

DOI: 10.38173/RST.2021.22.2.7:81-89

Title:	<i>BRIEF CONSIDERATIONS REGARDING THE SPECIFICITY OF TRADE RELATIONS BETWEEN CONSUMERS AND TRADERS REGARDING TRAVEL TOURIST SERVICES</i>
Author:	Elise-Nicoleta VÂLCU

Section: LEGAL SCIENCES

Issue: 2(22)/2021

Received: 22 August 2021	Revised: -
Accepted: 2 October 2021	Available Online: 15 November 2021

BRIEF CONSIDERATIONS REGARDING THE SPECIFICITY OF TRADE RELATIONS BETWEEN CONSUMERS AND TRADERS REGARDING TRAVEL TOURIST SERVICES

Elise-Nicoleta VÂLCU¹

ABSTRACT:

THE RESERVATION OF TOURIST PACKAGES OF TRAVEL SERVICES AND ASSOCIATED TRAVEL SERVICES CONFERS WELL-DEFINED RIGHTS TO CONSUMERS IN ADVANCE, DURING THE RESERVATION AND THROUGHOUT THE VACATION.

IN THE FOLLOWING, WE MENTION SUCH RIGHTS CONFERRED TO THE CONSUMER: THE RIGHT TO PRE-CONTRACTUAL INFORMATION, THE RIGHTS DERIVING FROM THE RESPONSIBILITY OF THE OPERATOR / ORGANIZER FOR THE PROPER FUNCTIONING OF THE TRAVEL SERVICES INCLUDED IN THE PACKAGE, RESPECTIVELY THE RIGHT TO PROTECTION IN CASE THE ORGANIZER ENTERS INSOLVENCY PROCEEDINGS. THE TOURIST PACKAGES PURCHASED BOTH ONLINE AND THOSE PURCHASED FACE TO FACE, FROM THE MERCHANT WHO ACTS AS AN ORGANIZER OF TOURIST PACKAGES, ARE CONSIDERED.

THESE RIGHTS ARE REGULATED BOTH BY THE LEGISLATION OF THE EUROPEAN UNION BY DIRECTIVE (EU) 2015/2302² REGARDING THE PACKAGES OF TRAVEL SERVICES AND ASSOCIATED TRAVEL SERVICES AS WELL AS BY THE INTERNAL TRANSPOSITION NORM, RESPECTIVELY ORDINANCE NO.2 / 2018 REGARDING THE PACKAGES OF TRAVEL SERVICES AND ASSOCIATED TRAVEL SERVICES, AS WELL AS FOR THE MODIFICATION OF SOME NORMATIVE ACTS³.

KEY WORDS: PACKAGE OF TRAVEL SERVICES, INFORMATION, GUARANTEED LOANS, TERMINATION, LIABILITY

I. INTRODUCTION

In accordance with Article 26 (2) and Article 49 TFEU, the Internal Market of the European Union comprises an area without frontiers in which the free movement of services, goods and the freedom of establishment recognized to nationals are ensured.

¹Associate Professor PhD, Faculty of Economics Sciences and Law, University of Pitesti, Pitesti (Romania), elisevalcu@yahoo.com

²Directive (EU) 2015/2302 of the European Parliament and of the Council on travel packages and associated travel services, 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, published in the Official Journal of the European Union, L series, no. 326 of 11 December 2015

³Ordinance no. 2/2018 regarding the packages of travel services and associated travel services, as well as for the modification of some normative acts, published in the Official Gazette no. 728 of August 23, 2018

We consider necessary the presence of an adequate national legislation, respectively GO no. 2/2018, harmonized with the union legislation regarding the rights and obligations deriving from the contracts regarding the service packages, in order to support the single union market.

This ordinance establishes the legal framework regarding commercial contracts that have as object packages of travel services and associated travel services concluded between travelers as consumers and traders⁴.

For a better understanding of the specifics of the legal relationship established between the trader and the traveler, as defined by this norm, we consider it opportune to clarify the appropriate terms.

