
IMPLICATIONS OF THE PROPOSED CHANGES TO THE TOURISM DIRECTIVE 2015/2302 – ADMINISTRATIVE AND LEGAL PERSPECTIVE

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Abstract. The European Commission's legislative proposal from November 2023 amending Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements amended Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealed the previous Council Directive 90/314/EEC may pose difficulties of interpretation. In further stages of work, some solutions will need to be specified or clarified in order to provide a transparent legal basis ensuring a high level of consumer protection, as well as to ensure effective enforcement of consumer rights and better harmonization of the market. In the article, I will present the historical and legal aspects of reaching the solution proposed by the European Commission. As part of the work, I will also present comments on the solutions proposed by EU legislators, as well as de lege ferenda conclusions. The whole thing was based on the dogmatic-exegetical research method, which required studying the institutional approach to the target solution proposed by the European Commission. The article presents my private views and cannot be interpreted as the position of any body or institution

Keywords: directive; European Union law; legislation

JEL: K12, K20, K22

4. Introduction¹.

Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements amended Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealed the previous Council Directive 90/314/EEC. Directive (EU) 2015/2302 of the European Parliament and of the Council is a so-called “instrument of maximum harmonisation”². It means that Member States, when implementing the document, had very limited

¹ This paper has been drawn up as part of the implementation of the agreement concluded in September 2023 between IBS Bulgaria and the Polish Ministry of Sport and Tourism.

² D. Borek, H. Zawistowska (red.) Komentarz do ustawy o imprezach turystycznych i powiązanych usługach turystycznych. Gdańsk, 2020.

possibilities to modify its wording. The directive aimed at contributing to the appropriate functioning of the internal market and to achieving a high and possibly uniform level of consumer protection through the approximation of certain aspects of Member States' laws, regulations and administrative provisions on contracts on package travel and linked travel arrangements, concluded between travellers and traders. The small area left to the exclusive competence of the EU Member States covered mainly the system of insolvency protection. The Member States were required to ensure that:

- 1) Tour operators¹ established in their territory provide security for the refund of all payments made by or on behalf of travellers insofar as the relevant services are not performed as a consequence of the tour operator's insolvency.
- 2) traders facilitating linked travel arrangements shall provide security for the refund of all payments they receive from travellers insofar as a travel service which is part of a linked travel arrangement is not performed as a consequence of their insolvency².

The system is therefore intended to be effective, to cover reasonably foreseeable costs and to take proportional account of risks. The manner in which the insolvency protection system is developed and implemented has been left to the discretion of individual Member States. Hence, the system looks differently in each of them.

Furthermore, only three narrow subject areas were left to be regulated by the Member States in different ways. These areas concerned:

- a) appropriate limitation of the compensation to be paid by the tour operator to the traveller, insofar as international conventions not binding the Union limit compensation to be paid by service providers (subcontractors of the tour operator),
- b) off-premises contracts under which the traveller has the right to withdraw from the package travel contract within a period of 14 days without giving any reason,
- c) the liability of the retailer (travel agent) for the performance of the package³.

By 1 January 2019, the Commission was required to submit a report to the European Parliament and to the EU Council on the provisions of the Directive applying to online bookings made at different points of sale and the

¹ I use this term interchangeably with term "organiser" (used in EU documents).

² Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32015L2302>.

³ Ibidem.

qualification of such bookings as packages, linked travel arrangements or stand-alone travel services, and in particular on the definition of package and whether an adjustment or broadening of that definition was appropriate. By 1 January 2021, the Commission was required to submit a general report on the application of the Directive to the European Parliament and to the EU Council¹.

