

L'Osservatorio di Diritto dei Trasporti

Studi di Diritto dei Trasporti, raccolti da A. Antonini e F. Morandi

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Francesco Morandi

TOURISM TRAVEL AND TRANSPORT LAW CURRENT LEGAL ISSUES


**Pacini
Giuridica**

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Fondamentale è, in esso, l'apporto dato dalla pratica, nella quale si sperimentano e si affermano le regole nuove, che vivono nella realtà concreta quotidiana sotto forma di moduli e clausole standardizzati a livello mondiale, di usi mercantili, di prassi operative e interpretative uniformi.

Ai molteplici profili di Diritto dei trasporti è dedicata l'attenzione della presente Collana, che si propone di concorrere allo studio e allo sviluppo del medesimo attraverso il contributo di scienza e di esperienza dei giuristi, dei giovani studiosi, dei professionisti e degli operatori del settore.

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*I am not interested in how people move
but what moves them.*

— Pina Bausch

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FOREWORD

This volume systematically organises a series of international articles I have published in English over the past few years on key topics in transport, tourism, and travel law.

The writings are selected from those that retain their full relevance for the current scientific debate and are sometimes reposed in a revised and partially updated version.

Some of them arise from individual in-depth analysis of the issues addressed, while others are the outcome of research projects carried out jointly with distinguished Colleagues, to whom I extend my sincere gratitude for their valuable collaboration.

The writings belong to different literary genres, as do their placement and investigation occasions. Yet, they are connected by the common thread of studying the legal models that define the sectors under consideration.

In detail, they respond to the effort to analyse the legal instruments for passengers, travellers and tourists, with the aim to strengthen their protection. At the same time, they derive from the need for establishing balanced and fair rules that allow operators to compete on the global market on equal terms. Finally, they propose practical and effective solutions to the main problems affecting the sectors, in order to guide the policymakers' decisions.

The collected contributions bear witness to the ongoing evolution of the field and the growing complexity of its particular issues, as well as the effort of synthesis between theory and practice that characterises the disciplines of positive law.

The topics addressed provide a set of interpretive keys and analytical tools useful for understanding contemporary dimensions and navigating domains constantly enriched with new issues and evolving meanings.

The book also offers a comprehensive overview, highlighting the strengths and weaknesses of the current legal framework, and presents insights into the future perspectives and challenges that transport, tourism, and travel law must face in an ever-evolving global landscape.

At a time when the transport sector, the travel industry and the world of tourism are taking on new meanings and undergoing significant changes, the volume proposes an original reading and an innovative interpretation of the current economic and social reality, thus contributing to outlining an effective perspective on evolution and development.

PART I
THE INTERNATIONAL PROTECTION OF TOURISTS

CHAPTER I

THE UNWTO DRAFT CONVENTION ON THE PROTECTION OF TOURISTS

SUMMARY: 1. Background. – 2. The draft Convention. – 3. Structure and contents of the draft. – 4. The position of the European Union and other public entities and private parties. – 5. The relationship with other international conventions and with European regulation. – 6. The “sustainability” of tourism law.

1. Background

During the 22nd biannual sessions in 2017⁽¹⁾, the World Tourism Organization General Assembly appointed through Resolution A/RES/686(XXII)⁽²⁾ the Secretary-General to supervise the drafting of the “Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers”.

Likewise, to create in a short time frame the draft text to be presented to United Nations Member States, the Secretary-General has also been given the responsibility to organise a conference on the Draft Convention, to be held

⁽¹⁾ The 22nd session of the UNWTO General Assembly was held in Chengdu, China, from 11 to 16 September 2017; all official documents are public and available online at <http://lmd.unwto.org/event/general-assembly-twenty-second-session-0>.

⁽²⁾ According to Resolution A/RES/686(XXII), the General Assembly, after having examined the report of the General Secretary, that resumes the recent developed activities, and the last draft text of the Convention, «takes note of the significant progress made by the Working Group in the elaboration of the draft Convention and thanks all the members of the Working Group for their support to this initiative; thanks Member States that have participated in the Public Consultation, Regional Commissions and during the last Executive Council sessions providing comments to the Secretariat on the content of the draft Convention; requests the Secretary-General to continue with the drafting of the Convention and encourages the Working Group to finalize a draft text with the Secretariat that could be submitted to all Member States».

before the next General Assembly, leading to the Convention's negotiation and adoption⁽³⁾.

Thus, the draft International Convention can be seen as an interesting attempt to support tourist contract regulation by governing the rights and obligations of tourists and tourism service providers.

At the same time, the effort made by the Agency to introduce new rules to regulate international tourism leads to the development of a series of *Recommended Practices* and *Standards*, aiming at introducing specific obligations, involving both the destination country and the country of origin, to provide assistance, cooperation and information to tourists during an emergency, including any procedure needed to repatriate travellers.

The latter is a critical issue and has significant value based on the fact that, for the first time, the UNWTO adopted a joint international Convention. As a matter of fact, until 2017 the UNWTO was the only United Nations Specialized Agency that had not developed international conventions aimed at regulating issues related to its specific key area.

The legal framework of the draft Convention is represented by Article 12, lett. *n*, of the UNWTO *Statutes*, which enables the General Assembly to prepare and recommend international agreements on any matter falling within the scope of action of the Organization⁽⁴⁾.

With this purpose in mind, the Agency first adopted the "*Guidelines for the adoption of the draft UNWTO Conventions by the General Assembly*"⁽⁵⁾ as a legal framework to govern disciplinary interventions, such as the preparation of the potential approval or adoption of a draft Convention on the protection of tourists and on the rights and obligations of tourism service pro-

⁽³⁾ Resolution A/RES/686(XXII) «grants a mandate to the Secretary-General to convene an International Treaty Conference before the next General Assembly for the negotiation and adoption of the Convention». This approach was also endorsed by the Executive Council by Decision EC/DEC/7(CV), in its 105th session which took place in Madrid from 10 to 12 May 2017.

⁽⁴⁾ Under Article 12 of the *Statutes*, the UNWTO General Assembly «may consider any question and make recommendations on any matter within the competence of the Organization. Its functions, other than those which have been conferred on it elsewhere in the present Statutes, shall be: [...] (n) to prepare and recommend international agreements on any question that falls within the competence of the Organization».

⁽⁵⁾ See, in particular, Annex VI, «Guidelines for the adoption of the draft UNWTO conventions by the General Assembly», of the Report on implementation of the General Working Programme 2016-2017, CAM/61/4/Part I (Madrid, April 2017), prepared for the 61th meeting of San Salvador, El Salvador-Roatán, Honduras, of 30 and 31 May 2017.

viders, in tandem with the draft Framework Convention on Tourism Ethics⁽⁶⁾.

As far as the latter is concerned, the General Assembly has achieved an outstanding result, since the UNWTO managed to approve the “*UNWTO Framework Convention on Tourism Ethics*”⁽⁷⁾ on 15 September 2017, which transposed the Code of Ethics for Tourism⁽⁸⁾ into the first International Convention adopted by the United Nations Specialized Agency⁽⁹⁾.

With the aim of promoting responsible, sustainable and universally accessible tourism through implementing ethical principles in tourism, the Convention addresses tourists⁽¹⁰⁾, excursionists and any stakeholders involved. The approved text defines a framework of rules to develop a tourism that fosters mutual understanding and respect among people and communities, as well as acting as a tool for human development, both from an individual point of view and within social organizations where the personality of individuals is expressed; in addition, it is a key-factor towards the support of environmental sustainability and to promote cultural resources.

Tourism ethical principles also include the “right to tourism”⁽¹¹⁾, regard-

⁽⁶⁾ Respectively, Resolution A/RES/654(XXI) and Resolution A/RES/668(XXI), adopted by the General Assembly during the 21st biennial session which took place in Medellín, Colombia, on 12-17 September 2015.

⁽⁷⁾ The UNWTO Framework Convention on Tourism Ethics has been approved by the UNWTO General Assembly with Resolution A/RES/707(XXII) during the 22nd biennial session of c2017, with the favourable vote of 51 States and the abstention of 23 Countries, among which Italy.

⁽⁸⁾ The Global Code of Ethics for Tourism has been adopted with Resolution A/RES/406(XII) by the 13th UNWTO General Assembly in Santiago del Cile (27 September-1 October 1999) and its fundamental objective is to promote responsible, sustainable and accessible tourism, following the Manila Declarations of 1980 on World Tourism and those of 1997 on the Social Impact of Tourism, as well as the Charter of Tourism and the Tourist Code adopted in Sofia in 1985 under the auspices of the UNWTO.

⁽⁹⁾ The Convention, open for signature by the Member States of the UNWTO and all the Member States of the United Nations, shall enter into force on the thirtieth day following the deposit of the tenth instrument of ratification, acceptance, approval or accession (see Article 20, par. 1).

⁽¹⁰⁾ The Global Code of Ethics for Tourism recalls the definitions and classifications applicable to travel and in particular the notions of “visitor”, “tourist” and “tourism” as adopted by the Ottawa International Conference, which took place from 24 to 28 June 1991, and approved in 1993 by the United Nations Statistical Commission, on the occasion of its XXVII session.

⁽¹¹⁾ Under Article 10, par. 1, “right to tourism” means «the prospect of direct and personal access to the discovery and enjoyment of the planet’s resources constitutes a right equally open to all the world’s inhabitants».

ed as the corollary of the right to rest and leisure, freedom of travellers, rights affecting workers and professionals active in this field; specific tasks were given to the *World Committee on Tourism Ethics*, a subsidiary branch of the UNWTO General Assembly, and to the Conference of the Member States.

On the other hand, as far as tourist protection is concerned, the aforementioned *Guidelines* are expressly based on the “*Guidelines for Consumer Protection*” approved on 22 December 2015 by the 70th United Nations General Assembly, the par. 78 of which specifically refers to “Tourism”⁽¹²⁾. Among other objectives, these Guidelines require Member States to ensure that consumer protection policies are suitable for facing challenges related to trading practices and the provision of tourism goods and services.

Provided that rules and procedures set up by the *Guidelines* are always subject to the Organization Statutes, these have been exclusively developed to enable the analysis, approval, and potential adoption of one or both draft Conventions drawn based on the aforementioned Resolutions 654(XXI) and 668(XXI)⁽¹³⁾.

With the aim of applying it exceptionally during the 22nd General Assembly session, when only the *UNWTO Framework Convention on Tourism Ethics* was approved, the guidelines were adopted in order to provide legal certainty during the process of observation, analysis, finalisation, and, eventually, to approve the text⁽¹⁴⁾.

⁽¹²⁾ The 70th General Assembly of the United Nations approved the “Guidelines for Consumer Protection” with the resolution A/RES/70/186, whose paragraph 78 “Tourism”, located in section K “Measures relating to specific areas”, establish that «*Tourism*. Member States should ensure that their consumer protection policies are adequate to address the marketing and provision of goods and services related to tourism, including, but not limited to, travel, traveller accommodation and timeshares. Member States should, in particular, address the cross-border challenges raised by such activity, including enforcement cooperation and information-sharing with other Member States, and should also cooperate with the relevant stakeholders in the tourism-travel sector».

⁽¹³⁾ In order to guarantee the internal coherence of the path, the Secretariat of the UNWTO has opportunely harmonized the draft Convention on Tourism Ethics and the draft Convention on the Protection of Tourists, in particular with regard to the sections relating to the Conference of States Parties and the final provisions.

⁽¹⁴⁾ In particular, it was a question of guaranteeing a viable and efficient procedure for the General Assembly’s examination of any comments and proposals for changes made by the Member States to the draft texts of international conventions, in order to establish the final text on which to commit the will of the States, besides disciplining the modalities of approval of the text; see Item 7 of the provisional agenda for the draft International Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers submitted

As far as the draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers is concerned, based on the experience and results obtained during the 22nd session of General Assembly, the Executive Council might take into consideration the option to include the special *Guidelines* as an attachment of the General Assembly internal regulation, anticipating the potential future approval of a project on an International Treaty⁽¹⁵⁾.

In conclusion, it should be highlighted that the UNWTO General Secretariat, with the purpose of safeguarding the internal coherence of the process, has conveniently arranged for the harmonisation of the text of the draft framework Convention on Tourism Ethics and the draft Convention on the Protection of Tourists, specifically on sections dealing with the Conference of the Member States and final provisions.

2. The draft Convention

The latest version of the *draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers*⁽¹⁶⁾ is the final result of the long preliminary activity carried out by the Working Group consisting of Member States, international organizations and other stakeholders; it was created by the UNWTO Executive Council in October 2010 with the aim of defining the range and the level of legal tools to be proposed in order to introduce new international rules on tourism protection⁽¹⁷⁾.

The commitment of the Agency to govern travellers' rights stems from considering the limitations of current binding rules, which should govern worldwide the rights and duties of tourists/consumers, tour operators, ac-

to the 29th Joint Meeting in Chittagong, Bangladesh on 17 May 2017, doc. CAP/CSA/29/7_Draft Convention_Protection of Tourists.

⁽¹⁵⁾ In this perspective, the Executive Council may decide to submit the *Guidelines* to the approval of the 23rd session of the General Assembly, with any adjustments that may be necessary in light of the experience gained in the approval of the UNWTO *Framework Convention on Tourism Ethics*.

⁽¹⁶⁾ See the text prepared for the work of the 22nd biannual session of the 2017 General Assembly of the World Tourism Organization (doc. A/22/16 rev.2, of 23 August 2017), available in the original English version at http://cf.cdn.unwto.org/sites/all/files/pdf/a22_16_approval_or_adoption_of_the_convention_on_tourism_ethics_rev.2_en.pdf.

⁽¹⁷⁾ K. TONNER, *Reviewing the protection of the tourist: passengers' rights and package travel only or a Tourist Services Directive?*, in E. BUTTIGIEG (ed.), *Rights and Remedies for the Consumer in the European Union*, Malta, 2012, 134 ss.

commodation providers and other tourist service providers⁽¹⁸⁾.

Therefore, taking into account the growing development of international tourism and the increasing consolidation of its social and economic functions, the UNWTO realised that it is essential to establish new homogeneous rules on tourist protection, as well as to govern tourist services with the added objective of improving transparency and increasing legal certainty for travellers and traders.

To find the right balance between tourist needs and providers' interests, the Agency attempted to implement a series of new, homogeneous and globally coherent rules based on a general scenario that is highly characterised by a continuous increase in the tourist flow and by the progressive diversification of international destinations involved in tourism⁽¹⁹⁾.

Indeed, the decision to work on a draft International Convention was sped up following some issues related to global climate change and natural disasters that occurred at the beginning of the new millennium⁽²⁰⁾, being also a consequence of the limitations of the International Conventions in dealing with transport, specifically by air⁽²¹⁾, and with other standard rules set up to regulate situations such as assisting travellers in trouble or repatriating tourists when the trip is interrupted due to *force majeure*⁽²²⁾.

On one hand, the UNWTO aims to ensure an adequate protection level

⁽¹⁸⁾ See the Decision EC/DEC/11(LXXXIX), adopted by the World Tourism Organization Executive Council on the proposal of the Secretary General of the Organization on the occasion of its 89th session, held in Kish Island, Iran, on 26 October 2010 (CE/89/DEC).

⁽¹⁹⁾ On the occasion of the General Assembly held in Gyeongju, Korea, on October 8-14, 2011, the UNWTO welcomed the preliminary results of the Working Group and took note of «the preliminary work conducted in order to prepare some initiatives approved for the next biennium, notably on consumer and enterprise protection, leading to an international convention» [A/RES/593(XIX)].

⁽²⁰⁾ Among these, in particular, take note of the effects on the market of travel and holidays of the tsunami that occurred in the Indian Ocean on 26 December 2004, as well as the eruption of the Eyjafjöll volcano, in the southern part of Iceland, on 20 March 2010, which had serious consequences on the international air transport system and gave rise to the well-known ruling of the Court of Justice of the European Union of 31 January 2013, in case C-12/11, *Denise McDonagh vs. Ryanair Ltd.*

⁽²¹⁾ In particular, R. ABEYRATNE, *Regulation of Air Transport: The Slumbering Sentinels*, Heidelberg, 2014, 87-88, connects the UNWTO draft convention with the regulation of international air transport.

⁽²²⁾ See C. LIMA MARQUES, D. WEI, *UN World Tourism Organization and the protection of foreign tourists in case of emergency situation/force majeure*, Discussion Interim Report of the International Law Association for the Conference of Washington of 8 April 2014 on the international consumer protection, 14.

for tourists, having a significant international degree of uniformity in order also to increase the travellers' trust; this would be achieved by providing adequate support when needed or when an emergency occurs.

On the other hand, it seemed necessary to implement a system of rules, especially concerning tourist service providers' responsibilities, so as to guarantee that all key players on the market might operate based on equal opportunities and effective competition, regardless of the Country of origin and place where services are provided.

Noticeably, the draft Convention is introduced to serve as a legal tool that is essential to ensure the growth and development of tourism worldwide, in a setting that is increasingly complex and diversified, as well as subjected to new challenges imposed by market development and deeply characterized by the lack of harmonized rules on consumer protection, thus acting as a considerable obstacle both for tourist protection and cross-borders exchanges ⁽²³⁾.

According to official documents, with the aim of increasing tourist trust in service providers, in States' action and in the tourist sector as a whole, the following two main objectives have essentially been foreseen by the draft International Convention.

Firstly, the Agency seeks to establish standardised rules to guarantee and promote an adequate level of protection for tourists, in order to safeguard them as consumers and provide support during unexpected events, by improving cooperation among States under such extraordinary circumstances.

Secondly, it seeks to explain the duties and rights of tourist service providers, fostering the correct balance between State duties, responsibility of key players from the private sector and protection of tourists.

Therefore, the UNWTO action is based on the extremely ambitious attempt to create a set of standard rules to govern the system of private interactions and the need of travellers for protection, which characterises the tourism phenomenon in general, including each part and all different features as a whole.

