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Study on Safety and Liability Issues Relating to Package Travel

Frank Alleweldt
Civic Consulting, Berlin

Klaus Tonner
University of Rostock

Marc McDonald
Technological University Dublin, marc.mcdonald@tudublin.ie

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**STUDY ON SAFETY AND LIABILITY ISSUES
RELATING TO PACKAGE TRAVEL**

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Authors. Dr Frank Alleweldt (Project director)
Prof Klaus Tonner (Lead author)
Mr Marc McDonald (Co-author)
Dr Senda Kara
Ms Bilgin Ayata
Ms Uta Stenzel

Civic Consulting
Potsdamer Str. 150
DE-10783 Berlin
Tel. +49 30 2196 2295
Fax +49 30 2196 2298
E-mail: alleweldt@civic-consulting.de
Website: www.civic-consulting.de

Administrator: Patricia SILVEIRA DA CUNHA
Policy Department Economy and Science
DG Internal Policies
European Parliament
Rue Wiertz 60 -
B-1047 Brussels
Tel: +32 (0)2 283 04 69
Fax: +32 (0)2 284 69 29
E-mail: patricia.silveira@europarl.europa.eu

Balazs MELLAR
Policy Department Economy and Science
DG Internal Policies
European Parliament
Rue Wiertz 60 -
B-1047 Brussels
Tel: +32 (0)2 283 22 02
Fax: +32 (0)2 284 69 29
E-mail: balazs.mellar@europarl.europa.eu

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✉ Rue Wiertz – B-1047 Bruxelles - ☎ 32/2.284.43.74 Fax: 32/2.284.68.05

✉ Palais de l'Europe – F-67000 Strasbourg - ☎ 33/3.88.17.25.56 Fax:
33/3.88.36.92.14

E-mail: poldep-esc@europarl.europa.eu

Table of Contents

EXECUTIVE SUMMARY	i
1. CURRENT COMMUNITY LEGISLATION	1
2. STATISTICS RELATING TO ACCIDENTS AND INJURIES	11
3. RELEVANT FEDERAL LEGISLATION IN THE US	22
4. PROBLEMS AND GAPS IN COMMUNITY LEGISLATION	28
ANNEX I: PACKAGE TRAVEL DIRECTIVE	34
ANNEX II: CODE OF FEDERAL REGULATIONS – PUBLIC CHARTERS.....	43
ANNEX III: METHODOLOGY OF ANALYSIS OF STATISTICS	68

Executive Summary

The issue of accidents and injuries while on holiday has been described as an “essentially invisible problem” that has received little attention compared to other themes in tourism. This is most reflected in the very limited availability of statistics on travel accidents and safety issues during holidays.

This study on safety and liability issues relating to package travel, package holidays and package tours seeks to highlight some of the gaps in the EU package travel law by answering a number of specific questions related to statistical evidence, Community legislation, and US legislation. It also suggests possible solutions to fill these gaps. The study was prepared by Civic Consulting and is based on a legal analysis, a literature review, an evaluation of statistical data, and on interviews with European and national travel and tour operator associations, individual tour operators, European and national associations of insurers, individual insurance companies, and European and national consumer organisations. All research was conducted between November and mid-December 2007. An overview over the organisations contacted is given in the Annex.

Main conclusions of the study include:

Accidents and injuries during package travel: Data gathered from tour operators and their associations indicate that illness is the major type of injury during package travel, while accidents constitute only a fraction. There are no particular trends noted. The fatality statistics of the UK Federation of Tour Operators indicates that in the decade 1994-2003 a total of 587 package travellers from the UK died because of accidents that occurred during a package holiday, equivalent to about 3.6 fatalities per million travellers. More comprehensive data on the extent and frequency of accidents and injuries during package travel in the EU could not be established. This underlines the need for a regular, systematic and standardized data collection at the EU-level on accidents and injuries during holidays that would improve the information level for all stakeholders. On the other hand, the available data is sufficient to reconfirm beyond doubt that injuries and accidents, including fatal accidents, regularly occur during package travel and therefore there is a need for a clear and unambiguous legislative framework concerning the duties of relevant operators concerning tourist safety and the liability rules that apply in case of injuries and accidents.

Legislative framework in general: It was shown that there is no “specific legal instrument” at Community level dealing with tourist safety, but that aspects of safety are, nevertheless, addressed by a) Community provisions regulating the airline industry, and b) decisions of the courts of Member States dealing with safety standards in compensation claims under Art. 5 of the Package Travel Directive. It was also shown that safety regulations, where they exist, are piecemeal and not comprehensive. It is, however, not possible to suggest a single legal instrument, such as an additional article in the Package Travel Directive, which could be inserted during the ongoing review of this Directive. Safety issues across the different package service suppliers are too diverse. Five different fields were identified: road traffic safety, hotel safety, air transport safety, natural disasters, and terrorism. Each of these areas needs different regulations.

Road traffic: Traffic accidents with tour buses are unfortunately common enough. In many cases courts of the Member States impose liability on the tour organiser even if the driver causing the accident is an employee of a local and independent bus company. While this seems correct there are three potential excuses an organiser might raise, depending on the circumstances, to avoid liability.

- Accident beyond control of tour operator - Consideration should be given to amending Art. 5 of the Package Travel Directive to clarify that a tour operator is liable for all acts of service suppliers, regardless of whether the operator chose them with due care and regardless of whether they acted beyond the control of the tour operator.

- Accident on a trip booked at the resort - Consideration should be given to clarifying Art. 5 of the Directive to ensure that the tour operator is liable for trips booked by package travel consumers if the tour operator is involved in any way in the conclusion of the contract.
- Limitation periods - Consideration should be given to clarifying Art. 5 of the Directive to ensure that time limitation clauses must guarantee a reasonable period and must not have the effect of depriving consumers of their rights.

Hotel safety: There is much case law (arising out of compensation claims) in the Member States dealing with safety risks within hotels. However, because of different national approaches to liability questions consumers cannot be sure that courts in all Member States will impose liability on a tour organiser in all cases of safety defects in a hotel. Therefore, Community legislation defining basic safety standards for hotels appears to be necessary. With such standards applicable across the Community it would be easier to determine liability questions in a uniform and consistent manner. Consideration should be given to updating and re-enacting Recommendation No. 86/666/EEC on fire safety in hotels as a directive or regulation and to undertaking further research as a matter of urgency to identify appropriate safety standards for guest use of hotels with a view to their implementation by means of a directive or regulation.

Air transport safety: Air transport law at Community level is different from hotel law in that there is comprehensive legislation, including the 'Third Package' for the liberalisation of air transport which is currently under review. The current network of safety regulations appears to work well. But what is missing is a link between these regulations and the liability of the tour organiser if an airline, which supplies services to a tour operator, does not meet the requirements of the regulations. While courts in the Member States will probably often hold a tour operator liable if the operating carrier is not safe and does not comply with existing Community law, there is no rule either in national or in Community law which expressly states that a tour operator is liable if an airline, which provides a service within a package, breaches air regulations. It is therefore recommended that Art. 5 of the Package Travel Directive be amended by the insertion of a new subparagraph under which an organiser will be liable for any injuries occurring to a consumer as a result of a breach of Community safety regulations by an airline supplying services to a tour organiser.

Natural disasters and terrorism: Natural disasters and terrorism must be treated differently from road, hotel or air transport accidents because there is often no clear identifiable human agent involved; and the tour operator is often not liable because these are cases of force majeure for which liability is excluded by the Package Travel Directive. There is no reason to suggest that this protection should be removed. Courts do, however, sometimes imply or impose a duty to inform in advance about a hurricane or a danger of a terrorism attack so that before departure the consumer can make a decision whether to start the tour or cancel it. In addition to the information duties already contained in the Package Travel Directive, it is recommended that an organiser should be made subject to a duty to a) monitor the destination with regard to specific, not generalised, risks arising from natural disasters, terrorist attacks, public health, public order and other sources which an organiser should reasonably foresee, and b) to appropriately inform package travel consumers before and after departure, as the case may be, regarding such risks. Consideration should also be given to amending the Package Travel Directive by the addition of a right of the consumer to cancel the contract in cases of force majeure.

Scope of application: The changes suggested will be of little value to consumers if the scope of the Package Travel Directive is not extended. The Package Travel Directive is in danger of not covering all relevant holiday bookings because of increasing direct bookings by consumers using internet websites. Consumers are able to book individual services themselves through the internet and bundle them into a tailor-made tour. It is questionable whether internet-booked holidays like this are within the scope of the Directive, although tailor-made packages bundled by travel agents are. Both Commission and Parliament are aware of the need for a review of the scope of the Package Travel Directive on this issue. While there are significant differences between a typical tour organiser and, say, an airline website

which also sells hotel accommodation and car hire (often as agents), there is a case for including such forms of booking within the scope of the Directive and for ensuring that such inclusion should be the starting point in reviewing the Package Travel Directive. This will ensure that a reformed Directive is able to cope with the current challenges including the liability and safety ones examined in this study.

Basis of Liability: The language used in Art. 5 is unnecessarily difficult to interpret and has contributed to the situation in which courts in some Member States require consumers to bear the burden of proof regarding negligence, while courts in other Member States place the burden on organisers. Consideration should be given to redrafting Art. 5 in order to clearly provide that the tour organiser is liable for the service supplier, that this liability is strict and that the burden of proof rests with the organiser to prove that any of the available defences apply.

1. Current Community legislation

An overview of current Community legislation relating to safety and liability issues with respect to package travel, package holidays and package tours, addressing in particular Directive 90/314/EEC on package travel, package holidays and package tours.

The most relevant piece of Community legislation dealing with safety and liability issues in relation to package tours is the Package Travel Directive, which was adopted in 1990.¹ The purpose of the Package Travel Directive is, as stated in Art. 1 of the Directive, to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community.²

The Directive is based on the former Art. 100a EC Treaty (now Art. 95 EC), which authorises the enactment of measures to achieve a single European market. On a second strand the Directive is also a consumer protection measure. The Directive focuses on provisions concerning advertising³ and information duties of tour organiser and retailer,⁴ contractual obligations including withdrawal and cancellation,⁵ liability for damages in case of non performance or improper performance,⁶ and on insolvency protection.⁷

The scope of the Directive is limited to the non-occasional sale of package tours by an organiser or retailer to a consumer.⁸ The Directive does not apply to individually organised tours or to the delivery of single travel services, like a scheduled flight or hotel accommodation. Time-share is also not included in its scope. Like all consumer protection directives of the 1980's and 1990's the Directive only requires minimum harmonisation which allows Member States maintain or introduce higher standards of consumer protection.⁹ This has led to variations in standards across the Community on a number of package law issues, including, for example, the limits on compensation organisers are allowed impose.

Parliament and the Package Travel Directive

Since the transposition of the Directive by the Member States the European Parliament has addressed the issue of package tours a number of times. In 2001 it passed a resolution which followed a report of the relevant committee, known as the Bushill-Matthews-Report.¹⁰ This report recommended many improvements to the 1990 Directive, most of them in favour of the consumer, hereby going further than a working paper of the Commission in 1999.¹¹

Parliament also dealt with the Package Travel Directive in an indirect way. In February 2007 the Commission adopted a Green Paper on the Review of the Consumer Acquis. Among other suggestions, the Commission proposed a "horizontal instrument" which would include general rules on consumer law and "vertical instruments" dealing with the different sectors of consumer law, including package travel law.¹² The Commission also proposed moving away from the principle of minimum harmonisation towards adopting a principle of full harmonisation, that is, to leave less discretion to Member States in the transposition process.

¹ Directive 90/314/EEC, OJ 1990, no. L 158/59

² Art. 1 Directive

³ Art. 3 para. 1, para. 2 Directive

⁴ Art. 3 para. 2, Art. 4 para. 1, para 2, Annex Directive

⁵ Art. 4 para. 3, para. 5, para. 6 Directive

⁶ Art. 5; Art. 4 para. 7 Directive

⁷ Art. 7 Directive

⁸ Art. 1; Art. 2 Directive

⁹ Art. 8 Directive

¹⁰ A 5-0463/2001

¹¹ SEC (1999) 1800

¹² COM (2006) 774

The European Parliament adopted a resolution on the Green Paper in which the Green Paper and its ideas were welcomed, but Parliament stressed that full harmonisation should not lead to a lower standard of consumer protection in Member States with a higher level of protection than at present.¹³

These recent developments provide the background to the present study: Parliament has already accepted the basic structure of the forthcoming review of the Consumer Acquis, that is, the continuing use of both "horizontal" and "vertical" instruments. In due course when the Commission presents its proposals for individual directives Parliament will have the opportunity to consider the Commission's proposals and the Council's common position as regards safety and liability issues affecting package tours.

At the moment there is no legislative proposal from the Commission with regard to package tours. But the Commission published a consultation paper in September 2007 which gives some insight into its thinking on how to review the Package Travel Directive.¹⁴ In November 2007 Parliament adopted a general resolution on tourism policy.¹⁵ As regards package tours, Parliament expressly regretted that there is no explicit safety provision in the existing tourism law.

While it is not the purpose of this study to comment on the review of the Consumer Acquis in general or on the package travel law in general (the Terms of Reference of this study focus only on safety and liability issues relevant to package tours), one has to bear in mind that the legislative process which will follow the review forms the background to the questions posed by Parliament in this study.

Safety and Package travel law

The Package Travel Directive includes provisions providing for liability vis-à-vis the consumer, in particular in Art. 5. However, it does not address directly the issue of consumer safety. This does not mean that there is a gap in the law because the Directive relies on regulations governing the providers of individual travel services which make up the package, that is transport and accommodation. Safety issues in these areas are the concern of (air) transport law and should be the concern of hotel law (see section 4.2). While there is a significant body of (air) transport law at Community level¹⁶ which deals with safety, there is little if any specific Community hotel law (whether dealing with safety or other consumer matters). With some exceptions hotel law has been left to the Member States.¹⁷

It is important to note therefore that an analysis of the details of transport or hotel law regarding consumer safety, and on how Member States and their courts or equivalent bodies apply the liability rules of Art. 5, lies outside the scope of this study, which focuses on Community legislation relevant to package tours. Nevertheless it is clear that safety does play an indirect role in package travel law, as a lack of safety within one of the components of the package – whether transport or accommodation – can result in the organiser being held liable for any safety defects in the service provided.

As indicated earlier, safety is not directly dealt with by the Package Travel Directive, a point which Parliament itself noted in its recent resolution on tourism policy.¹⁸ But this does not mean that safety issues play no role or are neglected by the existing legislation. Rather, safety issues are "hidden" in two ways. They are hidden, firstly, in the liability rule which makes a tour organiser liable for safety omissions during the tour. The way the Directive is written, it is left to the Member States and their courts to "discover" safety issues by applying the liability rule. When a compensation claim is brought the courts essentially declare the level of safety which should have been provided and perhaps was not.

¹³ A 6-0281/2007, cf. especially no. 9

¹⁴ http://ec.europa.eu/consumers/cons_int/safe_shop/pack_trav/comm_wd_20072007_en.pdf

¹⁵ A6-0399/2007 of 29. November 2007: a renewed tourism policy

¹⁶ Reg. (EC) No. 1592/2002 establishing EASA (European Aviation Safety Agency); Reg. (EC) No. 1406/2002 establishing EMSA (European Maritime Safety Agency)

¹⁷ Report from the Commission on the application of the Council Recommendation of 22. December 1986 on fire safety in existing hotels (86/666/EEC)

¹⁸ A6-0399/2007 of 29. November 2007: a renewed tourism policy

In those Member States where the onus is on the consumer to prove fault by the organiser or service supplier before liability can be found there is considerable focus on the issue of safety standards and frequent debate over whether the standards should be those of the host state or the consumer's state of residence.

Second, safety issues are "hidden" in the law which governs relations between the tour organiser and the service suppliers. This law does not apply within the relation between tour organiser and traveller, but breaches of this law may result in the tour organiser being held liable to the traveller.

In the remainder of this section we firstly provide a detailed overview of the existing liability rules of the Package Travel Directive, Art. 5 (section 1.1). Secondly, the "hidden" safety issues in the liability rules are examined and illustrated through some case examples from France, Germany, and the UK (section 1.2). Thirdly, safety issues in airline law and hotel law (also section 1.2) are addressed. Finally a short review of other issues of the Package Travel Directive is given (section 1.3). While this latter review was not expressly required by the Terms of Reference of this study, it touches on matters of considerable current importance to consumers, including the bundling of travel services by consumers and facilitated by web suppliers. In the resolution mentioned previously, Parliament requested that the scope of consumer protection be extended to these newer forms of booking¹⁹. "Discovering" the "hidden" safety issues does not automatically mean that this represents a satisfactory solution of the problem. This aspect will therefore be dealt with in section 4 of this study.

1.1. Liability of organiser and/or retailer vis-à-vis the consumer

The main provision of the Package Travel Directive dealing with liability is Art. 5. It covers the liability of organiser and retailer for damage suffered by the consumer due to non-performance or improper performance of the services contracted for. Compensation is awardable for both material (personal injury and property loss) and non-material damage (loss of holiday enjoyment).

Art. 5 of the Directive imposes liability for non-performance or improper performance of the contract by the "organizer and/or retailer" of the package.

Who is liable, organiser and/or retailer?

Whether the organiser or retailer or both are liable for contract failures was left to the discretion of the Member States. Different approaches are possible. It is possible to impose "joint and several liability" and give the consumer the choice of whom to sue. Another option is to impose liability on just the organiser or just the retailer. When transposing the Directive most Member States decided not to adopt a system of joint liability, but to split liability in consideration of the traditional role and responsibility of organiser and retailer. In most jurisdictions the organiser and not the retailer is held liable, except in some cases where the organiser is located outside the jurisdiction. For the purposes of this study it is unnecessary to deal further with the role of the retailer (travel agent), although it should be borne in mind that the question "who is liable?" may arise during debates on the reform of the Directive.

Basis of liability – strict or fault? Art. 5 para. 1 & 2 Directive

Art. 5 (1) and (2) are drafted in complex language which reflects the difficulty lawmakers had in reaching agreement on this vital question. While it seems to work more or less in practice, it remains surprising that Art. 5 has not been highlighted by the Commission in the ongoing revision of the Package Travel Directive. Art. 5 (1) makes the organiser liable for the service supplier and Art. 5 (2) provides for the basis of the organiser's liability, that is, why or for what quality of behaviour (by the service supplier or organiser) is the organiser made liable. Liability under Art. 5 is a contractual liability, that is, the organiser is liable to the consumer because the organiser breaches a duty arising from the contract and thereby injures the consumer or causes a loss.

¹⁹ A 6-0399/2007

Besides contractual claims, the legal systems of the Member States also allow tort claims, that is, claims by a person who suffers a loss through a third party with whom he or she has no contractual relation (for example in a road traffic accident: Driver A damages the car of B and is held liable). Tort claims are not regulated by the Package Travel Directive, but they still play a role in the package travel law of the Member States. This is because the Package Travel Directive, as already noted, is only a minimum harmonisation measure.

The liability under Art. 5 includes elements of strict liability and of fault-based liability. Strict liability means the organiser is liable if the consumer can prove that the organiser broke a promise under the package contract and that he or she suffered loss as a result. If liability is fault-based, the consumer has additionally to prove that the organiser (or service supplier) was at fault (acted deliberately/recklessly or negligently), which is more difficult since it means proving, not only how the accident happened, but also proving that a reasonable organiser would have acted differently.

It is easy to see that strict liability is more favourable to consumers than fault-based liability. Not surprisingly there was some debate about this when the Directive was drafted,²⁰ and the outcome was a compromise of sorts expressed in difficult language. Nonetheless, it can be said that strict liability is the principle underlying the Directive, although in at least two Member States (Ireland and the UK) the courts interpret Art. 5 as imposing only fault-based liability as regards personal injury claims. This naturally makes it more difficult for consumers in those states to recover damages.

Strict liability is not absolute liability and Art. 5 allows three defences to organisers which come close to effectively meaning organisers can avoid liability if they can prove they were not at fault. Thus, although it remains convenient to use the term strict liability, in effect what Art. 5 does is it reverses the usual burden of proof in claims and requires organisers to prove they were not to blame, rather than requiring consumers to prove that they were.

