

## THE ESSENTIAL REVIEW OF THE EUROPEAN LEGAL FRAMEWORK FOR DISTANCE SELLING OF TOURIST SERVICES

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### Abstract

*Unquestionably, one of the ways of stimulating competition in the tourist sector at present is to promote distance selling, particularly electronic selling. The benefits it offers are remarkable. Nevertheless, we are facing the fact that a major hurdle in this development is the tourist's distrust.*

*A political framework for European tourism cannot be introduced without a clear legal framework addressing the rights and obligations of the various parties involved. Along these lines, the scope of application of the recent Directive 2011/83/EU excludes important tourism services. Moreover, Directive 90/314/EC is completely outdated. Accordingly, the object of this study is to put forward a proposal on the need to review this European legal framework.*

**Keywords:** *Distance selling, electronic commerce, tourist services, consumer protection*

### Resumen

*Resulta indudable que una de las vías para estimular en la actualidad la competitividad en el sector turístico es la de potenciar la contratación a distancia, y en particular, la electrónica. Sus ventajas son evidentes. Pese a ello, nos encontramos con que el freno más importante en el desarrollo de esta contratación es la desconfianza del turista.*

*No es posible implementar un marco político para el turismo europeo sin la existencia de un claro marco jurídico de los derechos y obligaciones de sus diversos interesados. Y a este respecto, nos encontramos con que la reciente Directiva 2011/83/UE excluye de su ámbito de aplicación importantes servicios turísticos. Y a su vez, la Directiva 90/314/CE está totalmente desfasada. Es por ello que el objeto del estudio se centra en una propuesta sobre la necesaria revisión del actual marco jurídico europeo.*

**Palabras clave:** *Contratos a distancia, comercio electrónico, servicios turísticos, protección del consumidor.*

## **The Consumer Protection of Tourists**

The importance of the role of tourism in economic terms within the European Union is unquestionable. In fact, and although European tourism has already faced a number of challenges in the XXI century, including the economic crisis, demographic change, globalisation and natural phenomena, the European Union remains the leading tourist destination in the world and the tourism sector is the third largest industry in the EU. (Study on the Impact of EU Policies and the measures undertaken in their framework on tourism).

Nevertheless, the fact is that we cannot speak of the existence, strictly speaking, of a Community policy on tourism, but of a regulatory framework, relatively new and constantly evolving (Torres 2010:12), ranging from the soft-law recommendations expressed mainly during the 80s, until the more recent pronouncements in the form of directives, regulations and decisions. On the other hand, we cannot ignore that this is a cross-nature sector affected by policies as diverse as those on consumer and user protection, transportation, the free movement of people, goods and services, the environment, taxation, and so on.

However, a political framework for tourism in Europe cannot but be based on a clear legal framework of rights and obligations of the various interested parties, particularly tourism companies and tourists. The latter are the key element, as they are the active subjects of the tourism activity. The relationships they establish with the tourism companies, in most cases, clearly fall within the scope of consumer law, considering that the typical tourists are users who are particularly vulnerable to the extent that they are away from their normal place of residence, and probably subject to different customary norms, which becomes especially evident when the stays take place abroad (Alcover 1990: 64-68). In this condition, the tourist will be subject to the application of the rules protecting the rights of consumers and users. Clearly, an undoubtedly essential part of such protection will refer to the physical safety of tourists, although, for obvious reasons, we will refer only to its legal character. Although the problems the tourist may face can be of different nature, the truth is that they could basically be subsumed into two issues. Firstly, because the information may be inadequate, erroneous or generate confusion; or secondly, there may be difficulties in making any claim due to a failure to comply, fully or partially, with the tourism services procured.

The tourists' need for protection, as consumers may require, is actually greater, if the hiring of tourism services is done from a distance, and more particularly using the computer network. Undoubtedly, one of the ways to enhance tourism development is to promote the use of information technologies and communication. In fact, by using many different methods of distance communication, the consumer generally hires deals for products and services of all kinds, such as hotel stays, travel packages, ticketing, tickets for cultural events, and so on. Distance selling also includes acceptances by telex, fax or mail, and messages left on telephone answering computers (Hall 2007:684).

