

The New Package Travel Directive

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The Directive 2015/2302: New challenges to package travel and tourism law concepts

*Virgílio Machado**

ABSTRACT

The object of this article is to question and answer if the Directive 2015/2302, dated 25th November 2015, by the European Parliament and of the Council on package travel and related travel services is an important milestone in the systemic enhancement of package travel and tourism Law. Concerning the challenges that the current legal reality calls in the areas of information and communication to the tourist as well as the market organization in the provision of travel and tourism services. The research uses a comparative, historical and functional methodology to analyse and interpret the problems posed. In short, it questions whether the Directive meets functionally self-referential stability objectives in the market regulation of supply and demand for package travel, with benefits for the systemic understanding of the Tourism Law. The conclusions reveal a retreat of the framework law on the regulation of the sale of package travel market, with losses for the protection of consumer rights.

Keywords: tourism law; package travel; tourism market; consumer; tourism.

1. INTRODUCTION. THE PROBLEM OF RESEARCH

The Directive 2015/2302, dated 25 November 2015 by the European Parliament and of the Council on package travel and related travel services features 54 considerations and 31 articles. It revokes, from 1 July 2018, Directive 90/314 / EEC dated 13 June 1990 on package travel, package holidays and package tours, which only featured 22 considerations and 10 articles. The Community

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legislature gave more regulatory dimension to travel, indicating its greater importance in the Community tourism travel market.

For over 20 years, it was argued by the international legal doctrine (see among others: Valdecasas and Pedrero, 1994; Criado, 1999; Py, 2002; Martin, 2002) the existence of a Tourism Law as an autonomous and specific branch of Law. Portuguese legal doctrine (Quintas, 2003; Torres, 2011; Pereira, 2015) affirms its specificity in the field of science of Law with comprehensive analysis of the regulation of components of the so called "tourist industry" (e.g. accommodation, catering, travel agency, public policies of tourism).

This question (Machado, 2010) was somehow disturbed by the author of these lines, who questioned whether tourism would not constitute a typological concept, something indeterminate, a concept open to factuality, the evolution and the social becoming. The consensus obtained on what the society consider tourism in every moment, in short, is marked by judgments of possibility and approach, not absolute reality or truth (Fernandes, 2014).

In fact, the term 'tourism' was designated in the Portuguese law of public tourism policies, as "the temporary movement of people to different destinations of their habitual residence, for leisure, business or other, and the generated economic activities and the facilities created to meet their needs" (article 2 point a) Decree-Law 191/2009, of 17 August 2009). The term "other" leaves space for indeterminacy. On the other hand, the needs of tourists and the regulation of economic activities to their satisfaction can be of multiple order and nature (e.g. food and beverages, communications, financial transactions), thus making the task of finding the foundations and specificities of a Tourism Law it very complex and difficult one.

As such, tourism will always be subject to open, flexible and successive dynamic standards. Legal systems with diffuse plurality of legal realities, given the need for regulation, not only about the contexts in which tourist production but the behaviour of organizations as well to ensure, among others, movement, stay and recreation of people (tourists) interact, taking into account the systemic interaction with the needs of tourists. Such dynamics can disrupt the stability of a body of rules with systematic perspective directed towards the interaction between supply and demand.

The construction of a dogmatic, while coherent, critical and specific body of principles (Ferris, 2013) which is based on part of an area of scientific knowledge, remains a challenge to the Tourism Law. The needs for specific study of specific contractual instruments (e.g. contracts such as accommodation, travel, and

tourist activities) can help create this dogmatic. Among them, the package travel contract (v. for all, the study of Miranda, 2000).

I advanced (Machado, 2015) some conceptual tools for the delimitation of the Tourism Law, based on parallels between Tourism and Law. Both presented as communication tools, methods of organization and promotion of core values. Among these, the tourist's right to be treated with dignity, fairness and equity, as a human being, whether how or where to move. Symbolic values such as the right to movement, freedom of movement and initiative, but also corporate responsibility should be included in this dogmatic.

The package is an organizational method in the combined sales of services (e.g. transport, accommodation, entertainment, etc.) offered to the tourist. Also as aggregate and efficient information/ communication tool value to tourists to encourage their movement. Here there are indicators to consider as very important the regulation of this contract and of the market for its sale and delivery by Directive 2015/2302, to the dogmatic challenges of the Tourism Law.

