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The Relationship between the Legal Regulation of Communications Technology (CT) and Travel and Tourism in the EU.

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1. The impact of electronic commerce on tourism

Travel and Tourism is one of the largest industries in the world. Yet traditional lawyers raise their eyebrows when they hear mention of the subject of Travel and Tourism law. There is a general lack of awareness of it, which is as a result of the inertia of the legal profession. In addition there is a lack of awareness of the specific contexts in which CT operates in relation to Travel law. This is surprising in view of the significance of CT. This paper seeks to show the links between CT and Travel law

In this paper we will discuss the challenges that the rapid development of CT poses for the travel industry and examine how the legislator should react to the evolution, to provide sufficient protection to the service recipients, in this case to the tourists. Although, only a couple of years ago the purchase of electronic travel products represented just a small portion of overall Internet sales, the potential for electronic commerce[1] in the travel and tourism sector appears excellent.[2] Electronic commerce poses great challenges to the market structure in tourism. Travel agencies are under a threat of being left behind unless they can re-adjust their role in the industry.[3] The tourism sector, serves also as a good example when considering whether the protection of the service recipient in e-commerce is sufficient under the EC law. Tourists have traditionally been vulnerable due to the fact that they cannot see the product beforehand and, instead, have to rely on the information given to them by the service providers, which often means so called 'brochure speak'. The service is also difficult if not impossible to replace, which puts more pressure on the quality of the prior information.

In order to re-assess the position of the tourist, it is first necessary to define what we mean by a 'tourist'. In 1937 the League of Nations defined a tourist as person travelling for pleasure, on domestic travel and health travel. That definition also includes people travelling for business and conference travellers. People seeking employment are not tourists. Students, immigrants and people in transit fall into the latter category.[4] Tourism is defined also by the World Tourism Organisation as follows as, "Activities engaged in by persons during journeys to or stays in places located outside their normal living environment for a continuous period not exceeding one year for leisure, business or other reasons." [5] According to the Advocate General in the case of *Cowan v Trésor Public* [1990] 2 CMLR 613 at p 621-623, whether or not a person is a tourist, depends on the general manner of the services received during the journey, which is determined at the beginning of the journey.

Despite being the largest service business in Europe and one of the fastest growing service sectors and therefore, a major employer, tourism has not got its own legal status in the EU.[6] Actions get authorisation from Article 308 (ex 235) of the EC Treaty and arise under different titles, like transport, taxation, employment, environment, consumers and health protection. The protection for tourists can be found under consumer and travel law and indirectly through e.g. competition law provisions.[7] The outcome of such a heterogeneous ground for the protection may be, that in some situations the tourist is left without any protection at all and others where the different pieces of legislation overlap with a potential conflict.

2. Is the consumer protection sufficient for tourists[8]

2.1 The unfair terms in electronic travel contracts

The Directive on Unfair Terms in Consumer Contracts[9] applies only to contracts, which have not been individually negotiated. A term is regarded as not individually negotiated, when it has been drafted in advance, and therefore, the consumer has not been able to influence the substance of the term.[10] The burden of proof on the individual negotiations is on the supplier. The terms in tourism contracts are traditionally in standard form and the same is also true overall in electronic commerce, where the individual negotiations are usually out of the question even for practical reasons.

According to the Directive, a term is regarded to be unfair if it, contrary to the requirement of good faith, causes a significant imbalance in the parties rights and obligations under the contract, to the detriment of the consumer.[11] The standard of 'significant imbalance' is up to the courts to decide, and that can lead to inconsistent interpretation practices between the different Member States. An unfair term is not binding on the consumer, but if possible, the rest of the contract will continue to exist without the unfair terms.[12] That is of special importance in travel and tourism context where the product is often difficult, if not possible, to replace.

The Directive also states that the terms of the contracts that are in writing must always be drafted in a plain and intelligible language.[13] Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer should prevail.[14] Presumably, 'in writing' in this context also includes terms written and supplied electronically. In order to make sure that the provisions cover all possible future forms of writing, the wording 'in writing or any other appropriate form' could be used instead, like in the Article 4 of the Package Travel Directive (90/314/EC).

Member States are to take appropriate and effective means to insure the rights set out in the Directive on Unfair Terms in Consumer Contracts and that the consumer does not lose the protection, in case there is a close connection to a non-member country where the risk exists that the law of that country could apply instead. This turns out to be increasingly difficult obligation to fulfil in practice due to the jurisdictional problems in electronic commerce. Electronic travel services are especially problematic due to the fact that there is often a foreign tour operator or other service provider involved and the connection to another legal system is likely.

