Ius Novum
1/2018

CONTENT OF A TOURIST SERVICES CONTRACT IN THE LIGHT OF AMENDMENTS TO THE REGULATIONS ON TOURIST PACKAGES

DOI: 10.26399/iusnovum.v12.1.2018.02/a.kosinska-madera

AGATA KOSIŃSKA-MADERA*

1. INTRODUCTION

It is unambiguously emphasised in jurisprudence that doing business professionally is a reason for increased community, including customers' one, expectations of professional entities' knowledge, skills, diligence, forethought and ability to predict. Thus, more can be required from those professional entities, in the discussed case tourism organisers and intermediaries. This is justified because they have specific competence in the field of tourism organisation. However, as P. Kaflik indicates, one cannot expect "all the participants of the professional business to have the same ability to assess the risk occurring in every branch".[1] Assessing activities undertaken by professional entities, it is necessary to choose (specify) adequate measures of diligence, which should differ depending on the branch of business. A tourism organiser's obligation to take care of tourist package participants is an inseparable element of tourist services contracts (i.e. contracts to provide tourist packages, trips or excursions) and also a factor differentiating it from other types or categories of contracts.[2] This obligation constitutes a basic measure of assessment of activities

* Master of Laws, doctoral student at Adam Mickiewicz University in Poznań; e-mail: agata.kosinska@amu.edu.pl

[1] P. Kaflik, *Glosa do wyroku s. apel. z dnia 1 kwietnia 2015 r., I ACa 1431/14*, Glosa No. 2, 2016, pp. 46–50 [accessed at Lex Omega].

[2] P. Cybula points out: "It is proposed in the literature to recognise the provision of services in a precisely defined time in the future, equivalence of the services of the parties to the contract, integrity and complexity of services, **a travel organiser's obligation to ensure care of participants** and an obligation of the participants' cooperation in order to perform the programme of a journey as characteristic elements shaping the nature of the legal relation resulting from the discussed contract the elimination or deformation of which should be excluded" (P. Cybula, *Usługi turystyczne. Komentarz*, Warsaw 2012, p. 163 [accessed at Lex Omega]). Thus, the above are often recognised as rudimentary elements of a tourist services contract. In comparison, W. Kurek concludes that this concerns the following elements: (1) the subjective layout of a contract,

undertaken by professional entities. The term "tasks" may be intuitively associated with an obligation that occurs only during a tourist package, when as a rule it is fulfilled by persons providing services (e.g. various contractors, a tour pilot, a tour guide or a resident). However, the conclusion should be recognised as erroneous, which is confirmed in the legal norms laid down in the provisions concerning tourist packages. In fact, its implementation starts from the protection of consumer trust treated both as a social value and an economic one. The protection of the weaker party to a contract, a consumer, as a rule consists in the protection of trust, which makes the legislator undertake steps to create regulations, i.e. mechanisms facilitating proper functioning of professional entities, e.g. in the field of contract law (contract conclusion and implementation), so that consumers are certain of the specified course of events (fulfilment of the obligation). Z. Radwański noticed that customers must be protected against dangers resulting from the trust that is typical of them and is demonstrated in their market unawareness and a lack of sufficient knowledge of phenomena taking place in the economy.[3]

Information has the basic significance for "(…) appropriate and conscious development of the parties' rights and obligations and satisfactory fulfilment of a concluded contract",[4] which has a positive impact on the process of law application (mainly the law of obligations) and indirectly also on business transactions. It is also worth mentioning that consumer regimes have a specific feature, where information is important not only at the pre-contract stage but also in the course of contract conclusion and thereafter. Appropriate fulfilment of information duties is an expression of taking care of a tourist package participant (alternatively, potential participants to whom a tourist package offer is addressed), and thus of protecting their trust. Obviously, a consumers' right to information is developed already at the constitutional regime level but its implementation is undoubtedly guaranteed in the civil law norms, which impose certain strict obligations on the professional entities. Following P. Mikłaszewicz, it is necessary to state that: "A consumer is ensured access to information by the instruments of the general part of civil law (the principles of interpretation of a declaration of will, basic legal mechanisms of contract conclusion, defects of declarations of will), certain specific solutions adopted for transactions with the participation of consumers (control over abusiveness of clauses not agreed upon individually, the construction of withdrawal from a contract in case of distance contracts concluded away from the provider's office), detailed information duties established in connection with specific named contracts and other more general mechanisms such as general requirements concerning the method of an obligation

---

(2) the complex nature of services, (3) fixed fee for services, (4) **provision of care for a tourist package participant** (see, W. Kurek (ed.), *Turystyka*, Warsaw 2007; compare, J. Gospodarek, *Prawo w turystyce i rekreacji*, Warsaw 2007, p. 222 ff).

[3] Z. Radwański, *Kodeks cywilny wymaga unowocześnienia*, Kancelaria No. 7–8, 2010, p. 18; for an interesting discussion of trust as a guarantee of performance of obligations, see M. Grochowski, *Venire contra factum proprium a zaufanie i „słabość sytuacyjna"*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016 [accessed at Lex Omega].

[4] P. Mikłaszewicz, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej,* Warsaw 2008, p. 15 [accessed at Lex Omega].

fulfilment or doctrinal constructions of contractual loyalty (honesty) obligation. A consumer's right to information in the sphere of contractual relationships is implemented through the application of all the above-mentioned mechanisms, however, each of them acts in a different way and in a different 'field'".[5] Thus, the issue of what type of information a tourist services consumer is entitled to and how this right is exercised is essential. The obligation to thoroughly and honestly inform a party to a contract is a general (fundamental) feature of the contract law and results from an obligation to maintain loyalty and professionalism at all stages of the legal relationship.

In principle, one can distinguish the following categories of professional entities' information duties in the tourist services contract regime:

- pre-contractual information, i.e. information provided before a tourist services contract is concluded;
- **contractual information, i.e. information included in the contract**;[6]
- information provided before a journey starts.[7]

The article describes thoroughly the issue of contractual information (information included in a contract) because it is purposeful to indicate that professional entities communicate with customers also via the content of a contract, where basic information about tourist services provided is included, and thus customers should pay special attention to the analysis of its content. It is obvious that the lack of equality between professional entities and customers on any service market reflects its defectiveness, and thus results in far-reaching competition disturbances. By the way, these drawbacks often depend on internal features of a given market.[8] Thus, a consumer's position is antagonistic to an entrepreneur's (this is how a consumer's position is interpreted in economics) and is at the end of the economic chain (end recipient of goods and services provided by professional entities).[9]

This is why, the article first of all indicates the most important features of the tourist market (resulting from the specificity of tourist products) and only then the issues concerning the content of a contract are discussed in detail.

---

[5] *Ibid.*, pp. 15–16.

[6] It is indicated that the regimes of consumer contracts not only require that they have an appropriate form (recording of the content) but also their content must include some strictly defined information (inter alia about the contract performance from the point of view of a consumer's needs; see, B. Gnela, *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*, Warsaw 2013).

[7] It is pointed out here that a different classification of professional entities' information obligations is made in the literature. M. Sekuła-Leleno divided them into three categories: (1) an organiser's obligations before a contract conclusion; (2) an organiser's obligations resulting from the provisions of the contract; (3) an organiser's obligations before the start of a tourist package (see, M. Sekuła-Leleno, *Odpowiedzialność za szkodę niemajątkową wyrządzoną niewykonaniem umowy o imprezę turystyczną*, Warsaw 2014, p. 102 ff).

[8] J. Bazylińska, *Ochrona zbiorowych interesów konsumentów w prawie Unii Europejskiej i wybranych porządkach prawnych państw członkowskich,* Toruń 2012, p. 218.

[9] E. Łętowska, *Europejskie prawo umów konsumenckich*, Warsaw 2004, p. 45 ff.

2. TOURIST PRODUCT AS A CONSTITUENT OF A CONTRACT

The content of a tourist services contract is one of the most important elements constituting the quality of the contract on the market of tourist services. Due to the fact that tourism is a cross-border phenomenon, the above-mentioned issues are reflected in abundant European law, especially in the field of consumer protection.

Basically, it can be assumed that tourist packages, in some sense, may be classified as consumer goods.[10] However, these goods have their specific characteristic features. In accordance with the new directive on the tourist market, i.e. Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC,[11] the term "tourist package" was in general extended (Article 3(2)). Looking at the definition from a broader perspective, it should be emphasised that a tourist package is a type of tourist service (a combination of elements, including goods and services as well as their image, which are purchased by tourists in order to satisfy needs connected with tourism[12]). Its obligatory elements and features must not only be developed by the provisions of law but they also should depend on inseparable features of a tourist product. Namely, unlike in case of other consumer goods, one can distinguish immanent as well as most important features of a tourist product, i.e. its service nature, illusiveness, unity of time and place of provision and consumption, inability of storage, immovability, complexity, comprehensiveness, typical lack of ownership and seasonality.[13] It should be emphasised here that a catalogue of features selected this way distinguishes only tourist products. Obviously, tourist products alone may be classified as different types. According to J. Kaczmarek, A. Stasiak and B. Włodarczyk, the following categories of tourist products can be listed: (1) tourist products – things, (2) tourist products – services, (3) tourist products – events, (4) **tourist products – packages**, (5) tourist products – objects, (6) tourist products – routes, (7) tourist products – areas.[14]

Referring the comments on tourist products to the area of the present discussion, it is absolutely necessary to highlight that the establishment of the above-mentioned features and categories of classification is essential for the identification and potential assessment of the catalogue of information duties. One can make a preliminary assumption that legal regulations depend (or at least should depend) on the above-mentioned ones, and thus their construction should correspond to them.

