



Groupement des Unions Nationales des
Agences et Organismes de Voyages de
PUE
Group of National Travel Agents' and
Tour Operators' Associations within the
EU



ASSOCIATIONS INTERNATIONALES SANS BUT LUCRATIF

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Preliminary views of ECTAA and GEBTA on the review of the community acquis on consumer protection and in particular of Directive 90/314 on Package Travel

1. Introduction

ECTAA, the Group of National Travel Agents' and Tour Operators' Associations within the EU, counts among its membership the national associations of travel agents and tour operators of 23 Member States, of all the candidate countries and of Norway and Switzerland.

GEBTA, the Guild of European Business Travel Agents, represents the interests of travel management companies in Germany, Italy, the Netherlands, Portugal, Spain, Ireland and the United Kingdom.

All together, ECTAA and GEBTA represent the interests of about 80 000 businesses in Europe, which are involved in the sale of travel services to consumers and are therefore affected by the European legislation on the protection of consumers.

In a communication of 11 November 2004¹, the European Commission announced that it would review the existing consumer acquis, composed of 8 Directives². In its first annual report on European Contract Law and the Acquis Review of 23 September 2005³, the European Commission indicated that two options could be considered in the context of a revision of the acquis, namely a vertical approach consisting in revising the existing directives or a more horizontal approach, consisting in the adoption of one or more framework instruments, to regulate common features of the acquis.

ECTAA and GEBTA welcome the analysis that is currently being undertaken by the European Commission, because it is essential that EU legislation suits current and foreseeable market developments in order to ensure fair competition within the EU and effective protection of consumers where appropriate.

¹ Communication of the European Commission to the European Parliament and the Council, "European Contract Law and the revision of the acquis: the way forward", COM (2004) 651.

² Directives 85/577, 90/314, 93/13, 94/44, 94/47, 97/7, 98/6 and 98/27.

³ COM (2005) 456.

In Germany and Austria, the industry is generally satisfied with the legislation in place. However, in other Member States, this is not the case and therefore, in these Member States, it is considered that the review of the consumer acquis comes at a very appropriate time for the sector, because the market of sale of package travel and, from a more general perspective, the market of sale of travel services, has undergone significant changes since the adoption of Directive 90/314 on Package Travel, Package Holidays and Package Tour.

Before going further in their analysis, ECTAA and GEBTA would like to underline that this paper sets out the preliminary views of the industry in respect of the review of the community acquis on consumer protection launched by the European Commission but is without prejudice to any future developments at European and/or national level as well as in the market of sale of travel services. ECTAA and GEBTA reserve themselves the possibility to amend the views expressed in this paper and/or to bring new issues to the attention of the European Commission.

2. Developments in the market

At the time of the adoption of the Directive, consumers who wanted to travel abroad for their holidays were mainly buying package holidays put together by organisers. Bookings were most often made through travel agents, acting as intermediaries.

However, in recent years, bookings of genuine package travel holidays have been decreasing, consumers being more and more interested in buying separate travel services, whether those services are offered for sale by organizers or directly by travel service providers. For example, in the UK, the Civil Aviation Authority (CAA) reported that the proportion of leisure air travel protected by ATOL (which is largely analogous to the sale of package holidays) has reduced to 60% in 2005 from a peak of 98% in 1997. At present, the CAA estimates that over the year to March 2006, some 18.3 million air passengers travelled without ATOL protection.

The change in consumers' buying habits is mainly due to the entry of low cost air carriers in the air travel market, combined with the rapid development of the Internet. The consumer has direct access to travel service providers as well as to numerous booking tools. He is thus able to compare prices and it is well known that price has become one of the most decisive factors for the consumer.

Taking all these elements into account, in a few years time, the sale of package holidays is likely to become a very small proportion of the sale of total travel sales.

This raises the following questions: Why are consumers increasingly choosing to purchase travel services that do not provide the protection offered by the current legislation? Is it that they are unaware of the lack of protection or that they do not consider it important?

If consumers are unaware of the lack of protection then there is a concern that they are purchasing travel services in the belief that they have protection when they do not. If they do not consider it important then there is a concern that a specific part of the travel industry is having to bear the costs and burdens of a regulated system which is not considered important by consumers.

If the situation remains largely unchanged then a specific part of the travel industry is being placed at a competitive disadvantage.

