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**Report on the Implementation  
of Directive 90/314/EEC on Package Travel and  
Holiday Tours in the Domestic Legislation of EC  
Member States**

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**ANNEX I**

Legal texts adopted by Member States in order to transpose Directive 90/314/EEC, infringement proceedings and decisions by the European Court of Justice related thereto

**ANNEX II**

Brief survey on national legislation transposing Article 7 of Directive 90/314/EEC

## INTRODUCTION

Nine years after the adoption and seven years after the coming into force of Directive 90/314/EEC on Package Travel and Holiday Tours<sup>1</sup> the Commission releases the present report with the aim

- to inform on the measures taken by Member States to transpose that Directive,
- to identify the problems thereby occurred and
- to launch a discussion that could, eventually, lead to an improved implementation.

Following these objectives, the **first part** of this report gives a brief summary of the measures of transposition adopted by Member States and, where appropriate, of infringement procedures relating thereto. On this basis, some issues for further discussion are identified.

A complete list of national measures of implementation and infringement procedures is given in **Annex I**. This annex also lists the decisions of the European Court of Justice relating to Directive 90/314/EEC.

The **second part** of this report is dedicated to the transposition and implementation of Article 7 of the directive, which, among all the provisions contained in the Directive, opens the largest margin of interpretation and has therefore been transposed in very different ways by the various Member States. The European Court of Justice have made a number of decisions with reference to Article 7 of the directive which are analysed below. In addition, proposals are made as to the interpretation of this Article.

Short commentaries on the legal texts transposing Article 7 of the are given in **Annex II**.

The Commission invites the governments of Member States as well as all other interested persons to submit their comments on this report until 30 April 2000 to the following address:

European Commission  
Directorate General Health and Consumer Protection  
Unit C/2  
Rue de la Loi 200  
B-1049 Brussels  
Belgium

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<sup>1</sup> OJ No L 158 of 13 June 1990, page 159

## 1. GENERAL REMARKS ON THE IMPLEMENTATION OF THE PACKAGE TRAVEL DIRECTIVE

Essentially, the purpose of the Package Travel Directive is to set out minimum standards concerning the information provided to the consumer, formal requirements for package travel contracts, to provide compulsory rules applicable to the contractual obligations (cancellation, modification, the civil liability of package tour organisers or retailers etc.) and to achieve an effective protection for consumers in the case of the package tour organiser's insolvency:

### **Information of consumer:**

Information must not be misleading (Art 3 – 1)

Minimum information to be contained in brochures – Brochure is binding to organiser/retailer (Art 3 – 2)

Minimum information to be given to consumer (visa requirements, time schedules, local representative etc) (Art 4 – 1)

### **Contract law:**

Minimum form requirements and minimum information to be contained in the contract (Art 4 – 2)

Transfer of booked package must be possible (Art 4 – 3)

No price changes, except under special circumstances (Art 4 – 4)

In case of alteration of package consumer must have right to either withdraw and receive compensation for non-performance or accept substitute package. (Art 4 – 5)

In case of grave problems after departure: alternative arrangements or home transport (Art 4 – 7)

### **Liability:**

Organiser/retailer liable for proper performance and for damages (Art 5)

In cases of complaint, organiser must take prompt efforts to find solution (Art 6)

### **Security in case of insolvency:**

Security must be provided for refund of money paid over and for repatriation in case of security (Art 7)

### 1.1. The Transposition of the Directive into Member States' domestic legislation

The Directive is now completely transposed by all Member States, with the sole exception of Italy, where the Travel Guarantee Fund, which should provide the security foreseen by Article 7 of the Directive, has not yet been created.<sup>2</sup>

The laws adopted by Member States in order to comply with the Directive have been scrutinised by the Commission. In this context, it should be noted that many of the Directive's provisions allow for a very large margin of interpretation for national legislators. Consequently, the approaches taken by different Member States to transpose the Directive (and the level of protection of consumers' economic interests) differ considerably. However, the cases where the Commission has observed that the Directive had not been correctly transposed into a Member State's domestic legislation have remained rather scarce.

Whilst several of the provisions of the Directive might be considered imprecise, we limit ourselves to give a few examples that illustrate the potential problem:

- The whole issue of the field of application of the Directive, as provided for in Article 2: what is meant by “pre-arranged combination”? Are tailor-made holidays not included? How are the words “other than occasionally” in the definition of a travel organiser to be understood? What is meant by “other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package”? Member States have incorporated these definitions into their domestic legislation<sup>3</sup>, thus staying in line with the directive, but at the same time transporting the problem of interpretation from the supranational to the national level.
- Art 4 (3) of the Directive provides: “Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package.” Most Member States have not foreseen, in their legislation, a definition of what would be considered a “reasonable notice”<sup>4</sup>. Some Member States have foreseen a deadline of a few days before departure<sup>5</sup>.

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<sup>2</sup> An infringement procedure (96/2155) is pending

<sup>3</sup> e.g. Sweden, § 2 Package Tours Act (SFS 1992:1672) and Denmark, Chapter 2 of Law 472 of 30 June 1993; Germany (§ 651a BGB) does not at all foresee a definition of a package in the sense of the Directive.

<sup>4</sup> e.g. Austria, § 31c (3) Konsumentenschutzgesetz, Sweden § 10 Package Tours Act (SFS 1992:1672)

<sup>5</sup> For example, Italy, in Art. 10 of Legislative decree 111/1995, foresees a deadline of 4 working days before departure; Germany (§ 651b BGB) even foresees that the package may be transferred at any time before departure

Luxembourg foresaw a deadline of three weeks<sup>6</sup> which was considered excessive by the Commission, which therefore initiated infringement proceedings<sup>7</sup>.

- Article 5 (2) of the Directive provides in its last sentence: “In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.” Here again, the views on which limitation would have to be considered “unreasonable” seem to differ considerably. While some Member States have simply not transposed the provision (thus applying the general rules of their tort law)<sup>8</sup> or taken over the provision of the Directive, others have issued more detailed provisions<sup>9</sup>. The Commission, being in charge of the control of application of the directive, would from its part consider “unreasonable” a provision that would limit or exclude the organiser’s/retailer’s liability in cases of gross negligence; this policy appears to be in keeping with the general rules of tort law in all Member States.<sup>10</sup>
  
- Article 6 of the Directive provides: “In cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions”. Obviously, this provision is extremely vague: it constitutes no obligation for the organiser/retailer to have a local representative to which consumers could address their complaints, and it does not set out what is meant by an “appropriate” solution. For example, if the complaint appears unreasonable to the organizer, he might consider it “appropriate” to take no further action. Furthermore, organizers/retailers are obliged “to make prompt efforts to find an appropriate solution”, not to actually find one. No wonder,

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<sup>6</sup> Règlement grand-ducal du 04/11/1997 déterminant les éléments de l'information préalable et les dispositions du contrat relatifs aux voyages, Art 3, par 15

<sup>7</sup> Infringement procedure 98/2388

<sup>8</sup> e.g. Austria, Sweden, Denmark

<sup>9</sup> Ireland, Statutory Instrument 1995 N° 235, Regulation 20 (4)(b) foresees that “the organiser may not limit liability to less than (a) in the case of an adult an amount equal to double the inclusive price of the package to the adult concerned, and (b) in the case of a minor an amount equal to the inclusive price of the package to the minor concerned”. In Italy, a minimum threshold is determined by referring to Art 13 of the CCV (International Convention of Travel Contracts, Brussels, 23 April 1970). In Germany, liability can be limited to triple the value of the package (c.f. § 651h Abs 1 BGB). In Portugal, liability may be limited to five times the price of the package (c.f. Decree-Law 209/97, Art. 40 (5))

<sup>10</sup> However, these general rules of tort law, which are of decisive importance for the application of the Directive, have not been notified by the Member States to the Commission. Any shortcomings in the application of this aspect of the Directive, if such existed, could only be revealed by individual complaints submitted to the Commission. Until now, the Commission has not received any complaint that would allow for the conclusion that an “unreasonable” limitation of liability were admitted under a Member State’s domestic legislation. In any case, any such limitation could be assessed under national legislation implementing Directive 93/13 on Unfair Contract Terms.

therefore that some Member States<sup>11</sup> have not explicitly transposed this provision, whereas others have adopted rules that differ considerably from the Directive.<sup>12</sup>

- Finally, the interpretative problems raised by Article 7 of Directive are so important, that a separate section of this report needed to be dedicated to this complex matter.

## 1.2. Points for Discussion

As can be seen from the above, the control of transposition has not only revealed some shortcomings in the national measures of execution adopted by the Member States but also some weaknesses in the Directive itself.

The Commission would therefore like to invite further reflection by Member States' governments and all interested parties on the following points which may finally lead to a common interpretation of the Directive. If necessary, modifications of the Directive could also be envisaged.

### 1.2.1. *The scope of the Directive*

According to Article 2, the Directive is applicable to organisers, who, other than occasionally, organise packages and sell them or offer them for sale, whether directly or through a retailer. A “package” in the sense of the Directive is a pre-arranged combination of transport, accommodation and other tourist services (wherever two of these three elements are combined), sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation.

Some elements of this definition might be reconsidered. For example, the criteria “*sold or offered at an inclusive price*” appears to be on the one hand a compulsory element of the definition of package travel and thus of the scope of the directive. On the other hand, the last sentence of Article 2 (1)<sup>13</sup> seems to state that the element “*inclusive price*” has only indicative character. This point should be clarified.