---

[10] Possibly "final goods", which mean (for the need of this article) goods (products) manufactured to be purchased and used by a consumer.

[11] OJ L of 2015, item 326, p. 1; Member States must apply the provisions of the Directive from 1 July 2018 (full harmonisation).

[12] See, W. Kurek (ed.), *Turystyka...*, p. 361 ff.

[13] R. Seweryn, *Produkt turystyczny i wyznaczniki jego atrakcyjności*, Zeszyty Naukowe Akademii Ekonomicznej w Krakowie, No. 697, 2005, p. 71.

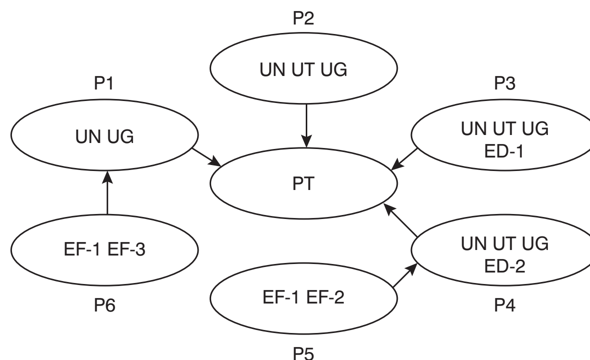
[14] Kaczmarek, A. Stasiak, B. Włodarczyk, *Produkt turystyczny*, Warsaw 2005, pp. 75–89.

A tourist (or a visitor)/consumer/traveller takes a decision to participate/purchase a tourist product in the form of a tourist package under the influence of an idea or image. The quality of a tourist package offered to customers in the form of a selection of services (and some benefits) depends almost exclusively on its organiser, i.e. honesty and professionalism in the selection of the quality of partial services included.[15] At the same time, inter alia thanks to information provided by a professional entity, a consumer may acquire basic knowledge about the said quality of a tourist package. The tourist package, which a tourist perceives as a specific type of "experience available for a specified price", in general, may only constitute a combination of basic elements of a tourist offer (goods and services). In practice, however, it has marginal application; that is why, the structure of tourist packages is greatly varied and includes:

– basic packages, i.e. basic goods and services, including overnight accommodation, board and transport;
– enlarged packages, i.e. a basic package and additional services and goods increasing the attractiveness of the offer but a customer (a tourist) usually cannot influence their selection;
– optional packages, i.e. elements supplementing a basic package (or an enlarged one), which a tourist may order for a specified price choosing them freely in different configurations[16] (see, Fig. 1).

That is why, it is a very difficult task to select a general catalogue of information provided to customers. This catalogue must be flexible enough to include all the possibilities of developed tourist packages.

Fig. 1. Sample structures of tourist packages



Note: PT – tourist product; UN – overnight accommodation; UG – gastronomic service; UT – transport service; ED-1, ED-2 – additional elements; EF-1, EF-2, EF-3 – optional elements; P1, P2 – basic packages; P3, P4 – enlarged packages; P5, P6 – optional packages.

Source: J. Kaczmarek, A. Stasiak, B. Włodarczyk, *Produkt turystyczny*, Warsaw 2005, p. 99.

[15] *Ibid.*, p. 91.
[16] *Ibid.*, p. 99.

In order to make a decision, a consumer must have a complete set of reliable and true information concerning the constituents of a tourist package (a tourist product), and thus all information concerning every element (including the basic package, the enlarged package, the optional package or the destination). Thanks to the purchase of a tourist product when a decision has been made based on carefully analysed information, "(…) a consumer obtains certain additional profits constituting its attractiveness, such as comfort resulting from the provision of all services in one place, in addition synchronised in terms of things, space and time, and the **feeling of security** connected with the guarantee of services still at the place of residence and a possibility of focusing responsibility for failure to perform or inappropriate performance on one entity (organiser)".[17]

Summing up the considerations concerning theoretical issues connected with the phenomenon of tourism, undoubtedly, every (even the shortest) journey requires financial as well as service-related preparation. It is the responsibility of the provider (i.e. a tourism organiser) who is obliged to prepare a proposal of a potential tourist product (in the discussed case: a tourist package), which after the assessment made by a potential tourist or a visitor after his/her choice becomes a real tourist product. A consumer's choice of a particular tourist product is reflected in an obligation relationship, i.e. conclusion of a tourist services contract. A fundamental question that arises here is the issue whether the obligatory content of a contract imposed by the legal regulations corresponds to the special features that a tourist product in the form of a tourist package has.

3. OBLIGATORY CONTENT OF TOURIST SERVICES CONTRACTS

3.1. COMMENTS IN THE LIGHT OF THE ACT OF 29 AUGUST 1997 ON TOURIST SERVICES AND DIRECTIVE 90/314

The issues connected with threats resulting from the purchase of a tourist package (a tourist services package) were regulated at the European Union level as well as in the domestic legal system.[18] The provision of Article 14(2) of the Act of 29 August 1997 on tourist services[19] (hereinafter referred to as Act on tourist services) specifies elements that every tourist services contract should contain. The issues concerning the right to information in relation to a tourist services contract are laid down in Chapter 3 Act on tourist services entitled "Consumer protection" (the Chapter contains the provisions of Articles 11–19a, including the right to contractual information directly regarding the content of a tourist services contract).

---

[17] R. Seweryn, *Produkt turystyczny…*, p. 76.

[18] It is worth drawing attention to the statement made by B. Gnela in accordance with which "(…) a tourist package contract is classified subjectively and objectively. However, the Act on tourist services, like Directive 90/314/EEC, does not regulate the tourist package contract but only selected issues connected with threats for a consumer in conjunction with using the combination of tourist services called a tourist package" (B. Gnela, *Umowa konsumencka...*, p. 372).

[19] Journal of Laws [Dz.U.] of 2017, item 1553, as amended.

Looking at the elements of a tourist services contract that the legislator lists, one can classify them into the following categories:

- provisions concerning information about parties to a contract;
- provisions concerning the parties' rights and obligations;
- provisions concerning a tourist package;
- provisions concerning the legal regime governing a contract.[20]

First of all, it must be pointed out that the legislator did not indicate in Article 14(2) that the content of a tourist services contract should contain basic information concerning a consumer, mainly data serving his/her identification (given name and surname, place of residence and address, valid identification document number or PESEL identification number), unlike in case of a tourism organiser, whose data are listed in the provision discussed. It seems that it can be assumed that the above-mentioned fact is the legislator's evident error (an oversight). Undoubtedly, unanimous declarations of will of at least two parties are necessary for the validity of a contract (in the discussed case: a professional entity – a tourism organiser and a non-professional party – a consumer).

Moving on to the substance of the present discussion, it is necessary to make a critical evaluation of the provisions concerning the content of a contract. It is pointed out that as a rule they mainly impose an obligation to conclude a contract in writing. However, the obligatory content of a contract that the legislator proposes raises doubts. The provision does not raise any interpretational doubts: the phrase "a contract should specify" clearly indicates that the elements specified by the legislator must be recognised as obligatory content (at the same time, the minimum) of a contract where its "extension" may be an expression of the Napoleonic principle of freedom to develop contractual relationships. The provision discussed means in practice that a professional entity has no choice (to include or not to include) with respect to particular contractual provisions, and thus specifies a "strict" obligation to include all elements listed in statute. It is also often emphasised in the literature that Act on tourist services determines the minimum information that should be found in a contract. It is often pointed out that the above-mentioned elements are to guarantee the appropriate catalogue of parties' obligations. However, "The lack of some data in a contract causes the situation when the scope of mutual obligations of the parties is not precisely determined, which can lead to a dispute based on the implementation of a contract and result in difficulties in providing evidence in case such a dispute arises".[21]

---

[20] Obviously, a different division of the provisions proposed by the legislator can be found in the literature. Namely, (1) provisions that enable identification of an organiser, (2) provisions directly concerning services that are subject to a contract, (3) provisions concerning the rules of modifying or terminating a contract, (4) provisions regulating the procedure in case of inappropriate performance of a contract (Office of Competition and Consumer Protection, Branch Office in Katowice, *Raport z kontroli działalności organizatorów turystyki*, Warsaw–Katowice 2011, p. 8).

