

## **POSITION OF ECTAA**

### **ON THE PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS**

#### **1. 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 some 80,000 European companies.

ECTAA welcomes the proposal for a Directive on consumer rights. It is an important step towards the harmonisation of the rights of consumers who shop throughout the EU, which will facilitate cross-border sales. Since its Members are very much involved in cross-border and domestic sales to consumers, ECTAA has carefully analysed the proposal for a Directive on Consumer Rights.

When analysing the proposal, ECTAA has also taken into account the applicable provisions of another Directive that is very important for its Members, namely Directive 90/314/EEC on package travel, package holidays and package tours (here after the Package Travel Directive). ECTAA indeed believes that it is of utmost importance to avoid incoherencies and overlaps between the Package Travel Directive and the provisions of the proposed Directive on consumer rights.

On this basis, ECTAA:

- **Fully supports the fact that package travel contracts are not subject to Chapter II on consumer information and Chapter III on consumer information and withdrawal right for distance and off-premises contracts**
- **Calls for specifying in the proposal that the provisions of the Package Travel Directive shall always prevail when they conflict with Chapter V on unfair contract terms, which remains applicable to package travel contracts.**
- **Considers that both contracts for the provision of accommodation, transport, car rental, catering and leisure services that are concluded at a distance AND off-premises should be exempted from Chapter III on consumer information and withdrawal right for distance and off-premises contracts.**
- **Calls for the need to amend the lists of terms unfair in all circumstances and of terms presumed unfair, in order to allow providers of package travel services to continue to include in their contracts terms on a minimum number of participants and price revision terms. Also, the right of a consumer to use the services of a third party intermediary should be preserved.**

## 1. Chapter I Scope

According to Article 3 of the proposal, contracts regulated by the Package Travel Directive are only subject to Chapter V on unfair contract terms.

Since package travel contracts are regulated by a sector specific Directive, namely the Package Travel Directive, ECTAA fully supports the fact that they are not subject to Chapter II on consumer information and Chapter III on consumer information and right of withdrawal.

Concerning Chapter V, we believe that the text of the proposal should further clarify how Chapter V of the proposal will interact with the Package Travel Directive, if it is in contradiction with one of its provisions.

Indeed, terms included in the Package Travel Directive by European legislators must be considered fair and reasonable. Therefore, we believe that Article 3 should specify that whenever Chapter V conflicts with a provision of the Package Travel Directive governing specific contract terms, the latter shall always prevail. This would establish legal certainty and is in line with the approach taken in other EU instruments, such as for example the Services Directive, that special legislation always prevails over general legislation.

We thus propose the following amendment to Article 3 of the proposal:

### Article 3 – paragraph 3

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council <b>and of Council Directive 90/314/EEC</b>	3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council ( <i>deleted</i> ).  <i>3a. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Council Directive 90/314/EC on package travel, package holiday and package tours. If Articles 30 to 39 conflict with provisions of Directive 90/314/EC governing specific terms of package travel contracts, the relevant provisions of Directive 90/314/EC shall prevail.</i>

### *Justification*

*Legal certainty requires that the text of the proposal clarifies its relationship with other community legislation and more particularly with the Package Travel Directive. Therefore, it should be specified that if a term of a package travel contract complies with the provisions of the Package Travel Directive, those provisions shall prevail over Articles 30 to 39 of the current proposal for a Directive on consumer rights.*

## 2. Chapter III Distance and off-premises contracts

In the current proposal, contracts for the provision of accommodation, transport, car rental services, catering or leisure services are not subject to chapter III when they are concluded at a distance and thus, no right of withdrawal shall apply to such contracts. However, the same is not true when they are concluded off-premises.

ECTAA strongly believes that when those contracts are concluded off-premises, they should benefit from the same exemption that applies when they are concluded at a distance. In both cases, making travel services contracts subject to a right of withdrawal is not appropriate and at the end of the day, will be detrimental to the consumer.

Indeed, the consumer purchasing off-premises will no longer be able to benefit from promotional offers, like for instance last minute bookings, which must be immediately confirmed, as by essence they are close to departure date, very often less than the 14 days withdrawal period provided in the proposed Directive. Immediate confirmation is also crucial for packages involving a complicated itinerary, composed of various combinations of services. It is essential that all bookings are confirmed directly; otherwise it could jeopardize the whole travel itinerary.

Furthermore, in many Member States such as Germany, UK and the Netherlands, travel agents acting as intermediaries for the sale of travel services have now adapted their services to customers' demand for flexibility. They thus meet consumers, at their express request, outside of their business premises to assist them in organizing their travel arrangements. However, under the terms of the proposal, bookings made during such solicited visits would be considered off-premises contracts to which a right of withdrawal applies. Would it be the case, it would have a very detrimental impact on the activities of these travel agents.

