

# The implementation of the new PTD in France: a balanced deal between all actors?

By Valérie Augros

Over recent years the tourism industry has been notably transformed by technical innovations. As a result, appeared new travel products and services as well as new distribution models to respond to the changing of travellers' behaviour (gift box, "direct" travel arrangements, travel coach, etc.). In addition, traditional travel businesses had to adapt themselves to face such changes. The travel industry became more than ever a fast-growing competitive sector where new types of businesses are now entering the market (e.g. Airbnb, Google, Trip Advisor, etc.).

Above that, the travel package remains an attractive product for many travellers.

The EC Directive n° 90/314 of 13 June 1990 on package travel, package holidays and package tours was not anymore adapted given the significant transformations in the tourism industry.

The new Directive (EU) 2015/2302 of 25 November 2015 on package and linked travel arrangements (hereinafter "the directive" or "the PTD") aims at adapting the legal framework to this changing market.

Tourism plays an important role in the economy of the European Union as well as in the French economy. French are keen to travel and to spend money. France is a country that attracts many tourists.

France is considered as the 5<sup>th</sup> outbound market in the world in term of outbound tourism expenditures (after China, the USA, Germany and the United Kingdom).<sup>1</sup>



It is also considered as the 5<sup>th</sup> market in the world in term of earnings in 2016.<sup>2</sup>



Despite the development of new travel products, French travellers are still keen to discover a new destination through a package travel.<sup>3</sup> In 2015, 26.7% of overall travels consisted of a travel package. The package is preferred to travel abroad: 70.5%. This falls at 29.5% for travels in France. By reasons of extensive use of new technologies in the travel sector, it can be noticed that there is also a difference between generations. Travellers who are aged 40 or more prefer travel packages compared to youngest travellers. The percentage becomes more important for travellers who are 65 or more.

<sup>1</sup> Source: UNWTO, July 2017.

<sup>2</sup> Source: UNWTO, July 2017.

<sup>3</sup> Source: DGE, enquête SDT 2015

In view of the above figures, the travel industry at large (i.e. including TO, TA and also travel services suppliers) is important in France. And it is important to save the interests not only of French consumers who are travelling but also the French travel businesses who directly participate to the economy.



#### **I. Strengthening the travellers' rights: professionals are exposed to greater duties and risks**

Numerous regulatory instruments adopted at European level clearly aimed at improving the protection of consumers and/or ensuring their access to the internal market. Some of these instruments<sup>4</sup> affected directly or indirectly the travel sector.

In some other specific areas of the travel sector, further legal frameworks were adopted in favour of consumers; for instance, in transport of passengers: the EC Regulation n° 261/2004<sup>5</sup> on air passengers' rights for which the ECJ ruled in favour of the passengers considered as consumers.<sup>6</sup> The European Commission has just announced its intention to improve the rights of train passengers.<sup>7</sup>

<sup>4</sup> For instance, the Directive n°2006/123/EC of 12 December 2006 on services in the internal market; the Directive n°2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes.

<sup>5</sup> EC Regulation n°261/2004 of 11 February 2004, JOUE n°L046 of 17/02/2004, p1.

The new PTD is in line with this. It aims at reaching a high level of consumers' protection.<sup>8</sup> On the other hand, such a protection gives rise to higher duties for professionals.

#### **A. Anticipation of difficulties**

Following the new PTD the professionals will have to anticipate difficulties that may arise upon conclusion or execution of the package.

##### **1. Information**

The information obligations were already present in the Directive of 1990 and were introduced under French law in the tourism code at Articles R.211-2 and R.211-4. The new PTD completes the list of information to be communicated before the conclusion of the package contract and also those to be set out in the contract. The list provided by the PTD is exhaustive. Such information should further be given in a clear, comprehensive and prominent manner.

Precontractual information (Article 5 of the PTD) includes:

- the main characteristics of the travel services such as:
  - the travel destination(s), itinerary and periods of stay, with dates and, where accommodation is included, the number of nights included;
  - the means, characteristics and categories of transport, the points, dates and time of departure and return, the duration and places of intermediate stops and transport connections; the approximate time of departure and return

<sup>6</sup> ECJ, C-402/07 & C-432/07, 19 Nov. 2009, Sturgeon & a.