Thus, within the meaning of the ordinance, “trader” means any public or private person who acts, including through another person, for purposes related to his commercial, business, craft or professional activity in connection with contracts the object of this ordinance, as an organizing travel agency, an intermediate travel agency, a trader that facilitates an associated travel service or as a travel service provider ”.⁵

For the generic title of “trader”, specific to commercial relations, the legislator uses the concept of “travel agency”, defining it as the economic operator that holds a valid travel license under the law and which, as the case may be, functions as an *organizing travel agency* or *intermediate travel agency* as follows:

- a) When it behaves as a *travel agency* organizing its commercial activity, it is limited to selling or offering for sale packages either directly or through another trader;
- b) When it behaves as an *intermediate travel agency*, we must identify the presence of an organizing agency, so that the tourist packages will be sold to the traveler by the former, but under the conditions set by the organizing travel agency. “

As mentioned above, the commercial relationship ends between *the trader-travel agency*, on the one hand and *the traveler*, on the other hand. The text of the ordinance defines the term *traveler* as any person who concludes a contract or who has the right to travel based on a *contract regarding the package of travel services*.

Article 2 point 12 of the normative act clarifies the concept of “package” as the combination of at least two different types of travel services intended for the same trip or vacation, if one of the following conditions is met:

- a) The respective services are combined by a single trader and we have, therefore, in view a single contract regarding all the services;
- b) The respective services are purchased based on several contracts concluded separately with several suppliers and which meet the following conditions:
 - b1) were selected before the traveler accepted the payment;
 - b2) are promoted or sold under the name of "package" or under a similar name;
 - b3) are purchased from different merchants by booking online on behalf of the traveler, the payment details and email address being sent from the merchant with whom the first contact is concluded to the other merchants and contractually it is concluded with the latter no later than 24 hours after confirmation of booking the first travel service.

⁴“ This ordinance does not apply to: a) packages and associated travel services that last less than 24 hours except in situations where they include overnight accommodation; b) travel packages and services associated with the facility occasionally and on a non-profit basis and only to a small group of travelers; c) packages and associated travel services purchased for the organization of a business trip, concluded between a trader and another natural or legal person acting for reasons related to his commercial activity, business, trade or profession. ”, see in this meaning, art.2 paragraph 2 of Government Ordinance no.2 / 2018

⁵ See art.3 paragraph 2 point 4 of Ordinance no.2 / 2018

The categories of services regulated by this ordinance are classified as follows:

- i) *Travel service*, which represents:
 - i.1) passenger transport
 - i.2) accommodation (other than residence)
 - i.3) car rental, etc.

Associated travel service which involves the existence of at least two types of travel services purchased for the same trip or holiday, which is not a package and which involves several contracts concluded separately with individual travel service providers if at least one of traders facilitates one of the following options:

- ii.1) the traveler selects and pays separately for each travel service;
- ii.2) the traveler purchases, in a personalized way, an additional travel service with a second trader, within 24 hours at the latest since the confirmation of the reservation of the first travel service with a first trader.

II. THE RIGHTS TRAVELERS / CONSUMERS BENEFIT FROM, WITHIN THE CONTRACT REGARDING THE PACKAGE OF TRAVEL SERVICES

A. *Before concluding the commercial contract for travel services, the travel agency is obliged to provide the traveler with standard information, such as:*

- a) The destination / destinations of the trip, the itinerary, and in case the accommodation is included, the number of nights included;
- b) Means of transport / its characteristics, places, dates and times of departure / return;
- c) Location / main characteristics (example, tourist classification according to the norms of the destination country / meal services offered / excursions, visits included in the agreed price / language in which information about services will be provided at the destination of the holiday / identification data of the organizing agency or of the intermediate agency, as the case may be (phone number, email address, etc.)
- d) The total price of the package including commissions, fees, penalties, additional costs, and when these cannot be reasonably established, prior to the conclusion of the contract, the agency is obliged to provide unequivocal indications on possible additional costs / payment methods (advance and schedule payment of the balance or any financial guarantees to be paid by the traveler)
- e) General information regarding the travel documents / deadlines for obtaining visas.
- f) Information regarding the possibility of the traveler of unilateral denunciation at any time before the beginning of the execution of the contract, concretely identifying the payment of penalties / unilateral denunciation of the travel agency.

Thus, according to the provisions of Article 13, if the traveler terminates the contract or withdraws before the start⁶ of the execution of the package, he may be obliged to pay to the travel agency a *termination penalty* which must be proven to be adequate and justifiable. In practice, in most cases, contracts provide for *reasonable standardized termination penalties* depending on the time of termination of the contract, before the execution of the package.

If no standardized penalties are expressly provided, their value is to be calculated in relation to the package price.

