

ECCG opinion of 21 April 2010 on the review of the package travel directive (PTD)

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DISCLAIMER

"The European Consumer Consultative Group (ECCG) is a consultative group set up by the Commission, entrusted to represent the interests of consumers at the Commission and to give opinions on issues relating to the conception and implementation of policy and action on the subject of protection and information of consumers. The opinion of the ECCG does not reflect the opinion of the Commission or one of its Services".

CONTEXT

- *The ECCG discussed the revision of the Package Travel Directive at its meeting of 10 December 2009 with the Commission lead services responsible for this issue.*
- *An ECCG sub-group was created in order to prepare an ECCG Opinion on this issue and met for this purpose on 1 March 2010.*
- *Following these discussions, the members of the ECCG have adopted the Opinion stated below.*
- *The Commission chairs the meetings of the ECCG. However, the Commission does not interfere with the drafting or adoption of ECCG Opinions.*
- *The Commission lead services will take into account the ECCG Opinion in the context of the revision process.*

The European Consumer Consultative Group (ECCG) is the Commission's main forum to consult national and European consumer organisations. The ECCG welcomes the opportunity to timely contribute to the debate on the review of the package travel directive and suggests to the Commission and the other EU policy makers to take account of the analysis of the needs for review from the consumer perspective¹.

¹ Alongside these discussions, the ECCG draws the attention of the Commission to the urgent need to also tackle the issue of safety of tourist accommodations, as there are currently many shortcomings in this sector.

Background

The regulatory framework of the travel sector is not up to date anymore. This is linked to the ever-creative evolutions of the on-line travel market, but also to the changes in consumer behaviour, who are more and more inclined to arrange themselves the different elements of their travel or holidays. It is therefore essential that the new regulatory framework that will be established at EU level takes account of the current situation and its ever moving features. In this context, the ECCG would welcome indications by the Commission on the **timeframe** of anticipated policy measures in this area.

The process of stakeholder consultation for the preparation of the review

The Commission has received feedback from different groups of stakeholders on the consultation it launched on-line. The ECCG draws the attention of the Commission to the need to very cautiously weight the representativeness, as well as on the sector-specific expertise of the respondents. Pure numbers, put out of context, should not be granted any validity: number of respondents from the industry sector could of course outweigh easily that of consumer representatives; on the other hand, the very few individual consumer responses should not at all be considered to be a valid basis for extrapolation of, on the one hand, consumer understanding of the issues at stake, and on the other, global consumer expectations within the travel sector.

Also, as there is a parallel consultation going on in the area of air passengers rights, it is essential that the different Commission services liaise in order to maximise consistency of approaches and methodology. From the consumer perspective, it is essential to be able to rely on a coordinated and consistent regulatory framework that would provide the same level of protection for the traveller.

In parallel, it is also important to take account of the process followed by the proposal for a consumer rights directive. The Commission should prevent legal gaps in consumer protection due to the fragmentation of consumer specific provisions: this is applicable to definitions, but also to the applicability of certain provisions, such as the ones related to unfair contract terms.

The right of the consumer to coherent protection whatever form the travel services takes

Currently, consumer rights when travelling differ significantly according to the form under which they choose to travel: transport, accommodation or other leisure services, only, fixed or a dynamic package. Different regulations apply, with different rules and different procedures for complaints handling.

This is counterproductive and lacks legal certainty. Consumer rights with regard to travel services should not depend on the form under which he has contracted.

Therefore, the ECCG calls upon the Commission to take the opportunity of the review of the PTD to *extend its scope such as to cover the widest possible number of different travel services*. In this respect, dynamic packages should be covered, not only when they are concluded with the same company, but also when, via a “click through” on the website of one company, the consumer is redirected to the website of

another company. In this case, the first company acts as an intermediary and should be held liable as any other travel agent. Also, there should be track keeping of this “click through” in the contract concluded with the second company.

Similarly, the situation where a tour operator provides **accommodation only** in his advertising material should be covered by the review, bearing the same liability as any other tour operator.

More fundamentally, there is a need to have a clear picture of *the chain of responsibilities in the travel sector*, for the various situations in which the consumer can find himself when he contracts for a tourist service.

A coherent regulatory framework also implies that all provisions in EU legislation that refer to the protection of the consumer when travelling should *use in a consistent way similar concepts, such as tour operator*, travel agent, force majeure, essential wishes, etc. They should in parallel *apply similar concepts to similar situations* (strict liability vs. fault liability).