<sup>7</sup> Proposal for a regulation on rail passengers' rights and obligations – Com(2017) 548 - 2017/0237(COD), 27 September 2017.

<sup>8</sup> Recitals 3, 5, 51, 52.

where the exact time is not determined yet.

- the location, main features and, where applicable, tourist category of the accommodation under the rules of the country of destination;
  - the meal plan;
  - visits, excursion(s) or other services included in the total price agreed for the package;
  - where it is not apparent from the context, whether any of the travel services will be provided to the traveller as part of a group and, if so, where possible, the approximate size of the group;
  - where the traveller's benefit from other tourist services depends on effective oral communication, the language in which those services will be carried out; and
  - whether the trip or holiday is generally suitable for persons with reduced mobility and, upon the traveller's request, precise information on the suitability of the trip or holiday taking into account the traveller's needs;
- the trading name and geographical address of the organiser and, where applicable, of the retailer, as well as their telephone number and, where applicable, e-mail address;
  - the total price of the package inclusive of taxes and, where applicable, of all additional fees, charges and other costs or, where those costs cannot reasonably be calculated in advance of the conclusion of the contract, an indication of the type of additional costs which the traveller may still have to bear;
  - the arrangements for payment, including any amount or percentage of the price which is to be paid as a down payment and the timetable for payment of the balance, or financial guarantees to be paid or provided by the traveller;
  - the minimum number of persons required for the package to take place

and the time-limit, referred to in point (a) of Article 12(3), before the start of the package for the possible termination of the contract if that number is not reached;

- general information on passport and visa requirements, including approximate periods for obtaining visas and information on health formalities, of the country of destination;
- information that the traveller may terminate the contract at any time before the start of the package in return for payment of an appropriate termination fee, or, where applicable, the standardised termination fees requested by the organiser, in accordance with Article 12(1);
- information on optional or compulsory insurance to cover the cost of termination of the contract by the traveller or the cost of assistance, including repatriation, in the event of accident, illness or death.

It should be pointed out that the notion of brochure disappears. Information has then to be communicated by any means, provided it is on a durable medium.

Thus, upon conclusion of the package travel contract, the above-mentioned information will also be inserted into the contract together with the following information (Article 7 of the PTD):

- special requirements of the traveller which the organiser has accepted;
- information that the organiser is responsible for the proper performance of all travel services included in the contract in accordance with Article 13 and obliged to provide assistance if the traveller is in difficulty in accordance with Article 16;
- the name of the entity in charge of the insolvency protection and its contact details, including its geographical address, and, where applicable, the name of the competent authority designated by the Member State

concerned for that purpose and its contact details;

- the name, address, telephone number, e-mail address and, where applicable, the fax number of the organiser's local representative, of a contact point or of another service which enables the traveller to contact the organiser quickly and communicate with him efficiently, to request assistance when the traveller is in difficulty or to complain about any lack of conformity perceived during the performance of the package;
- information that the traveller is required to communicate any lack of conformity which he perceives during the performance of the package in accordance with Article 13(2);
- where minors, unaccompanied by a parent or another authorised person, travel on the basis of a package travel contract which includes accommodation, information enabling direct contact with the minor or the person responsible for the minor at the minor's place of stay;
- information on available in-house complaint handling procedures and on alternative dispute resolution ('ADR') mechanisms pursuant to Directive 2013/11/EU of the European Parliament and of the Council, and, where applicable, on the ADR entity by which the trader is covered and on the online dispute resolution platform pursuant to Regulation (EU) No 524/2013 of the European Parliament and of the Council;
- information on the traveller's right to transfer the contract to another traveller in accordance with Article 9.

With the new PTD, a special standard information form (as set out in the annexes of the directive) will also have to be communicated to the clients at the same time.