If the protection offered by the current regulation is considered important, it should be provided to all consumers of all tourism services, not only restricted to purchasers of package holidays.

3. A new approach

In the light of the changes to the market and in order to ensure fair competition between all market players and that all consumers have the same level of protection (at whatever level is considered appropriate), ECTAA and GEBTA Members, with the exception of their German and Austrian Members, believe that a new approach should be adopted.

This new approach would consist in the adoption of a **horizontal legal instrument**, which would impose a **full set of fundamental obligations to all providers/suppliers of services/goods, in any business sector, who sell or offer for sale their services or goods in their own name to consumers**, being persons acting for purposes outside of their trade, business or profession.

Such a horizontal instrument should mainly be **based on existing EU legislation** in the field of consumer protection and should be a full harmonization instrument, in order to avoid implementation differences in the Member States.

However, due to the specificities of the travel sector, there may be a need to protect consumers who purchase travel services in order to ensure that they are repatriated to their point of departure when a travel service provider is unable to perform its operation because he becomes insolvent or goes bankrupt. A specific legal instrument regulating the issue of repatriation could thus be adopted, in order to supplement the horizontal one.

The analysis of the Package Travel Directive indeed shows that, with the exception of repatriation, all other issues that it addresses could be dealt with at horizontal level, very often under existing EU legal instruments:

- a) Provision of information (Article 3, Article 4, (1) and (2)): Directive 2005/29 concerning unfair business-to-consumer commercial practices already includes rules aiming at ensuring that the consumer receives all appropriate information on the service to be purchased as well as on the other party to the contract.
- b) Alteration of the contract (Article 4 (3) to (7)): a contract may be altered either by the consumer (transfer of booking) or by the organizer (price variation and inability to provide all or part of the services contracted for before and after departure). The main aim of such provisions is to ensure that the organizer does not unfairly cancel or alter the services that had been contracted for.

Points 1 (j) and (k) of the Annex to the Directive 93/13 on unfair terms in consumer contracts also prohibit terms which would enable the seller or the supplier to alter unilaterally the terms of the contract and any characteristics of the service to be provided without a valid reason. Point 1 (l) of this Annex also prohibits unfair variation of the price provided in the contract.

- c) Proper performance of the contract (Article 5). It is a general contract law principle that a party to a contract is liable for the proper performance of his

obligations under the contract. Therefore, the organizer who sells or offers for sale package travel services in his own name as well as any service providers selling services in their own name will be liable, under their national contract law, for the proper performance of the services contracted for.

Concerning the limitations of liability, which are currently regulated under Article 5 (2), §§ 3 and 4 of the Package Travel Directive, the consumer is protected under European law, since point 1 (b) of Directive 93/13 on unfair terms in consumer contracts prohibits terms inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the supplier in the event of non or improper performance of the contract.

- d) Financial guarantee requirement (Article 7): organizers have to provide a financial guarantee covering, in case of bankruptcy or insolvency:

➤ *prepayments made by the consumer*

Other suppliers and providers of goods and services, who also receive advance payments from consumers, are not subject to such a requirement to provide a financial guarantee to ensure that consumers will obtain a reimbursement of their prepayment if they go bankrupt. However, the risk that those providers might fail financially is as high as the risk that an organizer/retailer might fail. In some cases, the risk could even be higher.

Therefore, the reimbursement of money paid over by consumer in case of a supplier's bankruptcy should be addressed at horizontal level.

If it is considered that the protection of prepayments in the travel sector warrants specific regulation, then any such regulation should not be restricted to package travel but also to all holiday service providers, since all consumers deserve to be treated in the same way, whether they purchased their services from a tour operator or directly from the service provider.

➤ *Repatriation*

The issue of repatriation is very specific to the travel market and should thus be addressed in a specific EU legislation. This EU legislation should not be restricted to package travel but should also apply to all travel service providers, since all consumers deserve to be treated in the same way, whether they purchased their means of transportation from an organizer or directly from the transport service provider. Repatriation could possibly be dealt with in the framework of Regulation 261/2004 on Denied Boarding Compensation.

We trust that the European Commission will examine our proposals with all the attention required.