[21] E. Rutkowska-Tomaszewska, *Decyzje prezesa UOKiK w sprawach praktyk naruszających zbiorowe interesy konsumentów stosowanych przez organizatorów turystyki*, [in:] P. Cybula (ed.), *Transformacje prawa turystycznego*, Kraków 2009, pp. 170–171.

Taking into consideration the literal wording of the above-mentioned provision, it is hard to disagree with the presented approach. However, some dysfunctions occur in terms of operation of a tourist services contract. The elements specified in Article 14(2) Act on tourist services do no always refer to all contracts, i.e. they do not apply to every tourist contract, and thus they do not match its features. Therefore, the assumption that they are obligatory elements imposes an obligation on professional entities to provide the "negative information" in a tourist services contract (e.g. it should be clearly indicated that an organiser does not provide meals within a tourist package). It should be provisionally assumed that in general this violates the interests of professional entities because it is hard to approve of a situation when the above-mentioned entity must provide information about services that are not offered in a tourist package.

The above-mentioned situation also results from the characteristic features of a tourist package, which undoubtedly should be classified as a tourist product. In practice, a situation in which a tourist package constitutes a simple combination of just a few services is very rare. Nevertheless, it does not mean it cannot take place. Therefore, it is necessary to emphasise again that the structure of a tourist package is differentiated and comprises basic packages, and enlarged and optional packages (see, Fig. 1). The adoption of the above leads to an unambiguous conclusion that it is impossible to include all the products belonging to this category in the framework of Article 14(2) Act on tourist services (a tourist package does not always contain elements indicated in statute, and thus not all tourist packages contain the same components). Moreover, it is justifiable to point out here that one cannot put forward a theory that Article 14(2.4) – namely: "(…) a programme of a tourist package comprising the type, quality and time of the offered services, including: (a) the type, nature and category of the means of transport and the date, time and place of departure and scheduled return; (b) the location, type and category of hotel facilities in accordance with the regulations of the destination country or a description of the equipment of the facilities that are not classified within the type and category; (c) the number and types of meals; (d) the programme of sight-seeing and other services included in the price of a tourist package (…)" – results in a possibility of choosing the elements that a professional entity should include in the programme of a tourist package as obligatory elements of a contract. The issue of regulations concerning the programme of a tourist package should be recognised as especially disputable when discussing which elements listed in Article 14(2) Act on tourist services are obligatory. The phrase "including" used by the legislator is similar to the concept of "in particular", which means that the provision includes an open catalogue of elements, which a professional entity may include in the programme of a tourist package. Nevertheless, it must be clearly highlighted that those elements listed by the legislator must be found in the programme, which again indicates that a professional entity has an obligation to provide "negative information".

Attention is drawn to the opinion expressed by the Competition and Consumer Protection Court in its sentence of 26 May 2010, XVII Ama 77/09, in accordance with which "The Act on tourist services precisely regulates tourism organiser's activities with respect to the type of services provided, conditions for their provision,

obligatory elements of a contract, an organiser's liability for failure to fulfil or inappropriately fulfil the contract, etc. (…)". One can also indicate the opinion that "Failure to fulfil information duties consisting in narrowing the content of a contract in relation to the one that is required by the provisions of the Act on tourist services is recognised in the rulings of the President of the Office and courts as the use of practices violating the collective rights of consumers. (…) All the information listed in Article 14(2) Act on tourist services is important, although it is necessary to agree that its omission in a contract may result in various consequences".[22] However, it should be acknowledged that it remains insignificant that a category of contractual provisions can be "omitted" in the process of developing a tourist services contract. A different statement would lead to a conclusion that the legislator makes a classification (hierarchy) in accordance with clauses, which does not result from the literary wording of the provision of Article 14(2) and the legislator's intention. Therefore, it should be indicated that at present failure to fulfil any of the information duties (i.e. non-inclusion of all the elements in a contract) results in appropriate legal consequences.

It also seems that the European Union regulations, especially the provision of Article 4(2a) Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours[23] (hereinafter referred to as Directive 90/314), which stipulates that depending on a particular package, the contract should contain at least the elements listed in the Annex, have not been appropriately implemented. A contract should also clearly and comprehensively determine a consumer's obligation to communicate any failure in the performance of a contract to the service provider, organiser or retailer of the services (Article 5(4) Directive 90/314).[24] It should be emphasised that the highlighted provisions describe professional entities' obligations more precisely and indicate the obligation to include only clauses concerning a particular tourist package in a contract (while it is obvious that the provisions concerning the rights and obligations of the parties remain the same, regardless of the form of a tourist product). Summing up, the European regulations do not impose an obligation on a professional entity to provide "negative information", which makes them more flexible and gives them the possibility of adjusting the form of a contract to the services offered by an organiser.

It is also necessary to emphasise at least two aspects. Firstly, a thorough analysis of the Act on tourist services indicates that the issue of the content of a contract was established not only in the provision of Article 14(2), which envisages that a professional entity may have problems with its interpretation, and thus with the development of a contract alone. Inter alia, Article 16b(2) Act on tourist services stipulates that a contract should unambiguously determine a customer's obligation in the area referred to in (1), namely: "If in the course of a tourist package a customer recognises inappropriate performance of a contract, he should

---

[22] Office for the Competition and Consumer Protection, Branch Office in Katowice, *Raport z kontroli...*, pp. 11–12. P. Cybula also refers to that citation in *Usługi turystyczne...* [accessed at Lex Omega].

[23] OJ L of 1990, item 158, p. 58, as amended.

[24] For detailed comments, see P. Mikłaszewicz, *Obowiązki informacyjne...* .

immediately communicate that to the service provider and a tourism organiser in the way that is proper for the type of service". Nevertheless, as the thorough analysis of Article 14(2) shows, the legislator "stipulates" only a duty to indicate the way of making complaints about the performance of services by a tourism organiser or a person cooperating with them as well as the deadline for filing complaints. At the same time, as it is clearly indicated in literature,[25] a complaint procedure should be distinguished from a consumer's (customer's) obligation to inform a professional entity about the inappropriate performance of a contract (still in the course of a tourist package). Moreover, the wording of Article 16b(1) determines that a customer's notification should be treated not as the right but as an obligation (therefore, a tourism organiser is obliged to inform a customer about this obligation). P. Cybula indicates that the lack of the above-mentioned notification may result in two types of consequences, namely:

1) The omission may be recognised as a reason of increased loss, which at the same time may lead to the reduction of the obligation to redress it in accordance with Article 362[26] Act of 23 April 1964 – Civil Code;[27]
2) The omission may result in negative consequences for evidence (Article 6 Act of 23 April 1964 – Civil Code[28]).[29]

Secondly, it is also justifiable to indicate that the scope of provisions concerning the obligatory content of contracts is in general the same as that laid down in Article 12(1) Act on tourist services (the scope of information that consumers are provided with when a tourist package is offered), where the relation between them may reflect different relationships, a different shape. In accordance with Article 12(2), contractual provisions have priority. Nevertheless, in case a contract does not refer to the written information included in various materials (e.g. brochures), it should be assumed that the content of the information becomes a part (an element) of a contract.[30]

It must be clearly emphasised that at present case law (in particular that of the Competition and Consumer Protection Court) quite unambiguously indicates that

---

[25] See, P. Cybula, *Usługi turystyczne...* [accessed at Lex Omega].

[26] In accordance with Article 362 Act of 23 April 1964 – Civil Code, "If the aggrieved contributed to the occurrence of or the increase in the loss, the obligation to redress it is subject to reduction adequate to the circumstances, especially the degree of both parties' guilt". In short, it can be pointed out that circumstances classified as contributing to the occurrence of or the increase in the loss include: (1) adequate proximate cause relation between the conduct of the aggrieved and the loss (or its increase); (2) objectively inappropriate conduct of the aggrieved (i.e. the infringement of legal norms, decorum or praxeological rules of behaviour; A. Olejniczak, *Komentarz do art. 362 Kodeksu cywilnego*, [in:] A. Kidyba (ed.) *Kodeks cywilny. Komentarz*, Vol. III: *Zobowiązania – część ogólna*, Warsaw 2014 [accessed at Lex Omega].

[27] Journal of Laws [Dz.U.] of 2017, item 459, as amended.

[28] In accordance with Article 6 Act of 23 April 1964 – Civil Code, "The burden of proof of a fact is the duty of the party bringing an action based on that fact". However, it is worth mentioning here that the new Directive (2015/2302) introduces a rule pursuant to which a professional entity bears the burden of proof in relation to **the performance of information duties** – Article 8. After the transposition to the national legal system, it will be *lex specialis* in relation to Article 6 Act of 23 April 1964 – Civil Code.

[29] See, P. Cybula, *Usługi turystyczne...* [accessed at Lex Omega].