The reports referred to above were to be accompanied, where necessary, by legislative proposals. None of the above-mentioned reporting requirements was met and the documents were not submitted within the set deadlines. This was mostly due to the Member States' negligence to adopt and publish, by 1 January 2018 at the latest, the laws, regulations and administrative provisions necessary for the implementation of the Directive. These documents were expected to be forwarded to the European Commission without delay. Many Member States neglected this obligation and thus the European Commission was not able to draw up the reports in time². The last update date in such cases has been extended, but by the Member States themselves without the consent of the text of Directive, for example:

Cyprus: 19 November 2018;
Hungary: January 2019;
Italy: 19 November 2018;
Ireland: April 2019;
Lithuania: 12 September 2018;
Portugal: 19 November 2018;
Romania: 15 February 2019;
Slovakia: 19 September 2018;
Slovenia: 12 September 2018;
Spain: 17 January 2019³.

5. Report from the Commission to the European Parliament and the Council 21.06.2019.

The first of the reports was drawn up on 21 June 2019 and concerned the provisions on package travel and linked travel arrangements applying to online bookings made at different points of sale⁴. In order to draw up the document,

¹ Ibidem.

² Ibidem.

³ National transposition measures for the Package Travel Directive, https://commission.europa.eu/law/law-topic/consumer-protection-law/travel-and-timeshare-law/national-transposition-measures-package-travel-directive_en

⁴ SPRAWOZDANIE KOMISJI DLA PARLAMENTU EUROPEJSKIEGO I RADY dotyczące przepisów dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2302 z dnia 25 listopada 2015 r. w sprawie imprez turystycznych i powiązanych usług turystycznych mających zastosowanie do rezerwacji online dokonywanych w różnych punktach sprzedaży z 21.06.2019.

a group comprising 20 representatives of consumer organisations, tourism organisations, insurers and arbitration tribunals for alternative dispute resolution (ADR) was set up. The group held only two meetings¹. In addition, at the turn of October and November 2018 public consultations were held. Responses were received from 9 arbitration tribunals, 4 consumer organisations, 195 tour operators or their associations, and 14 insurers or their organisations². At the same time, a rather bold conclusion was reached that the aviation sector had no objections to the regulations on package travel and linked travel arrangements booked online at various points of sale³. This was because of the fact that the aviation industry organisation “Airlines for Europe”⁴ received the questions and full documentation within the public consultations but did not take part in them. The information gathered during the consultation process showed that:

- 1) Entities that took part in the consultations very rarely (if at all) offered “packages sold through linked online booking processes”. In particular, this applied to shared transmission of such essential data referred to in the Directive as the traveller's name, payment details and e-mail address. The transmission of the last item was particularly rare.
- 2) Interpretation-related doubts were raised as to:
 - a) the understanding of the phrase „facilitate in a targeted manner”;
 - b) distinguishing between packages and linked travel arrangements created online (in particular, it is not clear whether the second trader has actually concluded the contract with the traveller within 24 hours of the conclusion of the first contract)⁵.

https://commission.europa.eu/sites/default/files/live_work_travel_in_the_eu/consumers/documents/com_2019_270_fl_report_from_commission_pl.pdf

¹ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3617&news=1>

² Ibidem.

³ SPRAWOZDANIE KOMISJI DLA PARLAMENTU EUROPEJSKIEGO I RADY dotyczące przepisów dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2302 z dnia 25 listopada 2015 r. w sprawie imprez turystycznych i powiązanych usług turystycznych mających zastosowanie do rezerwacji online dokonywanych w różnych punktach sprzedaży z 21.06.2019.

https://commission.europa.eu/sites/default/files/live_work_travel_in_the_eu/consumers/documents/com_2019_270_fl_report_from_commission_pl.pdf

⁴ <https://a4e.eu/>

⁵ SPRAWOZDANIE KOMISJI DLA PARLAMENTU EUROPEJSKIEGO I RADY dotyczące przepisów dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2302 z dnia 25 listopada 2015 r. w sprawie imprez turystycznych i powiązanych usług turystycznych mających zastosowanie do rezerwacji online dokonywanych w różnych punktach sprzedaży z 21.06.2019.

https://commission.europa.eu/sites/default/files/live_work_travel_in_the_eu/consumers/documents/com_2019_270_fl_report_from_commission_pl.pdf

As regards the follow-up actions and conclusions of that short analysis (that took only four pages), it seemed that the European Commission decided to take the following measures as the next steps:

- 1) further analyses and assessment of linked online booking processes creating tourism products such as packages and linked travel arrangements;
- 2) completion of the evaluation of the national measures transposing the Directive;
- 3) conducting an information campaign addressed to consumers;
- 4) continued cooperation with entities that took part in the public consultations;
- 5) coordination of the cooperation between the focal points¹.