The organiser and the retailer shall bear the burden of proof to establish that the above

information was communicated to the travellers in due course (Article 8 of the PTD). In France, information currently has to be provided in writing, when possible (Article R.211-6 of the tourism code). Failure to provide a written contract may even sometimes give rise to severe consequence for the travel agent: he may be deprived from the right to request payment of the packages even though the client did travel<sup>9</sup> or he may not refuse cancellation by travellers before the start of the package<sup>10</sup>.

In concrete terms, French organisers will have to amend their general terms as well as any commercial documents presenting the package to comply with their new duties of information. However, French organisers are mainly concerned by the extent of such information and their details.

Indeed, it results from the new PTD that the list of information to be communicated to travellers has not only increased but requires also the organisers and/or the retailers to be more proactive with their clients.

For instance, it is currently admitted that particular requests or needs have to be raised by the client to the package seller before the conclusion of the contract. French lower courts ruled that disabled persons had to inform the organiser or retailer of their special needs when entering into the package travel contract,<sup>11</sup> unless the seller already had knowledge of this. Following the implementation of the new PTD, French organisers and retailers will have to provide extensive information about the accessibility of the various travel services contained in a package.

As regards "specific needs", the travellers will now have to make an enquiry before concluding the package travel contract should they wish them to be included into the contract and at the latest 48 hours before the start of the package. However,

<sup>9</sup> CA Paris, 29 June 2001, n°2000/15149.

<sup>10</sup> CA Paris, 12 January 2012, n°10/10325.

<sup>11</sup> TGI Paris, 10 June 2004, n°04/03428 (Marmara).

the organiser or the retailer may be well advised to take some steps to anticipate some possible needs or issues with regards to the proposed travel package.

The main issue for French organiser will be how detailed the information to be communicated to the travellers in respect of special needs or situation. Currently, with regards to case law and in particular the hostages of the Jolo Island case<sup>12</sup>, general information as to destination was held to be insufficient.

Following the new obligations set out in the directive, the organisers will have to provide very detailed information even if they are not relevant to all their customers. The organisers cannot limit the information provided on destination and on possible special needs to basic information. Information has to be detailed as French travel agents are severely judged if it appears that information was not sufficient.

## 2. Changes and termination of the contract before the start of the package

Changes to the package travel contract as well as termination were already specified under certain circumstances by the Directive of 1990 and implemented in the French tourism code.

The new PTD extended the scope of changes to the contract or of termination before the start of the package. Changes or termination can be initiated either by the organiser or by the traveller.

With regards to changes to the contract and termination of the package contract initiated by the organiser, the directive maintains cases set out in previous directive. Indeed, changes are admitted only in respect of alteration of price (Article 10) and of insignificant change (Article 11). As regards termination of the contract by the organiser, this is exclusively possible in case of insufficient number of travellers (provided

that a clause was set out in the contract) or unavoidable and extraordinary circumstances (Article 12.3.).

Such provisions are familiar for the professionals.

In fact, the organisers will most importantly have to anticipate the risk of change or of termination decided by the travellers.

The French travel agents raised that this would involve an increase of price, whereas they are subject to great competition in this sector in the internal market but also worldwide. Indeed, the travellers are entitled to change and even to put an end to the package travel contract in the following circumstances:

- Transfer to another traveller (Article 9). Such a change can be realised at the latest 7 days before the start of the package after notice to the organiser. However, if both parties to the transfer (i.e. the transferor and the transferee) are jointly responsible for the payment of due balance or any additional costs arising from the transfer, the organiser has the burden of proof to establish the reasonableness of the costs for such a transfer.

Currently, the tourism code, at Article L.211-11, provides such a right for the travellers which had to be exercised at the latest 7 days before the start of the package, or 15 days in case of cruises.

- Significant change to the main characteristic of the travel services or price increase by more than 8% (Article 11.2). In such a case, the traveller is entitled to terminate the contract without paying any termination fee. He will obtain a full refund of the package price. This right existed already but there was no clear indication as to the notion of "significant increase".

