

## Selected Issues of the Implementation of the PTD 2015 in Austria

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By widening the definition of a “package”, including online booking processes and introducing a new concept of “linked travel arrangements”, the EU Package Travel Directive 2015<sup>1</sup> brings some significant changes for the travellers and the travel industry. According to Article 28, Member States were supposed to adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January 2018. This article will give an overview on the implementation in Austria and highlight some particular aspects.

### 1. The legislative process in Austria

As early as February 28, 2017, the Austrian Ministry of Justice published a Government Draft for a new “Package Travel Act (Pauschalreisegesetz – PRG)”<sup>2</sup> meant to transpose major parts of the EU Package Travel Directive 2015 into Austrian law. Preceding the publication of the draft, between February 3 and February 21, observations had been filed by various Federal Authorities, Federal Provinces, the Appellate Courts of Vienna and Innsbruck, the Austrian Chamber of Commerce (WKÖ), the Austrian Automobile, Motorcycle and Touring Club (ÖAMTC), Thomas Cook Austria and Expedia.

On March 14, 2017, the Government Draft was considered in the Committee of Justice of the Austrian Parliament and adopted without any amendments. This was followed by the adoptions by the two chambers of parliament, the National Council and the Federal Council, on March 30 and April 4. Subsequently, the new Package Travel Act was published in the Official Journal on April 24, 2017.<sup>3</sup>

Thus, the legislative process went quite speedy without much discussion or opposition – which is a big difference to Germany where the Government Draft was subject to an intensive debate which led to some significant amendments in the final text.

The text of the Austrian Package Travel Act by and large follows the structure and the wording of the Directive with only minor amendments mainly for the purpose to comply with common legal terminology in Austria. The Austrian legislator made no use of any of the options provided in the Directive as for instance extending liability for the performance of the package to the retailer.<sup>4</sup>

### 2. A new understanding of the term “Package”

So far we were used that while a “Package” means a combination of different services, this combination always is subject of a single contract entered into by the traveller and the organiser. The PTD 2015 (and the new Austrian Package Travel Act) brought a paradigm shift in this regard by extending the meaning of the term “Package” to certain separate contracts concluded with different travel service providers for the purpose of the same trip or holiday.<sup>5</sup>

This can create problems in particular for hotel operators if in addition to their accommodation services they mediate service contracts with other suppliers who offer ski passes, wellness treatments, health services or others. Even if it is clearly communicated that these services are delivered under a separate contract with a different supplier the hotel operator may still become liable as tour organiser.

According to Article 3 para 2 of the Directive a combination of either carriage of passengers, accommodation or car rental with one or more “other tourist service(s)” is not a package if the other tourist service(s) do not account for a significant proportion of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination. Recital 18 to the Directive says that other tourist services should only be considered as representing a significant proportion of the value of the package if these services account for 25% or more of the value of the combination. For the sake of legal certainty, the Austrian legislator decided to put this limit in the law itself:<sup>6</sup> if other tourist services account for 25% or more of the value of the

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<sup>1</sup> Directive (EU) 2015/2302 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

<sup>2</sup> Regierungsvorlage für ein Bundesgesetz, mit dem ein Bundesgesetz über Pauschalreisen und verbundene Reiseleistungen (Pauschalreisegesetz – PRG) erlassen wird sowie das Konsumentenschutzgesetz, das Fern- und Auswärtsgeschäfte-Gesetz und das Verbraucherbehörden-Kooperationsgesetz geändert werden, GP XXV RV 1513.

<sup>3</sup> BGBl. I No. 50/2017.

<sup>4</sup> Article 13 para 1 of Directive (EU) No. 2015/2302.

<sup>5</sup> Article 3 para 2 of Directive (EU) No. 2015/2302 and sec. 2 para 2 of the Austrian Package Travel Act.

<sup>6</sup> Sec 2 para 2 no. 3 of the Austrian Package Travel Act.

combination it is assumed that they represent a significant proportion of the value of the package.

This, of course, is only a small contribution to help hotel operators to avoid tour organiser liability as regardless of the proportional value of the other tourist services there will still be a package if these services are advertised as an essential feature. Of course, hotels which offer such services (either themselves or through third suppliers) want to advertise these services as essential feature in order to differentiate from their competitors.

