



The Consumer Voice in Europe

REVISION OF THE PACKAGE TRAVEL DIRECTIVE

Commission proposal (COM (2013)512

BEUC Position

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Ref.: X/2013/082 - 29/11/2013

Summary

The new proposal adopted on 7 July 2013¹ provides for a few improvements but also shows some important gaps and flaws, which need to be remedied in the legislative process. In general we are concerned that due to the application of the principle of **full harmonization**, national general contract law and national rules on package travel, which represent a higher level of consumer protection than the level in the reviewed Directive, would be precluded in many instances.

We thus advocate achieving increased approximation of the national laws through this revision; yet the **harmonisation** should be based on a **minimum approach**, with some exception of full harmonization where possible and necessary. By no means should the level of protection in the current Directive be lowered.

Positive points of the proposal:

- It extends the scope of the Package Travel Directive 90/314 to other travel combinations, in particular tailor-made packages, certain dynamic packages and certain online “click-through” combinations of travel services.
- The obligation to guarantee the protection of pre-payments and passengers’ repatriation in case of the insolvency of the traders is extended to the new category of “assisted travel arrangements”.
- Some consumers’ rights when buying packages have been improved (e.g. the right to cancel the package before departure, right to compensation for non-material damage).

Points that need to be improved:

A **number of shortcomings** need to be addressed in order to ensure the Directive fully addresses consumer detriment in the travel sector with **a future-proof approach** and provides a truly **level playing field** in the market.

- The Directive should in principle apply to **packages**, to **assisted travel arrangements** and to **standalone services** offered for sale or **sold by a retailer or intermediary** (other than the owner of the service), whereas not all rules would apply to the latter two categories, but to the extent set out in the respective provisions.
- Packages and assisted travel arrangements covering a period of **less than 24 hours** as well as **occasionally organised**, should be included in the Directive, not excluded as proposed.
- The definition of **package** should include purchases made through linked on-line booking processes where the **booking data** are transferred between the different service providers, not only when the name or the credit card details are transferred.

¹ Proposal for a directive of 9 July 2013 of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation EC 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC (COM (2013)512).

- The definition of **package** should **apply** irrespective of whether the sale is made within the same booking process or within separate booking processes.
- Retailers selling **assisted travel arrangements and standalone services** should be obliged to provide the consumer with **relevant information** about the service sold, **confirm the bookings** and be **liable for any errors** occurring in the **booking** process.
- Both the **organiser and the retailer** should be **jointly liable** vis-à-vis the consumer for the performance of the “package” contract (joint liability).
- **No price increases** should be allowed after the conclusion of the contract; **alternatively** the price increase should be capped at **3% of the price** of the package and be notified at the latest **40 days before** the date of departure; **no price increase** should be allowed for **late bookings** (4 months before departure).
- In case of **alteration of the contract conditions by the organizer**, the acceptance or refusal by the consumer should be **explicit** (not tacit).
- The consumer should have the **right to cancel the contract without paying compensation** for reasons of force majeure in the traveller’s private sphere (e.g. illness, accident, death in the family).
- The **limitation of the obligation** to provide **care/assistance** (to 3 nights of accommodation and €100 per night) **should be deleted**.
- The **right to compensation** should **not** be excluded if the consumer does not **notify a lack of conformity on the spot**.
- The prescription period for introducing claims in court **should not be shorter** than **3 years** (Member states being able to provide or maintain longer periods in their laws).
- The consumer should have the **right to withdraw from a distance selling contract within 48 hours after the booking**.
- In case of contracts concluded **off-premises**, a **14 day right of withdrawal** should be introduced **as stipulated for package holidays in the doorstep selling Directive (Directive 85/577/EEC)**.

✚ Background and market developments

Since the adoption of the current Package Travel Directive in 1990, the travel market has profoundly changed. Consumer's demands and expectations have evolved and "alternative" business models appeared, in particular on line.

The first market developments relate to **tailor-made packages**², as opposed to pre-arranged packages³. The internet came soon afterwards and contributed most in changing the features of the travel market⁴. Online agencies⁵, travel platforms⁶ and airlines now offer many types of travel products including those displaying features very similar to packages⁷, but not covered by the current Directive.

In 2000 the Court of Justice (in the *Club Tour* case⁸), ruled that tailor-made packages are to be considered "packages" for the purposes of the Directive. Even if this ruling referred to sales in a physical agency, it can be applied to some on line sales although its adaptation to the on line environment raises many questions.⁹ Particularly in the on line sphere those are referred to as "dynamic packages."

In 2009, a study assessing the **consumer detriment** in the market of "dynamic packages"¹⁰ was published. This study estimated yearly consumer detriment for users of dynamic packages to be €1065 million gross¹¹. The study focused in particular on airlines¹², travel agencies¹³ and online platforms¹⁴.

In March 2009, a selection of **BEUC members**¹⁵ conducted an extensive **survey** on travel and holidays. This survey showed that the problems consumers encounters when they buy a traditional package are not statistically different from those arising

² Tailor-made packages are generally defined as packages where the different components are put together at the moment when the contract is concluded and following the specifications of the consumer.

³ Only 23% of the market relates to traditional pre-arranged packages, 23% relates to "combined travel arrangements"(dynamic packages") and 54% involves independent travel arrangements by consumers: Impact Assessment accompanying the Commission proposal:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0263:FIN:EN:PDF>

⁴ In the UK, traditional packages accounted only for 18% of the UK leisure market in 2007 compared to 46% in 2000 (Tui Travel).

⁵ E.g. E-dreams, e-bookers, Opodo, Rumbo, Voyages SNCF.

⁶ E.g.Booking.com.

⁷ The added value for consumers lies in particular on the greater flexibility and choice than in the traditional package travel market; organisers of traditional packages can offer a limited number of options as their business model relies on a large number of consumers taking the same holiday so that they benefit from economies of scale when negotiating prices with the service providers.

⁸ ECJ C-400/00 (Club-Tour).

⁹ German *Bundesgerichtshof* judgment of 30 September 2010 in case Xa ZR 130/08, and the Dutch *Eerste Kamer Hoge Raad* ruling of 11 June 2010 in case 08/04611, SGR vs ANVR.

¹⁰ London Economics, November 2009:

http://ec.europa.eu/consumers/rights/docs/study_consumer_detriment_dyna_packages_en.pdf

¹¹ The scope of the study includes in particular the sale and purchase of on line travel products from the same website and those purchased at different times and/or where the consumer receives separate billings from the different companies involved in the package. In the first case (single website) the study estimated consumer detriment at €88 million; in the second case (purchased at different times or billed from different companies) at €124 million and €237 million, respectively.

¹² 37% of consumers used airlines websites to book dynamic packages; 34% of problematic cases related to sales by airlines (figure 11 of the study).

¹³ 29% of consumers booked dynamic packages through travel agencies (figure 45 of the study).

¹⁴ 39% of consumers booked dynamic packages through Internet-only companies (figure 45 of the study).

¹⁵ Test-Achats, OCU, Altroconsumo and DECO.

from tailor-made packages or buying online service combinations. The survey also pointed that even though new forms of selling and buying travel have emerged, traditional holiday packages are still a very popular product among consumers in some countries¹⁶.

General comments

In July 2013 the European Commission adopted a proposal for a revision of the Package Travel Directive (1990/314/EEC). This revision was long overdue as the current Directive was no longer adapted to the new market reality. Thus, the aim is to adapt the legislative framework to developments in the travel market by covering other products and business models deployed, particularly in the online environment.

A characteristic of the travel market is the rapid pace of its development both in terms of offers and as regards consumer's expectations. On line travel agencies (Expedia, Opodo, e-dreams etc.) airlines, internet platforms (Booking.com, Tripadvisor...) and other intermediaries as search engines (e.g. Google, Bing), and computer reservation systems (Sabre, Amadeus) have inter alia, all entered the travel market at different levels and more developments are to be expected. Consumer expectations also evolve accordingly. So the scope of any future Directive needs to be as flexible and future proof as possible in order to ensure that the directive will not be again obsolete soon after its adoption.

BEUC welcomes the proposal of the Commission in that it extends the protection of travellers to travel combinations not covered by the current Directive especially when using the internet, taking note of market developments and of case law in this regard. Yet, we think that the approach taken by the Commission runs the risk of not fulfilling the purpose of the revision because it is not fit to address a market in continuous movement.

Yet, the proposed scope is overly detailed and narrow in its concept, thereby **potentially not "adaptable" to future developments** in the market. The proposal focuses on the business models traders decide to deploy rather than the **expectations of the consumer** when buying travel products. In this regard, it is important to underline that a package or a combination of different travel services involves a series of services linked to each other for the same purposes of **the same trip or holiday**. As various services are involved, **a problem or a failure of one service included in the package may affect the others**.

