

## **Statement of the Verband Internet Reisevertrieb e.V. (VIR) on the revision of the Directive (EU) 2015/2302 on Package Travel and Linked Travel Arrangements (PTD)**

Munich, 2<sup>nd</sup> December 2020

### **1. Introduction**

The Verband Internet Reisevertrieb e.V. (VIR) welcomes the opportunity to participate in the revision process of the Directive (EU) 2015/2302 on Package Travel and Linked Travel Arrangements (afterwards “Directive”) and, specifically, on the respective draft report of the EU Commission. This VIR position paper highlights the key points for the consideration of the EU Commission, summarises our observations on the operation of the Package Travel Directive (“Directive”) in the ongoing COVID-19 pandemic and makes proposals for reforming important aspects of the Directive in order to prevent unfair and unsustainable burdens falling on travel agents, acting in the capacity of organisers.<sup>1</sup>

Because of transparency reasons, we would like to point out that some of the opinions you will find below can also be found in the PTD statement of Expedia which is a member company of the VIR.

The Verband Internet Reisevertrieb e.V. (VIR) is the interest group of the German digital tourism industry, that represent 67 percent of the leisure travel bookings made by Germans according to the market research institute FUR. The over 90 member companies are split into so-called clusters of OTAs, supplier and tour operators, service and travel technology providers and travel start-ups. The association is not only a contact point for the industry but also for consumers, media and politics.

### **2. Situation and assessment**

The COVID-19 global crisis presented the travel service businesses with unparalleled challenges as it contributed to an extraordinary decline in travel demand and an unprecedented number of change and cancellation requests from travelers and travel suppliers in a very short period of time.<sup>2</sup> In general, across the travel industry, refund requests from travellers have exceeded the level of new bookings by far.

This experience has highlighted significant failings in the current regulatory framework. These failings ultimately disadvantage consumers and place a disproportionate burden on organisers of package travel, to the extent that these products are no longer commercially viable without changes to the legal framework.

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<sup>1</sup> Organisers in this instance means both organisers and retailers (where Member States have introduced national law provisions which also make the retailer responsible for the performance of the package (see Art 13(1)).

<sup>2</sup> The European Commission, in its Recommendation on vouchers offered to passengers and travellers published on 13 May 2020 (EU) 2020/648, refers to an estimated reduction in travel bookings of 60% to 90% compared to 2019 and a Q1 loss of 30 billion euros and a Q2 loss of 46 billion euros.

Given this global crisis, we are looking for effective and strengthened protections and a fairer sharing of risk across the travel ecosystem. Achieving this will contribute to a travel market where consumers have choice and access to value for money travel products.

### **Impact of COVID-19 on package cancellations**

Cancellations associated with COVID-19 created immense pressure on the travel ecosystem as a whole. The pain of this was exacerbated by a legal framework which allowed airlines to shift the financial pressure of cancellations onto package travel organisers, despite the fact that they neither held customers' funds nor had any control over airline policies. This created a deeply inequitable situation where organisers had no choice but to pay out-of-pocket for package customer refunds when airlines decided (legally or not) to retain customer payments and only offer credits. Reimbursement of these costs by the airline suppliers has been extremely slow.

The full impact of this situation is described in detail below.

- Almost unbearable pressure on package travel organisers' liquidity. With new bookings collapsing, the package travel organisers faced significant reimbursement of travel products. Whilst it is fairly straightforward to manage reimbursement for the travel services where they hold the funds paid by the traveller for the services, this is not true where they either do not receive the funds or no longer hold the funds (as they have been passed to the supplier).
- Airlines not offering refunds on involuntary cancellations and/or creating hurdles to the process by which organisers could process this refund and/or only issuing credits in the name of the passenger (which are not transferable and which organisers cannot utilise themselves).

In an effort to manage their own cash flow and liquidity many airlines were refusing to reimburse cash for cancelled bookings but instead offering a credit that was only eligible for the travellers themselves. This is despite Article 7(3) of the EU passenger rights Regulation 261/2004 which states that vouchers are only permissible as an alternative to a cash reimbursement "*with the signed agreement of the passenger*". This meant that if the traveller rejected their credit, package travel organisers had to provide the cash refund for the flight portion of the package to the traveller and are now looking to recoup this from the airlines (and facing the prospect of no recoupment at all from the airline in many cases). In the meantime, the airline gets to remove the full liability from its books at no cost. This results in an inequitable situation.

