

THE GUIDELINE OF SECURITY OBLIGATION PROVIDED BY TOURISM ACT

Competence

Pursuant to § 14 (10) of the Statute of the Consumer Protection Board, the Board has the right to issue, within the limits of its competence, recommended guidelines for compliance with consumer protection requirements arising from legislation.

Purpose

The purpose of this guideline is to provide explanations on the security regulation, security obligation and requirements for security provided in Tourism Act (hereinafter also referred as TurS)

Tourism Act and Law of Obligations Act have transposed the Package Travel and Linked Travel Arrangements Directive nr 2015/2302 (hereinafter also referred to as the Directive), which aims to bring the scope of protection into line with market trends, to harmonize the requirements for package travel and linked travel arrangements and to improve consumer protection.

Legal basis

The following legal acts have been used to prepare the guideline:

- Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 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
- Tourism Act

1. Obligation to provide security

TurS § 15 (1) first sentence specifies that a tour operator shall provide security for the performance of the obligations listed in TurS § 15 (3) in case the tour operator becomes unable to perform their obligation arising from a package travel contract due to their solvency.

TurS § 15 (1) second sentence specifies that an undertaking which facilitates the conclusion of contracts on linked travel arrangements shall provide security for the performance of the obligations listed in TurS § 15 (4) in case a travel service which is part of the linked travel arrangements is not provided due to the undertaking's solvency.

TurS § 15 (2) clarifies that the obligation to provide security lies with a travel undertaking established in Estonia and a travel undertaking which is established in a state outside the European Economic Area but which offers packages or linked travel arrangements or concludes package travel contracts or operates as a travel undertaking which facilitates the conclusion of contracts on linked travel arrangements in Estonia or directs their activity to Estonia in any manner. A travel undertaking established in another Member State of the European Economic Area which offers packages or linked travel arrangements or concludes package travel contracts or operates as a travel undertaking which facilitates the conclusion of contracts on linked travel arrangements in Estonia shall provide security in accordance with the requirements set by the state of their establishment.

As a result, all tour operators and undertakings which facilitates the conclusion of contracts on linked travel arrangements established in Estonia and travel undertakings which are facilitated outside European Economic Area who offers and sells packages and linked travel arrangements in Estonia or in any way direct their activity to Estonia, are required to provide security provided by Tourism Act.

Obligation to provide security lies also on travel retailer who mediates packages combined by travel undertaking established outside European Economic Area, as it is subject to all the requirements that are imposed to tour operators. This means that such travel undertaking is handled as a travel retailer, but who must follow the requirements imposed to tour operator.

Obligation to provide security is no longer for those travel retailers who mediates packages combined by a tour operator established in Estonia or in another contracting state of the European Economic Area. In such case, the obligation to provide security shall be on the tour operator who has given travel retailer the corresponding sale right and in whose name and interest travel retailer offers and sells packages.

It is important to notice that all tour operators and undertakings which facilitates the conclusion of contracts on linked travel arrangements established in Estonia are obliged to provide security provided by the Tourism Act, regardless of:

- where packages or linked travel arrangements are offered or sold;
- to which state's travellers packages or linked travel arrangements are offered and sold;

- **where travel services which are part of a package or linked travel arrangements are provided, where the trip starts or ends.**

2. General requirements of security

TurS § 15 (3) specifies that a **tour operator** shall provide sufficient monetary security:

- 1) for the return of the traveller to their place of departure or another agreed place if the package travel contract includes carriage of passengers;
- 2) for the accommodation of the traveller until their return to their place of departure or another agreed place;
- 3) for the refund of the payments made on the traveller's behalf under a package travel contract if the package is cancelled or for the payment of compensation for the cancelled part of the package;
- 4) for the refund to the traveller of an unused package gift voucher.

This means that the security of a tour operator must be sufficient at any given time of its activity and if necessary, at the expense of the security to return all the travellers to the place of departure or another agreed place; accommodate if package includes carriage of passenger and refund all the payments made by travellers for their package and unused package gift voucher.

Tour operators' obligation to provide security lasts until package is provided, it means that all the travel services that combine package are provided and the security obligation is not related to whether the tour operator has provided its own obligations before actual service providers of travel services.

This means, for example in a situation where tour operator transfers payments made by travellers to air carrier and accommodation establishments for flight tickets and accommodation which are part of package, tour operator is still liable before travellers for the total amount of travel expenses made by travellers and until all travel services that are part of package are provided.

Tour operator is also liable for payments made by traveller to travel retailer. It means that fulfilling the tour operator's security obligation there is no longer difference whether the tour operator sells packages by itself or through a travel retailer nor how transferring the payments made by travellers to travel retailer are organized between tour operator and a retailer.

Returning travellers back to the place of departure or another agreed place and accommodation will be considered when package includes carriage of passenger. This means that if package does not include carriage of passenger, there is no need to consider provided obligations in order to assess the need and sufficiency of security.