Under French case law, it is considered that an increase of 12% of the package

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<sup>12</sup> CA Paris, 23 January 2009, JCP G 2009 II 10083.

price was significant, despite a discount granted by the travel agent.<sup>13</sup>

- Right to terminate the contract (Article 12.1). The traveller may terminate the contract at any time before the start of the package provided that payment of “an appropriate and justifiable termination fee” is made to the organiser. Such a termination can intervene without any reason from the traveller. Here again the organiser will have to justify that the termination fee is reasonable.

Such an obligation to justify the reasonable amount of the termination fee will in practice be difficult to comply with for travel agents. Such a provision may clearly lead to discussions with the consumer who seems finally to be the only person who can assess reasonableness – subject to court’s supervision. Organisers are left with greater risk of litigation in this respect even though they clearly provided fixed termination fee amounts (depending on the date of termination by the traveller) in their conditions.

- Unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package or which significantly affect the carriage of passengers to destination (Article 12.2).

This is a quite extensive right granted to travellers by the new PTD. Such a right may be considered as a counterpart to the right for the organiser to terminate the contract in case of unavoidable and extraordinary circumstances set out in Article 12.3. At first view, the conditions of application of this right seem narrower compared to the possibility for the organiser to terminate the contract for unavoidable and extraordinary circumstances. Indeed, the directive mentions that such an event should

occur at the destination whereas such a criterion is not required for the organiser.

However, the traveller will be entitled to terminate the contract upon his own assessment of the situation. Reference for instance to the foreign office advice and recommendation may well assist to this end, but not necessarily.

Before the new PTD, the decision to terminate the contract because of unavoidable and extraordinary circumstances was only left with the travel agent, under his responsibility. However, the travel agent was entitled to maintain the contract and/or to carry on the performance of the package even though an event occurred at destination but did not affect the performance of the package.

This new right has a great impact for organisers who would have to anticipate any event that may fall in the definition at the time of entering into the package contract.

The examples of events found in the directive and considered as an ‘unavoidable and extraordinary circumstance’ are quite broad: warfare, terrorism, risks to human health, natural disasters, weather conditions, etc.<sup>14</sup> Then, it is likely that the existence of threats or even the possibility of such events at destination will be interpreted as a “serious security problem” even though the advice and recommendation of the foreign office are not necessarily alarming.

Travellers will thus be entitled to full refund but they will not be able to claim further compensation (e.g. moral damages, etc.).

In a French case, the visit of an archeologic site, which was included in a travel package, was cancelled because of important flood in Thailand few days

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<sup>13</sup> Cass. Civ. 1, 10 September 2015, n°14-16734.

<sup>14</sup> Recitals 31.

before the start of the package. For the Court, this event constituted a circumstance for which the travellers were entitled to terminate the contract at no costs, even though all the other travel services agreed in the package for a thirteen-days holiday were not affected at destination. The Court carried on ruling that such a visit was a substantial service of the package, hence the right to terminate it.<sup>15</sup>

French courts interpreted here again with severity the right to terminate the package. In implementing the new PTD it may then possible to attempt to mitigate such effects, given that two requirements are now expressly listed: (i) the event occurs at destination or its immediate vicinity and (ii) the event significantly affect the performance of the package (or of the carriage to the destination).

It results that organisers will have to face many situations where there is an accrued risk of cancellation of the package by the travellers. Interpretations by French courts given in such situations to date were quite severe to the organiser. Now this right is expressly mentioned in the new PTD the French organisers and retailers are quite concerned with regards to their financial position.

- Withdrawal in respect of off-premises contracts (Article 12.5). The new PTD now expressly recognizes a right of withdrawal to the travellers. Such a right has to be exercised within 14 days from the date of conclusion of the package travel contract.

French law expressly excludes the right to withdraw a package contract concluded at to distance and off-premises (Article L.221-2 of the French consumer code). However, the member State have some flexibility in this respect to adopt this rule or not. It remains to be

observed whether the French legislator will introduce this right for package under French law, given that right of withdrawal is expressly excluded for travel services which are sold outside a package (such as accommodation, transport, car rental, restaurant - Article L.221-28 of the consumer code).