Similar concerns could be raised by the criteria “*when the service covers a period of more than twenty-four hours or includes overnight accommodation*”. This phrase excludes from the scope of application of the directive all packages that cover a period of less than 24 hours and do not

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<sup>11</sup> E.g. Italy, Germany

<sup>12</sup> For example, Austria (§ 31e Konsumentenschutzgesetz) foresees that in case of non-execution or insufficient execution (which is quite different from the “case of complaint” envisaged by the Directive) the organiser is obliged to undertake all reasonable effort to provide assistance to the consumer to overcome difficulties (which is also not mentioned in the Directive: are cockroaches in the hotel room a reason for complaint or a “difficulty” that needs to be overcome?). A local agent is not mentioned.

<sup>13</sup> “The separate billing of various components of the same package shall not absolve the organizer or the retailer from the obligations under this directive”

include accommodation, e.g. organised sightseeing excursions or the organised tours to cultural or sport events.

For example, an arrangement consisting of a ticket for the Soccer World Cup Final and a return air ticket for the same day could easily cost more than an average one week package tour. The need for consumer protection is comparable in these circumstances.<sup>14</sup>

Also, the meaning of the word “*pre-arranged*” in the definition of package travel occasions some uncertainties. In the original proposal for the Directive<sup>15</sup>, it had been made clear that the Directive should be applied only to packages that were offered “*by means of brochures, or other forms of advertising, to the public generally*”<sup>16</sup>, so as not to include tailor-made arrangements. In the later course of the legislative procedure, however, the Economic and Social Committee and the European Parliament considered that this was an excessive restriction upon the scope of the proposal. The amended proposal eliminated this restriction<sup>17</sup>. Accordingly, also packages that have not been advertised as such are to be considered “pre-arranged”. If this is the case, then it would be difficult to argue that tailor-made packages are excluded. Within the definition of “package” in Art 2 of the Directive, the word “pre-arranged” appears to be artificial, of unclear meaning and effect and could be eliminated. The consumers’ need for protection may, in some circumstances, be the same with regard to tailor-made as with regard to other packages.<sup>18</sup>

Finally, some provisions of the Directive, especially the organiser’s/retailer’s duty to provide security for the event of his insolvency, require public authorities to undertake steady efforts to supervise the market and to enforce the law. Many Member States have therefore instituted a licensing system under which each travel organiser/retailer needs to fulfil certain requirements in order to obtain a license that would allow him to pursue his business. Nevertheless, the Commission would like to point out that the provisions of the Directive must be applied to all travel organisers/retailers in the sense of Article 2 of Directive 90/314, not only to those who are in possession of a valid license<sup>19</sup>. Otherwise, it could occur that the civil liability of somebody, who is unlawfully organising packages in spite of not holding a license would

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<sup>14</sup> Note that the Austrian measures of execution have not taken over the limitation to services lasting more than 24 hours, thus considerably broadening their field of application.

<sup>15</sup> OJ No C 96, 12.4.1988, p.5

<sup>16</sup> cf. the definition of “organizer” in the original proposal.

<sup>17</sup> Amended Proposal OJ No C 190, 27.7.1989, p. 10

<sup>18</sup> Note that the Portuguese Law (Decree-Law 209/97) specifically mentions “tailor-made” holidays in its Article 17 (3). However, most of the provisions transposing Directive 90/314/EEC are not applicable to this type of arrangement, but only to package tours (as defined in Article 17 (2)).

<sup>19</sup> such is the case in Italy (c.f. Art 3 and 4 of Legislative Decree 111/1995)



be less strict than the liability of a licensed travel agent. This would be contrary to the aims of the Directive, even if the unauthorised travel organiser/retailer were to face a fine.

### 1.2.2. Liability

Article 5(1) of the Directive provides: “Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.”

With this provision, the Directive has left it to the Member States to determine the respective liabilities of organisers and retailers. Obviously, the Directive aims that national legislators determine clearly who is liable to the consumer.

The majority of Member States have made provision for a different and separate liability of the organiser and the retailer, with each of them being liable for problems occurred in their respective spheres.<sup>20</sup> The non-performance of the services involved in the package and supplied by third parties in most Member States entails the direct liability of the tour organiser, but not of the retailer.

Yet this might lead to shortcomings in the case where a consumer purchases from a retailer in his home country a package organised by a foreign tour organiser (or even by an organiser who has his seat outside the EEA). In this case, the consumer might have to address complaints to a defendant organiser outside his own country, which would entail all the disadvantages connected to trans-border litigation<sup>21</sup>. This would be contrary to the aims of the directive, which was to provide the consumer with one contract partner responsible for the execution of the contract and easily accessible to him (as opposed to the previous situation where complaints were to be addressed to a great diversity of suppliers in the country he is travelling to).

This point should be clarified. If need be, the Directive could be amended to clearly state that a retailer, who offers packages that are organised by an organiser based in a jurisdiction outside the EEA, shall be held liable for their proper execution.

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<sup>20</sup> e.g. Austria, §§ 31b-f Konsumentenschutzgesetz, OGH 6 Ob 519/95; Belgium, Law of 16 February 1994, Art. 18 and 27; Italy, Legislative Decree 111/1995, Art. 14; In Portugal, liability rests with the Travel agent (retailer), c.f. Decree-Law 209/97, Art. 39. The UK Package Travel Regulations, Reg. 2, paragraph 1, define the travel contract as “the agreement linking the consumer to the organiser or retailer, *or to both* as the case may be”; this wording appears to allow to hold the retailer liable in addition to the organiser.

<sup>21</sup> e.g. the questions of the applicable law, the competent law court, the enforcement of a judgment or the language problem

### 1.2.3. *Issues not covered by the Package Travel Directive*

Even if the Package Travel Directive were completely and satisfactorily transposed by all Member States, the protection of consumers in the field of tourism would still be open for improvement. The Commission would like to highlight the following deficiencies:

- Rules to be applied in the case of the unjustified withdrawal of the consumer from their contract:

The Directive makes no provision for the case where the consumer withdraws without good reason from the travel contract. In practice, travel contracts contain “penalty clauses” that specify penalties of up to 100% of the package price (depending on when the withdrawal is effected)<sup>22</sup>. Yet such penalties should be limited to a reasonable extent, corresponding to the damage caused by such behaviour. While it is true that a “no-show” is very costly to a tour organiser, it is also true that a consumer announcing the withdrawal with reasonable notice is likely to originate few costs for the organiser. There is no justification for the consumer, in the case where the contract is not executed due to the fault of the organiser, will receive compensation only for proven damages<sup>23</sup>, while the tour organiser needs not to prove any damage in order to obtain a “penalty” payment in the case of unjustified withdrawal of the consumer.

- Consumer protection in the field of civil aviation:

The Package Travel Directive is not applicable to air travel, except where it is included in a package. Yet the ever increasing number of complaints addressed by consumers to the Commission appears to indicate that the level of consumer protection in the field of air travel is insufficient. The issues to be tackled comprise compensation for unjustified delays, improvement of market transparency, the improvement of civil liability rules.

- Likewise, there should be a discussion whether measures could be taken to improve consumer protection in the field of public transport in general, especially where the general terms of contract of public transport enterprises, usually regulated by statutory law in the Member States, are concerned.

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<sup>22</sup> Directive 93/13/EC on Unfair Contract Terms provides, in sub-section 1 (d) of its annex, that terms which have the effect of “permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract” may be considered unfair and thus void. The same goes, according to sub-section 1 (e) of this annex, for contract terms “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”. Nevertheless, a specific rule for “no-shows” might be helpful.

<sup>23</sup> cf. Art. 4(6), 4(7) and 5 of the Directive

#### *1.2.4. Unfair contract terms in package travel contracts*

The Package Travel Directive and national measures of transposition related thereto set out a statutory framework for package travel contracts. Apart from the protection awarded to him by this directive, it is of essential importance to the consumer that the contract does not contain any unfair, unclear or incomprehensible contract terms.

Protection against unfair contract terms is provided by Directive 93/13/EC, on Unfair Contract Terms, which covers not only package contracts, but all contracts concluded between consumers and professionals. This directive establishes, as a basic principle, that unfair contract terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. An indicative list of contract terms that may be regarded as unfair is given in the Annex of Directive 93/13/EC.

In order to provide to the public easily accessible and transparent information on the court practices of European Law Courts in the field of unfair contract terms, the Commission has created the CLAB-Database which is accessible on internet under <http://europa.eu.int/clab/index.htm>. This database contains information on decisions on unfair contract terms by judicial and extra-judicial decision making bodies from all over Europe, covering all economic sectors.<sup>24</sup>

As an additional step, the Commission is organising an expert working group (“round table”) on unfair contract terms in package travel arrangements. Representatives of consumers and the industry and independent experts will meet to discuss and, if possible, to set out a code of conduct, which, whilst having only the character of “soft law”, will serve as a point of reference for travel organisers, retailers and consumers throughout Europe.

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<sup>24</sup> Of the 6673 decisions contained in the database on 1<sup>st</sup> July 1999, 273 concerned the tourism sector. Of these, 182 concerned contract terms stipulated in package travel contracts.

## **2. SECURITIES FOR THE TRAVEL ORGANISER'S/RETAILER'S INSOLVENCY (ARTICLE 7 OF DIRECTIVE 90/314)**

The transposition of Article 7 of the Package Travel Directive into Member States' domestic legislation is a matter of concern for various reasons. The European Commission, in line with the commitments taken in its working paper on Enforcement of European Consumer Legislation<sup>25</sup>, has therefore invited consumers' associations from all over Europe to submit their observations on the implementation of Article 7 in their respective country. Many associations submitted valuable information, which helped the Commission to understand the different approaches taken by different national legislators.

As a next step, the Commission invited Member States to discuss the consequences that might result from differences in the interpretation and implementation of that provision. To that end, a meeting of government experts took place in Brussels on 14 April 1999.

