

When the Package Holiday is Not Realized

A Piece of EU Consumer Law under Review

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Abstract

When a package travel contract is not realized, the organizer assumes the obligation to inform the consumer, to provide a refund and to provide alternative services. All these measures form part of the core of the EU's legislative acquis and are mainly governed by Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. The Directive employs a fragmented approach and is currently under review. This area also remains outside the new comprehensive approach introduced by the Proposal for a Directive of the European Parliament and the Council of 8 October 2008 on consumer rights, and it would appear that this harmonization 'deficit' will be covered by means of 'vertical action'. The aims of this paper are to contrast the existing regulations in this field with the general rules of consumer contract law, to identify the inconsistencies involved and to present some proposals regarding performance rules.

Keywords: package holiday, consumer law, contract law.

A. Introduction

Currently, revisions are being made to Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (hereinafter, the 'Package Travel Directive').¹ After more than twenty years, this Directive has become crucial for consumer rights with regard to issues such as the information that must be provided, payment, transfer of bookings, significant changes to the package holiday, cancellation by the organizer and liability, assistance or insolvency. Nowadays, package holidays are not just two weeks spent almost entirely under a beach umbrella in a hotel with air transport included, but extend to very innovative products, e.g. genealogy holidays to countries for people whose ancestors

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1 OJ 1990 L 158/59. A list of responses to the public consultation on the revision of the Package Travel Directive was published by the European Commission in March 2010 and is available at: http://ec.europa.eu/consumers/rights/public_consultation_responses_en.htm.

once emigrated from these destinations.² Moreover, with the advent of information technology (IT), including the Internet, traditional travel agents have gradually been replaced. These trends mean that the Package Travel Directive is bound to have great impact.

This paper focuses on the remedies provided in the Package Travel Directive when there is a significant change in the package holiday and the consumer decides to terminate the contract or when the organizer cancels the package before the agreed date of departure for any cause other than the fault of the consumer.³ On this basis, the situation is referred to in this paper by the expression – and regarded as equivalent to – ‘when the package holiday is not realized’, whether or not the organizer is unable to perform the contract.⁴ We analyze whether the following obligations are appropriate in such situations: the organizer’s obligation to inform the consumer (Section B), the obligation to provide a refund to the consumer (Section C) and the obligation to provide the consumer with an alternative service (Section D).

For this purpose, the package travel regulation will be compared with other performance rules protecting consumers, such as Article 7(2) and (3) of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1990 on the protection of consumer in respect distance contracts (hereinafter, ‘Distance Selling Directive’)⁵ and Articles 8 and 14 of Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or long delays in flights (hereinafter, ‘Airline Regulation (EC) No. 261/2004’).⁶ However, although there are many relevant cases of national disputes that have occurred when the package holiday is not realized,⁷ the European Court of Justice has not been required to interpret the relevant EU

2 According to Art. 2(1) of the Package Travel Directive: “For the purposes of this Directive: [...] ‘package’ means 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. The separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive”. In *Case C-400/00, Club-Tour, Viagens e Turismo SA v. Garrido and Club Med Viagens Ltd.*, [2002] ECR I-4051, the European Court of Justice stated that the Package Travel Directive also applies to holidays organized at the request of, and in accordance with the specifications of, the consumer. As for the concept of a package, see also the English case *The Association of British Travel Agents Ltd (ABTA) v. Civil Aviation Authority (CAA)*, [2006] EWCA Civ. 1299 (Lord Chadwick); [2007] 2 Lloyd’s Rep. 249 (CA).

3 Art. 4(5) and (6) of the Package Travel Directive.

4 Cf. the more restrictive situation in which the “business is unable to fulfil consumer’s order by distance communication” as provided in Art. III.-3:108 of the Draft Common Frame of Reference of the Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) (hereinafter, ‘DCFR’).

5 OJ 1997 L 144/19.

6 OJ 2004 L 46/1.

7 See, for instance, the Spanish case *SAP Bizakaia* of 25 September 2000, seccion 4ª. JUR 2000/304355.

law on this matter. The public consultation conducted by the European Commission on the revision of the Package Travel Directive⁸ is also not very relevant because it does not focus on these issues.

The Package Travel Directive forms part of the consumer *acquis*⁹ and was enacted in the first stage of EU consumer policy when certain minimum standards were set for all member states in application of the minimum harmonization principle.¹⁰ This perspective has recently been abandoned with the Proposal for a Directive of the European Parliament and of the Council of 8 October 2008 on consumer rights (hereinafter, 'pCRD') in other important fields of consumer law.¹¹ This is to avoid distortions in competition resulting from minimum harmonization,¹² although the final outcome of the harmonization process is far from clear.¹³ The Package Travel Directive, however, is not integrated into the pCRD. Some scholars suggest that the proposal should only incorporate consumer directives that "embody significant contract law, and are not restricted to a single market sector" in the manner of the Timeshare Directive.¹⁴ Also, the fact that there is no opportunity for the Package Travel Directive to be applied to contracts of sale