[30] B. Gnela, *Umowa konsumencka...*, pp. 376–377.

the omission of any contractual provision laid down in the Act on tourist services or inappropriately performed information duties by a professional entity should be recognised as a practice violating collective rights of consumers, and thus as the non-commercial tort[31] (therefore, the consequences are the same, regardless of the type of the provision that has been omitted in a contract). The provision of Article 24 of the Act of 16 February 2007 on the competition and consumer protection[32] stipulates that the use of practices violating collective rights of consumers is forbidden. The legislator indicates that a practice of violating collective rights of consumers[33] should be understood as an entrepreneur's conduct that is in conflict with law and decorum and violates them, including:[34] the non-compliance with the obligation to provide consumers with reliable, true and **complete** information.

An activity (omission) violating collective rights of consumers should be recognised when the conduct of a professional entity results in taking advantage of the stronger market position as well as when it can be assessed as dishonest, unprofessional or resulting from a professional entity's lack of knowledge. That is why, it is emphasised that the role of preparation to do professional business (including organisation of tourist packages) is significant. Many examples of entrepreneurs' malpractice can be found in the literature. These include:

- inappropriate or untrue information about products and services consumers are provided with;
- unreliable (or complete lack of) information that is essential for a consumer, inter alia concerning consumer rights (e.g. the right to complain, to withdraw from a contract, etc.);
- imposing unfavourable, often unlawful contract terms on consumers;
- pressure to use products or services exerted on consumers (minors and elderly people can be considered the most endangered groups).[35]

The above catalogue also makes it possible to cover activities consisting in constructing a contract that is in conflict with commonly binding law (thus also the development of a contract that does not contain clauses required by legal provisions). As a rule, it should be assumed that such an activity is unlawful but it also breaches decorum because activities leading to misinformation, disorientation, invoking erroneous conviction as well as the use a consumer's lack of knowledge

---

[31] There are also two commercial torts distinguished in the literature, i.e. related to the violation of law between entrepreneurs.

[32] Journal of Laws [Dz.U.] of 2017, item 229, as amended.

[33] M. Sieradzka's discussion of the above issues should be recognised as especially interesting; see, M. Sieradzka, *Wykładnia pojęcia „zbiorowy interes konsumentów" na tle orzecznictwa*, Glosa No. 3, 2008, pp. 102–111.

[34] It should be clearly emphasised that the above-mentioned categories of the violation of consumers' rights do not constitute a closed catalogue (*numerus clausus*). Therefore, "Classification of an entrepreneur's conduct as a practice violating the consumers' collective rights cannot be based on the establishment of matching features of the general clause concerning the violation of consumers' collective rights (Article 24(2)), or the recognition of the application of the named practice violating the consumers' collective rights (Article 24(2.1–3))" (M. Sieradzka, *Glosa do wyroku SOKiK w Warszawie z dnia 25 maja 2009 r., XVII Ama 98/08*, LEX/el. 2010).

[35] A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska, [in:] A. Stawicki (ed.) *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* Warsaw 2011 [accessed at Lex Omega].

(or possibly also naivety) are undoubtedly recognised as being in conflict with the rules of decorum.[36] Therefore, the violation takes place at the stage of concluding a contract, during the development of contractual clauses "consisting in the breach of legal regulations that have impact on the content of a contract"[37] (breaches at the pre-contract stage are also distinguished, e.g. a breach aimed at convincing a consumer to enter into a contract and a breach at the stage of performing a contract by the use of advantage over a consumer resulting from the conclusion of a contract by deformation of the rights and obligations of the parties laid down in legal provisions).[38] Following M. Sieradzka, one can indicate that: "(…) the breach of collective rights of consumers at the stage of contract performance is recognised as the most serious, followed by a breach at the stage of contract conclusion and at the pre-contract stage".[39] To clarify, it is unambiguously determined in the literature that the practice of failing to include the provisions required by law in the content of a contract belongs to the category of practices misleading consumers as they make the addressee have an erroneous image of a service or a product (or may evoke such an erroneous image). Obviously, it does not refer to an error in the meaning of the provisions of the Act of 23 April 1964 – Civil Code (see, Article 84 Civil Code). It would be groundless to state that there is a breach of collective rights of consumers and misleading a consumer in relation to information a consumer is obliged to have (in other words: which, from the logical point of view, professional entities are not obliged to provide).

It is also obvious that the content of a tourist services contract is especially important for the establishment of a professional entity's liability for failure to perform or inappropriate performance of a contract. With respect to that, Article 11a Act on tourist services, which is the equivalent of Article 5(1) and (2) Directive 90/314, constituting a tourist package (travel) organiser's liability for damage caused to a customer (a consumer) as a result of failure to perform or inappropriate performance of a contract, is of fundamental importance. The above-mentioned provisions are also the basis for awarding a consumer compensation for non-financial loss: the "wasted vacation".[40] Therefore, it should be pointed out that, as the Court of Justice case law clearly indicates that Article 5 Directive 90/314 should be interpreted in the way recognising non-financial loss in the form of wasted vacation as damage, the above-mentioned Article 11a transposing Article 5 Directive 90/314 to the Polish legal system must be interpreted in the same way. Such interpretation, which is also consolidating in nature, makes it possible to draw a conclusion that the solution adopted in the domestic law is in compliance with the

---

[36] See, the judgement of the Competition and Consumer Protection Court of 23 February 2006, XVII Ama 118/04.

[37] M. Sieradzka, *Komentarz do art. 24 ustawy o ochronie konkurencji i konsumentów*, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2014 [accessed at Lex Omega].

[38] *Ibid.*

[39] *Ibid.*

[40] Compare, the judgement of the Court of Justice of 12 March 2002 in case *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, C-168/00.

directive.[41] As J. Gospodarek indicates, "The possibility of claiming compensation for the 'wasted vacation' under contractual liability is ensured by the appropriately interpreted Article 11a Act [of 1997 on tourist services], which is a special provision in relation to Article 471 Civil Code".[42] In principle, a similar solution is introduced in Directive 2015/2302 as well as in the Bill on tourist packages and related tourist services,[43] where a definition of a term "non-compliance" is laid down, which means failure to perform or inappropriate performance of tourist services included in a tourist package. Therefore, it seems that the proposal put forward by M. Łolik was accepted: "In connection with the above-mentioned, it seems purposeful to put forward a proposal that the legislator should amend the act in order to establish clear legal grounds for claiming compensation as it was recently done in relation to the possibility of claiming compensation for the death of a relation (…). The introduction of such a clear legal basis would certainly lead to greater transparency and coherence of private law and would eliminate the necessity of performing sophisticated legal interpretation serving the possibility of getting compensation for non-financial damage."[44]

3.2. COMMENTS IN THE LIGHT OF THE BILL ON TOURIST PACKAGES AND RELATED TOURIST SERVICES AND DIRECTIVE 2015/2302

Directive 2015/2302, which devotes Chapter II: Information Obligations and Content of the Package Travel Contract to the issue of a contract construction alone, in comparison with the above-mentioned legal acts, demonstrates a much more detailed approach to the matters connected with the content of a tourist services contract in the provisions of Article 7. The catalogue of the provisions that should be found in a contract is very broad (inter alia, it concerns the main features of tourist services, the organiser's data, prices and payments, rights and obligations of the parties, the legal regime, etc.). The provisions of Directive 2015/2302 concerning the content of a package contract should be recognised as extremely precise, especially if compared with those laid down in Directive 90/314. The issue that requires most attention is the fact that the new directive also points out the obligation to indicate all the elements determined therein in a tourist services contract, which is criticised in the present article ("The package travel contract or confirmation of the contract shall set out the full content of the agreement which shall include all the information referred to (…)"). It can be stated that the provisions of the new

41 Resolution of the Supreme Court of 19 November 2010, III CZP 79/10.

42 J. Gospodarek, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Orzecznictwo Sądów Polskich No. 1, 2012, p. 2 ff; compare: P. Zasuwik, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Monitor Prawniczy No. 24, 2016, pp. 1329–1333; K. Kryla, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Przegląd Sądowy No. 9, 2011, pp. 137–145; M. Łolik, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Europejski Przegląd Sądowy No. 9, 2011, pp. 45–47.

43 Accessed at Lex Omega on 30/09/2017.

44 M. Łolik, *Glosa do uchwały SN z dnia 19 listopada 2010 r. ...*, pp. 45–47 [accessed at Lex Omega].

directive are in general an expression of the European Union policy in the field of consumer protection, which means the extension of that protection at the expense of professional entities.