The assessment of the unfair nature of the terms is restricted. It shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, in so far as these terms are in plain intelligible language.[15] The impact of the Directive on the tourism sector is further restricted by Article 1 (2), according to which, the contractual terms reflecting mandatory, statutory or regulatory provisions or principles of binding international conventions, are not subjects of that Directive. In the field of air transport, such provisions are provided by the Warsaw Convention. The purpose of that Convention is to balance the interests of the service users and carriers: it offers greater protection to the users but also insures the profitability and financial security of the carrier through limits of liability. One could argue that due to the structure of the air transport market the balance is disturbed in favour of the air carrier. There have been several attempts to limit the defences mainly on the initial of the United States, some of those actions have been successful but overall situation remains unsatisfactory for the passengers.

2.2 The lack of distance selling provisions applicable to electronic travel contracts

The objective of the Distance Selling Directive 97/7/EC is to ensure that the use of distance communication must not lead to a reduction of the information provided to the consumer. It also suggests, that the Member States should take appropriate measures to protect the consumers who do not wish to be contacted. The problem of direct marketing, especially unsolicited commercial communications by e-mail, (in other words spamming), is dealt with in the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. However, those Directives only apply in situations where personal data is processed.

The Distance Selling Directive controls contracts on goods and services where the supplier makes an exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. The 'means of distance communication' refers to any means that lack the simultaneous physical presence of the supplier and the consumer. The sale of electronic travel and other tourist services fall into this category. However, the Directive does not include electronic communications, where the contract itself is not concluded through distance communication means. In those cases minimum protection against misleading advertising is provided by the Directive 97/55/EC on misleading comparative advertising,[16] which covers any advertising, which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed, or whom it reaches, and which, by reason of its deceptive nature is likely to affect their economic behaviour.[17] The purpose of that Directive is not just to protect the consumers, but also persons carrying on a trade or business, in other words, also people travelling for business.

The impact of the Distance Selling Directive is very restricted in electronic travel contracts. Article 3 (2) effectively excludes most of the duties of the supplier to provide information. Provisions concerning prior information, written confirmation of information, rights to withdrawal and the time during which the order should be fulfilled, do not apply to accommodation, transport, catering or leisure service contracts. However, some of the exceptions are easy to understand when looking at the above-mentioned Articles - they would not apply very well to the tourism services.

According to what we have seen above, the present consumer provisions protecting a tourist purchasing electronic travel services is insufficient. One option in order to solve the problem is to include general provisions in the Distance Selling Directive covering also tourism and the other is to have more specific rules, governing only travel contracts concluded by distant means. The latter approach has been adopted in the State of New York according to *Judge Thomas Dickerson* in his article submitted 20 August 1999, 'The Truth in Travel Act in New York State 1974'.^[18] That Act has similar provisions concerning written notice and cancellation, as the Doorstep Selling Directive (85/577/EEC) in European Union.^[19] However, the existing EC Directive would not be applicable to on-line selling, as it is, due to the requirement of contract being concluded outside trader's usual place of conducting business and also, because the Directive does not apply to contracts concluded on the basis of a brochure, which in e-commerce can include information on the WebPages.

3 Special features of the Package Travel Directive 90/314/EEC

3.1 Information requirements and brochures on the Internet

The Package Travel Directive concerns not just package travels but also package holidays and package tours. The Directive sets out the minimum standards for the consumer protection controlling the information provided to the consumer, the formal requirements for package travel contracts and the protection of the consumer in case of the package travel organiser's insolvency. The implementation process proved to be difficult and slow in most of the Member States, which partly reflects the problems with the Directive. Only France, Netherlands and UK met the deadlines.^[20] Also, some inconsistency can still be found between the national laws and the Directive.

According to the Directive, any information on conditions applying to the contract, supplied by any means, must not contain any misleading information. The tourists are also entitled to certain minimum information, in writing or by any other appropriate form or medium, before the contract is concluded.^[22] There is no requirement to produce a brochure, but a minimum standard must be met, whenever one exists. The brochure forms a part of the contract and the organiser or retailer is bound by its terms, unless the changes have been clearly communicated to the consumer before the conclusion of the contract or are made later by an agreement between the parties.^[23]