Such a purpose is clearly illustrated not only in the Preamble of the Project, but rather in Article 1, par. 2, of the document, where, to provide emphasis and considering the fact that it is the beginning of the document, it is declared that «this Convention applies to all tourists, tourism service provid-

⁽²³⁾ Consider the document EC/89/8, "Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector", of August 2010, presented at the 89th session of the Executive Council, held in Kish Island, Iran, on 26 October 2010.

ers and tourism services».

Likewise, the decision that texts in Arabic, Chinese, English, French, Russian and, Spanish – UNWTO official languages – have to be taken as equally authentic (for *ex.* Article 19, «Authentic texts»), testifies the intention to share as much as possible the general principles enunciated by the Convention and the intent to foster their dissemination, looking forward to creating a new international legal setting for tourism contracts and travellers' protection⁽²⁴⁾.

However, the perspective of implementing a new global setting to rule interactions between tourists and market operators still shows some crucial issues. So far, it can be considered a challenging goal to fulfil, especially in relation to interactions involving the private sector and what concerns the direct involvement of States.

As a matter of fact, the stronger the binding rules proposed to protect consumer rights and to govern contract obligations between travellers and market operators are, the harder it seems to obtain a broad and generalised acceptance of regulation options to be internationally approved by Countries primarily interested in tourism and affected by tourist flows.

Especially if we analyse the specific scenario, which is characterised by a strong evolution of contract models and continuous paradigm changes caused by the technological development of tools for tourism promotion and marketing.

In other words, there seems to be a widespread agreement within the international community on fundamental options and general principles, together with a renewed attention to one of the main components of the general economic system and having a complete understanding of its importance, both from a cultural and social point of view. Instead, considering some technical decisions taken during the draft of the document, it seems more challenging to reach a strong agreement, especially for Countries that have recently adopted an updated set of rules to govern travel contracts and tourist protection⁽²⁵⁾.

⁽²⁴⁾ The rule is in line with Article 38 of the UNWTO Statutes, "Interpretation and languages", as it emerges following the amendment adopted by the General Assembly in its 17th session of Cartagena de Indias, November 2007, Resolution 521 (XVII), according to which «the official languages of the Organization shall be Arabic, Chinese, English, French, Russian and Spanish».

⁽²⁵⁾ See the 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

Such awareness of the complexity of this theme and the difficulties in reaching a wide agreement on the draft International Convention has also emerged during the selection of technical tools to be adopted and the choice of the legal form on which the treaty content should have been based.

Specifically, the Working Group has analysed four potential options ⁽²⁶⁾:

- (a) a binding International Convention, with the most limited margins of discretion, so as to give to the project the structure of a treaty and thus be a binding legal tool;
- (b) non-binding guidelines so the content of the project can be considered as advice that the States might decide to accept voluntarily;
- (c) two individual instruments, such as a legally binding Convention, coming together with a set of separate and independent guidelines or recommended practices;
- (d) a single document combining: (i) a binding part consisting of a legally binding Convention or a set of standard rules having a limited focus; (ii) a second part being non-binding and arranged as a list of general recommendations or guidelines referring to specific issues.

3. Structure and contents of the draft

Being consistent with the aim of implementing a legal instrument essential to guarantee the growth and development of tourism globally, and in step with the objective to establish homogeneous rules to guarantee and promote a satisfactory level of protection for tourists seen as consumers, the *draft UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service* ⁽²⁷⁾ is formed by General Provisions and by three different Annexes referring to the duty of States to provide assistance during an emergency (Annex I), package travel (Annex II) and accommodation service

and repealing Council Directive 90/314/EEC”, which will enter into force on 1 July 2018 and which is binding on the Member Countries of the European Union in a complex transposition process; in this regard, above all, consider the studies published in V. FRANCESCHELLI, F. MORANDI, C. TORRES (ed.), *The New Package Travel Directive*, Estoril-Lisbon, 2017, *passim*.

⁽²⁶⁾ See the document CE/90/7, “Activities towards a legal instrument on tourist/consumer protection - General debate”, of May 2011, prepared for the 90th session of the Executive Council, held in Mombasa, Kenya, from 19 to 21 June 2011.

⁽²⁷⁾ As a simple working document («provisional draft») the text may of course be subject to change after its further review by the Working Group, while it cannot yet be considered as a proposal or official UNWTO document.

providers (Annex III), respectively.

The *General provisions* contain legal provisions featuring the general character that traditionally forms international conventions – from principles to technical provisions – together with some “definitions” (Article 3) also applicable to the rules set by the Annexes.

With regards to this, it is interesting to analyse the concept of “Tourist”, meant as «a person taking a trip which includes an overnight stay to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited»⁽²⁸⁾.

The definition suggested by Article 3, lett. *a*, is significantly relevant in the structure of the draft International Convention, both because the tourist is the subject around which the discipline introduced by *Annex I - Assistance in emergency situations* is organized, and also because the tourist is the constant reference point when travel contracts regulation is taken into account (*Annex II - Package travel*), as well as accommodation services (*Annex III - Accommodation*).

The word “tourist”, based on the notion traditionally adopted by UNWTO, has been preferred to other terms with the same general meaning that have been used in various ways in different legal contexts, such as for instance: «visitor» or «guest», together with «consumer» or «traveller», as well as «passenger», which is predominantly used to govern contracts and transport services.

Actually, the term “consumer” is mentioned twice in the Preamble to the Draft Convention: the first referring to “tourists” («tourists, as consumers»); the second time it is mentioned indirectly through a reference to the aforementioned *Guidelines for Consumer Protection* approved by the United Nations General Assembly.

The *provisional draft* privileges the use of the term “tourist” even when compared to the word “traveller”; the latter appears only twice in the document and always in connection to the word “business” and used as an adjective: the first time in Article 1, standard 1.2, of Annex II on Package travel⁽²⁹⁾,

⁽²⁸⁾ In a previous unofficial version of 2012, the notion of “tourist” was limited to «a person who celebrates a contract of travel package with a trip organizer» (Attachment I, Chapter I of the Minute, Second Draft).

⁽²⁹⁾ According to the definition of the draft Convention «a person travelling for purposes related to his/her trade, craft, business or profession (business traveller) is considered as a tourist, unless the package is purchased on the basis of a general agreement for the

and also a second time in Article 1, standard 1.2, of Annex III on Accommodation service providers⁽³⁰⁾.

The «business traveller» – indicating the person who travels for reasons related to his/her own trading, craft, business or professional activity – is considered, as a matter of fact, a tourist, unless the package or accommodation had not been purchased based on a general agreement of business travel organization between a service provider and a legal or natural person who acts to achieve results in relation to his/her trading, business, craft or professional activity⁽³¹⁾.

It must be observed that Article 1, standard 1.2, of *Annex III - Accommodation* entitles the Convention State Parties to adopt restrictive measures to exclude business travellers from the scope of the standard discipline concerning accommodation, unlike *Annex II - Package travel* that arguably doesn't include a similar provision to regulate international travel packages.

The notion of “tourist”, which represents the keystone of the Draft Convention, has a different connotation depending on the legal context in which it is used.

Indeed, the definition of Article 3, lett. *a*, into the *General provisions*, expressly relates to the person who travels as having some specific features: (a) includes an overnight stay, (b) involves a main destination, (c) it takes place outside his/her usual location (d) lasts for less than a year, (e) it aims at any main purpose (business, leisure or other personal reasons) than to be employed by a resident entity in the country or place visited.

Thus, aiming at identifying the subject, natural person, affected by protection norms and assistance measures, different competing key factors are considered relevant, such as the activity carried out, the trip duration, the objective characteristics, and the purpose of the subject involved.

In this sense, the assistance measures during emergency situations apply

arrangement of business travel between a trader and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession».

⁽³⁰⁾ Under the rule in question, the business traveller corresponds to «a person travelling for purposes related to his/her trade, craft, business or profession (business traveller) is considered as a tourist, unless the accommodation service is purchased on the basis of a general agreement for the arrangement of business travel between an accommodation service provider and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession».

⁽³¹⁾ The Article 1, Standard 1.2, *Annex III - Accommodation*, unlike the *Annex II - Package travel*, establish that «notwithstanding the foregoing, States Parties are entitled to adopt restrictive provisions for excluding business travellers from the scope of this Annex».

both to tourists and “excursionists”⁽³²⁾, while the discipline of travel package in Annex II limits the range of application of the Convention proposal to “packages” resulting from the combination of at least two different types of tourist services included in the same trip or holiday when the package lasts longer than 24 hours, or at least an overnight stay, and also when other requirements from Article 1, Standard 1.1 occur⁽³³⁾.

Basically, the travel package contract discipline deals with a subject, who is him/herself a contractor or in any case the beneficiary of a service included into the travel package, but he/she might not be necessarily the person who travels in the same way as indicated by the qualifying requirements of Article 3, lett. *b*, of the General provisions.

Likewise, the accommodation that the “service provider” provides to the “tourist” – to be noticed here is the fact that the term “guest” is not mentioned, instead the contract counterpart is usually identified as “hotel-keeper” – is simply indicated as the provision of accommodation to a tourist who does not decide to stay there permanently, upon payment or based on a con-

⁽³²⁾ Under Article 1, Standard 1, lett. *c*, *Annex I - Assistance in emergency situations*, «“Excursionist” means a person taking a trip which does not include an overnight stay to a main destination outside his/her usual environment. For the purpose of this Annex any reference to tourists constitutes at the same time a reference to excursionists».

⁽³³⁾ The identification of the case is completed, in fact, by the condition that «(i) Those tourism services are combined by one trader, including at the request of or in accordance with the selection of the tourist, before a single contract on all services is concluded; or (ii) Irrespective of whether separate contracts are concluded with individual tourism service providers, those services are: *a*. Purchased from a single point of sale and those services have been selected before the tourist agrees to pay, *b*.

Offered, sold or charged at an inclusive or total price, *c*. Advertised or sold under the term “package” or under a similar term, or *d*. Combined after the conclusion of a contract by which a trader entitles the tourist to choose among a selection of different types of tourism services. A combination of tourism services where not more than one type of tourism service as referred to in point (i), (ii) or (iii) of the definition of tourism service is combined with one or more travel services as referred to in point (iv) of that definition is not a package if the latter services: (i) do not account for a significant proportion of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination; or (ii) are selected and purchased only after the performance of a tourism service as referred to in point (i), (ii) or (iii) of the definition of tourism service has started. (e) “Tourism service” means: (i) Passenger transport; (ii) Accommodation which is not intrinsically part of the passenger transport and is not for residential purposes; (iii) Rental of cars or other motor vehicles; and (iv) Other tourism services that are not intrinsically part of the tourism service within the meaning of points (i), (ii) or (iii) of this definition» (Article 1, Standard 1.1, *Annex II - Package travel*).

tract⁽³⁴⁾.

Furthermore, among subjects involved with the International Convention identified by Article 3 of General provisions, the «*Tourism service provider*»⁽³⁵⁾ plays a relevant key role together with the «*Accommodation service provider*»⁽³⁶⁾, being the tourist counterpart for what concerns the discipline of accommodation contracts mentioned in Annex III.

Being the person, legal or natural, private or public who sells, provides or is committed to provide a tourist service to the traveller, (Article 3, lett. c, of General provisions), the *tourism service provider* through the local representative or the local agency is the most important subject in the hosting Country, to be contacted immediately to provide tourists with assistance (*ex* Article 2, *Recommended Practice 2.5*, Annex I).

To the tourist service provider is connected the definition of “Trader” mentioned in Article 1, *Standard 1.1*, lett. a, of *Annex II - Package travel*⁽³⁷⁾, as well as the definition of “Package” stated by the same Article⁽³⁸⁾. Based on Article 9, “*Failure of performance or improper performance*”, the International Convention State Parties acting as a tourist contract counterpart adopt all necessary measures to ensure that the organiser is liable to the tourist for the performance of the obligations under the package travel contract, irrespective of whether such obligations are to be performed by the organiser or by other *tourism service providers*, without prejudice to the damages which may be claimed.

The *Annex II - Package travel* also refers to tourist service provider where the definition of “*Linked travel arrangement*” is mentioned, as requested by

⁽³⁴⁾ See Article 1, *Standard 1.1*, lett. a, *Annex III - Accommodation*, according to which «“*Accommodation service*” means the provision of accommodation to the tourist who does not take up long term residence, against remuneration or in a contractual framework».

⁽³⁵⁾ Under Article 3, lett. c, of the *General provisions*, «“*Tourism service provider*” means any natural person or any legal person (irrespective of whether privately or publicly owned) who sells, offers to sell, supplies or undertakes to supply a tourism service to the tourist».

⁽³⁶⁾ According to the definition of Article 1, lett. i, *Annex III - Accommodation*, «“*Accommodation service provider*” means the tourism service provider who, directly or through an intermediary, sells offers to sell, supplies or undertakes to supply standalone accommodation services. For the purpose of Articles 2, 3 and 5 of this Annex, intermediaries facilitating the provision of standalone accommodation services are considered accommodation services providers».

⁽³⁷⁾ In this sense «“*Trader*” means any natural person or any legal person (irrespective of whether privately or publicly owned) [...] acting as a tourism service provider».

⁽³⁸⁾ See Article 1, *Standard 1.1*, lett. d, *Annex II - Package travel*.

the *Recommended Practice* 1.2⁽³⁹⁾.

In addition, the discipline to be applied to tourist service providers is mentioned by Article 12, still in Annex II – Package travel, dealing with “Insolvency protection and information requirements for linked travel arrangements”. In detail, the Recommended Practice 12.2 states that the trader should state in a clear, comprehensible and prominent manner that the tourist will not benefit from any of the rights applying exclusively to packages, that each *service provider* will be solely responsible for the proper contractual performance of the tourist service provided⁽⁴⁰⁾.

As anticipated above, the discipline of accommodation contract described in *Annex III – Accommodation* of the Draft International Convention refers to the role of *Accommodation service provider*, complementary to the *tourist service provider*. The “Accommodation provider” is himself a particular «tourist service provider» who directly or through an intermediary, sells, offers to sell, supplies or undertakes to supply standalone accommodation services (Article 1, *Standard* 1.1, lett. b).

In conclusion, among the definitions offered by Article 3 of *General Provisions*, it is interesting to point out the notion of “Tourism service”, meant as the provision to tourists, separately or combined, of one of the services indicated as examples in the Draft International Convention. Among these should be specifically mentioned: (i) accommodation, (ii) food and beverage services; (iii) railway, road, water or air passenger transport services, (iv) transport rental services, (v) travel agencies and other reservation services, (vi) cultural, religious or sports events, (vii) other leisure services provided to tourists⁽⁴¹⁾.

As far as the potential adoption of the *draft Convention* at the international level is concerned, it should be especially highlighted that among the

⁽³⁹⁾ States Parties should consider as «*Linked travel arrangement*» at least two different types of tourism services, which cover a period of more than twenty-four hours or include overnight accommodation, purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual tourism service providers».

⁽⁴⁰⁾ Instead, the tourist will benefit from insolvency protection in accordance with the Recommended Practice 12.1, according to which «States Parties should ensure that traders facilitating linked travel arrangements should provide security for the refund of all payments they receive from tourists insofar as a tourism service which is part of a linked travel arrangement is not performed as a consequence of their insolvency. If such traders are the party responsible for the passenger transport, the security shall also cover the tourist’s repatriation».

⁽⁴¹⁾ See Article 3, lett. b, *General provisions*.

Final provisions, some regulations have been introduced to foster the highest possible dissemination of a standard discipline.

Towards the perspective of creating a new international framework for travel contracts, it is indeed expected that the International Convention should be opened to all Member States of the UNWTO and all Member States of the United Nations, together with regional economic integration organisations⁽⁴²⁾ (Article 12, “*Signature*”). Likewise, it has been established that the Convention is subject to ratification, acceptance, approval or accession by States and regional economic integration organisations (Article 13, “*Ratification, acceptance, approval or accession*”).

Although the extension of the range of subjects legitimated to agree with the International Convention seems extremely advantageous – also taking into consideration the fact that the discipline of tourist package travel, duty of assistance and tourist protection, has recently been subjected to a new discipline in Europe⁽⁴³⁾ – some issues might arise on the method through which the process of legal documents accession should be promoted.

It is clear that the choice to structure the Draft International Convention as a unique legal instrument, created by the combination of a base legally binding text (*General provisions*), a limited set of normative *Standards* (Article 6 of *General provisions*)⁽⁴⁴⁾ and a series of *Recommended practices* referred to specific issues (Article 7 of *General provisions*)⁽⁴⁵⁾, meets the need to guarantee that the *draft Convention* has a flexibility that is absolutely necessary to allow Member States and regional economic integration organizations to access a uniform discipline, conveniently adapting its own internal legal

⁽⁴²⁾ To these it refers the following Article 14, “*Participation by regional economic integration organizations*”, *General provisions*.

⁽⁴³⁾ In this regard it is worth recalling how the UNWTO has recently deepened significantly the relations of cooperation with the European Union, also considering that Europe is the main tourist destination in the world and receives half of the 1.3 billion international arrivals and, as of 2017, international tourism in Europe grew by 8%, one percentage point above the world average, for a total of 671 million tourists. Lastly, the promotion of sustainable tourism in Europe is at the heart of an agreement signed on 28 February 2018 between the UN World Tourism Organization and the European Parliament.

⁽⁴⁴⁾ In effect, under Article 6, “*Standards*”, of the *General provisions*, «States Parties shall take all necessary measures, in accordance with their national laws and practices, in order to implement the requirements in the standards of this Convention».

⁽⁴⁵⁾ The Article 7, “*Recommended practices*”, of the *General provisions*, in fact, establishes that «States Parties shall give due consideration to implementing the recommended practices of this Convention» (par. 1).

framework to the new regulation needs. In this sense, the decision to partly sacrifice the objectives of harmonizing the international legal framework is somehow counterbalanced by the need to facilitate a generalized adoption of the project.

It does not represent a problem the fact that the minimum number to be achieved in order to put into force the Convention on the protection of tourists and on the rights and obligations of tourism service providers is established as just ten formal approvals, acceptances or accessions by interested Member States⁽⁴⁶⁾; as a matter of fact this provision is actually substantially coherent to what is generally established by Treaty law.

