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Study on Safety and Liability Issues Relating to Package Travel

Comments of ECTAA

Introduction

ECTAA, the European Travel Agents' and Tour Operators' Associations, counts among its membership the national associations of travel agents and tour operators of 25 Member States, the national associations of Croatia and Turkey, as well as of Norway and Switzerland. ECTAA represents about 80,000 businesses that sell travel services and in particular package travel, tours and holidays, which are regulated by Directive 90/314 on package travel, package tours and package holidays.

Beginning of this year, a study on safety and liability issues relating to package travel has been submitted to the Committee on Internal Market and Consumer Protection of the European Parliament (Ref: PE 393.520).

The issues raised in the study as well as the conclusions drawn up by the authors are, in the opinion of our association, controversial and sometimes inappropriate. Therefore, given the importance of safety and liability issues for package travel organisers, ECTAA feels that it is of utmost importance that the Members of the IMCO Committee are provided with the position of our industry in this respect.

As a preliminary remark, we would like to stress that our association, as well as some of our national Member associations, has been contacted by one of the authors of the Study but only in respect of the statistical part. We were not consulted in respect of the analysis and implementation of Directive 90/314 on package travel, which we highly regret.

Part 1 of the study: Current Community legislation

When analysing the work of the European Parliament on the Package Travel Directive, in the 3rd paragraph of page 2, the study refers to a general Resolution on tourism policy adopted by the European Parliament in November 2007 (P6_TA-PROV(2007)0575), noting that “*As regards package tours, Parliament expressly regretted that there is no explicit safety provision in existing tourism law*”.

However, the authors of the study are going much further than what the European Parliament really adopted in its resolution, since the only point of the resolution referring to safety is point 41 which is drafted in general terms and does not target package travel specifically.

Indeed, in point 41, the European Parliament “*regrets the absence of a specific legal instrument covering the safety of services, which is crucial in the tourism sector and calls on the Commission and on the Member States to evaluate the possibility of addressing this issue in order to allay the concerns expressed by several of its Members*”.

Point 1.1.: liability of organiser and/or retailer vis-à-vis the consumer

On page 3 of the study, the authors note that Article 5 of the Package Travel Directive leaves it open to the Member States to provide in their national legislation who from the organiser and/or retailer should be held liable for the proper performance of the contract.

ECTAA believes that in the course of the upcoming review of the Package Travel Directive, there should be no reference to the retailer in provisions on liability for performance of a contract. Indeed, the retailer, who acts as an intermediary, is not party to the package travel contract. He 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 organisers 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.

Point 1.2. Safety and liability

The authors of the study mention that there is no special provision about safety in the Package Travel Directive but note that nevertheless, courts in Member States have held organisers liable for safety defects caused by their service suppliers. They note that organisers have an underlying obligation to contract only with safe service providers and damages liability can be seen as a kind of sanction for improper handling of safety issues.

ECTAA believes that the liability of organisers in relation with safety issues should be left to the courts as it is the case today. The general liability for proper performance of the contract provided in Article 5 constitutes a sufficient adequate legal basis for compensation of damages resulting from alleged safety defaults. Furthermore, it is fundamental that alleged safety breaches can be evaluated by a judge, taking into account the specific circumstances of each case.

Point 1.3. Other issues of the Directive

Scope and meaning of “package”, Article 2 of the Directive

Regarding the scope of the Directive, as the authors rightly point out, over the past years, the market has changed. 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 organisers or directly by travel service providers. This is what is usually called dynamic packaging. However, operators selling dynamic packages do not have to comply with obligations under the Package Travel Directive. This puts those selling regular packages in a competitive disadvantage and may put into question the existence of the Directive itself.

In order to allow that all travel service providers operate on a level playing field and in view of the mixed approach proposed by the European Commission in its Green paper on the review of the consumer acquis, ECTAA considers that the Package Travel Directive could be replaced by a **horizontal legal instrument imposing 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.** That horizontal instrument could be supplemented by a specific and sectoral legal instrument regulating the issue of repatriation of travellers when their travel service provider falls bankrupt.

Would this proposal not be retained, ECTAA suggests that at least, the scope of the Package Travel Directive is extended to cover both genuine packages and dynamic packages.

Information duties

The authors of the study mention that it is not clear whether the information requirements provided in the Package Travel Directive for brochures also apply to online offers.

