PEOPIL

THE Pan-European Organisation of Personal Injury Lawyers
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PEOPIL RESPONSE TO WORKING DOCUMENT ON THE COUNCIL DIRECTIVE 90/314/EEC 13 June 1990 on PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS

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The *Pan European Organisation of Personal Injury Lawyers* (PEOPIL) was founded in 1996 and formally established as a charitable entity in 1998 to improve and promote co-operation and communication between European jurisdictions in the field of personal injury law. The development and expansion of PEOPIL is recognition that the issues involved in personal injury litigation frequently extend beyond national boundaries and require an international perspective and knowledge.

Currently PEOPIL has nearly 500 members from jurisdictions within the European Union, Non-European Union jurisdictions within Europe and 5 jurisdictions outside Europe.

The aims of PEOPIL are:

- To develop co-operation and networking of personal injury lawyers within Europe;
- To promote access to the legal system for consumers suffering personal injury;
- To promote higher standards of care and safety for consumers;
- To promote proper and fair compensation for all personal injury victims;
- To support and encourage the exchange of information and knowledge

PEOPIL is interested in the harmonisation process which is being carried out by the European Commission and European Parliament. In this respect PEOPIL has formulated written submissions in response to matters, including the European Commission's Green Papers on Liability for defective products, Compensation of Victims of Crime, Proposals for a Fifth Directive on Insurance against Civil Liability in respect of the use of motor vehicles, on proposals for reform of Legal Aid, in response to the Commission's staff working paper on the rights of passengers in international bus and coach transport, and in respect of the European Parliament and the European Commissions proposals for "Rome II".

PEOPIL has received grants from the European Commission to fund its continuing work including research in Comparative Law under the Grotius Project and under the Framework Programme for Judicial Co-operation in Civil Matters.

PEOPIL confines its comments upon matters raised by the Commission which relate to personal injury sustained during actual or potential package arrangements, and the recognition of consequential rights, obligations and remedies.

QUESTION 1: Is the current scope of the Directive adequate to ensure protection for consumers and a level playing field in today's holiday market?

PEOPIL is concerned about the adequacy of the current level of protection provided to consumers as a consequence of Council Directive 90/314/EEC ("the Directive") and the decisions which have been given by domestic courts interpreting the Directive. For example recent decisions of the English Courts have seriously undermined the protection previously given to consumers. In the Court of Appeal case of the Association of British Travel Agents (ABTA) v Civil Aviation Authority (CAA), [1] ABTA challenged the accuracy of a guidance note issued by the CAA which ABTA contended gave misleading and incorrect guidance to travel agents about their need to obtain an air travel organisers licence (ATOL). The dispute centred on the interpretation of regulation 1(2) of the Package Travel, Package Holidays and Package

1 [2006 EWCA 1299]

Tours Regulations 1992 ("the Regulations") enacting Article 2(i) of the Directive and in particular the meaning of "inclusive price" therein. Lord Justice Chadwick concluded,

> "If the components are offered for sale as a pre-arranged combination - albeit that the components are not combined (and, perhaps, not all identified) until "the moment when the parties reach an agreement and conclude the contract" … then the price for the combination will be "an inclusive price" notwithstanding that it may have been calculated, arithmetically, by aggregating the prices of the components"

A little later in the Judgment, Lord Justice Chadwick went on to state,

> "If the services are sold or offered for sale as components of a combination, there is a Package: If they are sold or offered for sale separately but at the same time, there is no Package. The question whether they are sold as components of a combination - or separately but at the same time – is a question of fact. That question may not be easy to resolve in the particular case".

This definition, similar to the first instance definition given by Goldring J in the same case [2] has opened the door to Tour Operators and others to "unpackage" their holiday offerings to escape liability under the Directive and the Regulations. Several Tour Operators have deliberately sought to exploit this decision.

The interpretation of the Court in the ABTA case seems completely at odds with the philosophy of the European Court of Justice in the Club Tour case [3] where the Court clearly gave a very wide definition of "pre-arranged combination" under Article 2(1) (Regulation 2(1)(C)(ii) of the Package Travel Regulations). The underlying rationale for this was to provide consumers with broad protection under the Directive, which in turn was consistent with the philosophy underlying the introduction of the Directive itself.