Now, and referring particularly to electronic purchasing, it can be said that this type of newly minted hiring is expected to play an essential role in all areas of procurement, particularly in tourism. Particularly in Spain, the data shows that the online billing reaches up to €10,455.00. And among the ten first activity areas where the economic amount generated, travel agents and tour operators have a 11.7%, air transport 9.8%, land passenger transport 4.6% and the performing arts, sports and recreation 3.8%. (E-commerce Report in Spain, Third Quarter 2012). This type of procurement is potentially great for the provider of tourism services, as it represents cheaper business costs, without a need for premises open to the public, resulting, on the other hand, in a reduction of customer costs, regardless of their status as a consumer or user; and for tourists, it translates in having a wider range of offers, and the possibility of procuring without time or space constraints. As noted by the World Tourism Organization (UNWTO) innovation can be a key factor to help tourism adapt to new sustainable economic conditions, therefore its recommendations include encouraging all actors to adopt innovative practices and increase the application of technology.

However, these advantages are reinforced for customers, especially when these customers are consumers or users, also in a number of risks associated with the procurement technique (Riefa and Hörnle 2009:92-97). Both case law and doctrine have shown the risk of default in the sense that the consumer and user receives a defective product or service or one which does not comply with the contract, since until the final moment the user does not know how it really is and when this occurs they are far from their usual environment. This first drawback is added to other associated factors, such as a lack of information, since the product or service is only known through the indications provided by the entrepreneur either in the brochures, or by phone or the Internet, to name just a few of the most characteristic types. It is true that when using the Internet, in many cases this lack of information is not so, since the consumer is offered a wide range of information through websites and portals. Mentions have also been made regarding the consumers' risk of entering thoughtless business ventures as these are carried out outside the usual channels of procurement of the same, without forgetting the security problems in payment transactions. (Fernández 2009:32).

On the other hand, the fact that the material providers of tourism services (referring to tourism hosting companies, air transport companies, etc.) can engage directly with the tourists, clearly transforms the traditional role of travel agencies that coexist with new operators (reservation centres, etc.). Besides, we are seeing a corporate reorganisation process involving the concentration of tourism businesses, compared to small and medium-sized enterprises. Moreover, the products or services offered have evolved and new tourism services have consequently emerged (Aurioles 2006:26)

### **The Existing Fragmented Legal Framework**

While originally in the Agreement Establishing the European Economic Community, there was no mention of Tourism, subsequently, in particular with the ratification of the Lisbon Treaty, tourism happens to have a certificate of naturalisation, with the

inclusion of a new Title XXII dedicated to tourism, as well as Article 195, which refers to cooperation in this sector. Anyway, this does not consolidate this area as its own policy in all aspects involved, and which link not only the business sector, which is actually one of the axes on which tourism revolves around, but also tourists protection, which is not mentioned as such (Torres 2010:5-16).

Indeed, the two specific areas of tourism regulation have occurred in those areas in which tourists have demanded protection and have resulted in a especial legislative intervention. This is the case of packages, 90/314/EEC covered by Council Directive 90/314 EEC, of 13 June 1990, on package travel, package holidays and package tours, the legal basis of which, in the absence of the user and consumer policy in the Treaties, was that of the internal market. The second initiative is Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994, on the protection of the purchaser regarding certain aspects of the purchasing contracts of the right to use timeshare properties.

This last Directive has been revised in order to adapt to the evolution and to better meet the protecting demands from users of tourist services, resulting in 2008/122/EEC Directive of the European Parliament and of the Council of 14 January 2009, on the protection of consumers regarding certain aspects of timeshare, long-term holiday product, and resale and exchange contracts. However, that is not the case of the Directive on package travel, clearly in need of revision, as it is so clearly evidenced in the Working Paper on Directive 90/314 of 26 July 2007, a revision proposal of which has been presented: the Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements. As it has recently been stated by the European Commission, the rules need to be updated as more and more travellers arrange their holidays by using the Internet, meaning that holiday makers are not always sure of protection if something goes wrong. Around 23% of consumers book pre-arranged traditional package holidays, which are already covered by the 1990 EU Package Travel Directive. But another 23% buy customised holidays which are put together by one or more commercially linked traders to suit the needs and preferences of the customers. For example, consumers might book transport and a hotel from the same operator, or rent a car via the website where they booked their flight. Today's rules either simply do not cover such arrangements, or do so only in an ambiguous manner, leaving consumers unsure of their rights and traders unclear of their obligations (see Graphic 2 in the Annex). As a result, in a recent survey, 67% of EU citizens mistakenly thought that they were protected when buying such travel arrangements when they were not (Reference: IP/13/663).

