

The travel consumer

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Abstract

Given the increase in intra-Community travel, in particular ‘package travel’, the European Union legislature felt it necessary to define a set of rules common to all States Members. In the attempt to combat the inequalities between those who hire this type of services and the companies that organise the trips. We propose to critically analyse this new legal instrument and discuss its scope of consumer protection. The European legislature intends by Directive 2015/2302 harmonise the rights and obligations arising from contracts for package travel and related travel services. It aims to create a true internal market for consumers, establishing a good balance between a high level of consumer protection and the competitiveness of enterprises. The rights of travellers will be better protected, in matters such as compensation, cancellation, assistance, among others. On the other hand, we see the standardisation of the concept of organised trips ending differences in doctrine and jurisprudence.

Keywords: Consumer, traveller, directive, protection, organised trip.

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1. Introduction

The technological revolution and the phenomenon of globalisation have contributed decisively to a greater speed and ease in trade of goods and services. Such changes have inevitably reverberated in the course of legal–private relations.

It has become fundamental to respond to the problems and social economic requirements that are emerging in everyday life, demanding a more efficient legislation in several sectors.

One of them, in which legislative inefficiency is notorious, is the tourism sector and travel contracts. This situation stems from the fact that the weaker party to the contract, the travelling consumer, does not have protective legislation capable of responding to adversities that may arise during the performance of the contract (Torres, 2015).

Community law has shown great concern about the discipline of this type of legal relationship, in particular through the Council Directive of 13 June 1990 on package travel, package holidays and package tours. This instrument, as a legislative act emanating from the European Union (EU), has sought to establish, in general terms, certain objectives relating to travel. In order to achieve this, Member States must transpose the Directive into their national legal systems.

This legal diploma lasted 25 years, and nowadays it is no longer capable of fulfilling the purposes for which it was created. As we have stated, the technological advance that the world has been experiencing has altered the paradigm of hiring in this sector, providing electronic contracting models that allow the traveller to compose his trip on demand. Once unthinkable services are now possible thanks to the high technicality. Consequently, the traveller felt a greater need to safeguard his rights, a better agility and adequacy of the law to the dynamism of economic and social life (Camacho, 2016).

In order to meet the consumer's needs and expectations, Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 was created. This act is intended to provide a more efficient regimentation of the emerging relations of this type of contract. Its purpose is to adapt current regulations to market evolution, eliminate existing ambiguities and fill legal gaps.

In general terms, it will bring many changes, as far as its scope is concerned. This new directive applies to both the package tours offered for sale or sold by entrepreneurs to travellers as well as to the interconnected travel services provided by businessmen to travellers.

2. Aims and scope of Directive 2015/2302 of 25 November 2015

Regarding the directive in question, it should be noted that Directive 90/314 / EEC (still currently in effect) repeals Directive 90/314 / EEC and will apply as of 1 July 2018.

It should be noted that the new directive, in generic terms, governs, practically, the same matters as its predecessor, although it does bring other innovations.

According to its preamble, we see that the new Directive has a very ambitious purpose. It intends to protect the rights of the travelling consumer more effectively and suitably. As a basic aspect, it outlines the need to adapt the existing regulations by highlighting the central role that Tourism plays in the economies of the Member States. It is also worth noting that the Internet is an 'almost privileged' tool for both selling and selling travel.

At the same time, it should be noted that travel services are not restricted to combinations in the form of pre-arranged trips, and often the services desired by the travelling customer are combined in a personalised way. However, many of these service combinations are situated in a 'neutral zone' in terms of legal regulation and are outside the scope of Directive 90/314 / EEC, which is still in force.

On the other hand, the new Directive will reshape the scope of traveller's protection in order to enhance the safety of legal traffic. Regarding its scope, it will cover organised travel, being this

concept understood in a broader sense than in the case of the 90's. Currently, under the 90's Directive, package travel is conceived as a complete product sold by the operators (itineraries, timetables, accommodation), with the operator choosing the providers and coordinating them (Berenguer, 2016).

In contrast, there are trips where the consumer himself structures his tour and determines the program. These are called tailor-made trips, in which the consumer himself chooses according to his interests, not simply joining a tour package previously determined and offered by the operator (Antunes, 2017).

The 2015 Directive puts an end to differentiation, and there is only the concept of organised travel. For its part, the combination of at least two different types of travel services (according to Article 3 (2) of the diploma in question) will be understood as organised travel. These services may relate to accommodation, transport, car rental and other ancillary services (Camacho, 2016).

According to the new Directive, the following shall be excluded from this concept: package travel and linked travel arrangements with a duration of less than 24 hours (unless overnight stay is also included in proposed package tours) and proposed package tours and linked travel arrangements provided on an occasional and non-profit basis (and only to a limited group of travellers). In addition, it is excluded organised travel and linked travel arrangements acquired on the basis of a general agreement for the organisation of business travel between an operator and another natural or legal person, acting for purposes which fall within the scope of its business activity article 2 (2).

3. The subjects of the legal relationship under the 2015 Directive

Article 3 of the Directive seeks to determine the meaning and scope of the terms used by the EU legislator, taking into account the contours of travel and the subjects involved. Thus, in this type of contract, we will find, on the demand side, the 'traveller'. This is any person seeking to conclude a contract or who is entitled to travel on the basis of that contract (Article 3 (6)). Although this measure is concerned with consumer protection, it is only mentioned explicitly in Article 1 of the Directive. In the other legal provisions, the person who celebrates or intends to conclude a travel contract will be called a traveller (Machado, Vidal & Cafe, 2017).

On the supply side, we have the subject who offers the service. This may arise in the form of an operator, and may be any natural or collective person, public or private, which acts per se or through another person acting on his behalf or on his own for purposes related to his commercial or professional activity, being able to be assumed as an organiser, retailer, 'facilitator' operator of linked travel arrangements or a travel service provider (Article 3 (7)).

On the supply side, we can also have the organiser, who is any operator who combines, sells or proposes sale trips organised directly, through another operator or together with another operator, or the operator who transmits the data of the traveller to another operator in accordance with Article 3 (2) (b) (v).

Lastly, as a provider, the retailer appears, an operator other than the organiser who sells or proposes for sale package travel arranged by an organiser, article 3 (9) (Simoes, 2018).

4. New directions on the right to information

One of the main novelties introduced by the new Directive is, as far as the information is concerned, the requirement for a greater clarity as to whether or not the service offered is part of a package and the protection included therein.

Before transposing this Directive, there was an obligation to include information in their brochures and pamphlets. This required operators to adapt and print such information in accordance with the

State's law where it was intended to distribute them. This, of course, entailed very high costs and could lead to the de-motivation of companies in the sector to expand abroad. The rules relating to these requirements were eliminated because it is understood they are not necessary within the new technologies and the proliferation of communication through them. In today's networked digital world, information technologies, distance communication and the Internet foster greater dissipation of information value and lead to greater competition in its production and dissemination (Berenguer, 2016).

The transmission of this information must, however, comply with certain requirements. There is a clear expansion of the duties of the organiser or retailer. It shall make available to the traveller, in the case of an organised trip or related travel service, and prior to the signing of the contract, all information. The duty of informing the rights of the traveller and the level of protection guaranteed to him (Bermudez, 2017) lies on him.

These duties are even more demanding when it comes to electronic contracting. The set of pre-contractual information required is listed in Article 5 of the new Directive. From the text emerge clearly, standardised contents which must be poured into information sheets to be made available to the travelling customer. The Community requirements value integrated information, both in the organisation and in the communication established between operators and/or facilitators of travel and tourism. In accordance with Article 6 of the new Directive, essential information, as part of the pre-contractual information, is binding unless the organiser reserves the right to make changes and these are communicated to the traveller in a clear manner, visible and understandable, before the conclusion of the organised travel contract (Batuecas & Aparicio, 2013).

As for the content of package travel contracts, without prejudice to what is to be stated in the pre-contractual information, a number of additional requirements and information needs to be included. These changes necessarily imply legislative changes in other aspects of the legal regime of the contract. As is clear from Article 7 of the new Directive, and in particular Article 2 (2) (b) thereof, responsibility for the correct implementation of the travel rests solely with the organiser (stipulating the principle of sole responsibility of the organiser in Article 13) and on this obligation to provide assistance when difficulties occur during the travel (Article 16). Another of the amendments to the previous Directive of 1990 is contract's obligation to provide for the possibility of the traveller transferring his contractual position to another, and also the internal procedures for handling complaints and dispute resolution mechanisms (Berenguer, 2016).

There are two fundamental aspects to be borne in mind: tourism operators must, on the one hand, have a set of resources related to the creation, control and communication of electronic and computer information, on the other hand, the value of information and diffusion in a trust network will be vital for their survival and competitiveness (Machado, Vidal & Cafe, 2017).