PEOPIL are particularly concerned by this decision and the result that the rights of EU citizens injured abroad have been seriously eroded by this decision. The clock has effectively been turned back, depriving consumers of the protections given by the Directive and requiring them to take legal action overseas and under foreign laws. This presents significant hurdles to the consumer including potentially great expense, major logistical challenges and ultimately a high risk that such legal action overseas will not result in just payment of compensation.

Equally the growth of "dynamic packaging" and the provision of flights, hotel accommodation and other tourist services by internet providers deliberately seeking to avoid liability for creating packages also need to be addressed. There are many examples of consumers who suffer permanent and often severe injury, being unable to obtain compensation against internet providers who fall outside the current provisions of the Directive. By bringing such organisations within the ambit of 90/314/EEC, the commission will be providing much needed protection to consumers and also facilitating a level playing field for those within the holiday industry.

PEOPIL request that the European Commission take firm action to further define the term "inclusive price" giving it the broadest meaning or alternatively by deleting the words "at an inclusive price" from the definition of package currently given at Article 2.1 of the Directive. PEOPIL also see the merit of extending the protections given by the Regulations to cover flight only and accommodation only arrangements. Such a development would significantly extend consumer protection and would address the concerns of some of those within the package holiday industry who resent that airlines and hotel accommodation providers are not subject to the same level of regulation and are not required to provide the same level of consumer protection.

QUESTION 2: Do any of the definitions or notions used in the Directive cause problems? If so, please describe them.

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[2] [2006] EWHC 13

[3] Club-Tour, Viagens e Tourismo SA v Garrido: C-400/00 [2002] ECR I-4051, [2002] All ER (D) 289 (Apr)

The difficulties encountered in defining the term "inclusive price" and in particular problems raised for consumers in England have been outlined in the answer to question 1 above. There are also particular difficulties in relation to notions of liability and definitions relevant to Article 5 in respect of fault based liability. For more detailed discussion see the answer to question 18 below.

QUESTION 3: Have you encountered problems with the definition of organiser or retailer and their respective obligations under the Directive, for instance concerning organisers who occasionally put together packages? If so, please describe them.

From time to time PEOPIL has been aware of difficulties caused by the definition of "organiser" in the context of those who "other than occasionally" organise packages and sell or offer them for sale pursuant to Article 2.2. Occasionally difficulties have been reported in determining whether organisations including schools, social clubs and others are governed by the Directive. The precise definition of "occasionally" has caused difficulty both for consumers and for those organisers potentially affected. Such organisations often organise arrangements for large groups of individuals who may be affected e.g. school trips.

PEOPIL consider uncertainties in this area should be resolved and consumers given protection under the Directive in relation to holiday arrangements provided by individuals or organisations which "organise packages and sell or offer them for sale" irrespective of the regularity of their doing so. All such organisations will be able to protect themselves by entering contractual arrangements with providers of the relevant holiday services.

QUESTION 4: Do you think that persons travelling exclusively for professional reasons should be excluded from the scope of the Directive?

PEOPIL consider there are no compelling reasons to exclude person travelling exclusively for professional reasons from the scope and protection of the Directive.

QUESTION 5: Have you encountered problems with the pre-contractual information requirements? If yes, please give a short description.

PEOPIL consider that the Directive should stipulate clearly that any descriptive material given to consumers whether on web sites or in hard copy form should be subject to the provisions of the Directive. Furthermore, PEOPIL agrees with the suggestion that pre-contractual information should give maximum protection to consumers and should include the name of any operating air carrier as well as the "blacklist" of air companies[4].

QUESTION 6: Is the list of information to include in travel brochures at Article 3.2 up to date?

PEOPIL does not consider that any additional pre-contract information needs to be made available to a consumer other than the information specified at Article 3.2 of the Directive.

QUESTION 7: How should the information requirements be adapted to the increasing use of the internet? Should it be possible to provide less information, eg on the price, in the brochures, if that information is made available on the web?

PEOPIL has no objection to relevant information being provided on the internet, on the basis that a copy of all relevant information including that specified in Article 3.2 is provided in writing to the consumer in hard copy or e-mail format either before or at the time that the booking is made.

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[4] Consistent with Regulation (EC) No 2111/2005

The key issue is to ensure that written confirmation has been provided to the consumer in a form which is clear and can be retained. PEOPIL is particularly concerned about web based information which may change over time. There are many reports of difficulties in proving contractual terms since information on the web has changed in the meantime.