The only solution to avoid liability as an organiser, therefore, will be to only sell these additional services on the spot after the traveller has checked in for the hotel room: a combination of accommodation with one or more other tourist services is exempted from being regarded a package if the other tourist service is selected purchased only after the performance of the accommodation service has started.<sup>7</sup>

### 3. Price alterations – real or false problem?

According to current Austrian law,<sup>8</sup> the package price only may be subject to a subsequent revision after conclusion of the contract if this revision relates to a change of the costs for carriage (including fuel costs) or the level of taxes or fees on travel services like landing fees, embarking or disembarking fees in harbours or airports or a change in applicable currency exchange rates which occurred after the contract has been concluded. There has to be an explicit reservation in the contract and the respective contract clause has to provide the traveller with precise information on how the new price is to be calculated. No reservation of a price revision at all is allowed for the latest 20 days before departure. In addition, any reservation of price alterations may only be included in General Contract Terms if there are at least two months between the time of conclusion of contract and the start of the performance of the services.<sup>9</sup>

Due to the full harmonization approach of the Package Travel Directive 2015,<sup>10</sup> the latter restriction will no longer be applicable as soon as the Package Travel Act comes into force. However, the Austrian legislator has failed to make clear in the Package Travel Act<sup>11</sup> (or in the amendments to the Consumer Protection Act)<sup>12</sup> that the general rule of sec 6 para 2 No. 4 of the Consumer Protection Act will no longer be applicable to package travel contracts from July 1, 2018.

In line with the Directive,<sup>13</sup> the Package Travel Act provides that in case of a price increase exceeding 8% of the total package price the traveller may terminate the contract without paying a termination fee. There has been a big discussion in Germany that this new rule would be to the detriment of travellers as according to established case law, the traveller so far could terminate the contract without paying termination fee if the price increase exceeded 5% of the package price.

Anyway, this seems to be a more or less theoretical debate: the key requirement is the necessity to provide, in the contract, precise information on how the price revisions are to be

calculated. In the light of the different circumstances which can be a legal reason for a price revision and their different potential impact on the package price most likely to vary from each single package to the other, it seems almost impossible to comply with the requirement of providing a precise calculation method in advance. Not for nothing, the German Travel Agency Association<sup>14</sup> has for quite some time decided to abstain from recommending any price alteration clauses.

### 4. Responsibility for the performance of the package – the organiser's work and the traveller's contribution

According to sec. 11 para 1 of the Package Travel Act and in line with article 13 para 1 of the Directive, the organiser is responsible for the performance of the travel services included in the package travel contract. However, the traveller has the obligation to inform the organiser without undue delay of any lack of conformity which he perceives during the performance of such travel service.<sup>15</sup>

So far the traveller's obligation to communicate a lack of conformity has been very weak in Austrian law:<sup>16</sup> The obligation only applied if

- the organiser had designated a local representative;
- this representative was available on the spot without significant effort; and
- the organiser had, in writing, informed the traveller about the obligation and explicitly pointed out that any failure to comply with the obligation would not affect the travellers rights to remedy or price reduction but only could be regarded contributory negligence with regard to damage claims.

The Package Travel Act states that the traveller is entitled to an appropriate price reduction for any period of lack of conformity unless the organiser proves that the lack of conformity is attributable to the traveller.<sup>17</sup>

As the traveller has the obligation to inform the organiser of any lack of conformity which he perceives and this obligation is no longer subject to the additional requirements as mentioned above there are good grounds to assume that a failure of the traveller to inform the organiser of a lack of

<sup>7</sup> Article 3 para 2 of Directive (EU) No. 2015/2302 and sec. 2 para 2 No. 2 lit. b of the Austrian Package Travel Act.

<sup>8</sup> Sec. 31c Consumer Protection Act (KSchG).

<sup>9</sup> Sec 6 para 2 No. 4 Consumer Protection Act (KSchG).

<sup>10</sup> Article 4 of Directive (EU) No. 2015/2302.

<sup>11</sup> Sec 8 of the Austrian Package Travel Act.

<sup>12</sup> Article 2 of the Austrian Package Travel Act.

<sup>13</sup> Article 10 para 2.

<sup>14</sup> Deutscher Reisebüroverband (DRV).

<sup>15</sup> Art 13 para 2 of Directive (EU) No. 2015/2302 and sec. 11 para 2 of the Austrian Package Travel Act.

<sup>16</sup> Sec 31e para 2 of the Austrian Consumer Protection Act (KSchG).

<sup>17</sup> Sec. 12 para 1 of the Austrian Package Travel Act.

conformity he had perceived will as a result make this lack of conformity attributable to the traveller from the time it could have been notified to the organiser and the organiser could have taken measures of remedy.

However, the Austrian legislator still kept a provision whereas a failure of the traveller to inform the organiser of a lack of conformity can be regarded contributory negligence with regard to damage claims.<sup>18</sup> This provision has no equivalent in the Directive and seems to be an unnecessary and even confusing remnant of the previous legal situation: in line with article 14 sec. 3 of the Directive, sec. 12 para 3 of the Package Travel Act provides that the traveller shall not be entitled to compensation for damages if the organiser can prove that the lack of conformity is attributable to the traveller. If we assume that a failure to comply with the obligation to notify the organiser of a lack of conformity results in this lack of conformity being attributable to the traveller, there is no need for an additional rule on contributory negligence.

Probably it will be a task for the Court of Justice of the European Union to provide clarification in this regard.

### 5. Liability for damage: is “fault or no fault” still the question?

The liability of the organiser for any damage resulting from the failure to perform so far was widely regarded as fault liability with a reversed burden of proof<sup>19</sup> because of the reference to “*an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall*” in Article 5 para 2 of the Package Travel Directive 1990, a phrase which in its essence describes the *absence of fault*.<sup>20</sup>

However, the new Package Travel Directive 2015 replaced “force majeure” by “unavoidable and extraordinary circumstances” and completely deleted the reference to an event which the organiser, even with all due care, could not foresee or forestall. Therefore according to sec 12 para 3 of the Package Travel Act, the organiser is only exempt from paying compensation if he can prove that the lack of conformity is

- attributable to the traveller,
- attributable to a third party unconnected with the provision of the travel services included in the package travel contract and was neither foreseeable nor avoidable; or
- due to unavoidable and extraordinary circumstances.

This means that an event which the organiser, even with all due care, could not foresee or forestall will not release the organiser from paying compensation to the traveller unless it fulfils the requirements of one of the three alternatives mentioned above – or, in other words, to prove due care and absence of fault will no longer be enough to escape liability.

Thus, there seem to be good reasons to qualify liability under the Package Travel Act as a kind of strict liability rather than a fault liability with a reversed burden of proof.

An additional aspect is worth to be mentioned with regard to the liability provisions: while the Austrian legislation follows the wording of the German version of Directive (EU) No. 2015/2302, which regarding a lack of conformity attributable to a third party unconnected with the provision of the travel services establishes the requirements of having been “*neither foreseeable nor avoidable*” the English version of the Directive only says “*unforeseeable or unavoidable*”.<sup>21</sup> This is a significant difference because according to the German version both (negative) conditions have to be fulfilled while according to the wording of the English version (and other language versions likewise) one of the two conditions is sufficient. Again it will be up to the Court of Justice of the European Union to clarify which version shall prevail.

### 6. Insolvency protection – legislator in default

Although Member States were obliged to adopt and publish, the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January 2018<sup>22</sup> no such rules have been adopted and published yet in Austria with regard to insolvency protection.<sup>23</sup>

To comply with the Directive, it is not enough to maintain the current insolvency protection rules<sup>24</sup> as the definition of a package has significantly changed with the new Package Travel Directive and linked travel arrangements have to be included in insolvency protection.

According to recent information, a draft Regulation will only be published by the end of May and the final Regulation probably be adopted in June – which leaves the organisers and traders of linked travel arrangements only very short time to acquire an insolvency protection which complies with the new rules by July 1, 2018.

It seems to be an irony of legislation that Austria was so early and quick in adopting the contract related parts of the Directive but is so slow and late in adopting the insolvency protection part.

<sup>18</sup> Sec. 12 para 2 sentence 2 of the Austrian Package Travel Act.

<sup>19</sup> See Study on Safety and Liability Issues Relating to Package Travel (IP/A/IMCO/FWC/2006-058/LOT 4/C1/S. 5) by Dr. Frank Allweldt, Prof. Klaus Tonner, Marc McDonald, Dr. Senda Kara, Bilgin Ayata and Uta Stenzel, 5: “... although it remains convenient to use the term strict liability, in effect what Art. 5 does is it reverses the usual burden of proof in claims and requires organizers to prove they were not to blame, rather than requiring consumers to prove that they were.”

<sup>20</sup> German Supreme Court (BGH) judgement of 9 November 2004 in case X ZR 119/01; published in RRA 2005, 12 and NJW 2005, 418.

<sup>21</sup> Similar the Spanish version (“*imprevisible o inevitable*”), the French version (“*imprévisible ou inevitable*”), the Italian version (“*imprevedibile o inevitabile*”) or the Dutch version (“*niet kon worden voorzien of voorkomen*”).

<sup>22</sup> Article 28 of Directive (EU) No. 2015/2302.

<sup>23</sup> Articles 17 to 19 of Directive (EU) No. 2015/2302.

<sup>24</sup> Reisebürosicherungsverordnung BGBl. II Nr. 316/1999 most recently amended by BGBl. II Nr. 96/2013.