

Reference: D-0909-362-AW

Commission proposal for a Directive on consumer rights

NET position paper as of 9 October 2009

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;**
- **Fully supports the fact that package travel contracts are not subject to Chapter III on consumer information and withdrawal right for distance and off-premises contracts;**
- **Regrets that Chapter V on consumer rights concerning contract terms is applicable to package travel contracts. Chapter V should NOT apply to package travel contracts.**

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Therefore, **NET considers that only chapter I of the proposal shall apply to those contracts falling under the scope of Directive 90/314** on package travel, package holidays and package tours. This can be achieved by the following amendments:

Amendments proposed

- Point 11 of the preamble: an additional reference to package travel services should be inserted.

Justification: NET considers that similarly to financial services, package travel contracts are already subject to a detailed community legislation protecting consumers since they are regulated by the Package Travel Directive.

- Article 3 (3) of the proposal should provide that only chapter I shall apply to contracts which fall within the scope of the Package Travel Directive.

3. Chapter II Consumer information

NET members remind 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 question 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 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 currently discusses the possibility to also amend 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 reminds 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 he concludes 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 an empty hotel room cannot be sold any more the next night. 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, but also 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 additional actual losses for all the services contracted;
- Promotional offers, like for instance last minute or late bookings, are limited in quantity and in time. If a right of withdrawal applies, the trader will simply not be able to book such promotional offers for the consumer, or the consumer could possibly see a decrease in the availability of such offers. Furthermore, it is impossible to manage last minute or late bookings if the consumer can withdraw from the contract until for instance the last days 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 jeopardise 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 shall provide that no right of withdrawal will apply to 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

NET considers that this Chapter should not be applicable to package travel contracts because both the list of terms that are unfair in all circumstances and the list of terms that are presumed to be unfair contain terms that could put into question two types of terms that tour operators include in their contracts, namely the “minimum number of participants’ term” and the “price revision term”.

These terms are currently allowed under the Package Travel Directive. However, in view of the upcoming revision of the Package Travel Directive and the great uncertainties on the content of a revised Package Travel Directive, NET considers that at this stage, it is safer to provide that package travel contracts will not be subject to the provisions of the current proposal in respect of unfair contract terms.

a) Minimum number of participants' term

According to Article 4 (2) (a) of the Package Travel Directive, to be read in combination with point (d) of its annex, tour operators are allowed to include in their contract 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”.

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 persons 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. Would the clause not be allowed, the tour operator would have to base its price calculation on a very low number of participants. The result would be an extreme increase in prices, which most likely would not be acceptable for the consumers, or an important reduction of the offer as tour operators will no longer take the risk 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, if in the course its review, the Package Travel Directive does not refer anymore to the right of the tour operator to include a minimum number of participants' clause in its contract, point b) of Annex II could be used to put such terms into question and even to consider them as being illegal in all circumstances. Indeed, 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.

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.

According to Article 4 (4) of the Package Travel Directive, in specific circumstances such as increases in fuel costs, taxes or exchange rates, the tour operator is allowed to raise prices after the conclusion of the contract. However, Article 4 (4) does not grant the consumer the right to terminate the contract. As far as air travel is concerned, the price of a package is increased when air carriers raise their fuel surcharges or when airport taxes or charges are increased. Regarding

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.

coach tours, the price of a package is increased 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. They have thus been compelled to raise prices agreed in the contract, in accordance with Article 4 (4) of the Package Travel Directive.

As mentioned above, given that we have no certainty that in the course of the review of the Package Travel Directive, Article 4(4) will remain unchanged, the potential future application of point 1 (g) to package travel contracts 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.

Since the actual providers of the services that are included in a package frequently impose variations of prices, granting the consumer a right to withdraw in case of price increases would make it very difficult for a tour operator to pursue his activities. Indeed, 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, would the tour operator choose the option of absorbing price increases to avoid withdrawal; he would anticipate any potential increases and pass them on to its final price, which will inevitably be higher, to the detriment of consumer.

As a consequence, given the major uncertainties as to the content of a revised Package Travel Directive and considering that it is crucial that tour operators keep the possibility to set a minimum number of participants in their contracts and to adapt their prices after the conclusion of the contract, **NET considers that Chapter V should not apply to package travel contracts.**

6. Chapter VI General provisions

Not applying chapter VI to package travel contracts is the consequence of providing that only Chapter I of the proposal will be applicable to package travel contracts.