Calculating payments, it should be noticed that if previously tour operator's security had to cover only payments for package made by consumers, then from 1 July 2018 it must cover payments made by all travellers (both natural and legal persons), except when the package is purchased under a general contract. The general contract is concluded between the trader and a

person engaged in his/her economic or professional activity and its object is to offer and organize future business trips.

TurS § 15 (4) specifies that **a travel undertaking which facilitates the conclusion of contracts on linked travel arrangements** shall provide sufficient monetary security:

- 1) for the refund to the traveller of the payments made for linked travel arrangements on the traveller's behalf to the travel undertaking which facilitates the conclusion of contracts on linked travel arrangements if a travel service constituting part of the linked travel arrangements is not performed or for the payment of compensation for the cancelled part of the travel service;
- 2) for the return of the traveller to their place of departure or another agreed place if the linked travel arrangements include carriage of passengers and the travel undertaking which facilitates the conclusion of contracts on linked travel arrangements is liable for the carriage of passengers;
- 3) for the accommodation of the traveller until their return to their place of departure or another agreed place if the linked travel arrangements include carriage of passengers and the travel undertaking which facilitates the conclusion of contracts on linked travel arrangements is liable for the carriage of passengers.

Thus, in a situation where a tour operator acts, security must be sufficient in order to fulfill the obligation mentioned in TurS § 15 (3) and in the situation where undertaking which facilitates the conclusion of contracts on linked travel arrangements acts, security must be sufficient in order to fulfill obligation listed in § 15 (4) of the Tourism Act.

This means that the security of undertaking which facilitates the conclusion of contracts on linked travel arrangements must be sufficient at any given time of its activity, so if necessary to refund to all travellers the payments made to the facilitator for the linked travel arrangements and return all travellers to the place of departure of another agreed place and accommodate if the facilitator is responsible for the carriage of passengers.

Returning travellers to the place of departure or another agreed place and accommodating comes into consideration if linked travel arrangements include carriage of passenger and travel undertaking which facilitates the conclusion of contracts on linked travel arrangements is also liable for carriage of passengers.

Calculating payments, it should be noticed, that security obligation of travel undertaking which facilitates the conclusion of contracts on linked travel arrangements lasts until:

- travel service which is part of linked travel arrangements is provided by facilitator;
- payments made for the travel services which are part of linked travel arrangements provided by another undertaking is in the hand of facilitator.

Just like for packages, security of linked travel arrangements must cover payments made by all travellers (both natural and legal persons), except when linked travel arrangements are purchased under the general contract.

Also, tour operators and travel undertakings which facilitates the conclusion of contracts on linked travel arrangements should notice that a travel undertaking is required to assess the sufficiency of the security and increase the security, if necessary (TurS § 15¹ (12)).

The assessment of the sufficiency of the security must be organized in a such way that the accrual of payments and the total amount of payments are observable over time and travel undertaking has a daily and comprehensive overview of it.

Security is sufficient if it is sufficient at any given time and does not change insufficient at any given time. Therefore, it is extremely important to assess the sufficiency of the security and increase it properly and in time.

3. Absence of the obligation to provide security

According to TurS § 15 (5) a travel undertaking is free of the obligation to provide security if:

- 1) packages are paid for in full after the provision of the combination of travel services and the package does not include the carriage of passengers;**

Mentioned exclusion in point 1 can be considered for activities specified in TurS § 6 p 1 (organisation of packages which include travel services provided in Estonia) and in TurS § 6 p 4 (organisation of packages which include travel services provided outside of Estonia, except for charter flights or scheduled flights).

In order this exclusion to apply, two assumption must be fulfilled at the same time. Firstly, package does not include the carriage of passengers. Secondly, packages are paid for in full after the provision of the combination of travel services. This means that if package include the carriage of passengers or packages are paid in full or partly before or during the provision of the combination of travel services, this exclusion does not apply.

- 2) the travel undertaking which facilitates the conclusion of contracts on linked travel arrangements is not liable for the carriage of passengers constituting part of the linked travel arrangements and the payment is not made to the travel undertaking which facilitates the conclusion of contracts on linked travel arrangements or the linked travel arrangements are paid for in full after the performance thereof;**

Exclusion point 2 can be considered for activity specified in TurS § 6 p 6 (offer of linked travel arrangements and facilitation of entry into contracts).

Given exclusion applies similarly as the exclusion provided in point 1. However, there are two alternatives for applying the second presumption. Firstly, linked travel arrangements are fully paid after the provision of the travel services and secondly, no payments are made to the travel undertaking which facilitates the conclusion of contracts on linked travel arrangements. Second alternative applies, for example, when the payments are made directly to the actual service provider.

This means that if the facilitator is responsible for the carriage of passenger which is part of linked travel arrangements or linked travel arrangements are paid in full or partly to the facilitator before the provision of travel services, this exclusion does not apply.

