

THE BULGARIAN LEGAL REGULATION ON PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENTS ACCORDING TO DIRECTIVE (EU) 2015/2302

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ABSTRACT

In July 2018 entered into force new provisions of European law in relation to package travel and other travel services and their sale by organisers and retailers to consumers. The new legislative framework is a direct consequence of the changes that came on the travel market in the last decades and it expresses the European legislator's pursuit the changes concerned to be adequately reflected in the legal order. The subjects of this study are the main principles of Directive (EU) 2015/2302 on package travel and linked travel arrangements and their role of improving the protection of travel services consumers. In particular, in the article are analyzed issues relating to the scope of protection of new Directive with regard to consumers, the meaning of term "package travel", the trader's obligation to provide certain information to the consumer before concluding the contract, the rights arising out of the contract, the liability for the proper performance of a package, the means of protection in case of organiser's insolvency.

KEYWORDS: package travel, organiser, traveller, travel services, nonperformance of a contract

ABSTRAKT

Im Juli 2018 traten neue gemeinschaftsrechtliche Bestimmungen zur Bereitstellung von Pauschalreisen und anderen Reisedienstleistungen durch Reiseveranstalter und Reisebüros für Verbraucher in Kraft. Der neue Rechtsrahmen spiegelt direkt die Veränderungen wider, die sich in den letzten Jahrzehnten auf dem Tourismusmarkt ergeben haben, und bringt die Bemühungen des europäischen Gesetzgebers zum Ausdruck, den Veränderungen in der Rechtsordnung angemessen Rechnung zu tragen. Gegenstand dieser Studie sind die wesentlichen Bestimmungen der Richtlinie (EU) 2015/2302 des Europäischen Parlaments und des Rates vom 25. November 2015 über Pauschalreisen und damit verbundene Reisedienstleistungen und deren Bedeutung für die Verbesserung des Schutzes der Reisenden. Insbesondere wurden Fragen im Zusammenhang mit der persönlichen Wirkung der Normen der Richtlinie, dem Inhalt des Begriffs „Reisepaket“ und der Verpflichtung des Unternehmers, dem Verbraucher vor Vertragsabschluss bestimmte Informationen zur Verfügung zu stellen, analysiert. Gegenstand der Analyse sind auch die Rechte, die dem Reisenden aus dem abgeschlossenen Vertrag entstehen, die vertragliche Haftung für die Nichterfüllung oder mangelhafte Erbringung der versprochenen Leistungen, die Möglichkeiten zur Absicherung des Reisenden bei Insolvenz des Unternehmers.

STICHWORTE: Pauschalreise, Veranstalter, Reisender, Reiseleistungen, Vertragsbruch

RÉSUMÉ

Des nouvelles dispositions du droit communautaire ont commencé à s'appliquer sur les voyages forfaitaires et d'autres services de voyage proposés par les voyagistes ou les agents de voyage des particuliers en juillet 2018.

Le nouveau cadre juridique reflète directement les changements survenus sur le marché touristique au cours des dernières décennies et montre les efforts déployés du législateur européen pour refléter de manière adéquate les changements intervenus dans l'ordre juridique. Le sujet de cette étude porte sur les principales dispositions de la directive (UE) 2015/2302 du Parlement européen et du Conseil du 25 novembre 2015 relatives aux voyages forfaitaires et aux services de voyage associés et sur leur importance pour l'amélioration de la protection des voyageurs. En particulier, sont analysés les questions liées à l'effet personnalisé des normes de la directive, le contenu de la notion de « forfait touristique », l'obligation du professionnel à fournir certaines informations à l'utilisateur avant la signature du contrat, les droits du voyageur dans le cadre du contrat conclu, la responsabilité contractuelle en cas d'inexécution du contrat ou d'une mauvaise exécution des services promis, les moyens de protection du voyageur en cas d'insolvabilité du commerçant.

