

12 November 2009

Dear

**COMMENTARY ON THE CURRENT DEBATE ON EU SAFETY DIRECTIVES**

**Introduction:**

I understand that a meeting recently took place following the publication of a Corgi report sponsored by the FTO. I thought that it may be helpful to you to clarify and perhaps set out my observations, concerning the thinking currently being advanced by the Travel Industry, on the issues of Gas, Fire & Hygiene Safety. From what I understand, it appears that the Industry may be lobbying very hard to bring about a Directive(s) on these issues, the subject matter of which, will apparently sit outside the proposed Package Travel Directive.

Whilst the Travel Industry efforts are always welcome, I consider that it may be helpful to you if I set out a number of key issues.

**The general view on potential EU Safety Directives:**

In the first instance and as a Citizen, I would always welcome any Directive that would provide a framework of protection for the population at large. This position would be supported by most individuals and commercial concerns

However, as a Campaigner, I am concerned as to the extent that any proposed 'Safety' Directive would extend to:

1. Would it for example extend to all holiday properties, whether they were owned by large corporations or individuals?
2. What level of safety standards would be employed and how would those standards be enforced?
3. What rights would exist for holidaymakers in traditional or flexible package holidays for injuries sustained and what jurisdictions would they have pursue those claims in?
4. **Would the proposed Directives simply concentrate on holiday properties at the expense of domestic and other commercial premises (surely this would be self defeating action to find a pan-European solution to the vexed questions of safety)?**

### **Political Progress:**

We have evidence of how EU political will evaporated on the important issue of tourism or safety issues. The EU Commission was presented with the excellent Fire Safety Directive proposals some 10 years ago and they remained on the shelves of the Commission, due to the obvious and not insubstantial lobbying of tourism dependent destinations.

I suspect that the renewed attention of the Travel Industry has arisen because of the contents of the EU Parliamentary report on how to renew Tourism. The report highlighted the important issues of safety in holiday contracts and how those issues should be legislated within a new holiday Directive. In particular, they highlighted Fire Safety and concerns that there were insufficient safety considerations within the sale of holidays. I think that it is important to highlight two comments contained within that report; they stated:

*"[The EU Parliament] regrets 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 Member States to evaluate the possibility of addressing this issue in order to allay the concerns expressed by several of its members"*

*"As regards Package Tours, Parliament expressly regretted that there is no explicit safety provision in existing tourism law".*

With regard to the Fire Safety Directive and Safety Standards generally, they stated:

*"[That it was 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".*

The reaction from the European Travel Industry, through its representative body ECTAA, was perhaps predictable but nonetheless highly critical and scathing of the said EU parliamentary report.

As you know I have analysed their comments and submitted our views through our comprehensive report, which was submitted to the EU Commission earlier this year.

### **The abdication of responsibility within proposed EU Directives:**

Let's assume then that a Gas/Fire/Hygiene Safety Directive(s) was implemented, bringing all tourist accommodation into its scope. Let us also assume that such Directives incorporate domestic and other commercial premises within its provisions.

The first question is how do you define holiday accommodation? When you attempt to answer that question, you begin to realize the endless possibilities and the potential for exclusions.

Therefore, would it be safer to draft such Directives by stating that all properties, domestic or commercial, should be incorporated into its obligations?

It is obvious that the creation of 'separate' Directives or Regulations would tend to obligate the owners of such properties, as opposed to the Travel Industry itself. This is an important point; the Travel Industry is increasingly claiming that they are in fact travel agencies and therefore bear no responsibility for any failings in the holiday product! **The logic is this; if we remove an important component player and their obligations from a holiday contract, what will then be the resulting detriment suffered by a Consumer if a holiday property is not properly assessed?**

It is clear that in the event that if 'abdicating' Directives are created, the focus would shift from the tour operator, whose obligations exist under the current regime of the Package Travel Directive, to the accommodation provider, under any proposed Directives.

### **CAA v Travel Republic and its aftermath:**

To underline this serious concern, we must pay heed to the decision made in the case brought by the CAA against Travel Republic. The decision was delivered on 11 November 2009 in favour of Travel Republic.

Once again, the CAA have failed to establish the principles contained within the current Package Travel Directive as to what constitutes a 'Package' and therefore the regulatory obligations upon those selling a complex product to Consumers

This case related to the alleged failure by Travel Republic to obtain an ATOL licence on the basis that holidays sold via their web portal amounted to 'Packages'. Travel Republic's argument was that they are a 'travel agent' and therefore sell components at the Consumers request. They claimed that the operation their business model excluded them from regulatory requirements.

The aftermath demonstrates a clear split between those within the regulatory environment and those who believe that they operate outside its provisions.