The Commission proposal regulates two categories of travel combinations; "packages" and "assisted travel arrangements" (ATAs). The organisers of "packages" are liable for the performance of all the services included in the package and are obliged to be insured against the occurrence of insolvency, while the sellers of ATAs are only obliged to be insured against insolvency. We are concerned that the (new) category of "ATAs" (Article 3.5) might well fit the demands of some market actors, but in **practice the distinction in definition between "packages" and "ATAs" is not clear-cut and not comprehensible for**

¹⁶ In Belgium and Portugal, 37% and 32% of consumers respectively buy traditional packages (i.e. pre-arranged).

consumers, nor probably for SMEs. In general the description of the scope is overly complex and lacks clarity.

As a result, under the proposal, **traders who currently sell dynamic packages or even traditional packages could easily change their business model to avoid the liabilities stipulated for sellers of “real” packages**. Through offering ATAs, a trader can benefit from offering a multitude of third party services through its website, without any responsibility if non-compliance by these third parties. **For a consumer it looks like a package, generating expectations** of consumer protection, but in reality, it is not. This “flexibility” is even described as a necessity for the market reported in the Impact Assessment¹⁷.

The **lack of clarity** and the difficulty to grasp the description of the proposed scope, clashes with important aims of the proposal: namely to ensure **transparency and legal certainty**. New travel products and business models in the market of travel combinations make it almost impossible to determine whether the travel arrangement which has been bought is protected or the kind of relationship or link between different providers in the service chain¹⁸.

Yet consumers are increasingly moving away from the concept of package tours, and closer to single services either directly booked or via other traders¹⁹. Hence, the scope proposed by the Commission only covers a portion of common practice. In this regard, we believe that **the sale of stand-alone services via another trader should at least be addressed in the proposal**. Internet platforms and both off and online travel agencies sell single services to consumers among their offers (see comments below regarding the sale of single services through intermediaries).

Regarding the protection of consumers **against insolvency**, we welcome the fact that the proposal aims to extend passenger protection against damages or loss as a result of trader insolvency also to cover “ATAs”. The fact the consumer pays in advance for services used at a later date fully justifies the obligation to ensure protection against insolvency.

However, the proposal is unclear about fundamental aspects of this new element. In particular Article 15.1 should be redrafted to clarify that both organisers of “packages” and sellers of ATAs are obliged to be insured against insolvency protection. Second, it is unclear which of the services sold would be secured against the advent of insolvency. Only Recital 34 states that the protection extends to the insolvency of any of the service providers in the chain. This statement should be transferred to the operational section of the proposal (Article 15).

¹⁷ Impact Assessment accompanying the Commission proposal, page 144: *Companies will be able to adapt their business models so as to face only some requirements* (insolvency protection and obligation to inform the consumer that he/she not protected as under a “package”). It is assumed that 25% of “one trader” “packages” and 50% of “multi-trader” packages will in the future be solve as “assisted travel arrangements”.

¹⁸ The study on consumer detriment of 2009, highlights the difficulty for consumers to understand the kind of travel products they buy (package, dynamic package, independent arrangement): *“Consumers do not seem to have a good understanding of what constitutes a package and some of the consumers who have answered the survey might not have bought a dynamic package but rather a traditional travel package or independent travel arrangements”* (study on consumer detriment in dynamic packages, page 74).

¹⁹ 54 % of consumers, book travel combinations independently (Impact assessment accompanying the Commission’s proposal). In Belgium, 77% of consumers arrange their holidays independently on line, 75% in Italy, 74% in Portugal and 70% in Spain (Euroconsumers survey conducted in March 2013).

Regarding airlines, we hold concerns that the European Commission is not pursuing a coherent overall policy approach and that this results in inconsistencies and market competition problems. **We strongly support the idea that airlines be required to offer insolvency protection when selling travel combinations** (including ATAs). However, in order to insure all consumers are treated equally and there is a genuine level playing field in the market, **airlines should also be obliged to ensure their risk as regards seat-only passengers**²⁰.

What level of harmonisation?

In contrast to the current Package Travel Directive, the new proposal appears to be based on a **full harmonization approach** which is highly **problematic**. Our preliminary evaluation already shows that in many Member States the review as proposed would **reduce current national consumer protection standards**, particularly when it comes to the numerous contract law provisions which do not offer strong protection and in relation to insolvency protection schemes. Furthermore, the Commission proposal goes **below the level of protection of the current Directive 90/314** in some instances. We provide a series of examples regarding potential reduction of consumer protection in the detailed comments below.

Basic consumer rights – missing elements in a complex legal framework

Surprisingly the proposal does not stipulate a consumers' **right of withdrawal** in distance and off-premises purchases of "package travel" or an ATA. This is hard to understand, because such a right was previously granted for package travellers in the 1986 doorstep and 1993 distance selling²¹ Directives. Due to the merging of these latter Directives into the 2011 Consumer Rights Directive (CRD) - which excluded package travel services from its scope, in the end - , a right of withdrawal needs to be re-established in the new Package Travel Directive to fill the obvious and unjustified legislative gap. It is a particular problem in off-premises selling of package tours.

Furthermore it is not clear why the ATAs are covered by the 2011 CRD²², while the "package travel" is excluded except for a few specific provisions (see comments on Articles 4 and 25 below). The CRD does not apply to passenger transport services and therefore, an amendment of the CRD is needed to ensure that ATAs are covered by it. Important elements, such as for example in relation to pre-contractual information and formal requirements in case of off-premises and distance selling shopping, are missing in the proposal.

Such an incoherent approach in the proposal leads to an even bigger patchwork of consumer rights in relation to travel services, to a lack of transparency and ultimately to confusion for both consumers and for business. Clearly, a more

²⁰ The need for protecting air passengers against the insolvency of the airline was concluded in the latest study on insolvency protection of airlines:
http://ec.europa.eu/transport/themes/passengers/studies/doc/2011_03_passenger-rights-airline-insolvency.pdf

²¹ The 1986 Distance Selling Directive excluded contracts for transport, accommodation and leisure but did not specifically exclude package travel contracts; the Consumer Rights Directive (2011/83/EU) excludes both.

²² See article 25 of the proposal.

appropriate option would have been to enact a travel services directive reflecting and keeping pace with the variety of offers available in the market and the increasing consumer trend to book independently travel services²³. This would also allow a more coherent framework for European travellers to be established.

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CHAPTER I

SCOPE OF THE PROPOSAL

General comments

The aim of the new proposal is to extend the protection offered by the Package Travel Directive to the sale and purchase of travel combinations not clearly covered by the current Directive which are comparable to packages but generally now offered on the travel market. Regulating “Dynamic Packages”²⁴ and on line combinations is the main objective²⁵.

However in doing so the proposal creates **two categories of travel combinations: “packages”** (Article 3 (2)) and **“assisted travel arrangements”** (Article 3 (5)). The latter is a new category. Contrary to the organiser of packages, the seller of ATAs will not be liable for the performance of the services included in the “arrangement” and the consumer will not be able to exercise the particular rights linked to traditional packages. However the sellers of ATAs are required to provide sufficient security to cover the liabilities vis-à-vis the consumer (repatriation and reimbursement) in case of insolvency affecting the services involved.

We think that the **definition of “package” is too rigid and that the border line between packages and “ATAs” is not clear cut**. As a result, traders who sell dynamic packages or even traditional packages could easily change their business models to assisted travel arrangements. This is contrary to the aim of the Directive to ensure a more transparent market for consumers. The lack of clarity in the proposed directive could further undermine the already fragile level of consumer knowledge of their rights in the travel market²⁶.

²³ See footnote 17.

²⁴ See above for a definition of dynamic packages.

²⁵ According to the abovementioned study on dynamic packages, some of those travel combinations are more likely to fall under the provisions of the current Directive namely packages purchased from a single website. Others, on the contrary are said to be unlike to fall within its scope; those are packages where the elements are not purchased at the same time and/or for which the consumer receives separate billings from different companies.

²⁶ In a survey carried out in April 2013, our member in the UK, Which?, found that only 1 in 3 consumers knew when holiday companies must provide an ATOL certificate (in the UK the ATOL certificate tells the consumer what protections they are getting with their purchase); 78% of those who said they knew, wrongly thought they would get an ATOL certificate when they booked a hotel room only from a website; two thirds said they should get ATOL protection if they bought a flight and accommodation from an airline website..

Detailed comments

Article 2 of the proposal addresses the general scope and excludes certain contracts from its scope²⁷. The proposal applies to packages and partly to ATAs. BEUC considers that some of the exclusions should be revised and at times deleted.

We do **not see any reason** for the **exclusion of combinations covering a period of less than 24** hours (see Article 2.2 (a)). As the duration is limited the risk for the trader is lower and consumers may be confronted with as many problems as with any other package. In addition, in some countries this limit does not exist²⁸ and the principle of full harmonisation entails that those laws will have to be abolished. We therefore call for the deletion of this exclusion.

Regarding the exclusion of persons who **occasionally organise packages**, we recommend **deleting this exclusion** completely by amending recital 19 of the proposal²⁹.

As regards **business travellers** (Articles 2 (c) and 3 (6).)³⁰, **we support the fact that the proposal applies to business travellers** and we also agree that some major businesses could be excluded. However, we believe **the exclusion of packages negotiated on the basis of a framework contract should not apply to NGOs** and small businesses. This would be coherent with the Consumer's Rights Directive which allows Member States to apply the Directive on consumer Rights³¹ to NGO's, start-ups or small and medium-sized enterprises.³² Yet, by no means must protection for consumers be lowered because of a broader definition of package travellers as including business.

Article 2.2 (d) also **excludes** combinations where either transport, accommodation or car rental is **combined with other tourist services** if the latter do not account for a *significant proportion of the package*. We think that this exclusion carries a

²⁷ Article 2.2 of the proposal: This Directive shall not apply to: (a) packages and assisted travel arrangements covering a period of less than 24 hours unless overnight accommodation is included; (b) ancillary contracts covering financial services; (c) packages and assisted travel arrangements purchased on the basis of a framework contract between the traveller's employer and a trader specialising in the arrangement of business travel; (d) packages where not more than one travel service as referred to in points (a), (b), and (c) of Article 3(1) is combined with a travel service as referred to in point (d) of Article 3(1) if this service does not account for a significant proportion of the package; or (e) stand-alone contracts for a single travel service.

²⁸ In Hungary and Austria for instance journeys of less than 24 hours are covered. Already in some countries (ex. Spain) it is increasingly frequent to offer combinations consisting of transport + dinner + tickets to attend a show or a sporting event, the whole service being performed in less than 24 hours without accommodation.

²⁹ According to the Consumer Law Compendium, about two thirds of the member states have omitted to demand that the person has to act "other than occasionally".

³⁰ The proposal applies to business travellers unless their travel was bought on the basis of a *framework agreement* between the business and a trader specialized in business travel.

³¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

³² Recital 13 of the Consumers Rights Directive: "...Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises".

deficit of legal certainty and by no means should the percentage of 20% mentioned in the recital be applied, as the consumer has no means for verifying the percentage covered by those services. This exclusion should be deleted.

Article 3 of the proposal includes the definitions of “travel service”, “package”³³ and “assisted travel arrangements” (ATAs)³⁴. A “**travel service**” covers carriage of passengers, accommodation other than for residential purposes, car rental and any other tourist services not ancillary to transport, accommodation or car rental³⁵. Regarding any other tourist services, a reference to nutrition and means should be added to Recital 17³⁶.

Packages

The new definition of **package** includes a number of **positive elements** compared to the current proposal:

- The inclusion of **tailor-made packages** i.e. combinations put together following the specifications of the consumer (Article 3.2(a)). This codifies the Club Tour case law.
- The clarification that combinations offered at an **inclusive price or at a total price** are always considered “packages” (Article 3.2(b)(ii)); this should include cases where the total price is the result of the aggregation of the price of each component³⁷.
- The clarification that all combinations **advertised** or **sold** as packages, are covered (Article 3.2(b)(iii)). This will protect consumers against misleading practices.

³³ A “**Package**” is defined as “the combination of at least two different types of travel services for the purpose of the same trip or holiday, if: (a) those services are put together by one trader, including at the request or according to the selection of the traveller, before a contract on all services is concluded; or (b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:

(i) purchased from a single point of sale within the same booking process,

(ii) offered or charged at an inclusive or total price,

(iii) advertised or sold under the term ‘package’ or under a similar term,

(iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or (v) purchased from separate traders through linked online booking processes where the traveller’s name or particulars needed to conclude a booking transaction are transferred between the traders at the latest when the booking of the first service is confirmed”.

³⁴ “**Assisted travel arrangements**” are “combinations of at least two different types of travel services for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a retailer facilitates the combination:

(a) on the basis of separate bookings on the occasion of a single visit or contact with the point of sale; or

(b) through the procurement of additional travel services from another trader in a targeted manner through linked online booking processes at the latest when the booking of the first service is confirmed”.

³⁵ Article 3.1 of the proposed Directive.

³⁶ Recital 17: *Other tourist services, such as admission to concerts, sport events, excursions or even parks are services that, in combination with either carriage of passengers, accommodation and/or car rental, should be considered as capable of constituting a package or an assisted travel arrangement.*

³⁷ See judgment ECJ C-400/00 (Club-Tour).

- The inclusion of contracts which allow the consumer to **choose among a selection of services** (after the conclusion of the contract). In particular this category should include business models based on gift boxes.

Yet other parts in the new definition raise a number of questions. This is the particular case as regards packages bought from a single point of sale within the same booking process (Article 3.2(b)(i)) and packages purchased through linked on line booking processes (Article 3.2(b)(v)).

Regarding **packages bought from one single point of sale** (Article 3.2(b)(i), the purchase is considered as a package only if sold within *the same booking process*. The reference to *the same booking process* does not exist in the current Directive and this aspect was not addressed by the 2009 study on consumer detriment nor by the Impact Assessment³⁸. The current Directive also applies when separate billings are involved³⁹. In addition, the definition of package in the proposal (rightly) covers combinations when different contracts are concluded with the individual service providers (Article 3.2(b)). The proposal does not clarify the difference if any between separate contracts and separate booking processes, or even separate billings.

Yet the result of this artificial construction is that if the different elements are sold in one booking process the combination is a package, but it will be an ATA if the combination is sold within separate booking processes (according to Article 3.5 (a)). This creates a situation of uncertainty which may be abused by (any) traders to limit their liabilities by arguing that they sold the combination within different booking processes. It should also be noted that the laws on package travel of some Member States expressly cover sales within separate booking processes⁴⁰.

Therefore, **references to the same booking process** and to **separate booking processes should be deleted**.

Regarding **on line “click-through” contracts** (Article 3.2(b)(v)), the Commission proposal is overly restrictive. According to the proposal, only if the *traveller’s name or particulars needed to conclude a booking transaction* are transferred by the organizer/seller to the subsequent service providers *at the latest when the first booking is confirmed*, would the contract qualify as a package. Recital 18 states that the notion of “particulars” only refers to credit card details or other information needed to conclude a transaction; the transfer of the travel destination and/or the travel times are insufficient⁴¹.

Even though this provision is bound to cover the sale of travel combinations particularly by airlines, we believe that a number of business models currently deployed by airlines are not captured by this criterion. First, by many airlines’ business models, the combination is often purchased from one trader (the airline)

³⁸ The study only looked into the impact of Dynamic Packages involving one billing and separate billings.

³⁹ Article 2 of the Directive on Package Travel 90/314.

⁴⁰ The Norwegian law for instance covers combinations of services linked to transport (hotel, car rental, concerts...), even though the purchase is done in separate booking processes, as long as all the purchases is made during the one visit to the website.

⁴¹ Recital 18: “... *Particulars needed to conclude a booking transaction relate to credit card details or other information necessary to obtain a payment. On the other hand, the mere transfer of particulars such as the travel destination or travel times should not be sufficient*”.

and not from the different separate traders involved. In such cases, it should be specified that Article 3.2 b(i) also applies (purchases made from a single point of sale). Moreover, transmission of the credit card details is not needed to offer/sell additional services, but in most cases only the destination and the date of travel (if at all) is sufficient to offer/sell those services. Finally, the requirement that the transfer of the data has to occur *at the latest when the booking of the first service in confirmed* introduces an overly restrictive and also artificial limitation.

In sum, it is our contention that within this approach it would be simple for the trader to alter its business model in such a way that the credit card details are not immediately transferred⁴² and only transfer the information on the destination and date of the travel at a later moment in time. Therefore, depending on how the process of booking is construed, the contract could easily fall under the definition of ATA (in Article 3.5 (b)) or even under another category not covered by the proposal. In terms of transparency, it is a burden for the consumer to work out or prove their details have been transferred and at what moment in time.

Therefore, **BEUC** proposes to **delete the** reference to the credit card details in the Recital 18 **and replace it with a reference to *the booking data***.

Moreover, a number of **additional criteria** revealing the “true” nature of what is offered for sale to the consumer are needed. Other **additional criteria** should be:

- if the booking procedure creates the expectation on the consumer that they are still in the sphere of the website of the first seller; or
- if the services offered are limited (e.g. the offer includes only a selection of car rental companies)⁴³; or
- if the different services are offered under ownership or control of the organiser/retailer⁴⁴.

Moreover, we understand that the different criteria in the new definition of packages apply equally to both **off and online contracts**. The single reference to *on line booking processes* (in article 3.2 (b) (v)) could be interpreted in the sense that the previous criteria (points i, ii, iii and iv) only apply to off line contracts.

