements, which apply to nationals of the country where the tour operator is based. Information on identification and visa requirements for other nationals is only provided on request. It should therefore be made clear that information on identification and visa requirements has to be provided for all booking consumers who are nationals of an EU Member States.

**On Article 5 "Binding character of pre-contractual information and conclusion of the contract"**

Subsequent changes of pre-contractual information require a subject to alterations clause. Whether and which conditions such a clause has to meet is not specified. Clarification should be provided.

All actual changes have to be communicated before the conclusion of the contract. However, no information has to be provided on changes concerning identification and visa requirements or a new address of the tour operators or agent. This is difficult to understand as also these subsequent changes are relevant to the consumer. We therefore suggest that the last half sentence will be changed to "All changes to pre-contractual Information will be clearly communicated before the conclusion of the contract".

**On Article 6 "Content of the package travel contract and documents to be supplied before the start of the package"**

According to the present proposal, the contract shall also contain the requirement that the tour operator is obliged to provide assistance in accordance with Article 14. However, this support will be at the traveller's expense if he himself has caused difficulties intentionally or because of negligence. As already slight negligence is enough to generate charges, this paragraph should at least be supplemented by a reference to a possible liability to pay costs.

Information on insolvency protection is already the norm. However, if this point is fully harmonised, it will be questionable whether the special information obligations of the Travel Agent Insurance Regulations can be maintained. Our insolvency insurance system is based among other on a legal restriction of

the deposit. The maximum deposit requested may not exceed 10 % or 20 %, whereby the remainder has to be paid 20 days before the start of the journey at the earliest. Higher deposits are not insured; if higher deposits are paid, the only option left to consumers will be to be fully indemnified via state liability. Tour operators in Austria are therefore obliged, to draw attention to these deposit restrictions by placing special warnings on their booking confirmations.

#### **On Article 7 “Transfer of the contract to another traveller”**

The transfer of the contract now depends on the fact that the traveller has the duty to inform the tour operator of the change by giving “notice on a durable medium”.

The AK is opposed to this form requirement as it makes any transfer to another traveller unnecessarily difficult for the consumer. He is well-advised in any case to cover his back for reasons of proof and to notify the organiser in writing.

#### **On Article 8 “Alterations of the price”**

The AK welcomes several proposed improvements in respect of subsequent alterations to the price. Thus, a price revision clause is only admissible if price reductions are passed on under the same circumstances. This also corresponds to the Austrian level of protection in this context. The parameters for price changes are regulated similar to those in the existing Package Travel Directive; however, they are slightly more restrictive. A revision of transport costs shall only be possible if fuel costs are changing. Equally positive is the absolute restriction of price changes to 10 % of the total travel costs.

The proposal also defines taxes or fees for certain services more narrowly. These may only concern taxes or fees for services, which are part of the package; in addition, they have to be imposed by third parties not directly involved in the performance of the package. This raises the question, whether for example an environmental tax can be passed on to the consumer during the course of a subsequent price change. Strictly speaking, this is not a levy on single travel services. It is also not clear whether the initial application of such levies can be passed on to the consumer. However, the wording seems to suggest that this only refers to changes of applicable taxes or fees.

The proposed regulation also has some shortcomings. For example, the organiser has to inform the traveller of the subsequent price change, providing reasons and the calculation for the new price, 20 days before the start of the journey at the latest. The current version assumes that from the 20th day before the start of the journey the price may no longer be increased. In addition “exact” details about the reasons were required. The AK also points out that - in order to make price changes comprehensible and to enable consumers to assert in particular their right to price reduction - parameters have to be specified in advance. This applies primarily to exchange rates, but also to the concrete calculation mode for fuel costs. This also corresponds to existing legislation.

The AK would also like to draw attention to the fact that according to the current legislation in Austria subsequent price changes - provided booking and journey take place within two months - may not be passed on at all. This protection will be lost in case of full harmonisation. Hence, a similar protective mechanism

against short-term price increases has to be incorporated in the Directive proposal. The alternative would be to refrain from full harmonisation in respect of this point or in general.