**The headline on this case is that it is all about the future of financial protection, that may be, however, its implications are clear; if the court is correct in its assumption that 'we are all travel agents now', then the temptation to rush to the 'new' business model will be irresistible and all responsibilities will therefore be logically avoided, not just on financial protection, but on health & safety, information provided to the Consumer etc.**

If you need evidence of that fact, then you need look no further than the report we submitted earlier this year to the Commission and the daily calls to our helpline.

If we are not careful on these issues, we will return to the 'old' world of holiday contracts and the Consumer detriment that existed prior to 1992!

### **The creation of abdicating EU Directives:**

Holidaymakers are enticed by the 'promise' of a holiday product and the 'promise' of safety in that holiday product. Such contracts can never be said to be a contract of equals.

The evidence of the last 2/3 years has indicated that there is a slow but nonetheless determined rush by travel providers to re-create themselves as agents, sitting they believe, outside the regulatory environment. This is the obvious danger to the Consumer if the issue of safety is lost in the creation of separate Directives.

If separate Directives are created on safety issues, without reference to the Consumer rights of The Package Travel Directive, this would in my view present a disaster for Consumers.

Let us now assume that such Directives have been created and a holidaymaker suffers with an injury.

If the Directive only makes reference to an accommodation provider with regard to obligations and

liability, and the complaint is made to the tour operator, then it is obvious that the tour operator would shift the focus of attention away from itself, thus pointing all liability claims toward the accommodation provider.

I ask several questions:

1. How can that be an equitable position for the Consumer - Consumers purchase their product from the tour operator, who has represented, either expressly or impliedly that the product was safe?
2. How can any Consumer be certain that any holiday product advertised is safe for himself or his family?
3. How can the proposed Directives be said to contribute to the development of growth and confidence in tourism?

If the argument is successful in promoting a single interest safety Directive, with a poorly drafted definition of what constitutes holiday accommodation, or a poorly thought out route and levels of obligation and responsibility, then several important implications arise:

1. It will provide comfort and support for the notion that the Package Travel Directive should either remain largely untouched or watered down;
2. It would provide the green light that so called 'DIY Holidays' would not come under the Package Travel Directive, as the entity selling the so-called component holiday would not be motivated to sell the holidays with obligations on safety and could simply evade a responsibility for the standards in a holiday contract. The support for this would rest in the fact that other Directives would tell him that the 'safety' question was someone else's responsibility;
3. The Consumer would have no guarantees as to safety within a holiday contract, because of the potential 'opt out' created by any proposed Directive that sits outside the Package Travel Directive;
4. If a holidaymaker became injured, they would then have to pursue an action within that jurisdiction and be exposed to the vagaries of that legal system;
5. The Consumer would be returned to the 'old Travel Industry' of pre-1992 and the notion that the contract protects your rights.

### **The way forward:**

As I see it, if the Commission is persuaded to create these satellite Directives on Safety, then they should have serious consideration as to how the Consumer should be protected in Contract.

Most EU Directives are either presented as Horizontal or Vertical Legislation.

Horizontal Legislation is designed to create a general level of laws applicable across a given area. So for example in the Gas Safety scenario, it would set minimal standards to be applied by various levels of Citizens and/or Commercial bodies.

Vertical Legislation is much more concentrated. The best example is the Package Travel Directive. It relates to a particular interest and creates comprehensive rules on how that interest will deal with various issues.

It therefore seems logical that if the EU Commission are truly serious about improving safety standards and protecting Consumers in holiday contracts, then they have to ensure that all commercial parties to such a contract bear a responsibility or obligation to safety (that being the accommodation provider and the tour operator).

**If the Commission is intent on securing improved safety through separate Directives, then the best approach would logically take the 'crossroads legislative' approach.**

An example of Horizontal Legislation could be on Gas Safety, bringing all accommodation providers (manufacturers/fitters etc?) into its scope.

To then fully protect the Travel Consumer, that Directive should then be '**crossed**' with the extra 'Vertical Legislation' (i.e. The Package Travel Directive) guarantee for the Consumer, that **all sellers** (whatever their stated business model) of holiday products, be also made responsible for safety. Through that 'Vertical' legislation, comprehensive safety obligations (not tick box audits) could then be created, which in my view, would establish a 'strict' liability for both provider and travel provider alike. The 'Directives' could then establish a clear route to litigation against all parties, within the home country of the Consumer, the precedent of which has been established through the new EU Small Claims process and incorporated into our own Civil Procedure Rules. The Consumer would enjoy the benefit within their holiday contracts, that from the creation to the delivery of the contract, safety was now paramount.

**Conclusion:**

In my view the proposed Package Travel Directive must confront this 'new veneer' of holiday sales and incorporate all players into the definition of 'Package' and all its obligations. The ideal solution would be to create a tougher health & safety regime within the new Package Travel Directive, but I hope that the observations I have made above will provide you with some assistance on this difficult topic.

If you need any further information, then please do not hesitate to contact me directly.

Yours Sincerely

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cc: