

Commission proposal for a Directive on consumer rights
 –
NET position paper as of 25 March 2010

1. Introduction

NET (the Network of European private entrepreneurs in the Tourism sector) is a platform of 7 trade associations whose common objective is to promote the interest of private tourism entrepreneurs in Europe.

NET members welcome the Commission proposal for a Directive on consumer rights (COM(2008) 614 final) and consider that it is an important step towards the harmonisation of the rights of consumers who shop throughout the EU, thus facilitating cross-border sales. Since all NET Members are very much involved in direct cross-border and domestic sales to consumers, NET has carefully analysed the proposal for a Directive on consumer rights.

In its analysis of the proposal, NET has also taken into account the upcoming revision of Directive 90/314/EEC on package travel, package holidays and package tours (here after Package Travel Directive). NET members indeed believe that it is of the utmost importance to avoid inconsistencies and overlaps between the applicable provisions on package travel and the provisions of the proposed Directive on consumer rights.

2. Scope of the proposal

According to Article 3 (3) of the Commission's proposal, only Chapter V on consumer rights concerning contract terms (Article 30 to 39) shall apply to contracts which fall within the scope of the Package Travel Directive (90/314/EEC).

Having analysed the consequences of this Article for the tourism industry, NET:

- **Fully supports the fact that package travel contracts are not subject to Chapter II on consumer information and Chapter III on consumer information and withdrawal right for distance and off-premises contracts;**
- **Calls for specifying in the proposal that the provisions of the Package Travel Directive shall always prevail when they conflict with Chapter V on unfair contract terms, which remains applicable to package travel contracts.**

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

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

Amendment proposed

A new paragraph 3a should be added to Article 3 (3) of the proposal and provide that only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Council Directive 90/314/EC on package travel, package holidays and package tours. If Articles 30 to 39 conflict with provisions of Directive 90/314/EC governing specific terms of package travel contracts, the relevant provisions of Directive 90/314/EC shall prevail.

Justification: legal certainty requires that the text of the proposal clarifies its relationship with other community legislations and more particularly with the Package Travel Directive.

3. Chapter II Consumer information

NET members recall that according to article 3-2 of the existing distance selling Directive (97/7/EC), accommodation, transport, catering or leisure services contracts to be performed on a specific date or within a specific period were exempted from the obligation to provide pre-contractual information requirements. Whereas, NET members consider that most of the general information requirements contained in Chapter II of the Commission proposal are self-evident requirements that do not raise particular problems for the tourism industry, NET nonetheless questions the justification of this modification of the current situation.

NET also stresses that the list of general information requirements provided in article 5 of the Commission's proposal should not contain any unclear wording that may lead to legal uncertainties about traders' obligations. In particular, **article 5-1c should be clear that only prices inclusive of taxes and additional freight, delivery or postal charges need to be provided by the trader.** NET understands that the Council is currently discussing the possibility of amending article 5-1c to make it require the provision of information on "any other costs". NET is of the clear opinion that such a possibility would raise problems of legal certainty given the vagueness of the wording discussed by the Council. Moreover, these "other costs" cannot be calculated in advance as they merely depend on the customer's will to use additional services (e.g. use of the mini-bar or of the telephone in a hotel room).

Furthermore, NET recalls that information to consumers who conclude package travel contracts, whether at pre-contractual stage, at the time of the conclusion of the contract or after the conclusion of the contract, is regulated in a very detailed and comprehensive manner by the Package Travel Directive and in particular its Articles 3 and 4. Therefore, **NET believes that there is no need to further regulate the information to be provided to the consumer when concluding a package travel contract.**

4. Chapter III Consumer information and withdrawal right for distance and off-premises contracts

NET members consider that **the consumer rights Directive shall provide that no right of withdrawal will apply:**

- **To distance contracts for the provision of accommodation, transport, car rental, catering or leisure services;**
- **To package travel contracts concluded at a distance or off-premises;**

Indeed, applying a right of withdrawal to tourism services with reservation is not appropriate for the following reasons:

- Tourism services with reservation are of a highly perishable nature. For instance a hotel room left empty at short notice is unlikely to be sold. Manufacturers can build stocks, hotels cannot. Therefore, when a reservation for the provision of tourism services is made, it necessarily implies the setting aside of capacity that would be very difficult to re-fill if a right of withdrawal was to be applied. This is particularly true, for instance, in a context where the European hotel industry is suffering from over-capacity and where the average room occupancy rate in the EU is below 50%;
- A contracted accommodation service quite often covers more than just accommodation, and can include for example meals, banquets, wellness services and other additional services. In such cases, a cancellation or no-show does not only mean the loss of the room-night(s), but also losses for the additional contracted services;
- Promotional offers, like for instance last minute or late bookings, are limited in quantity and in time. If a right of withdrawal applies, the consumer will simply not be able to book promotional offers, or he could possibly see a decrease in the availability of such offers. Furthermore, it will be impossible for the trader to manage last minute or late bookings if the consumer can withdraw from the contract until for instance the last day before the beginning of the performance of the reserved service;
- Travel services with a nominative reservation or tailor made services are often a combination of interdependent different services from various suppliers and therefore cannot be kept on hold or resold after withdrawal. Also, when a package involves a complicated itinerary, composed of various combinations of services, it is essential that all bookings are confirmed directly; otherwise it could jeopardize the whole travel itinerary;
- Sales conditions of suppliers of travel services included in a package often do not allow cancellations without penalties or sometimes require 100% advance payment, without reimbursement in case of cancellation;

Moreover, NET members consider that **the Consumer Rights Directive should preclude the right of withdrawal from off-premises contracts for the provision of accommodation, transport, car rental, catering or leisure services.** Indeed, a right of withdrawal for such off-premises contracts would be inappropriate given some recent market developments. In many Member States now, self-employed travel agents, acting as intermediaries for the sale of travel services, have adapted their services to customers' demand for flexibility. They thus meet consumers, at their express request, outside of their business premises to assist them in organising their travel arrangements. Since visits are planned and agreed with consumers, it is not a situation where the consumer is taken by surprise and pressured to make a booking. But under the terms of the proposals, bookings made during such solicited visits would be considered off-premises contracts to which a right of withdrawal applies. However, applying a right of withdrawal would have a detrimental impact on the activities of these self-employed travel agents , since, for the reasons mentioned above, a right of withdrawal is not appropriate for tourism services with reservation.

In summary, NET considers that:

- As proposed by the Commission, **Chapter III (article 8 to 19) should not apply to package travel contracts.**
- As proposed by the Commission, **distance contracts for the provision of accommodation, transport, car rental, catering and leisure services should be excluded from the provisions of Chapter III (article 8 to 19) of the Commission proposal.**
- **Off-premises contracts for the provision of accommodation, transport, car rental, catering and leisure services should also be excluded from the provisions of Chapter III (article 8 to 19) of the Commission proposal.** This can be achieved by introducing the following amendments:

Amendments proposed

- Recital 36 of the proposal should specify that distance **and off-premises** contracts relating to accommodation, transport, car rental, catering and leisure services should not be covered by the provisions on consumer information and the right of withdrawal
- Article 20 of the proposal: the exclusion of Article 20 (3), which is limited to distance contracts, should be moved to Article 20 (1), which excludes application of Chapter III to both distance and off-premises contracts.

5. Chapter V Consumer rights concerning contract terms

The proposal for a Directive includes two annexes, one listing terms that are unfair in all circumstances and one listing terms that are presumed to be unfair. NET proposes the following amendments to these two lists of terms, in order to meet the three specific issues:

a) Minimum number of participants' term

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

Such clauses are particularly common in the activities of a tour operator in the field of group travel, such as coach tours or study tours, which is an important part of the tour operating business. The same is true for 50% of the river cruises and 25% of ocean cruises.

On an annual basis, there are approximately 50 million customers who buy tours (round trips)¹ in the EU and EEA, of which one third are organized in groups.

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

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

NET fears that some courts may take the view that reaching the minimum number of participants is a condition that depends exclusively on the tour operator for the fulfilment of its obligation to perform the contract and is thus prohibited under point b) of Annex II. But NET considers that whether a minimum number of consumers will purchase a given tour or not is beyond the control of tour operators.

Amendment proposed

It should be specified in point b) of Annex II that a term will only be unfair when the trader makes his commitment subject to compliance with a particular condition that only the trader is able to fulfil.

Justification: In order to enhance legal certainty, it is necessary to specify that a term will only be unfair if the trader sets a condition for the performance of his obligations under the contract and if that condition can exclusively be fulfilled by the trader himself.

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

Indeed, a trader may specify in his contract that he will only be able to perform a contract if a specific condition is met but the fulfilment of this condition may be beyond his control. For example, a package travel contract may include a clause specifying that the tour will only take place if a pre defined minimum number of customers book the tour. Whether or not that condition will be fulfilled, i.e. whether a minimum number of persons will purchase the tour, is beyond the control of the organiser of package travel services.

b) Term on price revision after conclusion of the contract

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

Many European tour operators include in their contracts a term that allows them to review the price agreed in the contract. The Package Travel Directive allows such a review without granting a right of withdrawal to the consumer but only in the very limited circumstances of variations in transportation costs, in taxes, dues or fees applicable to the services included in the package or in exchange rates. Because of this, the scale of variation of the price, compared to the overall price of the package is rather limited. In addition, in some Member States, the legislation caps the variation that may occur.

As far as air travel is concerned, the price of a package may for example be reviewed when air carriers raise their fuel surcharges or when airport taxes or charges are increased. Regarding coach tours, the price of a package may be reviewed when fuel prices or motorway tolls go up, or when access taxes to certain cities are levied. Frequent variations in such charges combined with access taxes applied by municipal authorities without timely communication to the industry are very difficult for tour operators to absorb.

Although the variation per passenger may be small, the collective sum for the tour operator may be considerable. In such circumstances, the tour operator would be compelled to raise prices agreed in the contract, but strictly in accordance with the requirements of the Package Travel Directive.

Therefore, if point 1 (g) should apply to package travel contracts; it would be very problematic for tour operators. They could maintain price revision terms but would then have to systematically grant the consumer the right to withdraw from the contract. However, for the various reasons mentioned under point 3 above, a right of withdrawal is not appropriate for services with reservations, which often require advanced confirmation and payments to actual service providers. Furthermore, should the tour operator choose the option of preparing to absorb potential price increases to avoid withdrawal; the inevitable result would be a higher offer price, which would be to the detriment of consumer.

Amendment proposed

Package travel contracts regulated by Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours should be added to the exceptions to point 1 (g) that are listed in point 3 of Annex III.

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

c) Consumer's right to use the services of a third party

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

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

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

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

Amendments proposed

A new point (d) should be added to Annex II to provide that a term shall be considered unfair in all circumstances if it has the object or effect of excluding or hindering the consumer's right to instruct and authorise a third party to conclude a contract between the consumer and the trader and/or to take steps which are meant to lead to, or facilitate, the conclusion of a contract between the consumer and the trader.

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