When facing the abovementioned situations, consumer protection has been a constant issue that has informed the different EU policies. As a specific area within that scope of protection, distance procurement has been considered an aspect to be kept in mind. Hence, it becomes necessary to address this specific system in order to learn about the protection given to tourists in distance procurement. This regime was first established with the EC Directive 97/7 of 20 May 1997 on the protection of consumers regarding distance contracts, which has been amended by Directive 2011/83/EU which will be referred to later. In Directive 97/7 there was no general exclusion of tourism services,

but there was a partial application of a series of them. It was a Directive of minimum requirements which had the protection of consumers as its main objective, and among the main means to carry this to term, the increase of the duties of information to be provided by the suppliers of products and services and the establishment of effective complaint systems.

This Directive is followed by Directive 2011/83/EC of the European Parliament and of the Council of 25 October 2011. This new directive is the result of the revision carried out on the consumer, covering various directives on their protection and started up in 2004 with the overall objective of establishing a true internal market for relationships between businesses and consumers, striking the ideal balance between a high level of consumer protection and the competitiveness of enterprises. In 2003 the Commission already published an Action Plan which proposed the creation of a Common Framework of Reference (CFR) for Contract Law and the revision of the *acquis* on consumer contract law. 2007 saw the presentation of a Green Paper on the review of the consumer *acquis*, which showed that one of the main problems in distance selling was the fragmentation of standards in different countries.

Initially the aim of the European legislator was to harmonise the following four directives that gather consumer contractual rights (Raluca 2012:1-7): Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13 / EEC on unfair terms in consumer contracts, Directive 97/7EC on distance contracts, and Directive 1999/44/EC on the sale and guarantees of consumer goods. Only Directive 85/577 and Directive 97/7 have been altered, even though the four abovementioned directives contain minimum harmonisation clauses. This means that each country may maintain or adopt stricter consumer protection standards. The widespread use the different countries have made of this possibility has led to a fragmented regulatory framework within the Community, which leads to very significant costs for businesses wishing to operate across borders.

Regarding all this, we must not forget that under Regulation (EC) No 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I), consumer contracts between consumers and professionals are governed by the law of the country where consumers have their residence, provided that the professional exercises or manages their commercial activities there. Based on freedom of choice, the parties may agree that the contract is governed by another law, provided this offers the same level of protection to consumers as that of their country of residence. Therefore, entrepreneurs cannot make cross-border competitive offers, while consumers are also prevented from taking advantage of the benefits of an internal market in relation to a larger number of deals (Tang 2009:229-230).

Instead of having tried to solve the situation described through a single policy instrument, once again the decision has been made in so far as opting for a partial action. It is true that it has an important feature, its horizontal nature, adopting a full harmonisation approach. As noted in paragraph 5 of Directive 2011/83/EU, the growth of cross-border distance sales has been limited, compared with the significant growth of domestic distance sales over the past years. This difference is particularly important

in the case of Internet sales, whose growth potential is high. The cross-border potential of contracts negotiated away from business premises (direct selling) is constrained by several factors, among which are the different national consumer protection laws imposed on businesses. When facing the growth of the domestic direct sales in recent years, particularly in the services sector (such as utilities), the number of consumers using this channel for cross-border shopping is stable. Given the growth of business opportunities in many member states, small and medium-sized enterprises (including sole traders) and the agents of the companies dealing in direct sales should be more inclined to seek business opportunities in other EU countries, in particular in border regions. Therefore, the full harmonisation of consumer information and the withdrawal right for distance contracts and off-premises contracts will contribute to a high level of consumer protection and better functioning of the internal market between businesses and consumers.