The most significant obstacle against the creation of a uniform rules system on the issue of travel contracts and tourist protection rather seems to be represented by what is established in Article 4, par. 1, of *General provisions* concerning the “Acceptance of requirements of the Convention”.

It has therefore been declared that ratifying, accepting, approving or accessing the International Convention means States are obligated to accept at least one of the three Annexes that form the text of the *draft Convention*, to be indicated in the ratification document or through a declaration enclosed to such document⁽⁴⁷⁾.

In other words, as a consequence of the mentioned provision, interested Countries might adopt from time to time the three Annexes to the Draft International Convention – and thus, specifically: *Annex I - Assistance in emergency situations*, the *Annex II - Package travel* and *Annex III - Accommodation* – or just two of them, in four different combinations that might occur, or only one of the documents; therefore, there might actually be eight different situations.

As a consequence, the different attitude of States at the time of approval, acceptance or accession of the International Convention might effectively determine a highly non-homogeneous application of the Draft International Convention, leading to extremely negative outcomes in terms of the achievement of harmonisation of the international legal framework.

⁽⁴⁶⁾ According to Article 16 *General provisions*, «this Convention shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification, acceptance, approval or accession» (par. 1), where «any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by Member States of that organization» (par. 3).

⁽⁴⁷⁾ The UNWTO General Secretary holds a record of the information in question and makes it available to all interested parties.

In such a scenario, there is a real risk that the attempt of the Special United Nations Agency to improve transparency and to increase the legal certainty through the implementation of a Draft International Convention ends in disappointment; besides, the latter may also increase the trust of travellers and guarantee that traders are able to operate in a setting based on equal opportunities and effective competition.

Likewise, the chance given to interested States to partially adopt the new uniform rules might severely jeopardise the attempt to reach an adequate level of tourist protection through harmonisation at an international level of the rules concerning the assistance in the case of emergency situations, together with the discipline of relations between tourists and service providers deriving from contracts on travel packages or accommodation services.

4. The position of the European Union and other public entities and private parties

The Working Group set up by the UNWTO in order to define the objectives of the draft International Convention and identify the legal framework to be implemented, discussed and revised over a long period of time ranging from 2010 to date, creating as many as 11 versions of the draft document⁽⁴⁸⁾.

One of the most significant phases of the drafting process of the current version of the *draft Convention*, in particular, occurred in August 2016, when the UNWTO's Secretariat launched a public consultation campaign to give an opportunity to all its Member States to participate in the discussion on the draft Convention, inviting them to submit their comments and proposals to improve its content.

Within a 5-month public consultation framework, between August and December 2016, the Secretariat received feedbacks from 35 institutions, both Member States and international organizations – including, in particular, the European Commission, ICAO and IATA – which submitted comments and

⁽⁴⁸⁾ As expressly reported by the General Secretary A/22/10(I)(c) “UNWTO Convention on the Protection of the Tourists and on the Rights and Obligations of Tourism Service Providers” of 20 July 2017 (prepared for the 22nd session of the General Assembly, held in Chengdu, China, from 11 to 16 September 2017), the *Provisional 11th draft text of the Convention*, which may further be subject to change as a result of its review by the *Working Group on the protection of tourists/consumers and travel organizers*, cannot be considered as a proposal or official UNWTO document.

opinions on the draft text⁽⁴⁹⁾, and which were then transmitted to the members of the Working Group for the purpose of evaluating comments and proposals⁽⁵⁰⁾.

However, relating more directly to the position taken by the European Union in March 2015, the UNWTO Secretariat forwarded a formal communication to the Commission for official confirmation regarding the competences of the European Union on the draft International Convention⁽⁵¹⁾.

In this regard, the Commission confirmed its interest in the *draft Convention*, with particular reference to the content of *Annex II - Package travel* and *Annex III - Accommodation*, having obtained the mandate to initiate formal negotiations on the International Convention on behalf of the European Union.

In the recommendation dated 6 February 2017, following the decision of the Council authorising the opening of negotiations for the *UNWTO Convention* on the protection of tourists and on the rights and obligations of tourism service providers, the Commission openly expressed its position on the European draft international Treaty and the content of its Annexes⁽⁵²⁾.

In particular, regarding the impact of the *draft Convention* on European legislation, it highlighted that a large part of the draft Treaty was covered by the exclusive competence of the Union, the only one entitled to negotiate *Annex II - Package travel* and *Annex III - Accommodation*.

Therefore, if the EU had been interested in influencing politically the development of international standards in matters already governed by detailed

⁽⁴⁹⁾ Among the independent evaluations, see the *IFTTA Submission to the UNWTO on the Draft Convention on the Protection of Tourists and Tourism Service Providers*, in *IFTTA Law Review*, 2-2014, 16 ss., as well as therein, 3-2014, 22 ss., accompanied by the individual comments of M. McDONALD, *General comments*, 20, J. TANTI DOUGALL, *Accommodation*, 21, as well as K. TONNER, *Alternative Dispute Resolution*, 22.

⁽⁵⁰⁾ The *Working Group* has met several times to continue the discussions on the content of the Convention, taking into account the comments received in the public consultation: among the meetings we note, in particular, those held on 26 and 27 January (9th meeting), 28 February, 1 and 14 March (10th meeting) and a final meeting on 28 and 29 March 2017 (11th meeting).

⁽⁵¹⁾ This issue is particularly important given the fact that the Member States of the European Union need prior official confirmation to be able to proceed with the possible ratification of the annexes to the Convention.

⁽⁵²⁾ See the document of the European Commission of 6 February 2017, *Recommendation for a Council decision authorising the opening of negotiations on a UNWTO-Convention on the protection of tourists and the rights and obligations of tourism service providers*, COM(2017) 60 final.

legislation, the Commission would have had no choice but to propose to the Council the enactment of an appropriate decision to authorize the opening of negotiations and allow Member States to negotiate the *draft Convention* ⁽⁵³⁾.

On 27 March 2017, the EU Council took steps to give the Commission a formal mandate to initiate negotiations with the UNWTO Secretariat for the negotiation of *Annex II - Package travel* and *Annex III - Accommodation*, while allowing Member States to negotiate *Annex I - Assistance obligation of States in Emergency Situations* on their own ⁽⁵⁴⁾.

With reference to the contents of the draft convention and the regulatory choices proposed by the UNWTO, the guidelines for the negotiation of the International Treaty and its Annexes, attached to the EU Council Decision ⁽⁵⁵⁾, drew the Commission's attention to the need to ensure that the *draft Convention* sets minimum international standards which are compatible with current European legislation.

In particular, concerning the level of detail arising from EU rules intended to be transposed into binding minimum standards and recommended practices, special attention should be paid to the need to balance the goal of achieving an adequate minimum set of international standards and the goal of ensuring that a sufficient number of Countries that are not Members of the

⁽⁵³⁾ The position is clearly expressed not only in the Recommendation but also in the minutes of the Council meeting of 27 March 2017, where it is stated that «through its participation in the negotiations the EU can influence the development of international standards and practices regarding package travel issues and accommodation services which are inspired by EU legislation».

⁽⁵⁴⁾ Concerning the «Tourism - International convention on the protection of tourists», the Outcome of the 3528th Council meeting, Justice and Home Affairs, held in Brussels on 27 and 28 March 2017, confirms that «the Council authorised the Commission to open negotiations on a future international Convention on the protection of tourists and rights and obligations of tourism service providers. The United Nations World Tourism Organization (UNWTO) is preparing an international Convention on the protection of tourists and the rights and obligations of tourism service providers. Through its participation in the negotiations the EU can influence the development of international standards and practices regarding package travel issues and accommodation services which are inspired by EU legislation. The draft Convention might be submitted to the General Assembly of the UNWTO in September 2017».

⁽⁵⁵⁾ See the *Annex Directives for the negotiation of an UNWTO-Convention on the protection of tourists and the rights and obligations of tourism service providers to the Council Decision authorising the opening of negotiations on an UNWTO-Convention on the protection of tourists and the rights and obligations of tourism service providers*, document n. ST 6197 2017 ADD 1 COR 1.

European Union will sign and ratify the Convention. At the same time, the Council recommends that the Commission ensure that standards and recommended practices are compatible with far-reaching commitments made by the European Union in the context of the *General Agreement on Trade and Services* (GATS) in tourism and related sectors⁽⁵⁶⁾.

On the merits of the scheme provided by *Annex I - Assistance obligation of States in Emergency Situations*, the Council draws attention to the importance of international law ensuring an adequate level of assistance to be guaranteed to the tourists who are in an emergency situation, such as a natural disaster while they are visiting a country that has ratified Annex I, and establishes procedures as effective and compatible as possible with the principles established by the laws of the European Union and its Member States. At the same time, it highlights that the type and level of assistance that countries affected by emergencies will be reasonably able to offer tourists should be considered carefully.

With reference to *Annex II - Package travel*, the Council decision indicates that, following the adoption of Directive (EU) 2015/2302 of 25 November 2015 concerning package travel and related tourism services, the discussion developed within the framework of the Working Group was essentially based on the contents of the new European legislation. Therefore, the Commission must ensure that the rules provided by Annex II are indeed compatible with the Package Travel Directive and reflect its content as much as possible. At the same time, the EU will show some flexibility with regard to the level of control that other stakeholders are willing to accept, with particular reference to legally binding rules in order to ensure that a sufficiently large number of non-Member States accept the uniform rules.

With regard to *Annex III - Accommodation*, it highlights the need for international regulations to be fully compatible with EU laws and ensure an adequate level of protection for tourists in relation to accommodation services, taking also into account the legitimate interests of those who travel for business reasons. In this case, the guidelines of the Convention must appropriately be linked to aspects already regulated by Directive 83/2011/EU of 25 October 2011 on consumer rights⁽⁵⁷⁾, especially with regard to the information

⁽⁵⁶⁾ Furthermore, it should be noted that the terminology used in the text of the draft Convention must correspond as closely as possible to that used in European Union law and in any case it is compatible even when, in consideration of the expressions generally used in some international contexts, there is not a perfect coincidence of language in the proposed texts.

⁽⁵⁷⁾ Directive of the European Parliament and of the Council 2011/83/EU of 25 October

to be provided prior to the signing of the contract and which will be included as an integral part of the contract. There is also a connection between Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market⁽⁵⁸⁾, which is still to be taken into account.

This attitude, based on openness towards the draft International Convention expressed by the European Union, is complemented by the interest shown by the other institutions and other international organisations, which the General Secretariat has contacted to ask for feedback and opinions.

Among others, considering that the UNWTO supports the development of a number of basic principles concerning the rights and the protection of passengers in air travel globally, ICAO has initiated a close collaboration with the Organization to avoid inconsistencies and duplication⁽⁵⁹⁾, as well as to minimize the possibility of conflict between the rules relating to the protection and assistance of the tourists and the rules and regulations in the field of air transport⁽⁶⁰⁾. The two United Nations special agencies have long been committed to «contributing to the emergence of globally convergent rules on the protection of passengers, tourists and tourism service providers, within our respective mandates and the framework of existing or future international bilateral or multilateral agreements»⁽⁶¹⁾.

The first reactions of market operators with respect to the text of the draft

2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁽⁵⁸⁾ See the Directive 2005/29/CE of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (so-called “Unfair Commercial Practices Directive”).

⁽⁵⁹⁾ The close relations of collaboration and the prospects of interaction between ICAO and the WTO are highlighted in the topics addressed in the preparatory document “*Tourism and Air Transport Policies - Background paper for the General Debate*”, prepared for the 20th session of the General Assembly of the UNWTO.

⁽⁶⁰⁾ See the Working paper on the topic “*A tourism perspective on consumer protection*”, presented by the WTO at ICAO (ATConf/6-WP/31 of 31 January 2013, Revised 11 February 2013) on the occasion of the Worldwide Air Transport Conference, the 6th meeting, held in Montreal from 18 to 22 March 2013.

⁽⁶¹⁾ The ICAO and UNWTO expressed themselves in these terms in the joint declaration “*Working together on common issues will more effectively position aviation and tourism as leaders in the pursuit of sustainable development*”, signed in Montreal on 18 March 2013.

International Convention are cautious with regard to the regulatory choices adopted by the Working Group in the latest draft version ⁽⁶²⁾.

For everyone, the position taken in particular by the HOTREC ⁽⁶³⁾ highlights the need to ensure that the draft International Convention (*Annex II - Package travel* and *Annex III - Accommodation*) does not clash in any way with current European legislation. Provided that the draft Convention applies to all tourism accommodation services, regardless of the quality of the service provider ⁽⁶⁴⁾, since hotel services in Europe are already heavily regulated, the new international convention should avoid additional legal costs to be borne by hotel-keepers and, at the same time, it should ensure that, all over the world, conditions apply fairly to all market operators ⁽⁶⁵⁾.

5. The relationship with other international conventions and with European regulation

As a matter of fact, the *draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers* overlaps in several areas with European legislation regarding the protection of travellers and package travel contracts, as well as with the international rules concerning accommodation contracts.

Firstly, by considering their scope and contents, the new regulations for tourist assistance in the event of emergency situations and the uniform rules on travel contracts are part of a wider regulatory framework governed by

⁽⁶²⁾ From a technical point of view, it is interesting to point out the observations made by IFFTA, the International Forum of Travel and Tourism Advocates, presented at the 24th UNWTO Conference, held in Prague from 23 to 26 October 2013, curated by T. Margiotti, M. McDonald and K. Tonner, then published as *IFTTA Submission to the UNWTO on the Draft Convention on the Protection of Tourists and Tourism Service Providers*, cit., where it is emphasised, among other things, how the project of the Convention should have been completed with the regulation of timesharing and leases for tourist use (in *IFTTA Law Review*, 2-2014, 14 ss.).

⁽⁶³⁾ The European Association of Hotels, Restaurants, Cafes, Pubs and similar, brings together 40 national Associations in 29 Countries and represents a significant part of the hospitality industry in Europe.

⁽⁶⁴⁾ According to HOTREC service providers should also be included in the so-called sharing economy, while business-to-business practices should be excluded.

⁽⁶⁵⁾ For more details about the considerations proposed by the Association see the *HOTREC position on the 8th draft of the UNWTO Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers*, D-0916-232-AW.

Directive (EU) 2015/2302⁽⁶⁶⁾ of the European Parliament and the Council of 25 November 2015, concerning package travel and related tourism services, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and the Council and abolishing Directive 90/314/EEC of the Council⁽⁶⁷⁾.

⁽⁶⁶⁾ For an analysis of the implications related to the transposition of Directive (EU) 2015/2302 in the various member countries of the European Union, see below, Part II, Chapter IV; in literature, above all, the studies published in the volume edited by V. FRANCESCHELLI - F. MORANDI - C. TORRES (ed.), *The New Package Travel Directive*, cit.; see also A. ASENSI MERAS, *Contratación on line de servicios turísticos y paquetes dinámicos de turismo*, in *Investigaciones Turísticas*, 12/2016, 163-182; A. BATUECAS CALETRÍO, *La contratación de viajes vinculados*, in *Aranzadi civil-mercantil*, 6/2016, 29; as well as J. M. BECH SERRAT, *Consumer travel law*, in *Research Handbook on EU Consumer and Contract Law*, edited by C. Twigg-Flesner, Cheltenham, 2016, 360 ss.; C. BERENGUER-ALBALADEJO, *Luces y sombras de la nueva Directiva (UE) 2015/2302 del Parlamento Europeo y del Consejo, de 25 de noviembre de 2015, relativa a los viajes combinados y a los servicios de viaje vinculados*, in *International Journal of Scientific Management and Tourism*, 2/2016, 33; I. GONZÁLEZ CABRERA, *¿Estamos ante el mismo producto si se adquiere en línea un viaje combinado o distintos servicios de viaje vinculados?*, in *Revista de Derecho Civil*, 3/2016, 139-144; I. ID., *Una nueva configuración legal del viaje turístico. Del viaje combinado al paquete dinámico*, in *Aranzadi civil-mercantil*, 7/2017, 29-66; A. PANIZA FULLANA, *Viajes combinados y servicios de viaje vinculados: replanteamiento de conceptos y sus consecuencias sobre la responsabilidad*, Madrid, 2017, 15 ss.; A. STAUDINGER – R. RUKS, *Das neue Pauschalreiserecht – Auswirkungen für Veranstalter und Vertrieb*, in *ReiseRecht aktuell*, 2018, 2 ss.; previously, S. KEILER, *Vorschlag: RL über Pauschal- und Bausteinreisen - Ein Zwischenbericht nach der Entschließung in 1. Lesung im Europäischen Parlament, das bereits den Namen der RL a ndern will*, in *Ecolex. Fachzeitschrift für Wirtschaftsrecht*, 2014, 388 ss.

⁽⁶⁷⁾ See, among the many contributions, those referred in S. KEILER - F. MORANDI, *Package travel and assisted travel arrangements: The proposal for a new 2013/11/UE in light of a possible full harmonisation approach*, in *Riv. it. Dir. tur.*, 2014, 5 ss., as well as, on the implications related to the new modalities of commercialization of the tourist services, above all, J. M. BECH SERRAT, *Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis*, Berlin-Heidelberg, 2012, as well as E. GÓMEZ CALLE, *En torno a una posible revisión del régimen del viaje combinado*, in CÁMARA LAPUENTE (ed.) y ARROYO AMAYUELAS (coord.), *La revisión de las normas europeas y nacionales de protección de los consumidores*, Madrid, 2012, 385; A. PANIZA FULLANA, *Nuevas fórmulas de comercialización on line de servicios turísticos: subsumción en los tipos legales y distribución de responsabilidad*, Granada, 2013; M. C. BERENGUER ALBALADEJO, *Nuevos horizontes en materia de viajes combinados*, in *Revista de Derecho Privado*, 05/2014, 35 ss.; J. D. CAMARGO GÓMEZ, *Contratación electrónica de paquetes dinámicos de turismo en el ordenamiento jurídico español*, in *Ars Iuris Salmanticensis*, 2/2014, 95; P. MARTÍNEZ ESPÍN, *Impacto sobre la protección del consumidor de la Propuesta de Directiva del Parlamento Europeo y del Consejo relativa a los viajes combinados y los servicios asistidos de viaje, por la que se modifican el reglamento (EC) n° 2006/2004 y la Directiva 2011/83/EU y por la que se deroga la directiva 90/314/EEC*, in *Aranzadi civil-mercantil*, 9/2014, 99-123; A. PANIZA FULLANA (ed.), *Paquete dinámicos: problemas y soluciones jurídicas desde una perspectiva*

Regarding the Directive, which was scheduled to be enforced on 1 July 2018, at that time, EU Member States were still engaged in a complex transposition process⁽⁶⁸⁾ which had been finalized only in a limited number of States⁽⁶⁹⁾. The awareness of the need to ensure the highest level of harmonization of the new international rules and the new European order, relating to the package travel contracts and linked tourist services, should help prevent the partial overlap of competing guidelines, closely related to each other, but designed to operate at different levels in part, and to prevent operational problems as well as generate a series of issues relating to the hierarchy of the common rules, continental laws and national laws⁽⁷⁰⁾.