The main points of discussion were:

- The interpretation of the words “evidence for sufficient security” in Article 7 of Directive 90/314/EEC;
- The enforcement of provisions of Member States' national legislation that are meant to transpose Art. 7 of the Package Travel Directive and the efficiency of these provisions;
- Undesirable consequences of the disparities in the national measures of implementation (e.g. the very different levels of protection in different Member States and possible distortions of competition)
- Trans-border aspects

Each delegation had the opportunity to present the system of implementation adopted by its country and to make observations to the implementing measures of other Member States. Thanks to the good co-operation of all delegations, this resulted in a fruitful discussion which provided the services of the Commission with valuable information that helped her draft this report and, in particular, its Annex II.

### **2.1. Points of reference for the Interpretation of Article 7 of Directive 90/314**

#### *2.1.1. Wording of Article 7*

The text of the directive states:

“The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.”

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<sup>25</sup> Commission's working paper on Enforcement of European Consumer Legislation, 27 March 1998, SEC (98) 527

This text leaves great liberty to the Member States in the choice of the appropriate measures. There is, however, no room for interpretation as regards the very clear aim of the provision: to provide that the security provided by retailers/organisers must cover the total refund of money paid over and the full repatriation costs. Therefore, no solution can be accepted that would, in effect, allow the refund of money paid over and repatriation expenses to be limited, even if that were to happen only under extreme circumstances.

### *2.1.2. Interpretation by the European Court of Justice*

In its decisions referring to Art 7 of the Package Travel Directive, the European Court of Justice stated that, in the case of insolvency of a travel organiser, consumers were to receive the full cost of their repatriation and the full amount of monies paid over.

#### *2.1.2.1. The Dillenkofer Case:*

In case C-178/94 (Dillenkofer)<sup>26</sup> the Court decided that the failure of Germany to transpose the Package Travel Directive in time constituted civil liability of the state to such consumers who had suffered damage because of the absence of a provision to transpose Article 7 of the Directive.

The German Government had argued that, already before the law to transpose the Package Travel Directive came into force, there had been a constant court practice in favour of consumers. According to this court practice the travel organiser, before having handed over “documents of value” to the consumer, was allowed only to require a deposit towards the travel price of up to 10% of the travel price with a maximum of DM 500.

The Court dismissed this argument, saying that

- if a Member State allows the travel organizer to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of the Directive is not satisfied unless a refund of that deposit is also guaranteed in the event of the organizer' s insolvency;

and that

- the protection which Article 7 guarantees to consumers could be impaired if they were made to enforce credit vouchers against third parties who are not, in any event, required to honour them and who are likewise themselves exposed to the risks consequent on insolvency.

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<sup>26</sup> Judgement of the Court of 8 October 1996. Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland. Reference for a preliminary ruling: Landgericht Bonn - Germany. Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94. European Court Reports 1996 page I-4845

These statements by the Court of Justice give rise to the conclusion that the provision transposing Article 7 of the Package Travel Directive must not allow the consumer to suffer the loss of any portion of the package price, be it only less than 10%. Also, it must be concluded that the refund of repatriation expenses and monies paid over should be guaranteed by a guarantor who is “not exposed to the risks consequent on insolvency”.

There is a third requirement that, though rather vaguely, is also contained in the Court’s judgement: the refund should be effected quickly and without too much bureaucracy. A security system that would require the consumer to “enforce credit vouchers against third parties” is not considered to conform to the directive. In fact, as far as the repatriation of consumers is concerned, it is obvious that the guarantee system ought to become active on its own initiative to organise and finance the return travel of consumers trapped at their holiday destination. A consumer, who has already paid for the package, should not be expected to finance his own travel home and then hope to receive, sooner or later, a refund of these expenses.

#### 2.1.2.2. The Case VKI vs Österreichische Kreditversicherung

The decision of the European Court of Justice C-364/96<sup>27</sup> deals with a prejudicial question that had been submitted by the District Commercial Court of Vienna (Austria). Here, a non-governmental consumers’ association, acting on behalf of two consumers who had been on a package holiday while the tour organiser became insolvent, sued an insurance company for reimbursement of the outlays the consumers paid for repatriation. These outlays covered not only transport costs, but also the hotel bill, as the proprietor of the hotel had not let the consumers go before his bill was paid. The insurance company had declared its readiness to reimburse the home transport, but not the hotel bill, because, according to its restrictive interpretation of the directive (and the transposing law), these outlays were not covered by the term “repatriation costs”.

The Court of Justice ruled that Article 7 of the Package Travel Directive must be interpreted “as covering, as security for the refund of money paid over, a situation in which the purchaser of a package holiday who has paid the travel organiser for the costs of his accommodation before travelling on his holiday is compelled, following the travel organiser's insolvency, to pay the hotelier for his accommodation again in order to be able to leave the hotel and return home.”

In its reasoning the Court affirmed that “the purpose of Article 7 is to protect consumers against the risks arising from the insolvency of the package holiday or tour organiser”. In the given context, the emphasis lies on the issue that all risks arising from the insolvency of the tour organiser must be covered.

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<sup>27</sup> Judgement of the Court (Fifth Chamber) of 14 May 1998. Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG. Reference for a preliminary ruling: Bezirksgericht für Handelssachen Wien - Austria. Case C-364/96. European Court Reports 1998 page I-2949

### 2.1.2.3. The Rechberger Case

The factual background to this decision (case C-140/97)<sup>28</sup> was as follows: an Austrian newspaper offered to its subscribers a free package holiday as a reward for their fidelity. The subscribers needed to pay only for the airport taxes and, if they desired a single room, a supplement. If a subscriber wished to be accompanied by a second person, this person had to pay the full price of the package. Unfortunately, more subscribers enrolled for this than the newspaper and the co-operating travel agency had ever expected, and the travel agency finally went bankrupt.

Following this, the six plaintiffs could not depart for their free holiday: four of them, because there were no places available, the other two, because the travel agency had already gone bankrupt. All of them had, however, effected the payments that had been required from them, but they could only recover a small proportion in the bankruptcy procedure.

The Landesgericht Linz (Austria) submitted six prejudicial questions to the European Court of Justice, of which some concerned the belated transposition of Article 7 into Austrian Law<sup>29</sup> and others the interpretation of Article 7 of Directive 90/314.

In its decision, the Court of Justice stated for the first time that a Member State's measures had clearly been insufficient to transpose Article 7 of the Package Travel Directive: "Article 7 of Directive 90/314 has not been properly transposed where national legislation does no more than require, for the coverage of the risk, a contract of insurance or a bank guarantee under which the amount of cover provided must be no less than 5% of the organiser's turnover during the corresponding quarter of the previous calendar year, and which requires an organiser just starting up in business to base the amount of cover on his estimated turnover from his intended business as a travel organiser and does not take account of any increase in the organiser's turnover in the current year."<sup>30</sup>

The court's reasoning explicitly stated that, "having regard to the fact that the sum secured is calculated on the basis of the turnover achieved by a given agency during the preceding year or, in the case of new travel organisers, on the basis of the turnover estimated by the organiser himself, the specific

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<sup>28</sup> Judgement of the Court of 15 June 1999. Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich. Reference for a preliminary ruling: Landesgericht Linz - Austria. Case C-140/97.

<sup>29</sup> In accordance with the Act concerning the conditions of accession of Norway, Austria, Finland and Sweden and the adjustments to the Treaties on which the European Union is based (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1), Austria was required to implement the Directive by 1 January 1995. The Austrian Reisebürosicherungsverordnung, however, applied only to packages booked after 1 January 1995 *with a departure date of 1 May 1995 or later*; the plaintiffs in the Rechberger Case were therefore not covered. The CJ ruled that the limitation to packages with a departure date of 1 May 1995 or later constituted a "serious breach of Community law".

<sup>30</sup> Point 5 of the Court Ruling

arrangements prescribed by the Austrian Government were inadequate given that the Regulation only requires a limited guarantee both in terms of the amount of cover and the basis on which that cover is calculated. That system therefore appears *structurally incapable* of catering for events in the economic sector in question, such as a significant increase in the number of bookings in relation to either the turnover for the previous year or the estimated turnover.”<sup>31</sup> Also, the Court emphasised that there was “no indication, either in the recitals in the preamble to the Directive or in the wording of Article 7, to suggest that the guarantee prescribed by that provision might be limited, as it was when it was put into effect in Austria.”<sup>32</sup>

What are the conclusions to be drawn from this decision? Quite clearly, the protection granted to consumers by the original version of the Austrian *Reisebürosicherungsverordnung* is denounced to have been insufficient. Therefore, we know now for certain that a limitation of the security to be furnished to 5% of the organiser's turnover during the corresponding quarter of the previous calendar year is inadmissible.

Now it is obvious that 5% of a quarter's (or 1,25% of a year's) turnover would indeed provide no sufficient security: this sum would roughly equal to a week's turnover, whereas most packages are paid some weeks in advance, so that the monies held by the organiser would be in all cases higher than the insurance coverage. Thus, the Court limited itself to state the obvious. On the other hand, the Court omitted to state precisely the conditions under which a national system of implementation would be seen to comply with Article 7 of the Package Travel Directive<sup>33</sup>.

#### 2.1.2.4. The Ambry Case

The decision in the Case C-410/96<sup>34</sup> dealt with certain single market aspects of the implementation of Article 7 of Directive 90/314.

The manager of a travel agency of Metz (France) had been charged in a criminal procedure with having assisted or engaged in an activity relating to the organisation and sale of travel and holidays without having obtained the licence required by Article 4 of French Law No 92/645. He had obtained no licence, because the insurance policy he had taken to cover the risks set out in

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<sup>31</sup> cf. par 62 of the decision

<sup>32</sup> cf. par 63 of the decision

<sup>33</sup> for example, no figures are given as to whether any kind of “minimum insurance sum”, if sufficient, would be acceptable. It must be noted that The Austrian *Reisebürosicherungsverordnung* has, since 1995, been amended four times, and the minimum insurance coverage has been considerably increased – It now amounts to 5-9% of the tour organiser's annual turnover. Unfortunately, the *Rechberger* decision gives no hint as to whether this limitation is considered by the Court of Justice to conform to the Directive.