On the other hand, the law in relation to electronic commerce is also enforced. The European Union showed an early concern for the creation of a European e-commerce harmonising legislation. The Communication from the Commission of the European Communities to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the European Initiative in electronic commerce, already urged the promotion of electronic commerce in Europe, highlighting the impact this is deemed to have on the Union's competitiveness in global markets. Likewise, specific areas of action should be related to other broader ones concerning the information society. Among these fields, the creation of a favourable structure for electronic commerce based on the principles of the single market should be highlighted. In order to achieve this, on the one hand, we propose to implement safer technologies (digital signature and payment means among others) and, secondly, to create a legal and institutional framework as the basis for these new technologies.

In any case, it is considered essential to avoid contradictions in legislations emerging from the member states, which can only mean a loss of trade effectiveness as well as undermining the single market itself. The aim has been to encourage the development of services in the information society, avoiding obstacles that hinder its functioning and, therefore, those in the internal market, which have largely originated from divergences in legislation that ultimately lead to significant legal uncertainty. Two major events should be highlighted in this regard. On the one hand, Directive 2000/31 of the European Parliament and of the Council of 8 June 2000, on certain legal aspects of the services of the information society, in particular electronic commerce in the Internal Market (Directive on electronic commerce) and Directive 1999/93 of 13 May 1998 of the European Parliament and of the Council on a Community framework for electronic signatures. These are joined by the e-money Directive, Directive 2001/11/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and rights related to the copyright in the information society, of personal data protection etc.

## **Analysis of the Applicable Legal Regime**

From these considerations, there is a need to analyse the legal regime applicable to distance contracts, particularly the electronic ones, when related to tourism services. To do so, we can differentiate between the contracts included in the scope of the Directive and those excluded in it. Concerning this particular point, there was a significant difference in relation to the regime foreseen in the repealed Directive, that of 97/7, and the current Directive regarding tourism services.

Indeed, Directive 97/7 did not contain an exclusion of tourism services as such. Notwithstanding the above, more particularly the third article stated that the regime relating to prior information (art. 4), written confirmation of information (art. 5), the right for termination (art. 6) and some aspects related to implementation (art. 7, sec. 1 and 2), would not apply to contracts for the supply of accommodation, transport, catering or leisure services, where the supplier undertakes, when entering into the contract, to provide these services on a specific date or within a specific period.

However, the current Directive explicitly excludes from its scope of application contracts governed by Directive 90/314 EEC on package holidays. These contracts were initially included in the scope of the Directive, but eventually certain amendments were approved on 24 March 2011, which led to their exclusion, as with the traveller transport services, although in this case, not completely. Also excluded are contracts covered by Directive 2008/122/EC on the protection of consumers in relation to certain aspects of timeshare contracts of tourism assets, acquisition of long-term holiday products, resale and exchange.

The Directive regulates contracts between traders and consumers, although it does not regulate all aspects, but as noted in Article 12, only some of them. In no case does this concern to rules relating to the agreement or validity of a contract, nor to general remedies of contracts. Neither does it refer to the economic public policy provisions. Clearly, Article 4 provides that member states may not establish more or less strict provisions to ensure a level of consumer protection, unless the directive itself so provides.

## **Protection of Tourists Procuring Distance Travel Services**

### *Contracts for accommodation and other complementary services*

The Directive successfully deletes the existing exclusion on the right to prior information in distance contracts relating to contracts for the supply of accommodation, transport, catering or leisure services, where the entrepreneur undertakes to entering into the agreement to provide these services on a specific date or within a specific period of time. It maintains the exception to contracts for passenger transport services, except for certain information duties if the contract is held electronically and involves payment obligations.

In the Directive we observe certain noteworthy developments, which in particular have an impact on the Spanish legislation. Article 2.1. describes consumer as "any individual who, in contracts governed by this Directive, is acting for any purposes which are outside his trade, business, craft or profession." Article 2.2. describes the trader as "any individual or legal entity who, in contracts governed by this Directive, is acting for purposes relating to his trade, business, craft or profession, and any person acting on behalf of a trader or on his account".

It is required that the goods or services are not intended to develop a business or trade activity, or an activity derived from a trade or profession, both public and private. This can also include entrepreneurs within the concept of consumer in those cases in which they are acting as private citizens, and therefore are removed from the business or profession which is their own. However, for dual-purpose contracts, if the contract is held with a purpose that is only partly related to the business activity of the person and the business object does not prevail in the general context of the contract, as it is limited, such a person as clarified in the Explanatory Memorandum (paragraph 17) shall be considered as a consumer. This allows to fit the so-called "conference or business tourism". In a different vein, the figure of the consumers is also limited by the fact that their relations, as the end users of the goods or service, must be made against an entrepreneur.

