

THE LEGAL IMPLICATIONS OF E-TOURISM: A EUROPEAN PERSPECTIVE*

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Internet, born and first used as means to exchange knowledge and information between institutions and research centres, or between cultural and research centres, has become also a major instrument for business activities through the exchange of tangible and intangible assets and services. Therefore we are witnessing a progressive placement side by side of a virtual market and the traditional market.

Figures are significant: according to a rough estimate, “*Starting from basically zero in 1995, total (global) electronic commerce is estimated at some \$26 billion for 1997; it is predicted to reach \$330 billion in 2001-02 and \$1 trillion in 2003-05*”². In the European Union similar estimates are in line with such predicted growth calculating an on-line revenue from •3.5 billion in 1999 to about •45 billion in 2002³. While at the beginning around 85% of the e-commerce transactions were business to business, the ratio is rapidly changing in favour of the business to consumer transactions, as purchasing goods and services on-line can benefit

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² OECD, *The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Research Agenda*, Report prepared by the Secretary-General for the Ottawa Ministerial Conference, “A Borderless World: Realising the Potential for Global Electronic Commerce” (OECD, 1998).

³ Boston Consulting Group, *The Race for Online Riches – E-retailing in Europe* (Boston Consulting Group, 1999).

consumers through a wider choice and lower prices, while suppliers, and in particular small and medium-sized businesses, can have access to greater market opportunities relatively cheaply⁴.

One of the product sectors that earned most success in electronic distribution is that of the tourist products. The success of the electronic reservation in the tourist area is based on the opportunity for the customer to approach a wide range of offer without the constraint of business hours, the ease of comparing simultaneously different sites which offer identical or interchangeable services, and also the opportunity to survey and find adequate information to make a satisfactory choice without direct relations with sales representatives.

The tourist sector has developed a wide operational area as a result of the possibilities given by the use of internet. The legal implications in this specific sector of tourist activities are characterized by the peculiarities of the use of e-commerce instruments from one side, and the object of the legal transaction performed through the internet.

This paper will focus in particular on the electronic transactions regarding tourist activities with particular reference to the sale contract of tourist packages, without taking into specific account the electronic sale of air tickets, hotel services or other different legal transactions involving the tourist sector.

With reference to the tourist activities, the reservation and the sale contract of travel packages are the most important legal instruments.

The reservation can have different legal implications according to the specific object of its application.

Generally speaking the reservation is a display of will by which the customer shows his intention to receive the service and declares his acceptance of the product offered. It is an agreement without a specific form required, usually made by phone or orally in the presence of the other party; in only a few cases is a written confirmation required.

In the tourist's jargon the terms "reservation" or "booking" have the specific meaning to indicate the customer's will to buy a specific tourist service with the contextual or following confirmation from the tour operator following to conclude the contract.

Today in terms of the reservations in the tourist sector we are witness to a progressive use of information systems together with the traditional instruments already used. Through internet the declaration of will to reserve a tourist service is today usually displayed without the instrument used for such purpose (the information system) influencing in any way the legal value of the declaration.

⁴ PEARCE G. and PLATTEN N., *Promoting the Information Society: The EU Directive on Electronic Commerce*, in (2000) 6 European Law Journal, n.º 4, pp. 363-378.

Even though the “electronic will” lacks verbal or para-linguistic exteriorization, it represents a “language”⁵ different from the traditional one but suitable to validly express the declarant intention in legal form. Therefore, either in the real or in the virtual world, the process for the conclusion of a contract is closed by the meeting of proposal and acceptance, but the peculiarity of the latter exists in the fact that the parties are not present in the same place but are in locations often extremely different, the only instrument of contact being the use of the internet.

Consequently, it is possible to say that the reservation is the means by which the traveller expresses his will to receive a specific tourist service from the tour operator subject to its final confirmation, and that the internet represents one of the possible options to validly enter into this kind of agreement.