⁶ The moment of starting the execution of the package represents the moment of starting the execution of the travel services included in the package; see in this sense, art.3 point 9 of Government Ordinance no.2 / 2018

At the request of the traveler, the travel agency has the obligation to justify the amount of penalties calculated and applied as an effect of the termination of the contract before the execution of the package.

By way of derogation⁷, the traveler has the right to terminate the contract before the start of the execution of the package without paying any termination penalty in case of "unavoidable and extraordinary circumstances" that occur at the destination... and which significantly affect the execution of the package... ", Such as in the case of serious security issues at the destination which are likely to affect the package, etc. In the latter case, the traveler has the right to a full refund of the package price without being able to request additional compensation⁸.

The travel agency also has the right to unilaterally terminate the contract and implicitly to reimburse in full the cost of the package without being obliged to pay compensation in the following cases:

- The number of persons registered for the execution of the package is less than the minimum number inserted in the required contract and the agency notifies the traveler about the termination of the contract but not later than:
 - a) 20 days before the start of the package, if the trip lasts more than six days;;
 - b) 7 days before the start of the package, if the trip lasts between two and six days;
 - c) 48 hours before the start of the package, if the trip lasts less than two days;
- The agency cannot perform contractually due to "unavoidable and extraordinary" circumstances exemplified above.

Both in case of *refund*, as a result of the unilateral denunciation by the traveler with retention of penalties by the travel agency, and in case of *full reimbursement* of the value of the package to the traveler, the obligation to pay falls within the agency within 14 days from termination of the contract regarding the package of travel services.

- g) Information regarding the minimum number of persons necessary for the services in the package to be able to be executed with the mention of the consequences "per a contrario";
- h) Information regarding the optional or compulsory insurance to cover the costs of assistance, in case of illness, accident or death, etc.

In addition to the rights enjoyed by the traveler, above-mentioned, he has the right to request information from the travel agency regarding:

- The identification elements (name, registered office) of the responsible entity regarding its protection in case of insolvency;
- Name, address, telephone number, email address of the local representative of the travel agency, to allow the traveler an effective collaboration with him, requesting assistance if necessary or to report any non-compliance notified during the execution of the package.⁹
- Information on alternative dispute resolution (ADR) procedures (SAL)¹⁰

⁷ see in this sense, art.13 point 1 of GO no.2 / 2018

⁸ see in this sense, art.13 point 4 of Government Ordinance no.2 / 2018

⁹ see art.13 paragraph 3 of Government Ordinance no.2 / 2018

¹⁰ For more details see GO no.38 / 2015 on alternative dispute resolution between consumers and traders with subsequent amendments, and as appropriate the online dispute resolution platform under Regulation (EU)

- The intermediate travel agency has the obligation, at the request of the traveler, to ensure without undue delay, the contacting of the organizing travel agency both in the pre-contractual phase and in any phase of its execution.

Regarding the rights enjoyed by the traveler during the execution of the contract, he is entitled to "adequate assistance without undue delay" when in difficulty such as: consular assistance, medical assistance, providing information on local authorities, supporting the traveler in finding alternative travel services, etc.

However, the traveler may be required to pay a reasonable fee for any of the above categories of assistance if he or she has caused "the situation of difficulty intentionally or through his or her own negligence."¹¹

III. THE CONDITIONS FOR MODIFYING THE CLAUSES OF THE CONTRACT REGARDING THE PACKAGE OF TRAVEL SERVICES

The clauses of the contract regarding the travel services can be modified, according to the provisions of article 10 of GO no. 2/2018 when:

i) The traveler transfers the contract regarding the package of travel services to a person in compliance with the conditions stipulated in the contract after notifying the travel agency within a reasonable time, in the sense that the notification submitted on a durable medium and addressed to the economic operator, to be communicated at least seven days before the start of the package. The transferor and the person to whom the contract is transferred are jointly and severally liable for the payment of the balance, commissions and other additional costs generated by this transfer provided that they are reasonable and proven by the travel agency.

ii) If the contract explicitly provides for the possibility of changing the price, the traveler may request its reduction if there are changes generated by:

- a) the price of passenger transport results from the cost of fuels;
- b) the level of fees and commissions applicable to the services to which it refers contractually are established by third parties;
- c) the exchange rate.