Regarding the concept of distance contract (art. 2.6), it is defined as "any sales or service contract in which the trader, to the conclusion of the contract, makes exclusive use of one or more means of distance communication." The proposed objective with this definition is that it may encompass all cases in which the contracts are held exclusively via one or more media and telecommunications (mail order, Internet, telephone or fax). The definition does not take into account the particular circumstances in which the trader engaged in the offer or the contract has been negotiated. In a very graphic manner, stating in the Directive that the fact that the trader is only occasionally performing distance sales or uses a system managed by a third party such as an online platform, should not deprive consumers of their protection. Similarly, and in that all-encompassing line, it should be understood that a distance contract is the contract negotiated in person between the trader and the consumer off-premises, provided this has been entered into exclusively via telecommunication means, such as telephone or the Internet. Eliminating the requirement that the trader has an organised distance sales system available at the time of conclusion of the contract should, in the opinion of the Community legislator, allow to improve legal safety and protect the entrepreneur from unfair competition.

The Directive includes a significant increase of the duties of information that will now also weigh in tourism businesses which hold distance contracts, and which beforehand appeared as exclusion. This situation had been strongly criticised (Loss 2007:25-28). The Spanish case is that of the commercial communications regime, enshrined in Article 96 of the Consolidated Text of the General Law for the protection of consumers and users and has its complement in Article 20 of the Law of Services of Information Society and electronic commerce, in the case of electronic contracts. Moreover, the contractual information regime is equally applicable, having also undergone a major



strengthening through the Directive. According to Article 6 of the Directive the trader has to inform the consumer about the following extremes: the main features of the goods or services, to the extent appropriate to the medium used and the goods and services; the identity of the employer, the geographical address of the place of business and telephone number, fax and email address in order to allow consumers to get in touch quickly and effectively; the cost of using the means of distance communication, where it is calculated on a different rate to the basic rate; the existence of codes of conduct and how to obtain the same, or the minimum of the consumer's obligations under the contract as appropriate. As is the case of non-harmonised legislation, each state can set linguistic requirements. An observation, however, is required. Directive 2011/83 refers to "geographic address" instead of the Directive on electronic commerce and services, which also allows the postal address. Although it is a matter of nuance, the fact is that the geographical address implies a greater information component, which should be reflected in the transposition rules. Specifically, within the bill that is currently being processed, the current Article 97 should be modified, as this retains the term "mailing address." This will save the existing exclusion which is so far inconsistent and, as noted before, came into collision with both the established sectorial scheme, as well as with the general rules on electronic commerce.

Pre-contractual information cannot be altered, unless both parties expressly agree otherwise, as required by Article 6.5 of the Directive. This agreement may only modify the content of the information, but never the duties of information imposed on the service provider (Mendoza 2011:28). In addition to this information, set out in Article 6.8 of the Directive, when dealing with contracts subject to the application of Directive 2006/123/EC of 12 December 2006, on services in the internal market, or Directive 2000/31/EC on electronic commerce, they will also be subject to the disclosure requirements contained in both, with the proviso that if they gather additional disclosure requirements, these may be established by the states, without prejudice of the principle of full harmonisation. Thus, in Article 97.7 of the Bill, it is considered that the information requirements referred to in the article itself should be seen as additional to those contained in Law 17/2009 of November 23, on free access to service activities, and Law 34/2002 of 11 July, on services of the information society and electronic commerce. Regarding the latter, the requirements are already applicable, given that the same does not contain an exclusion by the object.

In so far as the manner in which the above information is provided, the entrepreneur shall provide the information or make it available to the consumer "in a manner consistent with the techniques of distance communication used in plain and intelligible terms" (art. 8.1.). Therefore, the use of one support or another depends on its adaptation to the technique used, and in any case, if provided in a durable medium, it should be legible. In fact, if the contract is performed via a website, the information will be provided online, which is not a durable medium. In this case, there should be measures to enable the recipient to file the general conditions applicable to the contract, as stated in art. 10.3 of the Electronic Commerce Directive, and in Spain, Article 8.4 of the Law of Services of the Information Society and Electronic Commerce. However, confirmation of the contract always requires a durable support (Article 8.7 Directive), and must be made within a reasonable time in any case, before the start of

the execution, in our case, of the tourist service. Nevertheless, the confirmation shall include confirmation of the consumer consent when given the case set out in Article 16 the loss of the right of withdrawal.