4. Review of the Package Travel Directive

Should this new approach not be retained in part or in full and if the European Commission opts for a vertical approach where the existing consumer acquis Directives would be individually revised, ECTAA and GEBTA have reviewed the existing text of the Package Travel Directive. The problems identified and proposals for solutions will be further developed in this paper.

a) Scope of the Directive

Currently, both organizers and retailers fall under the scope of the Package Travel Directive. However, their activities differ in many ways. While the organiser is the person who gives access to the elements of the package and sells or offers for sale in its own name to the consumer, the retailer is only acting as an intermediary for the sale of the package travel. The retailer does not put the package together and is not party to the package travel contract. Consequently, only the organizer should be responsible for compliance with the Package Travel Directive, whether the package is sold or offered for sale directly or through a retailer.

The Directive is not clear in this respect, since it uses the terms “organizer and/or retailer”, every Member State being free to decide whether a specific obligation falls on the organiser or on the retailer or on both.

ECTAA and GEBTA Members, except the Greek and Spanish Members of ECTAA, thus consider that only the organizer must fall under the scope of the Package Travel Directive, the retailer being fully excluded. This entails the deletion of all references to the notion of retailer in the Package Travel Directive.

The territorial scope of the Package Travel Directive, established in its Article 1 (packages sold or offered for sale in the territory of the Community), must remain unchanged, because it clearly states that any provider of package travel services, whether established in the European Union or in a third country, must comply with the Directive, when he sells or offers for sale package travels in the EU. This Article ensures that national authorities are competent to also control third country providers who sell or offer for sale their services in the European Union and who must comply with the applicable legislation.

b) Article 1, combined with Article 8

The Package Travel Directive is a minimum harmonization Directive, since Member States are allowed to adopt more stringent provisions in the field covered by the Directive to protect the consumer. As a consequence, implementation legislations in the Member States show many divergences, which creates distortions of competition between organisers and retailers of the EU Member States. For example, some Member States, like Germany, allow limitations of compensation in accordance with international conventions, while others, like France, do not.

In order to avoid distortions of competition within the EU, Member States must not be allowed to depart from the provisions of the Directive in order to adopt more stringent provisions.

c) Article 2: Definitions

➤ Package and organiser

As already mentioned above, the market of sale of travel services has significantly changed over the past few years.

With the emergence of Internet and of low cost carriers, the consumer has increasingly the ability to book directly with other travel service providers. When the consumer makes his booking, those providers offer him the possibility to have access to other selected

suppliers of travel services. This is what is usually called dynamic packaging. The consumer puts various travel services together as if it were a package but all services are contracted with various service providers. The consumer is often not aware that the dynamic combination of services is not a package travel and is not covered by the legal provisions on package travel.

The practice of dynamic package also creates distortions of competition against organisers, who have to comply with many stringent obligations, which are costly, the most important ones being the liability for the proper performance of the contract as well as the obligation to provide a financial guarantee.

ECTAA and GEBTA thus consider that the definition of the notion of package should be amended in order to cover both genuine packages and dynamic packages. ECTAA and GEBTA are willing to cooperate with the European Commission in the drafting of a new definition of the notion of package.

Concerning the notion of organizer, the Package Travel Directive should clarify that the **organizer is the person who sells or offers for sale at least one of the combined services included in the package in his own name and who gives access by whatever means to the other travel services included in the combination.**

The notion of “selling or offering for sale in his own name” is central to this definition because it will allow differentiating an organizer from a retailer, who acts as an intermediary in the sale of travel services and who must remain outside the scope of the Directive.

ECTAA and GEBTA suggest the following definition of the notion of organizer:

“A person who sells or offers for sale at least one of the services forming the package in his own name, or through an intermediary under effective control, and who gives access to the other services of the same package”

The notion of “intermediary under effective control” aims at avoiding that a travel service provider creates a subsidiary that would act as an intermediary for the sale of that provider’s services and through which the consumer would also be given access to other selected service providers. Would it be the case, the travel service provider would not be considered as “giving access to the other services of the same package” and would thus fall outside the scope of the Package Travel Directive. The notion of control could be defined with reference to Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

The proposed definition of organizer is of course not intended to interfere with the Member States’ legislation on access to the profession of organizer or retailer. Each Member State remains free to lay down the conditions that a business has to comply with in order to exercise the profession of organiser and of retailer.

➤ *Retailer*

As mentioned above, ECTAA and GEBTA Members, except the Greek and Spanish Members of GEBTA, believe that retailers should be excluded from the scope of the Directive.