MOTS-CLÉS: voyage à forfait, organisateur, voyageur, services de voyage, rupture de contrat (inexécution du contrat)

INTRODUCTION

Directive 90/314/ EEC on package travel, package holidays and package tours of the European Parliament and of the Council, adopted in 1990, occupied an important place in the system of EU consumer law, amongst the other Union legislation relating to the consumer's legal status. It was for the first time common to the Member States to regulate the legal relations for organizing and providing package travels and to regulate the rights and obligations of the subjects involved in them. In this sense, its role as a regulator of these legal relations was undoubted. The effect of Directive 90/314/EEC on legal order lasted more than 20 years. In the early 1990s, the structure of the tourist market was quite simple, and the Internet as a means of communication and international trade did not exist. However, in recent times, there have been significant changes in the tourist market, driven on the one hand by the liberalization of the air transport industry and, on the other, the emergence of new manners in which consumers organize their trips and holidays.

Furthermore, due to the minimal harmonization approach used in the Directive, even with its transposition, substantial differences between the laws of the Member States as regards package travels have emerged. In particular, there was a lack of uniformity as to which contracting party (parties) are liable for the consequences of the non-performance of the package travel contract, and some of the provisions contained ambiguities and legislative gaps. On the other hand, the provisions of the Directive concerned have been partially or wholly inapplicable given the fact that consumers nowadays increasingly prefer to purchase a "personalized" package travel by combining travel services from one trader or several economically linked traders via websites. This trend in turn has created uncertainty as to the level of protection that can be expected by the consumer and uncertainty as to the extent of the obligations of traders in relation to the provision of such combined services.

The reasons for the invasion of Internet technologies in the tourist business are diverse and are subject to other types of research. However, the explanation offered in the theory is that "in the global network, the potential buyers and consumers of tourist services are, in general, much more than those who can visit travel bureaus as they are not limited by the time and space. In this sense, the understanding

of an open tourist market finds its specific manifestation in the virtual market of services and products created on the Internet".

In response to the changes, in 2007 in accordance with Article 114 of the Treaty on the Functioning of the European Union, the European Commission initiated a proposal to reform the existing Directive 90/314/EEC. In the course of preparing for the new rules, public consultations were held with a wide range of stakeholders - the European Economic and Social Committee, consumer organizations, representatives of the tourism business, academics, lawyers and some Member States. In the final analysis, the efforts of the EU legislative bodies in this regard are expressed in Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Council Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (hereinafter referred to as "Directive (EU) 2015/2302"). In view of the substantial changes it brings into the legal regime of organized trips, it obliges Member States to introduce the new provisions into their domestic law by January 1, 2018, respectively to apply them from July 2018.

The new Directive seeks to update the rules on package travels, extending the scope of protection, adding to the traditional package travels organized by tour operators or travel agents, individualized combinations of tourist services purchased online. The expected consequences of the entry into force of the adopted rules are increasing legal certainty and transparency for both parties of the package travel contract, limiting the possible damages to the consumer from the use of such combined services and removing obstacles to cross-border trade through ensuring equivalent conditions of competition between tourist businesses. The latter will make it easier for traders to expand their business and offer tourist products beyond national boundaries. More generally, bringing up to date the Directive 90/314/EEC should be seen as a step in the process of providing a common legal framework in the scope of consumer protection.

RESULTS AND DISCUSSION

Implementation of Directive (EU) 2015/2302 in the Bulgarian Law. The requirements of Directive (EU) 2015/2302 have been transposed into our domestic law in the provisions of Chapter Seven, Section II "Package travel contracts and linked travel arrangements" and Section III "Liability of tour operators and traders facilitating for the performance of linked travel arrangements in the event of insolvency and bankruptcy" of Tourism Act. The Directive also introduces changes to the existing terminology – the previous term "organized tourist trip with a total price contract" is replaced by "package travel contract", "consumer of package travel" is replaced by "traveller" and the term "organiser" refers to both the tour operator who sells package travels and the trader who facilitates the purchase of linked travel arrangement. Furthermore, a distinction is made between the concept of "package travels" ("packages") for which the package travel contract is concluded and the concept of "linked travel arrangements". They, although having similar characteristics do not constitute a package travel.

Package travel contract. Legal nature and characteristics of the contract. The Tourism Act lays down the principle that package travels may be offered and performed only by duly registered tour operators and travel agents (including traders who provide services in our country without being established here under the conditions of free movement of services). Package travel is only performed on the basis of a contract concluded between the consumers on the one hand and one of the listed entities on the other hand – article 61(2) of the Tourism Act.