The three defences are:

Firstly, the contract failure is attributable to the consumer.²¹ This can arise after departure where the consumer needs to be excluded from the remainder of the trip because of aggressive or unruly behaviour and has to book an expensive return flight home.

Secondly, the contract failure is attributable to a third party unconnected with the performance of the services and is unforeseeable or unavoidable.²² An example would be unexpected construction noise from a building next door to the hotel. This exception does not allow the organiser to disclaim liability for suppliers delivering the travel services. For a failure caused by those suppliers the organiser is liable even if the failure was unforeseeable or unavoidable by the organiser. Further, to a certain extent this exception imposes a duty on the organiser to discover – in advance – foreseeable or avoidable sources or defects which are able to affect the performance of the tour.

Thirdly, the contract failure is due to *force majeure* or to an event which the organiser or retailer or the supplier, even with all due care, could not foresee.²³ The Directive defines *force majeure* in Art. 4 para. 6(a)(i) as: “unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.” Thus, a hurricane or terrorism may cause *force majeure* but only if it is unforeseeable.

There is no doubt that the great advantage of the Directive as it stands for consumers is that there is no need to prove that the organiser acted negligently to succeed in a claim. However, the fact that the courts in some Member States do not appear to recognise this means that in any legislative reform of the Directive the strict liability position should be clearly and unequivocally spelt out.

²⁰ OJ No. C 96 of 12. 4. 1988, p. 4 (proposal)

²¹ Art. 5 para. 2, 1. indent

²² Art. 5 para. 2, 2. indent

²³ Art. 5 para. 2, 3. indent

A second advantage for the consumer of the current Directive which should also be retained is that organisers are liable for their service suppliers. The rationale for this is obvious. It is the organisers who promise to perform the services. From the point of view of the consumers, it matters little whether the organiser performs the services or the independent service suppliers do. The Directive does not allow organisers the freedom to exclude their liability for the acts/omissions of their service suppliers.

Duty to assist, Art. 5 para. 2 subpara. 2 Directive

If a contract failure is attributable to a third party or to *force majeure* the organiser is obliged to give prompt assistance to the consumer in difficulty,²⁴ even though the organiser is under no liability for the failure.

Duty to communicate, Art. 5 para. 4 Directive

The Directive obliges the consumer to communicate any failure in the performance of the contract to the supplier of the services as well as to the organiser and/or retailer.²⁵ This must be done in writing or in any other appropriate form “at the earliest opportunity”. The consumer has to be informed about this obligation clearly and explicitly in the travel contract.²⁶ However, Member States have a discretion whether to limit this duty in favour of the consumer and to require only that the organiser or retailer be informed of the complaint.

Limitation of liability, Art. 5 para. 2 subpara 3 Directive

There are different rules regarding organisers imposing limits of compensation for personal injuries and non-personal injuries. As regards personal injuries the Directive does not allow any limit on the amount of damages payable to a consumer, except where this is allowed under international conventions governing certain travel and accommodation services.²⁷ The Directive refers in particular to the Warsaw Convention of 1929 on the International Carriage by Air (now the Montreal Convention of 1999), the Berne Convention of 1961 on Carriage by Rail (now COTIF of 1980, as amended 1999), the Athens Convention of 1974 on Carriage by Sea and the Paris Convention of 1962 on the Liability of Hotel-keepers.²⁸ It is important to note that the Directive refers to these Conventions only to ensure that an organiser is not liable to pay more compensation than the service supplier would be if it were sued.

For non-personal injury cases the Directive allows organisers the freedom to limit the amount of compensation payable provided that the limitation is not unreasonable.²⁹ Unfortunately, the Directive does not state what is meant by “unreasonable” and Member States are left to define it themselves. Generally, a limitation to the amount paid by the consumer for the package tour is considered unreasonable, whereas a limit of three times the tour price might be viewed as reasonable.³⁰

Types of loss recoverable

The Directive does not define the types of loss for which compensation is recoverable. It merely refers to “damage arising/resulting from the non-performance or improper performance”. In civil law the general term “damage” is usually used, whereas common law defines the types of losses which are recoverable. Typically losses will include, in the case of personal injuries, special and general damage, and in the case of non-personal injuries, loss of bargain and some types of consequential loss.

²⁴ Art. 5 para. 2 subpara 2 Directive

²⁵ Art. 5 para. 4 Directive

²⁶ Art. 5 para. 4; annex (k) Directive

²⁷ Art. 5 para. 2, subpara. 3 Directive

²⁸ See Recitals of the Directive

²⁹ Art. 5 para. 2 subpara. 4 Directive

³⁰ E.g., in German law: § 651 h of the Civil Code (BGB)

A type of loss unique to package holidays is loss of holiday enjoyment arising from a breach of a package contract. Historically some Member States allowed this type of loss while others did not and the Directive was at least ambiguous on the point. The ECJ held in the *Leitner* case that damages can be awarded for lost vacation or loss of holiday enjoyment.³¹ In that case a ten year old girl from Austria suffered from salmonella poisoning in a Turkish club hotel. The Austrian court granted her compensation for her own pain and suffering, but the ECJ awarded compensation to the parents who had to take care for their daughter and so could not enjoy their holidays. It would seem the ECJ, not for the first time, filled a gap in the Directive. It is interesting to study the opinion of Advocate General Tizzano in this case. After analysing the development of the term "damages" in the laws of the Member States he came to the conclusion that there is a tendency to extend the meaning of "damages". He then deduced that the concept should be interpreted in a broad sense to cover non-material loss, including loss of holiday enjoyment. He also based his opinion on the aim of the Package Travel Directive which is consumer protection. The Directive should be interpreted according to its aim. This is more or less a *in dubio pro consumptore* rule. The ECJ followed his opinion. It can be expected that any revision of the Directive will explicitly incorporate the *Leitner* rule.

Finally, it can be noted that the *Leitner* rule only applies where there is a breach of contract, not when a consumer has a disappointing holiday. A tour operator usually does not promise snow or sun and a consumer therefore cannot claim breach of contract and loss of holiday enjoyment if the weather does not permit skiing or sun-bathing.

1.2. Safety and liability

Judge made safety rules

As mentioned previously there is no special provision about safety in the Package Travel Directive. Nevertheless, an organiser can still be liable for safety defects caused by the organiser's service suppliers. These defects can result from the breach of a safety regulation applicable to the service supplier, or from the breach of duty implied by the courts. These latter duties are not written down in either Community or Member State legislation. Damages liability can be seen as a kind of sanction for improper handling of safety issues. Among the safety duties imposed on organisers would be an obligation to contract only with safe airlines and safe hotels. The organiser may also have to warn consumers if a hurricane or terrorism is expected. Further, the organiser may even be under an obligation to control safety in hotels and, in particular, may be liable to ensure that the hotel building complies with safety requirements. A fire exit must not be locked. A glass door should only have safety glass. Dangerous steps should be marked. Tiles must not be slippery. Inappropriate wet surfaces should be dried or consumers warned about them.

These are examples taken from court decisions in Member States. The disadvantage of using court decisions to define safety duties is that it is unlikely to ever result in a comprehensive statement of safety duties, nor is it likely to produce consistent and predictable standards across the Member State. An advantage however, in the absence of statutory Community safety standards, is that courts can flexibly adopt the general principle of consumer safety to injuries caused by safety defects in any given situation. To illustrate how courts have developed safety standards during compensation claims, some examples from three Member States are discussed in the following sections.

1.2.1. France

The French experience is a good example of the trend of developing organiser duties almost to strict liability. In the *Bali* case, decided by the *Cour de Cassation* in 1983, consumers were hurt when their transfer bus in Bali was involved in a traffic accident. The organiser had chosen the bus company carefully, but the *Cour* still held that the organiser had to control the execution of the service.³² The

³¹ *Leitner v. TUI Deutschland GmbH & Co. KG*, C-168/00 E.C.R. I-2631 (2002), cited as *Leitner Case*

³² *Cour de Cassation* 1er, 23. 2. 1983, *Receuil Dalloz* 1983, p. 481

Cour did not say how the organiser was supposed to do this, except by placing a controller in the bus beside the driver. In effect, the liability was nearly a strict one (*obligation de résultat*). But there are also French cases which show that the organiser may be able to fulfil his or her obligations. In another case there was a railway line between a camp site near the sea and the sea itself. A consumer was hurt by a train when crossing the line. The organiser was held not liable as the consumer had been informed about the line.³³ In another case concerning a taxi accident in Rio the organiser was held to have acted negligently when he did not choose the supplier carefully.³⁴

1.2.2. Germany

German judge-made law is rich with examples dealing with an organiser's duty of care (*Verkehrssicherungspflicht*). An older much discussed case is the balcony fall case.³⁵ Here a consumer was severely injured when he fell off a hotel balcony because the railing was loose. The *Bundesgerichtshof* held the organiser liable because the organiser had not checked the safety of the balcony. A more recent decision was the water chute case.³⁶ A boy drowned because his arm got caught in the drainpipe of a swimming pool which had not been secured. The hotel had not received a building permit for the chute from the local authorities. The *Bundesgerichtshof* held the organiser liable because the organiser had not checked whether the hotel had such a permit.

1.2.3. United Kingdom

The courts in the UK impose safety duties on organisers just as continental courts do. In the *Silver Wing* case³⁷ consumers were hurt by a fire because a fire door in the hotel was locked. However, the organiser could prove that he had checked the doors a short time before the fire broke out and that they were not locked. Liability was denied. Another well-known case in the UK is the emergency chute case.³⁸ After an emergency landing of an aeroplane a consumer was hurt, when he left the aircraft through the emergency chute. Liability was denied because the consumer could not show which obligation was supposed to have broken by the airline. Although the High Court applied the almost identical equivalent of Art. 5 of the Directive, there is much debate whether this decision is in line with Art. 5, in particular as regards the need to reverse the burden of proof.

Another case, *Healy v Cosmo Air*³⁹, illustrates how the UK approach can even produce injustice. A tourist fell head first into a hotel swimming pool and sustained severe injuries. He lost his claim because he could not prove whether he slipped on the wet surface of the pool's plastic surround or jumped/dived into the pool. And since he could not prove how the accident happened he could not prove relevant hotel negligence. If, however the UK court had reversed the burden of proof (as required by Art.5) the tourist might have won because once he showed he had been injured at the pool the burden of proof would have shifted to the organiser to prove the hotel (or the organiser) had not been negligent.

Safety provisions for airlines and hotels

The breach of specific safety regulations which apply to airlines or hotels may also result in an organiser being held liable for loss suffered by a consumer. This is in addition to the general unwritten duty of an organiser, mentioned previously, not to contract with an unsafe airline or hotel.

³³ Cour de Cassation 1er 29. 5. 1990, Recueil Dalloz (information rapide), p. 151

³⁴ Cour de Cassation 1er 5. 1. 1961, Recueil Dalloz 1961, p. 340

³⁵ Bundesgerichtshof 25. 2. 1988, BGHZ (official reports of the Federal Supreme Court in civil matters) vol. 103, p. 298

³⁶ Bundesgerichtshof 18. 7. 2006, Neue Juristische Wochenschrift 2006, p. 3268

³⁷ Wall v Silver Wing, not officially reported

³⁸ Grard Hone v Going Places Leisure Travel Ltd., Int Travel Law Journal 2001, 12 (High Court), Int Travel Law Journal 2001, 153 (Court of Appeal)

³⁹ English High Court, 28.7.2005

At Community level there is some law dealing with safety of airlines, but almost no law dealing with safety of hotels. Thus, it is clear that an organiser must not contract with an airline which is blacklisted according to Regulation (EC) No. 2111/2005. The same is true if an airline cannot produce the necessary licence according to Regulation (EC) No. 2407/92 on licensing of air carriers or if it does not comply with Regulation (EC) No. 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation. If an accident happens with such an airline and the consumer is hurt the organiser would be liable under Art. 5 of the Directive, notwithstanding any liability under the Montreal Convention.

As regards hotels the only legal measure dealing with safety is a non-binding recommendation concerning fire safety in hotels.⁴⁰ Recent discussion in Parliament about hotels dealt only with quality matters,⁴¹ not consumer safety.

1.3. Other issues of the Directive

Scope and meaning of “package”, Art. 2 no. 1 Directive

As mentioned before, the scope of the Package Travel Directive is limited to packages. A package is defined as a pre-arranged combination of not fewer than two travel services - (a) transport (b) accommodation or (c) other tourist services not ancillary to transport or accommodation. Furthermore, the services have to cover a period of more than 24 hours or include overnight accommodation.⁴² Parliament has already recommended the deletion of these restrictions.⁴³ A “pre-arranged combination” includes not only an off-the-shelf package previously put together by an organiser, but also where the consumer specifies the components of the package finally composed by the travel agent. This might be seen as outside the typical notion of a package, but the ECJ held in the Club Tour case that a package exists even if the elements are tailored by the travel agent at the request of the consumer.⁴⁴ With the advent of websites which allow consumers to book different travel services through the one site within the same time span, there has been considerable uncertainty whether, or at what point, such arrangements amount to a package. A suggestion on this matter is contained in section 4.

Information duties

The Package Travel Directive imposes many information duties on organisers. Information must be provided by the organiser at the pre-contractual and the contractual stages of a booking. Before the conclusion of the contract the organiser must also provide information in the brochure. The organiser is not obliged to produce a brochure, but if he or she does it must give the information listed in the Directive. The information given in the brochure is “binding”. It is not clear what this means with regard to the contract which is made on the basis of the brochure. It is not clear, too, whether the information duties, foreseen for a written brochure, also apply to online offers.

The organiser must also provide information about passport and visa requirements before the conclusion of the contract even if the organiser does not produce a brochure. Finally, there is contractual information which must be given in a document called “travel confirmation”. A short time before the beginning of the journey the organiser has to give more information about some details of the tour.

⁴⁰ Supra, n. 17

⁴¹ Resolution A6-0399/2007

⁴² Art. 2 no. 1 Directive; further definitions refer to the personal scope of the Directive defining “organizer” (Art. 2 no. 2), “retailer” (Art. 2 no. 3) and “consumer”. (Art. 2 no. 4); also defined is the meaning of “contract” (Art. 2 no. 5)

⁴³ Resolution following the Bushill-Mathew report, supra, n. 2

⁴⁴ Club Tour, Viages e Turismo SA v. ACLG Garrida, C-400/00 E.C.R. I-4051 (2002), cited as Club Tour Case

The Directive does not provide for sanctions in case of a breach of the information duties by an organiser and the matter is left to the Member States. The resolution of the European Parliament on the 1999 report of the Commission asked for such additional regulations.⁴⁵

Withdrawal and cancellation, Art. 4 para. 5 Directive

The Directive does not exclude the right of an organiser to make changes to the contract after it has been made. However, in case of a significant alteration of an essential term of the contract the organiser is obliged to inform the consumer as soon as possible about the changes.⁴⁶ The consumer then has the choice either to reject the alteration and to withdraw from the contract without penalty⁴⁷ or, in the words of the Directive, to accept a "rider" to the contract specifying the alterations made and their impact on the price.⁴⁸

If the consumer rejects the alteration and withdraws from the contract the Directive entitles him or her to participate in a substitute package of equivalent or higher quality, provided that the organiser or retailer is able to offer such a substitute.⁴⁹ Instead of participating in a substitute package the consumer is entitled to be repaid all sums paid under the contract as soon as possible.⁵⁰ If appropriate, the consumer is also entitled to receive compensation for non-performance of the contract.⁵¹ It is not clear how the question of the appropriateness of paying compensation is determined and since this qualification (which clearly benefits organisers, not consumers) is repeated elsewhere in the Directive, the legislator may wish to seek its removal.

The Directive does not define what "significant alteration" means. But it does say that a price alteration can be a significant alteration, although it does not say what kind of price increase is "significant".⁵² Regarding surcharging (increasing the tour price after the contract is made) the Directive allows some price increases, but limits them to three grounds listed in the Directive.⁵³ However, only if the alteration results in a 'significant' increase is the consumer entitled to exercise the rights provided for by Art. 4 para. 5 of the Directive. Generally, a price increase of 10 percent is regarded as a significant alteration. The Directive does not allow price increases in the twenty days prior to the departure date,⁵⁴ and if that happened then any price increase, even if less than 10 per cent, will be regarded as a significant alteration. It follows from Art. 4 para 5 that the organiser may alter the tour price only insofar as the alterations are not significant.

Right to cancel the journey, Art. 4 para. 6 Directive

If the tour organiser cancels the tour before departure the Directive generally provides the consumer with the same rights as if the organiser significantly altered any of the essential contractual terms, i.e. participation on a substitute package or repayment and compensation.⁵⁵

However, these rights may be excluded if the organiser cancels because of the fault of the consumer⁵⁶ or if a minimum number of persons participating on the package can not be reached⁵⁷ or in the event

⁴⁵ Supra, n. 18

⁴⁶ Art. 4 para. 5 Directive

⁴⁷ Art. 4 para. 5, 1. indent Directive

⁴⁸ Art. 4 para. 5, 2. indent Directive

⁴⁹ Art. 4 para. 6 (a) Directive

⁵⁰ Art. 4 para. 6 (b) Directive

⁵¹ Art. 4 para. 6 (b) Directive

⁵² Art. 4 para. 5 Directive

⁵³ Art. 4 para. 4 (a) Directive

⁵⁴ Art. 4 para. 4 (b) Directive

⁵⁵ Art. 4 para. 6 (a), (b) Directive

⁵⁶ Art. 6 Directive

⁵⁷ Art. 4 para. 6 (b)(i) Directive; The requirement of a minimum number of participant must have been disclosed to the consumer in the brochure (Art. 3 para. 2 (g)) and in the contract (Index (g)).

of *force majeure*, as defined in Art. 4 para. 6 (b)(ii) of the Directive. Overbooking is expressly excluded as an excuse justifying non-payment of compensation.

A significant omission from the Directive is any provision dealing with cancellation by a consumer. While any sliding scale of cancellation charges will be subject to the Council Directive 93/12/EEC on unfair terms in consumer contracts⁵⁸, this is a general law and the legislator might consider it better to include a specific rule for package contracts.

Complaints, Art. 6 Directive

In cases of complaints, Art. 6 of the Directive requires the organiser and/or retailer or their local representatives to make prompt efforts to find appropriate solutions. This provision focuses on the question of how to deal with consumer complaints. In particular it focuses on the extent of the tour organiser's duty to assist an aggrieved consumer, to abolish the defect complained and to assume the expenses arising therefrom. Depending on how Member States transposed this provision, the organiser may be liable if he or she fails to offer a solution as required.

Organiser liability outside the Directive

Two injury situations which can affect package travel consumers, which lie outside the package but which only occur because the consumer is on a package holiday, should be mentioned. The first concerns injuries during "excursions" and the second concerns injuries while not receiving package services. These will be dealt with in section 4 dealing with problems and gaps in the Directive.

⁵⁸ OJ L 95/29, 21.4.93

2. Statistics relating to accidents and injuries during package travel

A presentation of, and commentary on, statistics relating to accidents and injuries caused during package travel, package holidays and package tours, their trends and likely main causes.

There is little statistics on travel accidents and safety issues during holidays available. Neither the data collection of the UN World Tourism Organisation nor the Eurostat tourism data contains statistics on accidents and injuries during holidays, let alone during package travel.⁵⁹ General injury statistics such as in the European Injury Database subsume holiday-related accidents within the category ‘leisure’ (or sometimes under the subcategory travelling) without further differentiation during what type of travel the accident occurred.⁶⁰ Similarly, statistics on tourism compiled by the World Tourism Organisation and Eurostat often do not differ between package travel and other forms of travel, and do not contain information on travel related accidents and injuries.⁶¹ In result, there is a significant lack of comprehensive EU data regarding accidents and injuries during package travel.

The following section therefore presents data on the main causes, trends and figures on accidents and injuries during package travel based on a combination of analysis of the limited general statistics that is available, the review of the relevant literature and the data obtained from interviews with key experts and stakeholders such as travel associations, tour operators, insurers, and consumer organisations. The analysis is structured as follows:

- Overview over the development of the package travel market;
- Review of selected travel medicine literature;
- Data from insurers;
- Data from travel associations and tour operators;
- Data from consumer organisations and other relevant sources.