Therefore we **recommend specifying** that the definition of “**package**” **applies to all contracts, irrespective of the distribution channel**.

It should also be clarified that the different **criteria** listed in Article 3.2(b) are **independent from each other** namely each criterion alone has to be sufficient to qualify the combination as a “package”. Thus, each criterion has to be separated by “or” as a connecting word.

⁴² Article 3.2 (b) (v) applies if the “particulars” are transferred at the latest when the first booking is confirmed.

⁴³ This clearly indicates that the services are linked by some kind of commercial agreement.

⁴⁴ Sometimes the trader/organiser also owns the services offered (e.g. Tui and Thomas Cook also own an airline and hotels).

Assisted Travel Arrangements” (ATAs)

According to the proposal, traders offering/selling ATAs⁴⁵ will not be liable for the performance of the services bought in combination for the same holiday. Equally sellers of assisted travel arrangements are not obliged to give any information to consumers regarding the arrangement sold. The consumer is only supposed to be informed by the trader who facilitates the purchase of the ATA about the fact that the consumer is not as protected as they would be when buying a real package holiday (see article 17 of the proposed directive). The consumer will however be protected against insolvency of the trader or the service providers and according to Article 17 must be informed about this.

As explained above, the first category defined as ATAs (3.5 (a) is very similar (and very hard to distinguish in practice) from the first category in the definition of packages Article 3.2 (b) (i))⁴⁶. This would mean that if the sale is made through a single booking process the contract is a package whereas if there are separate bookings involved it would be an ATA.

Yet, **whether the bookings are processed through one booking or through several bookings does not change anything for the consumer** who is buying a combination of services linked to each other as serving for the purpose of the same travel. We underline that the current Directive of 1990 applies and protects the consumer even if separate billings are involved and on the other hand the definition of “package” in the proposal applies even if different contracts are concluded with each of the service providers. And so it is not coherent to make the separation of booking processes a decisive criteria for the categorisation of the combination.

The inclusion of the new category of ATAs, coupled with the proposed (restrictive) definition of “packages”, **allows excessive leeway to (any) traders (in particular online) to change their business models in a way that offers no or less protection** (de-packaging) be it in the form of ATAs or in forms not covered by the proposal at all in order to exclude their liability for the performance of the services sold.

Sale of single services through an intermediary

Tour **operators, travel agencies and other online platforms**⁴⁷ currently allow consumers to buy stand-alone services (e.g. an air ticket, a hotel, an excursion) through them⁴⁸. Some **air companies** are also developing this type of service (rather than offering combined services⁴⁹).

⁴⁵ Article 3.5 defines “assisted travel arrangements” as combinations of at least two travel services resulting in the conclusion of different contracts sold by a retailer either a) on the basis of separate bookings on the occasion of a single visit to the point of sale; or b) through the procurement of additional travel services from a different trader in a targeted manner through linked on line booking processes at the latest when the booking of the first service is confirmed.

⁴⁶ Note that the definition of packages includes scenarios where different contracts are concluded with individual services providers (Article 3.2 (b)).

⁴⁷ E.bookers, e.dreams, voyages SNCF.

⁴⁸ TUI, E.bookers, e.dreams,

⁴⁹ Ryanair already develops a particular website as intermediary, selling hotel accommodation not linked to transport: www.ryanairhotels.com

Yet, the Package Travel Directive does not apply in these cases as the object of the contract is only one service. However, **some Member States have extended the scope of their laws on package travel to cover sales of standalone services**⁵⁰. It is unclear whether those laws would have to be abolished due to the application of the principle of full harmonisation.

Many of our members have reported problematic cases where the sale of a stand-alone service was made through an intermediary⁵¹. We thus argue **that there is a need to establish certain obligations on the seller of those services**.

Therefore, any **intermediary or agency selling stand-alone products should be subject to the following obligations**:

- Provide all the **information necessary** on the characteristics and quality of the service sold (based on the list of information requirements of the Directive)
- Send **confirmation of the booking/purchase** to the consumer (the lack of confirmation indicating that the contract has not been concluded);
- Adequately **complete the contractual transaction**; the intermediary/agency should be liable for any errors made when completing the transaction.

A legal lacuna in this regard will be easily exploited by traders in a market where the trend is to increasingly develop sales of stand-alone services by third parties and where consumers tend to organise their travel independently.

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CHAPTER II

Information obligations and content of the contract (Articles 4 to 6)

Article 4 of the proposed Directive establishes a list of pre-contractual information obligations for the organiser and the retailer of a package travel contract.

⁵⁰ E.g. Belgium, Norway, Germany. According to the Belgian law (16 February 1994) transposing the package travel directive, any intermediary offering stand-alone services has a number of (information) obligations vis-à-vis the consumer; it is also liable for the fulfilment of the contract concluded; it also has an responsibility of diligence and is obliged to provide assistance to the passenger in difficulty. In Germany, case law applies all the rules on package travel also to different standalone service like the rent of holiday homes.

⁵¹ July 2012: A consumer booked a flight from Innsbruck via Frankfurt and the USA to Peru in an Austrian travel agency. The travel agency did not inform the passenger that he had to register on line for a stay in USA (ESTA) even though it was only for transit. In Frankfurt she was required to present such registration (too close before departure of her flight) but she could not register anymore. Consequently she was denied boarding and lost about € 700 for the ticket. She went back home from Frankfurt to Innsbruck with a new ticket for about € 300,00. She had to get to Peru within one week to start a summer holiday-job, but tickets to Peru now were only available from € 2.000.-. So the consumer was confronted with a damage of about € 3.000.

We welcome that both the organizer and retailer are bound by the obligation to provide the information. However, it is not justifiable why none of these obligations apply to the sellers of ATAs; some of the obligations of Articles 4 and 5 should also be provided by retailers of ATAs (see below).

Regarding the list of information requirements⁵² we note that certain important items of information are omitted which are of relevance in the context of a travel contract. The **following information should be added**:

- the period of stay should include the number of nights;
- information on the method of calculating costs which cannot be given in advance⁵³ including the eventual price increase after the conclusion of the contract;
- information on the means and timescale for redress (complaints handling, alternative dispute resolution) in case of problems;
- information regarding risks arising from natural disasters, public health, public order and other interruptive sources;
- meaningful information on the category of the accommodation⁵⁴; for trips in foreign countries the specific hotel should be named so that the consumer can do his own research before booking;
- accurate descriptions of the services available at the place of destination;
- information of any circumstance which could complicate the accomplishment of the services purchased (e.g. works outside or nearby the hotel, an air conditioning plant in front of the balcony, facilities in bad condition or out of service)⁵⁵; and
- information about the type, goal and target group of the holiday;
- information on the absence or existence of a right of withdrawal⁵⁶ (the right of withdrawal needs to be re-introduced, see our comments below) and where applicable the conditions, time-limit and procedures for exercising that right⁵⁷;
- information on the insolvency protection and liability insurance of the tour operator.

Moreover, it should be explicitly stated that the information regarding **visa requirements** also covers consumers **from other Member States**⁵⁸. Also, the information about visa requirements should not be changed without informing the

⁵² 22% of consumers are provided with incorrect or incomplete information (study on consumer detriment, 2009, London Economics).

⁵³ The Consumer Rights Directive provides for this information obligation.

⁵⁴ There is no EU wide or international hotel categorisation and so the quality of the service may vary from country to country.

⁵⁵ Which? (UK) conducted a research in 2006 about brochure accuracy which concluded that tour operators' brochures can be "disingenuously economical with the truth". ABTA's (Association of British travel agents) standards on brochures document, which sets out standards in the information that tour operators should apply in their brochures was not being met.

⁵⁶ This is provided for in the Consumer Rights Directive (Article 6.1 h)).

⁵⁷ Articles 6.1 h) of the Consumers Rights Directive.

⁵⁸ Some tour operators interpret this obligation narrowly. Hence, they only provide information on identification and visa requirements, which apply to nationals of the country where the tour operator is based.

consumer before the conclusion of the contract (Article 5.1 should not exclude information on visa requirements).

Regarding the **formal requirements** to provide the information (Articles 4.2 and 6.3), it should be added that the trader must give this information on a **durable medium and be legible; as regards off-premises contracts the information should be given on paper**⁵⁹. Concerning the **language of the contract**, it should be added that the **language of the contract has to be the same as that in the pre-contractual information**⁶⁰. In addition, in accordance with the consumers Rights Directive (CRD), if the contract is concluded **by telephone**, the trader should confirm the offer to the consumer on a **durable medium** and the consumer should only be bound when they sign and/or send their written agreement to the offer⁶¹. Most importantly if the category of ATAs is maintained, the formality of the information must include a **clear and unequivocal text** (e.g. "**with me, you are not protected**", *I am not responsible in case of problems*"). This text should be **standardised in an information sheet** that the trader should give to the consumer.