<sup>34</sup> Judgement of the Court of 1 December 1998. Criminal proceedings against André Ambry. Reference for a preliminary ruling: Tribunal de grande instance de Metz - France. Case C-410/96. European Court Reports 1998 page I-7875



Article 7 of Directive 90/314, had been concluded not with a French insurance company, but with an Italian insurance company that had no premises in France.

This was not accepted by the French authorities, because French law requires that “a financial security may be provided by a credit institution or insurance company only if that institution or company has its registered office in the territory of a Member State of the European Community or has a branch in France. In all cases, the financial security must be available for immediate payment in order to ensure the repatriation of customers (...). If the credit institution or insurance company is situated in a Member State of the European Community other than France, an agreement to that effect must be concluded between that body and a credit institution or insurance company situated in France”.

The Court of Justice emphasised that the intention of the French legislator, to make sure that the security in question must not only exist but must also be immediately available for payment if required for the repatriation of travellers, was in line with Directive 90/314.

Then, however, it ruled: “it is contrary to Article 59 of the EC Treaty and to Second Council Directive 89/646/EEC on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC and Council Directive 92/49/EEC (third non-life insurance Directive) for national rules to require, with a view to implementing Article 7 of Council Directive 90/314/EEC on package travel, package holidays and package tours, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France”.

## **2.2. Principles for the Implementation of Travel Guarantees**

In the light of the above overview on the decisions of the European Court of Justice on Art 7 of the Package Travel Directive it appears that the following principles should be observed by national measures implementing this provision.

- Security must fully cover all risks arising from the insolvency of the tour organiser (including e.g. costs of accommodation that the consumer is required to pay before he can set out on his travel home<sup>35</sup>).
- Thus, the guarantor (be it an insurance company, a financial institute, a trustee or a joint guarantee fund) should take over unlimited liability. The amount to be refunded must not be limited to any maximum refund or maximum portion.
- Security must be provided by a guarantor who himself is not exposed to the risks consequent on insolvency. The guarantor must be sufficiently

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<sup>35</sup> c.f. the above-mentioned case VKI vs Österreichische Kreditversicherung (C-364/96).

independent from the tour organiser and must maintain sufficient funds to cover the insured risk.

- There should be a professional assessment of the insured risk (if possible by the guarantor himself). Member States should avoid setting up a system where the cost of insurance per package sold would be the same for each professional (irrespective of that professional's financial standing or of the risk connected with each specific package). National measures of implementation of Article 7 of the Package Travel Directive should not distort competition, imposing "coercive solidarity" on competing professionals by imposing on them to participate in closed systems on a national basis.
- The security, whatever its nature, should be quickly available. All services and refunds to the consumer under Art 7 of the Package Travel Directive should be effected quickly and without too much bureaucracy. In cases where the consumer needs to be repatriated, he should not be required to pre-finance the transport home nor to organise it himself.
- Public authorities should ensure that no organiser/retailer offers packages on the market unless they have given evidence of security as required by Art 7 of the Package Travel Directive. Whether there is a licensing system or not, this implies constant efforts to monitor the market and the elimination of professionals that do not comply with the security requirement.
- There should be a single market for the guarantee services required by Art 7 of the Package Travel Directive. Thus, guarantors (insurance companies, financial companies etc.) should be free to offer their services in all Member States. Domestic legislation must not, in an unjustified manner, reserve the right to offer such services to certain firms or other institutions.
- Likewise, Member States should (without prejudice of the principles set out above) mutually recognise their systems of implementation, thereby ensuring that a professional that has furnished the security required by one Member State's legislation should be allowed to do business in all other Member States.

With a view to these principles, the national measures of implementation adopted by a considerable number of Member States<sup>36</sup> appear not to conform to Community law. The Commission would wish to resolve this problem in close co-operation with Member States. It therefore invites Member States to communicate to her within the six months following the publication of this report, all observations on that matter they might have, especially

- which measures they consider to take in order to conform their legislation on travel guarantees to Community law;

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<sup>36</sup> C.f. Annex II to this report. It must be noted that the outline of the measures adopted by the different Member State contained in that annex is of a solely descriptive, not evaluative character.

- whether they consider their national measures of implementation to be in keeping with the above principles, and if so, on what grounds;
- whether, in addition to the above-mentioned principles, they would consider necessary to adopt measures that would grant comparable security to those consumers having concluded a package travel contract with an organiser/retailer who, in breach of his obligation, has not provided the security foreseen by Article 7 of the Package Travel Directive.

## ANNEX I

### LEGAL TEXTS ADOPTED BY MEMBER STATES IN ORDER TO TRANSPOSE DIRECTIVE 90/314/EEC, INFRINGEMENT PROCEEDINGS AND DECISIONS OF THE EUROPEAN COURT OF JUSTICE RELATED THERETO

#### 3. BELGIUM

- *Loi du 16/02/1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyage - Wet van 16/02/1994 tot reorganisatie en reisbemiddeling, Moniteur belge du 01/04/1994 Page 8928*
- *Arrêté ministériel du 19/09/1994 désignant les agents compétents pour rechercher et constater les infractions à la loi du 16/02/1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyages - Ministerieel besluit van 19/09/1994 waarbij de ambtenaren aangewezen worden om de inbreuken op de wet van 16/02/1994 tot regeling van het contract tot reorganisatie en reibemiddeling, op te sporen en vast te stellen, Moniteur belge du 04/10/1994 Page 25086*
- *Arrêté royal du 25/04/1997 portant exécution de l'article 36 de la loi du 16/02/1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyages - Koninklijk besluit van 25/04/1997 tot uitvoering van artikel 36 van de wet van 16/02/1994 tot regeling van het contract tot reorganisatie en reisbemiddeling, Moniteur belge du 13/06/1997 Page 15887*

#### 4. DENMARK

- *Lov nr. 454 af 30/06/1993 om ændring af lov om en rejsegarantifond. Industrimin.j.nr. 90-331-2. Lovtidende A hæfte 88 udgivet den 01/07/1993 s.2427. TLOV.*
- *Lov nr. 472 af 30/06/1993 om pakkerejser. Justitsmin.j.nr. L.A. 1992-460002-464. Lovtidende A hæfte 89 udgivet den 01/07/1993 s.2499. JLOV.*
- *Bekendtgørelse nr. 776 af 21/09/1993 om pakkerejser. Justitsmin., civilkontoret, j.nr. 93-4601-23. Lovtidende A hæfte 141 udgivet den 01/10/1993 s. 4301. JBEK.*
- *Lov nr. 428 af 01/06/1994 om markedsføring. Industri- og Samordningsmin., j.nr. 90-332-28. Lovtidende A 1994 hæfte nr. 84 udgivet den 02/06/1994 s. 2028. TLOV*
- *Lov nr. 315 af 14/05/1997 om en rejsegarantifond. Erhvervsmin., j.nr. 95-176-15.*

- *Bekendtgørelse nr536 af 14/07/1998 om registrering,garantistillelse m.v.i Rejsegarantifonden. Erhvervsmin. Forbrugerstyrelsen, j.nr 1998-121/1-246, 3 jur.kt.*

## 5. GERMANY

- *Gesetz zur Durchführung der Richtlinie des Rates vom 13/06/1990 über Pauschalreisen vom 24/06/1994, BGBl I vom 29/06/1994 Seite 1322 (eingearbeitet in §§ 651 a – 651l des Bürgerlichen Gesetzbuches und § 147b der Gewerbeordnung)*
- *Verordnung über die Informationspflichten von Reiseveranstaltern vom 14/11/1994, Bundesgesetzblatt Teil I Seite 3436*

Infringement case 98/2163, concerning the incomplete transposition of the Directive. The file was closed when Germany notified the Decree of 14/11/1994 to the Commission.

CJ, joint cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 (Dillenkofer): Civil Liability of Member State for damages caused to consumers by the belated transposition of Article 7 of the Package Travel Directive.

## 6. GREECE

- *Presidential Decree 339/96 du 05/09/1996, FEK A 225 du 11/09/1996 Page 4336*

Infringement case 98/2275: Incomplete transposition of Article 7 of the Directive, as maritime passenger transport lines are exempt from the obligation to furnish security for their insolvency. The case is pending

## 7. SPAIN

- *Ley número 21/95 de 06/07/1995, reguladora de los Viajes Combinados, Boletín Oficial del Estado número 161 de 07/07/1995 Página 20652 (Marginal 16379)*
- *Real Decreto número 271/88 de 25/03/1988, por el que se regula el ejercicio de las actividades propias de las Agencias de Viajes, Boletín Oficial del Estado número 76 de 29/03/1988*
- *Orden de 14/04/1998, por la que se aprueban las normas reguladoras de las Agencias de Viajes, Boletín Oficial del Estado*
- *Regional Laws on the organisation of Travel agencies*<sup>37</sup>,

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<sup>37</sup> In Spain, legislation in the field of tourism is in the competence of the 17 “Comunidades Autonomas”. Therefore, each region has the possibility to adopt its own law on the organisation of travel agency. Where such a law has not been adopted, the Royal Decree 271/1988 remains applicable.

## 8. FRANCE

- *Loi Numéro 92-645 du 13/07/1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours*
- *Décret Numéro 94-490 du 15/06/1994 pris en application de l'article 31 de la loi Numéro 92-645 du 13/07/1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours, Journal Officiel du 17/06/1994 Page 8746*

CJ, case C-410/96 (Ambry): The French implementation of Article 7 of the Package Travel Directive does not conform to the principle of free exchange of goods and services, as tour operators may take out insurance only with an insurance company that is registered in France.