2.1. Development of the package travel market

At the time when the Package Travel Directive was introduced, the purchase of package travel constituted the major trend for European holidaymakers. In recent years however, the use of the Internet⁶², the increased availability of low cost air carriers and the emergence of alternative travel options have changed the patterns of the package travel market.

⁵⁹ While a Council Directive was passed on 23 November 1995 on the collection of statistical information in the field of tourism (95/57/EC), the issue of safety has not been included into the data collection. Most recently, DG Health and Consumer Protection addressed this problem at a workshop in 2006 on “Accident/Injury Data Collection for Non-food Product and Service Risk Assessment”.

⁶⁰ For instance, the HASS (Home Accident Surveillance System) and LASS (Leisure Accident Surveillance System) injury databases in the UK use the category travelling/touring without differentiating between holiday, business travel or simply travelling from point A to point B. See <http://www.hassandlass.org.uk/query/reports/.htm>

⁶¹ The World Tourism Barometer of the UN World Tourism Organisation which publishes key tourism related statistics three times a year does not contain ‘package travel’ as a separate category, nor does it provide data on travel related accidents. Furthermore, the EUROSTAT data on tourism contains very few references to package holidays, and none on accidents and injuries. The most comprehensive data on tourism in Europe is available in the “Panorama on Tourism” and the “Tourism Statistics Pocketbook” as part of the Tourism database of EUROSTAT, yet without references to accidents and injuries. The general focus of tourism statistics are economic and business-related factors. See http://epp.eurostat.ec.europa.eu/portal/page?_pageid=2953,66450428,2953_66450743&_dad=portal&_schema=PORTAL

⁶² A study on Tourism and the Internet in the EU indicates that 47% of all Internet users in the EU have used the internet for services related to travel and accommodation in the three months before the survey (*Statistics in Focus*, 20/2006). It is estimated that about 41.7% of the entire population in Europe use the Internet (*Internet World Statistics*, 2007). This trend is also confirmed in the increase of 41% of online travel sales in Europe from 2003 to 2004 (*Panorama on Tourism*, p.12)

A growing trend in independent travel and direct reservations on the expense of package travel can be noted. For the EU 25, direct reservation was the most popular method in 2004 when about 40% of all trips were booked independently.⁶³ An increasing number of consumers are purchasing their holidays directly and assemble their holiday themselves from different suppliers, which is usually described as 'dynamic packaging'. Not surprisingly, the market share of intermediates such as travel agents and tour operators reportedly has diminished.⁶⁴ However, the preference for independent travel or package travel varies significantly within Europe, and for those EU Member States generating the largest number of tourists (Germany, UK, France, Netherlands and Italy)⁶⁵ package travel still makes up a significant portion within the tourism market, especially for outbound travel. Germany and the UK have the largest number of package travel sales: In Germany, the country with the largest number of holidaymakers, 24.5 million package holidays were sold for outbound travel in 2004 which constitutes nearly nine out of ten trips booked through a travel agent.⁶⁶ Together with domestic package travel, this amounts to sales of a total number of 28.7 million package travel trips. For the same year, 10.1 million package holidays were sold in the UK for outbound travel, which constitutes nearly two-thirds of trips booked through a travel agent; together with inbound travel, this amounts to sales of 11 million package holidays.⁶⁷ Sales figures for domestic package travel are generally much smaller in Europe since direct reservation and independent travel strongly dominates over intermediate booking for inbound travel for almost all Member States.⁶⁸

2.2. Review of travel medicine literature

A number of studies in the field of travel medicine have examined aspects of accidents and injuries during travel. In 2004, Bauer et al. published an article on the "Scope and pattern of tourist injuries in the EU" presenting the results of a DG SANCO funded research project in six Member States that account for 50% of tourism in Europe, yet without differentiating between package travel or independent travel.⁶⁹ In this study, it is concluded that the main causes of personal injury during travel are traffic accidents, followed by drowning and physical activity in the mountains. The share of injuries of non-domestic tourists that required hospital admission accounted for 0.5% of overall injuries in France, and 5% in Austria. Transport related injuries (accidents) accounted for 20% of hospital admissions, 30% of accident and emergency treatments, and 50% of fatalities for non-domestic tourists from the EU-15 travelling in Greece and Austria. These proportions are related to a further finding that private or hired vehicles are the most frequently used mode of transport. The majority of EU holidaymakers are between 25-44 years old and the average length of stay is 3-4 nights. Men accounted for more than 60% of tourist injuries with hospital admission, and 80% of fatalities. In accordance with the distribution of travellers, 40% of non-domestic tourists with injuries that were treated in hospitals were Germans, 20 % were from the UK, 11% from the Netherlands and 11% from Italy.⁷⁰

⁶³ *How Europeans Go on Holiday*. Statistics in Focus, 18/2006, p. 6

⁶⁴ European Parliament resolution of 29 November 2007 on a renewed EU Tourism Policy: Towards a stronger partnership for European Tourism (2006/2129(INI)). This trend was confirmed by stakeholder interviews.

⁶⁵ For 2004, the market share of the top 5 Member States generating outbound tourists in EU 25 was 40.7% for Germany; 19.2% for the UK; 7.5% for France; 7.2% for Netherlands, 4.8% for Italy which amounted to 79.4% of the total market share. See Panorama on Tourism, p. 5, Table 1.5.

⁶⁶ Related to trips of four days or more. Source: ibd, p. 32, table 3.19

⁶⁷ ibd.

⁶⁸ Except for Spain (15.4% direct reservation; 19.2 % travel agent); Germany again amounts for the largest total number of domestic package travel with 4,178,000 sales, followed by Spain with 2,103,000 sales of inbound package travel.

⁶⁹ Robert Bauer, Claudia Körner, Mathilde Sector. (2004). *Scope and Patterns of tourist injuries in the European Union*. International Journal of Injury Control and Safety Promotion, Vol. 12 (1), pp. 57-61. The countries selected for the research project were Austria, France, Germany, Greece, Italy and Netherlands. The study used three data sources: mortality data, hospital discharge register and the data of accident and emergency registration systems. Only non-domestic tourists were included into the study. This study was funded by the Injury Prevention Program of DG Health and Consumer Protection.

⁷⁰ Data based on hospital discharge registers in Austria, France, Greece, Italy and the Netherlands. See full report of the study at http://ec.europa.eu/health/ph_projects/2001/injury/fp_injury_2001_frep_10_en.pdf, p. 37

In another study on “Illness and injury presenting to a Norwegian travel insurance company’s helpline” by Lerdal et al. in 2006, the authors used calls and notifications to the helpline of Norway’s largest travel insurance company (Europeiske).⁷¹ Illness accounted for 76% of notifications to the travel insurance helpline, while injury accounted for 24%. Most of the injuries of Norwegian tourists occurred in Southern Europe and Eastern Europe (57%). The article points out that the data of travel insurance companies constitute an important source for health incidents abroad.⁷²

This is confirmed by another study that followed a similar approach: Fleck et al. (2005) retrieved data from a German health insurance company that asked its members to fill out a pre-travel and post-travel questionnaire in order to examine the perceived health status of travellers.⁷³ 1,471 answers were included into the study of which 10.1% reported an illness during their travel, while 1.8% reported injuries during travel. Diarrhoea was the most common complaint of overseas travellers, a travel illness that is examined in more detail in another study on British package holiday tourists.⁷⁴ Despite the common assumption that travel illness occurs mainly in rare exotic travel destinations during long travels, this study shows that travel illness is common also during short-haul package holidays.

With regard to road accidents, the most frequent cause of injuries, it has been argued that tourists are at greater risk compared to the residents of a country.⁷⁵ A study on road accidents on a Greek Island by Pertridou et al. (1999) showed that 15% of all accidents were traffic-related among Greek residents, but traffic-related accidents represented 40% of tourist accidents, and hence were relatively more frequent. The study concludes that the risk of traffic accidents was much higher for men than for female tourists, with younger tourists at the greatest risk.

However, this study, just as the other studies reviewed in this section, notes the absence of comprehensive and comparable data and cautions to generalize the findings. A review of literature on the epidemiology of injury from a global perspective regarding unintentional injuries during non-domestic travel concludes that most research is confined to American and Australian case studies; focuses on infectious diseases during travel and that the major problem are data deficiencies and inconsistency in classification which makes it difficult to establish a true profile of tourist injuries.⁷⁶ The lack of data is highlighted as a fundamental problem also in a further review on road traffic accidents during holidays.⁷⁷ Given the emergence of travel-related injuries as an important public health challenge at a global scale that can reverse the positive relationship between health and tourism, the need for standardizing data collection and analysis on this topic have been addressed by some public health scholars.⁷⁸

This leads to the following conclusion:

⁷¹ Anners Lerdal, Thomas Harding, Sverre Kjolstad. (2006). *Illness and injury presenting to a Norwegian travel insurance company’s helpline*. Travel Medicine and Infectious Disease (2007) Vol.5, p.165-170

⁷² Lerdal, p.170

⁷³ Susanna Fleck, Helmut Jäger, Hajo Zeeb. (2005). *Travel and health status: a survey follow-up study*. European Journal of Public Health, Vol. 16 (1), p. 96-100

⁷⁴ M.R. Evans, D. Shickle, M. Z. Morgan. (2001). *Travel Illness in British Package Holiday Tourists: Prospective Cohort Study*. Journal of Infection, Vol. 43, pp.140-147

⁷⁵ E. Petridou, N. Dessypris, A. Sklalkidou, D. Trichopoulos. (1999). *Are traffic injuries disproportionately more common among tourists in Greece? Struggling with incomplete data*. Accident Analysis and Prevention, Vol 31 (6), pp. 611-15

⁷⁶ R.J. McInnes, L.M. Williamson, A.Morrison. (2002). *Unintentional Injury during Foreign Travel: A Review*. Journal of Travel Medicine, Vol. 9, pp. 297-307

⁷⁷ L. Walker, S.J. Page. (2004). *The Contribution of Tourists and Visitors to Road Traffic Accidents: A preliminary Analysis of Trends and Issues for central Scotland*. Current Issues in Tourism, Vol. 7 (3), pp. 217-241

⁷⁸ C. Schmierer, M. Jackson. (2004). *Tourist Ill Health: What to do with the data?* Conference paper presented at the New Zealand Tourism and Hospitality Research Conference, December 8-10, 2006, Wellington, New Zealand

1. **Review of Literature:** The scientific literature in the field of travel medicine reviewed for this study has identified road accidents as the main cause of tourist injuries, with mainly young men at risk, regardless of their holiday location and nationality. Due to the increasing number of people taking vacations, travel injuries are recognized as an important but understudied public health concern that needs further attention. The differences in classification and data collection prevent generalized conclusions which underlines the need for a regular, systematic data collection on accidents and injuries during holidays.

2.3. Data from travel insurers and assistance companies

In addition to the Package Travel Directive that establishes the liability of the tour operator for the proper fulfilment of the contract, travellers also purchase in many cases a separate travel insurance that covers the vacation period. In case of an accident or injury that falls within the liability of the tour operator, travellers can seek assistance from the local representative of the tour operator and/or call the emergency assistance hotlines of the travel insurance company. While insurers and their assistance companies⁷⁹ do compile statistics of the number of notifications and claims received, they do not usually classify the case according to the type of organisation of the travel and thus provide only general data for travel-related injuries.

Table 1 below present the number of policies written, the number of claims incurred and the costs of claims for purchased travel insurances in the UK. In line with the increasing number and frequency of holidaymaking, the Association of British Insurers (ABI) records for the UK a strong increase in the purchase of travel insurance and claims relating to medical expenses.⁸⁰

Table 1: Travel Insurance sales and claims in the UK

Year	Number of policies written	Number of claims incurred (for medical expenses only) ⁸¹	Cost of claims in £ (for medical expenses only)
2004	11,226,000	108,000	67,000,000
2005	16,670,000	217,000	138,000,000
2006	21,024,000	276,000	166,000,000

Source: Civic Consulting, based on ABI statistics, 2007

The data from assistance companies based in Germany also indicate an increase in the number of calls and claims to their emergency services. Table 2 lists the number of notifications received.

⁷⁹ Assistance companies are service providers for insurance companies to provide 24-hour emergency services worldwide to the insured. Most of the insurers contacted for the study provided a contact to the assistance companies they cooperated with to retrieve the requested data.

⁸⁰ ABI estimates that these numbers cover about 90% of the UK travel insurance market. The statistics department of ABI notes that “the estimated market coverage is based on gross written premiums reported on the Financial Services Authority (FSA) returns for British based FSA-authorised companies and does not include Lloyd syndicates”.

⁸¹ The total number of claims incurred for 2006 was 850,000; apart from medical expenses the remaining claims related to cancellations (232,000), Baggage & Money (233,000) and ‘other’ (109,000).

Table 2: Number of notifications received by selected assistance companies (in Germany)

Year	Assistance Company A	Assistance Company B	Assistance Company C
2005	8,750		
2006	9,600	3,500	330
2007 (est.)	10,000		322

Source: Civic Consulting, data based on stakeholder questionnaire, 2007

Table 3 presents data from assistance companies in Germany on the type of accidents and injuries, the main causes and trends, and the countries in which most accidents occur.

Table 3: Type of accidents, the main causes, and countries of holiday provided by selected assistance companies (in Germany)

	Assistance Company A	Assistance Company B	Assistance Company C
<i>Most frequent types of accident and injury</i>	Fractures Alcohol related injuries	Fractures Roadside accidents (with public or private vehicle) Drowning	Sport accidents with traumatological injuries
<i>Main causes of accidents and injuries</i>	Carelessness Lack of knowledge about the local situation	Old age (fragility of bones) Sports (especially skiing)	
<i>Main trends</i>	Increasing number of accidents	Accidents during bus trips with elderly Skiing accidents Motorcycle accidents on Islands	none
<i>Countries where most accidents and injuries occur</i>	Egypt Turkey Spain Thailand	Austria Italy Spain Turkey Greece Thailand Mexico USA	Turkey Greece

Source: Civic Consulting, data based on stakeholder questionnaire, 2007

This leads to the following conclusion:

2. **Data from travel insurers and assistance companies:** Data gathered from insurance and assistance companies indicates that road traffic accidents, fractures, injuries related to physical activity and excessive behaviour are listed as the main causes of accidents and injuries. However, insurers and assistance companies do not distinguish between package holiday and independent travel, hence their data refers to travel in general.

2.4. Data from Tour Operators and Travel and Tour Operator Associations

Most national and European level travel and tour operator associations contacted for this study were not able to provide statistical data on accidents and injuries during package travel.⁸² However, the Federation of Tour Operators in the UK could provide statistics on fatal accidents for the years 1994-2003 with regard to customers of tour operators that are members of the FTO (see the following table). The FTO has 13 members which make up roughly 80% of the package travel supplier market in the UK.

Table 4: Fatal accidents statistics for package travellers from the UK (1994-2003)

Accident type	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
<i>Fire</i>	0	0	0	0	0	0	0	1	0	0
<i>Gas</i>	1	0	0	0	0	0	0	0	0	0
<i>Swimming</i>	24	13	10	9	14	16	12	8	17	5
<i>Road Traffic accidents</i>	18	34	12	9	15	41*	14	15	6	18
<i>Balcony</i>	7	6	5	8	6	8	10	5	8	0
<i>Risk Activity</i>	-	-	13	3	19	10	17	10	10	11
<i>Other**</i>	7	3	10	16	25	13	14	8	20	9
Total	57	56	50	45	79	88	67	47	61	43
<i>Approx. number of travellers (millions)</i>	15	16	15	16	17	17	17	17	17	17

Source: Federation of Tour Operators, 2007

*=Includes coach accident in South Africa involving 26 fatalities.

**= Includes deaths caused by illness, such as meningitis.

The table above confirms the relevance of road traffic accidents, which were the leading single cause of fatal accidents in four of the ten years for which data was available, followed by risk activities and swimming.

As suppliers of package holidays, tour operators should have the most reliable data on accidents and injuries, yet are generally reluctant to disclose their figures. One of the largest global tour operators declined to provide data claiming that they would not compile any statistics on accidents and injuries. Table 5 displays the information by another globally operating tour operator with a large market share in Germany (referred to as operator A).

⁸² Travel Associations were contacted in Austria, Germany, Netherlands, the UK, and as well as European Travel Associations. None could provide any statistics. The largest travel association in the UK announced that they are planning to compile accident and injury statistics to obtain data.

Table 5: Data from tour operator A for their German package travel customers

Business year	Customers	Mortality	Illness and Injury
2007	over 5 million	115	691

In addition, another tour operator (indicated as operator B in the table below) provided data. B is a European package travel supplier with a smaller market share in Germany. Table 6 lists the number of accidental injury (without illness), the most frequent types, causes and trends with respect to accidents and injuries.

Table 6: Data from tour operator B for their package travel customers in Germany

Business year	Customers	Number of accidents	Most frequent types of accidents and injury	Most frequent causes of accidents and injury
2006	Over 1 million	25 (including 2-3 severe cases)	Smaller injuries such as stepping into glass; Smaller coach accidents during transfers; Most accidents are caused by third-party negligence (and not the tour operator).	Carelessness of the guests; Third party negligence in road traffic; Third party negligence in technical maintenance (e.g. elevators).

Source: Civic Consulting, data based on stakeholder questionnaire, 2007

This leads to following conclusion:

3. **Data from tour operators and their associations:** Data gathered from tour operators and their associations indicate that illness is the major type of injury during package travel, while accidents constitute only a fraction. There are no particular trends noted. The fatality statistics of the UK Federation of Tour Operators indicates that in the decade 1994-2003 a total of 593 package travellers from the UK died because of accidents that occurred during a package holiday, equivalent to about 3.6 fatalities per million travellers.

2.5. Data from consumer organisations and other sources

Consumer organisations and consumer advice services

Seven consumer organisations and one consumer advice service were contacted in Belgium, Denmark, Germany, Luxembourg, UK, as well as the European umbrella organisation BEUC to gather information.⁸³ However, although consumer organisations do receive tourism related complaints, they generally do not compile specific statistics on cases of injury or accidents.

An exception was the UK organisation HolidayTravelWatch, which was particularly resourceful given its focus on consumer complaints by package travellers.

⁸³ The contacted organisations were: BEUC, Danish Consumer Council (DK), HolidaytravelWatch (UK), Test-Achats (BE), Union Luxembourgeoise des Consommateurs (LU), Verbraucherzentrale-NRW (DE) and WHICH (UK). Additional data was provided by the government funded advice service Consumer Direct in the UK.

For the year 2006, HolidayTravelWatch recorded a total of 7,720 complaints of which 720 were cases of personal injury. The overwhelming majority of these cases constituted illness, and about 1% constituted injury or accidents claims (see Table 7 below). It is important to note that one claim might be filed on behalf of 3-4 family members, hence the actual number is expected to be much higher. For 2007, HolidayTravelWatch received 10,500 complaints of which 900 cases related to personal injury. Again, the bulk of claims consist of illness related cases, and only about 1% of injury claims. Most frequent causes of injury were recorded as slips and trips; fractures; cuts; bruises; carbon monoxide poisoning, and bike accidents.

The main causes for accidents in a hotel facility were listed as poor lightening, poor maintenance, no steps, poor boiler systems and poor hygiene handling. According to the organisation, there is a trend of an increase in illness cases (especially related to Salmonella and Giardia).⁸⁴

Table 7: Complaints by British package travel consumers to HolidayTravelWatch

	Claims of personal injury	... of which related to illness	... of which related to injuries and accidents
2004	420	410	4
2005	270	267	3
2006	720	713	7
2007*	900	891	9

* Note: The figures for 2007 include complaints until December 2007.

Source: Civic Consulting, data based on stakeholder interview, 2007

The consumer advice service 'Consumer Direct' received in the period 1 January to 31 October 2007 a total of 6,820 claims from package travel consumers, of which 22 were related to safety standards. It should be noted that nearly half of the claims (3,130) were related to substandard services (Table 8).

