

The Recent Changes of the Portuguese Regulation on Travel Agents

1. *Compliments*

2. *Directive*

We think that it would be relevant to give you an overview of the recent evolution of the travel agents law in Portugal.

In the European Union countries this evolution has been based on the Council Directive related to the package travel, package holidays and package tours.

In the transposition movement that has followed the directive appearance, the member states ruled this issues respecting the minimum prescriptions imposed by the said directive, which represented a further more demanding standard in this activity that the one existing in the most part of the countries in the European Union.

3. *DL 198/93, of 27/05*

Fulfilling the obligation of transposition of the Directive, the Portuguese Government has approved the Law nr. 198/93, from 27th May, putting in practice the European Community rules in our legal system, and ruling the legal regime of the package travel and the access to the travel agent's activity, omitting, however the regulation of tailor made packages.

As the European lawmaker, the major aim of the Portuguese legislator was to defend the consumer in face of the travel agents.

In fact, this law went beyond the ruling of the European Directive on defending consumers. For instance, by widening the package travel concept in a way that allows

that many realities that are not packages become to be legally considered as package travel.

Other example is that, the 93 law did not rule the liability of the travel agent during the execution of the trip and the liability of third party providers.

Further more, this law required the written form for all the travel contracts that should last for more than 24 hours.

At last, this law did not rule the tailor made trips, which led to 97 lawmaker to qualify this situation as a lack that need to be solved.

4. DL 209/97, of 13/08.

The law 209/97, of 13th of August was announced as a law that would make compatible the opposite interests of consumers and travel agents.

This law has brought several novelties to rule the travel agents, among those changes, it was changed the concept itself of tourist and package travel, excluding “*other tourist services not ancillary to accommodation*”. This had the effect to reduce the amplitude of what is considered to be a package travel.

It was also admitted the possibility for the travel agents to have implants on other companies with who they work exclusively, and desks in commercial areas, airports, bus and train stations, etc. We will come back to these issues when reviewing the changes made by the 2007 law.

The 97 law, clearly pro travel agents in detriment of consumers, kept the enumeration of monopoly activities for the travel agents that was set out in 93 law, but added the possibility for them to act and develop other activities rather than those enumerated.

This law also introduced an increased number of rules concerning the requirements to establish and operate a travel agent.

Regarding the ruling of the travel itself, the preamble of the law demands for the need to rule the tailor made travel, in order to defend the consumer, but ended up not making any relevant distinction between the two types (tailor and package travel), except on liability issue, where the regime is common to the other tourist trips.

The 97 law has limited the liability of the travel agents arising from services provided by third parties, like airline companies, rent-a-cars, etc.

The unlimited liability of the travel agents was one of the major critics made to the 93 law, seeing that the liability of those third party providers was limited, in many cases, by international treaties, this would mean, in the worst case scenario, that a travel agent could respond for damages he didn't produce at an extension far much higher than he would be able to claim from the services provider.

One of the criteria to achieve this limitation was to import the existing limits of those international treaties already in force.

With particular relevance, the 97 law allowed liability for non physical damages to be reduced to the maximum of five times the price of the services sold.

The 97 law also introduced the arbitral commission as an expedite way of solving problems.

This commission is formed by 5 members and its work is to receive the application presented by the client, this application should be accompanied by all the evidence the client has and should have the effect of deploying the guarantee.

The commission has a 20 labour day's time limit to produce a decision and, if it is positive to the client, the payment by the guarantee entity must be made within 20 labour days counting from the decision.

These are the major changes operated by the 97 law and some of those are relevant to a better understanding of the recent changes we are going to talk about right away.

5. DL 263/07, of 20/07.

As mentioned before, new changes have recently been made to the travel agents law by the law 263/07, of 20/07.

The main purpose of the lawmaker, in its own words, was to reduce the bureaucracy of this activity, simplifying procedures and increasing consumer's protection.

It is the case of the article 18º, n.º 4, where to the existing rule "*Any description of a trip, as well as the respective price and the remaining conditions should have not misleading senses*" was added "*nor induce the consumer in mistake*".

We want to stress out that, in our opinion and in this particular change, the lawmaker was not happy.

This is the only rule in which it was used the term "consumer" instead of the more correct term "client". The term used in Portugal, since the directive, is "client" to avoid conceptual confusion with the consumer, that is normally related to natural persons that act as final consumers.

We don't think that the lawmaker wanted to distinguish in this particular case the two concepts, as that would be against the all system of the law.

The term "consumer" should then be interpreted as "client".

It is furthermore demanded to the travel agents that the obligatory elements of the travel contract appear in a "visible way", preventing those elements to be suppressed or written in such a way that are not easily recognized, like small lettering; letter colouring that may be confused with the paper, etc.

The obligatory elements mentioned above, now include the express mention to the insurance policy number and the deadlines to deploy the guarantee.

It was also added the obligation to inform the clients of unpredictable events such as natural catastrophes, epidemics, revolutions, etc.

Other changes to the Travel and Tourism Law that we want to refer are related to the reduction of the bureaucracy on the proceedings to attribute the licence to the Travel Agencies.

The Portuguese government has made a big and successful effort fighting the bureaucracy. An example of those changes is regulation of the e-government.

Today is possible to incorporate companies and keep all the public registrations online.

According to this law it is no longer necessary to present, on paper, all the documents that are available in the internet, being enough a declaration from the interested person saying where those documents can be found online.

In the article 2º it was withdrawn from the enumeration of the monopoly activities of travel agents the booking services in businesses declared of interest for tourism by the competent authority. This change has the aim to separate the monopoly activities of the travel agents of those of the tourism related companies.

These companies are the ones who develop leisure, cultural or sports activities that can be seen as a contribution for the tourism development of a certain region and are not travel agents, hotels, restaurants, etc.

The law has ruled that the travel agents can perform the activity of tourism related companies. According to the law, the travel agents can develop an all new range of activities as running golf courses, Professional Congress Organizer activities and their facilities, karting and automobile race track facilities, marinas, spas, etc.

In all the previous versions, the law stated that the agencies should have independent and autonomous offices, but this last version of the law excludes the need for the independency and autonomy.

The law also excludes the possibility of the travel agents maintain implants on different companies with who they work exclusively, and to keep desks in airports, railway and bus stations and shopping centres.

The new law has revoked those rules, but did not forbid those realities.

So it seems that, under the new law, the office of a travel agency can be the desk in an airport, railway or bus station, etc.

Those changes must be combined with the revocation of the rule that imposed the need of inspection to the travel agent's offices before the licence is granted.

Regarding the tourist and package travel ruling, one of the main changes was to bring back the 93 law rule (and the directive rule) about the requirements of a trip to be considered as tourist or package trip.

It is now again in force at full extension the requirement of *“other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package”*

As previously said, the 97 law did want to reduce the amplitude of what is considered to be a tourist or package travel, with the purpose of limiting travel agent's liability.

With this change it can be now included in this concept several realities that were taken out by the 97 law. It is the case, for instance, of a package composed by accommodation and booking services for a major event on sports booking service, or music, etc.

This change has great meaning, especially with the outcome of low cost carriers, in which reservations are made, mostly directly by the client through the internet.

Another changed rule, it is the one that imposes some requirements needed for deploying the guarantee for civil liability of the travel agent.

The new law requires, to authorize the deploy of the guarantee, a final court decision, an arbitration decision or the analysis of the petition made by the client who had suffered damages.

This petition must be delivered to the arbitral commission with all the evidence that can be used to prove the client's case.

The Travel and Tourism Agent's Association has made several critics to this rule stating that it is not sufficient to solve the client's problems, inasmuch as the Portuguese courts take a long time to pronounce a final decision on a court case, harming the need for celerity and safeness.

On the other hand, on arbitration both parties have to agree to submit the case to arbitrators, and experience says that, in most cases, this agreement is not easy to achieve.

The Travel and Tourism Agent's Association defends that deployment of guarantee could be authorized by the customer's purveyor.

Well, I think that those were the major changes made by the law 263/07 on Portuguese travel regulation.

6. Some interesting questions

Although the aim of this presentation is to give you an overview of the Portuguese case regarding the travel agents law, we could not lose the opportunity to introduce some of the discussions about these issues that are taking place here and abroad.

In fact, the 90's directive represented, back then, a very relevant step to determine and harmonize the rules of package travel across EU and forced the Member States to adopt regulations in this area. But almost 20 years have passed and, within this period, major changes and achievements occurred. It would be enough to say that when the directive was brought to life the term "web" was unknown.