For the same reasons mentioned above, the economic agent may request an increase of the contracted package price only if he has previously sent a notification justifying the increase decision based on a calculation, at least 20 days before the start of the package execution.

iii) If the travel agency, before starting the execution of the contract, cannot meet the special conditions required by the traveler, or proposes to increase the package price by more than 8% (increase generated by a) the price of passenger transport results from the cost of fuel ; b) the level of fees and commissions applicable to the services to which it refers contractually are established by third parties; c) the exchange rate), the traveler has the possibility either to accept the price increase or to terminate the contract without paying any penalty. When we remember these last situations, the traveler can accept another offer of the travel agency, of a quality at least equivalent to the initial one)¹².

no.524 / 2013 of the European Parliament and Decision of 21 May 2013 on the online settlement of consumer disputes and amending Regulation (EC) No.2006/2004

¹¹ see art.17 paragraph 2 of Government Ordinance no.2 / 2018

¹² see for more details art.11 paragraph 3 of GO no.2 / 2018

IV. CONSUMER PROTECTION - TRAVELER, IN CASE OF INSOLVENCY OF THE TRADER (TRAVEL AGENCY)

Article 18 of Government Ordinance no. 2/2018 stipulates that the organizing travel agencies established on the Romanian territory offer guarantees regarding the reimbursement of all expenses incurred by travelers or at the expense of travelers, as a result of the insolvency¹³ of the economic operator providing travel services.

The guarantees provided for in Article 18 (1) of GO no. 2/2018 are represented by:

- a) *Letters of bank guarantee*¹⁴. In an applied approach, within the meaning of the provisions of article 2321 of the Civil Code, the bank is the issuer of the letter of guarantee, the organizing travel agency is the author of the letter of guarantee and the Ministry of Tourism is the beneficiary of the letter of bank guarantee. The object of this instrument is the guarantee by the bank of the risk of non-payment by the organizing travel agency of the amounts paid by travelers, caused by the non-execution of all or part of the contracts regarding travel service packages, in case of insolvency of the organizing travel agency.
- b) *Insurance policies*¹⁵. According to Article 3 (5) of the "Guarantee Procedure of 15 January 2019", the insurance policy consists in guaranteeing by the insurance company the risk of non-payment by the travel agency of the amounts paid by passengers, caused by the non-execution in full or partial of the contracts for the sale of travel service packages, in case of insolvency of the organizing travel agency....”
- c) *travel package guarantee fund*¹⁶. The travel package guarantee fund represents the private guarantee scheme in the field of tourism, which aims to protect travelers who have purchased packages of travel services or travel services associated with the consequences of the insolvency of the organizing travel agency. The entity is organized as a Romanian joint stock company issuing registered shares, established based on the Companies Law no. 31/90¹⁷. The specificity of the guarantee fund consists in the fact that the shareholders (minimum 10, each holding at most 10% of the voting rights) are the travel agents or traders who facilitate an associated travel service or travel service providers.
- d) *Contract of trust*¹⁸. The trust contract as a guarantee instrument, implies the conclusion in authentic form of a contract between the organizing travel agency as a constituent and a trustee. The trust contract, as a guarantee instrument, has as

¹³ According to the provisions of art.5 paragraph 1 point 29 of Law no.85 / 2014 on insolvency prevention and insolvency procedures, with subsequent amendments and completions “insolvency is that state of the debtor's patrimony the payment of certain, liquid and due debts, as follows: a) the debtor's insolvency is presumed when, after 60 days from the due date, he has not paid his debt to the creditor; the presumption is relative; b) the insolvency is imminent when it is proved that the debtor will not be able to pay at maturity the due debts committed, with the funds available at the maturity date. See for more details and “Guarantee procedures from January 15, 2019” of the amounts paid by travelers in connection with travel service packages / associated travel services in case of insolvency of the organizing travel agency and traveler compensation procedures

¹⁴ The letter of bank guarantee represents the banking instrument by which the guaranteeing bank irrevocably undertakes to pay a certain amount of money to a beneficiary, in case the main debtor will not extinguish his own obligation.

¹⁵ The insurance policy represents the document / guarantee instrument (on electronic support or paper support) that proves the conclusion of an insurance contract and summarizes the clauses of the contract.