The sale contract of tourist packages is the main type of contract in the ambit of the contracts related to the tourist field and the subject matter of such contract – the tourist package – represents its peculiarity.

Using the terms provided for by the European lawmaker, the tourist package can be defined as “*the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:*

- a) *transport;*
- b) *accommodation;*
- c) *other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package*”⁶.

The definition of the tourist package has been drafted in wide and flexible form so as to cover the various kinds of travel available for consumers⁷. Therefore the European Court of Justice (ECJ) clarified that the term “package” must be interpreted in a manner to include holidays organized by a travel agency, at the request and according to the specifications of a consumer or a limited group of consumers; and that the term “pre-arranged combination” necessarily covers cases where the combination of services is the result of the wishes expressed by the

⁵ On the use of different forms to express the contractual will see IRTI N., *Scambi senza accordo*, in (1998) *Riv. Trim. Dir. Proc. Civ.*, p. 350; more in general on the different form of expression of legal rules see SACCO R., *Mute law* in (1995) 43 *Am. J. Comp. Law*, p. 455.

⁶ This definition is taken directly from Art. 2, n.º 1, of the EU Directive 90/314/EEC on package travel, package holidays and package tours.

⁷ See the Opinion of the Advocate General Tizzano delivered on 17 January 2002 in the Case C-400/00, *Club-Tour, Viagens e Turismo SA v. Alberto Carlos Lobo Gonçalves Garrido and Club Med Viagens Lda*.

consumer up to the moment when the parties reach an agreement and conclude the contract. It therefore covers combinations of tourist services put together at the time of the conclusion of the contract between the travel agency and the consumer⁸.

At the same time the ECJ ruled that even trips offered as a gift to a predetermined class of consumers fall within the definition of “tourist package”⁹.

The sale contract of tourist packages is a contract where the two parties are not in an equal contractual position since one of them is a “consumer”¹⁰ for which all the protection issues common to all the area of the consumer contracts are relevant. However, these special protection issues request specific solutions in the field of tourism contracts, in particular if we consider that the e-commerce issues for tourism contracts are referred mainly to the so called *last minute contracts* where tourist packages not sold at a full price are offered at a discounted price a few days before the due departure date¹¹.

The *last minute contract* presents specific features. The travel offers can be booked directly and the customer does not need to wait for further confirmation since the offers displayed on the screen always refer to effective availabilities, so, after the booking request, the confirmation appears on the screen in a few seconds time. Therefore, at the time of the reservation the tour operator immediately sends the confirmation, although the validity is subject to the due payment.

When the traveller has chosen and booked an offer by filling all the requested spaces and following all the indications shown on the screen, he will receive notice about the terms of payment conditions¹². Once the payment is made the traveller will receive the voucher necessary to travel by fax, e-mail or express courier.

Due to the particular form of conclusion of the *last minute* travel contract, the cancellation of the travel is not allowed for whatever reasons and the money paid will not be reimbursed in any event.

The wide potentialities in terms of access and speed of contacts provided by the electronic instruments to market travel packages have induced the tour operators

⁸ European Court of Justice, judgment of 30 April 2002, Case C-400/00, Club-Tour, Viagens e Turismo SA v. Alberto Carlos Lobo Gonçalves Garrido and Club Med Viagens Lda.

⁹ European Court of Justice, judgment of 15 June 1999, Case C-140-97, Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich.

¹⁰ The definition of consumer for our purposes is given by Art. 2, n.º 4, of the same EU Directive, according to which “consumer means the person who takes or agrees to take the package (“the principal contractor”), or any person on whose behalf the principal contractor agrees to purchase the package (“the other beneficiaries”) or any person to whom the principal contractor or any of the other beneficiaries transfer the package (“the transferee”).

¹¹ Usually not more than two weeks before the scheduled departure date.