- 8 See the working document of the Commission on the Package Travel Directive, available at: <http://ec.europa.eu/consumers/rights/commission_working_document_final26-07-2007.pdf>. See also the summary of responses in 'Working Document of the Commission: Responses to the consultation on the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours: Summary of Responses' of 26 July 2007, available at: <http://ec.europa.eu/consumers/rights/summary_responses_publication_final_30012007.pdf>.
- 9 The Package Travel Directive is mentioned in Measure I of the 2004 Action Plan jointly with the Distance Selling Directive, COM (2004) 651 final.
- 10 Art. 8 of the Package Travel Directive.
- 11 COM (2008) 614. The pCRD aims to integrate the Distance Selling Directive, Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29, and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12 (hereinafter, the 'Consumer Sales Directive'), into a single horizontal directive.
- 12 In the Commission's opinion, the minimum harmonization principle results in a low level of consumer confidence in cross-border shopping. For a detailed discussion, see J. Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?', 37 *CMLRev* 2000, p. 367 at p. 392 *et seq.*; and H. Micklitz, J. Stuyck & E. Terryn (Eds.), *Consumer Law – Cases, Materials and Text*, 2010, p. 20 *et seq.* and p. 157 *et seq.*
- 13 Recently, Commissioner Viviane Reding has indicated at least a rethink of the Commission's general approach by targeting the harmonization. See V. Reding, 'An Ambitious Consumer Rights Directive: Boosting Consumers' Protection and Helping Businesses', Speech/10/91, 15 March 2010, available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/91&format=HTML&aged=0&language=EN>>. Not to mention that the use of directives has been considered as no longer appropriate for the development of EU consumer law. See C. Twigg-Flesner, 'Time to Do the Job Properly – The Case for a New Approach to EU Consumer Legislation', 33 *JCP* 2010, p. 355 at pp. 364-366.
- 14 Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts, OJ 2009 L 33/10. See V. Roppo, 'From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?', 5 *ERCL* 1009, p. 304 at p. 305 *et seq.*

has been cited as another possible reason for the exclusion of the Package Travel Directive from the pCRD, unlike the other directives integrated into the proposal, such as the Distance Selling Directive.¹⁵ Arguments for the exclusion of the Package Travel Directive remain unclear, but there is no doubt that the aim of the recent changes is to go beyond a sector-specific approach and to provide a stronger framework for contract law in Europe.

Although various harmonization principles might continue to govern consumer law issues in the future, in our opinion the evolution of European consumer contract law should be considered in the light of the inevitable revision process of the Package Travel Directive.¹⁶ Although there is uncertainty about the harmonization principle applicable to package travel regulation,¹⁷ this specific sector should not be kept separate without taking other EU consumer contract law into consideration.¹⁸

So, where appropriate, the model rules of the Draft Common Frame of Reference (DCFR) will be considered in this paper.¹⁹ At this point, the performance rules do not form part of those areas where a targeted or a selective shift to full harmonization has been recommended, such as the duty to notify the seller of a lack of conformity within a specified time period,²⁰ and perhaps for this reason no rule on performance of the contract is included in the pCRD. Even so, the aim of this paper is to show that no regulation based on a sector-specific approach ('vertical action') should be taken in isolation.

Finally, we conclude with remarks that encourage the connection of the proposed measures regarding package holidays with the EU harmonization process (Section E).

- 15 The Package Travel Directive has no bearing, either directly or indirectly, on the sale of goods law, unlike the eight directives under review in the project. With regard to the prominence of sales contracts in the context of the review of the consumer *acquis*, see V. Mak, *Performance-Oriented Remedies in European Sale of Goods Law*, 2009, p. 18 *et seq.*
- 16 Harmonization is mainly focused on areas in which existing legislation is in place. No 'deregulation' of the EU legislation is on the agenda. The review or, more precisely, the update of the Package Travel Directive is therefore unavoidable. See Report of the European Commission (Health & Consumers DG) on the Review of the Package Travel Directive of 27 October 2009.
- 17 A full harmonization principle might require member states to considerably reduce a well-established national level of consumer protection and prevent member states from increasing that level in the future. See K. Tonner, 'Kommt die Vollharmonisierung auch im Pauschalreiserecht?', 3 *ReiseRecht Aktuell* 2009, p. 113 at p. 113.
- 18 In this context, there is debate about whether or not the rules protecting consumers should be separate from the general rules in the law of obligations and contract law. See Micklitz *et al.*, *supra* note 12, at p. 169.
- 19 Art. III.-3:108(1) DCFR. See C. Von Bar, E. Clive & H. Schulte-Nölke (Eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, 2009. Additionally, the investigations by the Commission show an increasing trend in favour of the adoption of non-sector-specific measures, such as an optional instrument, for which the DCFR may serve as a basis. See Mak, *supra* note 15, at p. 23 *et seq.*
- 20 See Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final (8 February 2007) (hereinafter, 'Green Paper'), at p. 10. However, areas of full harmonization remain uncertain. See Reding, *supra* note 13.

B. The Obligation to Inform the Consumer

I. A Gap in the Current Regulation

The organizer undertakes to provide package holidays on a specific date or within a specific period. Sometimes it becomes impossible to fulfil such a promise for a particular reason, for example because an air carrier goes bankrupt, a hotel is overbooked or the package is not interesting enough for the organizer, such as when the number of persons enrolled for the package is less than the minimum number required.²¹

Unlike in the case of transportation regulations,²² The Package Travel Directive contains no rules on when and how the information must be given to the consumer in cases where a package holiday is not going to be realized. This issue is not regulated individually by the national law of the European member states either. However, the organizer (or, where appropriate, the retailer) is not allowed to leave it until the last moment to inform the consumer.²³ In practice, notice to the consumer regarding the cancellation of a package holiday is provided between 14 and 30 days prior to the planned date of departure.²⁴

Likewise, the means by which the consumer is informed of the problems relating to a package holiday before departure, such as the inability to provide a particular service or even the entire package, is crucial. However, this issue has not been the focus of the current debate, and in practice information is provided in various forms: orally, by fax or by e-mail.