The new PTD introduces extensive cases where the travellers have the right to change and even to terminate the contract before the start of the package. Such a flexibility granted to travellers will have a significant impact for professionals. Organisers will have to anticipate possible changes to the contract or termination. This will without any doubt imply an increase of the travel package price.



## **B. Resolution of difficulties**

Performance of the travel package contract is under the responsibility of the organiser. This responsibility may be extended to the retailer, if the member States decide to maintain or to introduce, as the case may be, such a provision in their laws.

Currently, the provisions of the French tourism code relating to travel package apply to both organisers and retailers. It is very likely that these provisions will be maintained following the transposition of the directive in French law.

Except in cases where it is not possible or it would involve disproportionate costs, the

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<sup>15</sup> Cass. Civ. 1, 2 october 2013, n°12-23568.

organiser has to remedy the lack of conformity in respect one of the travel services mentioned in the package. The remedy can consist in a new travel arrangement of similar or higher quality and is at no cost for the traveller.

In any case, the lack of conformity will give rise to a price reduction to the benefit of the travellers. In some cases, a compensation can be sought alternatively or additionally to the price reduction, against the organiser.

However, the travellers, who have previously informed the organiser of the difficulty, are granted extended powers in case of lack of conformity which are not remedied by organiser. Here again the organiser will have to anticipate this.

- The traveller is entitled to remedy himself the lack of conformity. It should be outlined here that he will assess whether a delay can be left to the organiser to remedy the difficulty or if an immediate remedy can be taken. He will be reimbursed any expenses exposed to find a remedy.
- The traveller is entitled to refuse the proposed alternative arrangements when they are not comparable to the initial services agreed in the package or if the price reduction is not appropriate. This right applies only where a significant proportion of the travel services cannot be provided pursuant to the contract.
- The traveller is entitled to terminate the contract, as well as to request repatriation if the contract provided transport, when the lack of conformity substantially affects the performance of the package. Such a termination is at no costs for the traveller.  
The repatriation obligation was already set out in the tourism code

at article L.211-15 *in fine*. French courts apply these provisions severely to the travel agent.

The rights now expressly provided to travellers under Article 13 of the directive are very broad. Most importantly, travellers will assess themselves the extent of their rights and French courts will certainly and generally be reluctant to oppose a different interpretation.

For instance, when the Eyjafjöll volcano erupted, many travellers were blocked at their destination without having the possibility to travel back home. In a court case, a family had booked a package to Greece. By reason of the volcano eruption, the European airspace remained closed for several days. The family was thus not able to return to Paris at the agreed date. Consequently, they had to arranged further accommodation at their hotel in Greece for two additional days. They were then offered an air transport to Vienna but no other alternative transport to Paris. The French court observed that no compensation can be sought given that this should be considered as a force majeure case. Nevertheless, it further ruled that pursuant to Article L.211-5 of the tourism code, the travel agent had to offer alternative arrangements and in particular accommodation and alternative transport to Paris. The travel agent was held to pay the accommodation costs exposed by the family as well as the train expenses to Paris.<sup>16</sup> The Cour de Cassation (the highest jurisdiction under French legal system) confirmed this position in other very similar cases.<sup>17</sup>

It appears that this position will certainly remain applicable after the transposition of the directive in France.

The directive nevertheless provides a cap in such particular situations. The organiser shall support the costs up to three nights for accommodation in the case where it is not

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<sup>16</sup> Jur. Prox. Orléans, 15 février 2011, n°91-10-380, BTL n°3370 20June 2001, p371.

<sup>17</sup> Cass. Civ. 1, 8 March 2012, n°10-25913; Cass. Civ. 1, 17 October 2012, n°11-23387.



possible to ensure the traveller's return because of unavoidable and extraordinary circumstances. It should be outlined here that a draft regulation to amend the EC Regulation n°261/2004 on air passengers' rights is still under discussion. With regards to the current drafting, a maximum of three nights' accommodation has to be offered by the airline to assist the passengers if a flight cannot be operated because of an extraordinary circumstance.<sup>18</sup> The European legislator intended to provide similar provisions for the organisers of travel package. All businesses will be treated equally to this end.