Therefore, the reason for the title of this article can be understood. The constant adjustment of Directive 2015/2302 is, in itself, a challenge in adapting the concept of "package travel" to a flexible and dynamic legal reality, as is the sale of market tours and related travel services. Moreover, to the very tourism law itself.

Does the 2015 Directive constitute a symbol of progress and does it meet the challenges of a demanding reality, flexible and dynamic, as is the market for leisure travel? I will respond to the functional and systemic challenges of building its own dogmatic tourism law as regulation of this reality. These questions will be addressed on.

2. METHODOLOGY. THE FUNCTIONALITY OF THE TOURISM LAW

Scientific knowledge of the Law requires intellectual tools to sort methodically normative material, sort it according to objects and affinities, and search the common principles in laws of which standards are manifestation in order to build a logically coherent system (Caetano, 2006).

The Tourism Law can be regarded as an autonomous branch of Law if the laws governing the components of an organised bid to a temporary consumption, whether transport, accommodation or recreation, among others, are determined by principles, values and common features, with systemic view to guide its regime.

According to authors Sweigert and Kotz, the methodological basic principle of comparative method is the functionality, according to which it is argued, "what is comparable is what fulfils the same function" (Sweigert et al. 1977, p.25). Thus, the tourism law is a functionality to solve the same problems and can solve them by different means, but looking to achieve the same results.

Functional equivalence is a principle that states that what is comparable is based on the similarity of the factual needs, interests or functions that answer the problems, trying to perceive the connection between package travel, related travel services, lodging, tourist transport among others, which pose problems to be solved in a standard way by regulatory means.

Our answer is clearly positive in the Portuguese case. The abovementioned Law of tourism public policies (Decree-Law 191/2009, of 17 August 2009) contains a delimitative repository of concepts applied to tourism (Article 2), general principles of tourism public policy (article 3) and of what tourist service providers are (article 18). The law sets out systematically, rights and duties of these suppliers (articles 19 and 20), as it does for tourists and consumers of tourism products and services (articles 22 and 23).

In turn, Directive 2015/2302 extends the concept of "operator" to any collective, public or private person, whether commercial, professional or craft acting on his own or in the service of others' (Article 3 paragraph 7) or as organiser, retailer, service provider or facilitator of any travel service. That seems to prepare a comprehensive and systemic perspective for the regulation of the problems during formation, sales and implementation of a package travel contract.

There are thus systemic principles that guide a law, as a product of public policy (Machado, 2015) and regulating duties of a provider of tourist services in Portugal and a provider of package travel services within the Community. Materials to take into account are the standardized regulation of package travel market, as part of an overall regulation in the sale of tourist services market, in addition to the duties in the formation and implementation of contracts that fall on the organisers in the Directive 2015 / 2302.

The importance of the methodology and its comparative and historical application of laws that contain identical functional principles on rights and duties, whether it is a supplier of a tourist service or a consumer, allow extracting homogeneous understanding of the tourism Law. Strictly speaking, we intend to find if principles, functions and duties / regulatory duties in a package can be successfully applied to all other contracts of sale of a tourist service, in view of the requirements and objectives in a legal tourism system, either driven by the

ological basic principle to which it is argued, (Sweigt et al. 1977, the same problems and the same results.

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principles of efficiency (Machado, 2010), either by principles of protection and promotion of tourist interests as a consumer (Py, 2002).

The normative discipline of package travel in the Directive 2015/2302 is thus also subject to a systemic sieve in which questions, such as functionality (what, how and what for) are fundamental to solve problems, interests and effects of a tourist service. In view of the self-referential balance, on the one hand, the efficiency of interest in terms of cost / benefit by the tourism service providers; on the other, the interests of stability, security and legal protection of purchasers of those services.

Thus, the methodology will seek to establish the degree of parallelism, similarities or differences, a comparative and functionalist perspective between 1990 and 2015 Directives, juxtaposing identities and differences, given the elapsed period of time (25 years) between the two laws.