6. Report from the Commission to the European Parliament and the Council 26.02.2021.

The second Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements was drawn up on 26 February 2021 and was much more extensive². It described, in 27 pages, the main provisions and objectives of the directive.

The European Commission also pointed out the measures it had taken in connection with the recommendations of the 2019 document. The measures included:

- 1) conducting an information campaign **#yourEUright** on a number of key consumer rights and posting the information on the platform YOUR EUROPE³;
- 2) commencement of proceedings regarding Member States' failure to meet the obligation to provide information on national implementing measures by 1 January 2018. All Member States notified the European Commission of the full transposition of the directive by March 2019⁴.

¹ Ibidem.

² SPRAWOZDANIE KOMISJI DLA PARLAMENTU EUROPEJSKIEGO I RADY ze stosowania dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2302 w sprawie imprez turystycznych i powiązanych usług turystycznych z 26.02.2021, https://orka.sejm.gov.pl/SUE9.nsf/Pliki-zal/COM%282021%29_90_1_PL_ACT_part1_v2.pdf/%24File/COM%282021%29_90_1_PL_ACT_part1_v2.pdf

³ [Consumer protection policy](https://commission.europa.eu/strategy-and-policy/policies/consumers_en#node-24), https://commission.europa.eu/strategy-and-policy/policies/consumers_en#node-24

⁴ Ibidem.

- 3) holding a workshop on 26 November 2019 on the application of the Package Travel Directive in the airline sector¹.

In the document of 2021 the European Commission included extensive deliberations on the issue of insolvency protection, particularly in the context of the bankruptcy of the Thomas Cook Group² as well as the COVID-19 pandemic³. Also, for the first time the European Commission made a relatively clear distinction between the two products i.e. a package and a linked travel arrangement, in the context of their creation in the online formula. If a trader, after booking a service, transmits the traveller's name, payment details and e-mail address to another trader who will provide another service for which the contract is concluded, at the latest, 24 hours after the confirmation of the booking of the first service, the first provider is considered a tour operator⁴. If any of the aforementioned data items is not transmitted, the first trader is considered an entity facilitating a linked travel arrangement and is responsible solely for the performance of the service offered by him, provided that the second service is booked within 24 hours⁵.

The European Commission pointed out, at the same time, that in Germany downpayments for packages are, in general, limited to 20 percent of the total price of the package and are paid at the time of the booking, unless a higher downpayment is duly justified by the tour operator by expenses incurred by

¹ Ibidem, see also: Annexes to COM(2021)90 - Application of Directive 2015/2302 on package travel and linked travel arrangements, 26.02.2021,

https://www.eumonitor.eu/9353000/1/j4nvirkkkkr58fyw_j9vvik7m1c3gyxp/vlgknkrqb2qr7

² A. Jęczmyk, J. Uglis, J. Zawadka, J. Pietrzak-Zawadka, MM. Wojcieszak-Zbierska, M. Kozera-Kowalska, Impact of COVID-19 Pandemic on Tourist Travel Risk Perception and Travel Behaviour: A Case Study of Poland. *Int J Environ Res Public Health*. 2023 Apr 17;20(8):5545. doi: 10.3390/ijerph20085545. PMID: 37107828; PMCID: PMC10139158.

³ A. Jęczmyk, J. Uglis, J. Zawadka, J. Pietrzak-Zawadka, MM. Wojcieszak-Zbierska, M. Kozera-Kowalska, Impact of COVID-19 Pandemic on Tourist Travel Risk Perception and Travel Behaviour: A Case Study of Poland. *Int J Environ Res Public Health*. 2023 Apr 17;20(8):5545. doi: 10.3390/ijerph20085545. PMID: 37107828; PMCID: PMC10139158.