- 3) an undertaking engaged in the area of activity referred to in § 6 (5) of Tourism Act shall present a certificate proving that the obligation to provide security has been performed by the actual tour operator in accordance with the requirements of Tourism Act.**

Exclusion in point 3 can be considered for activity specified in TurS § 6 p 5 (intermediation of packages combined by a travel undertaking of a state outside the European Economic Area). Here is a situation where a travel undertaking who mediates packages combined by travel undertaking established outside European Economic Area, provides a document, which proves that the other travel undertaking (actual tour operator) has complied with the security obligation according to the Tourism Act.

4. Minimum rates for security

Additionally to the beforementioned general requirements for security, Tourism act has set minimum security rates for activities specified in TurS § 6 points 2 – 6. On the other hand, there is no minimum obligatory security rate for activity specified in TurS § 6 p 1 which means that for organizing packages which include travel services provided in Estonia applies only general requirements of security.

For travel undertakings operating in the area of activity specified in TurS § 6 p 2 - 6 must comply with the general requirements for security and the following minimum obligatory rates for security:

2) organisation of packages which include travel services provided outside of Estonia and charter flights;

Travel undertaking engaged in this activity shall provide security of at least 7% of the travel undertaking's planned annual total sales of packages, but no less than 32,000 euros;

3) organisation of packages which include travel services provided outside of Estonia and scheduled flights;

Travel undertaking engaged in this activity shall provide security of at least 3% of the travel undertaking's planned annual total sales of packages, but no less than 32,000 euros;

4) organisation of packages which include travel services provided outside of Estonia, except for charter flights or scheduled flights

Travel undertaking engaged in this activity shall provide security of at least 7% of the travel undertaking's planned annual total sales of packages, but no less than 13,000 euros;

5) intermediation of packages combined by a travel undertaking of a state outside the European Economic Area;

Travel undertaking engaged in this activity shall provide security of at least 7% of the travel undertaking's planned annual total sales of packages, but no less than 32,000 euros;

6) offer of linked travel arrangements and facilitation of entry into contracts.

Travel undertaking engaged in this activity shall provide security of at least 3% of the travel undertaking's planned annual total sales of linked travel arrangements, but no less than 13,000 euros.

The minimum obligatory rate of security must be based on whichever is higher, whether the **fixed amount determined** or the **corresponding percentage of total sales**.

TurS § 15² (2) enacts, the total sales of packages and linked travel arrangements mean the gross amount of all payments made to a travel undertaking by or on behalf of travellers on the basis of package travel contracts or contracts on linked travel arrangements, including the amount received as prepayment and unused package gift vouchers.

On the other hand, it is important to notice that the security is calculated on the basis of the travel undertaking's total sales of packages and linked travel arrangements during the previous calendar year if the sales exceed the travel undertaking's planned annual total sales of packages and linked travel arrangements (TurS § 15¹ (6)).

For example, if tour operator predicts 300 000 euros for the next year's total sales of packages, but its total sales of last year's packages has been 500 000 euros, security must be based on the total sales of last year's packages which is 500 000 euros.

If travel undertaking is engaged in only one activity requiring a security, then applies the minimum obligatory security rate for the concrete activity.

For example, organizing packages which include travel services provided outside of Estonia, except for charter flights or scheduled flights, security must be at least 7% of the travel undertaking's planned annual total sales of packages, but no less than 13,000 euros and if:

- such travel undertaking predicts 500 000 euros for the next year's total sales of packages, then security must be at least 35 000 euros (7% of 500 000) and not 13 000 euros;
- such travel undertaking predicts 100 000 euros as its next year's total sales of packages, then security must be at least 13 000 euros instead of 7000 euros (7% of 100 000 euros).

If a travel undertaking is engaged in several areas of activity where the provision of security is required, the security shall not be smaller than required in the area of activity with the greatest amount of security (TurS § 15¹ (11)).

It is important to notice that the activities of travel undertaking are all the activities to which its activity corresponds to regardless of how many and how often corresponding trips (either packages or linked travel arrangements) are offered and sold. **Therefore, the minimum obligatory rate for security of travel undertaking should be based on all the activities requiring security.**

For example, in a situation where undertaking which facilitates the conclusion of contracts on linked travel arrangements organizes only once in quarter packages including scheduled flights, its minimum obligatory security must be based on minimum obligatory security rate which is

set for activity specified in TurS § 6 p 3 (organisation of packages which include travel services provided outside of Estonia and scheduled flights).

It is also important to notice that the minimum obligatory security of travel undertaking is proper only then if it is sufficient for the performance of the obligations provided for in § 15 (3) and (4) of Tourism Act.

Even if the general requirements for security comes from TurS § 15 (1) and TurS § 15 (3) (4), then TurS § 15¹ (5) has emphasized that the security provided by a travel undertaking shall be sufficient at any given time for the performance of the obligations provided for in TurS § 15 (3) and (4) and a travel undertaking is required to prove the sufficiency of the security.