As the crisis evolved and many airlines received state aid, the incidence of cash reimbursement for involuntary cancellations has increased but with the caveat that the airlines have created a complicated and slow reimbursement system. De facto this has forced package travel organisers to become an informal credit line for the airlines.

- Airlines continuing to operate schedules and not offering refunds for these flights, deeming these voluntary cancellations on the part of the traveller. This is further exacerbated by the fact that there is a liability gap between rights under the Directive (and as a subset of this the role played by official government travel advice in triggering a right to cancellation) and the refund rights under the EU Passenger

Rights Regulation 261/2004<sup>3</sup> with airlines not being obliged to provide a refund if the flight is operating<sup>4</sup>.

We note that the impact of government travel advice on a traveller's right to refund has been debated across Europe. For example:

- Industry practice has long been that official negative travel advice would give the traveller a right to cancel their package and receive a refund
- The minutes of the workshop on the Transposition of the Directive on 13 June 2016 state *"Different sources of information, including official travel advice, can be used to establish whether there were unavoidable and extraordinary circumstances"* and those on 16 February 2017 state *"Different sources of information, including official travel advice, may be relevant when establishing whether there were unavoidable and extraordinary circumstances and might be taken into account by judges when deciding on such matters"*<sup>5</sup>.
- The Commission's information note of 19 March 2020 states that *"An official travel warning of national authorities is an important indicator that the package travel contract can be cancelled due to unavoidable and extraordinary circumstances impacting the performance of the trip. This also applies where public authorities prohibit certain travels or ban the movement of persons in a manner that excludes, de facto, the package travel contract to be performed"*.
- In the UK, On the Beach and Loveholidays (organisers of travel packages distributed online) resigned from the Association of British Travel Agents over the trade body's guidance which advises its members to cancel on the basis of negative advice. This development serves to underline the fracturing of legal interpretation on this issue<sup>6</sup>.

However:

- The Directive does not include a reference to Government/Official travel advice and national governments have not provided decisive guidance on the status/impact of Government / Official travel advice:
  - In an FAQ document prepared by the German Foreign Affairs Ministry, negative travel advice is described as not being "the decisive factor" but rather "the legal question of whether there are extraordinary, unavoidable circumstances... has to be clarified on a case-by-case basis"<sup>7</sup>.
  - Similarly, the UK's Competition and Markets Authority issued a "statement on coronavirus (COVID-19), consumer contracts, cancellation and refunds" which discusses cancellations relating to government guidance and in particular when it does not contain any legal restrictions.

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<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R0261&from=ES>

<sup>4</sup> This gap exists due to the gap in protection offered to package customers (provided by the organiser and triggered by "unavoidable and extraordinary circumstances") and to stand alone flight customers (provided by the airline and triggered only by a cancelled flight (i.e. an involuntary cancellation)). It has not been possible to close this liability gap by way of contractual agreement - for competition reasons travel agents cannot negotiate collectively whereas the airlines through IATA do this regularly.

<sup>5</sup> [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=35324](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=35324)

<sup>6</sup> <https://www.travelweekly.co.uk/articles/386064/on-the-beach-resigns-from-abta>

<sup>7</sup> <https://www.auswaertiges-amt.de/de/service/fragenkatalog-node/05-reiseruecktritt/606072>

In reality, the risk of cancelled travel under these circumstances is very present. Travellers are fully aware of this fact and indeed, when a traveller chooses to buy a non-refundable product, this information is clearly presented on the booking path and they are advised to consider flexible offers depending on their circumstances. Having received this information, providing travellers with the ability to then seek a refund due to COVID-19 would seem an unreasonable expectation. Package travel organisers in essence are being forced to provide a form of free insurance policy to EU package customers (not available in the marketplace to cover foreseeable future events) if it continues to allow bookings and a second wave strikes.

### Assessment of the Directive

The current Directive has been tested beyond its limit in this crisis and is not fit for purpose, in particular in respect of refunds due to travellers as a result of COVID-19 (both when the refund is payable, who is responsible for paying it and the required timing of the refund).

The current pandemic situation and its economic consequences have shown, that this one-sided overloading of the burden on organisers overwhelms the economic efficiency of many organisers. A significant part of the organiser's expenses, such as personnel, rent, advertising and many other operating costs, cannot be covered if travel costs are fully reimbursed.

The one-sided transfer of risk to the organisers is unfair under any circumstances, but it does not risk bankrupting the organizer if it is an isolated, time limited incident in a specific destination. If, however, the entire business operations of the organiser have to be discontinued and new business cannot and must not be generated, the application of the rule on cancellation with full refund for customers in unavoidable and extraordinary circumstances leads to systemic problems. The long term ability of organisers to continue to provide packages in Europe seems to us to be at risk.

Under Article 26 of the Directive, the Commission is obligated to submit a *“general report on the application of this Directive to the European Parliament and to the Council”* by 1 January 2021. We believe that it is urgent that this report addresses the issues highlighted by the COVID crisis (set out further in this paper) and provide tangible proposals to rectify and address these issues.

The COVID-19 crisis has highlighted that travel agents acting as organisers have been placed in the invidious position of having to refund travellers for packages, irrespective of whether or not they will be able to recoup money from suppliers whose travel services form part of the package and who may still hold the traveller's money.

This very point has been acknowledged in Recitals 13 and 14 of the Commission's Recommendation on travel vouchers published on 13 May 2020. In those recitals, the Commission noted:

- That mass cancellations have created a specific liquidity problem for travel package organisers as *“they have to reimburse the full price of the package to the traveller while they do not themselves always receive reimbursement of prepaid services that form part of the package in due time”*.
- This creates an *“unfair sharing of the burden”* within the travel ecosystem.

This “unfair sharing of the burden” has:

- Created a liability gap between travel agents acting as organisers and airlines (many of whom either refused to reimburse in cash, worked to very slow timelines and/or removed ways in which organisers could process and/or apply for refunds).
- Forced travel agents acting as organisers in many circumstances to:
  - act as an informal credit line to the airlines
  - act as an insurer of [known] risks to travellers (i.e. if travel booked post WHO declaration of pandemic)
- Put pressure on the operations and liquidity of many travel agents especially in light of the short (14 day) refund timing.

This situation is simply untenable and if left unaddressed will distort the travel market and may well result in the withdrawal of many organisers from the EU package travel market, and ultimately a loss of travel choices for European consumers.<sup>8</sup>

We must avoid a situation where the Directive serves no purpose, i.e. if its operation means that organisers cannot afford to assume the liability risk of continuing to offer packages and therefore travel packages cease to be a part of the EU travel market. To avoid this, the Commission must assess this situation urgently and change in the relevant regulations is therefore necessary. This change should take into account circumstances for which an exception from the travel organiser's obligation to bear 100% costs apply in the event of cancellation by the traveller due to unavoidable and extraordinary circumstances and what financial contribution can be expected from suppliers and the traveller.

### 3. Proposed short-term solution

Europe remains in the midst of a public health crisis with no clear timeline for when travel can fully resume and indeed further waves and further containment looking presently to be a realistic possibility and outcome (though timing and severity of this will naturally depend on the nature of the virus in each Member State). This point was made clearly by the Commission and the Council in their ‘Joint Roadmap towards lifting COVID-19 containment measures’ published in May 2020 as it describes the threat of a second wave as being “widely understood” and that “even with confinement measures the virus continues circulating and any level of gradual relaxation of the confinement will unavoidably lead to a corresponding increase in new cases”. It goes on to point out that “societies will have to live with the virus until a vaccine or treatment is found”<sup>9</sup>.

Further waves of COVID-19 infection and the reintroduction of containment measures is therefore a well understood risk and one that could not safely be considered extraordinary if it was to occur again. Being asked to do this on a repeated basis is completely unsustainable. We believe that whilst certain protections afforded to travellers in the Directive should be maintained in order to increase confidence in further bookings (and allow tourism to resume where safe and appropriate) that these need to be clarified to ensure that a second and third wave resulting in mass confinement could not be considered

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<sup>8</sup> We note the Commission’s impact assessment accompanying the last revision of the Directive which estimated that of 90,000 tour operators and travel agencies in Europe, 80% of them sold packages (72,000 businesses) and of these 72,000 businesses 99% were SMEs and 92% of those were micro enterprises.

<sup>9</sup> Joint Roadmap towards lifting COVID-19 containment measures, European Commission and Council, May 2020, p.4.

a circumstance that was unforeseeable at the time of booking. This may mean reviewing the language in the Directive to include the term “unforeseen” to further qualify “extraordinary circumstances”, or by explicitly including Force Majeure provisions in the Directive. Consideration could also be given to guidance which clarifies that if a customer opts for a non-refundable product and they had an option for a refundable product and were warned prior to purchase about the consequences of a non-refundable product, then this could no longer be considered “unavoidable” under the Directive.

To sum it up: Conscious of the ongoing crisis with the implications described above as well as the lengthy proceedings required for legal changes to the Directive, the Commission and Member States should officially acknowledge that Covid-19 no longer is an exceptional situation or an extraordinary circumstance. This would also mean a clearer decoupling of negative travel advice and Art. 12 of the Package Travel Directive. An official guidance as a short-term measure

in that respect would alleviate some of the immense pressures the travel industry is facing (see also the proposed legislative changes below, particularly proposal 4).

In addition, the Commission and the Member States should take into account that ‘extraordinary circumstances’ are also part of the Air Passenger Rights Regulation (EC) No 261/2004. The official guidance acknowledging that the ongoing pandemic is no longer an extraordinary circumstance should thus extend to the APR in order to strengthen consumers’ rights in case of involuntary cancellations.

#### **4. Proposed long-term solutions to enable strong consumer protection and fair burden sharing across the travel ecosystem**

We are committed to upholding consumer rights and providing the very best in travel experiences and we are acutely aware of the sensitivity associated with amending consumer rights. However, to be clear, we are not seeking to dilute consumer rights but instead ensure that they are clear and workable based on the recent experiences.<sup>10</sup>

Below are a number of specific options that could be explored to ensure a fairer sharing of burden amongst travel operators under the circumstances of a global pandemic like COVID-19. We would ask the Commission to consider these proposals (which are not mutually exclusive).

- **Proposal 1:** Amend the Air Passenger Rights Regulation to mirror the organiser responsibilities under the Package Travel Directive and place an obligation on airlines to provide a full refund under “unavoidable and extraordinary circumstances” (thus aligning the level of protection given to standalone and package customers in these extraordinary circumstances) **and** to clarify the role of Official Government travel advice in respect of triggering a refund so travellers are not left in a position where what rights they have in respect of cancellation and refund of a package (with all other circumstances being equal) only depend on who they booked the package with.

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<sup>10</sup> Even previous events that have caused widespread disruption to the travel industry (e.g. the volcanic ash cloud in 2010), are incomparable with COVID-19 in terms of the global scale and the ability to simultaneously freeze demand for every single travel product for a significant period of time: accommodation, car rental, event tickets, rail, coach, boat, air travel, etc.

This would prevent the turmoil encountered by many organisers trying to keep up with supplier policies (many of whom adjusted their cancellation and refund policies, often multiple times a day adding to the difficulty and complexity in servicing travellers and providing relevant/correct information). It would also prevent a consumer from losing rights due to timing of cancellation and provide better certainty for travellers (i.e. as many travellers cancelled their booking of a flight before the airline itself cancelled the flight – in this instance the airline views them as a voluntary cancellation and therefore will not have an obligation to provide a refund).

- **Proposal 2:** The Commission is able to temporarily suspend full liability of the organiser (or retailer as appropriate) under the circumstances of COVID-19 and/or any WHO declared pandemic.

This would entail giving the Commission the ability to essentially freeze full liability triggered by the situation of a global pandemic. Again, this is not about diluting consumer rights but keeping them intact and simply adapting them to an exceptional situation for which they were never designed. Alternatives could be allowing organisers the right to issue credit vouchers (consider if these can be backed by financial guarantees from Member States and are only refundable if not redeemed (i.e. amending the timeline for refund)).

- **Proposal 3:** Consider amendment of Article 22 of the Directive to add a B2B element obligating the supplier to reimburse organisers (within 7 days of request), in the event the supplier holds the money and the organiser can show they have refunded the traveller.

There is a high demand of fair and equal conditions for competition between the different players in the travel and tourism sector, especially between airlines and organisers. At the moment all risks accumulate at the level of the organisers and the intermediary. Consumers are entitled to cancel booked package travels free of charge in cases of unavoidable and extraordinary circumstances while there is no such possibility of cancellation with regard to booked flights towards airlines. In the current pandemic situation this has led to cases in which the organisers had to refund the consumer the whole tour price after cancellation but was not entitled to recourse against the airlines.

But also in cases in which the airlines had to refund the flight ticket price the liability gap between organisers and airlines became obvious. While organisers were legally obliged to refund the consumers within 14 days after cancellation, airlines refused refunds and instead offered credits, created hurdles to the refunding process or it just took months until the refunds were realized. This occurs even more unfair given the fact that organisers usually do no longer hold the funds paid by the traveller for the services. Organisers are mostly bound to pass the funds to the suppliers at the time of booking. Especially airlines are entitled to demand the whole ticket price in advance.

There is no possibility that organisers will be able to negotiate these terms into their contracts with airlines, particularly as the former, unlike the latter, are not able to negotiate collectively putting them in a position of relative weakness. A legal obligation on the suppliers is the only way to ensure that the economic impact is faced by the entity which holds the traveller monies.

- **Proposal 4: 'unforeseen'**

As described above in chapter "3. Proposed short-term solution", the Directive allows travellers to cancel a package travel booking free of charge in the event of unavoidable and extraordinary circumstances occurring at the place of destination. However, the current wording of the Directive does not presuppose that the circumstances have to be unforeseen. Therefore, travellers are also entitled to cancellations and receive full refunds although they know at the time of booking of the risks of the current pandemic situation. This has to be clarified when extraordinary circumstances become ordinary.

Thus, the Commission should take the following into consideration:

- Add "unforeseen" as an additional qualification to "unavoidable and extraordinary circumstances" in Article 12 of the Package Travel Directive to take into account the increased and now normalised threat of COVID-19 and future pandemics (as and when they arise).

"Unavoidable and extraordinary circumstances" are defined as a: *"...situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken."*<sup>11</sup> In addition, Recital 31 states that *"unavoidable and extraordinary circumstances ... may cover for example (...) significant risks to*

*human health such as the outbreak of a serious disease at the travel destination (...) which make it impossible to travel safely to the destination as agreed in the package travel contract"*. Finally, as set out above, official travel warnings of national authorities are generally seen as important indicators that the package travel contract can be cancelled due to "unavoidable and extraordinary circumstances" impacting the performance of the trip.

The wording of the Directive is based on an understanding that it is protecting travellers from situations which were essentially unforeseen by anyone at the time of booking. This is consistent with the other examples of "unavoidable and extraordinary circumstances" in Recital 31 of the Directive above. Note also that the Minutes of the Transposition Workshop on 13 June 2016 also acknowledged that *"it may be argued that the criteria "extraordinary" and "unavoidable" "circumstances" justifying a cancellation imply that it was not predictable/foreseeable at the time of the conclusion of the contract that the relevant event would occur at the travel destination at the agreed time of the trip."*<sup>12</sup>

## **5. Linked Travel Arrangements**

Another issue concerns the new concept of Linked Travel Arrangements ("LTA") which was introduced by the Directive.

The new information requirements linked to the LTA are neither useful, nor helpful for consumers. The information which has to be made available to the consumer only notifies that the consumer is not booking a package travel. The consumer receives this information after he/she already booked the first travel service. Therefore, the information does not

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<sup>11</sup> Article 3(12)

<sup>12</sup> [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=35324](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=35324)

provide any protection for the consumer at all. As the consumer already booked the first travel service of his/her planned trip, he/she no longer is able to cancel the trip because of the information which was provided. Thus, the information is redundant in this situation. Although the information requirements are not useful for consumers in the moment they receive them, they constitute a major challenge for the travel organisers legally obliged to provide the information.

## 6. Conclusion

It is in everyone's interest to encourage transport and tourism in Europe<sup>13</sup> and encourage consumer confidence and provide reassurance in relation to future bookings. However, the current structure places all the financial burden on one party in the operating chain and this is not sustainable. We need a coordinated approach to a clear revision of the Directive and related guidance to provide an ecosystem where burdens are shared equally amongst participants to ensure the healthy continuation of the package travel ecosystem. It is in no one's interest to see the offer of travel packages (and therefore consumer rights) diluted in the EU when it contributes so much to the EU economy, to consumer health and happiness and the EU currently leads the world in this respect.

We urge the Commission to review and consider the options above.

With kind regards,



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Chairman  
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<sup>13</sup> In the Communication from the Commission on 13 May 2020 – “Tourism and transport in 2020 and beyond”, it was stated that directly and indirectly the European tourism ecosystem contributed close to 10% of EU GNP