⁴ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32015L2302>.

⁵ SPRAWOZDANIE KOMISJI DLA PARLAMENTU EUROPEJSKIEGO I RADY ze stosowania dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2302 w sprawie imprez turystycznych i powiązanych usług turystycznych z 26.02.2021, https://orka.sejm.gov.pl/SUE9.nsf/Pliki-zal/COM%282021%29_90_1_PL_ACT_part1_v2.pdf/%24File/COM%282021%29_90_1_PL_ACT_part1_v2.pdf

them at the time of contract conclusion¹. The remaining amount is paid no later than 30 days before the starting date of the package. According to the European Commission, the solution should be considered at EU level as a good practice in the tourism sector². As for activities proposed for the future, it was pointed out that the European Commission would carry out, by 2022, an in-depth analysis of national regulations on insolvency protection³, taking into account, as the main objective, the protection of passengers' rights⁴.

7. Fit for future.

To meet this objective, the directive was analysed by the platform **Fit For Future** (a private advisory body supporting the European Commission). The work of the platform started in 2021 and consisted in gathering the Member States' opinions and developing a position on the directive⁵. On 22 March 2022, the platform adopted its final opinion on the directive and submitted to the European Commission five proposals of amending the document⁶.

1) Better information on the identity of the contractual partners and on contact details and better enforcement of rules.

2) Clarification of scope and simplification of the definitions of package and Linked Travel Arrangement – some Member States' experience showed that few entities registered as traders facilitating linked travel arrangements only. The change in the definition should, according to the platform, be considered in view of the experience of other Member States.

¹ Germany is trying to impose its position in this respect, which results from its judicial decisions, see: judgments of the Bundesgerichtshof of 9.12.2014, X ZR 13/14, and of 25.07.2017, X ZR 71/16, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=4803bc48cdfac870b7acb7fba96c1c46&nr=70492&pos=0&anz=1>, Urteil des X. Zivilsenats vom 25.7.2017 - X ZR 71/16 - (bundesgerichtshof.de).

² Ibidem.

³ SPRAWOZDANIE KOMISJI DLA PARLAMENTU EUROPEJSKIEGO I RADY ze stosowania dyrektywy Parlamentu Europejskiego i Rady (UE) 2015/2302 w sprawie imprez turystycznych i powiązanych usług turystycznych z 26.02.2021, https://orka.sejm.gov.pl/SUE9.nsf/Pliki-zal/COM%282021%29_90_1_PL_ACT_part1_v2.pdf/%24File/COM%282021%29_90_1_PL_ACT_part1_v2.pdf

⁴ Komunikat Komisji do Parlamentu Europejskiego i Rady „Nowy program na rzecz konsumentów – Poprawa odporności konsumentów na potrzeby trwałej odbudowy”, 13.11.2020, COM(2020) 696 final. <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52020DC0696>

⁵ Minutes of the Fit for Future Platform expert group, 25.10.2022, https://commission.europa.eu/ec-events/25-november-2022-minutes-fit-future-platform-expert-group-2022-11-25_en

⁶ FIT FOR FUTURE Platform Opinion, 22.03.2022, https://commission.europa.eu/system/files/2023-04/Final%20opinion%202021_SBGR3_15%20Package%20travel_fup_0.pdf

3. Clarification of pre-contractual information requirements, including annexes to the directive, which, in the platform's view, may raise doubts relating to their interpretation.
4. Clarification of uncertainties regarding insolvency protection, in particular in situations of emergency such as a pandemic, because package contracts were cancelled on a large scale during the COVID-19 pandemic¹.
5. Clarification and more precise definition of the concept of "other tourist services". Other tourist services not falling into any of the main categories of tourist services raise interpretation-related doubts in the context of their significant value in relation to the other components of the package².

5. European commission proposal and commentary.

Taking into account all the above mentioned preparatory measures, on 29 November 2023 the European Commission submitted a legislative proposal: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/2302 to make the protection of travellers more effective and to simplify and clarify certain aspects of the Directive³. In the following part hereof I will analyse the proposals that raise doubts in relation to the originally developed solutions and I will try to discuss the consequences of the proposed wording of those provisions.