## 9. IRELAND

- *The Package Holidays and Travel Trade Act, 1995*

## 10. ITALY

- *Decreto legislativo del 17/03/1995 n. 111, attuazione della direttiva n. 90/314/CEE concernente i viaggi, le vacanze ed i circuiti "tutto compreso", Gazzetta Ufficiale - Serie generale - del 14/04/1995 n. 88 pag. 3*

Infringement case 96/2155: The Italian law fails to implement Article 7 of the Directive, as the Travel Guarantee Fund stipulated by the national law (article 21) has not yet been set up. The case is pending before the Court of Justice.

## 11. LUXEMBOURG

- *Loi du 14/06/1994 portant réglementation des conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjour et portant transposition de la directive du 13/06/1990 concernant les voyages, vacances et circuits à forfait, Mémorial Grand-Ducal A Numéro 58 du 06/07/1994 Page 1092*
- *Règlement grand-ducal du 04/11/1997 déterminant le montant, les modalités et l'utilisation de la garantie financière prévue à l'article 6 de la loi du 14/06/1994 portant réglementation des conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours et portant transposition de la directive du 13/06/1990 concernant les voyages, vacances et circuits à forfait*
- *Règlement grand-ducal du 04/11/1997 déterminant les éléments de l'information préalable et les dispositions du contrat relatifs aux voyages, vacances ou séjours à forfait, en exécution des articles 9, 11 et 12 de de la loi du 14/06/1994 portant réglementation des conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours et portant transposition de la directive du 13/06/1990 concernant les voyages, vacances et circuits à forfait,*

Infringement case 98/2388, concerning the incorrect transposition of Article 4(3) of the Directive: the Luxembourg law provides that the package can be transferred to a third person only 21 days before departure at the latest, whereas the directive provides that this could be done within a reasonable delay before departure. The case is pending.

## 12. NETHERLANDS

- *Koninklijk Besluit van 15/01/1993 houdende regels inzake de gegevens die de organisatoren van georganiseerde reizen ten behoeven van de reizigers moeten vermelden (Gegevensbesluit georganiseerde reizen), Staatsblad 1993, nr. 43*
- *Wet van 24/12/1992 tot aanpassing van Boek 7 van het Burgelijke Wetboek aan de richtlijn betreffende pakketreizen, met inbegrip van vakantiepakketten en rondreispakketten, Staatsblad 1992, nr. 689*

Infringement case 93/2183, concerning the transposition of Articles 4(2)(a), 4(4)(a), 5(5), 5(7) and 6 of the Directive. Following a formal notice despatched by the Commission the Dutch Authorities gave additional information that convinced the Commission to close the file.

## 13. AUSTRIA

- *§§ 31b – 31f Konsumentenschutzgesetz (idF BGBl 247/1993, BGBl II 140/1997)*
- *Verordnung des Bundesministers für wirtschaftliche Angelegenheiten über Ausübungsvorschriften für das Reisebürogewerbe, BGBl 599/1994*
- *Reisebüro-Sicherungsverordnung BGBl II 10/1998, idF BGBl II 118/1998*

CJ, case C-364/96 (VKI vs Österreichische Kreditversicherung): under Article 7 of the Package Travel Directive, insurance should cover all costs connected with the repatriation of the consumer (such as the hotel bill).

CJ, case C-140/97 (Rechberger), concerning the implementation of Article 7 of the Directive in Austria: Art 7 is applicable also to packages that are offered for free. The obligation for travel organisers to take out insurance with a minimum insurance sum of 5% of the turnover of three months of commercial activity is not sufficient to transpose Article 7 of the Directive. The belated and insufficient transposition of Article 7 will incur civil liability against a Member State for consumers who have suffered damages as a consequence of this. This liability is not excluded by the negligent behaviour of a travel organiser.

## 14. PORTUGAL

- *Decreto-Lei n.º 198/93 de 27/05/1993. Regula o acesso e o exercício da actividade das agências de viagens e turismo, Diário da República I Série A n.º 123 de 27/05/1993 Página 2904*

- *Decreto Regulamentar n.º 24/93 de 19/07/1993. Regulamenta a actividade de agência de viagens e turismo, Diário da República I Série B n.º 167 de 19/08/1993 Página 3883*
- *Decreto Legislativo Regional n.º 13/94/M de 16/05/1994. Adapta à Região Autónoma da Madeira o disposto no Decreto-Lei n.º 198/93, de 27 de Maio, e no decreto Regulamentar n.º 24/93, de 19 de Julho (regula o acesso, exercício e licenciamento da actividade das agências de viagens e turismo), Diário da República I Série A n.º 122 de 16/05/1994 Página 2785*
- *Código de Direito Civil Portuges de 25/11/1966*
- *Decreto-Lei n.º 446/85 de 25/10/1985. Institui o regime jurídico das cláusulas contratuais gerais, Diário da República I Série n.º 246 de 25/10/1985 Página 3533*
- *Decreto-Lei n.º 330/90 de 23/10/1990. Aprova o Código da Publicidade, Diário da República I n.º 245 de 23/10/1990 Página 4353*
- *Decreto-Lei n.º 209/97 de 13/08/1997. regula o acesso e o exercício da actividade das agências de viagens e turismo, Diário da República I Série A n.º 186 de 13/08/1997 Página 4219*

## 15. FINLAND

- *Valmismatkalaki/Lag om paketresor (1079/94) 28/11/1994*
- *Laki valmismatkaliikkeistä/Lag om paketreserörelser (1080/94) 28/11/1994*
- *Åland Islands: Landskapslag om resebyråörelse (56/75) 26/11/1975*
- *Asetus valmismatkasta annettavista tiedoista annetun asetuksen 5 ja 7 §:n muuttamisesta/Förordning om ändring av 5 och 7 § förordningen om de uppgifter som skall ges om paketresor (372/98) 29/05/1998*

Infringement case 96/2181: incorrect transposition of Articles 3.2 (a) and 4.1 (a) of the Directive, as the Finnish law obliged the package organiser/retailer to furnish information on passport and visa requirements for Finnish citizens only, and not for citizens of all EEA Member States concerned. Due to the intervention of the commission, Finland agreed to change this provision.

CJ, Case 237/97 (Kuluttajavirasto vs AFS Finland): a school exchange program, where Finnish scholars are accommodated by an American Guest Family, is not considered to be a package travel, even if the organiser of the program receives a global price for the air transfer, the contacting of the guest family and the guest school and some other fringe services.

## 16. SWEDEN

- *Lag om paketresor, Svensk författningssamling (SFS) 1992:1672*



- *Lag om ändring i resegarantilagen (1972:204), Svensk författningssamling (SFS) 1992:1673*
- *Lag om ändring i sjölagen (1891:35 s. 1), Svensk författningssamling (SFS) 1992:1674*
- *Konsumentverkets föreskrifter och allmänna råd om paketresor, Konsumentverkets författningssamling (KOVFS), 1993:3*

## **17. UNITED KINGDOM**

- *The Package Travel, Package Holidays and Package Tours Regulations 1992, Statutory Instruments number 3288 of 1992*
- *The Package Travel, Package Holidays and Package Tours (Amendment) Regulations 1998, Statutory Instruments number 1208 of 1998*
- *Gibraltar: The Package Travel, Package Holidays and Package Tours Ordinance 1994, Legal Notice No. 8 of 1994, First Supplement to the Gibraltar Gazette No. 2,788 of 07/07/1994*

Infringement case 93/2182: incorrect transposition of Articles 3.2 (a) and 4.1 (a) of the Directive, as UK law obliged the package organiser/retailer to furnish information on passport and visa requirements for UK citizens only, and not for citizens of all EEA Member States concerned. Due to the intervention of the commission, the UK agreed to change this provision.

## ANNEX II

### BRIEF SURVEY ON NATIONAL LEGISLATION TRANSPOSING ARTICLE 7 OF DIRECTIVE 90/314/EEC

#### 18. BELGIUM

In Article 36 of the Law on Package Travel, Belgium has literally taken over the text of Article 7 of the Directive. The Royal Decree<sup>38</sup> on the Implementation of Article 36 of the Law on Package Travel states that travel organisers must provide “sufficient security” by concluding an insurance contract with an agreed insurance company. The insurer is obliged to cover the full reimbursements of all monies paid by consumers under, or in contemplation of, a package and the full cost of repatriation of consumers whose package holiday has already begun.

Persons wishing to act as travel agents are required to obtain a license from a regional authority. However, the proof of a sufficient security under Article 36 of the Law on Package Travel is not a requirement to be met before a license can be obtained. Instead, it is the insuring companies who are obliged to regularly publish lists of the travel agencies they have insured<sup>39</sup>.

#### 19. DENMARK

Even before the coming into force of the Package Travel Directive the Danish law 104/1986<sup>40</sup> had imposed on organisers and intermediaries of foreign organisers to be members in a travel guarantee fund, which is meant to cover all repatriation expenses and refund of monies. This law was modified by Act No. 454/1993 in order to conform to the directive.

A new Travel Guarantee Fund Act was adopted in 1997<sup>41</sup>. Like the previous regulation, it obliges organisers and intermediaries of foreign organisers to register with the travel guarantee fund. They have to lodge a guarantee deposit (varying

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<sup>38</sup> Arrêté royal du 25 avril 1997 portant exécution de l'article 36 de la loi du 16 février 1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyages

<sup>39</sup> c.f. Arrêté royal du 25 avril 1997 portant exécution de l'article 36 de la loi du 16 février 1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyages, Art. 14

<sup>40</sup> Lov om en rejsegarantifond, cf. Executive order No. 104 of 28 February 1986, as amended by Act No. 454 of 30 June 1993

<sup>41</sup> Lov nr. 315 af 14/05/1997 om en rejsegarantifond. Erhvervsmin., j.nr. 95-176-15.

between 1 and 100 % of the annual turnover<sup>42</sup>, depending on the turnover and of the type of packages sold) and for each package sold they pay a contribution of DKK 5.

The guarantee fund is meant to take over full liability for all risks set out in Article 7 of Directive 90/314. However, the endowment of the fund gives reason for concern<sup>43</sup>, even though the new Travel Guarantee Fund Act has considerably improved the financial standing of the fund<sup>44</sup>. In the meeting of government experts of 14 April 1999, the Danish delegation expressed its awareness of the problem.

## 20. GERMANY

Under German law<sup>45</sup> travel organisers must take out an insurance policy or a guarantee by a financial institute. The travel organiser or retailer may accept payment from the consumer only after having submitted to him a certificate that provides him with a direct claim against the insurer/guarantor.

### 20.1. Limitation of Insurance Sum

However, the liability for each insurance company or financial institution may be limited to a total amount of DM 200 million per annum. If this total amount is exceeded, the reimbursement of money paid over and the refund of repatriation expenses to the individual consumer will be only partial.

The amount of DM 200 million may appear high, but it must be seen in relation with the turnover of the German travel industry. In 1995 the greatest German travel organiser with a market share of 17 %, TUI, had a turnover of nearly DM 6 billion, so that DM 200 million would have covered this company's turnover of less than two weeks. Since then, turnover figures have grown, but the DM 200 million threshold has remained.

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<sup>42</sup> Cf. Art. 8 par (5) and (6) of Law 315/1997. Enterprises are, depending on their annual turnover, grouped into different size classes. For example in the case of the turnover not exceeding 15 million, the guarantee shall be DKK 300.000; in the case of a turnover between DKK 15 and 50 million, the guarantee shall be 1 million. It must be feared that this system has sometimes rather discriminating effects (why must an enterprise with a turnover of DKK 16 million furnish a guarantee that is more than three times higher than the guarantee to be furnished by an enterprise with a turnover of DKK 15 million?); it certainly builds an obstacle for small enterprises. Art 14 (1) foresees that the guarantee may be reduced if turnover is below the minimum guarantee, which means that for very small enterprises the guarantee can be equal to a year's turnover. On the other hand Art. 14 (2) foresees that in special cases (no indication is given which cases are meant here) enterprises may be exempted from both guarantees and contributions.

<sup>43</sup> According to a report drawn up by the University of Louvain-la-Neuve, the fund's own capital, in 1995, amounted to DKK 90 millions, while in the same year 8 cases of insolvency occurred and 14.4 million crowns were paid to consumers. 8 percent of that amount were recovered from the guarantee sums laid out by the bankrupt enterprises; the contributions (of DKK 5 per package) amounted to only 8 million Crowns.

<sup>44</sup> Before, the guarantee to be furnished amounted to DKK 200.000 for all enterprises, independent of their turnover, which was considerably less than under the new system. The contribution of DKK 5 remained the same.

<sup>45</sup> § 651k BGB (Bürgerliches Gesetzbuch – Civil Code)

In 1995, The total turnover of the package travel industry was estimated at roughly DM 40 billion per annum. If all enterprises had chosen to take out an insurance policy with the same insurance company, the total coverage would have been roughly 0,5 % of the annual turnover, while it is up to 10 % if not unlimited in other Member States.

Under the German system the consumer may have to wait for the reimbursement until the end of the year, because it can only then be decided, whether the limit of DM 200 million has been exceeded or not. A swift reimbursement appears, therefore, not possible.

Finally, it may be observed that the risk coverage is in fact dependent not on the concerned company's turnover, but rather on how many firms choose the same insurance company.

## **20.2. No license required**

Contrary to most other Member States<sup>46</sup>, Germany requires no licensing system for tour operators. Anybody who likes can start a travel agency business, and non-compliance with legal requirements (e.g. absence of travel guarantees) will only be discovered where problems have already occurred. Thus, consumers are not protected if the travel organiser has failed to take out insurance. Generally, it is left to the consumer to see whether a tour organiser is insured or not, and it has been observed that many tour organisers are not insured.

## **21. GREECE**

Under Article 5 (5) (b) and 7 (1) of Presidential Decree 339/1996<sup>47</sup> organisers and retailers must purchase an insurance policy to cover civil and professional liability, including, in the case of insolvency, the obligation to refund the money paid over and to repatriate the consumer.

Alternatively, these risks may be covered by bank guarantees or a special joint fund. With regard to the functioning of this fund, no information has been made available to the Commission.

Under Article 5 (5) (b) of Presidential Decree 339/1996 maritime passenger transport companies are exempt from this obligation. In this regard, a formal notice has been addressed to Greece.

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<sup>46</sup> e.g. Italy, Spain, Austria, Denmark

<sup>47</sup> Presidential Decree 339/1996 on Package Travel (Greek Government Gazette No. 225/A)

## 22. SPAIN

Article 12 of the Spanish Law 21/1995 on Package Travel<sup>48</sup> simply repeats what is said in Article 7 of the Directive, but empowerment for establishing detailed regulations is left to the 17 Comunidades Autonomas. Until now only the regulations adopted by Catalonia<sup>49</sup>, the Balearic Islands<sup>50</sup> and the Canary Islands<sup>51</sup> have been notified to the Commission.

For issues that are not covered by newer (regional) legislation, the Royal Decree on Travel Agencies of 1988<sup>52</sup> remains in force. This applies to those Comunidades Autonomas that have not yet adopted their own rules on guarantees to be furnished by travel agents. Also, it has to be noted that the measures adopted by Catalonia, the Balearic Islands and the Canary Islands are more or less the same as those foreseen in the Royal Decree of 1998. For our purposes it is therefore sufficient to base our observations on that Decree.

The Decree defines, in its Article 2, three categories of travel agencies: “mayoristas” project and organise all classes of tourist services and packages and sell them to retailers (minoristas), but not directly to the consumer; “minoristas” sell the packages organised by mayoristas or by themselves to the consumer, but not to other travel agencies; “mayoristas-minoristas” exercise the business of both mayoristas and minoristas.

All travel agencies must provide security by lodging either an individual or a collective bond with the regional tourism office.

The individual bond, which must be furnished in form of a bank guarantee, an insurance policy or stock papers to the regional public authority (so that they are at all times at the authority’s immediate disposition) must amount to 20 million PTA for a mayorista, 10 million PTA for a minorista and 30 million for a mayorista-minorista travel agency. The contribution of each travel agent to collective bond must amount to 50% of what he would have to furnish as an individual bond; but in any case the collective bond must not amount to less than 400 million PTA. These amounts cover the guarantee for travel agencies with up to six branch offices. For each additional branch office the individual bond must be increased by 2 million PTA, or the collective bond by 1 million PTA.

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<sup>48</sup> Ley 21/1995, de 6 de julio, reguladora de los Viajes Combinados

<sup>49</sup> Decreto 168/1994, de 30 de mayo, de Reglamentación de las Agencias de Viajes

<sup>50</sup> Decreto 43/1995, de 6 de abril, de Reglamento de Agencias de Viajes

<sup>51</sup> Decreto 176/1997, de 24 de julio, por el que se regulan las agencias de viajes

<sup>52</sup> Real Decreto 271/1988, de 25 de marzo, por el que se regula el ejercicio de las actividades propias de las Agencias de Viaje; Orden de 14 de abril de 1988 por la que se aprueban las normas reguladores de las Agencias de Viajes

### **22.1. Limitation of scope**

The new Spanish Package Travel Act stipulates that the bond should serve to guarantee the due performance of the travel contract and, especially, the repayment of money paid over and of expenses for repatriation of consumers in the case of the travel agent's insolvency. Thus, the requirement appears to envisage not the direct availability of the bond to finance the repatriation of the consumer, but only the reimbursement of the consumer's expenses for repatriation.

It also must be noted that the Royal Decree 271/1988 does not specify whether these bonds are meant to cover the insolvency risk. Thus, it is quite unclear whether the traveller could benefit from the bond in the case where the travel agent enters insolvency. In the absence of a clear rule in favour of consumers (which would have to state explicitly that the bond serves to reimburse and repatriate them in the case of the travel agent's insolvency) it would appear that a consumer could only demand reimbursement from the travel agent who is insolvent. Meanwhile, the bond would serve to cover any kind of civil liabilities incurred by the travel agent, thus forming simply part of the bankruptcy estate.

### **22.2. Limited liability**

While the Package Travel Act 21/1995 closely mirrors the wording contained within Article 7 of the Directive, the Royal Decree 271/1988 imposes some limitation upon the full risk coverage. For example, the limits which are set for the bond are not only fixed, but are rather low. Indeed, the amount of the bond is a lump sum, which is not linked to the travel agency's annual turnover. Therefore, the greater the annual turnover of a travel agency, the less risk coverage is ensured by the bond.

### **22.3. Obligations for foreign organisers/retailers**

According to explanations given by the Spanish delegation at the meeting of 14 April 1999, foreign organisers/retailers must furnish a security under Spanish law. Compliance with the travel guarantee regulations of their country of origin is not considered sufficient.

## **23. FRANCE**

Article 4 (c) of the French law 92-645 on travel agencies<sup>53</sup> obliges travel agencies to provide to its clients sufficient evidence of security for fulfilment of the contract, the refund of money paid over and for their repatriation. In cases of urgency, it must be possible to mobilise the guarantee immediately in France. The same obligation is established for associations that offer package tours on a non-profit-making basis by Article 9 (b) and for local tourism boards by Article 11 of that law.

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<sup>53</sup> Loi n° 92-645 du 13 juillet 1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours, (JORF, p. 9457)

In Decree 94-490<sup>54</sup>, which is based on Law 92-645, it is provided that security should be furnished either by adhesion to a joint guarantee fund or by guarantee of a financial institution or an insurance company.

Each year, the Ministry of Transport issues a decision fixing the amount of the guarantee. So far, these decisions have not been notified to the Commission.

As an example, reference is made to the decision of the Ministry of Transport of 22 November 1994 concerning the conditions of the fixing of the financial guarantee of travel agents. By this decision each travel agent was obliged to submit to the Prefect of his Departement a fact-sheet that served as a basis for the fixing of the guarantee sum. In this fact-sheet, the travel agent had to state the turnover of his enterprise in the previous year, subdivided into 8 categories. For each of these categories a percentage was fixed as guarantee sum, ranging from 2% (for the sale of services to retailers) to 16 % (for packages organised by the travel agent himself). The sum of the guarantees calculated for each of the 8 categories was to be the total guarantee sum. However, the minimum amount of the guarantee sum was fixed at 750.000 FFR for each travel agency and 250.000 FFR for each branch office.

The Prefects of the Departements are empowered to determine the minimum amount for each individual enterprise/association and to control the employment of guarantees.

### **23.1. Limited liability**

The Guarantees covering the reimbursement of money paid over and the repatriation of consumers are in all cases limited. Without disposing of more detailed data it is, of course, impossible to determine the average relation between the annual turnover of a travel agency and the amount of the guarantee it has to furnish. Nevertheless, it may be estimated that in the average case the guarantee sum will lie beneath 15 or even 10 % of annual turnover.

### **23.2. Other points of concern**

According to information received from a consumer association, the consumer appears not to be protected in the case where a travel organiser/retailer omits to renew his adhesion to a joint guarantee fund.

The French legislation requires that information on the existence of sufficient financial guarantees must be furnished to the consumer. In practice, the consumer usually receives the name and address of the guarantor but no precise information as to the details of the guarantee.

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<sup>54</sup> Décret n° 94-490 du 15 juin 1994 pris en application de l'article 31 de la loi n° 92-645, Articles 12-19

## 24. IRELAND

The Irish Package Holidays and Travel Trade Act<sup>55</sup>, section 22, obliges package providers to have sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency. A package provider shall be deemed to have satisfied this requirement by making one or more of the arrangements as described in sections 23 to 25 of that Act. If the package is one in respect of which the provider is required to hold a licence under the Transport Act of 1982<sup>56</sup>, and is covered by arrangements entered into for the purpose of that Act<sup>57</sup>, the provider is also deemed to have satisfied his obligation.

### 24.1. Bonding under the Transport Act of 1982

The Transport Act of 1982 contains a licensing system for tour operators and travel agents.

Section 13 of that Act states that each tour operator or travel agent must, before a licence is granted to him, enter into a bond. This bond shall provide that, in the event of the inability or failure of the tour operator or travel agent to meet his financial or contractual obligations in relation to overseas travel contracts, a sum of money will become available to the Minister for Transport to be applied for the benefit of any customer who has incurred loss or liability.

The bond may be applied for the repatriation of customers from outside Ireland, reimbursement of all reasonable expenses necessarily incurred by such customers by reason of the insolvency and reimbursement (as far as possible) of money paid over.

The requirements in relation to the bond are set out in the Tour Operators and Travel Agents (Bonding) Regulations 1983 (S.I. No. 102 of 1983). Under these regulations, the bond shall be for a sum of 10% (in the case of a tour operator) or 4% (in the case of a travel agent) of “projected licensable turnover” (i.e. the total of receipts estimated by an applicant for a licence in respect of overseas travel contracts during the period of time for which a licence is being sought). The bond may be comprised of a cash sum deposited with the Minister of Transport or in an Irish bank at the sole name of the Minister, a guarantee secured with a bank or insurance company, a guarantee of such other type as may be acceptable to the Minister, or a collective insurance scheme.

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<sup>55</sup> Package Holidays and Travel Trade Act 1995

<sup>56</sup> Transport Act 1982, Sec. 13-19

<sup>57</sup> see Tour Operators (Licensing) Regulations 1983 (S.I. No. 100 of 1983); Travel Agents Operators (Licensing) Regulations 1983 (S.I. No. 101 of 1983); Tour Operators and Travel Agents (Bonding) Regulations 1983 (S.I. No. 102 of 1983); Travellers’ Protection Fund Regulations 1983 (S.I. No. 103 of 1983)



## **24.2. Travellers' Protection Fund**

Sections 15 - 18 of the Transport Act require the establishment of a Traveller's Protection Fund to cover losses and liabilities incurred by customers of insolvent tour operators or travel agents in circumstances where the bond proves insufficient. Each holder of a tour operator's licence is obliged to contribute to the fund. The contribution is IR£ 4 in respect for each passenger who books an overseas travel; it is IR£ 2 if the passenger is a student. No contribution is due for passengers under 2 years of age.

## **24.3. Security under Sections 23 – 25 of the Package Holidays and Travel Trade Act 1995**

The provisions on bonding and insurance in the Package Holidays and Travel Trade Act 1995 are to be applied only to packages that are not covered by licences issued under the Transport Act of 1982. As the Act of 1982 requires licensing for all tour operators and travel agents who organise or sell overseas travels, it is to be understood that the that the Act of 1995 applies mainly to package tours within the Irish State.

The means of providing security foreseen by the Act of 1995 are bonding with an approved body that has a reserve fund or insurance (Sec. 23), bonding with an approved body that has no such reserve fund or insurance (Sec. 24), and taking out insurance (Sec.25).

If the bonding system<sup>58</sup> is chosen, the bond must amount to 10% of the organiser's annual turnover; this figure rises to 15% if the authorised institution itself does not have a reserve fund or insurance.

The insurance of the approved body under Section 23 appears to play a role comparable to the Travellers' Protection Fund foreseen by the Act of 1982. The travellers will therefore gain compensation from the approved body's insurance if the bond turns out to be insufficient. No such insurance coverage is contained in the system established by Section 24 but the endowment of the bonds lodged under that provision appears to be just acceptable.

## **25. ITALY**

Article 21 of Legislative Decree No 111/95 provides for the participation of all travel organisers in a Joint Guarantee Fund. However, this fund has not yet been established. The Commission has initiated infringement proceedings.

Aside from the transposition of the Package Travel Directive, Law 217/1983 establishes a licensing system for travel agents who, in order to obtain a license, must enter a bond. The amount of that bond is prescribed by regional authorities and varies between 3.000 and 200.000 ECU, grossly varying from region to region, but also depending from size and scope of the enterprise.

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<sup>58</sup> Package Holidays and Travel Trade Act, 1995 (Bonds) Regulations, 1995

## 26. LUXEMBOURG

Article 6 of the Package Travel Act<sup>59</sup> and Article 2 of the Grand-ducal regulation<sup>60</sup> provide that each travel agent must, in order to obtain authorisation to run his business, furnish a guarantee. This guarantee may consist of a bank guarantee, an insurance policy or the adherence to a joint guarantee fund. The guarantor has to take over full liability for the reimbursement of all monies paid as well as for the repatriation of travellers in the case of the travel agent's insolvency (Articles 4 and 5 of the Regulation). The security must be available immediately within the territory of the Grand-Duchy.

## 27. NETHERLANDS

Dutch law<sup>61</sup> only obliges the organiser to take the necessary measures to ensure that the repatriation of the consumer and the reimbursement of money paid over be secured. No specifications are made as to the means of security, nor are there any sanctions in the case of non-compliance. Furthermore, there is no scrutiny of the market by a public authority. The functioning of the system thus depends entirely on the awareness of consumers, who, according to the Dutch government, would not buy a package from an organiser/retailer who offers no guarantee against his insolvency.

The travel industry has established a security fund, to which travel organisers contribute according to the number of sold packages. In 1995 this fund amounted to roughly 100 million DFL. Participation to the fund scheme appears to be on a volunteer basis, but the great majority of Dutch tour organisers do, according to the assertions of the Dutch government, participate.

## 28. AUSTRIA

Article 7 of Directive 90/314 was transposed into Austrian law by a separate decree<sup>62</sup>. In the course of less than four years, this has been modified<sup>63</sup>, then substituted by a new decree<sup>64</sup> and again modified<sup>65</sup> as a reaction to apparent

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<sup>59</sup> Loi du 14 juin 1994 portant réglementation des conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours

<sup>60</sup> Règlement grand-ducal du 4 novembre 1997 déterminant le montant, les modalités et l'utilisation de la garantie financière prévue à l'article 6 de la loi du 14 juin 1994 portant réglementation des conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours

<sup>61</sup> Law 689/1992 on the Adaptation of Book 7 of the Civil Code to the Package Travel Directive, Art 13

<sup>62</sup> Reisebürosicherungsverordnung –BGBI 881/1994

<sup>63</sup> BGBI 170/1996

<sup>64</sup> BGBI II 10/1998

<sup>65</sup> BGBI II 118/1998

loopholes. The following comments refer exclusively to the latest version of the decree, i.e. BGBl II 118/1998.

Under this decree travel organisers are obliged to take out insurance or a bank guarantee with a minimum insurance sum of 5-9% of the annual turnover (depending on what kind of travel packages are offered). In addition to this travel organisers must join a common insurance fund with an insurance sum of 50 million ATS which will cover sums that are not covered by the individual insurance or bank guarantee. If an organiser does not join this fund, his individual insurance or guarantee must at least amount to 8-12% of his annual turnover.