In this respect, it should be noted that *Annex II-Package travel* operates in the same area as the Brussels International Convention of 23 April 1970 on travel contracts (the *Convention internationale relative au Contrat de Voyage*,

internacional, Dykinson, Madrid, 2014; A. PANIZA FULLANA, *La Propuesta de Directiva relativa a los viajes combinados y los servicios asistidos de viaje: ¿El reconocimiento de la nueva realidad?*, in *Aranzadi civil-mercantil*, 4/2014, 51-60.

⁽⁶⁸⁾ With reference to the prospects of transposition in Italy, see, above all, the contributions published in *La nuova disciplina europea dei contratti di viaggio*, edited by A. Finessi, Napoli, 2017, *passim*, as well as G. CIURNELLI, *I contratti del turismo organizzato*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, in the past VI ed., Torino, 2017, 350 ss. (see currently the VIII ed., 2023). For a first approach at the contents of the Directive, also in relation to the Italian legal system, see M. MAZIER - C. CAVANNA, *Introduzione alla nuova direttiva UE in tema di pacchetti turistici e di servizi turistici collegati*, in *Dir. mar.*, 2017, 275; F. MORANDI, *The new european regulation of package travel and linked travel arrangements*, in *Dir. trasp.*, 2017, 99; G. ROSSONI, *La Direttiva (EU) 2015/2302 relativa ai pacchetti turistici e ai servizi turistici collegati: una prima lettura*, in *Riv. it. Dir. tur.*, 2017, 88.

⁽⁶⁹⁾ At the time of writing this Article, the only two European Countries that have implemented the new Directive in their legislation are Austria and Germany, respectively, with the federal law of 24 April 2017, n. 50 (Bundesgesetz, mit dem ein Bundesgesetz über Pauschalreisen und verbundene Reiseleistungen (Pauschalreisegesetz – PRG) erlassen wird sowie das Konsumentenschutzgesetz, das Fern- und Auswärtsgeschäfte-Gesetz und das Verbraucherbehörden-Kooperationsgesetz geändert werden) and with the modification of the BGB Article §651a and following.

⁽⁷⁰⁾ By way of example, just think that the notion of “tourist package” in the draft International Convention, although very similar, does not however coincide with the much more articulated and complex notion introduced by the Article 3, n. 2), of the Directive (EU) 2015/2302 on package travel and linked travel arrangements.

the so-called “CCV”) ⁽⁷¹⁾, which is currently still applied by very few States ⁽⁷²⁾.

The draft International Convention, however, also interferes with the European and international regulations of the individual services which make up tourism packages and among them, in particular, the Regulation on passenger transport contracts ⁽⁷³⁾. Information and assistance obligations ⁽⁷⁴⁾, passenger protection and security duties ⁽⁷⁵⁾, the impediments to the proper implementation of the contract and the *ius variandi* ⁽⁷⁶⁾, the carrier’s liability and compensation for damages, the exercise of rights deriving from contracts and alternative dispute resolution systems, are fundamental issues on which the link between the draft International Convention and the regulation of transport require a coordinated effort ⁽⁷⁷⁾.

⁽⁷¹⁾ In literature, among all, V. ROPPO, *Commento alla Convenzione internazionale relativa al contratto di viaggio* (CCV), in *Nuove leggi civ. comm.*, 1978, 1757 ss.; regarding the passage to the new regulation of the travel contracts established by the legislative decree 17 March 1995, n. 111, on the implementation in Italy of the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, see, above all, G. SILINGARDI - F. MORANDI, *La «vendita di pacchetti turistici»*, II ed., Torino, 1998, 12 and 24.

⁽⁷²⁾ At present the CCV is in force in a very small number of States; essentially Argentina, Cameroon, China, Dahomey, San Marino and Togo. According to the Article 3, par. 2, of the Italian legislative decree 23 May 2011, No. 79, so-called “Code of tourism”, the Italian law of 27 December 1977, No. 1084, which implemented the International Convention on the travel contract (CCV) of 23 April 1970, is repealed with effect from the moment in which the denunciation of the Italian State of the CCV becomes effective, in accordance with the provisions of Article 37 of the same; to date, however, the related instrument of denunciation have not yet been filed.

⁽⁷³⁾ With specific reference to the legal regime of the contract for the transport of passengers, see above all the analysis of M. LOPEZ DE GONZALO, *La nuova direttiva sui pacchetti turistici e la normativa internazionale e comunitaria in tema di trasporto di persone*, in *Dir. mar.*, 2016, 405 ss., who observes that on the one hand, in fact, the transport of people constitutes in many cases a component of the package (and a particularly critical component in terms of the risk of personal injury); on the other hand, the subject of the transport of persons is the subject of a dated and stratified sectoral legislation, of uniform international law and, more recently, of Community law.

⁽⁷⁴⁾ Most recently, on this subject, L. ANCIS, *Informazione e assistenza del passeggero nel trasporto aereo. Il mutamento dei connotati dell’obbligo di protezione*, Napoli, 2017, 133 and 237.

⁽⁷⁵⁾ Among all, see G. MASTRANDREA, *L’obbligo di protezione nel trasporto aereo di persone*, Padova, 1994, 53 ss., as well as L. TULLIO, *L’obbligazione di protezione nel trasporto marittimo ed aereo*, in *Dir. trasp.*, 2013, 349 ss.

⁽⁷⁶⁾ See F. MORANDI, *Vicende modificative e solutorie del contratto di viaggio*, in *Studi in onore di Gustavo Romanelli*, Milano, 1997, 889.

⁽⁷⁷⁾ See F. MORANDI, *Alcune riflessioni sui rapporti tra contratto di viaggio e contratto di*

Firstly, the rules on air carriage contracts established by the Montreal Convention of 28 May 1999, for the Convention for the Unification of Certain Rules for International Carriage by Air (and on a residual basis, the Warsaw Convention of 12 October 1929), are worth noticing, especially with regard to the guidelines governing the carrier's liability⁽⁷⁸⁾. At the EU level, Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, recalls the fundamental guidelines of the Montreal Convention 1999, and it extends its applicability to all EU air carriers, with regard to passengers and their luggage, including during transport within a single Member State⁽⁷⁹⁾. For the purpose of this publication, particular interest is also attached to Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, while also repealing Regulation (EEC) No. 295/91, adding specific obligations regarding the protection and assistance of passengers⁽⁸⁰⁾.

trasporto aereo, in R. TRANQUILLI-LEALI - E. G. ROSAFIO (eds.), *Il trasporto aereo tra normativa comunitaria e uniforme*, Milano, 2011, 411 and 431.

⁽⁷⁸⁾ See below, Part IV, Chapter VIII. Among the others, see S. BUSTI, *Contratto di trasporto aereo*, Milano, 2001, 153; M. M. COMENALE PINTO, *La responsabilità del vettore aereo dalla Convenzione di Varsavia del 1929 alla Convenzione di Montreal del 1999*, in *Riv. dir. comm.*, 2002, 67; L. TULLIO (ed.), *La nuova disciplina del trasporto aereo. Commentario alla Convenzione di Montreal del 28 maggio 1999*, Napoli, 2006; U. La Torre, *La responsabilità del vettore e la tutela del passeggero nel trasporto aereo*, in *Congreso Internacional de Transporte Aéreo Aeropuertos y Turismo. 50 años ALADA*, Buenos Aires, 2011, 321; E. G. ROSAFIO, *Convenzione di Montreal del 28 maggio 1999: problemi applicativi*, in *Dir. tur.*, 2014, 10; ID., *Il problema della giurisdizione nel trasporto aereo di persone e nei pacchetti turistici*, in *Riv. dir. nav.*, 2016, I, 107. It should be recalled that the Montreal Convention 1999 was also ratified by the (then) European Community: M. BRIGNARDELLO, *Problematiche relative alla firma e alla ratifica della Convenzione di Montreal del 1999 da parte della Comunità europea*, in *Dir. mar.*, 2001, 3.

⁽⁷⁹⁾ In terms of literature see, among many others, R. TRANQUILLI-LEALI - E. G. ROSAFIO (ed.), *Il trasporto aereo tra normativa comunitaria ed uniforme*, Milano, 2011; previously, A. ANTONINI, *La responsabilità del vettore aereo per il trasporto di persone e cose nella più recente evoluzione normativa: protocolli di Montreal, Varsavia-Montreal, regolamento comunitario*, in *Dir. trasp.*, 2000, 615.

⁽⁸⁰⁾ See below, Part IV, Chapter IX. Most recently, on this subject, see the very relevant L. ANCIS, *Informazione e assistenza del passeggero nel trasporto aereo*, cit., nonché M. BRIGNARDELLO, *La tutela dei passeggeri in caso di negato imbarco, cancellazione del volo e ritardo prolungato*, Torino, 2018; see also *Negato imbarco, cancellazione del volo e ritardo nel trasporto aereo*, edited by M. Deiana, Cagliari, 2005.

Concerning the assumption that “air transport is key for tourism”, the very same UNWTO expressly recognises that there are significant differences between the protection regime applicable to aviation and the international standards on rights and obligations of tourists and tour operators⁽⁸¹⁾. The latter are insufficient to ensure, on their own, an adequate level of consumer protection and a balance of interests of the interested parties, causing problems to travellers and air carriers, particularly when provisions of two or more jurisdictions are applicable to the same flight.

As widely acknowledged, the Athens Convention of 13 December 1974 (PAL 1974), relating to the Carriage of passengers and their luggage by sea, as amended by the London Protocol of 1 November 2002 (PAL 2002)⁽⁸²⁾, the content of which was transposed in Regulation (EC) No. 392/2009 of the European Parliament and the Council of 23 April 2009, regarding the liability of carriers of passengers by sea in the event of accidents, introduces guidelines which are intended to increase the protection of passengers in the event of damages resulting from deaths or personal injuries⁽⁸³⁾. Another fundamental

⁽⁸¹⁾ See the document *Tourism and Air Transport Policies. 20th Session of UNWTO General Assembly - Background paper for the General Debate*, where we read: «Consumer protection - There are significant differences in consumer protection regulations applicable to air transport around the world, and an insufficiency of existing rules at a global level governing the rights and obligations of tourists/consumers and of travel organizers. This causes problems for air carriers and passengers, particularly where the provisions of two or more jurisdictions are applicable to the same flight. UNWTO is working on tourist/consumer protection with a special accent on the elaboration of a draft convention on the protection of tourists and tourism service providers. The subject of consumer protection was addressed at the ICAO Air Transport Conference in March 2013, which gave that Organization a mandate to “develop a set of core principles on consumer protection that strike an appropriate balance between protection of consumers and industry competitiveness and that take into account the needs of states for flexibility, given different State social, political and economic characteristics”. In the meantime, while the UNWTO and ICAO work evolves, pragmatic solutions will have to be sought on a bilateral and regional basis».

⁽⁸²⁾ About the evolution of the international regulation see M. M. COMENALE PINTO, *Il passaggio marittimo fra codice della navigazione, convenzioni non ratificate e prospettive comunitarie*, in *Arch. giur.*, 2006, 337; M. CASANOVA, *La tutela del passeggero nella Convenzione di Atene*, in *Dir. mar.*, 2006, 1089; M.M. COMENALE PINTO, *Le tendenze unificatrici nella disciplina del trasporto marittimo di persone*, in *Dir. mar.*, 2010, 385; S. ZUNARELLI - A. ROMAGNOLI, *Contratto di trasporto marittimo di persone*, Milano, 2012, 110.

⁽⁸³⁾ See F. PERSANO, *Problematiche concernenti l'incorporazione della Convenzione di Atene del 2002 in materia di responsabilità dei vettori marittimi di persone nel diritto comunitario*, in *Dir. comm. internaz.*, 2007, 205; A. ZAMPONE, *Il contratto di trasporto marittimo di persone*, 2. *La disciplina dell'Unione europea*, in L. TULLIO - M. DEIANA (eds.), *Codice dei trasporti*, Milano,

text on passenger protection and assistance obligations borne by the carrier in the maritime transport of passengers is the Regulation (EU) No. 1177/2010 of the European Parliament and of the Council of 24 November 2010, concerning the rights of passengers when travelling by sea and inland waterways, amending Regulation (EC) No. 2006/2004 and governing other aspects not covered by PAL 2002 and Regulation (EC) No. 392/2009⁽⁸⁴⁾.

With reference to road transport, the European Union's intervention is characterised by Regulation (EU) No. 181/2011 of the European Parliament and the Council of 16 February 2011, amending Regulation (EU) No. 2006/2004 and governing the rights of passengers during bus and coach transport, adding specific rights of assistance and protection obligations⁽⁸⁵⁾.

To international railway transport applies the Convention concerning International Carriage by Rail signed in Bern on 9 May 1980 (the so-called COTIF), amended by the Vilnius Protocol of 3 June 1999⁽⁸⁶⁾, and the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV - Annex A to the 1980 COTIF Convention), amended by the Vilnius Protocol⁽⁸⁷⁾, while in the European context, guidelines are provided by Regulation (EC) No. 1371/2007 of the European Parliament and the Council of 23 October 2007, concerning the rights and obligations of passengers during railway transportation⁽⁸⁸⁾.

2011, 513; ID., *Il trasporto marittimo di persone*, in F. MORANDI (ed.), *I contratti del trasporto. Dottrina, Casi e Sistemi*, tomo I, *Trasporto aereo e marittimo*, Bologna, 2013, 469.

⁽⁸⁴⁾ On this topic see M. BRIGNARDELLO, *I diritti dei passeggeri marittimi in caso di cancellazione o di ritardo della partenza della nave*, in *Riv. dir. nav.*, 2014, 573; S. ZUNARELLI – A. ROMAGNOLI, *Contratto di trasporto marittimo di persone*, cit., 216; S. ZUNARELLI, *Il Regolamento (EU) n. 1177/2010 sui diritti dei passeggeri che viaggiano per mare: obblighi di vettori e di operatori dei terminali e problemi applicativi*, in *Dir. mar.*, 2012, 779; A. ZAMPONE, *Il trasporto marittimo di persone*, in F. MORANDI (ed.), *I contratti del trasporto. Dottrina, Casi e Sistemi*, tomo I, *Trasporto aereo e marittimo*, Bologna, 2013, 450; see also A. SANTUARI, *Il contratto di trasporto di persone marittimo e per acque interne*, Trento, 2007, 126; S. POLLASTRELLI, *Il contratto di trasporto marittimo di persone*, Milano, 2008, 193.

⁽⁸⁵⁾ See, above all, A. CLARONI, *La tutela del passeggero nel trasporto effettuato con autobus nell'ambito del reg. (EU) n. 181/2011 del 16 febbraio 2011*, in *Dir. traspr.*, 2011, 505.

⁽⁸⁶⁾ Among all, see M. KOPECKY, *La nouvelle COTIF ou l'espace juridique ferroviaire en mutation*, in *ETL*, 2006, 53.

⁽⁸⁷⁾ See S. BUSTI, *Contratto di trasporto terrestre*, Milano, 2007, 341; M. V. PETIT LAVAL, E. G. ROSAFIO, *La responsabilità del vettore in caso di incidente nel trasporto ferroviario di persone: la prospettiva spagnola e italiana*, in *Riv. dir. nav.*, 2015, 93.

⁽⁸⁸⁾ In this field, S. BUSTI, *Il difficile varo del diritto privato comunitario sul trasporto ferroviario di persone*, in *Dir. traspr.*, 2008, 9; P. G. DEMARCHI, *I disagi nel trasporto ferroviario:*

Annex III - Accommodation shares some elements with the European Convention on the liability of hotelkeepers concerning the goods brought by customers to the hotel, signed in Paris on 17 December 1962, implemented in Italy by Law No. 316 of 10 June 1977⁽⁸⁹⁾, and transposed in Articles 1783 to 1785-*quinquies* of the Italian Civil Code⁽⁹⁰⁾.

The accommodation contract is defined by Article 1 as «the agreement linking the tourist to the accommodation service provider for the provision of a standalone accommodation service» (Standard 1.1, lett. c), while “Accommodation service provider” is defined as «the tourism service provider who, directly or through an intermediary, sells offers to sell, supplies or undertakes to supply standalone accommodation services» (Standard 1.1, lett. b).

In that regard, it is interesting to highlight how the draft Convention explicitly regulates information obligations (Articles 2 and 3) and the duties of assistance in case of unavoidable circumstances and extraordinary or emergency situations (Article 5), as well as contemplating the hypothesis of “Failure of performance or improper performance” (Article 4). In this regard, it should be noted that the draft framework refers to a sort of dual channel,

ritardi lesione e morte del passeggero, in P. G. DEMARCHI (ed.), *I diritti del consumatore e la nuova class action*, Bologna, 2010, 185; V. PICCININI, *L'entrata in vigore del regolamento CE n. 1371 del 2007 sui diritti e gli obblighi dei passeggeri nel trasporto ferroviario*, in *Giur. merito*, 2010, 1773.