The current regulations are also silent on the extent of the information to be provided to the consumer. Should such information indicate only the significant change in the package holiday or the cancellation by the organizer? Or should the consumer also be informed of remedies for non-performance, including information about options available when the package holiday is not realized?

21 The list of responses to the public consultation on the Package Travel Directive revision published by the European Commission in March 2010 indicates that the organizer cancels an average of 47.46 per 1,000 travel packages on the grounds that there are too few participants. See *supra* note 1.

22 See Art. 14 of Airline Regulation (EC) No. 261/2004 and Art. 20(1) and (4) of Regulation (EU) No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport, 03 2011 L 55/11.

23 See, e.g., the Spanish judgment SAP Madrid of 22 December 2006, *Sección 13ª*, JUR 2007\162048, in which the consumers were informed on the date of departure – at the airport – of the operator's inability to perform the contract even though the travel agent had known that no flights to the Dominican Republic were available during the previous five days because of Hurricane Jeanne.

24 Of the 49 professional associations and companies approached, only twelve responded to the questionnaires distributed in the framework of the public consultation process conducted by the European Commission with regard to this issue. See *supra* note 1.

At present, the consumer is offered two options if he or she terminates the contract²⁵ when there are significant alterations²⁶ or if the organizer cancels the package holiday before the agreed date of departure (for causes other than the fault of the consumer): to accept a substitute package of equivalent or higher quality or to be refunded all sums paid under the contract.²⁷ Thus, in this way, the regulations exclude a cure for non-conforming performance.²⁸ Sometimes, the trader may be given a chance to make good after an instance of non-delivery or to repair or replace defective goods before the consumer is allowed to terminate the contract or claim damages. The cure allows the trader to insist upon performance in situations where the consumer may prefer a different remedy, unless an anticipatory breach occurs.²⁹ Nevertheless, a right to cure on the part of the trader is replaced by the options given to the consumer by the Package Travel Directive. The consumer will be entitled to terminate the contract and is not required to wait for the trader's offer of a cure. An anticipatory breach occurs in circumstances regulated by Article 4(6) of the Package Travel Directive, for example when the consumer terminates the contract due to a significant change – pursuant to Article 4(5) – or if, for whatever cause other than the fault of the consumer, the organizer cancels the package before the agreed date of departure.³⁰

Stakeholders were consulted by the European Commission about what other information they considered to be important for consumers when purchasing the services of a travel agent, but none of the 119 responses referred to information to be provided when the package is not realized.³¹ In fact, companies generally prefer to sell a substitute package if the consumer decides to terminate the contract, and some organizers and retailers do not inform consumers of their right to reim-

25 The English version of Art. 4(6)(1) of the Package Travel Directive refers to when the consumer “withdraws from the contract”. However, this provision actually does not regulate a consumer's right to withdraw from the contract – to be exercised for any reason – but regulates termination as a remedy for non-performance.

26 This can include significant alterations to the package price. See Art. L.211-12 and 13 of the French *Code du tourisme*.

27 Art. 4(5) and (6) of the Package Travel Directive.

28 Arts. III-3:201-205 DCFR.

29 A creditor may terminate a contract before its fulfilment is due if the debtor has declared that there will be a non-performance of the obligation, or if it is otherwise clear that there will be such a non-performance, and if the non-performance is fundamental (Art. III.-3:504 DCFR).

30 Regarding the seller's right to a cure, see Art. 8:104 of the *Lando Commission's Principles of European Contract Law* (hereinafter, ‘PECL’). For a general perspective, see Mak, *supra* note 15, at p. 149 *et seq.*

31 *Id.* Nevertheless, on a scale of 1 to 5, information about whether a minimum number of participants is required for a package holiday to occur and the deadline for informing consumers of cancellation if those numbers are not achieved was considered extremely important (4.32) when a consumer is purchasing a travel package (5 = essential, 4 = very important, 3 = important, 2 = slightly important, 1 = not important). Such information was more valued by consumer organizations (4.78) than by companies (3.92).

bursement.³² Offering an alternative package is more appealing for the organizer and retailer from a commercial point of view. After concluding the contract some consumers are easily influenced and pre-contractual information duties, including the provision of information about the consumer's choice between an alternative package or a refund, are insufficient to guarantee a free decision. This lack of information for the consumer reduces the efficacy of their rights.³³ In short, the current information requirements provided in the Package Travel Directive are focused excessively on the pre-contractual stage,³⁴ so additional information for the consumer concerning the options after having concluded the contract should be introduced.³⁵

II. *The Need for a More Complete Regulation of the Obligation to Inform the Consumer*

As important gaps in the current regulation can be detected, we consider that there is a need for more complete regulation. For this reason, in our opinion, the

32 According to a survey addressed to 30 travel agents in Girona (Catalonia, Spain), when a package holiday is cancelled by the operator, a refund is offered to the consumer only in 48% of cases. See N. Soler Barnés, *Cancel·lació d'un viatge combinat segons la Llei 21/1995: estudi de l'aplicació deficient d'una regulació avançada* (final degree project on file at the University of Girona, 2007) p. 43 et seq.