However, the duty to bear the costs of accommodation is not limited when the traveller is a vulnerable person. Fall under this category, persons with reduced mobility and accompanying persons, pregnant women, unaccompanied minors, as well as persons in need of specific medical assistance provided that notice was given to the organiser at least 48 hours before the start of the package.

In view of the above, the traveller will have high ability to assess whether the proposed remedy is appropriate or exists at all. Such provisions will certainly give rise to discussions between the parties to the travel package contract should a lack of conformity be raised by a traveller.

The price reduction is granted in cases where there is a lack of conformity of supplied services, unless it is established that the lack of conformity is due to the traveller.

In addition, the traveller should be fully compensated without delay when he sustains a prejudice as a result of a lack of conformity. However, the new PTD maintains the three exclusions of liability that were already set out in the directive of 1990. Such exclusions are:

- Lack of conformity attributable to the traveller;
- Unforeseeable and unavoidable lack of conformity attributable to a third party (who is not connected to the provisions of the travel services agreed in the package);
- Unavoidable and extraordinary circumstances. In the new PTD, the definition has been clarified. Indeed, should be considered as unavoidable and extraordinary circumstances "*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*".

It should further be noted that the organiser will now be expressly entitled to invoke the limitations set out in various international conventions that bind the European Union, such as the Montreal Convention of 28 May 1999. For other international conventions that bind only a member State, an express provision in the transposition measures will have to be adopted to allow the organiser to invoke the imitations. Contractual limitations are also admitted except for personal injuries cases or for damage caused intentionally or by negligence and provided that the limitation does not amount to less than three times the total price of the package.



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<sup>18</sup> Com(2013) 0130 – C7-0066/2013 – 2013/0072(COD), 5 Feb. 2014.

The new PTD does not provide an express limitation period to make a claim under the new provisions. It only fixes a minimal duration of two years. The member States will not be entitled to provide shorter limitation period.

## **II. Ensuring competitiveness of travel businesses: professionals are under serious hesitation**

Besides consumers' aspects, the directive clearly outlines that it aims at improving competitiveness and fair competition between companies of the travel sector.<sup>19</sup>

### **A. The delicate scope of the package and linked travel arrangements**

Since the Directive of 1990, the travel market has been subject to significant transformations. The technical innovations played an important role in this regard. The behaviours of travellers have considerably changed and travel services are now often combined under various means: if pre-arranged travel packages are still offered for sale, travellers are keen to prepare their holidays in their own manner and to combine themselves travel services, in particular through the Internet or even their mobile.

However, it was outlined that the combination of travel services arranged by travellers did not necessarily fall under the package definition. Such a situation was not apprehended by member States laws. Consequently, travellers were quite confused: such combined services gave not necessarily rise to the package protection granted by the Directive of 1990, even though they comprised most of the time travel services such as transport and accommodation.

It was therefore decided to extend the definition of the travel package under the new PTD. The package is now defined as:

*a combination of at least two different types of travel services 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, those services are:*

*(i) purchased from a single point of sale and those services have been selected before the traveller agrees to pay,*

*(ii) offered, sold 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, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.*

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<sup>19</sup> Recitals 4, 5, 6, 14.

*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 a significant proportion 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.*



The directive also introduced the concept of linked travel arrangements. The purpose was to take into consideration the developments of the travel arrangements effected by travellers in particular through the Internet (but not exclusively). This is defined as:

*at least two different types of travel services purchased 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 trader facilitates:*

*(a) on the occasion of a single visit or contact with his point of sale, the separate selection and separate payment of each travel service by travellers; or*

*(b) in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.*

*Where not more than one type of travel service as referred to in point (a), (b) or (c) of point 1 and one or more tourist services as referred to in point (d) of point 1 are purchased, they do not constitute a linked travel arrangement if the latter services do not account for a significant proportion of the combined value of the services and are not advertised as, and do not otherwise represent, an essential feature of the trip or holiday.*

Despite its definition, the concept of linked travel arrangements is quite vague. This will certainly give rise to uncertainty and confusion for the professionals in the travel industry.