The Ministry of economic affairs maintains a public register of travel organisers<sup>66</sup>. All travel organisers must regularly, in the first weeks of each year, furnish evidence that the conditions for registration, among them the existence of sufficient security for the case of insolvency, are still complied with. The register comprises only Austrian travel organisers.

### **28.1. Minimum Amount of Security**

Under the Austrian System, the liability of guarantors/insurers is limited. Also, it must be understood that the legal “minimum insurance sum” set out in the Decree will hardly ever be exceeded so that this amount can be seen as the regular guarantee sum.

### **28.2. Guarantee by a financial institute**

§§ 3 and 6 of the Decree allow for Security to be provided by means of a guarantee from a financial institute.

According to information submitted by an Austrian consumer association, this system has some inconveniences which became apparent in the insolvency of the travel agency “Extratours Roland Swoboda”. The guarantee had been limited by the financial institute to a certain time period. After this period had elapsed the guarantee was not renewed, due to the precarious financial situation of the travel organiser. The public authorities were informed of this, but did not endeavour to shut the travel agency, which became insolvent two months after the guarantee had elapsed. Consequently, the financial institute declined to pay for the repatriation of travellers and the refund of monies.

Apart from the evident lack of attention shown by the public authority this case highlights two problems: First, in Austria financial institutes issue only guarantees for a limited time period; second, under Austrian law, such guarantees cannot be directly be enforced by the consumer but are only enforceable by the holder of the written guarantee. This would be in contradiction to the requirements of the Austrian decree itself, which, in §§ 5 (2) and 6, provides that the consumer can make a direct claim against the guarantor.

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<sup>66</sup> c.f. BGBl II 10/1998, § 9

### **28.3. Lack of protection if travel organiser fails to provide security**

Finally, it was also communicated by a consumer association that loopholes in the supervision of the market became apparent e.g. in the insolvency cases of “Phönix-Tabor-Reisen” and “Extratours Roland Swoboda”: the insurance policy / bank guarantee had elapsed but the travel organiser continued with his business. The Austrian legislation offers no remedy for the case where a tour organiser is not insured but continues to trade.

## **29. PORTUGAL**

Portuguese legislation<sup>67</sup> requires travel agents to lodge a bond<sup>68</sup> as well as to take out insurance<sup>69</sup> in order to cover the civil liabilities arising from their business.

The bond can consist of an insurance policy, a bank guarantee, a bank deposit or of other bonds that are deemed admissible by the General Direction of Tourism. The guarantee amount is 5% of the annual turnover but it must be neither under 5 million ESC nor over 50 million ESC. The insurance must cover at least 15 million ESC.

However, both bond and insurance policy are meant to cover civil liability risks in general and they are not explicitly intended to cover damages arising to consumers from the insolvency of an organiser or retailer.

Under these circumstances it is not clear how the consumer could benefit from the securities in the situation where the organiser/retailer becomes insolvent. In the absence of a direct claim by the consumer against the insurer it would appear that he could demand reimbursement only from the insolvent organiser/retailer who, in turn, would have a claim against the insurer.

Apart from this, it must be noted that the minimum amounts of the bond and the insurance policy constitute a limitation of the security foreseen by Article 7 of Directive 90/314.

## **30. FINLAND**

§ 8 of Law No. 1080/94 provides that each tour organiser and each agent of a foreign tour organiser must furnish to the National Consumer Administration an approved security guaranteeing repatriation of travellers and reimbursement of monies. § 9 provides that tour operators can, under certain circumstances, be exempted from the obligation of furnishing security.

According to § 10, security can be furnished in the form of a guarantee, insurance or “other surety” (it is not specified what this “other surety” could be). The National Consumer Administration must be given the right to the direct use of the security in

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<sup>67</sup> Decreto-Lei n.º 198/93 de 27 de Maio, Diário da República – I Série A - n.º 123, Chapter IV

<sup>68</sup> Decreto-Lei n.º 198/93, Sections 42 – 48

<sup>69</sup> Decreto-Lei n.º 198/93, Sections 49 – 50

the case where the travel organiser falls insolvent. It is up to the National Consumer Administration to decide whether the furnished security is acceptable, i.e. sufficient to cover the risk. The Commission has no information as to how the sufficiency of the guarantee provided is assessed.

§ 10 of Law No. 1080/94 provides that further requirements concerning the acceptability of a security should be set out in a separate decree but no such decree has until now been notified to the Commission.

If, in the case of insolvency of a travel organiser, the security turns out to be insufficient, the coverage of repatriation costs is given priority.

### **30.1. Exemption of certain travel organisers from the obligation to furnish security**

§ 9 of Law 1080/94 permits the National Consumer Administration to exempt travel organisers from the obligation to furnish security if, having regard to the nature and scale of the business, such security seems to be not essential. It is said in this provision that further provisions concerning the grant of such exemptions should be set out in a special decree. However, until now no such decree has been notified to the Commission.

According to a study carried out by the Catholic University of Louvain-la-Neuve, exemption is granted to roughly 10% of travel organisers in Finland.

### **30.2. Limited liability**

Although all securities must be furnished to the National Consumer Administration, they do not constitute a joint guarantee fund for travel organisers. Therefore, clients of an insolvent organiser will only be compensated from the security furnished by this organiser.

The Finnish Law (§11 of Law 1080/94) explicitly takes into account the possibility of a situation where the security furnished by a tour organiser turns out to be insufficient. In these cases, priority of payment will be given to the repatriation of consumers rather than the reimbursement of monies paid for the travel package.

### **30.3. Obligations for foreign organisers/retailers**

According to explanations given by the Finnish delegation at the meeting of 14 April 1999, foreign organisers/retailers must furnish a security under Finnish law. Compliance with the travel guarantee regulations of their country of origin is not considered sufficient.

## **31. SWEDEN**

The Swedish Travel Guarantees Act<sup>70</sup> (§§ 1,4) provides that organisers or retailers must, before offering a package tour for sale, lodge security with the

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<sup>70</sup> Travel Guarantees Act (SFS 1972:204, as amended by SFS 1996:354)

Kammarkollegiet (Judicial Board for public lands and funds). The amount of the bond is decided by the Kammarkollegiet and shall be at least 200.000 SKR for organisers, 200.000 SKR for retailers of travel packages outside Sweden and 50.000 for retailers of tours within Sweden. If there is particular reason for doing so, the Kammarkollegiet may fix the security at a lower figure or dispense altogether with the requirement of security.

## **32. UNITED KINGDOM**

In the UK, a license is required for all organisers of air tours<sup>71</sup>. In order to obtain such license, air tour organisers must lodge a bond with the civil aviation authority who are then responsible to use the bond in the case of the air tour organiser's insolvency.

For tour organisers who do not organise air tours, there is no licensing system. They are, however, obliged to comply with the provisions on travel guarantees contained in the UK Package Travel, Package Holidays and Package Tours Regulations<sup>72</sup>. Criminal sanctions are used to regulate tour operators that do business without having obtained the appropriate security.

The Package Travel, Package Holidays and Package Tours Regulations provide for a great variety of security mechanisms. The organiser/retailer must ensure that a bond is entered into by an authorised institution (Reg.17), amounting to 25% of his annual turnover or the maximum amount of all payments he expects to hold at any time, whichever sum is smaller. If the authorised institution has a reserve fund or insurance cover, the minimum amount of the bond falls to 10% of the organisers/retailers annual turnover (Reg.18).

As an alternative to this, organisers/retailers may take out insurance (Reg. 19). There is no "minimum insurance sum"; it appears therefore that the insurer has to take over unlimited liability.

Another alternative is provided by Regs. 20 and 21 in that all monies paid over by a consumer under, or in contemplation of, a package travel are to be held by a trustee for the consumer until the contract has been fully performed.

### **32.1. Limited responsibility**

Responsibility appears to be limited under the bonding system and the trusteeship system, whereas there is no limitation contained within the insurance system.

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<sup>71</sup> It must be noted that, due to the geographical situation of the UK, most packages sold comprise of air transport.

<sup>72</sup> The Package Travel, Package Holidays and Package Tours Regulations, S.I. 3288 of 1992, Reg. 16 – 26

### **32.2. Trust funds**

Regulations No. 20 and 21 of The Package Travel, Package Holidays and Package Tour Regulations 1992 provide that the requirement of providing security is met if “all monies paid over by a consumer under or in contemplation of a contract for a relevant package are held in the UK by a person as trustee for the consumer until the contract has been fully performed or any sum of money paid by the consumer in respect of the contract has been repaid to him or has been forfeited on cancellation by the consumer.” In this case no bond and insurance is necessary.

According to Information received from a renowned consumers’ association only 1.000 out of 30.000 providers of packages were covered by bonds, whereas all others were following the trust account system. Contrary to this, the British government asserts that only a very few tour organisers have chosen the trusteeship system, and that this system is, due to the strict accounting requirements it implies, rather unattractive for professionals.

It appears that the trusteeship system is, in some cases, providing only a partial refund of monies and expenses for the repatriation of the consumer. Regulation 20 (7) and regulation 21 (6) both provide that, “if the monies held in trust by the trustee (...) are insufficient to meet the claims of consumers (...), payments to these consumers shall be made on a *pari passu* basis”.

Furthermore, it must be noted that Regulation 20 is silent on who the trustees should be, how the trust account should be operated and on the powers and responsibilities of the trustees. There is no requirement that the trustee should be independent of the organiser/retailer. There is no approval or qualification required for those wishing to act as trustee. There is also no requirement that the trust be set up by the means of a formal document.

It has been reported that in many cases package organisers use their own employees (accountants) or their spouse to act as trustees. Obviously, the private funds of these trustees will be limited and unlikely to be comparable to the funds of a financial institute or an insurance company.