An important novelty in Article 8.4 of the Directive, of interest in so far as tourist contracts which are concluded by telephone, is the case of procurement of hotel rooms. It is the obligation of the entrepreneur who hires by means of techniques where the space or time are limited to facilitate that particular medium and before the enforcement of the contract the information contained in paragraphs a, b, e, h or of Article 6 of the Directive. This information can be summarized as the main features of the goods or services, the identity of the trader, the total price of the goods or services including taxes, the information on the exercise of the right of withdrawal and the duration of the contract, where appropriate, or where appropriate conditions of termination. The rest of the conditions applicable to the contract shall be provided by other techniques suitable to technique used. This provision has been included in the Draft (art. 98.4), and is therefore to replace the provisions of Article 2 RD1906/1999, the only legal instrument that until now included the requirement when hiring over the telephone to provide information or send it on a durable medium in good time. The confirmation of the contract itself must be done in any case on a durable medium (Article 8.7 Directive), as also set out in Article 98 6 of the Draft Law.

The Directive also introduces a new regime to exercise the right of withdrawal in Article 9, under which the consumer shall have a period of 14 days to withdraw, without giving reasons and without penalty. This is extended from the 7 days until now gathered in Article 101 which referred to the general withdrawal provided for in Article 71., excluding plus package travel contracts and timeshare resort fixed assets, already excluded from the scope of application of the Directive on distance contracts. Also excluded are those contracts for "providing hosting services to serve purposes other than housing, transportation of goods, vehicle rental, food or services related to recreational activities, if the contracts provide for a time or a specific implementation period.

This exclusion is justified by both the Directive as well as by the doctrine that has addressed this issue, due to the economic loss that tourism businesses can suffer in the event of cancellation of service without giving material time for re-booking (Paniza 2012:23). In fact, it has been considered a good measure. However, I do not think that this fact should solely be considered for the purpose of excluding the right. The position of the tourist, consumer or tourist service user who hires at a distance should also be considered. It is true that when the procurement is electronic, there is a large amount of information made available. Regarding the consumer or user who is part of an electronic procurement, it is worth indicating that there are singularities compared to other distance procurements. Moreover, it seems that it is impossible to simply apply the classic consumer status to the user or consumer of an e-Procurement deal (Cendoya 2003:135-137), to the extent that, on the one hand, it is an informed consumer in that he possesses a wealth of previously unknown information and the possibility of comparing multiple offers on any product or service; and on the other hand, because it is the user who initiates the search on the net and not the provider.

As it is obvious, this does not hinder the fact of providing adequate legal protection in order to enhance the security of these transactions, given that there has been a widespread use of adhesion contracts simply by pressing the appropriate key, which as noted, greatly facilitates impulsive business statements.

Nevertheless, we must not forget that in other means of distance communication, this type of procurement is also frequent when the possibilities of information differ from that of electronic procurement. It does not seem correct in my view, as noted (Bech 2010: 88-89), that this should only take into account the perspective of the tourism entrepreneur who is going to be hindered by the cancellation of the reservation. Surely, there should have been a rigorous study carried out regarding the negative economic consequences that can be caused when the consumer decides to not procure the service due to the fear of not being able to withdraw and of the tourism entrepreneur if the consumer decides to withdraw. Besides, we could have possibly found that the final economic balance, only aspect considered for the exclusion, can be favoured if extending the right of withdrawal because this would extend the tourist's confidence and thereby eliminate any obstacles for the procurement, when the means used to do so is not a conventional one. As stated in the opinion of the Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Europe, leading tourist destination in the world: A new political framework for tourism in Europe (COM (2010) 352 final) OJ 22.12.2011, it is essential that the Commission applies the principle of smart regulation and that all legislative proposals include a proper assessment of the impact of the proposed measures affecting the tourism industry. This is particularly relevant in some cases such as consumer rights. The current methods for gathering and analyzing information are insufficient. These deficiencies result in decisions being made with insufficient or erroneous guidance when developing guidelines.