33 The information about consumer rights when the package holiday is not realized is problematic. For instance, see the English case *Hook v. First Choice Holidays & Flights Ltd.*, [1998] CLY 1426, where the organizer knew four days before the scheduled departure that the hotel was not available, but the claimants were not informed of this. The claimants were told that the alternative being offered to them was at the same resort and of equivalent quality. The claimants were also told that, if they chose to cancel, they would only receive a 10% refund. The claimants reluctantly agreed to the change. The hotel, although of the same star rating, was of inferior quality. Thus, it was decided that the claimants' holiday had not been entirely ruined and they were entitled to a 20% discount on the price for diminution in value (£200) and £250 for distress and disappointment. At this point, the judge said that the claimants had not been properly informed of their full rights under Reg. 12 of the English Package Travel Regulations 1992 and that the organizers should inform consumers in writing of the options available to them in such circumstances. In this case, he felt that there had been "an element of H [the claimant] being duped into believing he had no right to cancel". See also *Crump v. Inspirations East* [1998] CLY 1427.

34 Arts. 3 and 4(1) and (2) of the Package Travel Directive. The consumer *acquis* is also mainly oriented towards pre-contractual duties, see Art. 6(2) of the pCRD. See also Arts. II.-3:101-109 DCFR.

35 Contrast with Art. 14 of Airline Regulation (EC) No. 261/2004. This Regulation does not make express reference to the right to reimbursement either.

trader should ensure that a notice in textual form on a durable medium³⁶ is clearly displayed to the consumer as soon as possible to inform him or her that the package holiday is not going to be realized (using an alternative means for blind and visually impaired persons where appropriate) and that he or she has the right to choose between an alternative service or a refund.³⁷

Additionally, we advocate establishing a particular remedy for breach of duty to provide this information. As the current remedies regarding pre-contractual information duties are not appropriate to this case,³⁸ we propose that, if the trader does not give the consumer the choice between an alternative service or a refund, reimbursement should be possible until the trader fully complies with its duty to provide this information, even when then the consumer decided on an alternative service prior to this. In consequence, the period for taking up the choice should not commence until the information requirement has been fulfilled. Regardless of the starting time, the consumer's option to choose should be valid up until a year from the time of the conclusion of the contract.

C. The Obligation to Refund the Consumer

The obligation to provide the consumer with a refund when the package holiday is not realized is another important issue to be examined. With regard to this issue, we must consider the differences between the package travel regulations and European contract law in general.

I. Current Status: Minimum Regulation and Room for Disharmony

Payment in advance is very common for package holidays. An agreement is made to provide accommodation, transport and other services on a specific date or within a specific period. Consequently, the organizer is usually obliged to provide a refund if services are unavailable. A significant instrument of consumer protection in this context would be the general prohibition of deposits. However,

36 For the purposes of the model rules of the DCFR, "a statement is 'in writing' if it is in textual form and in characters that are directly legible on paper or another tangible, durable medium" (Art. I.-1:106(1)). The phrase 'textual form' refers to a statement "expressed in alphabetical or other intelligible characters", expressed "by means of any support that permits reading" and "recording the information contained in the text and its reproduction in a tangible form" (Art. I.-1:106(2)). A durable medium is defined as "any material on which information is stored so that it is accessible for future reference for a period of time adequate for the purposes of the information and that allows the unchanged reproduction of this information" (Art. I.-1:106(3)). The term 'durable medium' consequently covers, e.g. floppy disks, CD-ROMs, DVDs and hard drives in personal computers or servers on which electronic mail is stored. In contrast, it generally excludes Internet sites unless the information has been stored on the website for a sufficient period of time and cannot be altered by the person who has posted the information. For further details, see Von Bar *et al.*, *supra* note 19, at p. 103 *et seq.*

37 Cf. Art. 14 of Airline Regulation (EC) No. 261/2004.

38 Contrast with model rules of Art. II.-3:109 DCFR. Other remedies are closely related to the right of withdrawal. See Art. II.-3:103(1), Art. II.-3:104(4), Art. II.-3:105(3) DCFR and Art. 13 of the pCRD. Restitutory effects will be very limited if the consumer terminates the contract after the alternative package holiday has been provided in its entirety.

advance payments are permitted for almost all tourism activities, with the exception of timeshares, long-term holiday products and exchange contracts.³⁹ The total level of consumer fraud in package holidays is in fact low enough to permit advance payments by the consumer.

At present, Article 4(6), first subparagraph, point (b) of the Package Travel Directive provides a right to reimbursement. However, unlike in the case of transportation regulations,⁴⁰ this right is regulated very little. No reference to how and when the consumer must be refunded is made. Only some EU member states have developed a rule regarding the time frame for repayment of all sums paid under the contract, for example ten days after cancellation by the consumer (Latvia) or no time limit (Czech Republic).