3. ANALYSIS AND RESULTS

The 1990 Directive, now revoked by Directive 2015/2302 (article 29), with effect from July 1, 2018, was of great importance to the historical evolution of the tourism law. As seconded by more relevant international doctrine (among others, Valdecasas and Pedrero, 1994; Py, 2002; Martin, 2002) marked by strong defence concerns and protection of tourist rights as a consumer, to a wider spatial dimension, such as the Community. Considerations 3, 4, 10, 11,13,15,16, and 18 of Directive 1990 extracted a concern in the defence of consumer rights. The text "consumer" appears 16 times in 22 considerations.

In fact, given the power of the organiser in the mix of services (e.g. accommodation, transportation, other services) in a package (Article 2 paragraph 1), the Community legislature in 1990 Directive, in particular, to balance the asymmetrical power relations between the tour operator and tourist, has established a set of duties by the organiser among which are:

- a) Detailed information of the content of the contract (Article 4);
- b) Communication of the content of the contract by physical means (e.g. brochure) to the consumer (Article 3);
- c) Protection in the event of insolvency or bankruptcy of the reimbursement of funds deposited and of the consumer repatriation (Article 7);

Moreover, the Member States may adopt or maintain more stringent provisions for consumer protection (Article 9). The 2015 Directive, in turn, hasn't conceptualized the term "consumer", replacing it with "traveller", designating it as any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded (article 3 paragraph 6). In the 54 considerations, the word "consumer" appears only 14 times (two times less than in the 1990 directive).

The rights of pre-contractual information (article 5) or the documents to be provided by the organiser before the start of the journey with a more comprehensive and detailed content of the contract (Article 7), as well as the responsibility for the performance of the package (article 13), would strengthen the rights of the traveller, as a special consumer, nothing distorting the systemic principles in the tourism law consumer's rights. As would the obligation to provide assistance (article 16) and protection in case of insolvency (article 17).

However, scientific analysis advises us to read the law in its extent. Thus, article nr. 4 of the 2015 Directive provides that Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in the Directive, including more or less stringent provisions which would ensure a different level of traveller protection.

In turn, the concepts of "who organised" and "what is organised" are diluted. The classic concept of "tourist operator" as a person who organizes a package other than occasionally and sells or offers for sale, directly or through an agency (article 2 paragraph 2 Directive 1990) is dropped. The new Directive advances the concept of "operator" as any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to its trade, business, craft or profession in relation to contracts covered by this Directive, whether acting as organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider" (article 3 paragraph 7).

Thus, the link between operator / organiser loses the exclusive relationship that existed in 1990. The 2015 Directive replaces this conceptualization of "who" with "what" "for a" how ", emphasizing the "how", that is the processes and forms to combine the package for its conceptualization (article 3 paragraph 2 b)), because disjunctively proposes to point a) as a combination of the services performed by a single operator, the existence of four subparagraphs (ia iv) disjunctive to this characterization.

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Thus, the package, irrespective of whether separate contracts are concluded with individual travel service providers, is composed by services:

- (i) purchased from a single point of sale and those services have been selected before the traveller agrees to pay;
- (ii) offered, sold or charged at an inclusive or total price;
- (iii) advertised or sold under the term 'package' or under a similar term;
- (iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or;
- (v) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service (article 3 paragraph 2 sub-paragraphs i) and v)).

One could say that "IT and distance communication" in the celebration of contracts to conclude has caught the legislator's attention in the 2015 Directive. What composes "packages" and the number of tours, as well as the form and the technological facility in their combination are now much more extensive than they were in the 1990 Directive.

This does not constitute a problem in itself, unless such opening deviates systemic objectives values such as justice or accountability, as well as standardization and efficiency in contracting tourism service providers, with increased protection and defence of traveller rights as a consumer. This protection, moreover, in terms of results, is taken in 2015 Directive as binding for the Member States (Article 4).

The opening processes, strengthening disclosure requirements, communication and assistance, among others, to organisers without connection to any relationship of exclusivity and guarantees on the market with the "who delivers" can constitute a systemic risk point of view of the general theory of legal relationship (Andrade, cit. by Pereira, 2015). Including its non-systemic interaction with the rights of the traveller, as a consumer.