Theoretically, the new regulations were to adjust the European Union policy to the changing conditions on the tourist services market, i.e. the "lack of borders" when choosing a tourism organiser (this is most probably the reason for harmonising regulations[45]) and the level of tourist services computerisation (i.e. on-line purchase of packages). Nevertheless, it seems that the legislator failed to notice that it would be purposeful to determine some obligations also on the part of consumers. At the same time, one can notice that despite more and more evident distinction of a new type of consumer, including a tourist services consumer, legal regulations are in general developed irrespective of this distinction; the above in particular does not correspond to the specificity of the European Union consumer law. Only as a rule, it is necessary to assume a consumer as a weaker party to a contract, who is characterised by trust to a professional entity and needs special legal protection provided by the legislator. The above idea has been present since the beginning of consumer regimes, however, in the course of development of new technologies in particular, requires updating, or at least reviewing the standards concerning professional entities' obligations in order to ensure appropriate (expected) performance of contractual obligations. The protection standards should, therefore, be based on the broader understanding of the economic weakness. Situations in which a consumer is a person who acts in the economic transactions professionally and is well informed and experienced are really important (therefore, pointing out a consumer's features in accordance with the economic or colloquial language meaning may prove to be fallible). Nevertheless, the today's consumer, often actively participating in the creation of a tourist package, and first of all an active Internet user, has a potential and possibilities of acquiring factors that let him make a conscious choice. That is why, it is more and more difficult to treat him as a weaker party to a contract, which as a rule should result in the limitation of some professional entities' obligations (e.g. in the area of contractual information, i.e. providing negative information, which is imposed by the obligation to include all the clauses listed in the provision of Article 7 Directive 2015/2302). The behaviour of contemporary consumers "(…) greatly differs from the behaviour of traditional consumers (…). While they are given a lot of attention in economic and sociological research and media studies, legal studies remain indifferent to the changes taking place. A consumer is still perceived to be a weaker party to a contract, who should be protected against producers' attempts, and a receiver or user of the Internet

---

[45] The desire to create the common internal market constituting the foundation for the development of competitiveness between professional entities in various European Union Member States should be recognised as a positive expression of the EU policy. It is also important for the free provision of tourist services. That is why, the proposal to standardise regulations should be recognised as a positive and desired process. The discussion, however, concerns the form of common regulations. For criticism of the imposed model of maximum harmonisation with numerous exceptions, see K. Marak, *Harmonizacja maksymalna projektowanej dyrektywy turystycznej i możliwe odstępstwa od tak wyznaczonego poziomu harmonizacji*, [in:] B. Gnela, K. Michałowska (ed.), *Współczesne wyzwania prawa konsumenckiego,* Warsaw 2016, p. 16 ff.

content is treated as an 'addition' to the relations occurring between an author and a producer".[46]

Comparing the above-mentioned acts (Directive 90/314, the Act on tourist services and Directive 2015/2302) one may highlight the following. Directive 2015/2302, despite its thoroughness, like the repealed Directive 90/314 and the Act on tourist services, does not contain a requirement of including information about a customer, mainly data serving identification (first name and surname, place of residence, identification document number or PESEL identification number). In the considerations presented above, it has been classified as a typical legislators' oversight. Now, it is emphasised again that determination of a consumer in a given contract is an obvious activity. Moreover, it must be highlighted that determining a professional entity's data again seems to be aimed at protecting tourist products purchasers' interests. It must be noted here that in accordance with the new directive, a tourist services contract should contain information enabling direct contact with the minor or the person responsible for the minor at the minor's place of stay. By the way, in accordance with the provisions of the Act on tourist services and Directive 90/314 with respect to tourist packages for minors, a professional entity is obliged to provide information about the possibility of direct contact with the child or the person responsible for the child in the child's place of stay in appropriate time, before the tourist package starts,[47] and not in a tourist services contract (the above role also applies to information identifying the entity that a consumer may rely on in the event of any difficulties). There is also an interesting proposal of a requirement of determining the first name and surname of a person signing a contract on behalf of the organiser (this concerns the Act on tourist services only). It seems that the above-mentioned information is important only for the professional entity's potential internal organisational procedures and has no significance for the consumer's potential claims.

As far as clauses concerning information about a tourist package are concerned, criticism has already been expressed, so now attention is drawn only to the provisions of Directive 2015/2302 that are especially remarkable, including:

- information whether any services are going to be provided for a group and if so, within the bounds of possibility, information about the approximate number of group members;
- in the event a traveller's use of other services provided for tourists depends on effective oral communication in a foreign language, information about the language in which the service will be provided;
- information whether a given journey or vacation is appropriate for people with limited mobility, and on a traveller's demand, detailed information on the adju-stment of the given journey or vacation to the needs of such travellers.

---

[46] K. Grzybczyk, *Nowy typ konsumenta w kulturze konwergencji*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej...*, thesis 3 [accessed at Lex Omega].

[47] The use of an indefinite and so extraordinarily unclear phrase "in appropriate time" should be critically assessed. In principle, the moment just before a minor's departure can be recognised as such. Moreover, it should be pointed out that the Act on tourist services uses an unclear term "child" and it seems that "minor" (i.e. a person under the age of 18) should be used instead.

The above should be treated as novelties introduced in Directive 2015/2302.

The obligation to provide information about the adjustment of a tourist package to the needs of people with limited mobility should be recognised as especially significant and treated as a reflection of trends in tourism occurring over the last years (they are also connected with the phenomenon of population aging, which results in the increased number of people with physical impairments).[48] A. Zajadacz and E. Stroik point out that "The ratification of the Convention on the Rights of Persons with Disabilities (2006) as well as many other legal acts adopted in the European Union or particular Member States is aimed at equal access agenda based on the principles of non-discrimination and equal participation of people with disabilities in social life (Ambrose 2012). Therefore, ensuring equal access to goods and services will be an obligatory requirement for tourist services. Both private and public sector tourism organisers should have the knowledge and ability to fulfil legal requirements. Activities aimed at supporting tourist industry in the development of an offer meeting the conditions of access should be undertaken at all levels connected with the development of tourism and by all stakeholders involved in the development".[49] It is also highlighted that the proposal of equal access to tourism in the context of consumer information should be also implemented at the stage of pre-contract information.

In the context of tourist package prices, it is highlighted that the basic difference between the discussed legal acts consists in the method of providing the above-mentioned data for the consumer. In accordance with the Act on tourist services and Directive 90/314, a consumer must be informed about the price of a tourist package with the specification of taxes, fees and other necessary charges (Directive 90/314 uses the phrase "fees chargeable for certain services", unless they are included in the price). Directive 2015/2302 imposes an obligation to provide the complete price and gives an opportunity to separately specify the additional costs only in case they cannot be established before the conclusion of a contract (however, a consumer must be informed what kind of costs these may be). Therefore, these are going to be determined circumstances that can cause the rise in price.

Directive 2015/2302 also imposes an obligation on a professional entity to include clauses that are not required in the current provisions of the Act on tourist services or Directive 90/314. These include:

– information concerning passport and visa regulations in a country of destination (the Act on tourist services and Directive 90/314 oblige a professional entity to

[48] Reliability and ease of access to information about the possibility of participation in a tourist package by a person with limited mobility should undoubtedly be recognised as a proposal of "accessible tourism", which means "(…) the form of tourism that requires cooperation between the stakeholders in order to enable people with various needs, connected with mobility, sight, hearing and cognition abilities, independent and dignified functioning" (A. Zajadacz, E. Stroik, *Podstawy planowania rozwoju „turystyki dostępnej"*, [in:] Z. Młynaczyk, A. Zajadacz (ed.), *Uwarunkowania i plany rozwoju turystyki. Społeczno-ekonomiczne problemy rozwoju turystyki*, Poznań 2016, p. 66). The common right to participate in tourism is undoubtedly also connected with the proposal to equalise opportunities for disabled persons so it is necessary to create a proposal of universal accessibility in relation to all the elements of the tourist chain, including information about an accessible tourist package and guarantees of the provision of a service adjusted to the needs of people with impairments.

[49] A. Zajadacz, E. Stroik, *Podstawy planowania rozwoju...*, p. 70.

provide the above-mentioned information at the pre-contract stage, e.g. in brochures, leaflets or before a contract conclusion, emphasising at the same time that this can be a circumstance influencing the decision on taking part in a journey);

– information about a professional entity's responsibility for the performance of a contract and ensuing care for a traveller if he finds himself in a difficult situation (the Act on tourist services and Directive 90/314 determine the regime of professional entities' liability, however, there is no obligation to include the above-mentioned information in a contract; regulations concern the lack of possibility of limiting liability).

At the same time, all legal acts require that a consumer be informed about the time when he should be notified about the cancellation of a journey because of insufficient number of participants (in addition to the above-mentioned clause, Directive 2015/2302 lays down a provision concerning information about the fact that a traveller is entitled to contract termination at any time before the start of a tourist package for an adequate termination fee charged or, in specific situations, information about standard fees for termination of a contract charged by an organiser). The above also applies to the complaint procedure, i.e. deadlines and methods in which a participant of a tourist package may complain (at the same time, Directive 2015/2302 requires that information about alternative dispute resolution methods (ADR) be provided).

The Act on tourist services and Directive 2015/2302 also determine an obligation to include a provision in a contract concerning a traveller's right to transfer a contract to another traveller, however, the Act indicates that the information must provide details (about the deadline for this transfer). Analysing the provisions of the Directive, one can state that it only requires that consumers be informed they have that right.