The package travel contract is defined as a contract according which one party, the tour operator, obliged to provide a combination of travel services constituting a package travel to the other party, the traveller. The traveller in turn is obliged to pay the total price of the package. The law expressly provides that in order to qualify an agreement as a package travel contract this agreement must cover all services of the package offered and constitute a single whole, and when the package travel is provided through

several separate contracts the package travel contract shall incorporate all contracts for travel services. The contract may be concluded directly between the tour operator and the traveller or through a travel agent acting as an intermediary.

According to the Tourism Act a tour operator is a trader who is registered under the law and entered in the Register of tour operators and travel agents for the purpose of carrying out tour operator activities. He prepares package travels and sells or offers them for sale directly or with the intermediation of another trader. A traveller is a natural person who is entitled to travel on the basis of a package travel contract.

In the doctrine the package travel contract is classified as a consumer contract. Its inclusion in this legal category is justified primarily by the quality of the subjects who conclude it. On the one hand, it is the natural persons as consumers of the respective type of services included in the content of the contract, and on the other – the trader. Consumer contracts stand out from other commercial and contractual agreements by some of their specific features which are unanimously shared in theory. The first is their object – goods or services and the direction of their acquisition is always the same – from the trader to the consumer. The other is the requirement that the consumer be a natural person who acquires the good or service for personal, non-commercial purposes.

Considering the fact that one contracting party undertakes to the other party a series of services or package of services against the agreed price the package travel contract belongs to the service contracts known under Roman law as *locatio conductio operarum*.

New rules and changes in the legal framework of package travels. Directive (EU) 2015/2302 sets out a number of new provisions in the area of package travels, the most important of which are in the following directions:

Scope of protection with regard to the travellers

The scope of persons covered by the provisions in question is clearly identified and each person as a party of package travel contract or a consumer of linked travel arrangements is being defined as a “traveller”. This avoids confusion between the consumers of travel services for which the specific regulation of Directive (EU) 2015/2302 is intended and all other entities covered by the general term “consumer” used in EU legislation.

Pre-contractual information

As a reflection of the general principle of consumer law, the new regulation places a special stress on providing sufficient and reliable information to the consumer. In light of the foregoing, Article 5 (1) of the Directive obliges the organiser and the retailer to provide the traveller, before the conclusion of the package travel contract, a standard form containing all the basic information and characteristics of the proposed package. The introduction of unified pre-contractual information forms and the notification of the consumer about his main rights in the performance of the package travel by referring to the relevant hyperlink obviously aim to create more clarity and security in relations between the contracting parties.

Definition of the term "package travel"

In its definitive provisions, the Directive uses the term "package travel", identifying it as the subject of the package travel contract. The clarification of the term in question is of particular importance to both parties of the legal relationship. For the organiser, the proper performance of the agreed package travel is the main for which he has obliged to the consumer. For its part, for the traveller, the content of the proposed package with the number, type of services, their price and characteristics included in it is the essential motive to be bound by a contract. Considering the key importance of the term "package travel", Directive (EU) 2015/2302 defines it explicitly, specifying which services or combinations of services have the characteristics of a package travel. As commented above, as a consequence of the changes in the market conjuncture and the practice of modern business models in the provision of services, the

current definition of a package travel has been substantially expanded in the text of Article 3 (2) of the Directive.

In accordance to that provision of the Directive the term "package travel" is defined in § 1, point 67 of the Additional provisions of Tourism Act. It is *"a combination of at least two different types of travel services for the purpose of the same trip or holiday"*, provided that this combination falls under any of the following hypotheses:

(a) The organiser prepares and combines the travel services included in the package and the consumer purchases these services from him through a single contract, or

(b) Whether the consumer enters into a single contract or several separate contracts with each of the providers of the services concerned those services:

- are purchased from the consumer by the same tour operator/travel agent;
- are offered, sold or charged at an inclusive or total price;
- are advertised or sold under the term "package" or under a similar term indicating a close connection between the travel services concerned (e.g. "all-inclusive", "all-in arrangements" or "combined deal");

- are combined after the conclusion of a contract by which the trader entitles a traveller to choose among a selection of different types of travel services (e.g. a package travel gift box which allows the selection of a particular trip);

- are purchased from separate trader's through online linked booking processes where the traveller's name, payment details and e-mail address are passed to another trader and within 24 hours of booking the first service, a separate contract with this trader is concluded ("click-through package").