Moreover, as consideration 48 of 2015 Directive heralds the problem. The concept of traveller, as a special consumer needs adjustments and clarifications to the normal consumer rights. Says consideration 48 that "it should be clarified that Regulation (EC) No 2006/2004 (on cooperation between national

authorities responsible for the enforcement of consumer protection law) applies to infringements of this Directive”.

It is further said that “Also, taking into account the fact that Directive 2011/83/EU of the European Parliament and the Council in its current form does not apply to contracts covered by Directive 90/314/EEC, it is necessary to amend Directive 2011/83/EU to ensure that it continues to apply to individual travel services that form part of a linked travel arrangement, insofar as those individual services are not otherwise excluded from the scope of Directive 2011/83/EU, and that certain consumer rights laid down in that Directive also apply to packages” (consideration 48).

The question is: what more complexity do we need to enter into the systemic understanding of the traveller’s rights as a consumer? The 1990 Directive contributed to the standardization and a systemic understanding of the evolution of the tourist rights as consumers. The 2015 Directive introduces the traveller, as a special consumer and moves away from the standardization and systemic understanding in the tourist hiring.

Moreover, it seems that the transformative role in the Tourism Law by 2015 Directive has decreased in comparison to 1990. The latter has as an object to approximate the laws, regulations and administrative provisions of the Member States (Article 1).

The 2015 Directive, in turn, has the object of “approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts between travellers and traders relating to package travel and linked travel arrangements (Article 1). What is this? A recognition of insufficient systemic capacity? An inability of the Community legislature in building uniform regulation in tourism? As a Community tourism policy? (Martin, 2002).

We have restricted ourselves to the functional aspects of 2015 Directive for the tourism law, presenting a comparison of symbolic terms (related to consumer protection, market, freedom, responsibility) used in the considering of 2015 and 1990 Directive in tribute to the perspective that all scientific thinking, including on the laws, we would say, should be measured, quantified and parameterized (Ferris, 2013). Let us present the data (Figure 1).

FIGURE 1
COMPARISON SYMBOLIC TERMS OF LAW
CONSIDERATIONS OF DIRECTIVE 2015/2302/EU AND DIRECTIVE 90/314/CEE

	Directive 2015/2302 EU (1)	Directive 90/314/CEE (2)	Relation 1/2
Considerations	54	22	2,45
Consumer	14	16	0,83
Organised	47	20	2,35
Market	8	3	2,60
Freedom	1	3	0,33
Responsibility	4	3	1,33

Source: Author's calculations.

The comparative results allow to conclude that the devaluation of the term "consumer" in 2015 Directive is associated with depreciations related to the promotion of core values (such as freedom (with a decline of 0.33) and responsibility (with a gain of 1.33, much below the growth of considerations (2.45)). On the other hand, the terms "market" and "organised" has reached values (2.60 and 2.35, respectively) close to the growth of considerations (2.45).

The considerations, so detailed as they are in the 2015 Directive, are important to understand, not only the meaning and sense of interpretation of the rules that make up the articulated, as well as the purpose, we would say, which the symbolic law intends to pursue. The results impose a conclusion: the promotion of core values associated with the realization of rights (e.g., liberty and responsibility, consumer protection / tourist, as the weaker party in the hiring) is undervalued in 2015 Directive with losses for systemic and guiding principles of the tourism law. In turn, the regulatory organization methods in the tourist market follow, in 2015 Directive, proportionally, the concerns of 1990 Directive.

It is still an alert for a loss, as announced in the European construction (Jauregui, 2000), to legitimacy and effectiveness of the law as a regulatory method of human coexistence, given the dynamics of technological globalization, business transnationalization and informal interaction between markets that cause challenges to its governance by regulation.

For other comparative aspects of 2015 Directive and 1990 Directive, highlight the maintenance, but the worsening of undetermined concepts associated with the package definition. "A significant part" that would invest

other services, in addition to the transport and accommodation, as constituents of the package (article 3 paragraph 1 c) of 1990 Directive), gave rise to "do account for a significant proportion of the value of the combination" and "advertised as" or "do represent" an essential feature of the combination" (article 3 paragraph 2 point v) a) and b) of 2015 Directive).