Likewise, no rules exist regarding the extent of the reimbursement or the means by which such a right may be exercised.⁴¹ In addition, there is no compelling reason why such a right should not be exercised by those consumers whose plans are disrupted for whatever reason after the agreed date of departure but before the actual departure. Article 4(7) provides remedies if a significant proportion of the services contracted cannot be provided after departure. Consequently, there is a gap in the regulations. It is possible to envision a consumer being caught between these provisions and being denied a remedy altogether. For example, what if a consumer boards a ship that is then unable to commence a cruise?⁴² In this instance, the cancellation occurs after the agreed date of departure but before the actual departure. The consumer is therefore not entitled to the benefits that he would otherwise have had under Article 4(6) and (7) of the Package Travel Directive,⁴³ and this gap should be filled. So, in this sense, for example, Article 4(6), first subparagraph of the Package Travel Directive could state the following:

If the consumer terminates the contract pursuant to para. 5, or if, for whatever cause other than the fault of the consumer, the organizer cancels the

39 See Art. 9(1) of the Timeshare Directive. Concerning the prohibition of advance payments. For an overview of the Timeshare Directive, see <http://ec.europa.eu/consumers/cons_int/safe_shop/timeshare/index_en.htm>.

40 Art. 8(1) of Airline Regulation (EC) No. 261/2004.

41 There are some provisions regarding how the consumer can choose between an alternative package and a refund. E.g. L. 211-13 and 14 of the French *Code du tourisme*.

42 See, e.g., the Spanish judgment SAP León of 24 November 2005, *Sección 2ª*, JUR 2006\9061, in which consumers boarded a confiscated boat to go on a cruise that was cancelled by the organizer. The consumers were practically refunded in full and not offered an alternative service.

43 With regard to English law, see D. Grant & S. Mason, *Holiday Law – The Law Relating to Travel and Tourism*, 2007, p. 293 *et seq.* However, the ABTA's Code of Conduct from 20 January 2009 simplifies the issue by not including the words 'agreed date' (Clauses 3A and 3B). The text is available at: <www.abta.com/filegrab/?ref=84&f=codeofconduct280208>. See also Regs. 12 and 13 of the English Package Travel Regulations 1992; I. Kilbey, 'Delayed Departure, Cancellation and the Package Travel Regulations', 6 *International Travel Law Journal* 1998, p. 110 at p. 112 *et seq.*; A. Saggerson, 'Delayed Departure & Cancellation: Hope for Consumers the Other Side of Midnight', 1 *International Travel Law Journal* 1999, p. 6 at p. 8 *et seq.*

package before *departure*, the consumer shall be entitled [...]. [emphasis added].

This would permit the application of Article 4(6) and (7) of the Package Travel Directive when the cancellation occurs after the agreed date of departure but before any actual departure takes place. Keeping a distinction between a cancellation happened before the agreed date of departure and a later cancellation does not appear to be justified.

On the other hand, the obligation to provide a refund when the package holiday is not realized will be similar across Europe. The vast majority of the member states have transposed the provisions of Article 4(5) and (6) in a very similar way to the system provided in the Directive. However, important differences arise from the Package Travel Directive, because some national norms include penalties for the organizer when the package is cancelled. Thus, for instance, if the organizer cancels between two months and fifteen days prior to departure, it is obliged to pay the consumer 5% of the package price.⁴⁴ In this way, the cancellation rights go beyond restitutionary effects⁴⁵ whether or not the trader is responsible for the cancellation and produce another significant deficit in the harmonization.⁴⁶

II. *The Need for Better Harmonization Regarding the Obligation to Refund the Consumer*

In view of the above-mentioned gaps, we consider that the ways in which the consumer is offered the reimbursement should be regulated, for example in cash, by electronic bank transfer, by bank order or bank cheque or even (with an agreement signed by the consumer) via travel vouchers and/or services.⁴⁷ It would also be appropriate to stipulate that a refund should be provided as soon as possible and, in any case within seven days, starting from the moment when the consumer communicates the termination of the contract to the organizer or retailer.⁴⁸ Here, an additional provision prohibiting the organizer (and, where appropriate, the

44 The figure rises to 10% of the package price if the operator cancels between fifteen and three days prior to departure and 25% if the operator cancels less than 48 hours prior to departure. See Art. 159(3) of the Spanish Royal Legislative Decree 1/2007 of 16 November 2007 on consumer protection. For a comment, see J.M. Bech Serrat, 'Regulación de los Viajes Combinados: Aclaraciones de un Texto Refundido', 6 *Revista de Derecho Privado* 2008, p. 55 at pp. 65-67.

45 Actually, the right to reimbursement provided in Art. 4(6)(1)(b) of the Package Travel Directive will be in accordance with EU model rules on restitutionary effects of termination: whether the consumer has received any benefits from the organizer is the crucial question for the recovery of previously incurred expenses based on the performance of the contract by the other party. See Art. III.-3:104(4) 4 and Arts. III.-3:510-514 DCFR.

46 Cf. Art. III.-3:510 DCFR.

47 Cf. Art. 8(1) of Airline Regulation (EC) No. 261/2004.

48 Art. III.-3:108 DCFR establishes that the consumer must be refunded any sums paid "without undue delay and in any case within 30 days". See Von Bar *et al.*, *supra* note 19, at p. 809 *et seq.* A time limit beginning from the moment of the conclusion of the contract would create more certainty and make it easier to prove when the start occurred, but this method is not appropriate for services to be provided on a specific date or within a specific period.

retailer) from retaining any of the money paid by the consumer for any expenses incurred could even be recommended. The current pCRD does not attempt to address these issues, nor did the consultation process that led to the revision of the Package Travel Directive do so.⁴⁹ However, in our opinion, the harmonization of contract law is desirable.