#### **On Article 9 “Alteration of other contract terms”**

According to Article 9 paragraph 1, the organiser may carry out insignificant services changes on the basis of reservation of right. It is not obliged to inform the consumer of these changes. However, according to paragraph 2, the organiser may carry out significant changes to main characteristics of the journey and also to contractual agreements if it informs the traveller without delay and the consumer remains silent. However, it has to be “forced” to make these alterations. Apparently a reservation of right is not required.

The conditions for subsequent service changes in Austria, which go much further, are laid down in particular in § 6.2.3 Consumer Protection Act. Here, this clause links the admissibility of a subsequent service change to its reasonableness. The insignificance of the alteration is only one of several evaluation criteria, factual justification another, which is explicitly mentioned. Hence, according to the provisions of the Consumer Protection Act, significant subsequent alterations are prohibited. In respect of this issue, Austrian legislation guarantees a higher level of protection than the Directive proposal.

Apart from that, it is not possible to interpret the silence of the consumer automatically as an agreement to the subsequent service change. Such legal fiction is only admissible in exceptional cases in the narrow framework of § 6.1.2 of the Consumer Protection Act, which means that also in this respect

consumers in Austria are better protected. From the point of view of the AK, these standards of protection have to be retained. This means that full harmonisation should not take place or that subsequent service changes have to be subject to strict rules in the Directive proposal. After all, this does not concern a travel law specific, but general contract law principles.

If the organiser advises the traveller of a subsequent contract change, he shall, in the opinion of the AK, not only be obliged to provide information on the proposed changes, but also - provided the now offered package is not of equal value, i.e. a reduction of the quality or the service spectrum has taken place - inform the consumer about the amount of the price reduction he can claim, if he agrees to this change.

According to the Directive proposal, the organiser has to be “constrained” to subsequently alter significantly any main characteristics of the travel services, i.e. the circumstances must be outside his influence. This restriction represents an important improvement compared to the existing Package Travel Directive. Otherwise it contradicts, together with also envisaged right on price reduction, Article 12 paragraph 3 of the proposal, which makes a price reduction attributable to fault resp. denies it in case of extraordinary circumstances.

#### **On Article 10 “Termination of the contract before the start of the package”**

The Member States have to ensure that travellers will be able to withdraw from the contract against reasonable compensation. This compensation may be also agreed as a standardised cancellation fee. Concerning its amount, the cancellation fee has to be guided



by the customary cost saving and the income from alternative deployment of services. This also corresponds to a large extent to our legal situation; however, according to Austrian Contract law, the amount is not only based on what has actually been added by alternative deployment, but was intentionally been left out. This should be added. If no cancellation fee has been agreed, concrete compensation must be determined. However, the last sentence of Article 10 paragraph 1 only refers to the criterion of cost savings; alternative deployment is missing.

The AK welcomes that consumers EU-wide will be granted with a cancellation right in case of extraordinary circumstances resp. in case of Force Majeure. However, in some aspects the Directive proposal falls short of the current legislation concerning the fact that the basis of the transaction had ceased to exist, which makes the plan under the aspect of full harmonisation problematic. Extraordinary circumstances must have a serious impact on the package. This puts into question whether unreasonableness is adequate, i.e. whether an unreasonable risk exists to life and health of travellers, without having an actual impact on the travel services themselves. Hence, in many cases this would not cover terror attacks at the holiday resort or political unrest. However, such a regulation must depict all possible relevant cases. Hence the cancellation right must be clarified accordingly.

Another restriction of the legislation concerning the fact that the basis of the transaction had ceased to exist, results from the fact that extraordinary circumstances have to occur "place of destination or its immediate vicinity". This should be disregarded. It has to be left to the case law to determine when

a risk justifies granting the right of cancellation.

The term "any undue payment made" in Article 10 paragraph 4 is an unfortunate choice of words. Some amounts are justified, for example because they concern due deposits or outstanding payments. However, these have to be refunded, if the consumer is entitled to free cancellation due to Force Majeure. Hence it would be better to use the phrase "unjustly retained amounts".

#### **Article 11 "Liability for the performance of the package"**

Article 11 gives the impression of a final regulatory system being created with regard to the non-fulfilment and inadequate fulfilment of the contractually agreed package and this would regulate all remedies concerning the lack of conformity. However, this would reduce a very complex range of topics to a small number of aspects. As already mentioned above, the AK is vehemently opposed to such profound interventions into general contract law. Apart from that, many of these legal institutions, in particular the services warranty have not yet been harmonised within the EU. Such anticipation in this context is considered overshooting the mark and is rejected.

Even though the foundation stone for this was already laid with the existing Package Travel Directive, it has so far not resulted in any problems, as it is only aimed at minimum harmonisation. Full harmonisation entails the risk that more favourable Austrian Standards of protection will be removed. Hence, the Directive proposal must again concentrate on the small number of sector-specific issues and freed of general contract law implications.

Hence, in this sense Article 11 paragraph 2 is considered problematic. It gives priority to improvements, which will be omitted if they are disproportionate. No further differentiated rules are provided; in particular the issue has been ignored, what will apply if the organiser is not able to carry out any improvement or rejects to undertake any improvement, or if improvements are not carried out in time or in situations where any improvement appears to be unreasonable. Hence, relevant clarification is required that only priority to improvements has been laid down, but that other remedies concerning the lack of conformity are not affected.

According to Article 11 paragraph 3 and 4, the traveller shall only be able to withdraw from a contract if a significant part of the journey cannot be provided or if the organiser is unable to take measures to continue the journey or if the traveller does not accept the alternative arrangements proposed because they are not comparable to what was agreed. This gives the impression that any withdrawal from the contract is only permitted in exceptional cases. This raises the question whether the right to withdrawal does also exist, if for example contractually agreed childcare cannot be provided. This service does not represent a significant part of the journey; however, from the point of view of the traveller it is an essential part. Apart from that, how does one deal with the circumstance that swimming in the sea has become impossible or unacceptable? This also is not a service provided by the organiser in the narrow sense. Here to improvements have to be made. Hence, it has to be ensured that this regulation does not curtail the right of conversion or other rights concerning irregularities in the performance.

However, compared to the current Directive the regulation has further deterioration in store. If the organiser is unable to provide a significant part of the service, it is obliged to take appropriate precautions to salvage the journey. The consumer may reject these for "good reasons". The proposal is now restricting the options of the consumer. If services are at least "comparable" to the original scope of services, he is no longer able to reject these or to withdraw from the contract. This leaves him in a worse position compared to Austrian legislation, which on the one hand requires alternative services to be of equal value within the scope of warranty, and which on the other hand links an alternative service to the reasonableness of such a subsequent service change. This lowering of the standards of protection cannot be accepted.

Article 11 paragraph 4 also proposes that - if for reasons of Force Majeure the stay of the consumer is prolonged - the organiser shall bear the costs for the continued stay for 3 nights and 100 Euro per night. This would mean an improvement for Austrian consumers.

It is a controversial issue whether the organiser has to pay for such costs in the first place. There is no final clarifying case law. The regulation follows the proposal of a revision of Regulation 261/2004 on air passenger rights. However, restricting compensation to 3 nights and 100 Euro is arbitrary and its amount inadequate. Hotel prices worldwide greatly vary. In Europe for example the average price for a hotel room in many cases exceeds 100 Euro.

#### **On Article 12 "Price reduction and compensation for damages"**

In Article 12 too, the Directive proposal does not only address travel specific is-

sues, but once again interferes in general contract law principles. Price reductions and compensation of damages in case of non-fulfilment and inadequate fulfilment of the contract are regulated and brought into line in respect of the question of fault and concrete effects. This puts into question the contract law principle of a no-fault warranty. Hence, this should be urgently amended. The fact that the organiser has to guarantee granting in particular a price reduction, provided any faults have been caused by third parties or Force Majeure, should not be challenged. Because it is incomprehensible and is not in accordance with the sharing of risk in respect of the travel contract, if the organiser is not obliged to release the share of the payment, for which no or only a limited service has been provided.