### *Combined travel packages*

As mentioned before, Directive 2011/83/EU expressly excludes package holidays from its scope of application. Previously, the fact that no explicit mention was made regarding package travel among the exclusions, made certain authors consider that it was not excluded (Márquez2011:234-235). However, another sector (Ruíz2008:3-10) believed that package holidays could be subsumed among the contracts for supply of products made to the user or consumer's specifications or clearly personalized. Today, the entire system is, which in my opinion is questionable, given that package holidays are still a form of adhesion contracts, subject to the conditions agreed between the agency and the various operators, to which the tourists will adhere and which are agreed upon in a specific manner.

Directive 90/314 on package travel does not expressly contemplate distance procurement. As noted, it is not harmonised, assuming that these are contracts, as stated by the memorandum of Directive 2011/98 itself, which are already specifically regulated.

The Package Travel Directive clearly needs to be revised. The reform should respond to a fundamental transformation of the travel market: tourists are increasingly taking a more active role in tailoring their holidays to their specific requirements, notably by using the Internet to combine travel arrangements rather than choosing from ready-made packages out of a brochure.

Actually, the conditions of procurement of the holidays that existed when the Directive 90/314 was approved, and that basically were based on a model in which the trip was made by the organiser while the sale was made through the retailer, have changed substantially. The developments of distance contracts, and basically, of hiring over the Internet have revolutionised the industry, since it is the consumers who make their reservations directly for transport, cruises, etc. This they do with a choice of a wide range of services offered by different companies, and among them, as well as a growing phenomenon, the low cost ones. The possibility that consumers can make up their own holidays from elements offered by various organisers has resulted in a "dynamic packaging" or "forfait personnalisé". Regulating this type of travel is a real problem in some states, since there is a lack of clarity regarding the scope of the Directive. This is evident in the Working Paper on Directive 90/314 of 26 July 2007: III. As seen, the concept of package is an issue that is being discussed, and when determining its contours, the potential for e-procurement must be taken into account. In this sense, some aspects which are key elements in the current definition of the package holiday in Article 2.1 of the Directive are vague concepts, as revealed in the Commission's own report on the transposition of Directive 90/314 /-EC (SEC (1999) 1800 final, paragraph 1.1. For example, if after making a reservation for a flight online through a low-cost company, consumers may be offered the opportunity to reserve a car or hotel room, and may be redirected to other websites. If the reservation encompasses different services from different contracts concluded with various different companies with separate payment methods, this could lead to a different interpretation in different countries on whether this should be considered included or not included within the scope of the Directive.

The Working Paper on the Package Travel Directive, based on the jurisprudence of the ECJ, in particular Case Club Tour, (ECJ 30.12.2002, C-400/00), considered those package tours that originate in agreements made by Internet platforms or travel agencies that combine spontaneously and upon request of the consumer, travel services such as flights and hotel reservations proposed by different service providers. This is not a trivial matter, since it can even affect the consideration of other tourist services contracts. Indeed, if one considers that there is a package holiday, airlines will be forced to new reporting obligations to consumers regarding ticket prices. Or there will be a need for considering how the liability of providers of information society plays its role within the e-commerce directive, under which providers host only pages and have no responsibility for their contents as a general rule. This would lead to the responsibility of the travel agency, which could be unduly burdensome for them. This is therefore an issue that must be clarified.

Besides the above, we find that in the Directive, as this does not envisage distance procurement and is excluded from the scope of Directive 98, there appears to be a gap

in terms of information to provide, and in particular, in the ways to provide the same, which would have to be appropriate for the type of e-procurement used, and not written as it appears in the Package Travel Directive. Similarly, there are special rules regarding the right of withdrawal by the consumer which do not contemplate the singularities of distance procurement, to which reference is made in this paper.