Likewise, although the minimum harmonization principle⁵⁰ excludes further restitutionary effects that are contrary to the consumer's interest,⁵¹ but there is no reason for not providing cancellation penalties, even if differences between the national law arise as a result of implementing Article 4(6), first subparagraph of the Package Travel Directive regarding the measure. In our opinion, cancellation penalties might be provided even when the number of persons who have purchased the package is less than the minimum number required or in the case of *force majeure*, despite the current exclusion of 'compensation' in Article 4(6), second subparagraph. This is because penalties in European contract law do not depend on whether or not the event is attributable to the organizer, unlike compensation for damages. In addition, cancellation penalties should exist without prejudice to compensation as in Article 4(6), second subparagraph.⁵² In summary, although cancellation penalties are not a suitable focus for full harmonization,⁵³ some additional rules might be introduced into the Package Travel Directive to avoid differences between national legal systems.

D. Providing the Consumer with Alternative Services

The last measure relating to contract performance in this paper is the provision of alternative services. Unlike the organizer's obligation to provide a refund to the consumer, the provision of alternative services related to package holidays is widely regulated.

49 See *supra* note 1.

50 Art. 8 of the Package Travel Directive.

51 Art. 4(6) of the Package Travel Directive allocates the risk of events over which the parties have no control by using mandatory rules. So, any contract travel term drawn up to avoid the frustration of the contract infringing on this provision, e.g. by indicating that if a strike occurs, the contract will not be frustrated, will become void and, where appropriate, will be regarded as unfair. In this respect, see Arts. 3 and 4 and points (d), (f) and (o) of the Annex to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

52 Conversely, no penalties for late payment by the organizer or retailer seem to be necessary. Member states should avoid providing such penalties based on other rules, unless the business is unable to fulfil the consumer's order via distance communication. On this subject, see Art. 7(1) of the Distance Selling Directive and Art. III.-3:108(1) DCFR.

53 See the transposition of Art. 7(2) of the Distance Selling Directive and Art. 4(6) of the Package Travel Directive. When analyzing the limits of full harmonization, differences between penalties for non-compliance are pointed out in the Opinion of the European Consumer Consultative Group (hereinafter, 'ECCG') on the pCRD adopted on 6 October 2009, as some of the significant causes of consumer frustration in cross-border cases (point 9). See document available at: <http://ec.europa.eu/consumers/empowerment/docs/20091006eccg_opinion.pdf>.

I. *Providing Alternative Services under the Current Regulations*

Assuming that the organizer and/or retailer can offer a suitable substitution, the consumer is offered the possibility of an alternative package of equivalent or higher quality upon terminating the contract after significant changes take place. The same occurs when the organizer cancels the package before the agreed date of departure for causes other than the fault of the consumer.⁵⁴

Tour operators face the inevitable fact that a service designed and marketed long in advance of performance – sometimes many months (if not years) in advance – cannot always be delivered as promised. In some cases, moreover, they are simply not willing to provide the services for economic reasons. In such cases, organizers often offer an alternative holiday to clients to avoid cancellation and having to pay substantial damages.⁵⁵ It is not optional for the organizer to offer an alternative package, because the consumer is entitled to ask for one if the organizer is able to offer it. Nor does the organizer have the option simply to refund the consumer's money rather than offering an alternative. Occasionally, the organizer may not wish to offer an alternative, if available, especially to a 'difficult' client who is already unhappy with the modifications to the contract or cancellation, but the Package Travel Directive precludes this possibility.⁵⁶

"A substitute package of equivalent or superior quality"⁵⁷ means that, if the organizer is unable to offer two weeks at the chosen four-star Gran Hotel, then he can offer the consumer a stay at the four-star Excelsior Hotel just a few hundred yards down the beach for the same dates. This would clearly be a package of equivalent quality. Sometimes a substitute package entails some modifications to the contracted package.⁵⁸ A substitution of superior quality will occur if the organizer is unable to offer a four-star alternative but is able to upgrade the consumer to a five-star hotel in the same resort.⁵⁹

The regulations do not indicate whether the organizer can charge extra when he is only able to offer an alternative that is far superior to the original destination.⁶⁰ However, the last sentence of Article 4(6), first subparagraph, point (a) does state that "[i]f the replacement package offered is of lower quality, the

54 Art. 4(6)(1)(a) of the Package Travel Directive.

55 The obligation to offer a substitute package is also laid down in the ABTA's Code of Conduct (Clauses 3B(i), 3E(iii) and 3I). See *supra* note 43.

56 Art. 4(6)(1)(a) of the Package Travel Directive.

57 *Id.*

58 For example, in the Spanish Judgment SAP Málaga of 14 May 2007, *Sección 4ª*, JUR 2007\359572, consumers were informed in writing about a hurricane in Mexico and were offered two options by the travel agent: (a) to take the contracted package holiday to Cuba and to Cancún if 'weather permitted' or (b) to cancel the tour package and have their money refunded. Consumers opted for the alternative package, but the weather conditions did not improve, so they were obliged to stay in Cuba for the whole holiday. The judge held that the consumers had been properly informed of their full rights.

59 See Reg. 13, para. 2(a) of the English Package Travel Regulations 1992; and Grant & Mason, *supra* note 43, at p. 287.