Table 8: Complaints by British package travel consumers to Consumer Direct (Jan-Oct 2007)

Product goods and services description	Trading practice	Total	Of these safety related complaints
(FG03) Package holidays in UK	(01) Defective goods	39	2
	(02) Substandard services	429	5
	(04) Prices	54	
	(05) Delivery/Collection/Repair	7	
	(06) Cancellation	27	

⁸⁴ It was argued by a representative of HolidayTravelWatch that recent British court case decisions interpreting the UK Package Travel Regulation to the advantage of tour operators rather than consumers had a negative effect on the quality of the offered services during a package tour. He suggested that this undermined the general improvement of hygiene and safety standards at travel destinations for the past two decades following the Package Travel Directive (Interview November 27th, 2007). This argument was supported by a solicitor dealing with injury claims on behalf of package travel consumers. It was not possible to verify this claim independently.

	(07) Selling practises	1	
	(08) Misleading Claims/Omissions	131	
	(09) Offers of inadequate redress	17	
	(-1) Unknown	5	
	(10) Terms and Conditions	24	
	(11) Problems pursuing a claim	20	
	(12) Business Practices	39	
	(16) Access to goods or services	5	
(FG03) Package holidays in UK total		798	7
(FG04) Package holidays overseas	(01) Defective goods	302	
	(02) Substandard services	2,711	15
	(04) Prices	430	
	(05) Delivery/Collection/Repair	83	
	(06) Cancellation	174	
	(07) Selling practises	38	
	(08) Misleading Claims/Omissions	1,329	
	(09) Offers of inadequate redress	224	
	(-1) Unknown	41	
	(10) Terms and Conditions	176	
	(11) Problems pursuing a claim	142	
	(12) Business Practices	297	
	(13) Age restricted sales	1	
	(15) Food related complaints	1	
	(16) Access to goods or services	72	
	(17) Guarantees	1	
(FG04) Package holidays overseas in total		6,022	15
Grand Total		6,820	22

Source: Consumer Direct, 2007, data from 1.1.2007 to 31.10.2007

Law firm specialized on accidents and injury claims abroad

One of the largest law firms in the UK specializing on personal injury claims of package travel consumers has provided figures based on their cases. The firm acts for, or through ongoing claims, becomes aware of, between 3,500 to 7,000 British tourists each year who suffer accidental injury (including illness/infections) during package holidays, package tours or other package arrangements.⁸⁵ The firm considers that they are aware of only a modest proportion of British holidaymakers who are injured and assume that the total number of travellers who are affected is likely to be substantially higher.⁸⁶ The firm's representative stated that gastric illness is the most common injury (including Salmonella, Shigella, Cryptosporidium, Giardia). He expressed, that "accident victims suffer a range of injuries from paralysis (tetrapeglia), serious head injuries or fatal injuries through to more minor short term injuries". He listed as main causes for illness poor health and hygiene standards at hotels and inadequate measures taken by hotels when an illness outbreak occurs. With regard to main causes of accidents he listed inadequate or unsafe facilities and equipment, poor maintenance, inadequate organisation and training of staff; improper selection of agents; organisation of excursions and unsafe driving of transfer coaches.

This leads to the following conclusion:

4. ***Data from consumer organisations and law firms:*** Data from consumer organisations and consumer advice services in the UK indicate that safety and injury related complaints by package travellers constitute only a fraction of consumer complaints. The bulk of injury related complaints by package travel consumers concerns illness and infections due to poor health and hygiene standards.

2.6. Conclusion regarding data on accidents and injuries during package travel

The available data indicates that main causes of accidents and injuries during package travel are likely to be:

- Road traffic accidents (including during coach transfers)
- Poor hygiene standards
- Poor equipment
- Lack of signs, steps and light
- Excessive alcohol consumption

With a lack of comprehensive data (both in terms of geographic area and time period covered) it is hardly possible to assess possible trends regarding accidents and injuries during package travel. The only long time series of data that could be obtained during the research for this study, namely the fatal accidents statistics for package travellers from the UK for the ten-year period 1994 to 2003, does not show a particular trend, neither regarding the overall number of accidents, nor concerning the accident type.

⁸⁵ According to the data provided, the firm acts for between 3,000 to 4,500 new British clients every year with injuries sustained during Package arrangements and becomes aware of approximately 500 – 2,500 additional British holidaymakers each year who suffer injury.

⁸⁶ Interview on November 20th, 2007

Some stakeholders report an increase in accidents and injuries claims, which may be due to increasing numbers of tourists, or, as was also stated, to declining health and safety standards in recent years and careless behaviour of travellers – a statement that is difficult to verify or disprove with the available data. There is also no statistical evidence regarding the question whether package travel is less or more safe than individual travel.

This underlines the need for a regular, systematic and standardized data collection at the EU-level on accidents and injuries during holidays that would improve the information level for all stakeholders. Both the European Injury Database and the tourism section of Eurostat could extend their data collection to safety and accident related categories. On the other hand, the available data is sufficient to reconfirm beyond doubt that injuries and accidents, including fatal accidents, regularly occur during package travel and therefore there is a need for a clear and unambiguous legislative framework concerning the duties of relevant operators concerning tourist safety and the liability rules that apply in case of injuries and accidents.

3. Relevant federal legislation in the US

3.1. Brief comparative analysis of relevant federal legislation in the US

The US does not have a federal law equivalent to the Package Travel Directive, although there is some federal legislation applicable to tour organisers/retailers.⁸⁷ Package tours do not play the same role in the US as they do in Europe. They constitute only a small proportion of all travel undertaken by US consumers, whereas in Europe, although changing, package tours remain an important form of holiday-making.

Travel sellers in the US, notably tour organisers or tour operators⁸⁸ and travel agents, are generally governed by state statutory and common law rules. Currently, about eleven states have statutes dealing with travel and travel sellers covering – but not limited to – tour organiser, retailer and package tours.⁸⁹ These statutes include – more or less – advertising standards, disclosures and information to be provided to consumers, refund obligations in the event of non- or improper performance of the services contracted for, requirements to provide for insolvency protection and provisions requiring the licensing or registration of some travel sellers. In states without such “qualified seller of travel statute”⁹⁰ tour organisers and retailers are governed by general consumer protection laws.

In nearly all US states⁹¹ the common law principle that a tour organiser is a principal vis-à-vis a consumer applies. As such this makes a tour operator liable for the performance of the tour. The operator is treated as being vicariously liable for non-physical injury claims regardless of whether the failure was caused by a supplier or the tour operator.

However, most state courts do not hold tour organisers strictly liable for personal injuries suffered by travellers at a foreign destination (e.g. in a hotel or while using transportation) if the organiser does not own or operate the place of injury. Usually the (contractual) promise of the tour organiser to perform the tour does not include a promise that no harm or injury will befall the traveller. Nor does he necessarily owe any duty to the traveller with respect to those accidents. Tour organisers are treated as principals who employ independent contractors – the service suppliers – to provide services to their patrons – the travellers – but whom they do not supervise or control. Because of this lack of supervision and control over the supplier’s facilities or operations, tour organisers are usually not held liable for the acts/omissions of suppliers. They often seek to re-enforce this lack of liability by using disclaimer clauses which reject all liability for the acts of service suppliers. While they remain, of course, liable for their own negligence, tour operators often seek to disclaim liability for this also. In many ways the situation is not dissimilar to the situation that prevailed in the common law states of the Community (most of the UK and Ireland) before the Package Travel Directive was passed.

Disclaimers aside, tour operators in the US are only liable under the common law tort of negligence for personal injuries to their package travel consumers if they are negligent. The two principal requirements in making a case are that the accident was reasonably foreseeable (duty of care) and that there was a lack of reasonable care by the tour operator in trying to prevent it (breach of duty).

⁸⁷ See below.

⁸⁸ Instead of “tour organiser” the term “tour operator” or “tour wholesaler” is more common within the US travel industry to describe a person or company that creates and/or markets inclusive tours and/or provides services or supplies packages sold by travel agents. It also describes a person who assembles tours or packages comprising of two or more services as accommodation and transport and offers it to the public directly or indirectly, through an intermediary, for an inclusive price. “Tour organiser” (“tour organizer” in American English spelling) refers to a person who locates and creates groups for travel arrangements, such as outside sales agents for travel agencies. This can be for religious, educational, or club purposes, and may or may not be for profit; See e.g. Online Glossary, Anolik Law Corporation, www.travellaw.com

⁸⁹ Florida, Hawaii, Illinois, Iowa, California, Massachusetts, Nevada, New York, Rhode Island, Washington, Virginia

⁹⁰ In most of the states single statutory provisions applicable to travel seller but focusing only on a specific issue like disclosure duties or advertising can be found.

⁹¹ Federal common law does not exist.

US lawyers and courts are very inventive in creating duties which can be breached by tour operators, as well as finding ways to circumvent disclaimers of liability. To some degree this activism by US courts can be seen as a reaction to the lack of laws similar to the Package Travel Directive.

The potential liability of travel agents in the US for personal injuries suffered by package travel consumers is unclear. This is because their legal status is highly disputed. The key question is: Who's agent is the travel agent? Is he/she the agent of the organiser – not responsible for the performance of the tour if the existence of the organiser as principal has been disclosed– or is he/she the agent of the consumer and as such deemed to act as a fiduciary with a high standard of care vis-à-vis the consumer? Various theories can be used to shift the liability of the organiser – and of the supplier – to the travel agent. It is one of the most developing and exciting areas within the US travel law.

In the statutes and/or regulations that do exist in the US there are no standardized terms such as “package tour”, “tour operator/organiser”, or “travel agent”, in contrast to the definitions provided in the Package Travel Directive. This hinders the clear differentiation between what tour organisers do and the delivery of individual travel services not combined in a package. The statutes contain a variety of different and conflicting definitions and are far from uniform in their scope.

Regarding liability for the performance of a package tour within the US the focus is not so much on the package itself as on the person or company who markets and delivers the travel service. To determine the applicable law and liability for the performance of the contracted travel services, it has to be decided who is involved in the marketing and delivery of the service. Is it a tour operator who assembles single services and re-sells them as a package or charter tour? Is the product sold directly or indirectly through an intermediary, e.g. a travel agent? Or is the service actually delivered by a supplier, e.g. a hotel or carrier?

3.2. Federal legislation dealing with the liability of tour operators

At the US federal level there is some legislation, only broadly comparable with the Directive, governing tour operators selling package tours or, in the words of the legislation, “combined tours consisting of at least two travel services”. But federal law only applies where air or sea transport is involved.

3.2.1. Tours including air transportation

Regulations issued by the Department of Transportation (DOT) govern public charter tour operators and special event tours. These regulations are based on the Federal Aviation Act (FAA) which authorises the DOT to enact special regulations to control and supervise, inter alia, the activities of charter tour operators and air carriers.⁹² However, the regulations do not provide consumers with a right of action in a federal court. The provisions are enforced by the DOT only.

Regulation of public charter flights

The most important regulation is the Public Charter Regulation. It applies to public charter operators and direct air carriers, including their agents, who furnish public charter air transportation for passengers travelling domestically or internationally.⁹³ The Regulation aims to balance the economic interests of charter participants, air carriers and charter operators. In doing so, it modifies and improves the rights of travellers in contrast to their rights under common law.

⁹² 49 U.S.C. §§ 40102, 40109; 41101 seq

⁹³ 14 C.F.R. §§ 380.01 – 380.67

As with the Package Travel Directive the US Regulation mainly contains rules regarding advertising standards,⁹⁴ information duties,⁹⁵ contractual requirements including cancellation⁹⁶ and insolvency protection.⁹⁷

Liability for performance of the tour (non-injury claims)

The Regulation identifies the charter tour operator as the “principal” of the contract with the traveller (referred to as “participant”) and makes him/her liable for all services and accommodations offered in connection with the charter.⁹⁸ This status imposes a strict liability on the charter operator for all non-physical injuries. As with the Package Travel Directive, the public charter operator is made responsible for the delivery of all travel services included in the package, regardless of whether it was indirectly sold by a travel agent and/or the services were actually performed by third party suppliers, not part of the tour operator. The charter tour operator is obliged to identify himself as “principal” and is not allowed to deny this status or to waive or disclaim this liability. However, despite this strict liability US courts are not uniform in their attitude to the use of disclaimers by tour operators to avoid liability for delay of flights caused by the air carrier. Some courts do not enforce such disclaimers⁹⁹, while others do.¹⁰⁰ Whether US courts would recognise further exonerations – as provided for by the Directive for *force majeure* – is not clear. The regulation does not explicitly deal with the issue.

Cancellation and major changes

The Public Charter Tour Regulation, like the Package Travel Directive, contains rules on cancellation and major changes to tours. The Regulation allows the tour operator to cancel the flight 10 or more days before the scheduled date of departure.¹⁰¹ Less than 10 days before then the tour operator is generally not entitled to cancel the trip, except if it is physically impossible to perform.¹⁰² If the tour operator cancels a trip, a refund must be paid within 14 days of the cancellation.¹⁰³

The US Regulation also provides for a traveller right of cancellation and the right to receive a full refund in case of a major change prior to the beginning of the tour. Notice of the change must be communicated by the tour operator to the consumer.¹⁰⁴ In case of a major change after departure the participant is entitled to reject the substitute service and to receive a refund of the portion of his payment allocable to the service not provided.¹⁰⁵ The Regulation defines what a major change is - a change of the departure or return date,¹⁰⁶ a change in the originating or destination city,¹⁰⁷ and a substitution of any hotel.¹⁰⁸ A tour price increase is also a major change if it occurs 10 days before departure and results in an aggregate increase of more than 10 percent.¹⁰⁹ Generally, the right to a refund is in addition to any other rights or remedies the participant may have. However, the tour operator is expressly allowed to pay the refunds on condition that any additional remedies are waived.¹¹⁰

⁹⁴ 14 C.F.R. § 380.25; 380.28

⁹⁵ 14 C.F.R. § 380.30; 380.31

⁹⁶ 14 C.F.R. § 380.31; 380.32

⁹⁷ 14 C.F.R. § 380.34

⁹⁸ 14 C.F.R.32(x)

⁹⁹ *Feuer v. Value Vacation Inc.*, 17 Aviation Cases 17,296 (N.Y.Sup.,1983)

¹⁰⁰ *Newsome v. Trans Intern. Airlines*, 492 So.2d 592, 600 (Ala.,1986)

¹⁰¹ 14 C.F.R. § 380.12(b)

¹⁰² 14 C.F.R. § 380.12(a); § 380.32(h)

¹⁰³ 14 C.F.R. § 380.32(k)

¹⁰⁴ 14 C.F.R. § 380.32(o)-(r); 380.33

¹⁰⁵ 14 C.F.R. § 380.32(s)

¹⁰⁶ 14 C.F.R. § 380.33(a)(1)

¹⁰⁷ 14 C.F.R. § 380.33(a)(2)

¹⁰⁸ 14 C.F.R. § 380.33(a)(3)

¹⁰⁹ 14 C.F.R. § 380.33(4)

¹¹⁰ 14 C.F.R. § 380.32(t); § 380.33(c)

Alternative arrangements, duty to assist, duty to communicate

Unlike the Directive,¹¹¹ the Charter Regulation does not oblige the charter operator to offer substitute services if available. The participant's choice is between accepting the alterations or receiving a refund. Also, the Charter Regulation does not contain a duty to assist passengers in difficulties as provided for by the Directive¹¹². Further, the Charter Regulation does not place a special duty to communicate a failure of the performance of the tour to the charter tour operator or air carrier or other supplier.¹¹³

Liability for personal injury

There is a major difference between the Package Travel Directive and the Public Charter Regulation as regards liability for personal injury or property damages suffered by travellers during the tour. The Public Charter Regulation allows the charter tour operator to disclaim liability for physical injury or property damage generated by contracted suppliers, but only where the tour operator was not himself negligent.¹¹⁴ The service supplier is viewed as an "independent contractor" not under the control of the tour operator. It is obvious that European law provides better protection of package travel consumers than the US law does.

Special event tours regulation

The DOT Regulation also regulates advertising, sales and refunds for "special event tours".¹¹⁵ A special event tour is defined as a tour that is organised for the purpose of attending an event of a special nature and limited duration (sporting, social, religious, educational, cultural, political events), which are held for reasons other than the tour itself and which is represented by the tour operator as including admission to that event.¹¹⁶ This Regulation expands the former "Super Bowl rule" which applied only to the super bowl event. It aims to ensure that air travellers who purchase tours to special events will receive the promised admission to the event.¹¹⁷ It applies to both scheduled and charter flights.¹¹⁸ The Regulation entitles tour participant to a refund of the total tour price if the promised admission to the event is not furnished by the tour operator.¹¹⁹ In the event of a tour price increase of more than 10 percent the participant is entitled to cancel the tour and to receive a full refund.¹²⁰ As with the Charter Tour Regulation, a tour operator is not allowed to increase the price less than 10 days before departure.¹²¹

3.2.2. US Maritime law and cruise packages

The European Package Travel Directive makes no distinction between cruise packages and "land" package. Both are packages and the same rules apply to both. However, in the US cruises and maritime passengers generally are governed by federal maritime law. Maritime or admiralty law¹²² is a distinct body of law (substantive and procedural) regulating navigation and shipping. The judicial power for all admiralty and maritime jurisdiction was placed to the Federal District Courts by the Judiciary Act of 1789 and Art. 3 § 2 of the Constitution and is codified in 28 U.S.C. § 1333.

¹¹¹ Art. 4 para. 5, para 6

¹¹² Art. Art. 5 para. 2 subpara. 2, Art.6 Directive

¹¹³ See Art, 5 para. 4 Directive

¹¹⁴ 14 C.F.R. § 380.32(x)

¹¹⁵ 14 C.F.R. § 381.1 – 13

¹¹⁶ 14. C.F.R. § 381.5. The Definition enumerates expressly college and professional sporting events, the Olympics, concerts and the Passion Play in Oberammergau.

¹¹⁷ 14 C.F.R. § 381.1

¹¹⁸ 14. C.F.R. § 381.3 with a more detailed definition

¹¹⁹ 14 C.F.R. § 381.11

¹²⁰ 14 C.F.R. § 381.13(a)

¹²¹ 14 C.F.R. § 381.13(b)

¹²² The terms are used interchangeable. Whereas "admiralty" derives from the English law of the seas, "maritime" has a more general connotation.

However, common law remedies are reserved by the savings-to-suitors clause, which allows aggrieved passengers to sue in state courts.¹²³ With the regulation and control of navigation and shipping on a national level Congress intended to achieve a uniform body of law to facilitate interstate and foreign commerce.

The balance in US maritime law between cruise lines/shipping companies and cruise consumers lies in favour of the former. Much of the relevant law dates from a different era when the greater economic interest lay in protecting ship owners. Cruise passengers have very limited rights and remedies compared to the rights and remedies of consumers and travellers outside maritime law. The following sections highlight some of the rules and decisions which limit the liability of ship owners.

Limitation of Vessels Owner's Liability Act

Under the Limitation of Vessels Owner's Liability Act the ship owner is allowed to limit liability for any loss suffered by the passenger to the value of the vessel. A prerequisite of this is that there is no privity of negligence or unseaworthiness of the vessel or knowledge of the owner.¹²⁴

Limitations for infliction of emotional distress, mental suffering and psychological injury

Generally, a cruise line that touches U.S. ports is liable for personal injury or death caused by its own negligence or fault. Stipulations limiting liability for negligence are invalid.¹²⁵ However, in 1996 Congress enacted a provision allowing cruise lines to include in their contracts, agreements or tickets a clause insulating themselves against liability for infliction of emotional distress, mental suffering or psychological injury.¹²⁶

No limitations are allowed if the emotional distress etc. is the result of physical injury to the claimant or results from the claimant having been at actual risk of physical injury and the injury or risk was caused by the negligence, fault¹²⁷ or intent¹²⁸ of the cruise line. Furthermore, limitations are not allowed in cases involving sexual harassment, sexual assault or rape.¹²⁹

Time limitation for bringing action

For physical injuries and death, maritime law allows cruise lines that touch U.S. ports to stipulate time limitations for filing a claim and commencing a suit.¹³⁰ Notice of or filing a claim for personal injury or death can be limited to six month after the date of the injury or death.¹³¹ The period for commencing a lawsuit can be limited to one year.¹³² If the passenger fails to give notice as required by contract the statute provides for some exceptions when such a failure does not exclude the claimant from recovery, e.g. if the owner of the vessel had knowledge of the injury or death or if there was a satisfactory reason why the notice could not have been given.¹³³ If the claimant is a minor or mental incompetent and also in case of a claim for wrongful death the time limitation period for giving notice of the claim is longer – depending on the date a legal representative is appointed or three years after the injury or death.¹³⁴ For non-physical injury claims, the time limitation can be shorter than the six month or one year period.

