



IFTTA

THE INTERNATIONAL FORUM OF TRAVEL AND TOURISM ADVOCATES

*Sodalem esse societatis quae deditur ad
Exercitatio legis ut producat iter peregrationemque*

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Main Topics to be revised

0. General

1. Clear and consistent terminology: The wording in the Recitals should meet with the wording of the provisions in all languages. [E.g. Recital Nr 10 in the German version uses the term “cession” (“Abtretung”) whereas Art 2 Nr 4 Alternative 3 and Art 4 Nr 3 use the term “transfer” (“Übertragung”) and furthermore Art 2 Nr 4 Alternative 3 uses the term “buyer” (“Erwerber”) which is quite different to the much clearer English term (“transferee”) which in German would be “Übernehmer”.]
2. Degree of harmonization: A new PTD should not aim for full harmonization. Member States providing higher protection standards should not be forced to decrease their level of consumer protection. However, it may be that a targeted full harmonization approach regarding the information obligations only is appropriate, due to pre-contractual information directed (cf Art 15 Para Nr 1 Brussels I-Regulation 2001/44/EC, Art 6 Nr 1 Rome I-Regulation 593/2008/EC) to consumers in a significant number of Member States at once. It is very difficult for organizers and retailers in this regard to meet the several particular obligations of each state’s domestic law. On the other hand, this distinction in the degree of harmonization in relation to different provisions might be questionable.

I. Scope (Art 1, 2, 5 Para 3; 8)

Material scope

1. The term “at an inclusive price” should be removed from the elements of definition of a package due to lack of limitative character.
2. The same applies to “pre-arranged” unless it is modified in a way that the different services (accommodation, transport, other tourist service) must have been combined at the time of offer, including offers which allow selection from a predefined choice of services in each category.
3. Transport could be a mandatory element to constitute a package (as the definition in Art 16 Brussels I-Regulation states).
4. Alternatively the scope of the PTD could be extended to provision of single services offered and/or contracted for by an organizer (as opposed to single services by a supplier).

5. “Dynamic Packaging” and “Dynamic Bundling” should be covered by the PTD in any case.

Personal scope

1. If the new PTD is based on “consumer protection” (Art 114 Nr 3 in connection with Art 169 Nr 2 lit a FEUT) the scope may focus on those packages or services purchased by consumers for private purposes only i.e. those consumers not purchasing in the course of a trade or business. The definition of the “consumer” within the PTD in this case could be made consistent with the definition in Art 2 Para 1 of the Proposal for a Consumer Directive (COM 2008/614 final), Art 2 lit b Unfair Terms-Directive 93/13/EEC, Art 15 Para Nr 1 Brussels I-Regulation 2001/44/EC, Art 6 Nr 1 Rome I-Regulation 593/2008/EC, etc all referring to a natural person “acting for purposes which are outside his trade, business, craft or profession“. If the purpose of the person actually traveling shall be decisive, the scope could be limited to cases when other beneficiaries and (potential) transferee also act for purposes which are outside their trade, business, craft or profession. In cases of mixed purpose (related to the principal contractor and/or different beneficiaries) business purpose could prevail unless these are negligible.
2. The fact that the principal contractor is not traveling himself (e.g. company booking travel arrangements for employees, etc) may be regarded irrelevant.
3. If the wide definition of the protected persons should be kept unchanged, a different term (“traveler”, “tourist” or else) might be considered to avoid confusion with the definition of “consumer” in other directives. It is acknowledged that in the common law systems “traveler” has a particular meaning in respect of the law of the innkeeper and that this will have to be taken into account.
4. Consideration should be given to replacing the element “other than occasionally” by “acting in the exercise of his trade or profession” as the professional in Art 6 Nr 1 Rome I-Regulation 593/2008/EC or the trader in Art 2 Para 2 of the Proposal for a Consumer Directive (COM 2008/614 final). This will prevent the obligations imposed on organizers applying to religious bodies, educational establishments and other civil society organizations that organize travel, pilgrimages, educational trips etc.