Taking into account the development of online sales, ECTAA questions the need for a list of information requirements specific to package travel. There is no reason to restrict the obligation of specific information to the providers of package travel. All providers should be subject to the same information obligations. Therefore, we recommend that information obligations are addressed at horizontal level. In the framework of the horizontal approach, ECTAA notes that Directive 2005/29 concerning unfair business-to-consumer commercial practices already includes rules ensuring that the consumer receives all appropriate information on the service to be purchased, notably the main characteristics of the product, the price or manner in which it is calculated, and as well as information on the identity of the trader and its attributes.

The current requirement in Article 3,§2 that the brochure must indicate the price in a legible, comprehensible and accurate manner put package travel organisers in a particularly severe competitive disadvantage with the online sale channels. Indeed, as a consequence of this requirement, once the brochure has been printed, the prices cannot be modified anymore. This requirement to publish the price in the brochure means in practice that package travel organisers determine the price one year or one year and a half before the sale without being in a position to adjust to market developments, demand, costs etc. Furthermore they cannot react to competition with online organisers and airlines, which have the means to change individual prices of specific products daily. This is not only to the disadvantage of the traditional organisers, but also to the detriment of consumers who may prefer to use a paper brochure. As a consequence, ECTAA considers that this requirement is no longer appropriate in the current business environment and should be deleted.

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

Withdrawal and cancellation, Article 4,§5 of the Directive

Under Article 4,§5 of the Directive, when an organiser cancels the package or the consumer withdraws from the contract because an essential element of the package has been altered, the consumer is entitled to a substitute package or to full reimbursement of all sums paid, as well as to compensation if appropriate.

The authors consider that it is not clear how the question of the appropriateness of paying compensation is determined and claim that this qualification benefits organisers but not consumers, with the consequence that they recommend that the legislator should seek its removal.

ECTAA is against the removal of the provision that compensation must only be paid if it is appropriate. The requirement of appropriateness is absolutely justified.

Indeed, appropriateness means that a consumer should only be compensated if he can demonstrate that he actually suffered an additional prejudice because of the alteration of an essential element of the contract prior to departure, even though he has been provided with a substitute package (with a possible reimbursement if the substitute is of a lower quality) or has been fully reimbursed of all sums paid.

Right to cancel the journey, Article 4, § 6

The authors consider that a significant omission from the Directive is any provision dealing with cancellation of the contract by a consumer, for any reasons. They recommend that the legislator includes a specific rule on cancellation charges for package contracts.

ECTAA believes that no method of calculation should be introduced in consumer protection legislation. Legislation, which is generally frozen for several years, is too rigid to deal with

compensation levels. Such aspects should be left to the courts and/or existing alternative dispute settlement bodies.

Also, we would like to recall that a Round Table on Package Travel Contracts (composed of legal experts representing the package travel industry, consumer associations as well as academics, under the Presidency of the European Commission) adopted conclusions on 13 February 2001 that among others, address the issue of cancellation of the contract.

The Round Table examined the practice of sliding scales of cancellation charges, which is applicable in most Member States and concluded that the principle of sliding scales of cancellation charges depending on the date of cancellation has many advantages. They provide a useful degree of certainty and a measure of 'rough justice', help consumers and traders overall by avoiding the time and expense of calculating loss in each individual case, ensure that the consumer does not have to pay for a service that he is no longer interested in and keep the tour operator from suffering a financial loss from the cancellation.

Part 2 Statistics relating to accidents and injuries during package travel

Regarding this section, ECTAA would like to underline that:

- the authors recognize that there is a significant lack of comprehensive EU data regarding accidents and fatal injuries during package travel,
- In order to collect data, 36 organisations were approached and only 10 were able to provide data,
- Part of the data collected and mentioned in the study are not specific to package travel.
- The only data specific to package travel was mostly collected in the UK, data from Germany having been communicated by only two tour operators. Data is thus not representative enough for an EU wide study.

Based on these findings, ECTAA considers that the **authors do not have sufficient relevant and reliable evidences to conclude** on page 21 that *"the available data is sufficient to reconfirm beyond doubt that injuries and accidents, including fatal accidents, regularly occur during package travel and therefore, there is a need for a clear and unambiguous legislative framework concerning the duties of relevant operators concerning tourist safety and the liability rules that apply in case of injuries and accidents"*.

Such a conclusion is **wrong and irrelevant**.

Part 4 of the Study Problems and gaps in Community legislation

Before analysing in details the recommendations of the authors in this section, we believe that an important distinction is to be made between safety and liability.

Safety of services can only be achieved by imposing specific obligations on each individual and actual service providers. In other terms, due to the specificities of each service to be provided, each service provider should have to comply with specific safety requirements, adapted to the service concerned. For the Members of ECTAA, compliance of actual service providers with safety requirements, like for instance hotel safety requirements, is of paramount importance, since in general, organisers are not the actual providers of the services included in the contract.