Even if the traveller, provided he himself is responsible for any faults, has no rights, in particular no entitlement to price reduction or compensation, caution should nevertheless be exercised in respect of apodictic statements such as "shall not be entitled to price reduction or compensation" against the background of full harmonisation. What is required in this context is a differentiated wording, which also considers a part responsibility of the organiser resp. a possible contributory fault and which, does not completely release him of any liability in this case.

Article 12 paragraph 3 b) lays down a notice of lack of conformity. The AK has always been opposed to such an obligation by the consumer. It is in the interest of the consumer to request - in case faults exist - for these to be remedied urgently; hence, the consumer will normally complain in any case. Introducing such an obligation does not result in the fact that consumers give companies the opportunity to remedy any faults; this

option already exists. Standardising an obligation to notify a lack of conformity will probably result in the fact that many consumers, because their preservation of evidence is inadequate and because they have inadequate knowledge to protect themselves, will not be able to assert their justified warranty claims.

Failing to notify a lack of conformity will entail that the traveller will lose his claim for price reductions and compensation. If the obligation to notify a lack of conformity remains, it has to be made clearer that in various cases there is no need to notify to notify a lack of conformity, namely, if it is not the consumer's fault if the does not notify a to notify a lack of conformity or if the latter is objectively not required.

This is the case if for example a remedy had not been possible or if the lack of conformity were known to the organiser in any case.

A contractually agreed restriction of compensation is also permitted in accordance with Austrian law. One should refrain from laying down a legal restriction, i.e. determining a sum, which is 3 times the amount of the total travel cost. This too is by no means a travel specific requirement. Monitoring the clause is the responsibility of the Member States; they only have to insure that the minimum standards of the Directive on unfair terms in consumer contracts are met.

The right to compensation or price reduction in Article 12 paragraph 5 has to be reviewed as again price reduction and compensation have been tarred with the same brush. Otherwise, this regulation closely follows the revision of Regulation 261/2004 on Air Passenger Rights; however, its final version is not yet foreseeable.

With regard to the prescription period for price reduction and compensation, the Directive proposal includes a minimum harmonized regulation. The Member States shall be obliged to provide periods, which are not shorter than 1 year. The AK considers this minimum standard inadequate. A minimum EU-wide 2-year warranty period is already standard for consumer goods purchases. Hence, it is no longer possible to go back on this standard.

**On Article 13 “Possibility to contact the organiser via the retailer”**

It is irritating in this context that the receipt of such a notification by the retailer “without undue delay” is regarded as a receipt without undue delay by the tour operator. However, the nature of such news, complaints and requests, which have to be submitted/received in good time, has not been made clear; i.e. it is unclear which periods are referred to here.

**On Article 14 “Obligation to provide assistance”**

It has to be put up for discussion what relation is between this obligation to provide assistance and the general contractually agreed protective duties and due diligence of an organiser.

A least in cases of slight negligence one should refrain from charging a fee. Apart from that, it should always be communicated when these services will only be provided on the basis of an additional charge resp. whether in the individual case, an extra/special fee will be charged.

**On Article 15 “Effectiveness and scope of insolvency protection”**

There is a discrepancy in content between Article 15 and 17, which has to be

clarified: whilst Article 15 only refers to insolvency insurance for organisers and retailers in the event of insolvency, Article 17 extends this insurance obligation also to insolvency of service providers.

**On Article 18 “Particular obligations of the retailer where the organiser is established outside the EEA”**

The scope of this provision is not exactly clear. All retailers - not only those providing assisted travel arrangements - shall be subject to the “obligations applying to organisers in accordance with Chapter IV and V”, if an organiser based outside the EEA is involved and where it cannot be proven whether this organiser does conform to these obligations in any case. It should be specified in more detail whether this concerns a liability because of negligence in choice (*culpa in eligendo*) in respect of the damage resulting from it. Also considered could be a default liability of the organiser, which only applies if the organiser does not fulfil his obligations, whether in respect of the insolvency insurance or of the contract.

It would also be important from the point of view of the AK to clarify that this does not affect national agent liability, and that if an organiser whose seat is outside the EEA is involved, existing liabilities in contract or tort will not be cancelled because other contractually agreed due diligence has been infringed against.

Should you have any further questions  
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