In short, it is intended to implement a contractual standardisation, including on-line provision of travel and tourist services, which will involve a network organisation of the Member States, thus aiming at a more effective legal and economic integration (Lana, 2013).

5. New limits on the price change regime

Another of the main innovations of this Directive is the change in the prices of package travel, Article 10. This legal provision establishes a more consumer-friendly regime compared to that prescribed in the 90's directive.

Prices will thus become more predictable. After the conclusion of the package contract, prices may be increased only if the contract expressly provides for such a possibility and indicates the right of the traveller to reduce its price.

It will only be possible to increase the price in the direct ratio of the variations related to the fuel price, the rates that affect their respective services and exchange rates. The increase will only be achievable if the organiser notifies the traveller clearly and comprehensibly, justifying the situation and showing the respective calculations. This *modus operandi* must occur no later than 20 days prior to the commencement of the package (Camacho, 2016).

In addition, Article 10 (2) states that in the event of an 8% increase in the cost of travel, the consumer may terminate the contract and accept a substitute trip, if this is proposed by the organiser. The 90's Directive, on the other hand, does not provide for any percentage limit on the increase of the price.

There will also be a possible reduction of the price and compensation for damages, if during the period of execution of the contract there is some disagreement with the contractor unless the organiser can prove that the lack of conformity is attributable to the traveller in accordance with Article 14.

6. Procedures in the event of insolvency and guarantee

In contrast to Directive 90/314 / EC, its successor, EU Directive 2015/2302 of 25 November 2015, regulates the arrangements for package travel and linked travel arrangements, setting out as main concerns the adaptation of organised travel to technological developments and consequent repercussions on the tourist market, giving greater guarantees of protection to the traveller, thus complying with Article 169 (1) and (2) (a) of the Treaty on the Functioning of the European Union (TFEU), which requires the Union to contribute to a high level of consumer protection. For this purpose measures may be taken in application of Article 114 TFEU. We cannot forget the many cases of insolvency that occurred in Europe within this sector, which left unprotected travellers consumers (Batuecas & Aparicio, 2013).

This protection is clearly intended to address the problems caused by the insolvency of the organiser or the retailer (Articles 17 and 18 of the new Directive, concerning organised travel services and Articles 19 and 21 for linked travel arrangements).

As stated in the recitals of the new Directive, in case of effective insolvency, it should be ensured the reimbursement of amounts owed or damages caused by the insolvency of the organiser and, where applicable, the costs of repatriation.

In this context it is important to distinguish between the types of liability concerned. We speak of the responsibility for the non-fulfillment of some of the services that make up the linked travel arrangements, being established, in this case, that the sole responsible party will be the non-compliant provider. The facilitator shall be excluded only if it has complied with the information obligations laid down in Article 19 (2), where it is presumed that the traveller will not benefit from the rights which apply exclusively to package travel.

Another type of accountability is the insolvency of the facilitator (Article 19 (1)). According to the wording of this provision, travellers will be protected in the event of insolvency, but the way in which it is effective is not, however, very clear. Under the new Directive, Member States should ensure that facilitators ensure reimbursement of payments received from travellers if travel services cannot be provided as a result of their insolvency, but the contracting and payment of these services is normally made separately. The following question can then be asked: is an airline, declared insolvent, liable for the return of the money paid by the traveller to the hotel that he never enjoyed because he was not guaranteed the plane trip? By virtue of the reference from Article 19 to Article 17 (5) of the Directive, it seems to be the case (Machado, Vidal & Cafe, 2017).

For this guarantee to be in place, the Portuguese legal system foresees the existence of a Solidarity Guarantee Fund, which will be jointly and severally liable for the payment of consumer credits due to

a non fulfilment of contracted services to travel and tourism agencies, having available an annual limit of payments of € 1.000.000,00 (Torres, 2016).

7. Conclusions

- The Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on Organised Travel and Linked travel arrangements introduces the figure of the traveller, encompassing consumers and professionals, as long as that they are not covered by a general agreement for the organisation of business trips.
- The new regime introduces the concept of linked travel arrangements distinguishing them from the concept of package travel, the latter covering travel purchased from different operators/agencies through 'interconnected online booking processes'.
- The diploma pays special attention to the right to pre-contractual information of travellers in the purchase of package travel, in particular through the obligation of the travel agent to provide a standardised information sheet containing essential travel information.
- The legal text also enshrines a greater protection for travellers in the event of travel agency and travel agency insolvency.

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