It is necessary to specify that in order for a combination of services to qualify as a package it is sufficient that one of the conditions listed in (b) is fulfilled, i.e. these conditions apply alternatively.

It is clear from the legal definition given in the Tourism Act that the package travel is formed by separate tourist services which are its constituent elements. The services that can be included in the package are not-exhaustively listed in the law and are as follows:

- passenger transport;
- accommodation that is not part of the carriage and is not for residential purposes;
- rental of cars and other motor vehicles;
- any other tourist service that is not an integral part of the above three.

Several other features related to the formation of the package should be highlighted:

- if a tourist service, such as accommodation, is combined with another additional service, such as a guided tour or a visit to a football match, the combination of these two services is treated as a package only if the additional service accounts at least 25% of the total cost of the trip or the additional service is the most essential part of the trip;

- if the consumer has chosen and purchased an additional service after the main tourist service (transport, accommodation, etc.) has started, such a situation is not considered a package.

The foregoing shows enrichment of the traditional concept of the package travel, starting from the way it is offered, combined or purchased the services included. Therefore, to packages should refer all combinations of services comprising the characteristics that typically are identified with packages. Vital importance to distinguish them from other similar combinations is the nature of the service and how it is combined with other service/services.

For that reason, package travels should not be identified with similar forms of offering and sale of tourist services, which, however, do not have the inherent characteristics of the package travel. It is related to linked travel arrangements. They, like the standard packages, combine two different types of travel services which are intended to use within the same trip. The main thing that distinguishes them, however, is that the trader, whether offering the services in office or online, is not liable for the proper

performance of all travel services but only facilitates the traveller in the procurement of a single service. Because of the intermediary nature of the business of traders facilitating linked travel arrangements the provisions laid down to the organisers are not applicable to them.

Right to a reduction of the package price. In line with the repealed Directive 90/314/ EEC, there was a possibility for the price of the package travel to be revised (increased or decreased) by specifying only the terms and conditions under which the organiser could unilaterally increase the price. Currently, without prejudice to the right of the organiser of price increases, a separate right is created in favor of the traveller – right of a price reduction. The conditions for arising of the right under consideration are set out exhaustively in Article 10 (4), points (a), (b) and (c) of the Directive, namely: where, after the conclusion of the contract but before the beginning of the performance of travel services, any of the following three circumstances is changed: the price of the carriage resulting from the cost of fuel; the level of taxes, including tourist taxes, landing taxes or embarkation or disembarkation fees at ports and airports; the exchange rates. I.e., the reasons for the price reduction are identical to those needed to its increasing, but the change in the circumstances listed above should be in the reverse sign. It is also necessary to reduce the initial price exactly to the value of the decrease in the respective costs and the package travel contract shall state how price revisions are to be calculated.

By their very nature, the right to a price reduction of the traveller should be considered as reciprocal to the organiser's right to increase. The considerations supporting such an opinion are two. First, the right to a price reduction and the right to price increases are characterized by the same features: both arise out of the same conditions; in both cases, the conditions to exercise the right in question are obligatory and can not be supplemented or amended by the contracting parties; the right of a price reduction, respectively of its increase, is exercised by unilateral act of will addressed to the opposite party; as a result of the exercise of the relevant right, the package travel contract is amended; and finally - the possibility of reduction/increase is a result of external, objective reasons which are not attributable to the behavior of the party to whom the relevant right is exercised. Secondly, the legislature has provided that if the package travel contract stipulates the opportunity of price increases the traveller is entitled to a price reduction. Consequently, this right serves the traveller as an equivalent remedy to be opposed to the possibility of a potential increase.

The provision of Article 10 of the Directive does not lay down any specific conditions on how and in what period of time a price reduction may be realized. It should be stipulated in the contract that the traveller can present claims for the price reduction within a certain period of time before the start of the package and in what manner to do that.