One can also note that information concerning legal grounds for a contract and legal consequences resulting from a contract are only required in the regime of the Act on tourist services.

It should be highlighted, and this can be recognised as especially significant, that Directive 2015/2302 determines an obligation to provide consumers with the name of an entity providing protection in the event of insolvency and the entity's contact data, including the address and, in applicable cases, the name of the authority appointed by the Member State for that purpose and its contact data. Taking into account problems resulting from insolvency of travel agents, especially among tourism organisers offering remote destinations, the provision should be recognised as especially necessary and justifiable.

The provisions of Directive 2015/2302 indicate that: "Member States shall ensure that package travel contracts are in plain and intelligible language". Thus, they determine the requirements of a language (a substrate of a material sign) in which the content of a contract must be developed. According to the Dictionary of the Polish language, the term "plain" (*prosty*) means "easy, not complicated, obvious",[50] and the term "intelligible" (*zrozumiały*) means understandable, i.e. "making it possible to realise the meaning of words, statements, relations between things and phenomena

[50] *Słownik języka polskiego*, https://sjp.pl/prosty [accessed on 13/09/2017].

(…), to draw conclusions"[51]. Thus, it seems that a contract should be developed in the language a consumer uses and which is communicative for him (not necessarily his native language). As it has been emphasised above, intelligible also means direct, thus not requiring explanation and interpretation of the intentions of an entity performing an act of will.[52] The plainness of a language undoubtedly applies to the level of complexity of phrases used so that an ordinary consumer could easily reconstruct the meaning of the contract provisions. In this context, it should be indicated that according to the wording of the formerly binding Directive 90/314 as well as the Act on tourist services, a tourist services contract, due to the fact that it is a kind of a consumer agreement, pursuant to Article 8 of the Act of 7 October 1999 on the Polish language,[53] as a rule should be concluded in Polish. However, it should be remembered that Directive 90/314 laid down a standard of minimum harmonisation; therefore, Member States could adopt more restrictive provisions. At present, Directive 2015/2302 lays down maximum, complete harmonisation and thus determines the minimum and maximum standards of domestic regulations. As a result, Member States cannot introduce more restrictive regulations (e.g. imposing the language of a contract when the Directive stipulates its free choice and sets a limit on it only by introducing a comprehensibility condition). The judgement of the European Court of Justice of 3 June 1999 in the case C-33/97 *Colim NV v. Bigg's Continent Noord NV* indicated that only in the absence of full harmonisation of language requirements applicable to information appearing on imported products, Member States may adopt national measures requiring such information to be given in the language of the area in which the products are sold or in another language which may be readily understood by consumers in that area, provided that those national measures apply without distinction to all national and imported products and are proportionate to the objective of consumer protection which they pursue. The Court emphasised that, as a rule, language requirements laid down by national legislation may constitute a barrier in domestic trade. However, in case the regulations envisage the possibility of introducing stricter provisions and the consumers' right to information justifies it, the solution is admissible (it does not constitute a violation of Article 34 Treaty on the Functioning of the European Union[54]).[55] The phrase "intelligible language" which aims to ensure the provision of information for consumers and not the imposition of a particular language does not mean an official language of the given Member State or the language of a particular region.[56] Therefore, national legislation, which on the one hand imposes a more restrictive obligation than just the use of a more understandable language, such as e.g. the obligation to use only the language of a region, goes beyond the

---

51 *Słownik języka polskiego PWN*, https://sjp.pwn.pl/sjp/zrozumiec;2547310.html [accessed on 13/09/2017].

52 S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, X ed., Warsaw 2011 [accessed at Lex Omega].

53 Journal of Laws [Dz.U.] of 2011, No. 43, item 224, as amended.

54 OJ L of 2004, item 90, p. 864/2, as amended.

55 Judgement of the European Court of Justice of 3 June 1999 in case C-33/97; compare judgement of the European Court of Justice of 18 June 1991 in case C-369/89.

56 Compare judgement of the European Court of Justice of 12 October 1995 in case C-85/94.

requirements resulting in this case from the provisions of Directive 2015/2302. A potential obligation to use only the language of the given country would constitute a measure having equivalent effect as quantitative restrictions banned in Article 34 Treaty on the Functioning of the European Union.

Having become acquainted with the Bill on tourist packages and related tourist services[57] (hereinafter referred to as the Bill), one can state that in general it constitutes a ona-to-one transposition of the Directive provision on the content of a tourist package contract into the national law. As it is indicated in the justification for the Bill: "Solutions adopted in the Chapter, although they may seem to be restricting the freedom of contracts, are indispensable in the light of the provisions of Article 8 Directive 2015/2302. They introduce considerable standardisation of contracts concluded between tourism organisers and entities facilitating the purchase of consolidated tourist services, which will make it easier to use them. At the same time, they ensure the provision of all necessary information for travellers and this way increase their safety. As a result, this will make it possible to, at least partly, eliminate the possibility of disputes and claims occurring between travellers and tourism organisers or entities facilitating the purchase of tourist packages".[58]

It also seems that the Bill tightens the requirements concerning the provisions proposed by the European legislator. To recapitulate, the provisions of the Directive stipulate: "Member States shall ensure that package travel contracts are in plain and intelligible language and, in so far as they are in writing, legible" (Article 7(1)). The Bill indicates that a tourist package contract must be developed in a plain, intelligible and legible manner. Therefore, it seems that the proposal of "legibility" is not appropriately articulated in Directive 2015/2302 because it applies only to contracts in writing[59] ("(…) package travel contracts are in plain and intelligible language and, in so far as they are in writing, legible"). Thus, the legislator associates legibility with writing and indicates that legible means easy to read, thus easy to get to know while reading the text[60] and not with the getting to know the appropriate meaning of something[61] (that the Bill seems to propose), which can be in general obtained not only by reading the text but also by opening a file, an audio recording, etc. The legislator also forgets that the requirement of plainness and intelligibility is to apply to language of a contract, which indicates that a tourist package contract may be concluded in any language comprehensible for a consumer, not necessarily his native language, which constitutes *lex specialis* in the provisions concerning the use of the Polish language in relations with consumers.

Full harmonisation laid down in Directive 2015/2302 determines not only its minimum but also maximum scope, thus it interferes into the sphere of national

[57] Accessed at Lex Omega on 30/09/2017.

[58] https://legislacja.rcl.gov.pl/docs//2/12294859/12412687/12412688/dokument271980.pdf [accessed on 21/09/2017].

[59] The discussion concerning the principle of "writing" is included in the commentary on the provisions of Directive 90/314.

[60] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/sjp/odczytac;2492822.html [accessed on 23/09/2017].

[61] *Wielki słownik języka polskiego*, http://wsjp.pl/index.php?id_hasla=281&id_znaczenia==4874413&l=12&ind=0&pwh=1 [accessed on 23/09/2017].

legislation more aggressively. Therefore, a Member State cannot regulate the issues in a way different than laid down in the Directive. More liberal or more restrictive regulations are repealed from the system of national law and the implementation freedom acquires the form of fiction (the range of "manoeuvres" of a Member State is considerably limited so it is necessary to appropriately distinguish the subjective and objective scope of the Directive). Full harmonisation in practice causes many interpretational problems for Member States as far as the level of regulations transposition is concerned, especially in order to avoid a plea of inappropriate implementation. Therefore, it is often done in one-to-one correspondence, which can disturb the domestic legal order. Nevertheless, "Full harmonisation in practice is getting closer to unification; their effects are similar. Full harmonisation results in the stiffening ('freezing') of a given standard (e.g. the level of consumer protection) at the Community level. Adopting some simplified assumptions, one should state that full harmonisation leads to 'field occupation' by pushing away national legislation, and the scope of implementation freedom in fact does not exist."[62] In the above context, it should be noted that the linguistic aspect of the proposal to implement the provisions concerning the content of a tourist services contract raises certain doubts. Attention should be drawn in particular to the proposal of provisions determining main features of tourist services (Article 40(1.1)), where it is laid down, inter alia, that a contract should indicate the number and types of meals, while the European legislator imposes an obligation to inform a traveller about meals (but does not determine what components of this information should be provided; thus, it seems that in order to fulfil the requirement Directive 2025/2302 imposes on professional entities, it is sufficient to include information whether a professional entity provides meals or not). Unlike that, however, in case of dates of a tourist package, the Bill imposes an obligation to include in the content of a contract at least approximate dates, i.e. "not exact dates but close to the actual ones",[63] which is in conflict with the content of the Directive, where it is clearly laid down that it is necessary to provide "(…) the place or destination of journey, route and the time of stay with dates [specified in detail – A.K.M.] and, in case of a tourist package including accommodation, the number of overnight stays within the service provided" (Article 5(1a)). In that context, it should also be indicated that the European legislator imposes an obligation to inform about the number of overnight stays only when a tourist package includes accommodation. The Bill lays down an obligation to provide information about the number of overnight stays provided during the tourist package, and thus a professional entity is obliged to provide negative information. Taking into consideration the European legislators' attempts, it is necessary to emphasise their inconsistency, which is reflected in rather arbitrary (unjustified) imposition of the obligation to provide negative information only in case of some types of component services (e.g. overnight stay).