¹²³ 28 U.S.C. § 1333 (1)

¹²⁴ 46 U.S.C. § 183(e); 46 U.S.C. § 183(a))

¹²⁵ 46 U.S.C. § 30509 (a) (formerly cited as 46 U.S.C. § 183c (a))

¹²⁶ 46 U.S.C. § 30509 (b)(1) (formerly cited as 46 U.S.C. § 183c (b)(1))

¹²⁷ 46 U.S.C. § 30509 (b)(1)(A),(B)

¹²⁸ 46 U.S.C. § 30509 (b)(1)(C)

¹²⁹ 46 U.S.C. § 30509 (b)(2)

¹³⁰ 46 U.S.C. § 30508 (formerly cited as § 46 U.S.C. § 183(b))

¹³¹ 46 U.S.C. § 30508 (b)(1)

¹³² 46 U.S.C. § 30508 (b)(2)

¹³³ 46 U.S.C. § 30508 (c)

¹³⁴ 46 U.S.C. § 30508 (d)

Death on the High Seas Act

The Death on the High Seas Act (DOTHA)¹³⁵, enacted by Congress in 1920 to expand claims provided for under common law, provides for recovery for the death of any person caused by wrongful act, neglect or default occurring on the high seas. To be applicable the death or incident causing death has to have occurred at sea three nautical miles out from the shore of any US state.¹³⁶ Only the personal representatives of the deceased person can bring a civil action against the person or vessel responsible. The action must be for the benefit of the decedent's spouse, parent, children or other dependent relatives.¹³⁷ Recovery is limited to monetary damages.¹³⁸ The DOTH A does not provide for non-pecuniary damages. The statute also applies in the case of an aviation accident beyond 12 nautical miles from the shore of the US and provides for additional compensation for non-pecuniary damages, i.e. damages for loss of care, comfort, and companionship.¹³⁹

3.2.3. Federal RICO Act

In case of non-performance or improper performance of the promised tour services an aggrieved consumer may also bring an action in a Federal District Court for violation of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO or RICO Act).¹⁴⁰ RICO –originally enacted by Congress in 1970 to seek the eradication of organised crime in the US – is also applicable in civil law actions and can be used in particular to claim misrepresentation by a tour operator about the performance of the services, e.g. his willingness and ability to perform. It covers especially misrepresentation relating to mail fraud¹⁴¹ and wire fraud.¹⁴² The traveller may claim three times the amount of damages and also the cost of the suit including attorney's fees.¹⁴³

¹³⁵ 46 U.S.C. § 30301 – 30308 (formerly cited as 46 U.S.C. App. §§ 761 – 768)

¹³⁶ 46 U.S.C. § 30302

¹³⁷ 46 U.S.C. § 30302, § 30305

¹³⁸ 46 U.S.C. § 30303

¹³⁹ 46 U.S.C. § 30307

¹⁴⁰ 18 U.S.C. §§ 1961 – 1968

¹⁴¹ 18 U.S.C. § 1341 (Frauds and swindles)

¹⁴² 18 U.S.C. § 1343 (Fraud by wire, radio, or television)

¹⁴³ 18 U.S.C. § 1964(c)

4. Problems and gaps in Community legislation

A summary highlighting any areas where clear problems or gaps have been identified in the Community legislation.

In its resolution of 29 November 2007 adopting a report of 17 October 2007 of its Committee on Transport and Transportation (Paolo Costa report) the European Parliament regretted “the absence of a specific legal instrument covering the safety of services which is crucial in the tourism sector and calls on the Commission and on the Member States to evaluate the possibility of tackling this issue in order to address the concerns expressed by several Members of Parliament.”¹⁴⁴

In section 1 of this study it was shown that there is indeed no “specific legal instrument” at Community level dealing with tourist safety, but that aspects of safety are, nevertheless, addressed by a) Community provisions regulating the airline industry, and b) decisions of the courts of Member States dealing with safety standards in compensation claims under Art. 5 of the Package Travel Directive. When a consumer sues an organiser he or she has to convince the court that he or she can rely on, or the court should invent or discover, a particular safety standard. This is clearly undesirable since the consumer cannot be sure the court will agree. It was also shown that safety regulations, where they exist, are piecemeal and not comprehensive, and that questions of safety and liability are not necessarily linked with each other. Safety primarily focus’ on pre-accident prevention, while liability focus’ on post-accident compensation. Nonetheless, for a consumer looking for safety standards to rely on in a compensation claim it is far better that he or she can rely on a “specific legal instrument”, as Parliament puts it, at Community level.

The purpose of this section is to outline some basic ideas about how such a legal instrument might be shaped and also to highlight some gaps in the current Directive.

It is not possible to suggest a single legal instrument, such as an additional article in the Package Travel Directive, which could be inserted during the ongoing review of this Directive. Safety issues across the different package service suppliers are too diverse. In section 1 of the study four different fields were identified:

- (1) Road traffic safety,
- (2) Hotel safety,
- (3) Air transport safety,
- (4) Natural disasters and terrorism.

Each of these areas needs different regulations. Within the scope of current Community tourism policy it is not possible to provide for new regulations on road traffic (safety of bus coaches is another issue which is not addressed here), but it is possible to clarify the responsibility of the tour organiser for bus drivers of independent service suppliers. By contrast with road safety, the very modest Community regulation on fire safety in hotels – only a recommendation – should be made binding and extended to cover other hotel safety issues, such as swimming pool safety standards. Air passenger safety is one area where there is already an extensive network of regulations at Community level, but the link with liability vis-à-vis the consumer is missing. Nor can preventive rules on natural disasters and terrorism be drafted within the constraints of current tourism policy, though the legislator can legislate for information duties or for a consumer right to withdraw from a contract.

¹⁴⁴ No. 41 of the report, supra, n. 18, A6-0399/2007

4.1. Road traffic

Traffic accidents with tour buses are unfortunately common enough. In many cases courts of the Member States impose liability on the tour organiser even if the driver causing the accident is an employee of a local and independent bus company. While this seems correct there are three potential excuses an organiser might raise, depending on the circumstances, to avoid liability.

Accident beyond control of tour operator

The tour organiser can, for example, argue that the accident was beyond his or her control and that it could not reasonably be foreseen that the bus driver would drive as badly as he did. The tour organiser might also argue that his or her liability should be exonerated by *force majeure*. In some jurisdictions this would not remove the organiser's liability, but in others it might because it is not clear whether the tour operator is liable only for choosing the service supplier carefully or for their fault as well, and that fault might not have been foreseeable by the tour operator.

This leads to the following conclusion:

5. ***Accident beyond control of tour operator:*** Consideration should be given to amending Art. 5 of the Package Travel Directive to clarify that a tour operator is liable for all acts of service suppliers, regardless of whether the operator chose them with due care and regardless of whether they acted beyond the control of the tour operator.

Accident on a trip booked at the resort

The tour operator could claim that the consumer was hurt during a trip which was no part of the package, an "excursion", although booked in the resort at an extra price with an independent local agency. According to the courts in some Member States, a tour operator is liable if the trip is booked through the operator's local representatives, if the logo of the tour operator appears on the booking form, or if the clause on the booking form which says the contract is with a local supplier, not the tour operator, is in small prints.¹⁴⁵ But other courts deny liability in such cases.¹⁴⁶

This leads to the following conclusion:

6. ***Accident on a trip booked at the resort:*** Consideration should be given to clarifying Art. 5 of the Directive to ensure that the tour operator is liable for trips booked by package travel consumers if the tour operator is involved in any way in the conclusion of the contract.¹⁴⁷

Limitation periods

The tour operator could argue that the consumer complaint is too late because it is after the stipulated contract time for making complaints. There are instances where consumers were prevented from bringing claims, even for personal injuries, for this type of reason. This seems unfair.

This leads to the following conclusion:

¹⁴⁵ There are examples from Austrian and German courts.

¹⁴⁶ There are other German cases contradicting the ones mentioned before, even from the same court.

¹⁴⁷ No suggestion is made here regarding the related issue of package consumers (in situ) booking contracts without any involvement of the tour operator or the operator's local representative. However, later in this part more explicit duties on organisers to warn or provide information to package consumer about reasonably foreseeable dangers are suggested.

7. **Limitation periods:** Consideration should be given to clarifying Art. 5 of the Directive to ensure that time limitation clauses must guarantee a reasonable period and must not have the effect of depriving consumers of their rights.

4.2. Hotel safety

As mentioned before, there is much case law (arising out of compensation claims) in the Member States dealing with safety risks within hotels, including in particular the water chute decision of the German Federal Supreme Court.¹⁴⁸ However, because of different national approaches to liability questions consumers cannot be sure that courts in all Member States will impose liability on a tour organiser in all cases of safety defects in a hotel. Therefore, Community legislation defining basic safety standards for hotels appears to be necessary. With such standards applicable across the Community it would be easier to determine liability questions in a uniform and consistent manner.

To date the only (non-binding) safety standard for hotels concerns fire safety.¹⁴⁹ The recent resolution of the European Parliament on a renewed tourism policy deals at length with the harmonisation of quality standards of hotels, but not with safety issues.¹⁵⁰ Of course, safety in hotels has much to do with national building regulations and workplace safety law which cannot be harmonised under tourism policy. But some basics related particularly to daily guest use of hotels could be identified and made binding via a directive or regulation. Further research will be needed to filter out which areas should be focused on. From the case law of the Member States it can be said that there are problems with steps, slippery floors, lifts, diving boards/water slides/swimming pools and adjoining areas, balconies, lighting, and the use of glass in doors and windows. An appropriate legal basis for a binding Community instrument would be Art. 95 of the Treaty.

This leads to the following conclusion:

8. **Hotel safety:** Consideration should be given to updating and re-enacting Recommendation No. 86/666/EEC on fire safety in hotels as a directive or regulation and to undertaking further research as a matter of urgency to identify appropriate safety standards for guest use of hotels with a view to their implementation by means of a directive or regulation.

4.3. Air transport safety

Air transport law at Community level is different from hotel law in that there is comprehensive legislation, including the 'Third Package' for the liberalisation of air transport which is currently under review.¹⁵¹ But existing and forthcoming air transport safety legislation does not give consumers the right to sue carriers and does not provide for liability in cases of failed safety. Competent national authorities in the Member States are obliged to supervise the airline industry, to grant licences if certain prerequisites are met, among them safety requirements, and to revoke licences if the conditions are not fulfilled.

This network of safety regulations appears to work well. But what is missing is a link between these regulations and the liability of the tour organiser if an airline, which supplies services to a tour operator, does not meet the requirements of the regulations. While courts in the Member States will probably often hold a tour operator liable if the operating carrier is not safe and does not comply with existing Community law, there is no rule either in national or in Community law which expressly

¹⁴⁸ Supra, section 1 under *Safety provisions for airlines and hotels*

¹⁴⁹ Recommendation No. 86/666/EEC, supra, n. 17

¹⁵⁰ Report, supra, n. 18, nos. 18 et seq

¹⁵¹ COM (2006) 396

states that a tour operator is liable if an airline, which provides a service within a package, breaches air regulations.

This leads to the following conclusion:

9. **Air transport safety:** It is recommended that Art. 5 of the Package Travel Directive be amended by the insertion of a new subparagraph under which an organiser will be liable for any injuries occurring to a consumer as a result of a breach of Community safety regulations by an airline supplying services to a tour organiser.

4.4. Natural disasters and terrorism

Natural disasters and terrorism must be treated differently from road, hotel or air transport accidents because there is often no clear identifiable human agent involved; and the tour operator is often not liable because these are cases of *force majeure* for which liability is excluded by the Package Travel Directive. There is no reason to suggest that this protection should be removed.

Information duties

Courts do, however, sometimes imply or impose a duty to inform in advance about a hurricane so that before departure the consumer can make a decision whether to start the tour or cancel it.¹⁵² Equally with terrorism, courts may be willing to impose a duty to at least warn of the danger of an attack. A regional German court case¹⁵³ concerned a terrorist bomb attack on a synagogue on the Tunisian island of Djerba that killed some tourists and severely injured others. They claimed against the tour operator for compensation, arguing the tour organiser should have collected information in advance about possibly imminent terrorist attacks. The court denied the claim, not as a matter of principle, but because the judges were of the opinion that the organiser did actually do all that could be done before the attack, and that there were no serious hints of such attacks. One can deduce from this decision that courts may in principle be willing to assume a duty to inform about safety dangers at tourist sites.

Other less dramatic situations where consumers may need warnings or other measures to protect them while on a package holiday arise when they are out and about and not receiving any package service. Examples are being injured while in a bus/taxi, walking on a street, buying food from a street vendor, swimming in the sea, using a beach etc. If injured, consumers will often try to sue the organiser on the basis of either (under common law) an implied contract term to warn of foreseeable dangers or under general tort law or equivalent information duties in other laws. In appropriate instances these claims succeed. Since the injury only occurs because the consumer is on the package holiday at a location identified by and initially better known by the organiser, there is a case for putting into statutory form what courts already say a tour operator must do – warn about specific dangers. The Package Travel Directive already includes many information duties at the pre-contractual, contractual¹⁵⁴ and post-contractual phase before departure.

This leads to the following conclusion:

¹⁵² Bundesgerichtshof 15. 10. 2002, Neue Juristische Wochenschrift 2002, 3700

¹⁵³ Oberlandesgericht Celle 22. 9. 2005, Neue Juristische Wochenschrift 2005, 3647

¹⁵⁴ Supra, section 1.3 under *Information duties*

10. Information duties: In addition to the information duties already contained in the Package Travel Directive, it is recommended that an organiser should be made subject to a duty to a) monitor the destination with regard to specific, not generalised, risks arising from natural disasters, terrorist attacks, public health, public order and other sources which an organiser should reasonably foresee, and b) to appropriately inform package travel consumers before and after departure, as the case may be, regarding such risks.

Right to withdraw from the contract

The provision of risk information to a consumer before departure is worthless if the consumer is bound to the contract and must pay cancellation fees if he or she wants to cancel. The consumer should be free, once informed about imminent dangers for a planned trip, to withdraw from the contract without paying any fee. Under the Package Travel Directive, as it is now, only the organiser and not the consumer can cancel a tour in cases of *force majeure* without incurring liability. It is suggested that this be changed to allow the consumer to cancel as well. There are models for such a right in Austrian and German law. In Austria a right to cancel in such cases is derived from general principles of contract law.¹⁵⁵ In Germany there is a special provision in the package travel law sections of the BGB.¹⁵⁶ Further, a Round Table convened by the Commission in 2001 recommended that organisers/retailers should introduce such a right.¹⁵⁷

This leads to the following conclusion:

11. Right to withdraw from the contract: Consideration should be given to amending the Package Travel Directive by the addition of a right of the consumer to cancel the contract in cases of *force majeure*.

4.5. Scope of application

The changes suggested in the previous sections of this study will be of little value to consumers if the scope of the Package Travel Directive is not extended. The Package Travel Directive is in danger of not covering all relevant holiday bookings because of increasing direct bookings by consumers using internet websites. Consumers are able to book individual services themselves through the internet and bundle them into a tailor-made tour. It is questionable whether internet-booked holidays like this are within the scope of the Directive, although tailor-made packages bundled by travel agents are.¹⁵⁸

Both Commission and Parliament are aware of the need for a review of the scope of the Package Travel Directive on this issue. While the Commission merely described the problem in its working document published in September 2007 at the beginning of the review process of the Package Travel Directive,¹⁵⁹ Parliament has pleaded for a clear extension of the scope of the Directive. In the recent resolution it stressed that “this anomaly needs to be rectified by incorporating into Directive 90/314/EEC all websites that offer more than one service for sale, such as those offered by low-fare airlines and other actors in the market”.¹⁶⁰

This leads to the following conclusion:

¹⁵⁵ Wegfall der Geschäftsgrundlage

¹⁵⁶ § 651 j BGB (Civil Code)

¹⁵⁷ Cf. the website of DG SANCO

¹⁵⁸ Club Tour, *supra*, n. 44

¹⁵⁹ *Supra*, n. 14

¹⁶⁰ Report, *supra*, n. 18

12.Scope of application: While there are significant differences between a typical tour organiser and, say, an airline website which also sells hotel accommodation and car hire (often as agents), there is a case for including such forms of booking within the scope of the Directive and for ensuring that such inclusion should be the starting point in reviewing the Package Travel Directive. This will ensure that a reformed Directive is able to cope with the current challenges including the liability and safety ones examined in this study.

4.6. Basis of Liability

The language used in Article 5 is unnecessarily difficult to interpret and has contributed to the situation in which courts in some Member States require consumers to bear the burden of proof regarding negligence, while courts in other Member States place the burden on organisers. The case of *Healy v Cosmo Air*, mentioned before, shows that this is no idle or mere theoretical difference, but one that has real prejudicial consequences for consumers. The position needs to be clarified.

This leads to the following conclusion:

13.Basis of Liability: Consideration should be given to redrafting Article 5 in order to clearly provide that the tour organiser is liable for the service supplier, that this liability is strict and that the burden of proof rests with the organiser to prove that any of the available defences apply.

Annex I: Package Travel Directive

Official Journal L 158, 23/06/1990 P. 0059 – 0064

Finnish special edition: Chapter 6 Volume 3 P. 0053

Swedish special edition: Chapter 6 Volume 3 P. 0053

COUNCIL DIRECTIVE of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas one of the main objectives of the Community is to complete the internal market, of which the tourist sector is an essential part;

Whereas the national laws of Member States concerning package travel, package holidays and package tours, hereinafter referred to as 'packages', show many disparities and national practices in this field are markedly different, which gives rise to obstacles to the freedom to provide services in respect of packages and distortions of competition amongst operators established in different Member States;

Whereas the establishment of common rules on packages will contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States and Community consumers to benefit from comparable conditions when buying a package in any Member State;

Whereas paragraph 36 (b) of the Annex to the Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (4) invites the Commission to study, inter alia, tourism and, if appropriate, to put forward suitable proposals, with due regard for their significance for consumer protection and the effects of differences in Member States' legislation on the proper functioning of the common market;

Whereas in the resolution on a Community policy on tourism on 10 April 1984 (5) the Council welcomed the Commission's initiative in drawing attention to the importance of tourism and took note of the Commission's initial guidelines for a Community policy on tourism;

Whereas the Commission communication to the Council entitled 'A New Impetus for Consumer Protection Policy', which was approved by resolution of the Council on 6 May

1986 (6), lists in paragraph 37, among the measures proposed by the Commission, the harmonization of legislation on packages;

Whereas tourism plays an increasingly important role in the economies of the Member States; whereas the package system is a fundamental part of tourism; whereas the package travel industry in Member States would be stimulated to greater growth and productivity if at least a minimum of common rules were adopted in order to give it a Community dimension; whereas this would not only produce benefits for Community citizens buying packages organized on the basis of those rules, but would attract tourists from outside the Community seeking the advantages of guaranteed standards in packages;

Whereas disparities in the rules protecting consumers in different Member States are a disincentive to consumers in one Member State from buying packages in another Member State;

Whereas this disincentive is particularly effective in deterring consumers from buying packages outside their own Member State, and more effective than it would be in relation to the acquisition of other services, having regard to the special nature of the services supplied in a package which generally involve the expenditure of substantial amounts of money in advance and the supply of the services in a State other than that in which the consumer is resident;

Whereas the consumer should have the benefit of the protection introduced by this Directive irrespective of whether he is a direct contracting party, a transferee or a member of a group on whose behalf another person has concluded a contract in respect of a package;

Whereas the organizer of the package and/or the retailer of it should be under obligation to ensure that in descriptive matter relating to packages which they respectively

Organise and sell, the information which is given is not misleading and brochures made available to consumers contain information which is comprehensible and accurate;

Whereas the consumer needs to have a record of the terms of contract applicable to the package; whereas this can conveniently be achieved by requiring that all the terms of the contract be stated in writing of such other documentary form as shall be comprehensible and accessible to him, and that he be given a copy thereof;

Whereas the consumer should be at liberty in certain circumstances to transfer to a willing third person a booking made by him for a package;

Whereas the price established under the contract should not in principle be subject to revision except where the possibility of upward or downward revision is expressly provided for in the contract; whereas that possibility should nonetheless be subject to certain conditions;

Whereas the consumer should in certain circumstances be free to withdraw before departure from a package travel contract;

Whereas there should be a clear definition of the rights available to the the consumer in circumstances where the organizer of the package cancels it before the agreed date of departure;

Whereas if, after the consumer has departed, there occurs a significant failure of performance of the services for which he has contracted or the organizer perceives that he will be unable to procure a significant part of the services to be provided; the organizer should have certain obligations towards the consumer;

Whereas the organizer and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract; whereas, moreover, the organizer and/or retailer should be liable for the damage resulting for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services;

Whereas in cases where the organizer and/or retailer is liable for failure to perform or improper performance of the services involved in the package, such liability should be limited in accordance with the international conventions governing such services, in particular the Warsaw Convention of 1929 in International Carriage by Air, the Berne Convention of 1961 on Carriage by Rail, the Athens Convention of 1974 on Carriage by Sea and the Paris Convention of 1962 on the Liability of Hotel-keepers; whereas, moreover, with regard to damage other than personal injury, it should be possible for liability also to be limited under the package contract provided, however, that such limits are not unreasonable;

Whereas certain arrangements should be made for the information of consumers and the handling of complaints;

Whereas both the consumer and the package travel industry would benefit if organizers and/or retailers were placed under an obligation to provide sufficient evidence of security in the event of insolvency;

Whereas Member States should be at liberty to adopt, or retain, more stringent provisions relating to package travel for the purpose of protecting the consumer,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community.