A brochure in the meaning of Package Travel Directive refers to the material through which the packages are sold or offered for sale. In other words a mere general promotional information does not amount to a brochure. Recognising a brochure is not that difficult when the material is in a traditional printed form, which is usually the case. However, it is fair to argue that the service providers are not always aware of the fact that information on the Internet can and often is considered to be a brochure and that the same minimum requirements apply to those on-line brochures as to the printed ones. There might appear further problems in proving the information that was displayed on the WebPages at the time, which however has formed a part of the contract. That also brings up the question of on whom the burden of proof lies in electronic travel contracts. According to the general principle, the onus of proof is on the one who claims that there is a breach of contract. In practice that could mean that the tourist should reproduce the contents of the WebPages in case he claims a breach of conditions or terms stated on the on-line brochure. However, it is arguable whether there should be specific rules governing those situations.^[24]

3.2 Limitation of liabilities

The organiser and/or retailer are under a strict liability for damages caused by a failure to fulfil the proper performance arising from the contract.[25] The liability can be imposed on both the organiser and the retailer or just one of them.[26] However, they are not liable just for their own faults, but also for the misconducts of other suppliers, unless the failure is caused by the consumer or by a third party and is therefore unforeseeable or unavoidable. In the case of *force majeure*, the organiser or the retailer is free from liability.

According to the Article 5 (2 (3)), Member States can allow limitations to the liability in accordance with the international conventions governing such services.[27] Some countries like Netherlands have used this opportunity to incorporate the defences in the Warsaw Convention[28] in their legislation. The purpose of that conduct is to avoid imposing such liability to the tour organiser, which according to the Warsaw Convention is considered unreasonable to the actual carrier. Under the Warsaw Convention the tour operator would be considered to be a contractual carrier, with similar liabilities as actual carrier has. It makes sense to leave this matter for the international conventions to solve, which are binding any way, and therefore avoid overlapping regulations. The Member States may also allow contractual exclusion clauses, as long as they are not unreasonable.

The Package Travel Directive has been criticised for not stating clearly enough the legal consequences of neglecting the obligations concerning information and transparency.[29] The result would be then to rely on the Community law principles of effective remedies, as in cases like *Von Colson & Kamann v. Land Nordrhein-Westfalen* case 14/83 [1984] ECR 1891, *M.H. Marshall v Southampton and South West Area Health Authority*, case C-271/91 [1993] ECR I-4367 and *Commission v Denmark* case 143/83 [1985] ECR 427.

3.3 Pigeon-holes in the applicability of the Package Travel Directive

The Directive applies to packages sold or offered for sale in the territory of the Community.[30] Therefore, when a consumer purchases a package while residing outside the Community area, the Directive does not apply. Electronic commerce challenges the interpretation of when a package sold or offered for sale in the Community territory; it is difficult to define when and where the contract is concluded. According to *Grant-Mason*, p. 56-57, the Package Travel Regulation would apply, when the package is sold or offered for sale over the phone from outside UK to a consumer in the UK. The argument was found teleologically in the purpose to protect the consumer residing in the UK. The jurisdiction in the UK implementation is limited to packages sold or offered for sale in the territory of the United Kingdom. That is clearly in conflict with the Directive and wouldn't probably stand in European Court of Justice according to the *Dillenkofer*-ruling.[31]

Apart from the jurisdictional restrictions, the definition of a package narrows down the application of the Directive. First of all, a package in the meaning of the Directive has to consist at least two of the following services- transport, accommodation and other tourist services. It does not cover plain transportation or accommodation. Second, the Directive only applies to package travels that last more than 24 hours or include overnight accommodation.[32] Also, the requirement of the package having to be sold at an inclusive price, excludes the situations where the package is purchased with two different contracts. On the other hand, the does Directive cover packages that include accommodation combined with 'other tourism services' but not transportation. That way, the protection is wider than in the traditional concept of tourism, according to which all tourism is travel, but not all travel is tourism.

4. Soft law measures: promotion of rights and voluntary codes of conducts

The Member States seem to be more in favour of soft law measures in order to increase the protection for tourists. They seem to be afraid that the increasing legislation will impose too heavy consequences to the tourism industry.[33] The downside of such development is that the different measures taken in each Member States are likely to hamper the goal of Internal Market. Many

member states have, however, produced voluntary codes of conduct in order to build up the confidence in consumers purchasing travel products. In Finland, for example, the Consumer Ombudsman and the Finnish Travel Agency Association have jointly negotiated and approved the General Terms and Conditions applicable to the marketing and sale of package tours.[34] That Agreement is only professionally but not legally binding. According to the Article 18 of the Agreement, the traveller can alternatively bring a claim to the Consumer Complaints Board for handling. Even though, the ruling is not legally binding the recommendation is still fairly effective due to the publication of monthly black lists of businesses, which haven't followed the Recommendations.