ECTAA therefore proposes the following amendments, that will make sure that contracts for the provision of accommodation, transport, car rental, catering and leisure services are subject to a similar regime, whether they are concluded at a distance or off-premises:

### Recital 36

<i>Text proposed by the Commission</i>	<i>Amendment</i>
The application of a right of withdrawal may be inappropriate for certain services relating to accommodation, transport and leisure. The conclusion of the corresponding contracts implies the setting aside of capacity which, if a right of withdrawal was introduced, the trader may find difficult to fill. Therefore, distance contracts should not be covered by the provisions on consumer information and the right of withdrawal	The application of a right of withdrawal may be inappropriate for certain services relating to accommodation, transport and leisure. The conclusion of the corresponding contracts implies the setting aside of capacity which, if a right of withdrawal was introduced, the trader may find difficult to fill. Therefore, distance <b>and off-premises</b> contracts should not be covered by the provisions on consumer information and the right of withdrawal

### Article 20

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Articles 8 to 19 shall not apply to distance and off-premises contracts: (a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property; (b) concluded by means of automatic vending machines or automated commercial premises; (c) concluded with telecommunications operators through public payphones for their	1. Articles 8 to 19 shall not apply to distance and off-premises contracts: (a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property; (b) concluded by means of automatic vending machines or automated commercial premises; (c) concluded with telecommunications operators through public payphones for their

<p>use;</p> <p>(d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises.</p> <p>2. Articles 8 to 19 shall not apply to off-premises contracts relating to:</p> <p>(a) insurance,</p> <p>(b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC and</p> <p>(c) credit which falls within the scope of Directive 2008/48/EC.</p> <p><b>3. Articles 8 to 19 shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.</b></p>	<p>use;</p> <p>(d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises;</p> <p><b>(e) for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.</b></p> <p>2. Articles 8 to 19 shall not apply to off-premises contracts relating to:</p> <p>(a) insurance,</p> <p>(b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC and</p> <p>(c) credit which falls within the scope of Directive 2008/48/EC.</p>
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### *Justification*

*Both distance contracts and off-premises contracts for the provision of accommodation, transport, car rental services, catering and leisure services must be exempted from Articles 8 to 19. Indeed, a right of withdrawal is not appropriate for services with reservation that must be provided at a specific time or period since in many cases, they cannot easily be sold to another consumer. Furthermore, granting a right of withdrawal would limit the possibilities for the consumer to benefit from attractive offers of travel services, such as promotional tariffs or last minute offers*

### **3. Chapter V. Terms unfair in all circumstances and presumed unfair.**

The proposal for a Directive includes two annexes, one listing terms that are unfair in all circumstances and one listing terms that are presumed to be unfair.

ECTAA proposes three amendments to these two annexes.

Two of them aim at preserving two types of terms that tour operators include in their contracts, namely the “minimum number of participants’ term” and the “price revision term”, both being currently allowed under the Package Travel Directive.

A third amendment aims at safeguarding the right of a consumer to use the services of a third party for the conclusion of a contract with a trader or for taking steps which are meant to lead to, or facilitate, the conclusion of such a contract.

#### *3.1. Minimum number of participants’ term*

In many of their contracts, tour operators include a term providing that the contracted package will only take place if a minimum number of persons conclude the same package travel contract. Such a term is usually referred to as “a minimum number of participants’ term”. Annually, millions of contracts contain this clause. Such a clause is expressly allowed in the Package Travel Directive.

These clauses are particularly common in group travel, such as coach tours or study tours, which are an important part of the tour operating business. The same is true for 50% of the river cruises and

25% of the ocean cruises. On an annual basis, there are approximately 50 million customers who buy tours (round trips)<sup>1</sup> in the EU and the EEA, of which one third are organized in groups.

Minimum number of participants' terms allow a calculation with low margins, the consumer thereby benefiting from acceptable prices. Should the clause not be allowed, the tour operator would have to base the price calculation on a very low number of participants. This would result in a severe increase in prices and/or a reduction in the number of offers available, as tour operators would be reluctant to put new tours on the market. In both cases, it will be to the detriment of the consumer.

However, point b) of the list of terms considered unfair in all circumstances (Annex II) prohibits terms making the trader's commitments subject to compliance with a particular condition, which depends exclusively on the trader.

ECTAA fears that some courts may take the view that reaching the minimum number of participants is a condition that depends exclusively on the tour operator and is thus prohibited under point b) of Annex II. But ECTAA considers that whether a minimum number of consumers will purchase a given tour is beyond the control of tour operators.

In order to meet our concerns, we suggest that it is specified in point b) of Annex II that a term will only be unfair when the trader makes his commitment subject to compliance with a particular condition that only the trader is able to fulfil.

#### **Annex II – point (b)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(b) limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition <b>which</b> depends exclusively on the trader;	(b) limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition, <b>the fulfilment of which</b> depends exclusively on the trader.