If email confirmation is given to a consumer, the other party should be obligated to retain a copy of that email for a period of no less than 4 years from the date that the contract is entered into and should provide a copy to the consumer at their request and at no additional cost.

PEOPIL has no objection to organisers providing a brochure with a separate price list to reduce the cost of brochure production subject to providing full written confirmation of the price and any other essential terms as set out above.

QUESTION 8: What information requirements, such as classification of the hotel or the passport or visa requirements, need to be separately regulated to respect the specifics of the package travel? and QUESTION 9: Are the information requirements in article 4.1-2 and in the annex up to date?

PEOPIL consider that the information requirements in article 4.1-2 are up to date. It is noted that there have been suggestions to clarify the requirement that pre-contractual information should be provided “in writing or any other appropriate form”. PEOPIL consider that pre-contractual information should be provided in writing. This however, could include written confirmation sent by email to the consumer. If email confirmation is given to a consumer, the other party should be obligated to retain a copy of that email for a period of no less than 4 years from the date that the contract is entered into and should provide a copy to the consumer at their request and at no additional cost.

QUESTION 10: Have you encountered problems with the provisions on price variations?

PEOPIL has no comment on this issue.

QUESTION 11: Have you encountered problems with the provisions of Article 4.5-4.6, in particular the reference to “essential terms” and “substitute package”?

PEOPIL is concerned by the reference to “essential terms” in Article 4.5. PEOPIL consider it would be appropriate to expand this article inserting after the words “essential terms” and before, “he shall notify the customer as quickly as possible…” the following, “or the organiser is aware of matters which are reasonably likely to be relevant to the consumer’s decision to cancel or decline to proceed with the package, including any alterations to the price or any matters which may potentially affect the health or safety of the consumer”.

PEOPIL is aware of many instances where organisers or retailers have been aware of outbreaks of illness in hotels and cruise ships but consumers have not been advised of the existence of the outbreak or the risk to their health. Thousands of consumers have gone on to suffer illness, often requiring hospital treatment and many of them going on to develop permanent health problems caused by bacterial, protozoal, viral or other conditions. Establishing a clear duty to warn consumers of relevant factors which affect their health and safety should enable informed decision-making by consumers and enhance their rights and protection. PEOPIL see it as important that a duty to warn is placed upon the other party to the contract and that the consumer is able to make an informed choice about continuing with their holiday arrangements or withdrawing from them in accordance with Article 4.5 and 4.6.

The issue as to the amount of compensation to be paid by the organiser or the retailer following cancellation should be left to domestic courts to decide.

QUESTION 12: Have you encountered problems with cancellation for the reason of an insufficient number of participants? Should the consumer be compensated in case of cancellation on the ground that there is an insufficient number of participants?

PEOPIL has not encountered significant reports of problems with cancellation due to an insufficient number of participants and offer no further comment.

QUESTION 13: Do you think there is a need for a generalised method of calculation of compensation?

PEOPIL does not consider that there should be a generalised method of calculation for compensation. The amount of compensation should be governed by the Courts who have jurisdiction to hear any claim and PEOPIL consider that compensation should be assessed in accordance with the laws of the domicile of the consumer.

QUESTION 14: Does the liability of the retailer respectively the organiser need to be clarified?

PEOPIL consider that the liability of retailers should be clarified. PEOPIL submit that the original intention of the Directive in this respect was to give the consumer rights against either the organiser or the retailer of arrangements falling within its scope. PEOPIL agree that where the liability of the retailer has been limited under the enabling legislation passed in some member states, consumers will have difficulty in enforcing their rights in cases where the organiser is established in a different member state to the retailer and the consumer. In such cases PEOPIL agree with the proposed solution that the retailer should be jointly liable. PEOPIL's preferred solution, however, is that the Directive should be clarified and impose express duties jointly upon the organiser and retailer in all matters covered by the Directive. This option has the additional benefit of avoiding the creation of open market barriers.

QUESTION 15: Do you think that the notion of "damages" should be clarified, for instance regarding moral damage?

PEOPIL agree that the Directive should be amended to recognise the right of a consumer to claim moral damages resulting from non-performance or improper performance of the services constituting a package. In this way the Directive would be consistent with the ECJ decision in the *Leitner* case. [5] PEOPIL consider that the amount of any compensation should be assessed in accordance with the law applicable in the consumer's country of domicile.