Organisers themselves also have safety obligations in the performance of their services, like for example to select destinations, hotel service providers, transport operators, etc with due care.

ECTAA agrees with the conclusion of the authors that safety issues, which primarily aim at preventing accidents, must be regulated in different legal instruments applicable to different service providers.

Article 5 of the Package Travel Directive is drafted in sufficiently broad terms to ensure adequate protection of the consumer who would be injured by an unsafe service, while leaving the necessary flexibility for interpretation by the courts. ECTAA would however like to stress once again that the liability of Article 5 is a **contractual liability**: the organiser is only liable for the proper performance of the services forming part of the package travel contract.

1.1. Road Traffic

1. Accident beyond the control of the tour operator

The authors recommend that *“consideration should be given to amending Article 5 of the Package Travel Directive to clarify that a tour operator is liable for all acts of service suppliers, regardless of whether the operator chose them with due care and regardless of whether they acted beyond the control of the tour operator”*.

ECTAA fully disagrees with that conclusion. Given that it is in practice impossible that a tour operator monitors the correct performance of the services by each supplier, it is of utmost importance that he can demonstrate that he selected them with due care or that the service provider acted beyond his control.

2. Accident on a trip booked at the resort

The authors further recommend that *“consideration should be given to clarifying Article 5 to ensure that the tour operator is liable for trips booked by package travel consumers if the tour operator is involved in any way in the conclusion of the contract”*.

Here again, ECTAA is absolutely against that recommendation. Indeed, the notion of *“being involved in any way in the conclusion of the contract”* is too vague and is a potential source of legal uncertainty. As we said above, Article 5 establishes a contractual liability for the proper performance of the services included in the package travel contract. If a consumer purchases an additional service at the resort, that is not part of the original contract, the organiser should not be liable under Article 5 of the Directive.

3. Limitation period

The authors conclude that *“consideration should be given to clarifying Article 5 of the Directive to ensure that time limitation clauses must guarantee a reasonable period and must not have the effect of depriving consumers of their rights”*.

Such clarification is not necessary, given that Directive 93/13 on unfair terms in consumer contracts considers as unfair any term which inappropriately excludes or limits the legal rights of the consumer vis-à-vis his supplier in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations (see point (b) of the Annex to the Directive).

In line with the better regulation principle, ECTAA believes that the issue of fairness of a time limitation clause is an issue of general contractual law. It should be regulated in the upcoming framework Directive on consumers' contractual rights, which will incorporate among others the unfair terms Directive.

1.2. Hotel safety

The authors suggest *“to consider updating and re-enacting Recommendation n° 86/666/EEC on fire safety in hotels as a directive or regulation and to undertaking further research as a matter of urgency to identify appropriate safety standards for guest use of hotels with a view to their implementation by means of a directive or regulation”*.

As indicated above, tour operators are liable under the package Directive, whereas in the European legislation, there are few mandatory health and safety requirements for service providers, so there is a different level of obligations imposed on both of them, to the detriment of tour operators.

1.3. Air transport safety

The study contains a recommendation that “*Article 5 of the Package Travel directive be amended by the insertion of a new subparagraph under which an organizer will be liable for injuries occurring to a consumer as a result of a breach of Community safety regulations by an airline supplying services to a tour organizer*”.

ECTAA is absolutely opposed to such a recommendation.

Compliance with Community Regulations on safety of air transport exclusively lies on Member States. They are responsible for delivering the relevant operating licenses as well as safety certificates to airlines and for monitoring that airlines keep on fulfilling safety requirements, provided in Community legislation.

Further, in accordance with Regulation 2111/2005 on a black list of carriers, the European Commission establishes a list of carriers subject to an operating ban within the Community, mainly because they do not fulfill safety requirements.

Tour operators select their contracting airline partners with due care, taking in particular into account that the airlines concerned have been duly authorized by the competent authorities of their country of establishment to operate as airlines and that they are not put on the black list established by the European Commission.

This recommendation is shifting the responsibility of control of compliance with the Community Regulations on safety of air transport from national authorities to tour operators, which is not acceptable and impossible in practice.

1.4. Natural disasters and terrorism

1. Information duties

In respect of the tour operator’s information duties, the authors recommend that “*in addition to the information duties already contained in the Package Travel Directive, an organiser should be made subject to a duty to*

- a) *monitor the destination with regard to specific, not generalised, risks arising from natural disasters, terrorist attacks, public health, public order and other sources which an organiser should reasonably foresee and*
- b) *appropriately inform package travel consumers before and after departure, as the case may be, regarding such risks*”.