These dimensions, always critical in terms of contractual conceptualisation (in particular, for intangible services related to leisure and tourism activities) worsen with the 2015 Directive. The concept of a package is extended to the possibility of establishing separate contracts with different service providers (article 3 paragraph 2 b)), including through interconnected processes of online booking (article 3 paragraph 2 b) v). It is left to determine the "who" of the organization, that is, "who" announced or made represent an essential characteristic or significant proportion of the value of the combination for the services other than transport and accommodation that can be part of the package concept.

Furthermore, for comparison, that the 2015 Directive adds to the concept of package travel, not only the simple combination of transport and accommodation, but also the combination of any of these services to the rental cars or other motor vehicles or motorcycles that require a driving license of category A and under Community rules in accordance with transportation (Article 3 paragraph 1 c).

This is to include the so-called "fly and drive" as a package. Being a combination of two transport services, this dimension, it seems to not add, but impoverish the functional aspects of tourist movement defined by the World Tourism Organization and the World Trade Organization (Miranda, 2000). These emphasize travelling for more than 24 hours with exemplary indication of common reasons for performing travel associated with recreation and leisure and usually imply stay, use of catering services and excursions.

These services of a more intangible nature and in local contexts different of the tourist place of origin justify different and greater legal consumer protection (Py, 2002), not including equal concern extends to "fly and drive", already covered by Community legislation air passenger rights protection (Regulation 261/2004 dated 11 February) or international conventions (Montreal Convention (1999) or Warsaw Convention (1929)).

This inclusive concern of the 2015 Directive covers all aspects regarding the formation and implementation of the package travel contract, including for persons who act for professional or non professional (e.g. craft) activity purposes (article 3 paragraph 7). This puts extensions to certain activities (e.g. school's excursions, non-profit package and social tourism usually organised) whose

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On the other hand, and finally in sight of the inclusive dimension of the 2015 Directive, aspects of the regulation of the lucrative market for the sale of travel packages (e.g. qualification of operators, guarantees in case of partial breach of contract, claim rights and on-line traveller complaint, with voluntary or compulsory arbitration resolution systems) have no framework. This puts such problems in a possible optical resolution by the Member States, but it nevertheless constitutes a missed opportunity, via Community source, to a functional and systemic development of the Tourism Law.

4. CONCLUSIONS

Conclusions of the investigation:

- a) The Tourism Law has autonomy in terms of legal sciences if it presents its own contractual securities linked to tourism and different systemic features, with a view to standard treatment of the contractual terms of tourism and additional guarantees to protect the rights of tourists as consumers;
- b) The abandonment of term "consumers" in the 2015 Directive, as well as the lack of flexibility of Member States to adopt more stringent provisions on consumer protection plan (e.g. in execution by default) in packages has negative consequences in a uniform legal protection tourist plan as a consumer under Community law and, by reflection, in the Member State's law;
- c) The definition of package of the 2015 Directive remains a critical undetermined concept (e.g. significant proportion of the value of travel, essential travel characteristic) for tourist services (e.g. leisure, tourist activities), which already needed greater security, legal certainty and protection to the tourist, as a consumer;
- d) The package concept of the 2015 Directive extends to "fly and drive" an unnecessary dimension in the protection plan of consumer rights, and does not work with the tourism law, by extending the concept to the simple combination of service transportation and with no association with services traditionally linked to tourism, such as accommodation, restaurant or local excursions;

- e) The 2015 Directive places an emphasis on “how”, whether in the conditions of formation / implementation and protection in case of insolvency in package sales contract, but with the absence of a relevant standardization in some aspects (e.g., the “who”), whether in the market of the business offer of sale / intermediation of package travel (e.g. qualification of organisers or travel facilitators, guarantees and complains due to the failure to services), extending its scope to areas clearly too disproportionate to the objective to be achieved (e.g. school tours and nonprofit-packages usually organised by charities);
- f) The 2015 Directive detaches itself from a traditional design in the tourism law of balancing power asymmetries between organiser / consumer by placing the emphasis on the regulation of the contract formation mode and less on who provides (subject) and contractual guarantees for non-compliance that such person shall pay in the sale and execution of the contract in favor of the consumer;
- g) The opening of the travel sales package market for operators as the producers or distributors of tourism was not accompanied by a symbolic concern in promoting fundamental values (freedom, responsibility, general interest), which guarantee more justice in relation to consumers and the tourist market in general in the sale and intermediation of travel packages.

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