Would this proposal not be retained, in order to avoid legal uncertainty created by the wording “*organiser and/or retailer*”, ECTAA and GEBTA suggest that the Directive only makes reference to “*the other party to the contract*”.

➤ *Consumer*

As currently drafted, the definition of the notion of consumer does not make clear that business travellers are excluded from the scope of the Package Travel Directive. However, given the specificities of business travel sector, it should be excluded from the scope of the Package Travel Directive.

Therefore, ECTAA and GEBTA believe that solely in the context of the review of the Package Travel Directive, the notion of consumer should be defined in accordance with other existing EU directive on consumer protection, that is to say a being a ““*a person who is acting for purposes, which are outside his trade, business or profession*””.

d) Article 3: precontractual information

The first paragraph of Article 3 prohibits the provision of any misleading information to the consumer. While ECTAA and GEBTA are not opposed to the maintenance of this requirement, it should be underlined that Directive 2005/29 concerning unfair business-to-consumer commercial practices deals in detail with the matter, which makes Article 3,§1 redundant.

The second paragraph of Article 3 lists elements of information that must be included in the brochure. Considering that the brochure is not the only information means on package travel anymore, many travel service providers providing information on the Internet, information requirements should be applicable to any information channel.

According to Article 3,§2, the brochure must indicate the price in a legible, comprehensible and accurate manner. As a consequence, once the brochure has been printed, prices cannot be modified anymore. Organizers wish to have more flexibility in this respect. While other travel service suppliers, and in particular airlines, are adapting their prices very easily, organizers are not allowed to do so, which puts them at a competitive disadvantage. As a consequence, ECTAA and GEBTA consider that this requirement is no longer appropriate in the current business environment and should be deleted.

Were our proposal not retained, ECTAA and GEBTA propose that a point is added to the elements of information listed in Article 3, §2, which would allow that general information on where the consumer can obtain the applicable price to be sufficient.

Regarding the binding nature of the pre contractual information, ECTAA and GEBTA believe that the flexibility provided in Article 3, §2, should remain unchanged. As long as the consumer has been duly informed before the conclusion of the contract, organizers must keep the possibility of amending the precontractual information. Once the contract is concluded, amendments should be allowed if both parties agree thereto.

e) Article 4

In line with our comments under point a), ECTAA and GEBTA Members, except the Greek and Spanish Members of ECTAA, believe that any reference to the retailer in this Article should be deleted.

The fourth paragraph of Article 4 allows revision of the price of the contract under specific conditions and prohibits any increase in the price 20 days prior to departure.

The time limit of 20 days is no longer appropriate and puts organizers at a competitive disadvantage compared to other providers of travel services, in particular when it comes to airfares.

Indeed, in the last years, airlines have been adding or increasing numerous surcharges to their airfares, without any reasonable prior notice, in order to cover additional insurance costs, fuel increase, security costs, passenger services, etc. Similarly, great variations in airport surcharges have been noticed in the past years.

Because of the prohibition to raise prices 20 days prior to departure, many organisers have to absorb the price increase at their own costs, while airlines have all freedom to modify their prices at any time, even after the contract has been included.

Therefore, in order to ensure a level playing field, ECTAA and GEBTA believe that Article 4, (4), b) should be deleted.

However, would Article 4, (4), b) not be deleted, ECTAA and GEBTA consider that it will be very important to make clear that this 20 days period is also binding for airlines, airports or public institutions that impose new taxes, as otherwise package travel providers are obliged to bear these price increases that cannot be charged to clients. If this period is not binding for airlines, airports or public institutions it cannot be binding for package travel providers either.

f) Article 5

As already mentioned under point a) and e), ECTAA and GEBTA Members, except the Greek and Spanish Members of ECTAA, consider that any reference to the retailer in this Article should be deleted because the retailer, who acts as an intermediary, is not party to the package travel contract and can thus not be held liable for the proper performance of a contract to which he is not party.

Any other solution is unfair, because the retailer does not have any control on the accuracy of the information provided by the organiser on the services included in the package nor on the actual performance of the services contracted for. This is even more important, knowing that organizers already encounter increasing difficulties to find, at a reasonable price, appropriate insurance contracts that fully cover their professional liability, which is in essence unlimited and has been broadly interpreted by national courts over the years.

The current European legal system provides consumers with the necessary tools to obtain redress against the organizer in case of non performance of the contract, whether he bought the package directly from the organizer or through an intermediary, whether the organizer is established in the consumer's Member State or in another Member State.