More clarity on liability rules

Currently, there is a lot of legal uncertainty as to the respective liability of the operator and the intermediary. Experience has shown that legitimate consumer claims were dismissed because he sued the wrong economic agent. This is even a more crucial issue as complaints in the travel sector often bear a cross-border element. It will always be more complex for the consumer to obtain access to redress where the service provider is abroad.

There is a clear need for a straightforward interlocutor for the consumer when he has claims to make with regard to a travel service.

Therefore the ECCG calls upon the Commission to introduce a system *of joint liability of the seller and the organiser/tour operator*, towards the consumer. In any case, the travel organiser should, in terms of chain of responsibility, always be considered to be liable and should not be able to transfer the liability to the seller only. In parallel, there must be a clear indication in the regulatory text that the liability regime for travel business is that of a strict/no fault liability.

More clarity on compensation in case of companies' liability

Currently, when the liability of the provider of the travel services is established, there are sometimes endless discussions as to the calculation of the compensation that is due to the consumer.

Therefore, the ECCG calls upon the Commission to take initiatives in order to make available a guidance document as to methods of classification of damages and *of calculating the compensation* linked to these different classes of damages; this scheme should also include *moral damages*. An interesting point of reference, even if not mandatory for the judiciary could be the table used by German courts, the Frankfurter Tabelle, which is currently already referred to in other national jurisdictions.

More certainty on prices

Currently, classic travel brochures are being replaced more and more by flexible virtual offers and/or temporary offers. Prices become more and more flexible. In parallel, the travel industry covers the risk of price variations by hedging currency risks and fuel prices².

In this ever changing context, there is a clear risk for the consumer to be misled on the effective price of the travel service.

Therefore, the ECCG calls upon the Commission to introduce the *principle of fixed prices*, i.e. prohibition of price modification once the contract is concluded. This principle could be derogated from in certain cases defined by law, such as printed brochures that are made available long before the service is supposed to be performed.

In parallel, prices displayed to consumers should be *all-inclusive*. All non-optional supplements should be included in the upfront price indication. While this is already included as a principle in the UPCD, practice in the travel sector shows a lot of abuses by companies.

More effective protection against insolvency

Very regularly, the news is full of desperate travellers who have to face insolvency of airlines or other companies offering prepaid travel services. The ECCG draws the attention of the Commission to the fact that where the scope of the Directive will be extended, the scope of protection against insolvency will follow, and this would constitute a major step towards an improved protection of the traveller who has to face insolvency. In any case, a complementary insolvency protection system (fund or insurance) should be set up for airlines.

The widened insolvency protection system should also cover, not only reimbursement or repatriation, but also the possibility to *continue the started travel* (at the choice of the consumer). Consideration should also be given to the coverage, by the scheme, of not only insolvency claims, but also of *liability claims introduced after a bankruptcy*.

A more consumer friendly legal framework for unexpected incidents

The provisions of the current PTD on force majeure should be improved in order to be in line with similar rules existing in other legislations (R261/04) and ECJ jurisprudence (C-549/07; C-402/07 and C-344/04).

Experience shows that Member States have different interpretations of this notion of force majeure. The ECCG calls upon the Commission to provide a strong EU framework for two cases of force majeure: natural / catastrophes, epidemics and political events linked to terrorism. In those cases, not only the professional, but also the consumer should be entitled *to cancel the contract* in case of force majeure without penalty. As to the tour operator/travel agent, in case of cancellation for force majeure, he should have an obligation to reimburse the consumer of the part of the payment he has already made and that is related to the part of the service that has not yet been performed.

A more consumer friendly regulation of travel insurance

Force majeure related to the situation of the consumer (**i.e. unexpected own personal / family incidents**) is only handled by the travel insurance. Experience shows that those insurance contracts contain a lot of unfair terms, there is no choice as to the insurer and also consumers are very often experiencing double insurance. Therefore the ECCG calls upon the Commission to introduce provisions into the future Directive that regulate the offer of travel insurance.

Consumer right of withdrawal in case of distance selling of travel services

There is no reason for exempting per se travel services from the right of withdrawal that is granted to consumers in the case of distance contracting, certainly in the case of early bookings.

Therefore, the ECCG calls upon the Commission to adapt the EU regulatory provisions in force or under discussion in order to introduce the right for a consumer, under certain conditions, and especially in case of early booking, ***to withdraw without penalty from a travel contract*** concluded or negotiated at a distance.

An improved system of complaints handling

Currently, consumers who wish to complain when things have gone wrong with their travel service often have to face a labyrinth before being able to get in touch with the adequate interlocutor.

Therefore, the ECCG calls upon the Commission to introduce among the pre-contractual information requirements (as well as on all documents and messages towards the consumer) the ***mention of a contact point*** in case of complaint.