Almost as important as the substance of the law itself is the way the law is promoted to the public. Even if the protection under Community law was sufficient and the implementation effective, the situation is not satisfactory if the tourists don't know their rights, especially when travelling abroad. The pressure to build confidence in cross-border purchasing of travel services has increased since the development of the electronic commerce. An important step in the promotion of tourism in EU was taken through the establishment of the Tourism Advisory Committee in 1986, the role of which is to facilitate exchange of information, consultation and co-operation on tourism.[35] The Council also gave a Recommendation (86/665/EEC) on the development of standardised information provisions for the clients in existing hotels, on the basis of easily recognisable symbols, permitting consumers across the Member States to assess the range of facilities in the hotel. The latest actions have been the Action Plan to Assist Tourism[36] and the Proposal for a Council Decision on a first multiannual programme, 'Philoxenia'(1997-2000), to assist European tourism.[37]

5 Alternative protection

5.1 Directive on Electronic Commerce 2000/31/EC

Electronic travel services fall within the scope of the Directive. The objective of the Directive is to avoid over-regulation and ensure the freedom to provide information society services, in order to facilitate the development of the Internal Market in

electronic commerce.[38] According to Article 3 (2), Member States may not restrict the freedom of undertakings from Member States to provide information society services, for example, by requiring prior authorisation of the information service provider.[39] However, interference is justifiable, when public policy, protection of public health, public security or consumer protection so requires.

Chapter II of the Directive sets out the information requirements and provisions controlling the commercial communications.[40] According to Article 5 of the Directive, the information service provider is under obligation to ensure an easy, direct and permanent access to certain general information.[41] The information service provider should also provide the recipient, prior to placing the order, with information on the technical steps taken to conclude the contract, whether or not the contract is filed, technical means to identify input errors and languages.[42] The information service provider also has to provide an electronic receipt without undue delay. However, that can be agreed otherwise upon, with a party other than a consumer. The receipt is not required neither when the contract is concluded exclusively by exchange of electronic mail or by equivalent individual communications.

The Directive does not touch the jurisdictional issues, which are problematic in electronic commerce, especially when it comes to air transport. According to the Article 13 of the Brussels Convention, the jurisdiction is the domicile of the consumer, if the negotiations before the conclusion of the contract were in the State of residence of the consumer.[43] The Warsaw Convention, which has a priority over the Brussels Convention in the field of air transport, states that the client has a choice between the jurisdiction of the domicile of the airline or the place of business, through which the contract is made. It follows, as *Professor Klaus Tonner* points out, that "as the

courts accept any travel agency as a 'place of business'... and as the client uses a travel agency near his home to book his flight... the client is under protection of the law of his residence. This advantage disappears in the case of an Internet booking: There is no longer a 'place of business' that is different from the domicile of the airline." [44]

The Directive on Electronic Commerce does not apply to service providers established in a third country. The place where the service provider is established is determined by the European Court of Justice, according to which the concept of establishment involves the place where the undertaking pursues its economic activity. However, the restrictions in application should not be of great importance because the Directive is supposed to be consistent with the overall international regulations, like the Model Law on Electronic Commerce of the UNCITRAL, [45] which served as a model for the equivalent EC Directive in question.

5.2 Competition law and the principles of free movement

An efficient competition law policy increases productivity and reduces prices ultimately to the benefit of the consumer. It is of special importance to the tourism industry, where numerous small and medium size enterprises are struggling along larger service providers. Anti-competitive practices of undertakings can be prohibited by Commission, on the basis of the Articles 81 and 82 of the EC Treaty or Merger Control Regulation 4064/89. The object of EC Competition Law is to enable the free movement between Member States and therefore to create an Internal Market. In some cases, the principles of free movement have been used directly for the protection of an individual. That was the case in *Luisi and Carbone* [1985] 3 CMLR 380, where the court held that the freedom to provide services, within the meaning of Articles 49 (ex 59) and 50 (ex 60) of the EC Treaty, protects not only those providing the services, but also the recipients. The Court also stated that tourists, amongst other service recipients, shouldn't be obstructed to such an extent that the freedom to provide services in Community is affected. [46]

Due to the structure of the market and the high vertical integration, the undertakings in travel industry have a tendency to fall within the scope of above mentioned competition law provisions. Especially, in air transport the relevant product markets are often defined quite narrowly, which facilitates the establishment restrictive practices. There have been a number of European but also transatlantic mergers and alliances between air carriers. However, such agreements have often reached a conditional acceptance due to the ultimate benefit for the consumers as they are provided a broader range of choice by the alliances than independent carriers could offer. Although, as *Commissioner Karel Van Miert* pointed out in his speech, there are risks that the long term effect may be in detriment to the consumer if market is foreclosed, competition eliminated or substantially reduced and there is a threat of price increases." [47]