In particular, issues would certainly be raised when some travel services (accommodation, transport, car rental) will be combined with other travel services (as laid down in Article 3 (1) (d) of the directive): sometimes this will be considered as a package and sometimes as a linked travel arrangement. The manner to offer the combination will assist to determine the applicable regime, however, this will be subject to court's interpretation in case of dispute.

Further, while the offer and sale of a travel package is subject to numerous obligations to be fulfilled by the organiser as mentioned hereinabove (obligation of information, obligation of remedy, obligation to reduce the price and/or to compensate in case of lack of conformity, etc.), the offer and sale of linked travel arrangements give rise for the professionals (i.e. the traders facilitating the LTA, as defined by the directive) only to two types of obligations:

- Obligation to provide a security, and
- Obligation to inform the traveller about the extent of protection.

Nevertheless, if the trader fails to comply with any of the two above obligations, the sanction set out in the directive is quite deterrent. The trader will be applied most of the rules normally applicable in case of package and in particular:

- Right for the traveller to transfer the contract to another traveller (as laid down in Article 9);
- Right for the traveller to terminate or where the conditions are met, to withdraw the contract (as laid down in article 12);
- Right for the traveller to obtain from the professional appropriate remedy in case of lack of conformity and to obtain a price reduction and/or compensation (as laid down in Chapter IV).

Therefore, unless the trader who facilitates linked travel arrangements fails to comply with the requirements set out in Article 19.1 and 19.2 of the directive, his responsibility would be admitted insofar that a breach can be established and a prejudice to the traveller evidenced. He will not be requested to provide a remedy in similar conditions as for the organiser of a package.

The difference of regime applicable to the organiser of a package on one hand and to the trader facilitating linked travel arrangements on the other hand can be explained by the fact that the traveller is informed correctly and in advance of his rights as well as of the extent of protection.<sup>20</sup>

This new regime sets out a minimal framework for traders who are not offering or selling a package but who are facilitating the combination of travel services. From consumers' point of view, it was necessary to inform them of the consequence of

purchasing combined services outside a package. The second purpose was to reinstate fair competition among various types of travel professionals, whether they sell packages, linked travel arrangements, only one travel service or all types of travel products. Some sort of balance was sought between the travel professionals following the introduction of the new concept of linked travel arrangements. However, this balance will be delicate to maintain in practice and the assessment of each combination of services will certainly give rise to hesitation.

French businesses are quite concerned by the introduction of a new category (the LTA) of products and by the difference of treatment with the package. Their responsibility will further be broadened under the package (see hereinafter in paragraph B).

Another issue will be the competition with non-EU professionals selling package or LTA in the European Union. Even if in terms of security, the directive obliges them to take a security in the member State where they direct their activities, effective control and sanction may be rendered difficult in practice.

Arbitration may then come surprisingly come from the consumers to re-establish fair competition: this supposes that they are well informed of their rights and potential risk of a lack of security and are not exclusively preoccupied by costs issues!

## **B. The delicate issue on extent of responsibility**

### **1. Current position under French law**

When the directive of 1990 was transposed in France with the law n°92-645 of 13 July 1992 a special liability regime was adopted. In fact, the French legislator decided to implement a severe regime as he provided

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<sup>20</sup> See recital 16.

for strict liability of the organisers as well as of the retailers who are organising or selling a package (“*responsabilité de plein droit*”).

Article L.211-16 of the tourism code provides:

*Any natural or legal person who carries out the operations referred to in Article L.211-1 shall be strictly liable to the purchaser for the proper performance of the obligations arising from the contract, whether this contract has been concluded at and that these obligations are to be carried out by himself or by other service providers, without prejudice to his right of recourse against them and within the compensation limits provided for in international conventions.*

*However, he may be exonerated from all or part of his liability by proving that the non-performance or improper performance of the contract is attributable either to the purchaser or to the unforeseeable and unavoidable act of a third party unconnected with the provision of the services provided for in the contract, or to a case of force majeure.*

According to the above provisions, the traveller does not have to establish the fault of the organiser, the retailer (who is applied the same provisions under French law) and he does not even need to evidence the foreign law of the country where the improper performance or accident took place or negligence of the local service provider!