Indeed, existing legal European instruments in the field of jurisdiction⁴ and of the law applicable⁵ provide for rules which allow the consumer to start legal action in his Member State of residence and to base his claim on his national consumer protection legislation. Furthermore, in case of cross border claims, through the European Consumer Centers Network, the consumer can get assistance and obtain information on existing alternative dispute resolution mechanisms or small claim procedures, which will soon be reinforced by the adoption of the proposal of the European Commission for a Regulation Establishing a European Small Claims Procedure⁶.

Article 5 (1) specifies that the organizer is liable for the proper performance of the contract, without prejudice to the right of the organizer to pursue the other providers of services. The ability of an organizer to have real effective recourse against providers is very problematic and should therefore be strengthened. The Directive should specify that the organizer has the right to pursue other services providers who must compensate the organizer in accordance with applicable relevant laws.

Indeed, there are many instances where the organizer has no effective control on the way service providers behave, for example, when a hotel is overbooked because the hotelkeeper decided to favour other contractual partners, when an airline unilaterally cancels a flight or when the delay of a flight affects the whole package travel to a point that the consumer has no interest in continuing the travel. In the same line, improper or non performance may be differently assessed in third countries, where local criteria may differ from European criteria and it would be preferable that liability is assessed based on local criteria. Also, organizers have concerns about duplication of potential liability between travel insurers (if the consumer contracted an insurance covering events occurring during the package) and organizers for compensating the consumer.

Under Article 5 (2), § 3, Member States may allow compensation to be limited in accordance with the international conventions governing the services included in the package.

This provision is problematic because:

- only the compensation to be granted may be limited in accordance with international conventions but not the liability itself. If an organizer is held liable for improper performance of the contract on the basis of the Package Travel Directive, he will compensate the consumer and be substituted in his rights against the actual service supplier. However, when the tour operator will exercise his right of redress, the service provider will most certainly oppose the limitations of liability allowed by international conventions. As a consequence, the organizer will have no effective right of redress and will in fact bear all costs.

⁴ Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁵ Rome Convention of 1980 on the law applicable to contractual obligations, to be transposed into Community Law by the proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM (2005) 650.

⁶ COM (2005) 87 final.

- limiting the application of relevant international conventions for compensation only, is again placing organizers at a competitive disadvantage compared to other travel service providers, who may base themselves on international conventions to limit their liability and the compensation to be paid to the consumers.
- the choice left to the Member States to allow limitations has generated differences between the Member States and thus distortion of competition between EU organisers.

These problems can only be solved by imposing an obligation on Member States to allow exclusion or limitation of both the liability and the compensation in accordance with international conventions. In the same way, when service providers are allowed to exclude or limit their liability or compensation under existing EU instruments, such as Regulation n° 261/2004 on Denied Boarding Compensation, organizers should also be allowed to invoke such EU instruments.

g) Financial guarantee

As already mentioned in other part of this position paper, ECTAA and GEBTA Members, except the Greek and Spanish Members of ECTAA, consider that the financial guarantee must only be provided by travel service providers who act as organizers, and this requirement should not apply to the retailer.

Regarding the financial guarantee to be provided by organizers, as defined in point 4, c) of this position paper, thus including any person selling or offering for sale at least one of the combined services in his own name, ECTAA believes that the following principles should apply in order to protect all EU Consumers:

- Organizers not established in the EU and selling or offering for sale in the EU should have a financial guarantee in at least one EU Member State. This solution should be in accordance with the Rome Convention and EU Regulation on competent jurisdiction.
- When organizers are established in the EU, 4 basic principles are recommended:
 1. The organizer established in the EU should be responsible for all sales, wherever its products are sold and disregarding the fact that they are sold directly or not.
 2. The organizer must be insured in accordance with the criteria provided for in the legislation of the Member State where it is established. Each Member State remains free to determine the national criteria applicable to the financial guarantee.
 3. All consumers must be protected irrespective of their place of residence in the EU.
 4. The organizer has an obligation to inform the consumer about his financial protection scheme and about the entity to contact in case of bankruptcy.

Each Member State remains free to determine the national criteria applicable to the financial guarantee but such criteria must be effective in providing the guarantee and the operation of a guarantee by way of a trust account is unlikely to be sufficient.