When discussing the price of the package, one more question needs to be concerned. According to the repealed Tourism Act, if after the conclusion of the contract the organiser undertakes an increase exceeding 5 % of the contractual price of the package, the latter qualifies as a significant change of the contract - Article 89 (2) bringing the legal consequences specified in this hypothesis: the first option for the traveller is to accept the changes, and the second - to terminate the contract by accepting a substitute package offered by the organiser or to insist the refund all payments made under the contract. By way of comparison, after the transposition of Directive (EC) 2015/2302 into the national legislations of the Member States, the consumer affected by alteration of the price is able to exercise his right of termination of the contract and his right of a substitute package only if the increase of the price of the package is more than 8 % - Article 11 (2) of the Directive. In practice this will lead to lower level of consumer protection to detriment of his interests. In this connection, I consider by adopting the relevant provision into national law, the legislator should provide an additional remedy which would allow the consumer to resist such a deterioration of his position under the contract.

The right of withdrawal by reason of force majeure. If, after the conclusion of the contract and before the start of the package arise circumstances which could significantly affect the performance of

the package or make it impossible to the travel safety, the traveller shall be entitled to terminate the contract - Article 12 (2). The circumstances in question need to be force majeure - to be unforeseen and unavoidable in the organiser's usual practice and to constitute an external, unexpected or suddenly occurring obstacle such as serious security problems at the place of destination or its immediate vicinity (warfare, terrorism, serious disease, natural disasters - floods, earthquakes, etc.). The assessment whether the performance of the travel services included in the package is threatened or is possible to be significantly affected is with a view to the concrete situation, by comparing the total cost of the travel, the type and number of services included, the importance of the service concerned, and its specific gravity compared to others, etc.

If, in accordance with Article 12 (2), the traveller uses his right of withdrawal, the package travel contract shall be terminated and the organiser shall be obliged to refund all payments made for the package. In case the traveller has suffered damages exceeding the price of the travel, the latter may present claim of compensation under the general rules. For the termination of the contract the traveller does not pay any termination fee.

In comparison with the repealed Directive 90/314/EEC it did not provide the consumer a special right of withdrawal by reason of force majeure. The organiser only was entitled unilaterally to cancel the trip before its beginning. This could happen in the event of circumstances which make impossible the performance of the travel (except for reasons attributable to the consumer). Providing of a separate right for the traveller to terminate the package travel contract under certain conditions deserves support. This allows the threatened participant in the trip to react duly and protect his or her interest in time when the organiser is passive.

Liability for the performance of the package. According to the imperative rule of Article 13 (1) of the Directive, the organiser of the trip is the person to whom the liability for failure to perform or improper performance of the services included in the package travel contract is attributed. He is liable also for the behaviour of his employees and third parties travel services providers who have caused damages for the traveller. It is at his disposal the right to seek redress from any person who has directly caused the damages. The liability of the retailer may be brought only if the national law of the Member State introduces such a provision. In this case, the retailer is liable on the same grounds and in the same scope as the organiser.

However, the following question appears: if the liability is assigned both to the organiser and the retailer, what should it be: solely or joint liability? In the doctrine it is proposed to apply joint liability for the organiser and the retailer as a solution which satisfies in the utmost degree the interests of the traveller. The main argument against such an approach is that it would be too drastic for most Member States where travel agencies are small traders unable to make high profits on their business.

The package travel contract may provide an upper limit of the compensation to be paid by the organiser for damages caused to the traveller as a result of non-performance of the package. Limitation of liability does not apply in case of personal injury and damage caused intentionally or with negligence. The upper limit of liability provided for in the contract can not amount to less than three times the total price of the package.

Organiser's insolvency protection. The organisers and the traders facilitating linked travel arrangements are obliged to provide the travellers security covering their liability for damages. The security shall cover the refund of all payments made by or on behalf of traveller in case the contractual travel services have not been totally or partially performed due to incurring debts to contracting parties and service providers and insolvency of the trader. If the carriage of passengers is included in the package travel contract, organiser also provides the security for the travellers' repatriation.