⁽⁸⁹⁾ The Council of Europe International Convention on the Liability of Hotel-keepers concerning the Property of their Guests has been ratified by 17 States and has been implemented in Italy with the law 10 June 1978, No. 316, of “Ratification and execution of the European convention on the responsibility of hoteliers for things brought by customers in the hotel, with an attachment, signed in Paris on 17 December 1962”.

⁽⁹⁰⁾ In this field, see U. CARNEVALI - G. BONILINI, *La responsabilità dell'albergatore*, in *Nuove leggi civ. comm.*, 1979, 127; V. GERI, *La responsabilità civile dell'albergatore*, Milano, 1979; ID., *Albergatore (responsabilità del)*, in *Noviss. Dig. it., App. I*, Torino, 1980, 198; F. MASTROPAOLO, *Il deposito*, in *Trattato Rescigno*, XII, Torino, 1985, 546; M. BUSSOLETTI, voce: *Albergo (contratto di)*, in *Enc. giur. Treccani*, I, Roma, 1988; G. ZUDDAS, *Il contratto d'albergo*, in G. CIURNELLI - S. MONTICELLI - G. ZUDDAS, *Il contratto d'albergo, il contratto di viaggio, i contratti del tempo libero*, Milano, 1994; R. Preden, *Albergo (contratto di)*, in *Enc. del dir. App.*, II, Milano, 1998; G. CIURNELLI, *Pernottamento e ristorazione*, in F. MORANDI (ed.), *I nuovi contratti*, VIII, *Tempo libero*, Torino, 2004; G. ZUDDAS, *Il deposito in albergo e nei magazzini generali*, in V. BUONOCORE (dir.), *Trattato di diritto commerciale*, sez. II, t. 3/IV, Torino, 2006; F. M. D'ETTORE - D. MARASCIULO, *Il contratto d'albergo. Profili civilistici*, Milano, 2008; M. E. LA TORRE, *I contratti di ospitalità*, in F. DELFINI - F. MORANDI (eds.), *I contratti del turismo, dello sport e della cultura*, Torino, 2010; among the handbooks, above all, see M. E. LA TORRE, *I contratti di ospitalità*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 299.

adjusting some standards (Standard 4.2; Recommended Practice 4.1 and 4.2) and the national legislation regulating the liability of accommodation service providers for the improper performance of obligations resulting from contracts⁽⁹¹⁾.

The result is a natural effect of coordination between the rules of the 1962 Paris Convention, which relate exclusively to the liability of hotel-keepers concerning the goods brought by customers in the hotel, and the provisions of the draft International Convention on the protection of tourists, which has a more general approach and introduces a broad set of rules governing the hotel-keeper's responsibility to be harmonised with the domestic law of individual signing States.

Last but not least, it has been reported by many that the draft Convention omits any reference to matters relating to the jurisdiction⁽⁹²⁾ applicable to the cases regulated⁽⁹³⁾ and the alternative dispute resolution⁽⁹⁴⁾, which is also fundamentally important to ensure the effectiveness and efficacy of the "Protection of Tourists and the Rights and Obligations of Tourism Service Providers".

It is significant, in this regard, to recall the proposed "draft Convention

⁽⁹¹⁾ According to *Standard 4.1*, «States Parties shall take the necessary measures to ensure that the accommodation service provider is liable to the tourist in accordance with national laws for the proper performance of the obligations under the contract».

⁽⁹²⁾ In particular, see S. FELIU ÁLVAREZ DE SOTOMAYOR, *Viajes combinados y servicios de viaje vinculados* [Directiva (UE) 2015/2302] *Cuestiones de ley aplicable*, Madrid, 2018, 45 ss.

⁽⁹³⁾ See M. LOPEZ DE GONZALO, *La nuova direttiva sui pacchetti turistici e la normativa internazionale e comunitaria in tema di trasporto di persone*, cit., 417.

⁽⁹⁴⁾ See, especially, Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) – completed by the Commission Implementing Regulation (EU) 2015/1051 of July 1, 2015, on how to perform the functions of the online dispute resolution platform, the characteristics of the electronic complaint form and the modalities of cooperation between contracts pursuant to Regulation (EU) No. 524/2013 – and Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), as well as the document of the European Commission (2013), *EU: New Legislation on Alternative and Online Dispute Resolution*, Memo 13/192, of 12 March 2013. With reference to the international conventions project, the topic is reported, in particular by K. TONNER, *Alternative Dispute Resolution*, in *IFFTA Law Review*, 3-2014, 22. For further appropriate references to the relevant literature, see A. CORRADO, *La tutela dei diritti del turista: metodi di risoluzione alternativa delle controversie*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 399 ss.

on Co-operation in Respect of Tourists and Visitors Abroad” presented for the first time in April 2013 by the Brazilian Government during the Hague Conference on Private International Law (HCCH), which might complement the set of international rules, providing a significant contribution to the protection of tourists⁽⁹⁵⁾. The Brazilian proposal became the “*draft Convention on Co-operation and Access to Justice for International Tourists*” (the so-called “Tourism Project”) of the HCCH, according to the determination of the *Conseil sur les affaires générales et la politique de la Conférence*, which in March 2017 presented a specific feasibility study on the proposal for a draft agreement on cooperation and access to justice for international tourists⁽⁹⁶⁾.

More generally, considering the overall scenario the draft International Convention refers to, it seems appropriate to reflect on the efficacy and the effectiveness of the level of protection provided to tourists – from time to time called “consumer”, “guest”, “passenger”, “tourist”, “voyagers”, “visitors” – in relation to the different guidelines applicable to package travel, tourism services and individual services sold or offered for sale on the travel and holidays market.

As determined by the UNWTO General Assembly during the 22nd biennial 2017 session, therefore, the Working Party will continue the discussion on the content of the draft Convention and submit proposals to the General Secretariat, focusing on the organisation of more bilateral and multilateral

⁽⁹⁵⁾ As has been effectively highlighted by C. LIMA MARQUES, the proposal has the following fundamental characteristics: «It is a multilateral convention on global cooperation of authorities and access to justice rather than traditional conflicts of law rules, leaving each country to use its own law. Using the existing institutions, authorities and judicial system (small claims, arbitration courts, judicial courts etc.) on the protection of consumers, defining tourists in a very flexible way as consumers, facilitating cooperation and ex ante interventions without extra costs. Aiming to overcome the eventual discrimination and difficulties of the foreign tourists to access legal assistance or the access to justice in the country of destination, by organizing a system of authorities with information and multilingual prospects, information about foreign law and costumes and connected with the authorities of the country of origin of the tourists, and multilingual formularies to complaint, that can be send to the other authorities, if the case cannot be resolved by the intervention of the authorities in the country of destination»; see International Law Association, Washington Conference 8th April 2014 on the *International Protection of Consumers*, 18 ss. (part. 20).

⁽⁹⁶⁾ See HCCH Conseil sur les affaires générales et la politique de la Conférence, *Projet relatif à une éventuelle future Convention sur la coopération et l'accès à la justice au profit des touristes internationaux (projet Tourisme)*, del 3 marzo 2017, and its Annex “*Preliminary Report. Study on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists*”.

meetings, in order to achieve a maximum degree of consensus on the fundamental issues still being explored⁽⁹⁷⁾.

6. The “sustainability” of tourism law

In conclusion, having considered the fragmentation of the related legal framework and the risks of overlapping between different discipline interventions, it seems the right choice to question the value and the significance of tourism regulations at international, European, and national levels.

The “sustainability” itself of the legal framework in tourism, even if limited to tourist protection during emergency situations and to the discipline of travel packages and accommodation contracts, can also be assessed under the basic perspective of economic analysis of the rights, in order to check which might be the real impact of the Draft International Convention on economy and on the social system.

Focusing on sustainability, the legal reference is firstly Resolution A/RES/70/1 adopted by the United Nations General Assembly on September 25, 2015, “*Transforming our world: The 2030 Agenda for Sustainable Development*”⁽⁹⁸⁾; the latter defined a thorough, wide and individual-centred series of universal and development-oriented objectives, as well as *Sustainable Development Goals*, aiming at eradicating poverty in all its forms and dimensions through a commitment to reach a sustainable development in its three areas – economic, social and environmental – with a balanced and integrated approach, based on the results of the *Millennium Development Goals* to face the work still to be carried out⁽⁹⁹⁾.

⁽⁹⁷⁾ See Resolution A/RES/686(XXII), recalled at the beginning of this article, with which the General Secretariat was appointed to continue with the drafting of the “*Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers*”.

⁽⁹⁸⁾ See also Resolution A/RES/70/193 adopted by the UN General Assembly on 22 December 2015, with which 2017 was proclaimed “*International Year of Sustainable Tourism for Development*”.

⁽⁹⁹⁾ According to Declaration 33, The United Nations «are also determined to promote sustainable tourism», so to be committed, by 2030, to «devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products» (*Goal 8.9*), «develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products» (*Goal 12.b*), on the «increase the economic benefits to small island developing States and least developed countries from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism» (*Goal 14.7*).

Specifically, among the 17 *Sustainable Development Goals* and the 169 *Targets* established by the Agenda, objective 16 has a prominent role among others to “*Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*”; based on this objective, the United Nations has the task to «promote the rule of law at the national and international levels and ensure equal access to justice for all» (*Goal 16.3*); likewise, a contribution might be given by the Draft International Convention on the protection of tourists and on the rights and obligations of tourism service provider.

Such a theme has been widely analysed in the guide published in 2005 by UNEP and UNWTO, *Making Tourism More Sustainable – A Guide for Policy Makers* ⁽¹⁰⁰⁾, aiming at providing national governments with a framework to implement more sustainable tourism policies and to offer a series of tools to be used to implement these policies.

Assuming that governments are able to adopt and apply rules, regulations and sanctions to control the development of the market, the activity of operators, and influence people’s behaviour, we can say that legislation and regulation should be applied only when needed. At the same time, the success of the discipline’s intervention requires pertinent, clear, viable and potentially applicable measures. It has also been considered that there is a series of issues dealing with development, activities and tourism management that should be controlled through legislation and regulations so as to achieve the specific goal to protect the environment, safeguard the communities, protect visitors and guarantee market stability.

Regarding the relationship between norms on tourism and the issue of environmental, economic and social sustainability, it can be stated that:

- (a) expanding the sustainability issue to the internal law, the national laws define the responsibility for tourism to be up to the government and their agencies;
- (b) the existing legislation should be reconsidered and, if necessary, reinforced to guarantee that it is adequate not only to control but also to promote sustainable tourism;
- (c) acting as instruments for guidance and control, legislation, regulation, and licences are interconnected issues that might be conveniently used to

⁽¹⁰⁰⁾ See the United Nations Environment Programme (UNEP) - World Tourism Organization (UNWTO), *Making Tourism More Sustainable – A Guide for Policy Makers*, 2005, especially the part on *Command and control instruments*, 78 ss.

strengthen sustainability.

More generally, regarding the sustainability of tourism rights, it is interesting to analyse the role and the meaning that the draft International Convention has been designed to have and, at the same time, the degree of efficiency and efficacy that the new international discipline will be able to reach pragmatically⁽¹⁰¹⁾.

The socio-economic scenario in which the *draft Convention* took place has been efficiently summarised by *The Global Competitiveness Report*, annually published by the World Economic Forum; the *Global Competitiveness Index* evaluates the competitiveness of 137 economies, providing a unique interpretation of factors that determine their productivity and relative prosperity⁽¹⁰²⁾.

As far as the field of travel and tourism is concerned, the biannual *The Travel & Tourism Competitiveness Report* of the World Economic Forum provides a thorough analysis of the competitiveness of 136 world economies, taking into account complete factors and policies that foster sustainable development on an area, and in turn, it gives a significant contribution to the social and economic growth and to the competitiveness of different States. The *Travel & Tourism Competitiveness Index* provides all interested parties with a series of awareness-based elements and some essential tools to promote cooperation among *stakeholders* and to improve the competitiveness of national economies.

The main topic of the 2017 edition, entitled “*Paving the way for a more sustainable and inclusive future*”, shows the growing international attention given to sustainability and inclusion, also in relation to the *Travel&Tourism*

⁽¹⁰¹⁾ An example, in this sense, is represented by the report PwC, *Review of consumer protection in the travel and travel related services market*, prepared in November 2010 for the Australian Department of the Treasury, on behalf of the Standing Committee of Officials of Consumer Affairs (SCOCA).

⁽¹⁰²⁾ The 2017-2018 edition, which presents a framework and a corresponding series of indicators subdivided into three main categories (subindices) and twelve policy sectors (pillars) for 137 world economies, is available at: www.weforum.org/reports/the-global-competitiveness-report-2017-2018. In the international ranking, Italy ranks in 43rd position, improving a place in the rankings and slightly increasing its score, thanks to an increase in the efficiency of the goods market (of seven places, rising to 60th), to higher education and training (two, going up to 41st). Its traditional competitive advantages include health and primary education (25th), large market size (12th), infrastructure (27th) and business capacity (25th). Despite recent reforms, labour markets (116th) and financial markets (126th) remain the main weaknesses. One of the most negative performance indicators is the 1st pillar - Institutions, with respect to which Italy is ranked in 95th place.

area, highlighting the need to guarantee sustainable tourism in order to protect the natural environment and safeguard local communities, since they are factors on which it strongly depends⁽¹⁰³⁾.

Based on this perspective, interestingly, the most crucial aspects that influence the “business environment”, and the first indicator taken into consideration to determine the competitiveness level, is how the inefficiency of the legal system often plays an important role together with the other main factors related to the commitment of national Governments, the security of the Country and the level of corporate taxation.

The priority attached to tourism by governmental policies, the quality of the legal framework, the impact of rules on attracting investments, the efficiency of the legal system – also including a timely judicial system and the required time to settle the litigation, as well as in terms of the cost of bureaucracy – thus representing elements as essential for competitiveness of the system as other development factors, such as those connected to technology and security, to infrastructure and services, to health and environment, to cultural attractions and natural resources.

Therefore, we could begin by asking how such a complex and heterogeneous international legal framework might really be integrated by an additional regulatory tool aimed at guaranteeing effective protection to tourists and creating certainty regarding the rights and duties of tourism service providers⁽¹⁰⁴⁾.

Then, it should be verified whether the Draft Convention, in its latest version, might truly be able to establish a new international legal order. The peculiar type of norms chosen by the Working Group also has to be taken

⁽¹⁰³⁾ The last edition of the “Travel & Tourism Development Index 2024” is available at the address: <https://www.weforum.org/publications/travel-tourism-development-index-2024/>.

⁽¹⁰⁴⁾ C. LIMA MARQUES - D. WEI, *UN World Tourism Organization and the protection of foreign tourists in case of emergency situation/force majeure*, cit., 16, highlight as «we can speak of three waves of efforts. The first efforts have pointed the importance of regulating the transport contracts and the travel agency contracts. The second wave of efforts have focused on the consumer protection in more complex contracts, like the package travel contract and time-sharing contracts. It seems that we are now in a third wave of efforts more focused on the internationalization of “consumer protection models” and stressing the need to increase the international cooperation channels on tourist protection itself. This does not mean that in the future we should not use the well-established consumer protection systems or cooperation for the enforcement with consumer protection agencies, but the aim now seems to be the creation of more confidence on the foreign tourist’s services industry. Here we see a new role for Private International Law».

into consideration, being characterised by the coexistence of a series of binding general provisions in tandem with a combination of standard rules and a set of recommended practices.

Achieving, ultimately, a global evaluation of the sustainability of the new discipline, in relation to the direct impact on international tourism⁽¹⁰⁵⁾, also evaluating if it will be effectively accepted by States that potentially might be Member Parties, specifically Countries and regional economic integration organisations that currently play a predominant role in the travel and tourism field.

Based on this perspective, the creation of a new uniform system of rules that is able to ensure a high level of protection and assistance to international tourists, also intending to increase the travellers' trust and to make it possible for service providers to operate under equal opportunities and effective competitiveness conditions, is not going to be considered as a restraint to the development of the trading system, but in fact as a true asset towards a more balanced growth of the global market for travel and tourism and, eventually, becoming more sustainable.

⁽¹⁰⁵⁾ See, in general, V. GREENWOOD - L. DWYER, *Challenges to Consumer Protection Legislation in Tourism Contexts*, in *Journal of Tourism Consumption and Practice*, vol. 6, 2/2014, 3.

CHAPTER II

THE ASSISTANCE TO TOURISTS IN EMERGENCY SITUATIONS

SUMMARY: 1. Introduction. – 2. The first EU reaction to the effect of the pandemic on the travel and tourism sector globally. – 3. The UNWTO Recommendations for the assistance to international tourists in emergency situations. – 4. Some technical issues concerning definitions, principles, and recommendations. – 5. Conclusions.

1. Introduction

As the former President of the European Central Bank, Mario Draghi, wrote in the Financial Times on 25 March 2020, «the coronavirus pandemic is a human tragedy of potentially biblical proportions. Many today are living in fear for their lives. Faced with unforeseen circumstances, a change of mindset is necessary in this crisis. The shock we are facing is not cyclical. The loss of income is not the fault of any of those who suffer from it. The cost of hesitation may be irreversible».

The outbreak of COVID-19, beyond the dramatic aspects that accompanied the pandemic and that still afflict our lives, is a significant opportunity for the international community and for every country to develop a new awareness and finally commit to adopting the necessary measures to guarantee assistance to travellers and tourists in an emergency situation at a global level.

2. The first EU reaction to the effect of the pandemic on the travel and tourism sector globally

During the emergency phase, travellers and tourists have experienced critical conditions: the concern for health, safety, and security; the need for assistance and repatriation, exacerbated by the lack of information and accommodation for overstays; the effect on travel, transport, and accommoda-

tion contracts, including the struggle to comply with contract obligations and obtain reimbursement for forced cancellations.

The pandemic has affected all social and economic sectors: companies and professionals threatened by insolvency and bankruptcy; service providers facing complaints and legal proceedings; and workers have been affected too, with thousands of jobs being lost.