II. Information obligations (Art 3, 4)

1. It is essential that greater clarification is given to who is to be considered “the other party to the contract”. Retailers or agents should be obliged to clarify their role and disclose the identity of the organizer or otherwise be treated as organizers themselves.
2. Regarding the degree of harmonization with respect to information obligations see above.
3. The right to transfer a booking and the applicable conditions could be part of the Annex and part of the minimum content of the contract to be communicated according to Art 4 Nr 2 lit a and b.
4. An appropriate form to provide pre-contractual, contractual and pre-departure information could be made mandatory. A durable medium, however, may not be necessary if the burden of proof was switched to the organizer (e.g. an SMS would be a good solution in some cases, which would not be a durable medium according to Art 5 Nr 1 Distance-Selling-Directive 97/7/EC).
5. Information obligations should only apply where relevant.

6. Contractual and the pre-departure information should be “drawn up in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the Union“ (as according to Art 4 Nr 3 Timesharing-Directive 2008/122/EC).

III. Contract Modifications (Art 4 Para 3-6)

1. The right to transfer a booking according to Art 4 Nr 3 could be subject to an information obligation (see above). It should be clarified that the transferee has to satisfy conditions applicable to the specific package at departure date at the latest. These applicable conditions should be part of the contractual information. It may be considered to grant a right to transfer a booking regardless of being prevented from proceeding with the package.
2. Revision of prices could be limited to cases provided by law.
3. The deadline after which a revision is not admissible anymore could be made dependent on the duration of the trip.
4. The right of withdrawal (cf Art 5 Nr 1 lit e Proposal for a Consumer Directive) could be connected with graduated fees being up to the time period left until departure.
5. A reservation clause regarding provisions being subject to change should not be binding.

IV. Post-Departure Problems [Warranty] (Art 4 Para 7; 5, 6)

1. The duty to provide prompt assistance in case of improper performance or non-performance of a service could be more stringent.

V. Liability (Art 5)

1. The structure of Art 5 could be improved by a clearer distinction between different types of loss.
2. Liability of organizer should be in line with Montreal and Athens Conventions if damage falls within the material scope of these conventions.
3. Non-material damages covered by liability could be specified.
4. Calculation of non-material damages as for loss of enjoyment should take into account all circumstances including the price of the package.
5. It may be considered to impose liability for damages arising from non-performance or improper performance on the organizer only while liability of agent could be limited to misrepresentation and fault through poor choice of organizer.
6. The consumer should be informed, who the liable contracting partner is and that the liability also covers failures of suppliers.

VI. Insolvency (Art 7)

1. Any insolvency security system shall not permit limitation of the amount guaranteed.

2. The insolvency security system could focus on repatriation (or continuation of the journey) while refund of any advance payment may be questionable under the principle of equal treatment.
3. Organization of repatriation within due time could be an obligation of the Member States.
4. Member States should take the necessary steps to ensure deterrent legal consequences in case of fraudulent sale packages at a time when insolvency or bankruptcy is foreseeable.
5. A security system in case of Airline bankruptcy (and likewise of railway, ship companies and bus/coach transport in line with Directive 1371/2007/EC and Proposals COM 2008/816 final and COM 2008/817 final as well) could be subject of a separate secondary legislative act. This system should also focus on continuing the service and repatriation of the passenger.

VII. Other matters

1. A logo introduced in all Member States to identify a “package” could be considered to increase consumer awareness. This might follow the Finnish model.
2. The term “brochure” now used in Recital 11 and Art 3 Nr 2 should be replaced by a term covering similar information provided through websites or other technical means (“detailed documentation” or “detailed description”).
3. The introduction of common standard check-in and check-out times for hotels when accommodation is part of the package may be taken into account.
4. Additional obligations of the tour organizer to provide assistance in emergency cases (regardless of causation and fault) might be considered – but possibly be disproportionate.

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