Against all this, the Directive Proposal offers a new definition of “package” which can contribute to solve the abovementioned problems and which reads as follows: “package” means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if:

(a) those services are put together by one trader, including at the request, or according to the selection, of the traveller, before a contract on all services is concluded; or

(b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:

(i) purchased from a single point of sale within the same booking process,

(ii) offered or charged at an inclusive or total price,

(iii) advertised or sold under the term 'package' or under a similar term,

(iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or

(v) purchased from separate traders through linked online booking processes where the traveller's name or particulars needed to conclude a booking transaction are transferred between the traders at the latest when the booking of the first service is confirmed.

As it is graphically stated by the preamble of the Directive Proposal (no.6): “The cross-border potential of the package travel market in the Union is currently not fully exploited. Disparities in the rules protecting travellers in different Member States are a disincentive for travellers in one Member State from buying packages and assisted travel arrangements in another Member State and, likewise, a disincentive for organisers and retailers in one Member State from selling such services in another Member State. In order to enable consumers and businesses to benefit fully from the internal market, while ensuring a high level of consumer protection across the Union, it is necessary to further approximate the laws of the Member States relating to packages and assisted travel arrangements”.

## Conclusion

The Community legislature has once again missed the opportunity to harmonise the EU acquis in the field of consumer protection, which also leads to the detriment of the tourist, as consumers and users.

A positive judgment should be given to the strengthening of the prior reporting requirements and confirmation for a large number of tourist contracts. Among the contracts to be strengthened is the accommodation contract, which is undoubtedly the cornerstone of tourism services, together with other contracts which integrate the so-called complementary tourist offer (in the case of restaurants, for example).

It is questionable the fact that there exists a loophole, especially when hiring combined distance travel contracts, the policy of which remains un-reviewed, since its regime has been explicitly excluded from the scope of the Directive. At the same time, there should have been a more in-depth analysis of the exclusion of the right of withdrawal, introduced by the Directive, which generally excludes contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when entering the contract, to provide these services on a specific date or within a specific period.

In conclusion, if the objective is to strengthen the tourist sector, we should adapt the legal framework to the real situation imposed by the use of the Internet, from the access to a great amount of information to the configuration of the services procured. The possibility that tourists may put together their own holidays from elements offered by different organisers has led to a clear innovation which benefits tourists, and therefore the tourist sector.

In this way, the legislator must be able to offer equal innovative solutions in order to solve the problems created by online contracts. In this sense, it is expected that the recent Directive Proposal will contribute to reduce the effects of the loopholes from the current legal framework which have been presented in this article.

## **Conclusión**

El legislador comunitario ha perdido nuevamente la oportunidad de armonizar el acervo comunitario en materia de protección de los consumidores, lo que redundará igualmente en perjuicio del turista, en cuanto consumidor y usuario.

En este sentido, merece un juicio positivo el reforzamiento de los deberes de información previa y confirmación para un importante número de contratos turísticos, entre ellos, el de alojamiento, que es sin duda, la piedra angular de los servicios turísticos, y junto a él, otros que integran la denominada oferta turística complementaria ( es el caso de la restauración, por ejemplo).

Resulta cuestionable el hecho de que existe una laguna, especialmente en la contratación a distancia de viajes combinados, cuya directiva sigue sin revisar, dado que su régimen explícitamente se ha excluido del ámbito de aplicación de la Directiva. Por otra parte, debería haberse analizado más detenidamente la exclusión del derecho de desistimiento que introduce la Directiva en el que con carácter general se excluyen los contratos de suministro de servicios de alojamiento, de transporte, de comidas o

de esparcimiento, cuando el proveedor se compromete, al celebrarse el contrato, a suministrar tales prestaciones en una fecha determinada o en un período concreto.

En definitiva, si el objetivo es potenciar el turismo, debemos adaptar el marco legal a la realidad que impone el uso de Internet y que va, desde el acceso a una gran cantidad de información hasta la propia configuración de los servicios que se contratan. La posibilidad de que los turistas puedan componer sus propias vacaciones a partir de elementos ofrecidos por diversos organizadores, ha supuesto una clara innovación que favorece al turista y por tanto al sector.

Y si esto es así, el legislador debe ser capaz de ofrecer igualmente soluciones innovadoras para solucionar los problemas que plantea la contratación electrónica. En este sentido, es de esperar que la reciente Propuesta de Directiva pueda contribuir a paliar algunas de las lagunas existentes en el actual marco legal. y que han sido expuestas en este trabajo.

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