---

[62] A. Kunkiel-Kryńska, *Glosa do wyroku TS z dnia 25 kwietnia 2002 r., C-183/00*, Europejski Przegląd Sądowy No. 10, 2008, pp. 49–55.

[63] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/sjp/przyblizony;2511796.html [accessed on 14/10/2017].

4. CONCLUSIONS

The above-presented considerations allowed the author to formulate the following conclusions:

1) The provisions of the Act on tourist services as well as Directive 2015/2302 and the Bill on tourist packages and related services impose an obligation on professional entities to include all the clauses concerning the content of a contract listed in those legal acts in their tourist services contracts. This in principle means that professional entities also have an obligation to provide negative information (e.g. clearly indicate that a tourist package does not include meals), which can be perceived as the infringement of their rights. If the above proposal is recognised as correct, one should approve of P. Mikłaszewicz's statement: "In the literature, it is rightly highlighted that some of the obligatory elements of a contract are not (and because of their nature, cannot be) so definite that they can shape the content of obligations in case of a lack of the parties' agreement concerning the issues those elements refer to. **That is why, there is pressure on informing consumers and including such data in a contract the main function of which is to provide a consumer with the knowledge of the service. It is assumed that a consumer informed this way will be able to take care of himself**".[64] In this context, it should be also highlighted that the legislator is inconsistent, which is reflected in the provisions of Directive 2015/2302. In case of some components of the service (e.g. overnight stay), the information must be provided only if the given service is a component of a tourist package. Thus, it is not obligatory to include negative information. In other cases, however, there is such an obligation (e.g. meals).
2) In the above context, it is therefore necessary to highlight that the provisions of commonly binding law, including Directive 2015/2302, do not correspond to the features of a tourist product in the form of a tourist package. This has far-reaching consequences because the regulations are not flexible enough to correspond to various structures of tourist packages, which may lead to the infringement of professional entities' rights.
3) The provisions of Directive 2015/2302 in principle do not reflect the proposal to change the interpretation of a term "ordinary consumer", whose features indicated above (including carefulness and consideration in decision-taking[65]) should be supplemented with the features of a consumer living in the information society dominated by modern technologies, i.e. a consumer who to some extent can search for certain information. Nevertheless, it must be clearly emphasised that it is too early to speak about a transfer of the burden of information from entrepreneurs onto consumers and a proposal of a model in which consumers would be obliged to seek information, while entrepreneurs' attitude would be

64 P. Mikłaszewicz, *Obowiązki informacyjne...*, thesis 6.2.1. [accessed at Lex Omega].

65 K. Jasińska, *Pojęcie przeciętnego konsumenta w rozumieniu ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym i jego znaczenie dla wykładni przepisów ustawy o zwalczaniu nieuczciwej konkurencji*, Transformacje Prawa Prywatnego No. 3–4, 2008, pp. 39–40.

passive.[66] However, it seems that a solution that should be pursued is activation of consumers' attitudes, i.e. the creation of a system in which both parties should have obligations concerning the right to information. Unfortunately, Directive 2015/2302 completely imposes that obligation on professional entities, which in the author's opinion may cause negative consequences on the tourist services market, inter alia by limiting competition. There was a proposal to introduce similar solutions to the provisions of the Act of 23 April 1964 – Civil Code. Namely, the Bill assumes the introduction of information obligations at two levels, i.e. an obligation to give access to information (passive information duty) and an obligation to provide information on demand and an obligation to provide information on the obliged entity's own initiative (spontaneous information duty).[67] The initiative alone that was proposed in the above-mentioned Bill should be approved of. What is interesting, the Bill (in the same way as Directive 2015/2302) assumes a transfer of the burden of proof of the performance of information duties on an entrepreneur obliged to give access to or provide information. However, a question arises how to assess which information should not be a part of the obligatory content of a tourist services contract, and what information consumers should find out on their own.

4) It is necessary to repeat the proposal connected with the plainness of the construction of regulations concerning the content of a tourist services contract. The analysis of the Bill on tourist packages and related services shows that the issue of the content of a contract was referred to not in one single provision, which may lead to a professional entity having difficulties with its interpretation, and thus with the formulation of the appropriate content of a contract (inter alia, provisions concerning the increase in the price of services).
5) The Bill on tourist packages and related services proposes inappropriate implementation of the provisions concerning the language of a tourist services contract. The authors of the Bill forget also that the idea of plainness and intelligibility should refer to the language of a contract, which means that a tourist services contract may be developed and concluded in any language that is understandable for a consumer, not necessarily his native language, which constitutes *lex specialis* in the area of regulations concerning the use of the Polish language in relations with consumers. Moreover, the proposal of "legibility", which in accordance with Directive 2015/2302 refers only to a contract developed in writing, is not appropriately articulated (this, however, would need further considerations on the form of a tourist services contract).
6) The authors of the Bill on tourist packages and related services should pay more attention to the aim that the Directive imposes on Member States, especially the requirement of full harmonisation. Therefore, more attention should be paid to the linguistic sphere of the Bill so that the potential charges that the introduced provisions are too strict or not strict enough can be avoided.

---

[66] Compare, M. Gumularz, *Ochrona konsumenta a fenomen „rozszerzonej rzeczywistości" – nowe wyzwania polityki prawa*, Transformacje Prawa Prywatnego No. 3, 2013, pp. 39–58.

[67] U. Ernst, M. Kućka, M. Pecyna, F. Zoll, *Obowiązki informacyjne – projekt*, Transformacje Prawa Prywatnego No. 4, 2010, p. 74.

BIBLIOGRAPHY

Bazylińska J., *Ochrona zbiorowych interesów konsumentów w prawie Unii Europejskiej i wybranych porządkach prawnych państw członkowskich,* Toruń 2012.

Boratyńska M. (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016.

Cybula P., *Usługi turystyczne. Komentarz*, Warsaw 2012.

Delegatura UOKiK w Katowicach, *Raport z kontroli działalności organizatorów turystyki*, Warsaw–Katowice 2011.

Dmowski S., Rudnicki S., *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, X ed., Warsaw 2011.

Ernst U., Kućka M., Pecyna M., Zoll F., *Obowiązki informacyjne – projekt*, Transformacje Prawa Prywatnego No. 4, 2010.

Gnela B., *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*, Warsaw 2013.

Gospodarek J., *Prawo w turystyce i rekreacji*, Warsaw 2007.

Grochowski M., *Venire contra factum proprium a zaufanie i „słabość sytuacyjna"*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016.

Grzybczyk K., *Nowy typ konsumenta w kulturze konwergencji*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016.

Gumularz M., *Ochrona konsumenta a fenomen „rozszerzonej rzeczywistości" – nowe wyzwania polityki prawa*, Transformacje Prawa Prywatnego No. 3, 2013.

Jasińska K., *Pojęcie przeciętnego konsumenta w rozumieniu ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym i jego znaczenie dla wykładni przepisów ustawy o zwalczaniu nieuczciwej konkurencji*, Transformacje Prawa Prywatnego No. 3–4, 2008.

Kaczmarek J., Stasiak A., Włodarczyk B., *Produkt turystyczny*, Warsaw 2005.

Kaczorowska S., Kurzyńska-Lipniewicz A., *Prawne aspekty ochrony konsumenta w Polsce i w Unii Europejskiej*, Legnica 2009.

Kurek W. (ed.), *Turystyka*, Warsaw 2007.

Łętowska E., *Europejskie prawo umów konsumenckich*, Warsaw 2004.

Marak K., *Harmonizacja maksymalna projektowanej dyrektywy turystycznej i możliwe odstępstwa od tak wyznaczonego poziomu harmonizacji*, [in:] B. Gnela, K. Michałowska (ed.), *Współczesne wyzwania prawa konsumenckiego*, Warsaw 2016.

Mikłaszewicz P., *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej*, Warsaw 2008.

Olejniczak A., *Komentarz do art. 362 Kodeksu cywilnego*, [in:] A. Kidyba (ed.) *Kodeks cywilny. Komentarz*, Vol. III: *Zobowiązania – część ogólna*, Warsaw 2014.

Radwański Z., *Kodeks cywilny wymaga unowocześnienia*, Kancelaria No. 7–8, 2010.

Rutkowska-Tomaszewska E., *Decyzje prezesa UOKiK w sprawach praktyk naruszających zbiorowe interesy konsumentów stosowanych przez organizatorów turystyki*, [in:] P. Cybula (ed.), *Transformacje prawa turystycznego*, Kraków 2009.

Sekuła-Leleno M., *Odpowiedzialność za szkodę niemajątkową wyrządzoną niewykonaniem umowy o imprezę turystyczną*, Warsaw 2014.