60 For example, if a consumer from Toulouse books a last-minute two-night city break in Paris at a two-star hotel at the height of the season, but the organizer only has a 10-day package in Ushuaia at a luxury hotel, some organizers offer the package to Ushuaia to the consumer as long as he or she is prepared to pay the difference in price.

organizer shall refund the difference in price to the consumer". The inference that can be drawn from this is that if the regulations do provide for a financial adjustment when the consumer is offered an inferior quality package, but not when the organizer offers a far superior package, then this must be because the operator is not allowed to charge extra for the superior charge. If it had been intended for the tour operator to be able to charge extra, then this would have been provided for in the Directive.⁶¹

Most alternative package holidays are of equivalent or higher quality than the one contracted,⁶² although packages of lower quality can also be offered. According to the last sentence of Article 4(6), first subparagraph, point (a), if the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer. When the organizer does not fulfil the quality standards agreed upon by both parties (e.g. a hotel room without the promised sea view), this will constitute a breach of contract. At this point, it will be possible to exercise a right to reduce price.⁶³

We now make a proposal regarding the measure to provide the consumer with alternative services.

II. *The Need for the Consumer's Right to Replacement and Complementary Information Requirements*

The remedies provided in the Package Travel Directive when the package is not realized are more consumer-friendly than remedies for non-performance. A cure by the debtor is preferable to termination in the scheme of the remedies for non-performance only.⁶⁴ Likewise, the hierarchy of the remedies for non-conforming goods in the Consumer Sales Directive does not favour the consumer, and it is only package holiday regulation that allows the consumer to terminate the contract directly.⁶⁵

61 In contrast, Reg. 14 of the English Package Travel Regulations 1992 expressly provides that, where alternative arrangements are made for a consumer after departure, these arrangements shall be at no extra charge to the consumer. Starting from this regulation, Grant & Mason, *supra* note 43, at p. 289 *et seq.*, admit that an opposing argument can be constructed because the consumer is in a much stronger position before departure to decide whether or not to pay any proposed extra charges.

62 According to the survey by Soler Barnés, *supra* note 32, at p. 46, 93.33% are of equivalent or higher quality.

63 Regarding the price reduction, see Art. 9:401 PECL, Art. 3(5) of the Consumer Sales Directive, Art. 10(2) of the Airline Regulation (EC) No. 261/2004 and the Art. III.-3:601 DCFR. As for comments on these texts, see O. Lando & H. Beale (Eds.), *Principles of European Contract Law (Parts I and II)*, Vol. I, 2000, at p. 381 *et seq.*; Von Bar *et al.*, *supra* note 19, at p. 910 *et seq.*; with regard to price reduction when providing hotel services, see J.M. Bech Serrat, 'Quality of Hotel Service and Consumer Protection: A European Contract Law Approach', 32 *Tourism Management* 2011, p. 277 at p. 282 *et seq.*

64 Contrast Art. 4(5) and (6) of the Package Travel Directive with Arts. III.-3:101:713 DCFR.

65 The right to repair and replacement prevails: see Art. 3(3) of the Consumer Sales Directive. For a critical approach to such a hierarchy, see J.M. Bech Serrat, 'Reparar y sustituir cosas en la compraventa: evolución y últimas tendencias', 1 *Indret* 2010, at p. 38 *et seq.*, available at: <www.indret.com/pdf/697_es.pdf>.

In practice, however, organizers take advantage when converting the option of providing the consumer with alternative services into an alternative obligation or a method of performance.⁶⁶ So when the package holiday is not realized, for example in cases in which the number of persons enrolled for the package is lower than the minimum number required,⁶⁷ the business decides to offer an alternative package, instead of providing the agreed service. As a result, a considerable degree of arbitrariness is possible.⁶⁸

Some parallels exist here with contract terms that enable the trader to alter other terms of the contract, including the possibility of making alterations to characteristics of the product or service, which are presumed to be unfair.⁶⁹ However, a contract term will not be seen as unfair when the trader reserves the right to unilaterally alter the conditions of an open-ended contract as long as the consumer is informed with reasonable notice and the consumer is free to terminate the contract.⁷⁰

Thus, termination rarely occurs in package holidays, and there is a gap in the information provided when the package holiday is not realized. This restricts the consumer's choice between an alternative package and termination.

In our opinion, in order to avoid such illegal practices, a right to replacement should be provided for under the package travel regulations – one that is identical to the performance-oriented remedy for a delivery of defective goods in sales. The organizer should be required to replace the services free of charge unless this is impossible, disproportionate or of such a personal character that it would be unreasonable to enforce it. In such cases, the consumer should not be entitled to require an alternative service (e.g. transport or accommodation) and the contract should be terminated.⁷¹

66 Art. III.-2:105 DCFR.

67 Art. 4(6)(2)(i) of the Package Travel Directive. Not achieving the minimum number of persons required was the most common answer that travel agents provided when they were asked to give their main reasons for cancelling package holidays (73.33%) in the survey results presented by Soler Barnés, *supra* note 32, at p. 47. Only a small portion of respondents considered *force majeure* cases (20%) and provider failures (6.67%) to be the main causes of cancellation.

68 The trader can allege inability to perform the contract if it prefers to fill later orders received for a higher amount of money, whereas the consumer will not be able to challenge this. In practice, the trader's obligation to provide the service becomes an alternative obligation, because the consumer will find it difficult to verify the trader's inability to perform.