There has been series of complaints made to the Commission in relation to the commissions paid by the airlines to the travel agents. The dominant airlines operate loyalty rebate schemes, which tie the travel agencies effectively to the airline and therefore discourage the travel agencies from selling tickets of any other airlines to the customers. There is a fairly recent case of *Virgin/British Airways* 2000/74/EC, where the Commission found British Airways infringing its dominant position on the market in travel agency services in the UK, through various top-up schemes whereby additional payments would be made to agents who exceed the sales targets set on the basis of their past sales. The negative decision was addressed to British Airways on the basis of Article 82 of the EC Treaty. The situation is expected to get even worse while the importance of travel agencies as retailers diminish through the increase of e-commerce; they become more and more dependent on the commissions of their remaining partners unless they can find alternative sources of income. [48]

5.3 Computer reservation system and its relationship to electronic commerce

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When used properly, computer reservation systems (CRS) provide an important and useful service to the carriers and travellers, who gain an easy access to up-to-date information on the services and are able to make reservations. However, due to the high

The definition of CRS is set out in Article 2 (f) in the Council Regulation. A CRS is a computerised system containing information about, inter alia, carrier's schedules, availability, fares and related services. It includes systems with or without the facilities through which the subscriber - usually a travel agency - can make reservations and issue tickets. The displays, indicated to the consumer, should be neutrally presented according to the ranking criteria set in Annex I of the Regulation. That way the consumer is provided with a comprehensive range of choice. The Regulation imposes duties on all the parties - the system provider, the travel agency and the air carrier - in order to insure that the information provided is not inaccurate, misleading or discriminatory. Article 3 of the Regulation sets out obligations on carriers controlling the CRS to allow access to other carriers and treat them in a non-discriminatory way. There is a fairly recent Decision 1999/618/EC where the Commission found Lufthansa distorting competition between CRSs by granting commissions and incentives to those air carriers using the services of the START AMADEUS - a CRS, over which Lufthansa had control.[52]

The purpose of the Regulation is to ensure fair and unbiased conditions for all the air carriers involved with the CRS and therefore, to protect the interests of the consumers. It applies to CRSs when offered for use and/or used in the territory of the Community for the distribution and sale of mainly air or rail transport products. According to the latest amendment of the Regulation, WebPages with booking capabilities are regarded as CRSs and thus subjects to the codes of conducts set in the Council Regulation.[53] It is still unclear, however, whether online selling would come to compete on the same market with the CRSs under the competition law. Traditionally, the tourists have felt the need to get a face-to-face contact when booking for a holiday. However, when the confidence in electronic purchasing increases there is no longer need for such contact. It seems that the survival of the CRS is heavily dependent on the position the travel agencies take in the near future.

6 Re-assessment of the overall situation

The problem with the incoherent measures controlling the tourism sector seems to be not that much the conflicts of overlapping legislation but the lack of protection of a tourist in certain situations. The consumer protection provisions do not cover all tourists and the provisions concerning solely travel sector are incomprehensive. However strong the protection of Package Travel Directive is to people on package travels, it does not concern other travellers, like people using just air or other public transport. The Commission has acknowledged that problem in its Working Paper in 1999.[54] One could also argue that the remedies in the Directive should be more preciously stated.

Electronic commerce imposes further problems to the legislation involving tourism. In addition to the general legal problems of jurisdiction and the choice of law, there are special difficulties with the information provisions concerning electronic travel commerce. The concept of a brochure has been challenged by electronic commerce and needs re-assessing. Also the information requirements on electronic travel contracts appear incomprehensive. Due to the highly vertically integrated structure of the tourism market there is a risk of misrepresentation of information, like the case Virgin/British Airways.[55] Some of the problems have been previously successfully solved through alternative protection of competition law or codes of conducts. However, such protection has not been tested in electronic travel services yet.

The most recent legislation involving e-commerce has a common feature of being technology neutral and taking into account the future developments therefore also unnecessary exclusions to applicability are avoided.[56] However, they only provide the minimum possible interference to commercial transactions and the existing consumer protection provisions applicable to tourists appear insufficient; the Distance Selling Directive - to which the consumer protection in electronic commerce relies on - basically does not concern tourists. Therefore, it seems that there is a need for more comprehensive protection for the tourist despite the means of communication used. That can be achieved through either more general consumer protection legislation covering also tourism services or then by developing the particular provisions applying solely to the tourists or both. When conducting these measures, one has to keep an eye also on the changes that the electronic commerce brings to the structure of the travel industry.

