

# **Directive travel service: what's new for tour operators: for termination of the contract?**

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The travel sector in France is made up of 5,300 companies<sup>[1]</sup> with a turnover of 15.4 billion euros, mainly represented by the travel agencies and by tour operators with 4000 companies and a turnover of 13.5 billion euros. The rest 1,300 companies offer services of booking and related activities.

This very dynamic sector has encountered many difficulties for the last five consecutive years due to the economic crisis, on one hand, and, on the other hand, due to the fact that geopolitical crises have occurred in countries where operators had important interests and were sending many clients (Egypt, Tunisia etc.)<sup>[2]</sup>.

The different social plans and plans for voluntary departures among the main actors (TUI France, Thomas Cook, FRAM etc.) already concern more than a thousand jobs.

The APST (Professional Association of Solidarity Tourism) never recorded such claims during the year 2014<sup>[3]</sup>. This is due to the uncertainties generated by the economic crisis of course, but also, for several years due to a level of increasing disintermediation that results in a transfer of customer to service providers not covered by the package travel Directive (hotels, sites selling hotel rooms, local agencies present on the internet (rental car sites etc.))<sup>[4]</sup>.

This mode of consumption of travel allows tourists to create a tourist package, addressing different local suppliers.

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<sup>[1]</sup> Data services market in France, year 2010.

<sup>[2]</sup> Law and practice of tourism n.<sup>o</sup> 2 - digital and tourism.

<sup>[3]</sup> APST Numbers – la quotidienne du tourisme, 16 september 2016.

<sup>[4]</sup> Tourisme's number – DGE 2015.

A statistical study entitled “personal of the French overseas travel”<sup>[5]</sup>, published by the branch companies, illustrates this phenomenon. The study states that the proportion of French people buying trips without going through an intermediate grew from 3% to 4% per year over the last 10 years to reach in 2013 the threshold of 50% of travel purchased online locally. The phenomenon is also not limited to France but is found for all the countries of the European Union: in other words, buying a trip from multiple local suppliers that are not included in the Directive allows to pay often cheaper!

We have to remember that the European Commission has adopted directive 90/314/EEC of the Council of 13 June 1990 (so-called “PTD – Package Travel Directive”)<sup>6</sup> in order to unify the regimes of States relating to package travel and to offer consumers a comparable level of protection regardless of the Member State in which they buy their package. The provisions and principles of this directive have been transposed in France by the law of July 13, 1992<sup>7</sup> entered into force on 1 December 1994. Following this, the law of July 22, 2009<sup>8</sup> took over the main lines.

However, observing the implementation of this legal framework during its transposition by the national law, some Member States have established specific regulations, thus making the partially incoherent the PTD.

For example, France has chosen a legislative and regulatory framework which, accompanied by a broad interpretation by the courts of several notions (particularly in the “Océane” judgment<sup>9</sup>), made our country a State where the responsibility of tour operators is today the most severely appreciated compared to other countries of the EU. This is particularly the case of the strict liability under article L.211-16 of the Code of tourism<sup>10</sup>.

Since 1990, profound changes have occurred at the level of the modes of consumption within the tourism industry: the emergence of low-cost airlines and the democratization of access to the internet contributed to the emergence of new patterns of production, distribution and consumption.

In this context, the consumers were facing uncertainty about the system of protection they could qualify.

<sup>5</sup> Les voyages des français en 2014 – DGE N° 45 6 Juillet 2015.

<sup>6</sup> Directive 90/314/CEE , du 13 Juin 1990.

<sup>7</sup> Loi n°92 646 du 13 juillet 1992, JORF 14 Juillet 1992.

<sup>8</sup> 3 Cass. CIV 1. Stop no. 274 of 8 March 2012 (10 - 25.913).

<sup>9</sup> Directive 2015 – 2302 du 25 novembre 2015, JOUE 1 326 / 1.

<sup>10</sup> Cornu (G.), vocabulaire juridique, édition PUF 2016.

At the end of this finding by the European Commission<sup>11</sup> Directive 90/314/EEC and Regulation 261/2004 and Consumer Rights Directive 2011/83/EU were repealed in favour of the directive 2015/2302 on November 25, 2015.

This directive must be transposed by Member States by 1<sup>st</sup> July 2018.

The directive of November 25, 2015 has been amended in order to bring all travel packages, both online and offline, together and to ensure all travelers have a balanced set of rights. Indeed, it was necessary to adopt the legislative framework in force and to bring it in line with the internal market, to remove ambiguities and to fill legal loopholes.

In the present article, we will examine the current conditions of termination before the start of the tourist package (I) and, in a second part,, the consequences of the new directive for tourism professionals (II).

## I – THE CURRENT CONDITIONS OF THE RIGHT OF CANCELLATION BEFORE THE START OF THE TOURIST PACKAGE

The package is described in the Code of tourism in article L.211 – 2. It is a benefit that results «*of the pre-arranged combination of at least two of the following when 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: a) transport, b) accommodation and c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.*

The definition is set according to the legal dictionary of Gérard Cornu<sup>12</sup> and the name given to the dissolution of the contract by voluntary act – such as the revocation – but without retroactivity – either at the initiative of one party, noted in contracts for an indefinite period (unilateral termination), or on the agreement of both parties (conventional termination).

The Tourism Code indicates the applicable provisions which are, on one hand, articles L.211 – 1 and following in the single chapter on the regime regarding the sale of travel and accommodation and, on the other hand, articles R.211 – 3- 11 of the Code of the section II relative to the contract of sale of travel and accommodation

<sup>11</sup> CA Paris, 25th ch., section B, 19 Dec. 2008: JurisData No. 2008 - 373589; JCP G 2009, II, 10058, comm. F. Baker.

<sup>12</sup> CA Paris, 5th pole, 11th c., Feb 12, 2010, no. 07/12483: JurisData No. 2010 - 002850.

### A – The termination before departure

The legislative part of the Tourism Code envisages in article L.211 – 13 the termination of the package travel and the reimbursement of the sums paid before departure «*in case of questioning of one of the essential elements of the contract to the seller as a result of an external event and no acceptance by the buyer of the change to the contract which may be offered by the seller.*” If an outdoor event occurred before departure, to the organizer or/and to the retailer, as referred to in this article, no indemnity is due by the the above-mentioned to the buyer/consumer, but the buyer has right without any penalties or fees, to a refund of all sums paid ».

The case law is rich in terms of termination of the package, for instance:

If the purchaser cancels the contract, he has the right to a refund of all money paid, without penalties. This is the case where the termination is the result of the unilateral modification of the contract by the travel agency having an impact on the number of nights on-site<sup>13</sup>[13].

Another example can be the result of an event of force majeure, such as the announcement on the eve of the departure of an exceptional hurricane<sup>14</sup>.

Moreover, the traveler who cancels the package five days before departure, on the ground of a stop-over in the United States at a date close to the September 11, 2001 attacks, can terminate his contract if the Department of Foreign Affairs had not advised against such a trip, and the travel agency was not prevented from doing what was obliged to.<sup>15</sup>

Another example is the event of a trip that was canceled because of a hurricane in Mexico the day of departure. In the case of such a journey, the departure date constitutes one of the essential elements of the contract and the Court of Appeal legally justified its decision by holding that the clients were entitled to opt for termination of the contract and for the refund of the price of the trip<sup>16</sup>.

### B – The resolution before departure

The resolution of the contract by the seller can also occur due to insufficient number of participants, as a result of a fault of the purchaser or due to a case of force majeure.

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<sup>13</sup> CA Grenoble, 1st ch. Civ., March 29, 2005, no. 03/01499; JurisData No. 2005-2804162.

<sup>14</sup> Cass. 1ere Civ., March 20, 2014, no. 12 - 26.518: No. 2014 JurisData - 005304; Resp. CIV. and assur. 2014, comm. 196, L. Bloch.

<sup>15</sup> (Angers, November 24, 2015, no. 14 - 006.53).

<sup>16</sup> Cass. 1ere Civ., March 20, 2014, no. 12 – 26.518: No. 2014 JurisData – 005304; Resp. CIV. and assur. 2014, comm. 196, L. Bloch.

### *1 – the insufficient number of participants*

The Tourism Code provides that the seller may reserve a possibility of cancellation of the package in case of insufficient number of participants in the basis of a contractual clause. This clause is fairly common and consists of a prior information at the formation of the contract.

The seller must specify the minimum size of the participants of the package and the deadline to inform the group. He must then cancel the contract and refund any amounts paid.

### *2 – the fault of the buyer*

Article L. 211 14 of the Tourism Code states:

«if, before the departure, the seller cancels the contract in the absence of fault of the buyer, all the amounts paid by the seller are returned to the buyer without damage and interests to which he could claim. Conversely, this means that the seller may terminate the contract in the event where the buyer refuses to pay the price».

### *3 – force majeure*

The Code of Tourism does not provide what happens when, before the departure of the traveler, the performance of the contract is rendered impossible by force majeure.

Force majeure consists of «unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised».

When the organizer or the travel agent are unable to perform the contract due to force majeure, they must be able to modify the contract.

More recently, according to a less consumer-friendly law, the participation in the New York marathon may be considered to be included in a package tour. The strict liability of the organizer of the package holiday is not engaged, in this case.<sup>17</sup>

Current legislation allows the travel professionals not to be responsible in a number of difficult cases.

Now let's see what the provisions of the new directive are.

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<sup>17</sup> (Angers, November 24, 2015, no. 14 – 006.53).

## II – THE CONTRIBUTIONS OF THE NEW DIRECTIVE IN THE EVENT OF CANCELLATION OF THE CONTRACT BEFORE THE TRIP

The Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amends Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repeals Council Directive 90/314/EEC.

On 25 November 2015 the new Package Travel Directive (2015/2302/EU) was adopted, bringing it up to date with the developments in the travel market. The new Directive entered into force on 31 December, 20 days after its publication. The Member States have to transpose it by 1 January 2018 and the Directive will be applicable from 1 July 2018.

This new directive aims to improve the rights of holidaymakers, and to adapt to changes in the travel market and travel services, i.e. accommodation, booking, car rental, etc., occurred as a result of the expansion of the internet. It was therefore necessary to adapt the legislative framework to the internal market and to fill legal loopholes. The new Directive also aimed to raise the level of consumer protection and make it as uniform as possible in its application by bringing together certain aspects of the legislative, regulatory and administrative provisions of the Member States concerning contracts between travelers and professionals on travel package and related travel services.

The directive increases the protection of the travelers with a package:

- pre-contractual information are strengthened;
- the termination of the contract of travel package is facilitated;
- cases of exceptional and unavoidable circumstances are better taken into account by the organizers;
- the traveler can substitute for the professional in the event of non-compliance important benefits, etc.

The DVAF must serve to establish uniformly high protection for the consumer and a fair competitive environment that will allow to develop the competitiveness of European companies.

### A – the amendments made in article 12

The termination is referred to in article 12 of this directive. First, it provides the possibility for the buyer to unilaterally terminate the contract of travel package,

before the start of the trip, but the traveler can also be asked to pay to the organizer the appropriate and justifiable termination fees.

### *1. the possibility of terminating the contract*

In the possibility to terminate the contract before the start of the trip, article 12 of the Directive provides that the consumer can cancel his trip and that the organizer can then hold "*of reasonable standard cancellation fee*" of termination charges appropriate and justifiable based on the date of termination of the contract before the start of the package.

Beyond the vagueness of the concept, the logic of justification of the real costs of cancellation by professionals posed by the Directive is in fact unfavourable to consumers.

Indeed, the current practice of the professionals is to apply as a cancellation fee, a percentage of the price of the trip based on the cancellation date compared to the departure date of the trip. This is coherent and averaged and close to real costs that the operator sees itself applied by its providers upstream in case of cancellation.

Tour operators will not be able to justify their actual cancellation costs for each case of cancellation of a trip by a customer insofar as their own providers charge them and they don't justify! (For example: a hotel X is going to retain as a cancellation of one night, the total price of the said night so that another hotel would only hold a negligible proportion even no charge).

Given the level of variable margin tourism professionals apply, the essence of the justification of the real costs of cancellation for each file professionals having to integrate the cost of this obligation (processing time) which impacted on the rise, the price of the trip paid by the traveler.

However, as soon as cancellation charges applied by operators are reimbursed by the insurance offered to customers or through their means of payment (credit card), the risk is insurable for the consumer.

Therefore, it would have been better for travelers and professionals to maintain the regime of 1990 and to leave to the professional the free choice to set a scale of cancellation charges. Hope that on this point the transposition law will improve the text.

### *2 – taking into account exceptional and unavoidable circumstances*

Another difficulty contained in article 12 relates to the concept of "*exceptional and unavoidable circumstances occurring at the destination or close to it.*"

This notion («a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken») gave the ability to the consumer to cancel his trip, according to his own assessment. The organizer has an obligation of result, in his regard.

The cancellation of the trip by the traveler in these conditions allows him to get a full refund of the payment, unless the professional judges the circumstances may impact the security of benefits for his client.

In view of the responsibility incurred by the professional, it was essential that it is him who exclusively retains this latitude cancellation and full responsibility, with the exception of the assumption where the area is discouraged by the Department of Foreign Affairs and that maintains the professional travel.

The European Parliament has had a real desire to strengthen the protection of the consumer against professionals. Therefore, tourism professionals will face new financial challenges. From now on, consumers have great flexibility to terminate the contract before the start of the travel package.

In addition, in view of the current policy and homeland security in the States, risk for professionals sees cancellations multiply.

Tourism businesses will have to review their internal procedures to deal with a possible increase in cancellations and terminations, in anticipation of the possible causes. It would be appropriate to make these changes before the entry into force of the directive, on July 1, 2018.

## **B – The consequences of the application of this directive for tourism professionals**

The question of liability is therefore significantly increased compared to the previous regime even as professionals would wish the reverse.

Accordingly, the new directive is more protective for the traveler in a way that he will be more easily and widely informed of his rights before the conclusion of any contract of travel package and the effectiveness of the rights of travelers during the execution of the package will be strengthened.

However, this protection is done to the detriment of professionals, including a strengthening of their responsibility.

It remains to be seen how this directive will be transposed, knowing however that the national legislature remains constrained by the objectives that it set. It is free however to specify them on the points where there is a flexibility to adapt.