The actions being taken by Member States to deal with such a difficult situation and to prevent tourist systems from being overwhelmed were brave and timely. Countries seem to have capitalised on the experience gained after September 11, on the occasion of the SARS outbreak and during the global economic and financial crisis that affected the markets and banking systems between mid-2007 and early 2009.

The emergency situation has required governments to adopt extraordinary and urgent measures. The reaction of the European Union Governments was not long in coming. Some key measures were taken almost immediately, and some had an international echo.

Nevertheless, the European Union also had to face significant problems and many critical issues, such as the lack of cooperation among Member States, with some Countries unilaterally deciding to close their borders.

As a matter of fact, greater collaboration and sharing of information, know-how, experience, expertise, logistics, equipment, and better coordination of actions would have been necessary, also to facilitate border-crossing, the transit of medical staff and equipment, the repatriation of travellers and assistance to tourists in an emergency situation.

Concerning reimbursing costs for tourists and refunding economic losses for operators, the legal system should ensure the necessary flexibility and solidarity.

In particular, several EU Member States have relaxed the refund rules in their national legislation and allowed operators to offer a voucher instead of a cash refund in case of cancellation. It is worth noting that, for instance, the total amount of refund requests in Italy exceeded 500 million euros, not to mention the air transport sector; the German Government has allocated over 850 million euros to refund travellers.

We also have to take into account the effectiveness and the scope of the insolvency protection rules provided by Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015, on package travel and linked travel arrangements.

The COVID-19 emergency has been considered a case of supervening impossibility of performance and, as such, the consequence should be the termination of the contract, and the user should have the right to receive a cash refund.

That is why the European Commission intervened with some non-legally binding measures, among others, the “Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with COVID-19 (2020/C 89 I/01) of 18 March 2020; the non-legally binding “Information on the Package Travel Directive in connection with the COVID-19” set of guidelines of 19 March 2020 (revised version, replacing the version of 5 March 2020); the “Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic”.

In the end, according to the European Union experience, for interventions to be effective, at least the following is needed: a strong cooperation among States, and among States and international organisations and private operators (especially in the transport, travel and tourism sectors); the adoption of standards and models for prevention, information, assistance, and repatriation; the introduction of compensatory systems for the reimbursement of consumers, the refund of operators, and the recovery of economic and social losses.

As a matter of fact, the European Union has been able to face the crisis thanks to the efficient organisation of its Member States, especially in operations and through the adoption of some measures amending EU regulations and making EU rules more flexible. For instance, in air transport, policymakers have taken action on slot allocation, financial requirements for airlines to maintain their licence, Countries to maintain flight restrictions, and so on.

However, returning to normal urges us to reflect on the need to strengthen our institutions and improve the quality of our legal systems.

3. The UNWTO Recommendations for the assistance to international tourists in emergency situations

In this context, at a global level, the UNWTO Secretariat recently issued the “Recommendations for the assistance to international tourists in emergency situations”, in the framework of Decision CE/DEC/4(CXII), adopted by the Executive Council (EC) at its one hundred twelfth session held in Tbilisi (Georgia) on 15-17 September 2020.

These Recommendations aim to provide guidance to Member States regarding the assistance to tourists in emergency situations and are intended to receive further impulse from the UNWTO Intergovernmental Committee for the development of an International Code on the Protection of Tourists (ICPT).

The regulatory initiative was adopted according to the programme priority established by the UNWTO Secretariat for 2020-2021, aimed at facilitating safety, security, and seamless travel. A series of recommendations has been set to support Member State governments and the private sector in their efforts to resume international tourism in the context of the COVID-19 pandemic.

The UNWTO is making a significant effort to ensure adequate protection for international travellers in the event of an emergency due to unavoidable and extraordinary circumstances. Nevertheless, the text already prepared is not to be considered exhaustive, nor is it intended to be definitive, but it will be subject to review and subsequent approval by the governing bodies of the UNWTO and endorsed by Member States.

The intervention is underpinned by the “UNWTO Framework Convention in Tourism Ethics”, the first UNWTO international convention, adopted by the General Assembly at its 23rd session held in St. Petersburg, Russian Federation, in 2019, through Resolution A/RES/722(XXIII) and yet to enter into force. According to its Article 9, *Responsibilities of stakeholders in tourism development, inter alia*, public authorities, in cooperation with the professionals, should focus on security and safety, ensure suitable systems of insurance and assistance, inform about difficult circumstances, formulate recommendations and guarantee the repatriation of tourists in any event.

The Secretariat also acts on the basis of Article 6 of the “UNWTO Global Code of Ethics for Tourism”, which sets out obligations for States concerning travel advisory information in emergency situations and repatriation mechanisms.

Last but not least, the text properly took into account the outcome of the extensive work carried out to draft a preliminary text of the Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, welcomed by the UNWTO General Assembly at its 22nd session held in Chengdu, China (2017), through Resolution A/RES/686(XX-II), and in particular its Annex I (“Assistance in emergency situations”).

Concerning the Recommendations, the current version is divided into three parts: Introduction, Principles and Recommendations.

As far as the Introduction, the draft contains a presentation of the purposes, the general framework and the circumstances that generated the initiative, as well as some definitions in the footnotes (tourist, extraordinary situations, unavoidable and extraordinary circumstances, tourism service provider) that orient the interpreter’s attention and guide the application of recommendations.

The Principles on which they can be based are attributable to “Uniformity”, as the need to find a common and global approach and harmonize the

policies and practices; “Balance”, as the need to find a fair and equitable equilibrium between what is desirable and what is achievable, and also to distribute responsibilities among stakeholders; “Cooperation”, as the need to improve and strengthen international collaboration among the public and private sectors as well as among countries; “Responsibility”, as the duty of public authorities to protect tourists in trouble and to ensure that professionals provide assistance, as well as information; “Accessibility”, according to which travellers with disabilities, specific access requirements and seniors wish to travel just as any other citizen.

With reference to *Recommendations* – I. *Prevention*, II. *Information*, III. *Assistance*, IV. *Repatriation* – which certainly are the most relevant part of the document, the attention is focused both on States (host country, country of origin and third countries) and operators (tourism service providers, their local representative or local agency).

It is worth noting that the first concerns “Prevention” and refers primarily to the set-up of a crisis management service, as well as the establishment of protocols for emergency situations, the designation of responsible authorities, the provision of information, the fostering of travel insurance schemes for the protection of tourists and financial schemes to support tourism service providers.

The experience has also revealed the importance of real-time “Information” (on border procedures, means of transport, travel restrictions, public health and safety measures, contact tracing apps), to be disseminated on emergencies in accordance with the “Recommendations on the Use of Geo-references, Date and Time in Travel Advice and Event Information”, adopted by the UNWTO General Assembly with Resolution A/RES/592 (XIX), in Gyeongju, Republic of Korea, 10-13 October 2011.

The document’s core is the “Assistance” in emergency situations, which, from a humanitarian perspective, commits States to adopt measures to guarantee the safety of tourists. In particular, among others, the host country is expected to make immediate contact with the tourist service provider, ensure that the latter provides appropriate assistance and cooperate with the relevant authorities to offer information, travel arrangements, and accommodation (displaying fair and ethical behaviour, not increasing the room rates and not requesting cancellation fees). It is also specified that tourist contracts provide insurance schemes and guarantee systems that cover the risks resulting from emergency situations, including pandemic events, both regarding assistance and repatriation, and with reference to cancellations and reimbursements. In such conditions, the host country shall also provide communication services, basic medicines and emergency health care, temporary shelters, necessary meals and transportation, a visa (overstays should not be taken into account

during the processing of future visa applications), and waive administrative sanctions or penalties in specific conditions.

“Repatriation” implies that both the host country and the country of origin transmit information and cooperate in facilitating operational measures. The recommendation envisages that the host country ensures the repatriation of tourists, facilitates the necessary visa requirements, including for compelled stays exceeding the maximum established days and cross-border procedures, but also assists and facilitates the entry, stay and freedom of movement in its territory of any official, medical and technical staff and their equipment on a need basis. For the country of origin, above all, the need to cooperate in facilitating the repatriation of tourists and onward transit of nationals and their family members is also specified. Lastly, third countries are requested to provide all necessary information, cooperate in facilitating the transit and repatriation of tourists, and allow the transit of any official, medical, and technical staff and equipment.

A significant amount of work has already been completed, but our commitment now is to reflect on how the text may be improved, create the conditions for worldwide buy-in, and finally implement the contents in all the Member States’ legal systems.

4. Some technical issues concerning definitions, principles, and recommendations

Indeed, I wish to highlight some technical issues concerning the three main sections of the document: *Definitions*, *Principles* and *Recommendations*.

The first issue regards the “Definitions”.

It has to do with the scope of application of the Recommendations and, in particular, the identification of the main subject of protection rules.

One of the definitions that we find in a footnote for the term “tourist” is “a person taking a trip which includes an overnight stay to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited”.

The definition has been acquired from the notion originally given in the UN International Recommendations for Tourism Statistics 2008 (IRTS 2008), and it is fully consistent with Art. 1, lett. c, of the UNWTO Framework Convention on *Tourism Ethics*, adopted by the Resolution A/RES/722(XXIII) of the General Assembly in 2019).

However, in international laws and according to national rules and regulations, we often find different terms used, as well as varying levels of protection

depending on whether we are dealing with or taking into consideration consumers, passengers, travellers, voyagers, guests, and visitors, among others.

It is therefore necessary to consider whether to maintain the current expression “tourist” and its definition, or whether to accept the partially different – or perhaps broader – notion of “traveller”, or even to introduce specific references to the other subjects indicated.

In any case, the definitions reported in the footnotes need to be transposed and incorporated into the body of the document.

The second issue concerns “Principles”.

Concerning *Principle II.3*, “Cooperation”, the document states and only refers to “the need to improve and strengthen international cooperation among the public and private sectors, as well as among countries to assist international tourists in emergency situations”.

However, we must not forget the experience gained in recent months during the tackling of the COVID-19 pandemic, as well as what happened in 2001, following the terrorist attacks of September 11, or in 2003 during the SARS pandemic, and again in 2009 in view of the global economic and financial crisis.

In short, the provisions must be completed and extended, at least, by fostering cooperation among international organisations (i.e., WTO and the World Health Organisation, as it already happens, ICAO, IMO, ILO, ACU, CLIA, IATA, WTTC, etc.) and cooperation among countries and international organisations (including NGOs- Non-Governmental Organizations).

The third issue is about “Recommendations”.

One of the main problems is related to the compensation of tourists following the interruption of a trip due to the early return to the country of origin, or the cancellation of travel and tourist services, especially those of air transport and hospitality.

States should be required to commit to and bear the costs and economic losses suffered by all the actors in the supply chain, including tourists, providers, and all those who have incurred expenses, in order to support countries in providing assistance to travellers and repatriating tourists.

That is why it might be appropriate to introduce a new recommendation for the country of origin or the host country concerning the adoption of the necessary measures for refund in case of cancellation and other prejudices borne by tourists; reimbursement of costs and economic losses borne by operators (carriers, hotel keepers, tour operators, travel agents, hospitals, etc.); compensation of the expenses incurred for operations relating to assistance and repatriation operations.

The development and use of travel insurance schemes and guarantee systems – which aim to provide adequate coverage for tourists, cover the ex-

tra costs resulting from specific emergency situations, including cancellation fees, the costs of treatment and quarantine for tourists, and the costs of repatriation – must clearly be fostered.

5. Conclusions

In the end, at a time when travel and tourism law is taking on new meanings, everything seems to change in tourism: the disruptive innovation of the digital era, COVID-19 these days and the other challenges that the new world of travel must face.

But one thing has not changed at all: our duty to implement the best legal instruments for the protection of tourists; our duty to guarantee operators fair conditions and equal opportunities on the market; our duty to strengthen our institutions and improve the quality of our legal systems.

However, the real question is whether this can become the ultimate long-term solution or not. The emergency situation required the adoption of extraordinary and urgent measures. The return to normal urges us to reflect on the structure of relations between travellers, on the one hand, and providers, on the other, taking into account all the components of the market and the different types of tourist services.

The global travel and tourism industry has been ravaged by COVID-19, a typical example of a black swan event. While many are looking backwards to compare the current market environment with the post-9/11 or other periods of the past, I prefer to look forward – trying to address the tough questions weighing on our collective minds.

If it is true what we often hear repeated – that nothing will be the same as before – then we must think of new rules that are fairer for tourists (travellers, hosts, passengers, consumers) and equally sustainable for the States and for the market.

This is a crucial time for all of us. That is the reason why the commitment and contribution of all relevant stakeholders will be crucial to implement new rules that can offer effective solutions to the problems affecting the travel and tourism sector at a global level.

Anyway, going back to the words of Mario Draghi, «speed is absolutely essential for effectiveness. The speed of the deterioration of private balance sheets must be dealt by equal speed in supporting each other in the pursuit of what is clearly a common cause».

It is not only an opportunity. It is not only a duty. It is an absolute necessity.

CHAPTER III

THE UNWTO INTERNATIONAL CODE FOR THE PROTECTION OF TOURISTS

SUMMARY: 1. The International Code for the Protection of Tourists. – 2. From the Recommendations for the assistance of international tourists in emergency situations to the Code. – 3. The meaning, structure, and contents of the Code. – 4. A new starting point.

1. The International Code for the Protection of Tourists

The General Assembly of the World Tourism Organization, during the 24th session held in Madrid from November 30 to December 3, 2021, approved Resolution A/RES/732(XXIV), officially adopting the “International Code for the Protection of Tourists” (ICTP)⁽¹⁾.

The Code provides principles and recommendations for the protection of tourists in emergency situations and for the safeguarding of the rights of travellers, with the stated objective of harmonising minimum protection standards globally and providing sufficient guarantees to international tourists in the post-COVID-19 world.

As stated in the introduction, addressed to governments, public and private stakeholders, and tourists themselves, the Code provides a series of practical and operational guidelines for those with obligations and responsibilities or who hold rights and duties in the tourism sector

It is structured into five chapters:

⁽¹⁾ The World Tourism Organization, *International Code for the Protection of Tourists*, UNWTO, Madrid, 2022. A fundamental progress to the study and analysis of the ICPT is currently offered by the valuable contributions collected by F. J. MELGOSA ARCOS - A. GÓMEZ - L. JÉGOUZO (Dirs.), *El Código Internacional para la Protección de los Turistas*, Madrid, 2024, which propose an in-depth review of all the profiles considered below.

- (I) Definitions and clarifications;
- (II) Assistance to international tourists in emergency situations;
- (III) Protection of tourists in contracts;
- (IV) International composition of disputes in the field of travel and tourism through alternative means of conflict resolution;
- (V) Mechanisms for the adherence to and application of the recommendations.

Uniting the minimum standards for the protection of tourists in emergency situations and the rights of travellers at the international level, the Code aims to restore trust and create a sense of security among consumers, including through the improvement of contractual relationships between providers and recipients of various tourist services.

As a *soft-law* instrument of a non-legally binding nature, it does not create direct obligations or impose specific burdens on states. Instead, it seeks to support the efforts undertaken at the national level by each of the member countries of UNWTO and the United Nations to rebuild a conducive environment for travel and expedite tourism recovery. The Code provides guidance to governments to adopt appropriate legislative policies and regulatory practices.

Similarly, other *stakeholders* in tourism are encouraged, as far as possible, to promote the Code, support its principles, and apply relevant recommendations. They are also encouraged to integrate or specifically refer to them in their respective contractual instruments.

This is done to increase travellers' awareness of their rights and obligations and to enhance consumer confidence when booking a trip or tourist service.

The process of drafting the Code is primarily attributed to the Committee for the development of an International Code for the Protection of Tourists, established by Decision CE/DEC/4(CXII), adopted by the Executive Council of UNWTO at its 112th session held in Tbilisi, Georgia, from September 15 to 17, 2020.

In carrying out the mandate, the Committee was supported by a Group of independent experts with recognised legal expertise at the international level in the fields of travel and tourism law, as well as consumer protection ⁽²⁾.

⁽²⁾ The group of experts was composed of Diego Augusto Benitez (National University of Río Negro, Argentina), John J. Downes (international tourism law consultant), Julio Facal (tourism law expert), Claudia Lima Marques (Federal University of Rio Grande do Sul, Brazil), Francesco Morandi (University of Sassari), Sarah Prager, Barrister (Bar of England and Wales),

The text of the Code was developed in just over a year – a relatively short period considering the significant complexity of the content – thanks also to the direct participation of over 100 member states, major international organisations, and leading entities in the travel and tourism sector, along with some of the major private entrepreneurial groups operating in the market.

A certainly decisive impetus was provided by the crisis generated by the COVID-19 pandemic, which highlighted the fragility of the international framework of rules, the substantial absence of a system of legal instruments capable of providing assistance to international tourists in emergency situations, and the absolute lack of global uniformity in relation to the protection of travellers' rights⁽³⁾.

2. From the Recommendations for the assistance to international tourists in emergency situations to the Code

The approval of the Code by the UNWTO was preceded by the issuance, by the General Secretariat, of the “Recommendations for the Assistance to International Tourists in Emergency Situations”, adopted within the framework of the aforementioned Executive Council Decision CE/DEC/4(CXII)⁽⁴⁾.

The regulatory initiative, aimed at facilitating travel safety and continuity, was adopted according to the priorities set by the UNWTO Secretariat for

Christine Riefa (University of Reading School of Law, United Kingdom), Haien Shen (China University of Political Science and Law, China), and Charlotte Wezi Mesikano Malonda (Commercial Court, High Court Judge, Malawi).

⁽³⁾ As emphasized by the General Secretary of the UNWTO, «the COVID-19 crisis has revealed the absence of an international legal framework to assist international tourists in emergency situations and the lack of uniformity at the international level regarding tourism consumer protection rights. During the crisis, the closure of borders with little notice left hundreds of thousands of tourists stranded abroad, millions of flights were cancelled and the situation soon deteriorated, impacting negatively on the confidence of tourists regarding their rights to assistance in emergency situations and consumer rights in general. In order to support the efforts taken by Member States in the recovery of the tourism sector, the “International Code for the Protection of Tourists” (ICPT) aims at restoring consumers’ confidence by developing and harmonizing minimum international standards for the protection of tourists in emergency situations, including but not limited to pandemics, and consumer rights of tourists in the post COVID-19 world».