¹² Payment is normally made by credit card or bank transfer. In the first case the credit card is charged immediately, while the bank transfer must be done within the twenty-four hours from the reservation and copy of the related receipt must be sent to the tour operator within the same time

to develop a further kind of product offered to the consumers called *last second*, characterized by even lower prices¹³ and the obligation for the client to render himself available for the departure through the insertion of his name in a particular stand-by list, waiting for a confirmation of the departure twenty-four hours before the fixed date.

The regulation of this kind of *last second* offers usually provides that the booking confirmation is subject to availability twenty-four hours before the departure and all those who are registered in the stand-by list will be notified if their reservation has been confirmed. At the time of the reservation the customer must indicate all the details of the credit card that he intends to use for the payment of the travel and the credit card used for the booking request will not be charged until the booking itself has been fully confirmed. The reservation of a *last second* product is binding: in case of confirmation the credit card used for the booking request will be automatically charged and it will not be possible to cancel the reservation unless the consumer has bought the same product on the site under normal conditions. Therefore, this kind of contract is characterized by the absolute impossibility (also in terms of time) for the traveller to cancel the reservation, even more so than in the *last minute* contract¹⁴.

The peculiarities of these kinds of agreements and the difference in terms of contractual strength between the two parties of the contract has encouraged legal scholars to consider the consumer protection issues as particularly relevant in this area of activity.

The consumer contracts are today the meeting point of the contrast between the traditional sufficiency of the formal equality between the contractual parties and the necessity of a more comprehensive control over the real contractual balance. For this reason the electronic negotiation highlights the need of consumer protection at the highest level. In brief, it can be recalled that the consumer position at the conclusion of the contract needs to be strengthened against the one of the supplier: the consumer agrees to an unmodifiable contractual proposal made by the supplier and very often – especially when he is negotiating from home, at a distance – he has no possibility to obtain the adequate information about the goods or services for which the contract was concluded, that would normally be necessary to create his full intention to enter into the contract.

¹³ Usually at least 60% of the standard price.

¹⁴ We can consider this particular contract as performing in some way also an insurance function for the tour operator because it assures him a minimum remuneration for the tourist package, apart from the possibility to place the same product to other customers at a full – or in any way superior – price before the twenty-four hours prior to the departure (DELFINI, F., *Vendita via internet di pacchetti turistici last minute e recesso del consumatore*, in (2003) *Diritto del Turismo* n.º 2, p. 121).

Two aspects then are particularly critical: the usual impossibility to negotiate the content of the agreement and the possible lack of opportunity for reflection by the consumer at the time of his declaration of will.

The first one is characterized by a high level of strictness, standardization being an essential feature of mass contracts. However, to avoid any detrimental effects of standardization for the consumer, an effective compromise is provided by the European Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts by providing that *“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”*¹⁵.

Consequently, the European lawmaker requests *“that unfair terms used in a contract concluded with a consumer by a seller or a supplier shall [...] not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms”*¹⁶.

With reference to the second aspect, the one of the full liberty and awareness of the consumer in his decision making process to enter into a certain agreement, when a negotiation is absent and it is substituted by a simple assent to a standard and unmodifiable proposal as is the case in the consumer contracts, it is more efficient and appropriate to offer a protection subsequent to the conclusion of the contract by giving the option to reconsider the contract he entered into. This necessity has been recognized by the European lawmaker in general through the European Directive 97/7/EEC of 20 May 1997 on the protection of consumers in respect of distance contracts and through the abovementioned European Directive 90/314/EEC with particular reference to package travel, package holidays and package tours.

The structure of this protection system is provided by the imposition of a transparency burden on the supplier over object and price of contract from one side, and the provision of a prior information obligation with reference of a number of elements specifically listed by the law¹⁷. At this level, the right of the consumer (traveller) to transfer his booking, if he is prevented from proceeding with the package¹⁸, and the right to withdraw from the contract without penalty under certain specific conditions must also be considered¹⁹.

¹⁵ See Art. 3, n.º 1, of the Council Directive 93/13/EEC.