Currently, Members of ECTAA already provide a valuable service in providing advice and information to their customers about their holiday destinations, that they select with the most possible due care.

However, ECTAA is absolutely opposed to the recommendation, for the following reasons:

- It is impossible to assess with certainty risks arising from natural disasters, terrorist attacks, public health and public order. This is even more true since Member States themselves rarely explicitly forbid travel in a given country. They prefer to state that unnecessary travel should be avoided or that the traveller is encouraged to reconsider his choice of destination.

Very often, Member States specify that their travel advices are purely informative and further disclaim their liability towards the traveller¹. They also state and recall that no region of the world and no country can be regarded as safe from terrorist risks².

Considering that Member States themselves refrain from giving binding information on various risks of travelling to specific destinations, imposing such monitoring and information obligation on tour operators would be unfair and totally disproportionate.

- Imposing an obligation to monitor and inform specific, not generalised risks “of other sources” is also unfair, inappropriate and impossible to manage. What kind of information will the organiser have to collect and provide to his customer? Any risk can be specific for a particular person, depending on its personal situation. For example, will the organiser have to inform the customer about the risk to fly, about the risk to visit a country with another climate than at home, about the risk to eat food which is not prepared by themselves, about the risk of going outside of the holiday resorts, about the risk of driving or doing sport?

The consumer is also responsible for assessing the risks of his behaviour and should act as a responsible person when travelling abroad.

2. Right to withdraw from the contract

The authors recommend “*considering amending the Package Travel Directive by adding a right of the consumer to cancel the contract in cases of force majeure*”.

When formulating that recommendation, authors refer to situations where there would be imminent danger for a planned trip.

If there is an imminent danger for a planned trip, it is highly unlikely that the organiser would take the risk of actually performing the contract. He would cancel it or propose an alternative package, in accordance with Article 4 of the Package Travel Directive. Therefore, there is no need for specifically amending the Package Travel Directive.

Would the consumer wish to cancel the package for other reasons related to his personal situation, such as for instance illness, a car accident, death of a relative, etc. either before or after departure, ECTAA believes that a specific provision in the Package Travel Directive is not necessary. Like any other contract, the consumer has always the right to terminate the contract for any reason. It is true that he may however have to compensate the tour operator, possibly in accordance with a sliding scale of cancellation charges but the consumer always has the possibility to contract an insurance providing adequate coverage of such situations where the consumer is unable to travel for personal reasons. Such insurances are easily available on the market, at an affordable price.

1.5. Scope of application

The authors note that “*there is a case for including bookings made on an airline website which also sells hotel accommodation and car hire within the scope of the Directive and for ensuring that such inclusion should be the starting point in reviewing the Package Travel Directive*”.

As mentioned above, ECTAA considers that if the Package Travel Directive is maintained and revised, all forms of combination of travel services sold by service providers in their own name should be covered by the Package Travel Directive.

¹ See for instance the websites of the Spanish Ministry for Foreign Affairs: <http://www.maec.es/es/MenuPpal/Paises/ArbolPaises/Afganistan/Recomendaciones%20de%20viaje/Paginas/recoAfganistan.aspx>, of the UK Foreign and Commonwealth Office: <http://www.fco.gov.uk/en/travelling-and-living-overseas/travel-advice-by-country/disclaimer> or of the Belgian Ministry for Foreign Affairs: <http://www.diplomatie.be/fr/travel/countrydetail.asp?COUNTRYID=76>

² See for instance websites of the Spanish and Belgian Ministry of Foreign Affairs mentioned under footnote 1 or the website of the French Ministry for Foreign Affairs:

http://www.diplomatie.gouv.fr/fr/conseils-aux-voyageurs_909/pays_12191/afghanistan_12192/index.html

1.6. Basis of Liability

Authors recommend “*giving consideration to redrafting Article 5 in order to clearly provide that the tour organiser is liable for the service supplier, that this liability is strict and that the burden of proof rests with the organiser to prove that any of the available defences apply*”.

In respect of liability for the proper performance of the contract, ECTAA agrees that it should be clarified that only the organiser and not the retailer is liable for the proper performance of the services included in contract.

Concerning burden of proof, it should be clarified that the burden is on the consumer to prove improper performance of the obligations arising from the contract and the damage resulting from improper performance, while the burden is on the organiser to prove exemption from liability.