Then in case of improper or absence of performance, the traveller is entitled to bring proceedings against the organiser, the retailer or both.

The organiser or the retailer currently have an “obligation of result” towards the traveller but also a duty of security.

The prejudice sustained by the traveller may thus consist in a material damage but also in a non-material damage (moral damage, see hereinafter).

The organiser or the retailer are deemed to be liable but they can raise a defence to the traveller’s claim. Therefore, the liability will be held pursuant to Article L.211-16 of the tourism code, unless the defendant can establish that failure to perform or improper performance is:

- attributable to the purchaser of the package,
- attributable to a third party unconnected to the provision of the travel services and was unforeseeable and unavoidable,
- attributable to a case of force majeure,

in which case, the organiser or the retailer will be able to reduce or to avoid liability. However, the evidence that they did not commit themselves a breach is not relevant.

Since 2009, it is possible for the organiser or the retailer to invoke the limitations mentioned in international conventions, such as the Montreal Convention of 1999.

In addition, the right of recourse against a travel service provider has been recognised. In practice, the organiser or the retailer will have to establish in such a case the fault committed by the service provider... but in most cases this would be subject to local standards.

The provisions of Article L.211-16 of the tourism code are often applied strictly by French courts.

For instance, a travel agent has been held liable for the moral prejudice sustained by the travellers who have been detained by pirates on the Jolo Island for more than four months. The Court considered that such an event was not unforeseeable as the French government (the foreign office) published few days before the start of the package a note on potential risks at destination. The

Court further ruled that no action was taken by the travel agent to avoid such a risk.<sup>21</sup>

Another example showing the severity of French courts: Travellers had a package holiday to India. Their flight departing from Paris via Frankfurt was cancelled because of snow in Germany that disorganised air traffic. For the Court, the travel agent has to compensate the travellers as it was not demonstrated that the presence of snow in Germany in March was unforeseeable nor unavoidable.<sup>22</sup>

In practice, case law is quite reluctant to exonerate the travel agent, unless the harmful event took place “outside” the execution of the travel services agreed in the package, for instance during an excursion which was not included in the package.

This was the case for example for a couple who booked a package for holidays in Morocco and who decided at destination to purchase a further excursion. They had an accident during this excursion. The Court decided that such excursion was not included in the package. It observed that the booking and payment were directly made to the local supplier, without the travel agent intervention. The liability of the travel agent was not retained.<sup>23</sup>



## 2. Expectations of French tour operators and travel agents

The French provisions are very favourable to the travellers who purchased a package. Nevertheless, these provisions clearly affected the competitiveness of French organisers and retailers on the European market. The current liability regime (strict liability) involves for French travel professionals, significant costs in particular for insurance. Such costs necessarily have an effect at the end on price of travel products sold by French actors and thus, on their competitiveness in the internal market.

It was observed upon the adoption of the directive that the variety of responsibility regimes applied in member States was restraining the internal market in respect of travel package.<sup>24</sup>

This explains the reasons for a full harmonisation process (Article 4) expressly provided in the new PTD and member States cannot normally introduce more or less stringent provisions in national laws.

With the implementation of the new PTD, French travel professionals expect in view of the principle of full harmonisation that the regime of liability would be made more flexible, at least in a similar extent compared to other European professionals.

The implementing measures have not been adopted in France yet, despite a consultation process between the travel sector and the administration, launched in early 2016. The government has then been authorized by the French parliament to draft an ordinance transposing the new PTD.<sup>25</sup> The draft ordinance should normally be adopted before the end of this year. The extent of responsibility of the French organisers will thus remain undisclosed until publication of the ordinance.

<sup>21</sup> CA Paris, 23 January 2009, JCP G 2009 II 10083.

<sup>22</sup> Cass. Civ. 1, 5 Nov. 2009, n°08-20385.

<sup>23</sup> Cass. Civ. 1, 15 January 2015, n°13-26466.

<sup>24</sup> See Recital 6.

<sup>25</sup> Article 64 of the Law n°2016-1888 of 28 December 2016.