Some specific **sanctions for the non-fulfilment** of the information obligations should be established although Member states should also be allowed to retain their specific provisions on this issue:

- if the right of withdrawal exists but the consumer was not informed of it, the consumer should be able to cancel free of charge;
- if the consumer was not informed of the price increase or of any additional costs, those costs are not due by the consumer⁶²;
- in the case of ATAs (article 17.b) when the trader offers vague, insufficient or no information on the level of protection he offers, full protection applies.

Finally, it should be added that the **burden of proof** that all the information was correctly provided should rest **with the seller**.

In order to improve the visibility and the exercise of certain consumers' rights, the new Directive should include annexes with **model forms** (e.g. cancellation, transfer of the package, complaints). These annexes could be used as a check-list concerning the essential information and contract elements, of which the consumer is not always aware when booking a holiday.

Regarding **retailers of ATAs**, article 25 implies that the information requirements (and other formalities in relation to distance and off premises contracts) of the CRD, apply to retailers of ATA's. Yet, the Consumers Rights Directive fully excludes from its scope all contracts in the transport sector. Therefore, the new directive should amend the CRD in order to include retailers of ATAs in its scope.

The information requirements and the formalities of the CRS (Articles 5, 6, 7, 8 and 9) should apply to ATAs irrespective of the type of retailer (airline, online platform

⁵⁹ Article 7.1 of the Consumer Rights Directive.

⁶⁰ Member States should be able to maintain language requirements (article 6.7 of the Consumers Rights Directive).

⁶¹ Article 8.6 of the Consumer Rights Directive.

⁶² Article 6.6 of the Consumer Rights Directive.

or travel agency). Moreover, the following number of **additional information** items specific to the transport sector should be given by retailer of ATA's:

- In so far as transport is included, general information on passport and visa requirements, including approximate periods for obtaining visas, for nationals of the all the Member State(s) concerned and information on health formalities;
- Information regarding risks arising from natural disasters, public health, public order and other interruptive sources.
- Information on the retailer's complaint handling policy and on the available out-of-court dispute resolution mechanisms.

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CHAPTER III

Transfer of the contract to another traveller (Article 7)

As with the current Directive, the proposal allows the consumer to transfer the contract of package to another consumer. In the new proposal however, the consumer can only give notification of the transfer to the organiser, not to the retailer. The current Directive leaves discretion to the consumer to choose between the organiser and the retailer. Even though we understand the coherence of the proposal with the proposed sole liability of the organiser, we believe that the consumer should be allowed to signal **to either the organiser or the retailer** their intention to transfer the package.

Alteration of the price after the conclusion of the contract (Article 8)

Article 8 of the proposal allows organisers to alter the price of the package after the conclusion of the contract if the increase concerns fuel and taxes or fees imposed by third parties and under the condition that consumers can also benefit from price reductions.

The possibility to increase the price already exists in the current Directive. The proposal however limits the increase to no more than 10% of the price of the package.

BEUC certainly **welcomes that cap on price increases**. Yet the **limit of 10% is too high** as it will represent a disproportionate burden on the consumer especially where the cost of the package is high or where there are many participants connected to one package, like families (each member paying the additional 10%). In particular several national legislations who allow prices to be increased have established a percentage lower than 10%⁶³. In other countries the increase is not allowed at all or the consumer can cancel the contract following an increase⁶⁴, while in others no increases can be imposed for **bookings within 2 months from**

⁶³ For example 5% in Bulgaria and Germany; 2% in Cyprus.

⁶⁴ E.g. Germany and Slovenia (Consumer Law Compendium).

departure⁶⁵. Due to the proposal's full harmonisation nature the impact would be that consumers in those Member States would lose the better provisions in this regard.

The proposal also establishes that price increases are allowed only if the organiser passes eventual price reductions on to consumers (in taxes, fees and fuel costs). This additional condition is in theory positive. However, we are concerned that the possibility to benefit from price reductions would never materialise in practice not only because the organiser would be reluctant to reveal this to the traveller but also because providing proof of a decrease in taxes or fees is often too burdensome. We are also concerned that a clause allowing for price increases which requires decreases at the same time, would probably be upheld as fair by the courts because it is more balanced, while in reality price reductions will never be passed onto consumers.

Moreover, BEUC considers that in the **context of market developments** in recent years the right to **increase** prices in the travel market is **unjustified** mainly for the following reasons:

- classic travel brochures have been largely replaced by flexible virtual offers;
- prices fluctuate more and constantly updated with "fluid pricing" techniques;
- the limited risk of sudden price variations is covered by traders using different techniques like "yield management"⁶⁶ and "hedging"⁶⁷ which enable traders to effectively manage the risk without having to raise prices.

Therefore, BEUC opposes **allowing price increases after the contract is concluded**. Should this option not be accepted, the following conditions should apply to price increases:

- the percentage allowed should be **capped at 3%** of the holiday price; if the trader passes on to the consumer a higher increase, the consumer should have the right to withdraw from the contract.
- the period within which the increase should be notified should not be shorter than **40 days or 30 days maximum** (20 days as proposed by the Commission is too short a period to change the conditions of the contract)⁶⁸;
- **no price increases** should be allowed for **late bookings** (4 months before departure);
- moreover, it should be required that the criteria for price alterations calculations, for example in case of fuel costs increases, are already **indicated in the contract terms and conditions**. This kind of information helps the

⁶⁵ In Austria if the booking and the departure take place within 2 months no increase can be passed on to the consumer; in Germany only contracts which have been concluded more than 4 months before the travel can be subject of a price alteration.

⁶⁶ Yield management is a variable pricing strategy, based on understanding, anticipating and influencing consumer behaviour in order to maximise revenue or profits from a fixed, perishable resource (such as airline seats or hotel room reservations or advertising inventory). As a specific, inventory-focused branch of revenue management, yield management involves strategic control of inventory to sell it to the right customer at the right time for the right price (Wikipedia)

⁶⁷ Hedging is a risk management strategy used in limiting or offsetting probability of loss from fluctuations in the prices of commodities, currencies, or securities. In effect, hedging is a transfer of risk without buying insurance policies (<http://www.businessdictionary.com>).

⁶⁸ The laws of France and UK provide for a 30 day limit (Consumer Law Compendium).

consumer to understand price increases but also to make use of their right of price decreases.

Alterations to other contract terms before departure (Article 9)

Article 9 addresses the issue of **unilateral changes to contract conditions other than the price**. It includes a new element compared to the current Directive, namely the distinction between insignificant and significant changes.

Paragraph 1 prohibits the unilateral alteration of the contract terms before departure unless the organiser reserves that right in the contract, the change is insignificant and the organiser informs the passengers of this fact. This provision is a new element which is not included in the current Directive which we believe does **not have any added value**; general contract law should apply to contract changes and in particular the Unfair Contract Terms Directive⁶⁹. Thus, this paragraph **should be deleted**.

Paragraph 2 allows the organiser to **significantly change any of the main characteristics** of the contract before departure if he is constrained to do so. This is an instance already included in the current Directive but the proposal altered somehow to the existing wording. The **new wording reduces the level of protection for the consumer compared to the current Directive** (Article 4.5 of the current Directive) in which the rights of the consumer following a significant change by the organiser are stronger and clearer. In particular, the proposal does not clearly grant the consumer the right to be offered a package of **equivalent, lower⁷⁰ or higher quality** instead of terminating the contract⁷¹.

In addition, the proposal (unlike the current Directive) stipulates that a consumer gives **tacit acceptance** to the contract alterations if they do not terminate it within a given time after being informed of the changes. Such an agreement should be under the condition of **explicit consent**, not silent acceptance⁷².

Regarding the **right to compensation following significant changes** (Paragraph 4), some Member States establish specific compensation duties. In the Czech Republic the organiser has to pay 20% of the price of the package if the organiser cancels less than 20 days before departure.

Moreover, we think that both the existing Directive and the proposal go too far in allowing **significant contractual changes** to occur before the travel. In some national laws (e.g. Austria, Germany) significant changes are as a general rule prohibited unless those changes are for example factually necessary and do not cause a significant inconvenience to the passenger.

Therefore, the directive should be very restrictive in allowing for significant changes. This should only be possible if they **do not cause inconvenience** to the consumer

⁶⁹ Point (j) of the Annex of the Unfair Contract Terms Directive: "Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract".

⁷⁰ In which case the consumer is refunded of the difference (Article 4.6 of the Package Travel Directive).

⁷¹ In most of the Member States, the consumer has the right to be offered another package of higher or lower quality (see Consumer Law Compendium).

⁷² Portuguese law even demands the acceptance of the consumer to be in writing.

and are fair and reasonable. **Acceptance** by the consumer of the changes should be **explicit** and the consumer should be offered the possibility to contract another package of equivalent, lower or higher quality instead. Moreover, if the new package is of lower quality, the consumer should be informed of the price reduction that he/she will be granted if he/she accepts the alternative.

Termination of the contract before the start of the travel (Article 10)

The proposal stipulates a general right of the passenger to terminate the contract before the start of the package by paying *appropriate compensation* to the organiser (Article 10.1). **We welcome that a traveller can terminate the contract without cost if extraordinary circumstances arise at the point of destination** before the departure (Article 10.2). However, in both cases the proposed rules need improvement.

Regarding the general **right to terminate the contract against compensation**, we support the rule that the standardised termination fees should be based on the time of cancellation minus the savings and the income made by the organiser from alternative deployment of the services. However, in the absence of standardised termination fees the proposal only subtracts the savings made by the organiser, it omits the income made from alternative deployment of the services. Thus the income from deployment of alternative services should be added. Besides, the compensation should not include disproportionate or excessive administrative fees⁷³.

As regards the **right to cancel following extraordinary events** at the place of destination, we believe that the list of such events in Recital 26 should include not only **warfare and natural disasters** but also in particular terrorism, **hurricanes, earthquakes** and **political instability**. Moreover, **the risk of such events** taking place should be sufficient to trigger the right to cancel⁷⁴ by the consumer but in particular when national authorities publish warnings in relation to such risks. Moreover the requirements that the incident needs to occur at "at the place of destination or in its immediate vicinity" and that it has to "significantly affect" the package, are too restrictive. It should be left to case law to decide when a risk justifies the termination of the contract.

Regarding the right of the organiser to **cancel the package if the minimum number of persons required is not reached**, we are **not** satisfied that this is maintained in the new proposal. Due to the different features now governing the travel market compared to 20 years ago when the Directive was adopted, this right may no longer be justified. Currently technology allows traders to easily foresee and manage the risks involved in their offers and operations. Moreover, traders could

⁷³ Our German member VZBV has won two court cases against tour operators that charge excessive fees for cancellation rights: see press release: <http://www.vzbv.de/12404.htm>

⁷⁴ In particular German and Austrian case law interpret the law in this sense: OGH(Austria) 27.11.2001, 1 Ob 257/01b: the consumers cancelled a journey to Turkey because of terrorist attacks, there was a note by the Ministry that there is a risk, there was no "warning" but there where media reports alerting of the danger; the High Court decided that the consumers had the right to cancel; OGH (Austria) 26.08.2004, 6 Ob 145/04y: consumers cancel their trip to New York and Chicago on 15.09.2001 as they were insecure about risks and restrictions following the terrorist attacks; there was no "warning" by the Ministry but The High Court accepted the cancellation; HG Wien 07.09.2004, 1 R 136/04b: Cancellation of a journey to Burma, China and Thailand due to the SARS-epidemics, no official "warning" but only various risk-notes, also by WHO; The Court decided the consumers had the right to cancel.

easily abuse this rule as it is not possible for consumer to verify the truthfulness of the number of passengers. In case this right of the organiser is maintained, the timeline of 20 days should be replaced by **40 days or** maximum **30 days** before departure and a duty of the organiser to provide evidence and to compensate the consumer⁷⁵ should be required. The information obligation in this regard should be changed accordingly.

On the other hand, the proposal does not allow the consumer to cancel the package without having to pay compensation following an event of force majeure (extraordinary circumstances) of the traveller (e.g. **illness, accident, death in the family**). We argue that allowing the organiser to cancel the package for reasons of force majeure⁷⁶, but excluding this possibility for the consumer is unfair results in an imbalance between the rights and obligations of the parties due to the lack of reciprocity. Thus, the Directive should grant the consumer the same right to cancel the contract following extraordinary circumstances of the consumer (e.g. illness, accident, death in the family⁷⁷).

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CHAPTER IV

Liability for the performance of the package (Article 11)

Article 11 of the Commission proposal places the liability for the performance of the contract package, solely on the organiser⁷⁸. Thus the retailer is not liable vis-à-vis the consumer though the consumer would be allowed to send complaints to the organiser through the retailer (Article 13 of the proposal).

The current Directive left discretion to Member States to decide who the organiser or the retailer is liable vis-à-vis the consumer. Therefore, according to different national traditions some national laws diverge on this issue⁷⁹.

The liability system foreseen in the current Directive was conceived to fit the market features at the time of its adoption. Then, the organisers of packages were tour operators who grouped tourist services together in a package; retailers were travel agents who would sell packages put together by the organiser. However, this clear distinction has become somewhat blurred as more and more personalised holidays are put together by travel agents and online travel sites and platforms.

⁷⁵ Since some popular packages are sold out very early before the holiday season begins, it is often difficult for the consumer to find a suitable substitute package.

⁷⁶ Article 10.3 (b) of the proposal.

⁷⁷ See suggestions of the Round Table organised by the Commission in 2001 and § 651j of the German Civil Code.

⁷⁸ Article 3.8 of the proposal: 'organiser' means a trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader.

⁷⁹ The law of the majority of Member States provides for a different and separate liability of the organiser and the retailer; in other countries only the organizer or only the retailer is liable vis-à-vis the consumer, and in others both the organiser and the retailer are jointly liable vis-à-vis the consumer.

In fact, in some Member States travel agents act as organisers while others are retailers in the strict sense. In the case **Club-Tour** the CJEU ruled that the term “organiser” does not only cover the typical tour organisers, which sell pre-arranged packages via travel agencies and other retailers, but **also travel agencies or internet platforms** which spontaneously combine, at the specific request of the consumer, several tourist services such as flights and hotel accommodation (offered by other service providers)⁸⁰.

Therefore, the new proposal should clarify that **travel agents** (off or on line) and other retailers which in practice **combine different services** independently, are to be considered **organisers**.

BEUC supports the underlying idea of the Commission proposal to ensure clarity and legal certainty as regards the liability for performance. However, this should not be at the expenses of consumer protection and consumer expectations. Both aspects should be combined. The **reality** is that consumers **are often confused as to who is who in the contractual chain**, all the more in a situation where many more different traders have entered the market over the last years (e.g. airlines, on line platforms). As a matter of fact, many consumers identify the seller as being the party whom they should refer to in case of problems; it is straightforward for them to identify that party.⁸¹ In many Members States the liability is placed on the retailer for this very reason⁸².

Putting the liability only on one party would complicate the application and use of the consumers’ rights⁸³, in particular as regards **cross-border purchases** i.e. when the organiser is not established in the country of residence of the consumer.

We believe that the proposal of the Commission allowing the consumer to contact the organizer through the retailer (Article 13⁸⁴) would not ensure transparency and could result in adding a layer of complexity and be a source of disagreement between the retailer and the organizer.

Consequently, BEUC calls for a system where the **organiser and the retailer** are **jointly liable** vis-à-vis the consumer (joint liability). The party who compensates the consumer would have a **right of regress** against the party ultimate liable. If only the liability of the organizer is maintained, **at the very least the proposal**

⁸⁰ See also case C-237/97, *AFS Intercultural*.

⁸¹ 50% of consumers having problems with dynamic packages complaint to the seller (London Economics study, page 64).

⁸² 45% of package travels in the EU are sold through a travel agency (Commission Impact Assessment accompanying the proposal, page 107).

⁸³ In the case BEST TOURS⁸³, a group of consumers from Luxemburg had booked a (expensive) package travel organised by the Belgian tour operator BEST TOURS, via a travel agency in Luxemburg. The travel agency in Luxemburg went bankrupt and the tour operator refused to compensate the consumers by rejecting its liability. BEST TOURS sent a message to the consumers stating that the travel agency had gone bankrupt and that BEST TOURS had not received the deposits that the travel agency should have paid. It went on saying that BEST TOURS had not concluded any contract with the consumers and that the affected consumers should have recourse to the retailer (travel agency)

⁸⁴ Article 13: Member States shall ensure that the traveller may address messages, complaints or claims in relation to the performance of the package directly to the retailer through which it was purchased. The retailer shall forward those messages, complaints or claims to the organiser without undue delay. For the purpose of compliance with time-limits or prescription periods, receipt of the notifications by the retailer shall be considered as receipt by the organiser.

should state that when the organiser is established in a different Member State from the consumer, the retailer is to be considered the organiser⁸⁵.

The principle of **joint liability** is already present at different degrees in many member states including Belgium, Bulgaria, Denmark, Greece, Hungary, Luxemburg, Lithuania, Malta, Norway, Portugal, Romania, Slovakia and Sweden⁸⁶.

Our comments on article 11 to 14 therefore jointly apply to the organiser and the retailer.

Articles 11 and 12 put forward a regulatory system addressing the extent of the **organiser's liability** following a lack of conformity. The main elements of the proposed liability system are already present in the current Directive. Yet, this proposal is based on the principle of full harmonisation and therefore the national systems regulating lack of conformity for services will be strongly affected.