#### *Justification*

*In order to enhance legal certainty, it is necessary to specify that a term will only be unfair if the trader sets a condition for the performance of his obligations under the contract and if that condition can only be fulfilled by the trader himself. Indeed, a trader may specify in his contract that he will only be able to perform a contract if a specific condition is met but the fulfilment of this condition may be beyond his control. For example, all package tour contracts which are group organised contain a clause that specifies that the tour will only take place if a pre defined minimum number of customers book the tour. Annually millions of contracts have this clause. Whether or not that condition will be fulfilled, i.e. whether a minimum number of persons will purchase the tour, is beyond the control of the organiser of package travel services.*

#### *3.2. Term on price revision after conclusion of the contract*

Point 1(g) of Annex III presumes the unfairness of terms that allow the trader to increase the price agreed with the consumer when the contract was concluded, without giving the consumer the right to terminate the contract.

Many European tour operators include in their contracts a term that allows them to review the price agreed in the contract. The Package Travel Directive allows such a review without granting a right of withdrawal to the consumer but only in the very limited circumstances of variations in

<sup>1</sup> Tours or round trips designate organised tours where the traveller visits different cities and sites of a single country or of a specific region of the world, which implies transportation from one point to another and accommodation in different hotels.

transportation costs, in taxes, dues or fees applicable to the services included in the package or in exchange rates. Because of this, the scale of variation of the price, compared to the overall price of the package is rather limited. In addition, in some Member States, the legislation caps the variation that may occur.

The price of a package may for example be reviewed when air carriers raise their fuel surcharges or when airport taxes or charges are increased. In the last years, there were very frequent variations in such charges. Although the variation per passenger may be small, the collective sum for the tour operator may be considerable. In such circumstances, the tour operator would be compelled to review the prices agreed in the contract, but strictly in accordance with the requirements of the Package Travel Directive.

However, if point 1 (g) should apply to package travel contracts; it would be very problematic for tour operators. They could maintain price revision terms but would then have to systematically grant the consumer the right to withdraw from the contract. Or, they would not use such terms anymore but would then anticipate any variations and thus offer their products at higher prices, at the consumer's detriment.

In order to solve this problem, ECTAA suggests that package travel contracts are added to the exceptions to point 1 (g) listed in point 3 of Annex III.

### **Annex III – point 3**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>3. Point 1(g) shall not apply to</p> <p>(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;</p> <p>(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;</p> <p>(c) price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.</p>	<p>3. Point 1(g) shall not apply to</p> <p>(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;</p> <p>(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;</p> <p>(c) price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.</p> <p><b>(d) package travel contracts regulated by Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.</b></p>

#### *Justification*

*Directive 90/314 on package travel, package holidays and package tours authorises organisers of package travel services to review the price laid down in the contract without giving the consumer the right to terminate the contract, if it is expressly provided in the contract and only if specific conditions as defined by the Directive are met (variations in transportation costs, dues, taxes or fees chargeable for certain services and exchange rates). Therefore, point 1 (g) should not apply to package travel contracts.*

### 3.3. Consumer's right to use the services of a third party

Over the years, internet sales to consumers are steadily increasing. Nowadays, some traders and notably providers of travel services only offer their services for sale on their websites.

To book the travel services on the website of those providers, some consumers, who do not have Internet access, use the services of off-line travel agents. Also, other consumers may prefer to use screen scraping websites, i.e. websites which gather information from various websites of travel service providers in order to provide a full circle view of the existing offers in answer to the request of a customer. Those screen scraping websites provide an objective comparison of prices, thereby allowing the consumer to take a fully informed decision to book a travel service of a specific provider.

However, recently, some travel service providers have announced that they would cancel any booking that was not made directly through their websites or via their call centres. But these travel service providers thereby violate the right of the consumer to resort to the services of a third party intermediary in order to make his booking.

Given that in all Member States, it is a principle of law that any person has the right to instruct and authorise a third party to take some actions, ECTAA strongly believes that any term violating this right of the consumer should be considered unfair in all circumstances.

Therefore, ECTAA proposes the following amendment to annex II:

#### **ANNEX II – new point (d)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Contract terms, which have the object or effect of the following, shall be unfair in all circumstances: ...	Contract terms, which have the object or effect of the following, shall be unfair in all circumstances: ... <b><i>(d) excluding or hindering the consumer's right to instruct and authorise a third party to conclude a contract between the consumer and the trader and/or to take steps which are meant to lead to, or facilitate, the conclusion of a contract between the consumer and the trader.</i></b>

#### *Justification*

*Any consumer has the right to instruct and authorise a third party to conclude a contract between this consumer and a trader and/or to take steps which are meant to lead to, or facilitate, the conclusion of such a contract. Any term preventing or hindering that right must be considered unfair in all circumstances.*

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