Consumer claims should be valid also if they are filed after the vacations. ***Too short prescription periods*** for introducing complaints should be prohibited (such as “on the spot”. If an ADR mechanism is used, the prescription periods should be interrupted for the whole duration of the ADR procedure. Also, the future Directive should provide that MS may not lay down shorter statutory limits (**for judicial or extrajudicial redress**) than minimum 2 years.

More globally, member States should be **obliged** to impose an ADR or an on-line dispute resolution (ODR) system, and it should be provided that those solutions should be ***at no extra costs*** for the consumer.

Relevance of a trustmark

Experience demonstrates that trustmarks can be misleading for consumers. A trustmark is often seen by a consumer as an added-value sign for quality service above minimum legal requirements. Granting a trustmark to companies that do not more than abiding to the law would therefore be ***misleading*** to consumers, because ALL companies should abide **by** the law. Such initiative could then be compared with the negative effects in terms of consumer information of the CE mark. More fundamentally, ECCG does not believe that the proliferation of trustmarks (one for PTD, one for R 261/04 ?) would constitute a valuable tool of consumer information

and would consistently prefer the adoption of a broad, all-encompassing regulatory framework at EU level that regulates travel services.

The need for a minimum harmonization approach

Full harmonisation will not bring an increase in cross-border sales, as it is observed that language barriers, as well as lack of proper enforcement measures at cross-border level are the most problematic barriers in the travel sector. On the other hand, the experience gathered with PTD has sufficiently shown that national developments in the area of consumer travel can vary considerably. It is therefore essential that, on the basis of a common regulatory framework that makes it possible for companies to design services more and more in a harmonized way within the EU, Member States must be granted the right to continue to regulate their market on the basis of the expectations of their domestic consumers and, even more, to quickly intervene if new developments in their travel services market call for such an intervention to protect consumers.

International private law

The ECCG draws the attention of the Commission to the fact that international private law issues play an important role in the travel sector. The consumer faces almost systematically cross-border situations in the performance of the contract, and, more and more, with online marketing possibility, even at the time of conclusion of the contract. The protective provisions of the Rome I regulation are limited to package travel and it is essential that the EU initiates a reflection on the implications of the changing travel market (dynamic packages, etc.) on the scope of the protection offered by Rome I.

Improvements needed on particular provisions

On the basis of the experience gathered in the travel sector by the various complaints handling structures, the ECCG calls upon the Commission to introduce the following improvements into some of the detailed provisions of PTD :

Strengthening of information requirements :

- availability of facilities
- accessibility for disabled people
- health and safety requirements or measures
- any circumstances that can disturb the health or rest of the consumer
- communication in emergency situations
- clear mention of time limits in terms of cancellation, percentage of penalties in case of cancellation
- needed travel documents
- the target group and holiday goal
- included or optional excursions, visits or circuits.

On contractual aspects :

- more clarification of the legal mandate of the seller/travel agency
- obligation to confirm bookings within a maximum period to define (e.g. one week)
- clear display and easy print of contract terms contained in websites
- regulation of the content of certain provisions, e.g. related to travel insurance

- EU guidance and benchmarking exercise on certain practices that exist in the travel sector (high penalties in case of early cancellation by the consumer etc.)
- Special attention should be granted to the termination of the contract : no penalty should be imposed on the consumer in case of supplier's liability; also penalties in case of cancellation before departure – and their percentage depending on the period before departure – could be linked to the destination.

More consumer friendly approach towards program changes

For the sake of legal certainty, the current PTD should be completed with a list of essential elements that would qualify for the notion of program change. This is also the cause for “significant” price increases that could still be valid subject to the limitations set out before, where ECCG would welcome a percentage of increase that would allow the consumer to cancel the contract (e.g. 5%). Also, non essential program changes should give rise to a possible compensation.

The provisions related to a *minimum number of travellers* should be deleted, as the new developments in the travel market enable companies more and more to prevent these difficulties. Also, currently, these provisions are misused by some tour operators who indicate a percentage of required travellers, which is not verifiable by the consumer.

It appears that some companies attract consumers into very early bookings with attractive prices, then cancel the travel and refund the price to the consumers, benefitting as such from liquidities through free loans granted by consumers. It must be stressed that the conclusion of a travel contract ties the supplier, that the burden of proof on legitimate reasons for cancellation lies on the supplier. The ECCG also recommends that in case of cancellation, the refund of the downpayment should be combined with the payment of an interest.

Language requirements

There should be a specific language requirement for online sales, indicating that all documents and information made available to the consumer should be displayed in the same language as that used in the advertising material.