PRIMARY SOURCES

COMMISSION DECISIONS

1999/618/EC

on a procedure relating to the application of Council Regulation 2299/89/EEC. (Electronic ticketing). *Official Journal L 244* , 16/09/1999 p. 0056 - 0063

88/589/EEC

relating to a proceeding under Article 86 of the EEC Treaty (IV/32.318, London European - Sabena). *Official Journal L 317* , 24/11/1988 p. 0047 - 0054

COUNCIL DECISIONS

89/46/EEC

on an action programme for European Year of Tourism. *Official Journal L 17/54*, 21.01.89

86/664/EEC

establishing a consultation and co-operation procedure in the field of tourism. *Official Journal L 384/52*, 31.12.86

COUNCIL RECOMMENDATIONS

86/665/EEC:

on standardized information in existing hotels. *Official journal NO. L 384* , 31/12/1986 P. 0054 - 0059

COUNCIL REGULATIONS

COUNCIL REGULATIONS

1999/323/EC

amending Regulation (EEC) No 2299/89 on a code of conduct for computer reservation systems.
Official journal L 40/1, 13.03.1999

3089/93/EEC

amending Regulation (EEC) No 2299/89 on a code of conduct for computerized reservation systems.
Official Journal L 278, 11/11/1993 p. 0001 - 0009

2299/89/EC

on a code of conduct for computerized reservation systems. *Official Journal L 220, 29/07/1989 p. 0001 - 0007*

COUNCIL DIRECTIVES

2000/31/EC

on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. *Official Journal L 178, 17/07/2000 p. 0001 -0016*

99/93/EC

on a Community framework for electronic signatures. *Official Journal L 13, 19/01/2000, p. 12-20*

98/27/EC

on injunctions for the protection of consumers' interests. *Official Journal L 166, 11/06/1998, p. 0051-0055*

97/66/EC

concerning the processing of personal data and the protection of privacy in the telecommunications sector. *Official Journal L 24, 30/01/1998, p. 1-8*

97/55/EC

amending directive 84/450/EEC concerning misleading advertising so as to include comparative advertising. *Official Journal L 290, 23.10.1997, p. 18-23*

97/7/EEC

on the protection of consumers in respect of distance contracts. *Official Journal L 144, 04.06.1997, p. 19-27*

95/46/EC

on the protection of individuals with regard to the processing of personal data and on the free movement of such data. *Official Journal L 281, 23/11/1995*

93/13/EEC

on unfair terms in consumer contracts. *Official Journal L 95, 21.04.93, p. 29*

90/314/EEC

on package travel, package holidays and package tours. *Official Journal L 158, 23.06.90, p.59*

85/577/EEC

to protect the consumer in respect of contracts negotiated away from business premises. *Official Journal L 372, 31/12/1985 p. 0031 - 0033*

Warsaw Convention of 1929, as amended by Hague Protocol in 1955 and Guadalajara Convention in 1961.

SECONDARY SOURCES

Dickerson, T A, **New York state needs a modern travel seller statute**, submitted 20 August, 1999 [On-line] <http://www.tay.ac.uk/iftta>.

Downes, J, **The need for awareness of travel law in the EU enterprise**, UACES 30th Annual Conference and Fifth Research Conference in Budapest, Hungary 6-8th of April, 2000.

Downes, J, **European union progress on a common tourism sector policy**, EIU Travel and Tourism Analyst No 1 1997, Occasional Studies, pages 74-87.

European Commission, **Comments on US Perspective on Consumer Protection in the Global Electronic Marketplace** 21/4/1999

European Commission, **Green Paper on Commercial Communications in the Internal Market**, COM (96) , May 1996.

European Commission, **Report on the implementation of the Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic legislation of EC Member States (SEC (1999) 1800)**

European Council, **European Convention for the Protection of Human Rights and Fundamental Freedoms**, Rome on 4 November 1950.

French, T, **The future of global distribution systems**, EIU Travel and Tourism Analyst No 3 1998.

Grant, D - Mason, S, **Holiday Law**, Sweet & Maxwell, London 1998.

Howells, G - Wilhelmsson, T, **EC Consumer Law**, Ashgate, Dartmouth, Aldershot 1997.

Karel Van Miert, **The transatlantic and global implications of European competition policy**, in North Atlantic Assembly Meeting in Palais Egmont, Brussels, 16.02.1998.[On-line] http://www.europa.eu.int/comm/competition/speeches/text/sp/1998_054_en.html

Smith, C - Jenner, P, **Tourism and the internet**, EIU Travel and Tourism Analyst No 1 1998, Leisure industries, pages 62-81.