Article 3 proposed the following changes to the definition of a package:

„‘package’ means a combination of at least two different types of travel services, as defined in point 1, for the purpose of the same trip or holiday, if:

‘package’ means a combination of at least two different types of travel services, as defined in point 1, for the purpose of the same trip or holiday, if:

(a) those services are combined by one trader, including at the request of or in accordance with the selection of the traveller, before a single contract on all services is concluded; or

(b) irrespective of whether separate contracts are concluded with individual travel service providers, and:

(i) those services are purchased from a single point of sale and

- have been selected before the traveller agrees to pay, or

- other types of travel services are booked within 3 hours after the traveller agreed to pay for the first travel service, or

- other types of travel services are booked within 24 hours after the traveller agreed to pay for the first travel service and if, before the traveller agreed to

¹ Ibidem.

² Ibidem.

³<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A905%3AFIN>

pay for the first travel service, the trader invited the traveller to subsequently book one or more additional types of travel services, or

- (ii) are offered, sold or paid at an inclusive or total price, regardless of any separate billing, or
- (iii) are advertised or sold under the term ‘package’ or under a similar term, or
- (iv) are 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) are purchased from separate traders through linked online booking processes where the traveller’s name, payment details, e-mail address or the traveller’s other personal data are transmitted from the trader with whom the first contract is concluded to another trader or other traders.

A combination of travel services where not more than one type of travel service as referred to in point (a), (b) or (c) of point 1 is combined with one or more tourist services as referred to in point (d) of point 1 is not a package if the latter services:

- (a) do not account for at least 25% of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination; or

- (b) are selected and purchased only after the performance of a travel service as referred to in point (a), (b) or (c) of point 1 has started;”¹

Doubts seem to be caused mainly by the wording of Article 3(2)(b)(i), second and third indents (in the wording as in the proposal of the amendment of Directive (EU) 2015/2302).

The second indent refers to other types of travel services that are booked within 3 hours after the traveller agreed to pay for the first travel service. The proposed wording refers to a combination where the main tourist service (transport, accommodation or rental of a motor vehicle) is accompanied by other service or services not mentioned in the brackets. The catalogue is therefore unlimited if the other services does not account for at least 25%² of the total value of the combination. In such a case, the combination is not a package, similarly as when the other services are not advertised as and do not otherwise represent an essential feature of the combination. Doubts are raised, however, by the words “booked within 3 hours” after the traveller agreed to pay for the first travel service. The reference is made only to a booking process, which does not necessarily result in making the payment for the service, but

¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/2302 to make the protection of travellers more effective and to simplify and clarify certain aspects of the Directive Brussels, 29.11.2023 COM(2023) 905 final 2023/0435(COD)

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0905>

² Such a solution is currently included in Polish statutory regulations.

still a tourism product in the form of a package is created. This raises justified doubts. The same applies to the third indent where reference is made to a situation in which, before the traveller agreed to pay for the first travel service, the trader invited the traveller to subsequently book one or more additional types of travel services. There is also a requirement for other types of travel services not to come within the scope of the main services i.e. transportation, accommodation or motor vehicle rental. Such other services are required to be booked within 24 hours after the traveller agreed to pay for the first travel service. In addition, the third indent refers to a situation in which the trader invites the traveller to subsequently book one or more additional types of travel services. The term „invites” is very ambiguous and raises doubts as to whether such invitation takes place, for example, when leaflets of a car rental company are placed on a hotel’s reception counter. There are also reasonable doubts about the solution proposed in point (V), according to which services are purchased from separate traders through linked online booking processes where the traveller’s name, payment details, e-mail address or the traveller’s other personal data are transmitted from the trader with whom the first contract is concluded to another trader or other traders. The European Commission itself has underlined in its reports that all the specified data items have to be transmitted in order for a package to be created. In practice, it is rare for a trader to transfer the traveller’s e-mail address to other service providers. All booking platforms try to avoid transferring e-mail addresses so as to avoid the creation of a package. Thus, maintaining this specific data item as a necessary condition for the creation of a package does not seem a good solution.