Seweryn R., *Produkt turystyczny i wyznaczniki jego atrakcyjności*, Zeszyty Naukowe Akademii Ekonomicznej w Krakowie, No. 697, 2005.

Sieradzka M., *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym. Komentarz*, Warsaw 2008.

Sieradzka M., *Wykładnia pojęcia „zbiorowy interes konsumentów" na tle orzecznictwa*, Glosa No. 3, 2008.
Sieradzka M., *Komentarz do art. 24 ustawy o ochronie konkurencji i konsumentów*, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2014.
Słownik języka polskiego, https://sjp.pl.
Tischner A., *Model przeciętnego konsumenta w prawie europejskim*, Kwartalnik Prawa Prywatnego No. 1, 2006.
Wędrychowska-Karpińska A., Wiercińska-Krużewska A., [in:] A. Stawicki (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* Warsaw 2011.
Wielki słownik języka polskiego, http://wsjp.pl.
Zajadacz A., Stroik E., *Podstawy planowania rozwoju „turystyki dostępnej"*, [in:] Z. Młynaczyk, A. Zajadacz (ed.), *Uwarunkowania i plany rozwoju turystyki. Społeczno-ekonomiczne problemy rozwoju turystyki*, Poznań 2016.

Legal regulations

International law

Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L of 1990, item 158, as amended.
Treaty on the Functioning of the European Union of 16 April 2003, OJ L of 2004, No. 90, item 864/2, as amended.
Convention on the Rights of Persons with Disabilities of 13 December 2006, http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf.
Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L of 2015, item 326, p. 1.

Polish law

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code], Journal of Laws [Dz.U.] of 2017, item 459, as amended.
Ustawa z dnia 29 sierpnia 1997 r. o usługach turystycznych [Act of 29 August 1997 on tourist services], Journal of Laws [Dz.U.] of 2017, item 1553, as amended.
Ustawa z dnia 7 października 1999 r. o języku polskim [Act of 7 October 1999 on the Polish language], Journal of Laws [Dz.U.] of 2011, No. 43, item 224, as amended.
Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act of 16 February 2007 on the competition and consumer protection], Journal of Laws [Dz.U.] of 2017, item 229, as amended.
Projekt ustawy o imprezach turystycznych i powiązanych usługach turystycznych [Bill on tourist packages and related tourist services], February 2017.

Court rulings

Judgement of the European Court of Justice of 3 June 1999 in case *Colim NV v. Bigg's Continent Noord NV*, C-33/97.
Judgement of the European Court of Justice of 12 March 2002 in case *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, C-168/00C-168/00.
Judgement of the Competition and Consumer Protection Court of 23 February 2006, XVII Ama 118/04.
Judgement of the Competition and Consumer Protection Court of 26 May 2010, XVII Ama 77/09.
Resolution of the Supreme Court of 19 November 2010, III CZP 79/10.

Glosses

Gospodarek J., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Orzecznictwo Sądów Polskich No. 1, 2012.

Kaflik P., *Glosa do wyroku s. apel. z dnia 1 kwietnia 2015 r., I ACa 1431/14*, Glosa No. 2, 2016.

Kryla K., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Przegląd Sądowy No. 9, 2011.

Kunkiel-Kryńska A., *Glosa do wyroku TS z dnia 25 kwietnia 2002 r., C-183/00*, Europejski Przegląd Sądowy No. 10, 2008.

Łolik M., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Europejski Przegląd Sądowy No. 9, 2011.

Sieradzka M., *Glosa do wyroku SOKiK w Warszawie z dnia 25 maja 2009 r., XVII Ama 98/08*, LEX/el. 2010.

Zasuwik P., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Monitor Prawniczy No. 24, 2016.

CONTENT OF A TOURIST SERVICES CONTRACT IN THE LIGHT OF AMENDMENTS TO THE REGULATIONS ON TOURIST PACKAGES

Summary

A tourist services contract is one of the most common contracts concluded on the market of tourism services, which in general comprehensively regulates the relationship between a participant of tourist packages (a consumer, a traveller) and a professional entity (basically, although with some simplification, a tour operator). Proper stimulation of the relationship between professional and non-professional (consumers) entities should, therefore, be the priority task of the tourism policy, which can be achieved by using a wide catalogue of instruments, including legal acts. Problems with proper functioning of a contract cause dysfunctions, which, due to the universality of the agreement, can result in far-reaching negative effects. Of course, it is necessary to remember that the content of a tourist services contract is one of the most important elements determining the quality of the agreement on the market of tourist services. That is why, the study concentrates on the issue of contractual information (the information contained in the contract), because it is reasonable to indicate that the professional entities "communicate" with consumers also via the content of the agreement, which includes basic information about the provided services, and therefore, consumers should pay special attention to the analysis of that content. It is more than obvious that the lack of equality between professional and non-professional entities on any services market can be considered this market defectiveness, and hence can result in far-reaching distortions of competition. Defects often depend on the internal characteristics of the market. Therefore, the article first identifies the main characteristics of the tourist market (determined by the specificity of tourist products). Then, issues related to professional entitles' information obligations, with a special emphasis on the content of a tourist services contract, are discussed in detail. The main considerations are divided into two areas: (1) comments on Directive 90/314 and the Act on tourist services of 1997; (2) comments on Directive 2015/2302 and the Bill on tourist packages and related tourist services.

Keywords: tourism law, tourist services market, tourist services contract, content of a tourist services contract, information obligation

TREŚĆ UMOWY O USŁUGI TURYSTYCZNE W KONTEKŚCIE ZMIAN PRZEPISÓW DOTYCZĄCYCH IMPREZ TURYSTYCZNYCH

Streszczenie

Umowa o usługi turystyczne jest jedną z najbardziej powszechnych umów zawieranych na rynku usług turystycznych, która w zasadzie kompleksowo reguluje stosunek łączący uczestnika imprezy turystycznej (konsumenta, podróżnego) i podmiot profesjonalny, za jaki co do zasady i dla pewnego uproszczenia należy uznać organizatora turystyki. Właściwe stymulowanie wzajemnych relacji pomiędzy podmiotem profesjonalnym, a nieprofesjonalnym (konsumentem) należy zatem do zadań priorytetowych polityki turystycznej, która w celu ich realizacji wykorzystuje szeroki katalog instrumentów, w tym prawnych. Problemy w prawidłowym funkcjonowaniu umowy powodują różnego rodzaju dysfunkcje, które ze względu na powszechność umowy rodzą daleko posunięte negatywne skutki. Należy przy tym pamiętać, iż treść umowy o usługi turystyczne stanowi jeden z ważniejszych elementów konstytuujących jakość funkcjonowania umowy na rynku usług turystycznych. Niniejsze opracowanie konkretyzuje zatem problematykę informacji umownych (informacji zawartych w umowie), gdyż zasadne jest wskazanie, iż podmioty profesjonalne „komunikują się" z konsumentami również za pomocą treści umowy, w której zawarte są podstawowe informacje dotyczące świadczonych usług turystycznych, a zatem konsumenci powinni szczególną uwagę poświęcić analizie owej treści. Oczywiste jest, iż brak równorzędności pomiędzy podmiotami profesjonalnymi a konsumentami, na jakimkolwiek rynku usług, jest przejawem jego wadliwości, a przeto powoduje daleko idące zaburzenia konkurencji, przy czym bardzo często wady te uzależnione są od wewnętrznych cech danego rynku. Stąd w pierwszej kolejności w niniejszych rozważaniach zostają wskazane najważniejsze cechy rynku turystycznego (kreowane przez specyfikę produktów turystycznych), dopiero następnie szczegółowo omówione są kwestie związane z obowiązkiem informacyjnym podmiotów profesjonalnych, ze szczególnym uwzględnieniem treści komentowanej umowy. Rozważania główne zostały podzielone na dwie sfery: (1) uwagi dotyczące ustawy z dnia 29 stycznia 1997 r. o usługach turystycznych oraz dyrektywy 90/314; (2) uwagi dotyczące dyrektywy 2015/2302 oraz projektu ustawy o imprezach turystycznych i powiązanych usługach turystycznych.

Słowa kluczowe: prawo w turystyce, rynek usług turystycznych, umowa o usługi turystyczne, treść umowy o usługi turystyczne, obowiązek informacyjny

Cytuj jako:

Kosińska-Madera A., *Content of a tourist services contract in the light of amendments to the regulations on tourist packages,* „Ius Novum" 2018 (Vol. 12) nr 1, s. 20–45. DOI: 10.26399/iusnovum.v12.1.2018.02/a.kosinska-madera

Cite as:

Kosińska-Madera, A. (2018) 'Content of a tourist services contract in the light of amendments to the regulations on tourist packages'. *Ius Novum* (Vol. 12) 1, 20–45. DOI: 10.26399/iusnovum.v12.1.2018.02/a.kosinska-madera