Presently, the Directive states that for damage other than personal injury resulting from the non performance or improper performance of services involved in the package, member states may allow compensation to be limited under the contract. The proviso given is that "such limitation shall not be unreasonable". While PEOPIL have no objection to the Commission's suggestion to prohibit any limitation, PEOPIL consider that this current wording is acceptable, respecting notions of freedom of contract but ultimately allowing the courts to determine whether any contractually imposed limits are unreasonable and therefore unenforceable.

PEOPIL also suggests that although member states may provide that the liability of an organiser or retailer may be limited in accordance with international conventions governing such services including travel by air or sea, this should be subject to the provisions of other relevant EU law in force within member states. In this regard, for instance, passengers on aircraft should receive the benefit of the provisions of Regulation 889/2002/EC. This provides

[5] C-168/00

enhanced protection to passengers over and above that given under the Warsaw and Montreal Conventions on international travel.

QUESTION 16: Have you encountered problems with Article 6? Is there a need to clarify the meaning of the terms "prompt efforts" and "appropriate solutions"?

PEOPIL is not aware of problems with Article 6 and sees no need to clarify the meaning of the terms "prompt efforts" and "appropriate solutions".

QUESTION 17: What are your experiences of the guarantee scheme system in your Member State and, when applicable, of the interaction between different Member States' systems? How could in your view the system be improved?

QUESTION 18: Does, in your view, the fact that scheduled airline business does not have such a guarantee scheme impact on market conditions?

PEOPIL consider that the airline business should have a guarantee scheme equivalent to that in force in relation to organisers or retailers of package arrangements. PEOPIL also has concerns about the protection available for victims of personal injury in the event of insolvency of a retailer or organiser. Present bonding arrangements do not provide for compensation for the victims of personal injury in the event of insolvency. In some cases consumers who have been injured have been unable to obtain adequate remedy when insurance arrangements which should have been put in place by organisers have not been, or have been invalidated. PEOPIL consider that such third party risks arising from the insolvency of the organiser should be fully provided for by requiring mandatory bonding or compulsory insurance arrangements.

QUESTION 19: Is/are there any other issue(s) or area(s) that require(s) to be explored further or addressed at EU level in the context of consumer protection? Are there market trends that in particular should be taken into account when considering a revision of the Directive and, in that case, what facts and/or figures exist confirming such a market development?

As well as the issues discussed in answer to other questions above (and in particular the answers to Questions 1 and 11) PEOPIL is particularly concerned about the application of Article 5 of the Directive. Article 5 states:

"1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:

   - the failures which occur in the performance of the contract are attributable to the consumer,

   - such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,

- such failures are due to a case of *force majeure* such as that defined in Article 4(6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall."

The defences in Article 5.2 clearly set out circumstances in which an organiser or retailer will not be liable for damage, including injury, suffered by a consumer due to improper or non-performance of aspects of a package contract.

Whilst it was widely understood that Article 5 established no fault liability, subject to the limited defences set out in the Directive, the Courts in some member states have interpreted the Article in a way which requires the consumer who has suffered personal injury to effectively establish fault on the part of an organiser or retailer as a prerequisite for claiming relief under the Directive. Both the English and German Courts accept that fault is a prerequisite to liability and if fault is established, the organiser or retailer will still be able to escape liability if one of the statutory defences under Article 5.2 applies. [6]

PEOPIL submits that the above fault based interpretation of the Directive is inconsistent with the spirit and intention of the Directive. The Directive does not require fault to be established within the meaning of "improper performance" of the contract or otherwise. It is submitted that by the Courts requiring fault, an unfair hurdle has been placed in the path of injured consumers seeking redress. The requirement of establishing fault has also spawned significant satellite litigation and jurisprudence, among other things requiring injured consumers to rely upon expert evidence of standards prevailing in the country where they were injured. [7] PEOPIL request that the Commission urgently clarify Article 5 and confirm that it is not necessary for a claimant to establish fault before being able to claim a remedy. The clarification should confirm that a consumer has a right to be compensated by an organiser or retailer for any injury or loss sustained during a package arrangement subject to the organiser or retailer establishing that one of the defences under Article 5.2 applies.

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[6] See Hone v. Going Places [2001] EWCA CIV 947

[7] See Holden v. First Choice Holidays and Flights Limited [2006] HHJ Goldring, Winchester CC.