Special Report No 3/96 on tourist policy and the promotion of tourism, together with the Commission's replies, Official Journal C 068 , 09/03/2000 p. 0024 - 0045.

Tonner, K, **Electronic Commerce and Travel Law**, chapter 13 in Consumer Law in the Information Society, (eds.) Wilhelmsson, T et al., Kluwer Law International, Netherlands 2000.

United Nations - World Tourism Organisation, Recommendations on tourism statistics, 1993.

Pim W H de Vos, **Principles of travel law**, chapter 4 in European Travel Law, (eds.) Yaqub, Z - Bedford, B, JohnWiley & Sons, Chichester 1997.

[1] The concept of electronic commerce includes not only on-line selling but also commercial communications. According to the Commission's Green paper, COM (96), Commercial communications covers all forms of advertising, direct marketing, sponsorship, sales promotion and public relations, promoting products and services. The protection of the service user depends often whether the actual contract is concluded by electronic means.

[2] *Smith - Jenner*, 1998 p 62: Travel industry's portion of Internet sales is around 6 % according to one estimate or just 0.5 % of all travel and tourism spending according to another. Presumably, those amounts have gone up quite rapidly during this past few years.

[3] *Professor Klaus Tonner*, p 217: "As mere agent services paid by commissions are no longer profitable, consultation and service have become more important."

[4] There was a case in Finland where the Finnish Supreme Administrative Court (Korkein hallinto-oikeus 1999/1729) sought for a preliminary ruling from the ECJ as to whether the Package Travel Directive 90/314/EC applied to an organisation arranging educational exchange programmes. It was submitted by the ECJ in a Decision C-237/97 that the courses arranged for educational purposes could not be included to 'tourist services'.

[5] *UN-WTO*, Recommendations on tourism statistics, 1993.

[6] The Commission produced a Green Paper on the Role of the Union in the Field of Tourism in 1995 COM (95) 97, the purpose of which was to e.g. to facilitate the coherence between tourism industry and consumer protection. The responses have been controversial and no specific legal base for actions on tourism exists yet.

[7] *Downes, J*, 1997 p 75.

[8] In all the following consumer protection Directives, the consumer is defined as a natural person, who is acting for purposes, which are outside his trade, business or profession. These obviously do not cover the tourists travelling for business or to a conference. See also the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

[9] 93/13/EC.

[10] Article 3 paragraphs 1 and 2.

[11] Article 3 paragraph 1. The indicative list of possibly unfair contract terms is included in the Annex of the Directive. Commission has also created a database in Internet - <http://europa.eu.int/clab/index.htm> - containing information on decisions on unfair contract terms from all over Europe. According to the Commission's Report on the implementation of the Package

Travel Directive p 12, on 1st July 1999, 273 of the 6673 decisions in the database, concern the tourism sector.

[12] Article 6 paragraph 1.

[13] Article 5.

[14] This rule of interpretation does not apply when an organisation or persons, having a legitimate interest under national law in protecting consumers, take action under the provision given to them under Article 7 of the Directive. Such action can be taken, when the unfair contractual terms are drawn up for general use

[15] Article 4(2).

[16] According to Article 4 (1), the organisations and other persons, regarded under national laws to have a legitimate interest in prohibiting misleading advertising or regulating comparative advertising, are allowed to take measures on behalf of the consumer. Member States should also introduce accelerated procedure either with interim or definitive effect. However, Member States are not under obligation to monitor the advertising, but may do so for example through self-regulatory bodies.

[17] The provisions on comparative advertising were added to the Directive by Common position (EC No 29/96) adopted by the Council in 1996.

[18] <http://www.tay.ac.uk/iftta/journal.html>.

[19] The Doorstep Selling Directive obliges the undertaking to give consumers a written notice of their rights of cancellation and gives the consumer a week time to regret his or her undertaking. In the Truth in Travel Act the regression time for the consumer is only three days and the time during which the travel promoter should refund, is ten days.

[20] Germany was among the Member States, which failed to implement the provision on financial security for prepayments. European Court of Justice gave a judgment on the case *Dillenkofer v Federal Republic of Germany* [1996] 3 CMLR 469, where consumers, who had lost they money after a tour operator became insolvent, sued German government for failing to implement the Directive on time. The judgment was based on the rule established in the famous case of *Frankovich and Bonifaci v Italy* [1991] ECR I-5357, where Italian government had similarly failed to implement a Directive, which would have protected the employees in the event of employer's insolvency.

²¹ Article 3.

[22] Article 4 (1): The obligation to give general information consists e.g. information on visa requirements, time schedules, local representatives.

[23] Article 3.