Article 3(5) proposes to make the term “linked travel arrangement” more precise:

“linked travel arrangement’ means a combination of different types of travel services, not falling under the definition of a package in point 2, where, a trader which is party to a contract on the provision of a travel service and receives payments by or on behalf of a traveller invites a traveller to book additional type of travel service from another trader for the purpose of same trip or holiday and where a contract on the provision of an additional travel service is concluded at the latest 24 hours after the confirmation of the booking of the first contract”¹.

The definition included in **Article 3(5)** (in the wording as in the proposal of the amendment of Directive (EU) 2015/2302)

¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/2302 to make the protection of travellers more effective and to simplify and clarify certain aspects of the Directive Brussels, 29.11.2023 COM(2023) 905 final 2023/0435(COD)

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0905>

In the proposed wording, a linked travel arrangement is created if the first trader invites a traveller to conclude another contract for any of the basic travel services (transport, accommodation or rental of a motor vehicle). It is important that the contract for the additional travel service is concluded at the latest 24 hours after the confirmation of the booking of the first contract. In the proposed provision, there are two items raising doubts: the term „invites”, raising the same doubts as in the case of the new definition of a package, and the conclusion of the second contract at the latest 24 hours after the confirmation of the booking of the first contract, which finally may never be concluded. Notably, the legislative proposal has removed, from the scope of the term “linked travel arrangement”, the condition according to which a package does not constitute a linked travel arrangement if other tourist services, not coming within the scope of the main tourist services, account for less than 25%¹ of the value of the combination, and are not advertised as or do not otherwise represent an essential feature of the trip or holiday. This is a fundamental change which can have serious consequences in practical application.

Article 5a proposes a limitation of the size of downpayments for packages.

‘Article 5a

Payments

“Member States shall ensure that, except for packages as defined in Article 3, point (2)(b)(iv), and packages booked less than 28 days before the start of the package, the organiser or, where applicable, the retailer shall not request downpayments exceeding 25% of the total price of the package and shall not request the remaining payment earlier than 28 days before the start of the package. The organiser, or where applicable, the retailer may request higher downpayments where this is necessary to ensure the organisation and the performance of the package. The downpayments may cover advance payments to providers of services included in the package and costs incurred by the organiser, or where applicable the retailer, specifically in relation to the organisation and performance of the package insofar as it is necessary to cover those costs at the time of booking.”².

¹ Such a solution is currently included in Polish statutory regulations, similar like in the case of travel package.

² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/2302 to make the protection of travellers more effective and to simplify and clarify certain aspects of the Directive Brussels, 29.11.2023 COM(2023) 905 final 2023/0435(COD)

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0905>

It should be pointed out that the introduction of the provision setting the maximum share of downpayment at 25% can disturb the market of so-called first minute trips, i.e. those booked very far in advance (e.g. a year in advance). Such trips, offered at low prices to consumers, are usually paid in full in advance, with more advance than indicated in Article 5a. The impossibility to collect full payments may lead to a collapse of this branch of the market, as such trips will no longer be profitable from the point of view of organisers.

Also, according to the provision “The organiser, or where applicable, the retailer may request higher downpayments where this is necessary to ensure the organisation (...) of the package”. Such construction of the provision will lead to a large number of organisers requesting higher downpayments, without any possibility to verify whether there is actually a need for them, which in turn will make the regulation a “dead provision”¹.

Article 12(4) (in the wording as in the proposal of the amendment of Directive (EU) 2015/2302) maintains the deadline for refunding payments made for terminated packages.

“4. The organiser shall provide any refunds required under paragraphs 2 and 3 or, with respect to paragraph 1, reimburse any payments made by or on behalf of the traveller for the package minus the appropriate and justifiable termination fee. The organiser shall make such refunds or reimbursements to the traveller without undue delay and, in any event, not later than 14 days after the package travel contract is terminated, regardless of whether the traveller specifically asks for a refund.”²

Where Member States introduce or maintain mechanisms aiming to ensure that refunds to travellers are made within the time period laid down in the first subparagraph, following the termination of package travel contracts in accordance with paragraphs 2 and 3, they shall inform the Commission and the central contact points of the other Member States, referred to in Article 18(2) about those mechanisms. Any co-financing of such mechanisms by Member States is possible only in exceptional and duly justified circumstances and shall be conditional on approval under the Union State aid provisions.”³

The 14-day deadline in question is too short and should be extended. Recent experience, in particular related to the COVID 19 pandemic, has shown

¹ Compare: A. Brzozowski, J. Kondek, Stosowanie reguły walidacyjnej oraz zasady desuetudo na przykładzie spraw dotyczących obszaru ograniczonego użytkowania (in:) Przegląd Prawa Handlowego 2015/8/13-19.

² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/2302 to make the protection of travellers more effective and to simplify and clarify certain aspects of the Directive Brussels, 29.11.2023 COM(2023) 905 final 2023/0435(COD)

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0905>

³ Ibidem

that 14 days may not be enough to settle all claims. The European Commission itself, in its reports referred to in this research article, has found that traders had problems with refunding to travellers, within 14 days, the amounts paid by them. As many as 14 proceedings were initiated against EU Member States in connection with this issue. Thus, the maintenance of such a demanding deadline raises justified doubts¹.

Article 22(2) (in the wording as in the proposal of the amendment of Directive (EU) 2015/2302) proposes compensation by a package subcontractor.

„2. Member States shall ensure that, when a service provider cancels a service that is part of a package or fails to provide it, that service provider shall refund to the organiser any payments made by the organiser for the service within 7 days. The 7-day period shall start on the day following the cancellation of the service or the day when the service was due to be performed, whichever is the earlier date.”²

The provision does not clarify whether it applies only to packages organised in the territory of the EU. If not, it will result in much greater security of tourism in EU countries. The provision contains no reference either to any enforcement procedure making it possible to enforce the refund of the payments in question.

Moreover, the provision does not differentiate between a situation in which the cancellation of a service has taken place due to the service provider's fault (e.g. due to the lack of qualified personnel or to overbooking) and a situation in which the cancellation of a service has taken place due to extraordinary and unavoidable circumstances, such as force majeure, a hurricane, a flood or a terrorist attack. It seems that particularly in the latter case – of extraordinary and unavoidable circumstances - the 7-day deadline is too short, although, of course, it should be borne in mind that this deadline should be slightly shorter than the one to be finally regulated in Article 12(4).

¹ D. Borek, K. Świtaj, H. Zawistowska, O zgodności z prawem UE regulacji art. 15k ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (w:) Prawo-narzędzie sprawiedliwości czy władzy?, (red.) Barwicka-Tylek I., Dziewałtowski-Gintowt P., Zyzik K., Łyżwa Ł. Kraków, 2020.

² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/2302 to make the protection of travellers more effective and to simplify and clarify certain aspects of the Directive Brussels, 29.11.2023 COM(2023) 905 final 2023/0435(COD)
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0905>

6. SUMMARY.

In conclusion of the analysis made in this research article it should be acknowledged that the legislative proposal of the European Commission raises reasonable doubts of legal and practical nature. Although we currently at the beginning of the legislative path, the proposal itself provides an overview of the ideas that the European Commission would like to realise. The work on the document will require thoroughness on the part of the EU Member States' delegations and their common position on the postulated time of entry into force of the changes. Given that the European Commission itself failed to meet the report submission deadlines set out in the original Directive 2015/2302, the EU institutions should all the more take a liberal approach to the implementation of the regulations by EU Member States. It should be borne in mind that the amendment of the directive is also an instrument of maximum harmonization. Therefore, any deviations from the original text, drawn up as a result of work of the working groups, will have negative consequences. Consumers and traders can only hope that the harmonization of the system will be of benefit to both parties.

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