Article 2

For the purposes of this Directive:

1. '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;

2. 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;

3. 'retailer' means the person who sells or offers for sale the package put together by the organizer;

4. 'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee');

5. 'contract' means the agreement linking the consumer to the organizer and/or the retailer.

Article 3

1. Any descriptive matter concerning a package and supplied by the organizer or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information. 2. When a brochure is made available to the consumer, it shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning:

(a) the destination and the means, characteristics and categories of transport used;

(b) the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;

(c) the meal plan;

(d) the itinerary;

(e) general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;

(f) either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;

(g) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.

The particulars contained in the brochure are binding on the organizer or retailer, unless:

- changes in such particulars have been clearly communicated to the consumer before conclusion of the contract, in which case the brochure shall expressly state so,

- changes are made later following an agreement between the parties to the contract.

Article 4

1. (a) The organizer and/or the retailer shall provide the consumer, in writing or any other appropriate form, before the contract is concluded, with general information on passport and visa requirements applicable to nationals of the Member State or States concerned and in particular on the periods for obtaining them, as well as with information on the health formalities required for the journey and the stay;

(b) The organizer and/or retailer shall also provide the consumer, in writing or any other appropriate form, with the following information in good time before the start of the journey:

(i) the times and places of intermediate stops and transport connections as well as details of the place to be occupied by the traveller, e.g. cabin or berth on ship, sleeper compartment on train;

(ii) the name, address and telephone number of the organizer's and/or retailer's local representative or, failing that, of local agencies on whose assistance a consumer in difficulty could call.

Where no such representatives or agencies exist, the consumer must in any case be provided with an emergency telephone number or any other information that will enable him to contact the organizer and/or the retailer;

(iii) in the case of journeys or stays abroad by minors, information enabling direct contact to be established with the child or the person responsible at the child's place of stay;

(iv) information on the optional conclusion of an insurance policy to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.

2. Member States shall ensure that in relation to the contract the following principles apply:

(a) depending on the particular package, the contract shall contain at least the elements listed in the Annex;

(b) all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract; the consumer is given a copy of these terms;

(c) the provision under (b) shall not preclude the belated conclusion of last-minute reservations or contracts.

3. Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package. The transferor of the package and the transferee shall be jointly and severally liable to the organizer or retailer party to the contract for payment of the balance due and for any additional costs arising from such transfer.

4. (a) The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:

- transportation costs, including the cost of fuel,
- dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports,
- the exchange rates applied to the particular package.

(b) During the twenty days prior to the departure date stipulated, the price stated in the contract shall not be increased.

5. If the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:

- either to withdraw from the contract without penalty,
- or to accept a rider to the contract specifying the alterations made and their impact on the price.

The consumer shall inform the organizer or the retailer of his decision as soon as possible.

6. If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:

- (a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer;
- (b) or to be repaid as soon as possible all sums paid by him under the contract.

In such a case, he shall be entitled, if appropriate, to be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:

- (i) cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the package description; or
- (ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.

7. Where, after departure, a significant proportion of the services contracted for is not provided or the organizer perceives that he will be unable to procure a significant proportion of the services to be provided, the organizer shall make suitable alternative arrangements, at

no extra cost to the consumer, for the continuation of the package, and where appropriate compensate the consumer for the difference between the services offered and those supplied.

If it is impossible to make such arrangements or these are not accepted by the consumer for good reasons, the organizer shall, where appropriate, provide the consumer, at no extra cost, with equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed and shall, where appropriate, compensate the consumer.

Article 5

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 such 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.

In the cases referred to in the second and third indents, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.

4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity.

This obligation must be stated clearly and explicitly in the contract.

Article 6

In cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions.

Article 7

The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.

Article 8

Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer.

Article 9

1. Member States shall bring into force the measures necessary to comply with this Directive before 31 December 1992. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive. The Commission shall inform the other Member States thereof.

Article 10

This Directive is addressed to the Member States.

Done at Luxembourg, 13 June 1990.

For the Council

The President

D. J. O'MALLEY

(1) OJ No C 96, 12. 4. 1988, p. 5.

(2) OJ No C 69, 20. 3. 1989, p. 102 and

OJ No C 149, 18. 6. 1990.

(3) OJ No C 102, 24. 4. 1989, p. 27.

(4) OJ No C 165, 23. 6. 1981, p. 24.

(5) OJ No C 115, 30. 4. 1984, p. 1.

(6) OJ No C 118, 7. 3. 1986, p. 28.

ANNEX II

Elements to be included in the contract if relevant to the particular package;

- (a) the travel destination(s) and, where periods of stay are involved, the relevant periods, with dates;
- (b) the means, characteristics and categories of transport to be used, the dates, times and points of departure and return;
- (c) where the package includes accommodation, its location, its tourist category or degree of comfort, its main features, its compliance with the rules of the host Member State concerned and the meal plan;
- (d) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation;
- (e) the itinerary;
- (f) visits, excursions or other services which are included in the total price agreed for the package;
- (g) the name and address of the organizer, the retailer and, where appropriate, the insurer;
- (h) the price of the package, an indication of the possibility of price revisions under Article 4 (4) and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at ports and airports, tourist taxes) where such costs are not included in the package;
- (i) the payment schedule and method of payment;
- (j) special requirements which the consumer has communicated to the organizer or retailer when making the booking, and which both have accepted;
- (k) periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract.

Annex II: Code of Federal Regulations – Public Charters

Title 14. Aeronautics and Space

Chapter II. Office of the Secretary, Department of Transportation (Aviation Proceedings)

Subchapter D. Special Regulations

Part 380. Public Charters

Authority: 49 U.S.C. 40101, 40102, 40109, 40113, 41101, 41103, 41301, 41504, 41702, 41708, 41712, 46101.

Source: Docket No. OST-97-2356, 63 FR 28241, May 22, 1998, unless otherwise noted.

C.F.R. Title 14: Aeronautics and Space

PART 380—PUBLIC CHARTERS

Subpart A—General Provisions

§ 380.1 Applicability.

This part applies to Public Charter air transportation of passengers in interstate or foreign air transportation, whether furnished by direct air carriers or Public Charter operators. This part also relieves such charter operators from various provisions of subtitle VII of Title 49 of the United States Code (statute), formerly Title IV of the Federal Aviation Act of 1958, as amended, for the purpose of enabling them to provide Public Charters utilizing aircraft chartered from such direct air carriers. It also declines jurisdiction over foreign Public Charter operators operating foreign-originating Public Charters.

§ 380.2 Definitions.

For the purposes of this part:

Certificated air carrier means a U.S. direct air carrier holding a certificate issued under the statute.

Charter flight means a flight operated under the terms of a charter contract between a direct air carrier and its customer. It does not include scheduled air transportation, scheduled foreign air transportation, or non-scheduled cargo air transportation, sold on an individually ticketed or individually way billed basis.

Direct air carrier means a certificated commuter or foreign air carrier, or an air taxi operator registered under part 298 of this chapter, or a Canadian charter air taxi operator registered under part 294 of this chapter, that directly engages in the operation of aircraft under a certificate, authorization, permit or exemption issued by the Department.

Educational institution means a school that is operated as such on a year-round basis and is empowered to grant academic degrees or secondary school diplomas by any government in the United States or by a foreign government.

Foreign air carrier means a direct air carrier that holds a foreign air carrier permit issued under the statute or an exemption issued under the statute authorizing direct foreign air transportation.

Foreign Public Charter operator means an indirect air carrier which is not a citizen of the United States as defined in the statute, that is authorized to engage in the formation of groups for transportation on Public Charters in accordance with this part.

Indirect air carrier means any person who undertakes to engage indirectly in air transportation operations and who uses for such transportation the services of a direct air carrier.

Public Charter means a one-way or round-trip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a charter operator.

Public Charter operator means a U.S. or foreign Public Charter operator.

Security agreement means:

(1) A surety bond issued by a company—

(i) That is listed in the Best's Insurance Reports (Fire and Casualty) with a general policyholders' rating of "A" or better, or

(ii) That is listed in the U.S. Department of Treasury's notice listing companies holding Certificates of Authority as acceptable sureties on Federal bonds and as acceptable reinsuring companies, published in the Federal Register in the first week in July; or

(2) A Surety trust agreement or a letter-of-credit, issued by a Federal Deposit Insurance Corporation-insured financial institution, which provides substantially equivalent protection.

Statute means Subtitle VII of Title 49 of the United States Code (Transportation).

Sub-operator means a Public Charter operator that has contracted for its charter seats from a Public Charter operator that has contracted from one or more direct air carriers. A sub-operator is itself an indirect air carrier, not an agent of the Public Charter operator from which it has obtained its seat.

U.S. Public Charter operator means an indirect air carrier that is a citizen of the United States as defined in 49 U.S.C. 40102(a) and that is authorized to engage in the formation of groups for transportation on Public Charters in accordance with this part.

[Docket No. OST-97-2356, 63 FR 28241, May 22, 1998, as amended at 70 FR 25773, May 16, 2005]

§ 380.3 General provisions.

(a) Public Charters may be operated on a one-way or round-trip basis, with no minimum group or contract size. Public Charters may be sold on an air-only basis, or with mandatory or optional land arrangements.

(b) A U.S. Public Charter operator operating a Public Charter which originates in a foreign country shall not be subject to the requirements of §§380.25, 380.28, 380.30 and 380.35.

(c) The Department declines to exercise jurisdiction over a foreign Public Charter operator which operates a Public Charter originating in a foreign country, but reserves the right to exercise its jurisdiction over any foreign Public Charter operator at any time its finds that such action is in the public interest.

(d)(1) An educational institution operating a Public Charter need not comply with the financial security requirements of §380.34 if each student participant in the charter is enrolled in a formal academic course of study outside the United States, sponsored by or in conjunction with that institution, that is of at least four weeks' duration.

(2) The spouse, children, and parents of a student participant may accompany the participant on a charter operated under this section.

(e) The Department, upon application or on its own initiative, may waive any of the provision of this part if it finds such action to be in the public interest.

§ 380.4 Enforcement.

In the case of any violation of the provision of the Statute or of this part, or any other rule, regulations, or order issued under the Statute, the violator may be subject to a proceeding pursuant to the Statute before the Department or a U.S district court, as the case may be, to compel compliance therewith; to civil penalties pursuant to the provisions of the Statute, or to criminal penalties pursuant to the provisions of the Statute, or other lawful sanctions.

Subpart B—Conditions and Limitations

§ 380.10 Public Charter requirements.

Public Charters under this part shall meet the following requirements:

(a)–(b) [Reserved]

(c) If the charter is on a round-trip basis, the departing flight and returning need not be performed by the same direct air carrier.

(d) The air transportation portion of the charter must be performed by direct air carriers that hold authority under Chapter 411 and 413 of the Statute, or are operating under 14 CFR part 298, except that only U.S. citizen direct air carriers may provide air transportation for operations in interstate air transportation.

§ 380.11 Payment to direct air carrier(s).

Except for air taxi operators and commuter air carriers (which are governed by 14 CFR 298.38) and Canadian charter air taxi operators (which are governed by 14 CFR 294.32), the direct air carrier(s) shall be paid in full for the cost of the charter transportation (for both legs, if a round-trip charter) prior to the scheduled date of flight departure, as provided for in the basic charter regulations applicable to the direct air carrier(s) under part 212 of this chapter.

§ 380.12 Cancellation by charter operator and notice to participants.

(a) The charter operator may not cancel a charter for any reason (including insufficient participation), except for circumstances that make it physically impossible to perform the charter trip, less than 10 days before the scheduled date of departure of the outbound trip.

(b) If the charter operator cancels 10 or more days before the scheduled date of departure, the operator must so notify each participant in writing within 7 days after the cancellation but in any event not less than 10 days before the scheduled departure date of the outbound trip. If a charter is canceled less than 10 days before scheduled departure (i.e., for circumstances that make it physically impossible to perform the charter trip), the operator must get the message to each participant as soon as possible.

§ 380.13 Prohibition on sale of round trips with open returns.

The charter operator shall not accept any participant's payment for return transportation unless the participant has specified a particular return flight.

§ 380.14 Unused space.

Nothing contained in this part shall preclude a charter operator from utilizing any unused space on an aircraft by it for a Public Charter for the transportation, on a free or reduced basis, of such charter operator's employees, directors, and officers, and parents and immediate families of such persons.

§ 380.15 Substitution for charter participants.

Substitutes may be arranged for charter participants at any time preceding departure. Participants who provide the charter operator or its sales agent with a substitute participant, or who are substituted for by a participant found by the operator, shall receive a refund of all moneys paid to the operator, except that the operator may reserve the right to retain an administrative fee not to exceed \$25 for effecting the substitution.

§ 380.17 Charters conducted by educational institutions.

(a) This section shall apply only to charters conducted by educational institutions for charter groups comprised of bona fide participants in a formal academic course of study abroad which is of at least 4 weeks duration. The charter group may also include a student participant's immediate family (spouse, children, and parents). Except as modified in this section, all terms and conditions of this part applicable to the operation of Public Charters shall apply to charters conducted by educational institutions.

(b) An educational institution conducting such a charter shall submit to the Office of Aviation Analysis, Special Authorities Division, a statement, signed by its president, certifying that it meets the definition of "educational institution" set forth in §380.2.

(c) An educational institution conducting such a charter need not comply with the requirements of §§380.25, 380.28, 380.34, and 380.35.

Subpart C—Requirements Applicable to Charter Operators

§ 380.20 Relief from the Statute.

(a) To the extent necessary to permit them to organize and arrange public charters, charter operators and foreign charter operators are hereby relieved from the following provisions of Subtitle VII of Title 49 of the U.S. Code, only if and so long as they comply with the provisions and the conditions imposed by this part:

(1) Chapter 411.

(2) Chapter 413.

(3) Chapter 415.

(4) Chapter 419.

(5) If foreign charter operators receive interstate air transportation rights, any other provision of the statute that would otherwise prohibit them from organizing and arranging Public Charters in interstate air transportation.

(b) A charter operator who is a citizen of the United States shall not be subject to the following requirements with respect to Public Charters that originate in a foreign country: §§380.25, 380.28, and 380.30 through 380.35.

§§ 380.21-380.23 [Reserved]

§ 380.24 Suspension of exemption authority.

The Department reserves the power to deny the exemption authority of any charter operator, without hearing, if it finds that such action is necessary in the public interest or is otherwise necessary in order to protect the rights of the traveling public.

§ 380.25 Prospectus filing and related requirements.

A charter operator may organize and operate a Public Charter only in accordance with this part, and subject to the following conditions:

(a) No charter operator shall operate, sell, receive money from any prospective participant for, or offer to sell or otherwise advertise a charter or series of charters until the Office of Aviation Analysis, Special Authorities Division, has accepted a Public Charter prospectus as described in §380.28.

(b) If within 10 days after the filing the Department notifies the charter operator that it has rejected the prospectus for noncompliance with this part, the prohibitions set forth in paragraph (a) of this section shall continue until the Department advises that it has accepted the prospectus.

(c) The following amendments to a filed prospectus may be made:

(1) The addition or cancellation of any flight;

(2) A change in any flight, date, origin city or destination city; and

(3) A change in or addition of any direct air carrier, securer, or depository bank.

(d) The charter operator shall amend the prospectus to reflect any change described in paragraph (c) of this section. The amendment shall be filed in the manner and form used for the original prospectus. It shall become effective upon filing unless the operator is otherwise notified.

(e) The charter operator shall notify the depository bank (if any) and the securer of any change described in paragraph (c) of this section not later than when filing a prospectus amendment to reflect the change. If the securer is unable to adjust the security agreement as required by the change, the Office of Aviation Analysis, Special Authorities Division shall be advised of this fact within 2 business days.

(Approved by the Office of Management and Budget under Control Number 2106–0005)

§ 380.26 Discrimination.

No charter operator shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever, or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

§ 380.27 Methods of competition.

No charter operator shall engage in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof.

§ 380.28 Charter prospectus.

(a) The charter prospectus shall include an original and two copies of the following:

(1) From the charter operator and the direct air carrier:

(i) The proposed flight schedule, listing the origin and destination cities, dates, type of aircraft, number of seats, and charter price for each flight;

(ii) The tour itinerary (if any) including hotels (name and length of stay at each), and other ground accommodations and services; and

(iii) A statement that they have entered into a charter contract that covers the proposed flight schedule, that the contract complies with all applicable Department regulations, and that a copy of the schedule has been sent to the depository bank (if any) and the operator's securer. The schedule shall be identified with a number assigned by the charter operator that does not duplicate any schedule numbers assigned by the operator to other proposed flight schedules. The proposed flight schedule, tour itinerary (if any), and statement shall be filed on OST Form 4532.

(2)(i) From the charter operator and the securer, a statement:

(A) That they have entered into a security agreement covering the proposed flight schedule that complies with §380.34, including the amount of the coverage, the number assigned to it by the securer, and the amount of any outstanding claims against it, and

(B) That the securer has received a copy of the proposed flight schedule. The statement shall identify the proposed flight schedule by the schedule number assigned by the charter operator in accordance with paragraph (a) of this section. If there are any outstanding claims against the agreement, the charter operator and securer shall also state that they have executed a rider or amendment increasing the coverage by the amount of the claims, or that the securer will separately pay any claims for which it may be liable without impairing the agreement or reducing the amount of its coverage.

(ii) These statements shall be filed an OST Form 4533.

(3) If a depository agreement is used, a statement from the charter operator, the direct air carrier, and the depository bank:

(i) That they have entered into a depository agreement covering the proposed flight schedule that complies with §380.34, and

(ii) That the bank has received a copy of the proposed flight schedule by the schedule number assigned by the charter operator in accordance with paragraph (a)(1) of this section. This statement shall be filed on OST Form 4534.

(b) Each of the statements described in paragraph (a) of this section shall also include the names and addresses of the parties to it, and the originals shall be signed by those parties.