It has to be taken into account that there is **no EU harmonisation of the law on the lack of conformity for service contracts**. Thus the proposal reaches far into national civil law and would preclude better national standards in this field. This is unacceptable from a consumer policy perspective. In particular the rules on the lack of conformity of the travel service can only be stipulated on a **minimum harmonisation basis**.

In addition, the proposed regulation **weakens** the level of protection in the current Directive in relation to some elements.

Paragraph 2 of Article 11 states that the organiser shall remedy the lack of conformity **unless this is disproportionate**. This **limitation** of liability does not exist in the current directive. It could be read as allowing the organiser to exclude any liability completely if he argues that remedying the lack of conformity is disproportionate. In many cases if one remedy is disproportionate, others can apply such as the reduction of the price, or compensation. This part of the sentence is not meaningful and should be deleted.

Article 11 also deals with the consequences of a **lack of conformity after departure**. The proposal introduces some **restrictions to the rights of the consumer** compared to the current Directive. In the proposal, when a "**significant proportion**" of the services cannot be provided, and the organiser cannot offer suitable arrangements of comparable quality, the consumer can (only) withdraw from the contract. The current Directive allows the consumer to reject the alternative arrangements *for good reasons*. In many Member States, such a restriction does not exist and therefore this rule would lower standards of protection at national level.

In any case, the proposed changes raise the questions of how to define "significant proportion" and "comparability" of the arrangements and whether more favourable national systems are affected due to the principle of full harmonisation. The fact that according to the proposed rules, in case of lack of comparability of the alternative arrangements, the consumer could no longer terminate the contract is

⁸⁵ E.g. in Hungary and in Holland, a retailer who sells packages of a foreign organiser is liable as if it was the organiser of the package.

⁸⁶ See also the Impact Assessment accompanying the Commission proposal.

problematic in light of better national regimes. In Austria for example, if a comparable arrangement is offered, this change must also be convenient to the consumer following his/her specific needs, if not the consumer can withdraw⁸⁷. At the very least **consumer expectations** have to be considered when defining “significant proportion” and assessing the “comparability” concept.

Paragraph 5 includes a **new limitation** of the general **obligation of care** of organisers; the current Directive does not allow such limitation. If the package involves travel and this cannot take place due to **extraordinary circumstances**, at the time and in the conditions agreed, the proposal allows the organiser to limit his **obligation of care** to 3 nights of accommodation and €100 per night. BEUC **strongly opposes this rule** which is also included in the proposal for amending Regulation 261/04⁸⁸.

We claim that this exoneration runs counter to the general obligation of care and assistance of the organiser and that it has not been subject to an impact assessment in the context of package travel. Our disapproval of this limitation in the context of the revision of Regulation 261/04, becomes all the more pertinent when it comes to package travel contracts and other travel combinations. The very nature of travel combinations, as necessarily providing added value compared to other travel products, renders the obligation more relevant in terms of meeting consumers’ expectations.

Price reduction and compensation for damages (Article 12)

If the organiser fails to perform the package as agreed, the lack of conformity should be remedied by compensating the consumer and/or allowing a reduction in its price.

We **welcome** the explicit inclusion of **non-material damage** in the scope of compensation, reflecting existing case law⁸⁹.

However, the possibility of the organiser to exempt his liability by proving that he is not at fault (paragraph 3 of Article 12) would, in combination with the principle of full harmonisation, impact negatively in the laws of some Member States. The proposal surprisingly treats the fault based compensation and the remedy of price reduction in case of lack of conformity – which is typically **not** fault, based, but prompts a **strict liability** of the trader – by the same regime. Consequently serious negative consequences for consumers would occur.⁹⁰ It is unacceptable that the organiser is only liable for performance in case of fault, but for none or poor performance due to extraordinary circumstances or the fault of 3rd parties the consumer would not have a right to price reduction. The current principle of **minimum harmonisation must remain on this issue** rather than full

⁸⁷ 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.

⁸⁸ Regulation (EC) no 261/2004 of the European parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

⁸⁹ Case C-168/00, judgment of 12 March 2000 (*Simone Leitner*).

⁹⁰ E. g. Luxemburg, Germany, Austria. According to German law the right of the consumer to require a price reduction does not depend on the fault of the seller.

harmonisation, in order to preserve the level of protection applicable in those Member States.

Regarding consumer complaints, the **right of the consumer to be compensated** for a lack of conformity **must not be jeopardised** by conditioning it with the obligation of the consumer **to report** any lack of conformity "*on the spot*". The sanction to lose all rights in case of not fulfilling the duty to notify is not proportionate and doesn't exist in any other EU consumer legislation. Anyhow it is always in the interest of the consumer to notify as to a lack of conformity and most consumers naturally do it as soon as possible as they have a strong interest in changing the situation to the better. Yet, sanctioning a lack of notification by the consumer by excluding compensation is **unfair and disproportionate** and goes against the general right to compensation for lack of conformity. This will result in an unfair treatment of many consumers in certain circumstances⁹¹.

The limitation does not exist in the current Directive and thus it will entail a significant reduction of the existing level of protection. Therefore we call **for the deletion of paragraph 3.b of Article 12**.

Moreover, regarding paragraph 4, the possibility to **limit compensation for damages in the contract** does **not** exist in some Member States⁹². The principle of full harmonisation will again entail that better national laws will have to be abolished.

Regarding **the prescription periods for legal actions**, we believe that a minimum period of 1 year (Article 12.6) is not sufficient. It should be stated that the prescription period **shall not be shorter than 3 years**, with Member States being free to provide for longer periods. Moreover, it should be stated that national **prescription periods** are rules of **mandatory law** which the consumer can invoke in cross-border complaints⁹³, by applying the law of their domicile if it provides better protection in relation to those periods⁹⁴. It should also be stated that any prescription period is to be **suspended or interrupted** while an amicable solution or **ADR procedure** has been initiated until the end of the settlement or if no settlement is reached.

Obligation to provide assistance (Article 14)

Article 14 is a new provision exclusively dealing with the obligation of the organiser to provide assistance to the consumer in difficulty. However, it is **unclear when this obligation is triggered and the extent of it**. It should at least be possible for the consumer to be assisted with no extra costs when the fault of the organiser is involved.

⁹¹ The consumer could be prevented from reporting a lack of conformity on the spot due to a number of reasons (no availability of internet connection, remote area, the organizer representative being unreachable...).

⁹² France, Hungary, Latvia, Spain and Sweden: see Consumer Law Compendium.

⁹³ Case « BEST TOURS »: Ruling of the *Cour de Cassation* (Luxemburg) of 17 December 2009: The main issue was whether the prescription period of Luxemburg law (which was longer than in Belgium) is to be considered a mandatory provision which would then take precedence over the applicable law with the aim to ensure the *effect utile* of the Directive on Package Travel.

⁹⁴ Contractual conditions generally impose the law of the country of residence of the organiser/ seller and the rules on national applicable law are not always applied by the competent court.

CHAPTER V

Insolvency protection (Article 15)

The Commission proposal **extends the insolvency protection** obligation beyond traditional packages, by placing this obligation on traders selling ATAs also. In addition, the extended definition of package contracts (covering dynamic packages) entails that the new products covered by the scope of packages will clearly benefit from the insolvency protection as well. **This extension is to be welcomed.** The fact that the consumer pays in advance for services to be used later in time, fully justifies the protection against insolvency.

Moreover, the wording of Article 15 **does not clarify** if and to what extent the **insolvency** of the providers of additional services, is covered by the protection or even which of the implicated traders has to be ensured against insolvency. By reading Recital 34 we understand that only the organiser of packages and the seller of assisted travel arrangements are obliged to be ensured against their own insolvency but also against that of any of the service providers in the chain⁹⁵ (e.g. hotel, car rental). This has to be clarified in the operational part of the text. In this regard, it should also be **expressly stated** that **airlines** selling travel combinations be it **packages or assisted travel arrangements**, have to be insured against insolvency⁹⁶.

As Article 15.1 of the proposal, the current Directive already requires the guarantee to be sufficient to cover the **full costs of refund and/or repatriation of the traveller**, if transport is included⁹⁷. Yet, it is a fact that almost no Member State properly complies with this provision. In many countries the guarantees deposited have proved insufficient and in some cases not even enough to compensate one package travel⁹⁸. Therefore we think this obligation should be accompanied by a system to tighten the entrance to the market. Many Member States require a **licence** which may be obtained by the tour operator only if he proves sufficient insolvency insurance⁹⁹. The introduction of such a license at European level should be considered.

Besides reimbursement or repatriation, **continuation of the started holiday should be offered** (where possible), at the choice of the consumer¹⁰⁰. Finally, the Directive should state that the rights of the consumer also apply if the insolvency

⁹⁵ Recital 34 of the proposal.