¹⁶ See Art. 6, n.º 1, of the Council Directive 93/13/EEC.

¹⁷ With reference to the package travel, the information requirements are listed in Arts. 3 and 4 of the European Directive 90/314/EEC on package travel, package holidays and package tours.

¹⁸ See Art. 4, n.º 3 of the European Directive 90/314/EEC on package travel, package holidays and package tours.

¹⁹ See Art. 4, n.ºs 5 and 6 of the European Directive 90/314/EEC on package travel, package holidays and package tours.

It should be added that these instruments also offer the opportunity to the traveller to set aside the contractual obligation in case of personal impediments, like illness or health problems of his relatives. In such a case, if we look at the performance of the obligation from the debtor's perspective (i.e. the tour operator), it is clear that the fulfilment of his obligation becomes concretely impossible, even if he is in principle ready to perform, and therefore the traveller who is unable to receive the performance would be released from the performance of his own payment obligation. For these reasons the tour operators usually strictly limit in the tourist contract clauses the cases in which the client can release himself from the contractual payment obligation after the date and time of the carrying out of the tourist package has been fixed.

Therefore, the core of the consumer protection regulation – the supplier's information obligation and the consumer's right to withdraw from the contract without necessity of proper reasons – is brought up for discussion in the case of tourist negotiation. While the obligation to provide the consumer with complete information is surely feasible, even in the sale of tourist packages, the particular subject of the agreement (the tourist package) creates difficulties for the supplier in granting to the consumer the right of free withdrawal.

The same multifaceted essence of the tourist package composed of different connected services makes necessary that the performance is done through a net of contacts with different parties (like carriers, hotels, agencies, etc.) and it would therefore be extremely damaging for the tour operator to be subject to the simple consumer change of mind after entering into the contract. Moreover, such a situation would be economically unbearable in the case of *last minute* and *last second* contracts.

The issue of the consumer withdrawal from the sale contract of tourist packages becomes therefore the core and critical point of the tourist negotiation and such an issue becomes even more complex in e-commerce activity due to the normative stratification existing in this field.

The European lawmaker enacted the Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises creating a consumer protection regulation imposing special duties of information on the supplier and recognizing the right of withdrawal from the contract he entered into for the consumer²⁰.

The e-commerce is not expressly mentioned by Art. 1 of the Directive 85/577/EC among its fields of application, but Art. 1, n.º 4 of the Directive 85/577/EC provides that "*This Directive shall also apply to offers made contractually by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 where the consumer is bound by the offer*" and in principle this could be the case

²⁰ See Arts. 3, 4 and 5 of the EEC Directive 85/577/EEC.

of the e-commerce transactions. Moreover, Directive 97/7/EEC on the protection of consumer in respect of distance contracts has given rise to some harmonization problems with Directive 85/577/EC. Nevertheless, the eventual application of the consumer right of withdrawal to e-tourist contracts – and in particular to the *last minute* and *last second* contracts – should be verified according to the provisions of the European Directive 90/314/EEC on package travel, package holidays and package tours.

This Directive, as we have already seen, does not contain the traveller's right to withdraw from the contract, being such right of withdrawal only admitted in case of price variations as set forth by Art. 5 paragraph 5 of the Directive, but the Directive in no way affects the application of the Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, where the tourist contracts are not excluded from the respective ambit of application²¹.

From a different point of view, the right of withdrawal could be understood in accordance with the International Convention on Travel Contracts (CCV) which in its Article 9 provides that "*The traveller may at any time cancel the contract in whole or in part, provided he compensates the organising travel agent in accordance with domestic law or the provisions of the contract*". However, due to the small number of countries that joined the Convention, it cannot be considered as the reference text for consideration²².