⁽⁴⁾ The World Tourism Organization, *Recommendations for the assistance to international tourists in emergency situations*, UNWTO, Madrid, 2020, are available online: www.unwto.org/recommendations-for-the-assistance-to-international-tourists-in-emergency-situations.

the 2020-2021⁽⁵⁾.

It has to do with a series of recommendations aimed at sustaining the actions of governments of member states and the private sector in the efforts to enable the recovery of international tourism in the context of the COVID-19 pandemic⁽⁶⁾.

The Secretariat acted, first and foremost, based on Article 6 of the UNWTO “Global Code of Ethics for Tourism”, which establishes obligations for states regarding travel information in emergency situations and repatriation mechanisms⁽⁷⁾.

The intervention was also based on the UNWTO “Framework Convention on Tourism Ethics”, the first international convention developed within the World Tourism Organization, adopted with resolution A/RES/722(XX-III) by the General Assembly at its 23rd session in St. Petersburg in 2019, not yet in force. According to its Article 9 (*Responsibilities of stakeholders in tourism development*), among other things, public authorities, in collaboration with professionals, should focus on safety, ensure adequate insurance and assistance systems, provide information on difficult circumstances, make recommendations, and ensure the repatriation of tourists in any eventuality⁽⁸⁾.

The text has adequately taken into account, finally, the outcome of the extensive work carried out to draft the preliminary text of the “Convention on the Protection of Tourists and on the Rights and Obligations of Tourist Service Providers”, favorably welcomed by the UNWTO General Assembly during its 22nd session in Chengdu in 2017, through Resolution A/RES/686(XX-II), and specifically its Annex I (*Assistance in Emergency Situations*).

⁽⁵⁾ In developing Recommendations, the Secretariat was assisted by some independent experts with internationally recognized legal expertise in the fields of travel and tourism law: Diego Augusto Benitez (National University of Río Negro, Argentina), Francesco Morandi (University of Sassari), and Charlotte Wezi Mesikano Malonda (Commercial Court, High Court Judge, Malawi).

⁽⁶⁾ For a preliminary analysis of the recommendations, see F. MORANDI, *The assistance to tourists in emergency situation: Commitment of States, role of service providers and traveller protection*, in Giureta, 2022, 287.

⁽⁷⁾ The text UNWTO *Global Code of Ethics for Tourism* is published online at www.unwto.org/global-code-of-ethics-for-tourism.

⁽⁸⁾ The official text of the UNWTO *Framework Convention on Tourism Ethics* is available, in the official languages of English, French, Spanish, Russian and Arabic, at the website [www.unwto.org/ethics-convention#:~:text=in%20the%20Convention.,UNWTO %20Framework%20Convention%20on%20Tourism%20Ethics,several%20provisions%20have%20been%20adapted](http://www.unwto.org/ethics-convention#:~:text=in%20the%20Convention.,UNWTO%20Framework%20Convention%20on%20Tourism%20Ethics,several%20provisions%20have%20been%20adapted).

Regarding what is now of greater interest, the “Recommendations for the Assistance to International Tourists in Emergency Situations” now constitute Chapter II, “Assistance to International Tourists in Emergency Situations”, of the ICPT.

The current version is subdivided into “*Principles*” and “*Recommendations*”⁽⁹⁾.

Regarding the first section, the “*Principles*” are identified as:

- i) “Harmonization,” understood as the need to find a common global approach and to standardise policies and practices;
- ii) “Balancing,” as the need to find a fair equilibrium between what is desirable and what is achievable, and the requirement to distribute responsibilities among stakeholders;
- iii) “Cooperation and coordination”, in order to improve and reinforce the international collaboration between the private and public sectors, as well as among countries and international organisations;
- iv) “Responsibility”, just as it is the responsibility of the authorities to protect tourists in trouble and ensure that professionals provide assistance, other than information, at the same time international tourists must know and follow the information provided to them by the tourism service provider, as well as to be aware of health, safety, and security risks associated with travel and behave in a manner that minimizes these risks;
- v) “Accessibility”, as the right of vulnerable and disadvantaged tourists to travel like any other person on an equal basis and without discrimination of any kind;
- vi) “Clarity and certainty”, as a necessity for international tourists and tourism service providers, it is essential to clearly understand their rights and have sufficient time to meet their demands;
- vii) “Targeted Risk Approach”, as the need to have a regulatory approach focused on risk and specific and well-defined objectives that directly address emergency situations, while respecting the principles of equality, non-discrimination, and proportionality.

As for the second profile, the “Recommendations” are articulated in I. Prevention, II. Information, III. Assistance, IV. Repatriation, and represent

⁽⁹⁾ The original text also includes an Introduction: it is a presentation of the purposes, the overall framework, and the circumstances that led to the initiative, as well as some definitions in the footnotes (tourist, extraordinary situations, unavoidable and extraordinary circumstances, tourist service provider) to guide the interpreter’s attention and facilitate the application of the Recommendations.

the most relevant part of the document.

Attention is directed to both states (host country, country of origin, and third countries) and operators (tourism service providers, their local representatives, or local agencies).

It is worth noting that the first one significantly relates to “Prevention” and primarily involves the establishment of a crisis management service, as well as the establishment of protocols for emergency situations, the designation of responsible authorities, the provision of information, the promotion of travel insurance plans for tourist protection, and financial schemes to support tourism service providers.

Experience has also highlighted the importance of “Information” – on border procedures, means of transportation, travel restrictions, health and public safety measures, through tracking apps – to be disseminated in case of emergencies according to the “Recommendations on the Use of Georeferences, Date and Time in Travel Advice and Event Information”, adopted by the UNWTO General Assembly with Resolution A/RES/592 (XIX) in Gyeongju (Republic of Korea) on October 10-13, 2011⁽¹⁰⁾.

The focal point of the document is “Assistance” in emergency situations, which, from a humanitarian perspective, commits states to adopt measures to ensure the safety of tourists. In the event of unavoidable and extraordinary circumstances or emergencies, among other things, the host country should:

- a) ensure, through coordinated systems, procedures, or agreements, that the tourist service provider is able to promptly and without undue delay provide adequate care and assistance to international tourists within the limits established by applicable laws;
- b) ensure that accommodation service providers are adequately equipped with necessary information and communication channels, cooperate with the competent authorities of the host country in case of unavoidable and extraordinary circumstances or emergencies, maintain ethical behaviour, do not increase rates for extra nights, and do not impose cancellation fees in case the tourist is unable to receive the service;
- c) provide, to the extent possible, rescue services, communication services, temporary shelters, necessary meals and provisions, visas or permits, transportation, basic medicines, and emergency healthcare;
- d) waive administrative sanctions or penalties against citizens of other

⁽¹⁰⁾ See World Tourism Organization, ‘Resolution 593(XIX) of 13 October 2011’, available online at: www.unwto.org/archive/global/event/general-assembly-nineteenth-session.

countries, without compromising the national security of the host country, when tourists are forced to stay beyond and cannot leave the territory due to travel restrictions;

- e) adopt, as reasonably possible, additional necessary operational measures, such as coordinated evacuation, provision of emergency and security personnel, and provision of health and medical services, when the international tourist's life, health, or personal integrity is exposed to direct danger.

On the other hand, tourist service providers must immediately get in touch with the authorities of the host country, who should activate a direct and specific communication channel with the operators themselves or their local representatives to coordinate assistance to tourists.

Finally, but not least, a detailed regulation of "Repatriation" is envisaged, involving specific commitments for both the host country and the country of origin – including, first and foremost, the transmission of information and cooperation to facilitate operational measures – as well as for third countries.

The recommendation stipulates that the host country ensures the repatriation of tourists, facilitates the necessary visa requirements, even for forced stays exceeding the maximum established days and cross-border procedures, but also assists and facilitates the entry, stay, and freedom of movement of official, medical, and technical personnel, and their related equipment, within its territory, based on the needs. The country of origin, in particular, is required to cooperate to facilitate the repatriation of tourists and the continued transit of citizens and their family members.

Third countries, finally, are required to provide all necessary information, cooperate to facilitate the transit and repatriation of tourists, and allow the transit of any official, medical, and technical personnel and equipment.

In conclusion, the "Recommendations" constitute the fundamental basis upon which other provisions of the International Code for the Protection of Tourists are built, whose main objectives are well-defined.

Firstly, uniform rules should be established to ensure and promote an adequate level of protection for tourists, especially in emergency situations, providing them with primary and basic assistance and strengthening cooperation between states in exceptional circumstances.

Secondly, to clarify the rights and obligations of tourist service providers, ensuring a fair balance between the responsibilities of states, the private sector, and tourists.

The overall goal of improving travellers' trust in operators, states, and the tourism sector as a whole remains clear in the background, especially at a time characterised by the need to face new challenges.

3. The meaning, structure, and contents of the Code

3.1. The encouraging results that emerged with the adoption of the “Recommendations” and the needs repeatedly expressed by the member states have led the UNWTO to take a further decisive step forward to address the persistent lack of a uniform discipline at the international level regarding the protection of tourists’ rights.

As was highlighted in the beginning, in fact, the International Code for the Protection of Tourists (ICPT) provides a complete series of principles and recommendations for the protection of tourists in emergency situations and, above all, establishes a uniform model for the protection of the rights of international travellers.

Designed to unify minimum protection standards globally, guide the actions of national governments towards the adoption of appropriate legislative policies, and propose a balanced weighing of various interests at stake, it is, nevertheless, a *soft-law* instrument of a non-legally binding nature.

Looking at the contents, the Code consists of five chapters focusing on “Definition and clarification” (Chapter One), “Assistance to international tourists in emergency situations” (Chapter Two), “Tourists’ protection in contracts” (Chapter Three), “International settlement of travel and tourism disputes via alternative means of dispute resolution” (Chapter Four), and “Mechanisms for adherence to and the application of the recommendations of the International Code for the Protection of Tourists” (Chapter Five)⁽¹¹⁾.

Alternatively, by conducting a cross-cutting reading of the text for overarching thematic objectives, three main areas of intervention emerge.

3.2. The first, already discussed in the previous paragraph, deals with the emergency situations and takes up the content of the “Recommendations”, broadening its scope and meaning.

The focus is primarily on the indications contained in the second chapter (“Assistance to International Tourists in Emergency Situations”), with particular reference to the development of minimum international standards for the protection of tourists. These standards are organised around four central themes: prevention, information, assistance, and repatriation.

In the third Chapter, Part II, the focus is on “Contractual Issues relating

⁽¹¹⁾ The UNWTO International Code for the Protection of Tourists (ICPT), Madrid, 2021, is available online: <https://www.unwto.org/international-code-for-the-protection-of-tourists>.

to Emergency Situations”, with particular emphasis on contractual protection and the tourist’s rights as a consumer. The themes confronted are those that emerged in the context of the COVID-19 pandemic⁽¹²⁾, namely issues related to prevention, contract resolution, the right of withdrawal, the issuance of vouchers as an alternative to monetary reimbursement⁽¹³⁾ and the financial support offered by national governments to tourist service providers.

The fourth Chapter, Part III, finally, pertains to the “International Settlement of Travel and Tourism Disputes via Alternative Means of Dispute Resolution” and presents a series of recommendations regarding the alternative resolution of disputes, taking into consideration the particular vulnerability of tourists in such circumstances and the significant increase in litigation that generally follows the occurrence of emergency situations.

3.3. A second macro area refers to the perspective of strengthening the protection of tourist rights and creating a framework of uniform rules shared globally, assuming a central role in the structure of the new Code.

In this sense, the third Chapter, Part I, identifies minimum standards for the protection of tourists, focusing primarily on contractual protection. The proposed text departs from the challenging experience of the previous UNWTO draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, presenting itself in an entirely innovative manner, both in form and content, with the prospect of offering

⁽¹²⁾ With reference to the complex legal issues arising from the effects of the COVID-19 pandemic on the legal system and the tourism market, recently, V. CORONA, *Turismo e crisi pandemica*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, VIII ed., Torino, 2022, 75, as well as the contributions collected by F. MORANDI, *Il diritto del turismo affronta il COVID-19*, published in the monographic issue of the *Italian Journal of Tourism Law/Rivista italiana di Diritto del turismo*, 30/2020; see also, among others, A. PEPE, *L'emergenza sanitaria da coronavirus tra impossibilità sopravvenuta e impossibilità di utilizzazione della prestazione nei contratti di trasporto, di viaggio e del tempo libero*, in *Nuove leggi civ. comm.*, 2020, 596; U. IZZO (ed.), *Il diritto alle prese con la vulnerabilità del turismo, fra guerra e persistente pandemia*, available at <http://lawtechnew.jus.unitn.it>, 2022; C. TORRES - F. J. MELGOSA ARCOS (eds.), *Legal Impacts of Covid-19 in the Travel Tourism and Hospitality Industry*, Estoril, 2022, where, in particular, the contributions of A. CORRADO, S. D'URSO, F. MORANDI and C. TINCANI; see also N. SOLDATI, *Affitto di azienda alberghiera, rinegoziazione del contratto e tutela cautelare ai tempi del Covid-19*, in *Italian Journal of Tourism Law/Rivista italiana di Diritto del turismo*, 2022, 209.

⁽¹³⁾ On the legal issues resulting from the issuing of vouchers and the affair that affected Italy, in particular see, F. MORANDI, *The use of vouchers as an alternative to cash refund: The Italian way to deal with the pandemic*, in G. CARBONI (edited by), *Gli effetti del coronavirus su società, economia e istituzioni*, Udine, 2020, 82.

practical and shared solutions to the complex issues addressed⁽¹⁴⁾.

In particular, a detailed and comprehensive set of Recommendations is formulated for States, urging them to adopt all necessary and appropriate measures concerning various tourist services, provided either individually or as part of a travel package, in order to ensure adequate safeguarding of the interests involved.

In this regard, it is useful to highlight the choice made during the drafting of the text to make a general reference and adopt standards and recommendations related to contracts that concern tourist services (“Tourism service”)⁽¹⁵⁾, individual or aggregated in the form of travel packages, without specifically dwelling on the individual regulation of each of them, but prioritizing the search for common principles.

As is known, at the international level, there is a persistent absence of a uniform discipline concerning the individual relationships between the service provider (“Tourism service provider”) and the tourist (“Tourist”)⁽¹⁶⁾, given that it is a need increasingly felt in the global market.

The rare exceptions, represented by the Paris Convention of December 17, 1962, of the Council of Europe on the ‘Liability of Hotelkeepers concerning the Property of their Guests’ and the International Convention on the Travel Contract (CCV) signed in Brussels on April 23, 1970⁽¹⁷⁾, have actually

⁽¹⁴⁾ In this regard, see the critical analysis proposed by F. MORANDI, *The UNWTO draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Provider*, in V. FRANCESCHELLI - F. MORANDI - C. TORRES (Eds.), *Sustainable Tourism Law*, Lisbon, 2018, 203.

⁽¹⁵⁾ According to the definition offered in Chapter One, «“Tourism service” means the provision of any of the following services provided for tourists, in a single or combined manner: i. Accommodation services other than for residential purpose; ii. Transport services; iii. Package travel organization and retail, intermediation and other reservation services; iv. Tours, activities, attractions, excursions and events; v. Other services principally provided to tourists in her/his capacity as tourist».

⁽¹⁶⁾ Unlike a simple excursionist, «“Tourist” means a person taking a trip which includes an overnight stay to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited».

⁽¹⁷⁾ This is about the International Convention of Brussels dated April 23, 1970, concerning travel contracts, made effective in Italy by Law No. 1084 on December 27, 1977 (and intended to be denounced according to Article 3, paragraph 2, Legislative Decree No. 79/2011), currently in force in a very limited number of states: Benin, Cameroon, People’s Republic of China, Italy, San Marino, and Togo. On this theme see V. ROPPO, *Commento alla Convenzione internazionale relativa al contratto di viaggio*, in *Nuove leggi civ. comm.*, 1978,

had little success and have recorded a truly marginal number of memberships.

Only the European Union has decisively embarked on the path of introducing, at the European level, specific regulations for the protection of the traveller in the package travel contract, with the adoption of Directive (EU) 2015/2302⁽¹⁸⁾. Currently, it presents itself as an interesting reference model for the possible evolution of the general regulatory framework.

In short, following the suggestions provided by the code, it is necessary, first and foremost, to ensure compliance with specific information obligations. These obligations are related both to the pre-contractual phase (before

1757; G. ROMANELLI - G. SILINGARDI, *Contratti di viaggi organizzati*, in *Enc. giur.*, IX, Roma, 1988, 1; G. SILINGARDI - M. RIGUZZI - E. GRAGNOLI, *Responsabilità degli operatori turistici*, in *Riv. giur. circ. trasp.*, 1988, 24; V. CUFFARO, *Contratto turistico*, in *Dig. disc. civ.*, IV, Torino, 1989, 294; C. S. CARRASSI, *Il contratto di viaggio*, in *Giur. sist. dir. civ. comm.*, founded by W. Bigiavi, *I contratti in generale*, directed by G. Alpa e M. Bessone, II, *I contratti atipici*, I, Torino, 1991, 531; V. BUONOCORE, *Il contratto di viaggio*, in *Contratti d'impresa*, a cura di V. BUONOCORE - A. LUMINOSO - G. FAUCEGLIA - G. CAPO - R. ROSAPEPE - T. D'AMARO, I, Milano, 1993, 797; G. SILINGARDI - V. ZENO-ZENCOVICH (eds.), *La tutela del turista*, Napoli, 1993; S. MONTICELLI, *Il contratto di viaggio*, in G. CIURNELLI - S. MONTICELLI - G. ZUDDAS, *Il contratto di albergo. Il contratto di viaggio. I contratti del tempo libero*, Milano, 1994, 129; G. SILINGARDI - F. MORANDI, *La «vendita di pacchetti turistici»*, Torino, II ed., 1998 (I ed., 1996); G. TASSONI, *Il contratto di viaggio*, Milano, 1998; A. FLAMINI, *Viaggi organizzati e tutela del consumatore*, Napoli, 1999; V. BUONOCORE, *I contratti di trasporto e di viaggio*, Torino, 2003; A. SANTUARI, *Il contratto di viaggio «all inclusive» tra fonti interne e diritto transnazionale*, Padova, 2003; F. MORANDI, *I contratti di viaggio*, in F. MORANDI - M. M. COMENALE PINTO - M. LA TORRE, *I contratti turistici*, Milano, 2004; and finally, N. E. ONESTI, *Il problema della vigenza della CCV nella prospettiva del diritto internazionale*, in questa *Rivista*, 38/2023, 108.