This is so relevant that the EU Commission has already started the procedure to review the directive. For that purpose they've posed several questions to be answered by the member states and, in general, by the stakeholders operating in the tourism area. All this can be found in a self called "WORKING DOCUMENT on the Council Directive 90/314, on package travel, package holidays and package tours".

This fact led us to think if the moment chosen by the Portuguese lawmaker to review the law was the most appropriate as he could have waited for the outcome of this process to make its own changes. With so many issues under discussion it is more than likely that the Portuguese travel agent's law will be changed again in the near future.

The following issues were taken out of that document and match those we think are needed to be discussed, in the line of the discussion already started by the EU Commission. We hope they could launch the debate afterwards:

- A. The increasing trend, in some Member States, for consumers to put together their own holiday components from different organisers (what it's called *dynamic packaging*), instead of opting for packages pre-arranged by an organiser or a retailer. Concerning these "*dynamic packages*", the scope of the Directive may be clarified to determine which products should be covered by this new reality.

Differences between, on the one hand, cases where the retailer or the organiser offers different travel components (hotel, car rental etc.) on his web site and, on the other hand, cases where the retailer or the organiser links his web site to other businesses' offering such components, should be considered. Often it is not made clear to the consumer that different protection applies for more or less identical travel packages, which are sold differently. This uncertainty and possibly divergent interpretations of the Directive by the Member States may affect competition and consumer protection.

- B. As well, the actual meaning of the “package” ruled by the directive has been questioned, which indicates difficulties in interpreting the Directive. Certain expressions may need clarification, such as “*other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package*”. You’ve heard already talk about this in terms of the Portuguese law.
- C. It must be considered the extension of the protection afforded by the Directive to services performed over a period of less than twenty-four hours or which do not include overnight accommodation. (*like organised sightseeing excursions or organised tours to cultural or sporting events*)
- D. In terms of responsibility, it may not be appropriate to make the organiser responsible for oral or other information given by the retailer to the consumer at the time of the reservation of a travel package, or promises contained in the retailer’s marketing of a package.
- E. Since the Directive often makes use of the term "retailer" in a formula like "the organiser and/or retailer", this leaves discretion to the Member States as to which one of them should be obliged to fulfil the duties imposed by the Directive. Clarification may be needed.
- F. It could be argued that the need for protection of consumers and businesses differ and that by excluding B2B transactions from the field of application of the

directive the prices of consumer's packages may decrease since organisers and retailers would not be obliged to set up security guarantees for as many passengers.

- G. The extensive use of web information and the increasingly common practice to provide only limited information in the brochure, making reference to more details on the internet, needs also to be considered. The reverse side of the problem is that consumers may find it more difficult to compare different alternatives when reading the brochures if the prices are not indicated, and that they may, if in dispute with the organiser after the journey, have difficulties in proving what was promised before departure since the information on the web may have changed in the meantime.
- H. There is a variety of national deviations when implementing the articles on information requirements. Almost all Member States have added some obligations for the organisers. These may constitute cross border barriers since it may be difficult for an organiser to produce brochures that can be used in several Member States.
- I. According to the directive, the consumer can withdraw from the contract only if the organiser significantly alters any of the essential terms, such as the price. These undetermined terms need to be clarified. By the way, I take this opportunity to say that the Portuguese law went much further beyond this and introduced what we think it is an unbalanced rule. This rule states that the consumer can withdraw from the contract at any time, with no justification, and the organiser or retailer can charge him the maximum amount of 15% of the package price.
- J. In the field of package travel, private initiatives have led to the set-up of voluntary benchmarks, to facilitate the calculation of refunds in case of non fulfilment of parts of the contract. Should the up to come directive introduce regulations about this matter?

K. Further to the problem set out in the previous point, the liability of organisers must be rethought. In most cases the organiser is liable, including in cases of performance by someone else. However, the liability of the retailer is often more limited. Differences between Member States' legislation and the possibility for the consumer to claim his rights may then be problematic in particular in cases where the retailer and the organiser are established in different Member States.

It could be considered whether a retailer who is selling products from organisers based in another country, be it another Member State or a third country, should be jointly liable in all cases. Such a system must not, however, create Internal Market barriers.

Thank you very much!