Nevertheless, the economic unviability of granting this kind of withdrawal was certainly considered by the European lawmaker in drafting the following general regulation on consumer protection²³: the European Directive 97/7/EEC on the protection of consumer in respect of distance contracts. This provides that the right of withdrawal set forth in Article 6 "*shall not apply [...] to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period [...]*"²⁴ and therefore to almost all the tourist contracts and certainly to all *last minute* and *last second* contracts.

²¹ See Art. 3 paragraph 2 EEC Directive 85/577/EEC.

²² The text of the Convention is accessible at www.unidroit.org/english/conventions/c-trav.htm. The Convention has been signed by Belgium, Burkina Faso, Holy See, Italy, Ivory Coast, Lebanon, Morocco (with the reservations), Niger, Philippines, Portugal, San Marino and Togo; ratified by Belgium, Italy (with the reservations), and Togo; Argentina, Benin and Cameroon (with declaration) have subsequently acceded to the Convention and then Belgium has denounced it. For more details on the implementation process see <http://www.unidroit.org/english/implementation/i-70.htm>.

²³ DELFINI, F., *Vendita via internet* cit. *Supra*.

²⁴ See Art. 3, paragraph 2 EEC Directive 97/7/EEC.

With reference to electronic contracts, reference shall be made to the European Directive 2000/31/EEC of 8 June 2000 on electronic commerce²⁵, enacted to create a legal framework for electronic commerce with the purpose of achieving a balance between business interests and the need to protect consumer rights²⁶. This Directive contains specific provisions in terms of information to be provided (Art. 10) and transparency in which the customers will give their full and informed consent (Art. 11) and be fully aware of means of redress (Arts. 18 and 20)²⁷. Even though such Directive has been enacted with the purpose to create a confident and protective environment for consumers in electronic transactions, it does not contain any right of free withdrawal for the consumer²⁸.

Moreover, the Directive expressly safeguards²⁹ the application of specific Community acts protecting consumer rights, making express reference to the Council Directive 93/13/EEC on unfair terms in consumer contracts, the Directive 97/7/EEC on the protection of consumer in respect of distance contracts and especially the Council Directive 90/314/EEC on package travel, package holidays and package tours, which also does not include any provision concerning a general right of withdrawal in favour of the consumer, as we have already seen.

It must be determined, if the more favourable regulation provided for by the Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises where the right of withdrawal is expressly granted to the consumer by Article 5 should be applied to the tourist contracts (and to the *last minute* and *last second* tourist contracts), or better still if the right of withdrawal should be considered excluded in this kind of contract.

On this matter it should be recognized that the right of withdrawal can not be admitted in favour of the traveller in the tourist contracts, and especially in the *last minute* and *last second* contracts.

The first argument in favour of this view comes directly from the interpretation and the relation among the abovementioned rules.

The electronic conclusion of tourist contracts, and therefore the case of *last minute* and *last second* contracts, sets these kind of contracts in the area of contracts

²⁵ Council Directive 2000/31/EEC, "On Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)".

²⁶ See, in particular, recitals n.ºs 7, 22, 29, 41, 55 and 56 of the Directive 2000/31/EEC.

²⁷ PEARCE G. and PLATTEN N., *op. cit. supra*.

²⁸ On the inadequate protection level granted to consumers by Directive 2000/31/EEC see DIAS PEREIRA A.L., *Comércio Electrónico na Sociedade da Informação: da Segurança Técnica à Confiança Jurídica*, Coimbra, 1999, who criticized the Directive already at the level of proposal.

²⁹ See recital n. 11 of the Directive 2000/31/EEC.

entered into using a distance communication device – internet – and therefore in the area of distance contracts³⁰. The general consumer protection regulation with reference to distance contracts is now set up in the European Directive 97/7/EEC “*On the protection of consumer in respect of distance contracts*” and has expressly excluded from the area of its respective application of the right of withdrawal the sales contract of tourist packages with specific time definition for the execution of the service contemplated therein³¹.

Moreover, the European Directive 2000/31/EEC on electronic commerce has confirmed this kind of approach without providing any kind of general right of withdrawal for the consumer in the electronic contracts.