[24] See *Professor Klaus Tonner* p. 215.

[25] Article 5.

[26] According to the Commission's report on the implementation of Package Travel Directive p. 9, most of the Member States have made provisions for a different and separate liability of the organiser and the retailer. The liability for faults of third parties is often imposed directly to the tour

organisers but not on the retailer. A consumer might not know that when purchasing the package from a local retailer that uses a foreign tour operator, they might have to address their claims for damages, caused by a third party, to the foreign tour operator.

[27] *Pim W H de Vos*, p. 131. *Pim W H de Vos* would go even further when applying the limitations of the Warsaw Convention to a tour operator who operates in a country that has not adopted the Warsaw defences into its legislation.

[28] The Warsaw Convention on 12 October 1929 for the Unification of Certain Rules Relating to International Carriage by Air.

[29] *Howells and Wilhelmsson*, at page 234.

[30] Article 1.

[31] *Supra* footnote 20.

[32] However, the Commission in its working paper SEC (1999) 1800 s 1.3 appears ready to discuss the extension of the field of application of the Directive.

[33] See the speech of *John Downes* in UACES (University Association for Contemporary European Studies) 30th Annual Conference and Fifth Research Conference in Budapest, Hungary 6-8th of April, 2000.

[34] *Yleiset valmismatkaehdot* 4 May, 1995.

[35] Council Decision 86/664/EEC.

[36] The Action Plan ran years 1993-1995. The aim of the plan was to improve the knowledge of the tourists, to ensure co-ordination of Community measures, and to promote Europe as a tourist destination and to support initiatives improving the protection of the tourist, in areas such as existing classification systems, sign posting symbols, timeshare arrangements, overbooking and procedures for redress.

[37] Article 2 in COM(96) 168 and COM(96) 635: The objectives of *Philoxenia* are to improve knowledge in the field of tourism, improve the legislative and financial environment for tourism, to raise the quality of European tourism and to increase the number of tourists from third countries.

[38] The protection of personal data and privacy in e-commerce, as in commercial communications, are provided by the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. The confidentiality of communications is guaranteed in accordance with the European Convention for the protection of Human Rights and Fundamental Freedoms, 1950, the general principles of which have been accepted to Community Law in Article F2 of Maastricht Treaty 1991.

[39] Article 4.

[40] Section 2 of the Directive: The commercial communications, which are part of the information society service, should be clearly identifiable. Unsolicited commercial communication, when it is authorised in Member States requires the setting up of appropriate industry filtering initiatives. Also, the commercial communications should not result to any additional communication costs to the recipients. Consumers not wishing to receive the commercial communications should be able to opt

out on regular basis.

[41] Such information includes the name, address, details of the service provider, registration number, relevant supervisory authority, information concerning the regulated professions and VAT registration number, when needed. The prices, when referred to, should be indicated clearly and unambiguously and must state whether they are inclusive of tax and delivery costs.

[42] Article 10.

[43] Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement. The provisions between consumer and a non-consumer contracts differ. Here we only concentrate on the consumer provisions.

[44] *Professor Klaus Tonner*, p 212.

[45] United Nations Commission on International Trade Law.

[46] See also the case *Cowan v Tesor Public* [1990] 2 CMLR 613, where a British citizen who was mugged in Paris while visiting France as a tourist was refused compensation from the French Criminal Injuries Compensation Board because he was not French nor a resident in France nor a national of the country with which France had a reciprocal agreement. The Court found that the French compensation law practice discriminated against foreign nationals and therefore, restricted the free movement of services.

[47] *Commissioner Karel Van Miert*, The transatlantic and global implications of European competition policy. North Atlantic Assembly Meeting - Palais Egmont - Brussels - 16.02.1998.

[48] See *Professor Klaus Tonner*, p 216-218.

[49] *French*, p 1. The market of CRS on airline tickets is controlled by four leading CRSs or global distribution systems, as it seems more appropriate to say - Galileo, Sabre, Amadeus and Worldspan. CRS has met a powerful competitor from direct-to-consumer on-line services, which are eating the monopoly of CRS.

[50] Regulation 2299/89 has been amended by Regulations 3089/93 and 323/1999.

[51] Commission Decision 88/589/EEC: *London European v Sabena*.

[52] The Decision was based in Article 8 (1) of the CRS Regulation.

[53] Article 1 of the Regulation 323/1999.

[54] European Commission's report on the implementation of the Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic legislation of EC Member States

[55] *Supra*.

[56] The E-Commerce Directive 2000/31/EC, the Directive on a Community framework for Electronic Signatures 1999/93/EC and the Distance Selling Directive 97/7/EC.