As a security it can be used a valid insurance policy, the establishment of a guarantee fund or another means provided for in the national legislature. With the purpose of ensuring a high level of consumer protection, it is explicitly provided that the security shall benefit travellers regardless of their

place of residence, the place of departure or where the package is sold and irrespective of the Member State where the entity in charge of the insolvency protection is located. However, the transposition of the provisions regarding the insolvency protection in the national law of the Member States may lead to significant divergences and very specific regulations with regard to the traders offering packages within the Union. This will be an obstacle to the organisers to benefit fully from their right of free movement of services and freedom of establishment contrary to the main principles of Directive (EU) 2006/123. Therefore, each Member State is obliged to recognize as meeting the requirements of its national law any insolvency protection provided by an organiser or a trader facilitating linked travel arrangements under the law of the Member State of his establishment.

Level of harmonization. In contrast to the repealed Directive 90/314/EEC, the new Directive uses a full harmonization approach and does not allow the Member States to introduce in their national law provisions diverging from those laid down in the Directive, including more or less stringent provisions. As addressees of the Directive, Member States can not diverge from its specific requirements, except for specified aspects where more or less flexibility is possible.

The use of this harmonization approach results from the desire of the European legislator „to contribute to the proper functioning of the internal market and to the achievement of a high and as uniform as possible level of consumer protection” (Article 1). To take account of the above mentioned the expected result after the transposition of the provisions of the Directive is improving and detailing the degree of travellers protection across the Union. This is possible through unification of legal rules regarding the organisers and the retailers offering and selling package travels.

CONCLUSION

The legal provisions considered above, as well as other new rules of Directive (EU) 2015/2302 show the development and enrichment of Union consumer protection legislation. Main rights of participants in package travels are laid down in detail, such as: the right to receive all essential information about the package before concluding the package travel contract; to transfer the package to another person before the start of the travel; to be offered suitable alternative arrangements in the event of significant changes in any of the main characteristics of the travel services (substitute package); to terminate the contract unilaterally at any time before the start of the package including in case of unavoidable and extraordinary circumstances; to a price reduction and compensation for material and non-material damages because of non-performance or improper performance of the relevant travel services; to become appropriate assistance when he/she is in difficulty during the trip, etc.

At the same time, independently of the imperative rules, a number of important issues of package travels are left to the discretion of the Member States, including: the way in which insolvency protection requirements shall be implemented; whether these requirements apply only to the organiser or to the retailer too; the possibility for each Member State to go beyond the limits of the Directive by regulating in their internal law aspects of tourist activities not covered by the Directive; the period of time within which pursuant to Article 12 (1), after the conclusion of the contract and before the beginning of the performance of travel services the traveller is entitled to terminate the contract and so on.

There is no doubt that the detailed and updated provisions of the Directive are a better instrument for the protection of package travel consumers, especially those who prefer to book the desired travel services online. At the same time, the current version of the Directive raises potential problems and creates a number of unclarified provisions that are debated in theory. For example, the principle that a tour operator is liable for non-performance of his contractual obligations to the traveller, whether or not he has acted intentionally, is a central concept of the Directive. However, strict liability is only accepted by some Member States' legislation.

The other question is related to the fact that the share of the packages (both traditional and purchased online) is decreasing more and more at the expense of individual tourist and other services

(accommodation, transport, transfer from one place to another). These services the consumer buys independently through intermediary online platforms taking into account their own preferences and interests. Therefore, would it not be more appropriate to provide additional protection for purchase of such single services (including cancellations and duplicate bookings through no fault of the traveller) instead of focusing, as at present, only or mainly on travel packages?

In addition, as has been made clear, an important link in the structure of the Directive (EU) 2015/2302 is the information obligations of traders offering package travels and linked travel arrangements and the penalties of non-performing of these obligations. However, it is not always clear from the text of the Directive in which cases the information obligations should be performed by the tour operator alone and when by the travel agent. And if the agent failed to provide the necessary information to the consumer, who should bear the prescribed penalty – the intermediary or the organiser? In this sense the lifetime of the Directive under analysis in the EU legal system does not seem to be long-term and it is perhaps more reasonable to consider it as a legal act of a transitional, temporary nature.

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