69 Ann. III(1)(k) of the pCRD.

70 Ann. III(4) of the pCRD.

71 See Art. 9:102 PECL, Arts. 4:202 and 4:204(1) of the Principles of European Law on Sales (PEL S), Art. 3(3) of the Distance Selling Directive, Art. III.-3:302 DCFR and Art. 26 of the pCRD. Restrictions on the consumer's freedom of choice between the termination of the package travel contract and alternative services should be established by the European legislator. For instance, performance should not be required if it would be unreasonably burdensome or expensive and would involve disproportionate effort on the part of the trader in comparison with termination. Contrast this with Grant & Mason, *supra* note 43, at p. 288, who suggest that, ultimately, this will be a financial decision for the organizer based on Reg. 13 of the English Package Travel Regulations 1992. Regarding limitations of the consumer's right to choose between repair and replacement, see Mak, *supra* note 15, at 130 *et seq.*

Moreover, additional rules on information should be introduced to guarantee the effectiveness of the consumer's right to replacement. 'In the brochure' and 'pre-contract' were the preferred stages for when consumers should be informed by the stakeholders.⁷² However, in our opinion, consumer rights are not sufficiently guaranteed by the requirement for traders to put the contract terms in writing (or another form that is comprehensible and accessible to the consumer) and to communicate them to the consumer before the conclusion of the contract.⁷³ In the event that the package holiday itself will not be realized,⁷⁴ the organizer (or, where appropriate, the retailer) should ensure that the consumer is duly informed of the right to replacement, even in the case of a last-minute booking.⁷⁵ As mentioned above, a prolongation of the period for the consumer to choose, in the case of a breach of this information duty, should be contemplated.⁷⁶

Therefore, based on a comparison between the Package Travel Directive and some of the general rules of consumer contract law (in Sections B, C and D), we will formulate some concluding remarks to connect the proposed measures for package holidays with the EU harmonization process.

E. Conclusion

Whatever the next step in the harmonization of the EU's legislative *acquis*, there is still room for improvement in the current rules of the Package Travel Directive regarding situations when the package holiday is not realized.

In our opinion, the current information duties are excessively orientated towards the pre-contractual period only, with no exhaustive regulation for package holidays as regards information that must be provided after concluding the contract. Here there is a need for minimum regulation concerning what information should be provided to the consumer and how and when it should be provided. Also, even additional information requirements should be introduced to increase the effectiveness of the consumer's right to replacement remedies, such as a notice informing the traveller of the available remedies (including the right to reimbursement after termination) in textual form on a durable medium. The rules contained in Article 14(2) of Airline Regulation (EC) No. 261/2004 could be extended to package holidays, where appropriate with adaptations. Moreover, the particular remedies for not providing such information should be regulated, for example by prolonging the period for the consumer to choose between an alternative package and termination. As the area of information obligations has been

72 See *supra* note 34.

73 Art. 4(2)(b) of the Package Travel Directive.

74 See *supra* Section B.II. As for air transport, see Art. 14 of Airline Regulation (EC) No. 261/2004.

75 We suggest that the same should be valid for last-minute bookings. See Art. 4(2)(c) of the Package Travel Directive. Information requirements should not be reduced or made more flexible, at least while there is no consensus as to what constitutes a last-minute booking. See *supra* note 1.

76 See *supra* Section B.II.

considered as one that is more suitable for full harmonization,⁷⁷ legal improvement is surely feasible here in order to overcome a possible obstacle to cross-border trade.⁷⁸

Likewise, there is a need to introduce regulation (where currently there is none) that covers the ways in which the consumer shall be offered reimbursement and harmonizes the time limit for providing refunds. However, unlike with information requirements, the differences between EU member states regarding the provision of remedies beyond restitutionary effects (e.g. cancellation penalties) will be hard to be overcome. Even so, introducing cancellation penalties might be a way to harmonize the package travel regulations at EU level.

Finally, alternative services are commonly provided to the consumer by the package travel industry, but the current regulation of this remedy makes contract termination unlikely. For this reason, this paper advocates the introduction of a right to replacement that is identical to the performance-oriented remedies that apply in the case of the delivery of defective goods in sales, accompanied by additional information requirements and a particular remedy for a breach of the duty to inform.

77 The Opinion of the ECCG on the pCRD proposes that full harmonization be restricted to certain issues such as information duties (point 10). See *supra* note 53. The information requirements after concluding a package travel contract should rarely have distorting effects. There are no EU-specific rules and the same gap exists in national legal systems, so these should also be areas where a targeted or selective shift to full harmonization could be suggested. With regard to pre-contractual information, see A. Nordhausen Scholes, 'Information Requirements', in G. Howells & R. Schulze (Eds.), *Modernising and Harmonising Consumer Contract Law*, 2009, p. 213 at p. 236.

78 It is beyond the scope of this paper to work on this question, but, using a scale of 1 to 5 (where 1 = not at all important and 5 = very important), stakeholders rated the importance of information requirements at 3.75 when considering the need for harmonization across the European Union. See *supra* note 1. Divergent information requirements were given a rating of 3.11 (2.93 for professional associations and 4 for consumers on the same scale) as a possible obstacle to cross-border trade stemming from the rules of the current Directive.