¹⁶ see in this sense art.2 point 7 of Government Ordinance no.2 / 2018

¹⁷ Companies law no. 31/90 republished with subsequent amendments and completions

¹⁸ According to art.773 of the updated civil code “trust is the legal operation by which one or more constituents transfer real rights, debt rights, guarantees or other patrimonial rights or a set of such rights, present or future, to one or more trustees

beneficiary the traveler, in the sense that if the latter has bought a package of travel services thus guaranteed, and is in the situation where the services paid as a result of upon entering the insolvency of the agency, the trustee will: a) return to the traveler the amount paid by him to the organizing agency, b) either pay the package instead of the agency for the traveler to continue to benefit from travel services, c) or pay the traveler's repatriation (transport and accommodation, if applicable)¹⁹.

e) other legally constituted guarantee instruments, etc.

Specifically, if the travel package was guaranteed by an insurance policy, in case of insolvency of the travel agency, according to article 3 of the "Guarantee Procedure", the insurance company undertakes that within a maximum of 12 hours upon receipt of the notification made by the traveler:

- to ensure to him, through an operator, his repatriation with the support of all the expenses incurred;
- to offer alternative services for the continuation of the package, such as changing the accommodation by offering in a unit equivalent to the initial one in the offer or of superior quality to the first one;
- if the traveler pays from his own funds the repatriation expenses, the insurance company has the obligation to reimburse their cost.

In conclusion, regardless of the type of guarantee, they cover:

- 1) *Refunds at the request of the traveler* (if the travel service was not performed by the travel agency);
- 2) *Similarly Travel services (holiday)*;
- 3) *Repatriation costs*²⁰ (if applicable, including the cost of accommodation before repatriation).

Regarding the need to protect the traveler, the normative act regulates the ways in which the funds and activities of tourism providers are supervised, as follows:

1. In order to obtain the tourism license, the agency has the obligation to prove the establishment of a guarantee instrument (guarantee fund)
2. The share capital of an economic operator organized as a limited liability company, holder of a tourism license for the organization activity, may not be less than 25,000 lei.²¹
3. The agencies have the obligation to periodically transmit to the Ministry of Tourism information regarding the activity carried out.
4. The current activity of a travel agency is subject to the supervision and control of the National Authority for Consumer Protection, the European Consumer Center in Romania²² or the alternative dispute resolution entities²³.

¹⁹ see for more details art.5 paragraph (2) of "Guarantee procedures from January 15, 2019"

²⁰ Represents "reasonable expenses incurred by the traveler or expenses incurred by the issuer of the guarantee instrument for returning to the place of departure or to the place agreed for delivery" see in this sense art.1 paragraph 1 point 2 of the "Guarantee procedures from 15 January 2019" of the amounts paid by travelers in connection with the packages of travel services / associated travel services in case of insolvency of the organizing travel agency and the procedures for compensating travelers

²¹ See in this sense art. 20 paragraph 2 of GO no. 2/2018 corroborated with art. 11 paragraph 1 of the Companies Law no. 31/1990 republished, with subsequent amendments and completions

²² When travel packages are purchased from organizing travel agencies established in another Member State of the European Union.

²³ According to the provisions of GO no. 38/2015 regarding the alternative settlement of disputes between consumers and traders with subsequent amendments

CONCLUSIONS

Although we are discussing the presence of EU legislation in the field of analysis, national transposing legislation, disparities between national rules are an element that discourages travelers from a particular EU Member State to purchase travel packages and associated travel services. from another Member State.

We believe that the Member States must make an additional combined effort so that travelers, consumers of tourist packages, benefit from the advantages of the internal market throughout the European Union.

REFERENCES

1. Directive (EU) 2015/2302 of the European Parliament and of the Council on packages for travel services and associated travel services, amending Regulation (EC) No 2006/2004 and Directive 2011/83 / EU of the European Parliament and of the Council and repealing Directive 90/314 / EEC
2. Law no. 85/2014 on insolvency prevention and insolvency procedures, with subsequent amendments and completions
3. Government Ordinance no. 38/2015 on the alternative settlement of disputes between consumers and traders with subsequent amendments, and as the case may be the online dispute resolution platform under Regulation (EU) no. 524/2013 of the European Parliament and of the Council of 21 May 2013 on the online settlement of consumer disputes and amendment of Regulation (EC) no. 2006/2004 Ordinance no. 2/2018 regarding the packages of travel services and associated travel services, as well as for the modification of some normative acts, published in the Official Gazette no. 728 of August 23, 2018
4. “Guarantee procedures from January 15, 2019” of the amounts paid by travelers in connection with the package of travel services / associated travel services in case of insolvency of the organizing travel agency and the procedures for compensating travelers, published in the Official Gazette no.76 from January 30, 2019