⁹⁶ See judgments *Test-Achats v EasyJet*, 29 September 2010 (Commercial Court o Namur) and *UFC Que Choisir v Air France*, 26 April 2013 April 2013 (*Tribunal de Grande Instance de Bobigny*, Paris).

⁹⁷ Case law: ECJ, C-140-97, *Rechberger and others*, 15 June 1999: the consumer is entitled, under article 7 of the directive, to full compensation to cover his financial losses in case of insolvency of the tour operator; case law: ECJ C-354/96, *Verein für Konsumenteninformation*.

⁹⁸ In Germany the liability is limited, in clear contravention of the directive. In Greece, the amount of money that is required for a travel agency to issue a letter of guarantee in order to acquire its permit is €6.000 for agencies that operate at national level and €12.000 for agencies that operate at international level.

⁹⁹ Examples for license requirements can be found in the laws of the United Kingdom, France, Italy, Czech Republic, Portugal, Slovakia or Slovenia among others.

¹⁰⁰ This is current practise under the Belgian "Garantiefonds Reizen".

results from the fraudulent conduct of the company, as ruled by the Court of Justice in 2012¹⁰¹.

Paragraph 1 of article 15 should be reworded by clearly stating the obligation to provide insolvency protection applies both to packages and assisted travel arrangements. The current wording could be interpreted as providing only protection for assisted travel arrangements¹⁰².

Nonetheless, it is inconsistent that airlines will be obliged to offer insolvency protection when selling travel combinations, whereas consumers who buy **seat-only tickets** will be left stranded should the airline go bankrupt. **Seat-only passengers should also benefit from this protection**¹⁰³, otherwise discrimination among consumers will continue in the travel sector¹⁰⁴.

Existing studies and surveys show consumer confusion around the issue of insolvency protection¹⁰⁵. At European level, it was found that consumers buying travel combinations different from traditional packages expect (often mistakenly) to be protected against the insolvency occurrence¹⁰⁶. This confusion is produced in particular within the rapid development of new products and services in the travel market, most of which were not anticipated when the Directive was adopted.

If the obligation to provide insolvency protection is not accepted or watered down, **restrictions on pre-payments should be considered**¹⁰⁷.

Mutual recognition of insolvency protection

BEUC supports Article 16 establishing the mutual recognition of insolvency systems. The fact that the arrangements for insurance largely differ from Member State to Member State leads to the **fragmentation of the insurance market** and

¹⁰¹ Case C-134/11: "Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours is to be interpreted as covering a situation in which the insolvency of the travel organiser is attributable to its own fraudulent conduct"; in this case the travel organiser has used all the money collected from the travellers for an improper purpose and it was never intended that the trip would be organised.

¹⁰² Article 15.1: "Member States shall ensure that organisers and retailers facilitating the procurement of assisted travel arrangements...".

¹⁰³ The need for protecting air passengers against the insolvency of the airline was concluded in the latest study on insolvency protection of airlines:
http://ec.europa.eu/transport/themes/passengers/studies/doc/2011_03_passenger-rights-airline-insolvency.pdf

¹⁰⁴ See BEUC position on insolvency protection of airlines:

<http://docshare.beuc.org/Common/GetFile.asp?ID=41984&mfd=off&LogonName=Guesten>

¹⁰⁵ In a survey conducted in April 2013, our UK member found that only one in three surveyed knew when holiday companies must provide an ATOL certificate (in the UK this certificated tells consumers what protections they are getting with their purchase); 78% of those who said they knew wrongly thought they would get an ATOL certificate when they booked a hotel room only from a website. Two thirds said they should get one if they bought a flight and accommodation from an airline website.

¹⁰⁶ 80% of consumers who had taken dynamic package holidays believed that they are financially protected in the event of bankruptcy of one of the service providers (ref. study on consumer detriment in dynamic packages, 2009, page 129) ; 68% of consumers who bought travel combinations involving separate billings expect to be refunded or repatriated in case of insolvency of the seller or a service provider and 67% of consumers who bought the different elements of the combination at different times expected a refund in case of insolvency (Study consumer detriment, London Economics 2009, page 76).

¹⁰⁷ In Austria for instance, 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.

thereby of the package travel market with the consequence of a restriction of competition detrimental to the interests of consumers¹⁰⁸. Travel insurance valid under the law of one Member State cannot always be sold in another Member State¹⁰⁹.

Even though we support the mutual recognition as a step in the right direction, we are in favour of establishing a **harmonised guarantee scheme in the EU**. The system should be inspired by **best practices** of some Member States. For instance, the Austrian model requires a limited **basic insurance combined with a fund**, which operates if the insurance proves not to be sufficient.

Liability for booking errors (Article 19)

We support the liability of retailers for errors occurring in the booking process. The proposal establishes however that the responsibility of the retailer can be exempted in the event of "extraordinary circumstances". Yet, we do not see what kind of circumstances could prevent the correct processing of a transaction. Therefore, **the reference to extraordinary circumstances should be deleted**. In any case it should be explicitly stated that if the error results in the consumer making an undue payment, **the excess will be reimbursed to him**¹¹⁰.

Moreover, the right of the consumer to **correct booking mistakes** should be acknowledged - mirroring the proposal amending Regulation 261/04¹¹¹. The consumer should be able to correct his own booking mistakes **within 48 hours of the booking**.

¹⁰⁸ Case law: ECJ, C-410/96, Ambry, 1 December 1998: "It is contrary to Article 59 of the EC Treaty and to Second Council Directive 89/646/EEC...for national rules to require, with a view to implementing Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France".

¹⁰⁹ This fragmentation runs counter to the demands in Article 23.2 of the Directive on Services in the Internal Market (Directive 2006/123/EC) which states that the provider of cross-border services shall not be requested to take another guarantee when he is already insured in a Member State and the guarantee coverage is comparable to that required in the Member State where the service is to be provided.

¹¹⁰ Real case examples → Hotel bookings → A consumer booked a room through a web portal; as he did not receive the confirmation having waited 24 hour, he booked another room; arriving at the hotel the consumer had to pay two rooms for the same day. In Greece various cases were reported in which consumers booked a room through a website and the booking was not transferred to the hotels. When consumers arrived at the hotel, the hotel claimed no rooms were booked.

¹¹¹ Real case examples → Car rental via on line platform (Expedia) →A consumer booked an airline ticket through Expedia. In the booking process, the consumer mistakenly entered the wrong names (not the exact names as in the passport). The airline said it was easy to correct this, but that only Expedia could give them that order. Expedia however refused to do so, and told the consumer the only option was to cancel the tickets (of course against cancellation costs) and buy new tickets.

Relationship with the Consumers Rights Directive

BEUC welcomes Article 25 of the proposal as it incorporates in the proposal a number of consumer rights and safeguards excluded from the Consumers Rights Directive (CRD) for package travellers¹¹²:

- safeguards against internet traps: an obligation on the trader to explicitly inform the consumer of the obligation to make a payment¹¹³;
- prohibition on excessive fees for using electronic payment means (credit card extra charges)¹¹⁴;
- right of the consumer to contact the seller by telephone at the basic rate (prohibition of high rate telephone lines)¹¹⁵;
- Prohibition of pre-ticked boxes for additional services on websites or forms¹¹⁶.

According to this Article 25, ATAs would be fully covered by the 2011 CRD¹¹⁷ which we support in principle, whereas package travel is excluded except for a few specific provisions (the list above). Yet, the CRD itself excludes transport sector contracts (and so most combinations facilitated by sellers of ATAs). Therefore, the extent to which retailers of ATAs are obliged under the CRD obligations is far from clear and would sometimes be inexistent. Important elements, such as pre-contractual information and specific protection in case of off-premises and distance selling shopping, including the right of withdrawal, are missing.

Right of withdrawal

When purchases are made at a distance or off-premises, it is necessary to grant consumers a right of withdrawal. In relation to off-premises contracts such a right was excluded in the Consumer Rights Directive for package contracts¹¹⁸ and thus it has to be introduced in the new Package Travel Directive.

We advocate a **right of withdrawal** for early bookings made at a distance (e.g. online), as a solution which would not interfere in the capacity policy of the service providers. At the least, **consumers should be allowed to cancel the contract within 48 hours of the booking**. As regards **off-premises contracts**, the rule in the CRD should apply to packages and ATAs i.e. **14 days after the conclusion of the contract**¹¹⁹.

END

¹¹² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council.

¹¹³ Article 8.2) of the CRD.

¹¹⁴ Article 19 of the CRD.

¹¹⁵ Article 21 of the CRD.

¹¹⁶ Article 22 of the CRD.

¹¹⁷ See article 25 of the proposal.

¹¹⁸ While the directive on door-to-door selling included¹¹⁸ this right also for packages.

¹¹⁹ Article 9 of the Consumer Rights Directive.