(c) The prospectus may cover a series of charters performed by one charter operator if the departure of the last charter is not more than one year after the departure of the first.

(d) If the prospectus covers a series of charters and the air transportation will be performed by more than one direct air carrier, the prospectus shall include separate statements in accordance with paragraphs (a)(1) and (a)(3) of this section to cover the flights that will be performed by each direct carrier.

(Approved by the Office of Management and Budget under Control Number 2106–0005)

§ 380.29 Charter contract.

The charter contract between the charter operator or foreign charter operator and the direct air carrier shall evidence a binding commitment on the part of the carrier to furnish the air transportation required for the trip or trips covered by the contract.

§ 380.30 Solicitation materials.

(a) All solicitation materials for a Public Charter shall include the name of the charter operator and the name of the direct air carrier.

(b) Any solicitation material that states a price per passenger shall also include one of the following:

(1) A statement referring to the operator-participant contract for further information about conditions applicable to the charter; or

(2) The full text of the operator-participant contract.

(c) Except as set forth in §380.33a for operator's option plan contracts, if the charter prospectus names alternative dates or cities, any solicitation material that states a price per passenger shall also state that the actual dates or cities have not yet been selected, if that is the case.

(d) Any solicitation material that names a hotel but does not name every hotel named in the operator-participant contract shall also state that substitutions may be made.

(e) In any solicitation material from a direct air carrier, indirect air carrier, or an agent of either, for a charter, charter tour (*i.e.*, a combination of air transportation and ground accommodations), or a charter tour component (*e.g.*, a hotel stay), any price stated for such charter, tour, or component shall be the entire price to be paid by the participants to the air carrier, or agent, for such charter, tour, or component.

§ 380.31 General requirements for operator-participant contracts.

(a) Except for telephone sales for which payment is made by credit card as described in paragraph (b) of this section, the charter operator shall not accept payment from or on behalf of a prospective participant unless the participant has agreed to the conditions of the charter by signing an operator-participant contract as described in §380.32. If a member of a group that will travel together pays for the group, that member may sign the contract on behalf of the group.

(b) For telephone sales only, the charter operator may accept payment by credit card without the participant having first signed an operator-participant contract provided that the charter operator first advises the customer:

(1) That he or she has the right to receive the operator-participant contract before making a booking;

(2) That the operator-participant contract will be mailed to the participant within 24 hours of accepting payment by credit card; and

(3) That the operator-participant contract must be signed, and the signed portion returned to the operator, before travel.

(4) A full refund must be made of any amounts charged to a credit card for any participant who cancels before the operator-participant contract is signed.

(c) The contract form may include a space that participants may check to authorize the charter operator to retain their money while attempting to make other arrangements for them if there is no space available on the flight or on specific alternative flights they have requested.

(d) If there is no space available on the flight or specific alternative flights requested by the participant the operator shall return all the participant's money within 7 days after receiving it unless the participant, in accordance with paragraph (c) of this section, has authorized the

operator to retain the payments while the operator attempts to make other arrangements for the participant. If the operator retains the payments while attempting to make other arrangements for the participant, it shall notify the participant of the fact within 7 days after receiving the payments, but in no event later than the departure. For the purpose of the time periods in this paragraph, receipt of money by a travel agent on behalf of a charter operator will not be considered as receipt by the operator.

(e) Except as set forth in §380.33a for operator's option plan contracts, the operator-participant contract shall not specify alternative dates for the outbound or return flights, or alternative origin or destination cities for any flight leg.

(f) The contract form shall be printed in 7-point or larger type. The statements required by paragraph (a), (f), (h), (l), (r), (s), and (x) of §380.32 shall be printed so as to contrast with the rest of the contract by the use of bold-faced type, capital letters, or a type size that is at least 50 percent larger than that used for the rest of the contract.

(g) The contract form shall include a space that participants may check to indicate that they wish to be furnished details of trip cancellation, health, and accident insurance.

(h) The contract form shall be designed so as to enable participants to retain a copy of the general terms and conditions after signing it. The specific information supplied by participants (such as choices of dates, cities, or other options) need not be retainable.

§ 380.32 Specific requirements for operator-participant contracts.

Contracts between charter operators and charter participants shall state:

(a) The name and complete mailing address of the charter operator;

(b) The name of the direct air carrier, the dollar amounts of that carrier's liability limitations for participant's baggage, the type and capacity of the aircraft to be used for the flight, and the conditions governing aircraft-equipment substitutions;

(c) The dates of the outbound and return flights;

(d) The origin and destination cities of each flight leg;

(e) The amount and schedule of payments;

(f) If a depository agreement as provided in §380.34(b) is used: That all checks, money orders, and credit card drafts must be made payable to the escrow account at the depository bank (identifying bank)¹ or, when the charter is sold to the participant by a retail travel agent, checks and money orders may be made payable to the agent, who must in turn make his check payable to the escrow account at the depository bank;

¹ If the credit card merchant account is separate from the depository account, it must be used solely as a conduit, i.e., all credit card payments toward Public Charter trips must be immediately remitted to the depository account in full, without holdback, or retention of any portion of the participant's payment. If the depository bank is not the credit card merchant bank, the Department must be satisfied that there are adequate procedural safeguards for the protection of participants' payments.

- (g) The tour itinerary, if any, including the name and location of the hotels, length of stay at each, and other ground accommodations and services that are part of the tour;
- (h) That the charter operator may not cancel the charter less than 10 days before the scheduled departure date, except for circumstances that make it physically impossible to perform the charter trip;
- (i) That if a charter is canceled 10 or more days before the scheduled departure date, the operator will notify the participant in writing within 7 days after the cancellation, but in any event at least 10 days before the scheduled departure;
- (j) That if a charter is canceled less than 10 days before departure (*i.e.*, for circumstances that make it physically impossible to perform the charter trip), the operator will get the message to the participant as soon as possible;
- (k) That if the charter is canceled, a refund will be made to the participant within 14 days after the cancellation;
- (l) The right to refunds if the participant changes plans is limited;
- (m) The right to refunds if the participant changes plans, including
- (1) The right to a full refund, for sales made by credit card, until an operator-participant contract is signed; and
 - (2) That any participant who wishes to cancel will receive a full refund (less any applicable administrative fee, not to exceed \$25) upon providing a substitute participant to the charter operator or its sales agent, or upon being substituted for by a participant found by the charter operator;
- (n) The procedure for obtaining the refunds described in paragraph (m) of this section, including that they will be made within 14 days after the cancellation or substitution;
- (o) The meaning of “major change”, as set forth in §380.33(a);
- (p) That if the charter operator knows of a major change 10 or more days before scheduled departure, the operator will notify the participant of the change within 7 days after first knowing of it, but in any event at least 10 days before scheduled departure;
- (q) That if the operator first knows of a major change less than 10 days before scheduled departure, the operator will get the message to the participant as soon as possible;
- (r) That within 7 days after receiving a pre-departure notification of a major change but in no event later than departure, the participant may cancel, and that a full refund will be made to the participant within 14 days after canceling;
- (s) That upon a post-departure notification of a major change, the participant may reject the substituted hotel or the changed date, origin, or destination of a flight leg and be sent, within 14 days after the return date named in the contract, a refund of the portion of his payment allocable to the hotel accommodations or air transportation not provided;

(t) That the participants rights and remedies set forth in the contract, including the procedures for major changes, shall be in addition to any other rights or remedies available under applicable law, although the operator may condition a refund on the participant's waiver of additional remedies;

(u) That trip cancellation, health, and accident insurance is available and that the operator will furnish details of the insurance to participants who check the space provided for this purpose on the contract form;

(v) The name and address of the surety company or bank issuing the security agreement; and that unless the charter participant files a claim with the charter operator or, if he is unavailable, with the securer, within 60 days after termination of the charter, the securer shall be released from all liability under the security agreement to that participant. Termination means the date of arrival (or in the case of a canceled charter, the intended date of arrival) of the return flight. If there is no return flight in a participant's itinerary, termination means the date or intended date of departure of the last flight in the participant's itinerary;

(w) For international flights only: That additional restrictions may be imposed on the flight by the foreign government involved, and that if landing rights are denied by a foreign government the flight will be canceled with a full refund to the participant. This statement need not be included in the contract if—

(1) The prospectus includes a certification by the charter operator and the direct air carrier that landing rights have been obtained from all the foreign governments involved, and

(2) All the foreign governments involved have adopted country-of-origin rules for charterworthiness;

(x) That the charter operator is the principal and is responsible to the participants for all services and accommodations offered in connection with the charter. However, the contract may expressly provide that the charter operator, unless negligent, is not responsible for personal injury or property damage caused by any direct air carrier, hotel or other supplier of services in connection with the charter.

§ 380.33 Major changes in itinerary or price; refunds.

(a) For the purposes of this section, “major change” means any of the following:

(1) A change in the departure or return date shown in the operator-participant contract, (or, if the contract states alternative dates, the date designated to the participant by the charter operator in accordance with §380.33a(b)), unless the change results from a flight delay. In any event, however, a date change that the operator knows of more than 2 days before the scheduled flight date, and any delay of more than 48 hours, will be considered a major change.

(2) A change in the origin or destination city shown in the operator-participant contract for any flight leg (or, if the contract states alternative cities, the city designated to the participant by the operator in accordance with §380.33a(b)), unless the change affects only the order in which cities named in a tour package are visited.

(3) A substitution of any hotel that is not named in the operator-participant contract; and

(4) A price increase to the participant that occurs 10 or more days before departure and results in an aggregate price increase of more than 10 percent.

(b) The charter operator shall not increase the price to any participant less than 10 days before departure.

(c) The charter operator shall notify all participants of major changes, as required by the operator-participant contracts. This notification shall include the participants' rights to refunds required to be described in the operator-participant contract. The operator shall, if applicable, also notify the participants that the acceptance of a refund constitutes a waiver of their legal rights.

(d) Except as otherwise specified, notifications and refunds required by this part are considered made at the time they are mailed or sent by an equivalent method.

(e) The charter operator shall make all refunds required to be described in the operator-participant contract within the time limits set forth in paragraphs (k), (n), (r), and (s) of §380.32, as applicable.

§ 380.33a Operator's option plan.

(a) For the purposes of this part, an operator's option plan contract that states alternative dates for the outbound or return flights, or alternative origin or destination cities for any flight leg.

(b) Operator's option plan contracts shall state, in addition to the information required by §380.32, that the selection of the actual dates or cities, as applicable, is at the charter operator's option and will not entitle the participant to a refund, and that the operator will notify the participant of the actual dates or cities at least 10 days before the earliest of any alternative dates for the outbound flight.

(c) Contract forms for all operator's option plan contracts shall be labeled "OPERATOR'S OPTION PLAN" in bold-faced capital letters at least 1/4 inch high. The statement required by paragraph (b) of this section and the statement of alternative dates (§380.32(c)) or alternative cities (§380.32(d)), as applicable, shall be printed so as to contrast with the rest of the contract, as set forth in §380.31(f).

(d) Any solicitation material that states a price per passenger for an operator's option plan contract shall clearly and conspicuously—

(1) Identify that price as being for the operator's option plan,

(2) Name all the possible dates or cities, as applicable, and

(3) State that the selection of the actual dates or cities is at the charter operator's option.

(e) Charter operators and their agents shall not misrepresent to prospective participants, orally, in solicitation materials, or otherwise, the probability that any particular city or date will be selected from among the alternatives named in an operator's option plan contract.

(f) The charter operator shall notify all participants with operator's option plan contracts of the actual dates or cities, as applicable, as required by contracts.

§ 380.34 Security and depository agreements.

(a) Except as provided in paragraph (b) of this section, the charter operator or foreign charter operator shall furnish a security agreement in an amount for not less than the charter price for the air transportation, if only air transportation is involved, or, if the charter involves land accommodations in addition to air transportation, a security agreement in one of the following amounts dependent upon the length of the charter or series of charters:

(1) For a charter or series of charters of 14 days or less, security in an amount of not less than the charter price for the air transportation to be furnished in connection with such charter or series of charters;

(2) For a charter or series of charters of more than 14 days but less than 28 days security in an amount of not less than twice the charter price; and

(3) For a charter or series of charters of 28 days or more, security in an amount of not less than three times the charter price: Provided, however, That the liability of the securer to any charter participant shall not exceed amounts paid by that participant to the charter operator with respect to the charter.

(b) The direct air carrier and the charter operator or foreign charter operator may elect, in lieu of furnishing a security agreement as provided under paragraph (a) of this section, to comply with the requirements of paragraphs (b)(1) and (b)(2) of this section, as follows:

(1) The charter operator shall furnish a security agreement in an amount of at least \$10,000 times the number of flights, except that the amount need not be more than \$200,000. The liability of the securer to any charter participant shall not exceed the amount paid by the participant to the charter operator for that charter.

(2) The direct air carrier and charter operator or foreign charter operator shall enter into an agreement with a designated bank, the terms of which shall provide that all payments by charter participants paid to charter operators or foreign charter operators and their retail travel agents shall be deposited with and maintained by the bank subject to the following conditions:

(i) On sales made to charter participants by charter operators or foreign charter operators the participant shall pay by check, money order, or credit card draft payable to the bank;² on sales made to charter participants by retail travel agents, the retail travel agent may deduct his commission and remit the balance to the designated bank by check, money order, or electronic transfer: Provided, That the travel agent agrees in writing with the charter operator or foreign charter operator that if the charter is canceled the travel agent shall remit to the bank the full amount of the commission previously deducted or received within 10 days after receipt of notification of cancellation of the charter; except for the credit card company's usual commission (not to exceed 3 percent), the charter operator shall not permit any portion of a charter participant's payments by credit card to be "held back" by the credit card merchant bank;³

² See also n.1, *supra*.

³ "Holdback" is an amount in excess of usual commissions that a credit card merchant bank sometimes retains to cover potential charge-backs or other charges.

(ii) The bank shall pay the direct air carrier the charter price for the transportation not earlier than 60 days (including day of departure) prior to the scheduled day of departure of the originating or returning flight, upon certification of the departure date by the air carrier: Provided, That, in the case of a round trip charter contract to be performed by one carrier, the total round trip charter price shall be paid to the carrier not earlier than 60 days prior to the scheduled day of departure of the originating flight;

(iii) The bank shall reimburse the charter operator or foreign charter operator for refunds made by the latter to the charter participant upon written notification from the charter operator or foreign charter operator;

(iv) If the charter operator, foreign charter operator or the direct air carrier notifies the bank that a charter has been canceled, the bank shall make applicable refunds directly to the charter participants;

(v) After the charter price has been paid in full to the direct air carrier, the bank shall pay funds from the account directly to the hotels, sightseeing enterprises, or other persons or companies furnishing ground accommodations and services, if any, in connection with the charter or series of charters upon presentation to the bank of vendors' bills and upon certification by the charter operator or foreign charter operator of the amounts payable for such ground accommodations and services and the person or companies to whom payment is to be made: Provided, however, That the total amounts paid by the bank pursuant to paragraphs (b)(2) (ii) and (v) of this section shall not exceed either the total cost of the air transportation, or 80 percent of the total deposits received by the bank less any refunds made to charter participants pursuant to paragraphs (b)(2) (ii) and (iv) of this section, whichever is greater;

(vi) As used in this section, the term "bank" means a bank insured by the Federal Deposit Insurance Corporation;

(vii) The bank shall maintain a separate accounting for each charter group;

(viii) Notwithstanding any other provisions of this section, the amount of total cash deposits required to be maintained in the depository account of the bank may be reduced by one or both of the following: The amount of the security agreement in the form prescribed in this section in excess of the minimum coverage required by paragraph (b)(1) of this section; an escrow with the designated bank of Federal, State, or municipal bonds or other securities, consisting of certificates of deposit issued by banks having a stated policy of redeeming such certificates before maturity at the request of the holder (subject only to such interest penalties or other conditions as may be required by law), or negotiable securities which are publicly traded on a securities exchange, all such securities to be made payable to the escrow account: Provided, That such other securities shall be substituted in an amount no greater than 80 percent of the total market value of the escrow account at the time of such substitution: And provided, further, That should the market value of such other securities subsequently decrease, from time to time, then additional cash or securities qualified for investment hereunder shall promptly be added to the escrow account, in an amount equal to the amount of such decreased value; and

(ix) Except as provided in paragraph (b)(2)(i), (iii), (iv), (v), and (viii) of this section, the bank shall not pay out any funds from the account prior to 2 banking days after completion of each charter, when the balance in the account shall be paid the charter operator or foreign charter

operator, upon certification of the completion date by the direct air carrier: Provided, however, That if the Charter involves air transportation only and the bank has paid the direct air carrier(s) the charter price for the originating flight, and the returning flight if any, and has paid all refunds due to participants, as provided in paragraph (b)(2)(ii) and (iii), respectively, of this section, then the bank may pay the balance in the account to the charter operator upon certification by the direct air carrier performing the originating flight that such flight has in fact departed.

(c)(1) The security agreement required under paragraphs (a) and (b) of this section shall insure the financial responsibility of the charter operator or foreign charter operator and the supplying of the transportation and all other accommodations, services, and facilities in accordance with the contract between the charter operator or foreign charter operator and the charter participants.

(2) The security agreement may be either:

(i) A surety bond in the form set forth as appendix A to this part;

(ii) A surety trust agreement in the form set forth as appendix B to this part; or

(iii) An arrangement with a bank (for instance, a standby letter of credit) that provides protection of charter participants' funds equivalent to or greater than that provided by the Bond in appendix A. An arrangement that furnishes a lesser degree of protection than would be provided under the bond shall be invalid to that extent, and instead the bank, the charter operator or foreign charter operator, and the charter participants shall have the same rights and liabilities as provided under a bond in the form of appendix A. If the arrangement does not give as much protection as a bond against the risk of the charter operator's bankruptcy, the bank shall be liable in the event of bankruptcy to the same extent as if it had entered into a bond.

(3) Any agreement under paragraph (c)(2)(iii) of this section shall include a statement that, in the event that the other provisions of the agreement do not provide protection to charter participants comparable to that provided under a bond in the form of appendix A, the bank shall assume, for the benefit of the charter participants, all the liabilities it would have if it entered into the bond.

(4) The security agreement shall be effective on or before the date the charter prospectus is filed with the Department.

(5) The security agreement shall be specifically identified by the issuing securer with a numbering system so that the Department can identify the security agreement with the specific charter or charters to which it relates. These data may be set forth in an addendum attached to the security agreement, which addendum must be signed by the charter operator or foreign charter operator and the securer.

(6) When security is provided by a surety bond, such bond shall be issued by a bonding or surety company that is listed in Best's Insurance Reports (Fire and Casualty) with a general policyholders' rating of "A" or better. The bonding or surety company shall be one legally authorized to issue bonds of that type in the State in which the charter originates. For purposes of this section the term "State" includes any territory or possession of the United States, or the District of Columbia.

(7) When security is provided by a security agreement other than a bond, the agreement shall be issued by a national bank complying with the provisions of 12 CFR 7.7010(a), or by a State bank complying with applicable State laws that give authority to issue such agreements, and all such banks must be insured by the Federal Deposit Insurance Corporation.

(d) The security agreement required by this section shall provide that unless the charter participant files a claim with the charter operator or foreign charter operator, or, if it is unavailable, with the securer, within 60 days after termination of the charter, the securer shall be released from all liability under the security agreement to such charter participant. Termination means the date of arrival (or in the case of a canceled charter, the intended date of arrival) of the return flight. If there is no return flight in a participant's itinerary, termination means the date or intended date of departure of the last flight in the participant's itinerary.

§ 380.34a Substitution of direct air carrier's security or depository agreement.

(a) A direct air carrier may substitute its own security agreement and/or depository arrangements, as specified in this section, for those required of the charter operator under §380.34, but only for charter trips in which all the air transportation is provided by one direct air carrier. Charter operators are relieved from §380.34 to the extent that the direct carrier substitutes its own arrangements.