And the European Directive 90/314/EEC on to package travel, package holidays and package tours goes further in the same direction. There is no general right of withdrawal contemplated therein, being such right exercised only in the case contemplated in Article 4, paragraph 5; and finally the Directive expressly protects the field of *last minute* and *last second* contracts by providing that the provision under which “*all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract*”³² in any way and “*shall not preclude the belated conclusion of last-minute reservations or contracts*”³³.

But there is a more important argument that is based on the economic and social function of the *last minute* and *last second* contractual structure. Indeed the decisive argument to exclude the possibility of granting to the consumer a right of withdrawal from the *last minute* and *last second* contracts, in case of simple change of mind, seems to be in the consideration of these contractual types.

Actually, the granting of a considerable reduction on the ordinary price given by the tour operator against a closing of the contract near the execution date of the tourist package, and the consequent taking up of the risk of the intervening impossibility to receive the performance, and of other impediments anyway related to his position, is the same essence of these contractual relations where the taking up of related risk from the consumer side cannot be set aside. It is the same

³⁰ With reference to electronic contracts as distance contracts see VASQUEZ GARCIA R. J., *La Contratación en Internet*, in PERALES SANZ J. L. (ed.), *La Seguridad Jurídica en las Transacciones Electrónicas*, Madrid, 2002, p. 137; and with special reference to tourist contracts: VIGNALI C., *La prenotazione telematica nell'ambito turistico*, in FRANCESCHELLI V. (ed.), *Commercio elettronico*, Milan 2001.

³¹ The other important aspect of the distance contracts regulation – the information obligation – is mostly respected by the tour operators: the necessary information are present in the on-line offers reproducing the minimum requirements for sale contracts for rendering of services and operate as standard distance contract.

³² Reference is made to Article 4, paragraph 2 (b) of the Directive 90/314/EEC.

³³ See the following paragraph 2 (c).

contractual consideration that it is necessarily based on a significant price reduction from one side and on the taking up of the above mentioned risk from the other.

Moreover, it can not be argued that the contractual clauses by which this kind of result is achieved (and in particular the clauses according to which the price of the tourist package shall be paid in any event independently from any impediment of the traveller, or that the departure date can not be changed on any grounds) are unfair according to the provision of the European Directive 93/13/EEC on unfair terms in consumer contracts, since in the contract consideration the balance of the taking up of these risks is exactly the counter-obligation for the reduced price agreed upon.

Therefore, the price reduction typical of the *last minute* and *last second* contracts marks out their consideration in such a way that justifies the above said risk distribution and the consequent exclusion of the right of free withdrawal for the consumer³⁴. The effective price reduction can be easily verified by the confrontation with the usual price offered by the tour operator for the very same package (for example through the brochures) as well as considering the current standardization of the tourist package offer and the comparability of the product with other similar tourist packages not sold through the *last minute* (and *last second*) channel.

It shall be incidentally pointed out that this kind of approach has been developed with similar arguments for the purpose of the sale of airline tickets.

As mentioned at the beginning of this paper, there is no intention here to enter into the details of this kind of electronic transaction. Nevertheless, it should be noticed that the same principles are also applied in this sector of activity. The low-cost airlines, born in North America, widely developed in Europe and now present also in the Asian market, operate basically on the same principles; and even the "big" airlines have adopted widely this philosophy by providing special cheap fares accessible only through the internet.

In conclusion, the possible solution provided by the European lawmaker on the issue of electronic tourism contracts could be regarded as a possible pattern to be followed, provided, however, that a similar normative stratification is avoided in favour of better clarity of the provided solution.

³⁴ See also DELFINI, F., *Vendita via internet cit. supra*; MORANDI F., *I contratti di viaggio*, in MORANDI F., COMENALE PINTO M. M. and LA TORRE M. (ed.), *I contratti turistici*, Milan, 2004.