(b) The direct air carrier may substitute its security agreement for all of the arrangements required of the charter operator under §380.34 (a) or (b). Alternatively, it may substitute its depository agreement for the depository agreement required of the charter operator under §380.34(b)(2). If the direct carrier substitutes its depository agreement, it may also obtain and substitute a security agreement for the one otherwise required of the charter operator under §380.34(b)(1). If the direct carrier substitutes its depository agreement only, the charter operator must supply the security agreement required under §380.34(b)(1).

(c) If the direct carrier substitutes a security agreement for all the charter operator's requirements under §380.34, the charter operator shall include in the charter prospectus, in place of the information in §380.28(a)(2) regarding the charter operator's security agreement:

(1) A statement by the direct air carrier on OST Form 4535 that it will take responsibility for all charter participant payments (including those for ground accommodations and services) and for the fulfillment of all the charter operator's contractual and regulatory obligations to the charter participants.

(2) A statement from the direct air carrier and its securer (under §212.12 of this chapter), OST Form 4533, that they have entered into a security agreement assuring the direct air carrier's responsibilities to charter participants under this section in an unlimited amount (except that the liability of the securer with respect to any charter participant may be limited to the charter price paid by or on behalf of such participant), and that the securer has received a copy of the proposed flight schedule identified by the schedule number assigned by the charter operator under this part.

(d) A substitute depository agreement under this section shall be signed by the direct air carrier, the charter operator, and the depository bank, and shall provide, in addition to existing requirements under §212.8 of this chapter, that:

(1) Payments by or on behalf of charter participants shall be allocated to the flight accounts matching the participant's itinerary in the following way: Each account shall have allocated to it the charter cost of the participant's air transportation on that flight. The portion of each payment not intended for air transportation services shall be allocated to the account for the return flight in the participant's itinerary. If there is only one flight in the itinerary, the entire payment shall be allocated to that account.

(2) The bank shall pay funds from a flight account directly to the hotels, sightseeing enterprises, or other persons or companies furnishing ground accommodations and services, if any, in connection with the charter flight, upon presentation to the bank of vendor's bills and upon certification by the person who contracted for the ground accommodations or services of the amounts payable and the persons or companies to whom payment is to be made, except that no disbursement shall be made that would reduce the balance in the account below the charter cost of the flight.

(3) On sales made to participants by a person other than a retail travel agent, the participant shall pay by check, money order, or credit card draft payable to the bank. On sales made to participants by a retail travel agent, payments shall be made in the same manner unless the agent deducts its commission and remits the balance to the bank by check, money order, or electronic transfer. The agent may deduct its commission only if it agrees in writing with its principal (the charter operator or direct air carrier, as applicable) that, if the charter is canceled, the agent shall remit to the bank the full amount of the commission previously deducted or received within 10 days after receipt of notification of the cancellation. The depository bank shall pay refunds directly to participants according to the terms of the operator-participant contract and the terms of this part.

(e) If the direct carrier substitutes a security agreement in addition to substituting a depository agreement, the charter prospectus information must include all the information required by paragraphs (c) and (d) of this section, except for the amount of the security agreement. That agreement shall be in an amount of at least \$10,000 times the number of flights, except that the amount need not be more than \$200,000.

(f) A copy of the depository agreement under paragraph (d) of this section shall be filed with the Department, and it shall not be effective until approved by the Department.

(g) A copy of the security agreement under paragraph (c) or paragraph (e) of this section shall be filed with the Department. It shall insure the financial responsibility of the direct air carrier for supplying the transportation and all other accommodations, services, and facilities in accordance with the contracts between the charter operator and the charter participants. Such security agreement shall meet all the other requirements of §380.34 (c) and (d).

§ 380.35 Disbursements from depository account.

No charter operator or direct air carrier shall cause its agents or the depository bank to make disbursements or payments from deposits except in accordance with the provisions of this part.

§ 380.36 Record retention.

Every charter operator conducting a charter pursuant to this part shall comply with the applicable record-retention provisions of part 249 of this chapter.

Subpart D—Requirements Applicable to Direct Air Carriers

§ 380.40 Charter not to be performed unless in compliance with this part 380.

(a) For all Public Charters other than foreign-originating charters organized by foreign charter operators: A direct air carrier shall not perform air transportation in connection with such a charter unless it has made a reasonable effort to verify that all provisions of this part have been complied with and that the charter operator's authority under this part has not been suspended by the Department.

(b) For foreign-originating Public Charters organized by foreign charter operators: A direct air carrier shall not perform air transportation in connection with such a charter unless—

(1) The charter is conducted in accordance with subpart B of this part and

(2) The charter operator conforms to all requirements of this part that are applicable to charter operators within the Department's jurisdiction, other than §§380.25, 380.28, 380.30 through 380.36, and 380.50.

§§ 380.41-380.42 [Reserved]

§ 380.43 Cancellations by direct air carriers.

The direct air carrier shall not cancel any charter under this part less than 10 days before the scheduled departure date, except for circumstances that make it physically impossible to perform the charter trip.

§ 380.45 Suspension of exemption authority.

The Department reserves the power to suspend the exemption authority of any air carrier, without hearing, if it finds that such action is necessary in order to protect the rights of the traveling public.

§ 380.46 Charter trip reporting.

The direct air carrier shall promptly notify the Office of Aviation Analysis, Special Authorities Division, regarding any charters covered by a prospectus filed under §380.28 that are later canceled.

Subpart E—Registration of Foreign Charter Operators

§ 380.60 Purpose.

This subpart establishes registration procedures for foreign charter operators intending to engage in the formation of groups for transportation on Public Charters that originate in the United States.

§ 380.61 Operation by foreign charter operators.

(a) Each foreign charter operator shall be registered under this subpart and file a prospectus under §380.25 before organizing groups for transportation on Public Charters that originate in the United States.

(b) Each foreign charter registered under this subpart shall comply with the other provisions of this part directed to charter operators.

§ 380.62 Registration applications.

(a) To be registered under this subpart, a foreign charter operator shall file two copies of an application for registration with the Office of Aviation Analysis, Special Authorities Division. The Department will list the names and nationalities of all persons applying for registration in its Weekly Summary of Filings.

(b) The application shall be made on OST Form 4530, which can be obtained from the Office of Aviation Analysis, Special Authorities Division.

(c) The applicant shall clearly indicate in its application for registration whether it requests authority to engage in foreign and/or interstate air transportation.

§ 380.63 Objections to registration applications.

Any person objecting to the registration application of a foreign charter operator or to a proposed change in the name or ownership of that operator shall file an objection with the Office of Aviation Analysis, Special Authorities Division, within 28 days after the Department receives the properly completed registration application.

§ 380.64 Department action on a registration application.

(a) After a registration is received, one of the following actions will be taken.

(1) The application will be approved by the stamping of the effective date of registration on OST Form 4530 and returning the duplicate copy of the form to the operator;

(2) Additional information will be requested for the applicant;

(3) The applicant will be notified that its application will require further analysis or procedures, or is being referred to the Department for formal action;

(4) The registration application will be rejected if it does not comply with the filing requirements of this subpart;

(5) The application will be approved subject to such terms, conditions, or limitations as may be required by the public interest; or

(6) The registration application will be rejected for reasons relating to the failure of effective reciprocity or if the Department finds that it would be in the public interest to do so.

(b) One of the actions described in paragraph (a) of this section will normally be taken within 60 days after the registration application is received. The Department will also consider requests for faster action that include a full explanation of the need for expedited action.

§ 380.65 Notification of change of operations or ownership.

(a) Not later than 30 days before any change in its name or address or before a temporary or permanent cessation of operations, each foreign charter operator registered under this subpart shall notify the Office of Aviation Analysis, Special Authorities Division, of the change by resubmitting OST Form 4530.

(b) A foreign charter operator registered under this subpart shall apply for an amendment to that registration not later than 30 days after either of the following events:

(1) A person listed on its existing registration as owning or holding beneficial interest in at least 10 percent of the operator or of the operator's stock reduces its holding to below 10 percent;

(2) A person not listed on the existing registration as owning or holding beneficial interest in at least 10 percent of the operator or of the operator's stock becomes an owner or holder of 10 percent or more of the company or of its stock.

(c) An application for an amendment shall be made by resubmitting OST Form 4530. The existing registration shall remain valid pending Department action on the amendment.

§ 380.66 Cancellation or conditioning of the registration.

The registration of a foreign charter operator may be canceled or subjected to additional terms, conditions, or limitations if any of the following occur:

(a) The operator files a written notice with the Department that it is discontinuing its charter operations;

(b) A substantial ownership interest is acquired by persons who are not citizens of the same country as the registrant; or

(c) The Department finds, after notice and an opportunity for responses, that it is in the public interest to do so. In making this finding, the Department will consider whether effective reciprocity exists between the United States and the government of the foreign charter operator.

§ 380.67 Waiver of sovereign immunity.

By accepting an approved registration form under this subpart, an operator waives any right it may have to assert any defense of sovereign immunity from suit in any proceeding against it, in any court or other tribunal of the United States, that is based upon a claim arising out of operations by the operator under this part.

Appendix A to Part 380—Public Charter Operator's Surety Bond Under Part 380 of the Special Regulations of the Department of Transportation (14 CFR Part 380)

Know all men by these presents, that we _____ (name of charter operator) of _____, (city) _____ (state or country) as Principal (hereinafter called Principal), and _____ (name of surety) a corporation created and existing under the laws of the State of _____ (State) as Surety (hereinafter called Surety) are held and firmly bound

unto the United States of America in the sum of \$_____ (see §380.34(f) of Part 380) for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas Principal intends to become a Public Charter operator pursuant to the provisions of part 380 of the Department's Special Regulations and other rules and regulations of the Department relating to insurance or other security for the protection of charter participants, and has elected to file with the Department of Transportation such a bond as will insure financial responsibility with respect to all moneys received from charter participants for services in connection with a Public Charter to be operated subject to Part 380 of the Department's Special Regulations in accordance with contracts, agreements, or arrangements therefor, and

Whereas this bond is written to assure compliance by Principal as an authorized charter operator with Part 380 of the Department's Special Regulations, and other rules and regulations of the Department relating to insurance and other security for the protection of charter participants, and shall inure to the benefit of any and all charter participants to whom Principal may be held legally liable for any damages herein described.

Now, therefor, the condition of this obligation is such that if Principal shall pay or cause to be paid to charter participants any sum or sums for which Principal may be held legally liable by reason of Principal's failure faithfully to perform, fulfill and carry out all contracts, agreements, and arrangements made by Principal while this bond is in effect with respect to the receipt of moneys from charter participants, and proper disbursement thereof pursuant to and in accordance with the provisions of Part 380 of the Department's Special Regulations, then this obligation shall be void, otherwise to remain in full force and effect.

The liability of Surety with respect to any charter participant shall not exceed the charter price paid by or on behalf of such participant.

The liability of Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty of the bond, but in no event shall Surety's obligation hereunder exceed the amount of said penalty.

Surety agrees to furnish written notice to the Office of Aviation Analysis, Department of Transportation, forthwith of all suits or claims filed and judgments rendered, and payments made by Surety under this bond.

The bond shall cover the following charters:¹

¹ These data may be supplied in addendum attached to the bond.

Surety	company's	bond	No. _____
Date	of	flight	departure _____
Place of flight departure _____			

This bond is effective on the ____ day of ____, 12:01 a.m., standard time at the address of Principal as stated herein and as hereinafter provided. Principal or Surety may at any time terminate this bond by written notice to: "Special Authorities Division (P-57), Office of Aviation Analysis, U.S. Department of Transportation, Washington, DC 20590," such

termination to become effective thirty (30) days after the actual receipt of said notice by the Department. Surety shall not be liable hereunder for the payment of any damages hereinbefore described which arise as a result of any contracts, agreements, undertakings, or arrangements for the supplying of transportation and other services made by Principal after the termination of this bond as herein provided, but such termination shall not affect the liability of the bond hereunder for the payment of any damages arising as a result of contracts, agreements, or arrangements for the supplying of transportation and other services made by Principal prior to the date that such termination becomes effective. Liability of Surety under this bond shall in all events be limited only to a charter participant or charter participants who shall within sixty (60) days after the termination of the particular charter described herein give written notice of claim to the charter operator or, if it is unavailable, to Surety, and all liability on this bond shall automatically terminate sixty (60) days after the termination date of each particular charter covered by this bond except for claims made in the time provided herein.

In witness whereof, the said Principal and Surety have executed this instrument on the ____ day of _____, ____.

Principal

Name_____

By: Signature and title

Surety

Name_____

By: Signature and title_____

Only corporations may qualify to act as surety and they must meet the requirements set forth in §380.34(c)(6) of Part 380.

Appendix B to Part 380—Public Charter Surety Trust Agreement

This Trust Agreement is entered into between _____ (charter operator) incorporated under the law of _____ with the principal place of business being _____ (hereinafter referred to as the Operator), and _____ (Bank) with its principal place of business being _____ (hereinafter referred to as the “Trustee”), for the purpose of creating a trust to become effective as of the ____ day of _____, ____, which trust shall continue until terminated as hereinafter provided.

The Operator intends to become a Public Charter operator pursuant to the provisions of Part 380 of the Department's Special Regulations and other rules and regulations of the Department relating to insurance or other security for the protection of charter participants, and has elected to file with the Department of Transportation such a Surety Trust Agreements as will insure financial responsibility with respect to all moneys received from charter participants for services in connection with a Public Charter to be operated subject to Part 380 of the Department's Special Regulations in accordance with contracts, agreements, or arrangements therefor.

This Surety Trust Agreement is written to assure compliance by the Operator with the provisions of Part 380 of the Department's Special Regulations and other rules and regulations

of the Department relating to insurance or other security for the protection of charter participants.

It shall inure to the benefit of any and all charter participants to whom the Operator may be held legally liable for any of the damages herein described.

It is mutually agreed by and between the operator and Trustee that the Trustee shall manage the corpus of the trust and carry out the purposes of the trust as hereinafter set forth during the term of the trust for the benefit of charter participants (who are hereinafter referred to as "Beneficiaries.")

Beneficiaries of the trust created by this Agreement shall be limited to those charter participants who meet the following requirements:

1. Those for whom Operator or Operator's agent has received payment toward participation in one or more charters operated by or proposed to be operated by Operator.
2. Who have legal claim or claims for money damages against the Operator by reason of the Operators' failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by the Operator while this trust is in respect to the receipt of moneys and proper disbursement thereof pursuant to Part 380 of the Department's Special Regulations; and
3. Who have given notice of such claim or claims in accordance with this Trust Agreement, but who have not been paid by the Operator.

The Operator shall convey to the Trustee legal title to the trust corpus, which has a value of \$_____ by the time of the execution of this Agreement.

Trustee shall assume the responsibilities of the Trustee over the said trust corpus and shall distribute from the trust corpus to any and all Beneficiaries to whom the Operator, in its capacity as a Public Charter operator, may be held legally liable by reason of the Operator's failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by the Operator, while this trust is in effect with respect to the receipt of moneys and proper disbursement thereof pursuant to Part 380 of the Department's Special Regulations in connection with said charters, such damages as will discharge such liability while this trust is in effect; Provided, however, That the liability of the trust to any Beneficiary shall not exceed the charter price (as defined in Part 380 of the Department's Special Regulations) paid by or on behalf on any such Beneficiary; Provided, further, That there shall be on obligation of the trust to any Beneficiary if the Operator shall pay or cause to be paid to any Beneficiary any sum or sums for which the Operator may be held legally liable by reasons of its failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by the Operator in its capacity as charter operator while this trust is in effect with respect to the receipt of moneys and proper disbursement thereof pursuant to Part 380 of the Department's Special Regulations; And provided still further, That the liability of the trust as administered by the Trustee shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments, shall amount in the aggregate to \$_____. Notwithstanding anything herein to the contrary, in no event shall the obligation of the trust or the Trustee hereunder exceed the aggregate amount of \$_____.

The Trustee agrees to furnish written notice to the Office of Aviation Analysis, Department of Transportation, forthwith of all suits of claims filed and judgments rendered (of which it has knowledge), and of payments made by the Trustee under the terms of this trust.

The Trust shall not be liable hereunder for the payment of any damages hereinbefore described which arise as a result of any contracts, agreements, undertakings, or arrangements for the supplying of transportation and other services made by the Operator after the termination of this trust as herein provided, but such termination shall not affect the liability of the trust hereunder for the payment of any damages arising as a result of contracts, agreements, or arrangements for the supplying of transportation and other services made by the Operator prior to the date that such termination becomes effective.

Liability of the trust shall in all events be limited only to a Beneficiary or Beneficiaries who shall within sixty days after the termination of the particular charter give written notice of claim to the Operator or, if it is unavailable, to the Trustee, and all liability of the trust with respect to participants in a charter shall automatically terminate sixty days after the termination date of each particular charter covered by this trust except for claims filed in the time provided herein. Sixty-one days after the completion of the last charter covered by this Trust Agreement, the trust shall automatically terminate except for claims of any Beneficiary or Beneficiaries previously made in accordance with this Agreement still pending on and after said sixty-first day. To the extent of such claims, the trust shall continue until those claims are discharged, dismissed, dropped, or otherwise terminated; the remainder of the trust corpus shall be conveyed forthwith to the Operator. After all remaining claims which are covered by this Trust Agreement pending on and after the said sixty-first day have been discharged, dismissed, dropped, or otherwise terminated, the Trustee shall convey forthwith the remainder of the trust corpus, if any, to the Operator.

Either the Operator or Trustee may at any time terminate this trust by written notice to: "Special Authorities Division (P-57), Office of Aviation Analysis, U.S. Department of Transportation, Washington, DC 20590," such termination to become effective thirty days after the actual receipt of said notice by the Department.

In the event of any controversy or claim arising hereunder, the Trustee shall not be required to determine same or take any other action with respect thereto, but may await the settlement of such controversy or claim by final appropriate legal proceedings, and in such event shall not be liable for interest or damages of any kind.

Any Successor to the Trustee by merger, consolidation, or otherwise, shall succeed to this trusteeship and shall have the powers and obligations set forth in this Agreement.

The trust created under this Agreement shall be operated and administered under the laws of the State of _____.

IN WITNESS WHEREOF, the Operator and Trustee have executed this instrument on the ____ day of _____, ____.

Trustee

Name_____

By: Signature and title

Charter Operator

Name_____

By: Signature and title

Annex III: Methodology of analysis of statistics concerning holiday related accidents and injuries

The analysis has been based on the following resources:

- Analysis of main databases on injuries and on tourism;
- Review of existing literature on holiday related accidents, primarily within the field of travel medicine;
- Stakeholder interviews and inquiry with travel associations, insurer associations, lawyers associations and consumer associations;
- Questionnaire to selected tour operators, insurers, consumer organisations in several Member States, with a special focus on Germany and the UK which have the largest concentration of suppliers and consumers of package travel.¹⁶¹

Review of Literature

Scientific literature on holiday related accidents and injuries mainly exist within the field of travel medicine, where an emerging interest in illness and injuries beyond tropical and rare destinations is notable. The most relevant studies from the travel medicine literature were reviewed for this section to provide a general background on accidents and injuries during holidays.

Interviews and Survey

In the absence of comprehensive data on accidents and injuries during package travel, a selected number of travel associations, insurer associations, consumer organisations, tour operators, and insurance companies were approached by way of exploratory interviews and a questionnaire to provide their internal statistics. The interviews were carried out by phone. The majority of business associations and consumer organisations contacted could not provide any statistics on travel-related accidents and hence were only available for general information. Tour operators and insurance companies did compile statistics, but were reluctant in some cases to share their figures. An overview about organisations that were approached and provided statistics can be found in the following table.

¹⁶¹ Organisations were contacted in Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Netherlands, and the UK in addition to European umbrella organisations.

Table 9: Number of organisations contacted for the study

Organisation	Approached	Provided Statistics	Number of Interviews
European travel and tour operator associations	2	0	2
National travel and tour operator associations	9	1	1
European Insurance organisations	1	0	0
National Insurance organisations	1	1	1
Individual tour operators	3	2	1
Individual insurance companies	8	3	2
European consumer organisations	1	0	0
National consumer organisation, consumer advice services and lawyers associations	9	2	1
Individual law firms	2	1	2
Total	36	10	10

Source: Civic Consulting, 2007

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