⁽¹⁸⁾ See Directive (UE) 2015/2302 of the European Parliament and of the Council of the 25 of 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, transposed in Italy with the d.lgs. 21 May 2018, n. 62, see, among others, A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, in *Nuove leggi civ. comm.*, 2018, 1307; A. ZAMPONE, *Riflessioni sulla dir. (UE) 2015/2302 relativa ai pacchetti turistici ed ai servizi turistici collegati*, in *Dir. trasp.*, 2018, 1; C. ALVISI - V. BATTISTELLA - F. CECCHINI - A. CLARONI - V. CONFORTINI - I. MALAGUTI - A. MONTESANO - M. MUSI - E. ORRÙ - T. PELLEGRINI - G. TASSONI, *Commento agli artt. 32-51-novies cod. tur.*, in V. CUFFARO (ed.), *Codice del consumo e norme collegate*, Milano, 2019, 1157; C. BOITI, *Trasparenza e contratti del turismo organizzato*, Napoli, 2019; F. MORANDI, *Le nuove regole dell'Unione europea sui pacchetti turistici e i servizi turistici collegati nell'esperienza italiana*, in *Resp. civ. prev.*, 2019, Part I, 1102, and Part II, 1422; ID., *I contratti del turismo organizzato dopo il recepimento della direttiva (UE) 2015/2302*, in *Dir. trasp.*, 2020, 571; ID., *Il nuovo contratto di viaggio*, in *Riv. dir. nav.*, 2020, 869; F. MORANDI - F. LUCARELLI, *Le nuove condizioni generali dei contratti di viaggio*, in questa *Rivista*, 29/2020, 147; M. BRIGNARDELLO, *I contratti del «turismo organizzato» e di crociera*, Bari, 2023.

the service provider comes into contact with the customer and during the negotiation phase of the discussions) and to the content of the contract entered into between the parties. This aligns with the increasing importance that has long been attributed at the national and European levels to informative aspects in tourist contracts⁽¹⁹⁾.

The contractual discipline is then supplemented by rules regarding the termination of the tourist service before its commencement and the non-performance or improper performance by the service provider⁽²⁰⁾, in addition

⁽¹⁹⁾ On the subject, in addition to the initial analysis of G. SILINGARDI - F. MORANDI, *La «vendita di pacchetti turistici»*, cit., and G. TASSONI, *Il contratto di viaggio*, cit., cfr. more recently, F. ROMEO, *Il processo informativo nella commercializzazione dei contratti di viaggio*, in A. FINESSI (ed.), *La nuova disciplina europea dei contratti di viaggio. La direttiva 2015/2302/UE e le prospettive della sua attuazione nell'ordinamento italiano*, Napoli, 2017, 29; R. PASQUILLI, *Il contenuto e la forma del contratto di viaggio*, *ivi*, 47; previously, B. SIRGIOVANNI, *Il processo informativo e la forma nella disciplina dei pacchetti turistici*, in *Contratto e responsabilità. Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli*, edited by G. Vettori, Padova, 2013, 1610, in addition to A. VENCHIARUTTI, *Vendita di biglietti aerei e obblighi informativi dell'agente di viaggio*, in *Dir. tur.*, 2008, 391; more generally on the subject, N. IRTI, *Strutture forti e strutture deboli (del falso principio di libertà delle forme)*, in *Studi sul formalismo negoziale*, Padova, 1997, 137; R. AMAGLIANI, *Profili della forma nella nuova legislazione sui contratti*, Napoli, 1999, 47; D. VALENTINO, *Obblighi di informazione, contenuto e forma negoziale*, Napoli, 1999, 15; M. MESSINA, *«Libertà di forma» e nuove forme negoziali*, Torino, 2004; T. FEBBRAJO, *L'informazione ingannevole nei contratti del consumatore*, Napoli, 2006; E. MORELATO, *Nuovi requisiti di forma del contratto. Trasparenza contrattuale e neoformalismo*, Padova, 2006, 49; L. MODICA, *Vincoli di forma e disciplina del contratto. Dal negozio solenne al nuovo formalismo*, Milano, 2008, 222; B. PASA, *La forma informativa nel diritto contrattuale europeo. Verso una nozione procedurale di contratto*, Napoli, 2008; S. LANDINI, *Formalità e procedimento contrattuale*, Milano, 2008, 113; S. PAGLIANTINI, *Forma e formalismo nel diritto europeo dei contratti*, Pisa, 2009, 65; E. FAZIO, *Dalla forma alle forme. Struttura e funzione del neoformalismo negoziale*, Milano, 2011, 73; G. BERTI DE MARINIS, *La forma del contratto nel sistema di tutela del contraente debole*, Napoli, 2013, 58; G. LA ROCCA, *Il problema della forma contrattuale*, Torino, 2017, 3.

⁽²⁰⁾ If we limit ourselves to a single reference, it is relevant to recall the definition of inevitable and extraordinary circumstances contained in the first chapter, which constitutes the framework of the liability exemption system outlined by the Code. Specifically, «“Unavoidable and extraordinary circumstances” means a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken» (Definition 8), while «For the purposes of this Code, any reference to “unavoidable and extraordinary circumstances” may include, but is not limited to, civil unrest, other serious security problems such as terrorism, significant risks to human health such as the unforeseen outbreak of a serious disease at the travel destination or its immediate vicinity, natural disasters such as floods, earthquakes or weather conditions, beyond the control of the party, which makes it impossible to travel safely to the destination

to indications for the protection of the tourist in the event of the supplier's insolvency⁽²¹⁾ and in terms of access to justice.

3.4. One of the most innovative parts of the Code is represented by the provisions contained in the third Chapter, Part III, concerning the principles proposed for the protection of tourists in the provision of digital tourism services⁽²²⁾.

Taking note of how new technologies and digital transition have radically changed the travel experience and the profound transformations in contractual relationships, a set of principles has been identified to safeguard tourists in relation to new digital tourist services. The goal is to ensure a secure approach to using online platforms and to prevent possible abuses.

The new discipline appears to be inspired by Regulation (EU) 2022/2065 of October 19, 2022, regarding the creation of a single market for digital services in the European Union (so-called "Digital Service Act" or DSA)⁽²³⁾.

In particular, recognising the critical role of digital platforms and online services in the tourism sector, the Code sets forth a series of principles aimed

as agreed in the tourism service contract, as well as any other situations described in relevant international agreements in force to which the country is a party» (Clarification 15).

⁽²¹⁾ The issue concerning the protection of tourists in the event of insolvency of the organizer (or intermediary) is always at the center of attention of the European Union legislator, especially considering the recent events that, even before the Covid-19 pandemic, involved some of the major European tour operators. In this regard, the Court of Justice of the European Union has had the opportunity to intervene on several occasions, starting with the well-known case decided by the Tribunal of the European Union, 8th of October 1996, in the cases of C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer*, widely commented; v. and Tribunal of the European Community, 14th of May 1998, in cases C-364/96, *Verein für Konsumenteninformation*, in *Contr.*, 1998, 628, with a comment by A. CORRADO, *Rischi di insolvibilità o fallimento dell'organizzatore e tutela del viaggiatore*.

⁽²²⁾ In particular, «"digital tourism service provider" means any natural or legal person that sells, offers to sell, supplies, or undertakes to supply a tourism service to the tourist through digital means».

⁽²³⁾ Entered into force on 16 November 2022, together with Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital sector (the so-called "Digital Markets Regulation", "Digital Market Act" or DMA) it forms a package of new rules (the so-called "Digital Services Package") aimed at creating a safer and more open digital space. On the subject, with specific reference to the tourism sector, see G. AMORE, *Digital Service Act e turismo online*, in *Riv. it. Dir. tur.*, 39/2023, 54. More in general, cfr. E. Poddighe - P. Sammarco - V. Zeno-Zencovich, *European media and communication law*, RomaTre-Press, 2023, available online at the website <https://romatrepress.uniroma3.it/libro/european-media-communication-law/>.

at creating a fairer, safer, more reliable, easily accessible, transparent, and responsible market. At the same time, in awareness of the risks associated with using digital tourism services, effective actions are introduced to counter illegal content (goods, services, information, or activities) and ensure access to justice. In essence, the proposed rules aim to promote the creation of an “online tourism environment” that respects and safeguards, above all, human rights, the ethics of tourism, fundamental freedoms, and consumer rights.

In this sense, the fundamental “Principles” to inspire the intervention of States are clearly identified in the creation of a safe environment for online tourism, equality and non-discrimination, transparency and fairness, protection from abuse, identification of responsibilities, prevention and management of risks, data protection, coordination and cooperation, in dispute resolution and compensation.

In line with the pursued objectives, the new rules are addressed to the “digital tourism services”⁽²⁴⁾ in general and to the “online tourism platforms”⁽²⁵⁾ in particular, regardless of where they are established and whether they are privately or publicly owned, operating in relation to tourist services in the digital market.

3.5. The tools aimed at ensuring effective and actual protection of tourists’ rights are complemented by the identification of a set of global rules for alternative dispute resolution⁽²⁶⁾.

The fourth chapter, in fact, aims to provide tourists with flexible and efficient mechanisms for resolving disputes related to travel and tourism quickly and fairly, following Alternative Dispute Resolution (ADR) (“Alternative Dis-

⁽²⁴⁾ The notion of “digital tourism service” means any tourism service provided remotely, through electronic means, and upon the request of a recipient of services, including information society services and intermediation related to tourism services».

⁽²⁵⁾ According to the predictions of the Code, «“online tourism platform” refers to any hosting service – including collaborative economy websites, content sharing websites, social networks, app stores, online marketplaces, online travel, and accommodation websites – which, at the request of a tourist or a business user, stores and/or disseminates information related to tourism services».

⁽²⁶⁾ In the matter, A. CORRADO, *La tutela dei diritti del turista: metodi di risoluzione alternativa delle controversie*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 464.

pute Resolution”) procedures⁽²⁷⁾ or ODR (“Online Dispute Resolution”)⁽²⁸⁾ inspired by United Nations Guidelines for Consumer Protection (UNGCP)⁽²⁹⁾.

The absence of an international framework for judicial cooperation in the management of disputes and existing disparities in access to justice highlight the significant opportunity for tourists to resolve conflicts fairly, efficiently, and quickly through such mechanisms. These mechanisms also provide the possibility of obtaining compensation, if necessary, without unnecessary costs, cumbersome delays, and undue burdens.

With the declared aim of promoting the development and implementation of ADR/ODR systems (such as conciliation, mediation, and the intervention of the ombudsman), the Code identifies a series of principles and recommendations primarily directed at Member States. These principles and recommendations are applicable to consumer relations, excluding disputes between professionals or related to international commercial contracts.

Next to the recommendations related to emergency situations contained in the concluding section, which are also prompted by the particularly vulnerable condition of tourists in such circumstances and the significant increase in litigation that arises from it, the text stands out mainly for the indications presented in the other two sections.

⁽²⁷⁾ According to the definition contained in the first chapter, «“Alternative dispute resolution” (also referred to as “ADR”) means the settlement of travel or tourist complaints out of court with the assistance of an impartial dispute resolution body, whether public or private. ADR may include, but is not limited to, ombudsmen, complaints boards of self or assisted negotiation, conciliation, mediation and binding/nonbinding consumer arbitration».

⁽²⁸⁾ In particular, «any reference to “online dispute resolution” (also referred to as “ODR”) means a form of alternative dispute resolution as specified under paragraph 1 above which utilizes ICT and the Internet to simplify and expedite the settlement of travel or tourist complaints. ODR may include, but is not limited to, self-negotiation, assisted negotiation, online mediation and online arbitration».

⁽²⁹⁾ This is a set of principles for the protection of consumer rights, intended to assist the Member States involved in formulating and implementing laws, norms, and national and regional regulations that are suitable for their economic, social, and environmental needs. Additionally, these principles aim to promote international cooperation by encouraging the sharing of experiences in consumer protection. The guidelines were initially adopted by the General Assembly through resolution 39/248 on April 16, 1985, later expanded by the Economic and Social Council through resolution E/1999/INF/2/Add.2 on July 26, 1999, and recently revised by the General Assembly in resolution 70/186 on December 22, 2015. The text and further information are available online at the UNCTAD website <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-for-consumer-protection>. See, in particular, guidelines 37 to 41 on “Dispute Resolution and Appeals” and 78 on “Tourism”.

The first concerns the “Principles” that form the basis of the procedures, with specific reference to impartiality, transparency (with the consequent implications regarding information duties), effectiveness (taking into account the specific needs of disadvantaged or vulnerable tourists who may encounter particular difficulties), fairness, and informed consent, as well as the methods of accessing such mechanisms.

The second section includes a series of “Recommendations” addressed to states, asking them to provide an effective dispute resolution system, ensure the voluntary participation of individuals in proceedings, promote the development of fair and transparent procedures, provide specific information to tourists, promote fundamental freedoms and consumer rights, ensure equality and non-discrimination of international travelers, promote the development of global standards for disputes in travel and tourism, facilitate coordination, and support international cooperation.

3.6. The last part is reserved for the mechanisms provided for adherence to the Code and the implementation of principles and recommendations (Chapter five), in line with its non-binding nature for Member States.

In short, UNWTO Member States and United Nations Member States are called upon to voluntarily join by submitting a written notification to the Secretary-General⁽³⁰⁾. Subsequently, they are required to periodically report on the implementation status of the Code in their respective countries, with the aim of developing and sharing knowledge and best practices⁽³¹⁾.

Considering that states have full freedom regarding the methods of imple-

⁽³⁰⁾ As of today, the following member states of the UNWTO have confirmed their adherence: Ecuador, Guinea-Bissau, Moldova, Myanmar, Paraguay, Portugal, and Uruguay. Additionally, Cambodia, Maldives, and Indonesia have joined (following the adoption of the “Phnom Penh Declaration on the UNWTO International Code for the Protection of Tourists” on June 16, 2023), committing to promote its dissemination and implementation in the Asia-Pacific region as a crucial tool for ensuring a clear, transparent, and effective framework for the protection of tourists as consumers and to foster confidence in travel. Guatemala, Chile (partially), Costa Rica, Haiti, Honduras Argentina, Brazil, Lebanon (partially), Lithuania (partially), Senegal, Thailand (partially) and Venezuela have joined in 2023. Finally, in 2024 also Cuba and the United Arab Emirates adhered in 2024, as well as Andorra, Uzbekistan, Cabo Verde and Sierra Leone in 2025. For an updated list of participating countries see <https://www.untourism.int/adherence-to-the-international-code-for-the-protection-of-tourists>.

⁽³¹⁾ A Technical Sub-Committee to the Executive Board will be established to assist the Secretary General in promoting the Code and monitoring the application of Principles and Recommendations.

menting the recommendations proposed in the text, the accession procedure essentially involves a minimum level of harmonisation achieved through the definition of a common standard, from which members can still deviate.

From a strictly procedural standpoint, it is required, among other things, to make every effort to integrate the principles and recommendations into one's own policies, laws, and regulations and to designate one or more national authorities to ensure coordination of interventions and actively contribute to the implementation of the Code.

4. A new starting point

In conclusion, through the development and harmonisation of international minimum standards, the Code will provide greater legal certainty to the world of tourism and ensure member states a secure framework when introducing new rules regarding the protection of international tourists.

The principles and recommendations constitute a sort of practical guide for achieving a proper balance of the complex interests at stake and represent an essential reference point for empowering, improving, or supplementing national regulations.

Indeed, it is a flexible tool made available to the international community, allowing different countries to freely adopt any measures they consider appropriate in relation to the peculiarities of their respective legal contexts and to adapt the proposed solutions according to specific needs.

At the same time, the Code offers several advantages for various interested stakeholders. Specifically in the private sector, tourism service providers are encouraged to promote its principles and directly apply the recommendations, without the need to adhere to them and regardless of whether a state has adhered to it or not.

In addition to providing specific guidelines for the voluntary integration of general conditions in contracts with tourists, the Code presents a clearer distribution of responsibilities among different actors in the system. It provides greater legal certainty to the parties involved and clarifies the rights and obligations of private parties and public institutions regarding traveller protection and assistance in emergency situations.

The main challenges to address involve overcoming the fragmentation of sources, disparities between different countries' legislations on tourist rights, and differences in minimum global protection standards.

From this perspective, the Code also serves as a dynamic tool, subject to interpretation by the Technical Committee in light of evolving conditions and susceptible to modification based on the Technical Committee's proposal in

response to continuous market changes.

In a moment when international tourism is experiencing a strong recovery and taking on new meanings, the world of travel is called upon to face ever-new challenges⁽³²⁾. It is therefore necessary to implement the best legal tools to protect tourists, ensure fair and equal opportunities for operators in the market, and strengthen institutions by improving the quality of legal systems.

If the emergency situation has required the adoption of extraordinary and urgent measures, the return to normality prompts reflection on the structure of relationships between travellers on one side and service providers on the other, taking into consideration all components of the market and different types of tourist services.

At the same time, by adhering to the International Code for the Protection of Tourists and incorporating the set of principles and recommendations into their respective legal systems, states have the concrete opportunity to finally elevate the threshold of tourist protection to a new level. A new starting point for member countries, guided by the awareness that only effective and common rules can guarantee the “universal right” to “tourism for all” and create the tourism of the future for a better world⁽³³⁾.

At the moment, the hypothesis of converting the current *soft-law* instrument into a genuine international convention with binding character remains in the background. The commitment and contribution of all stakeholders will be crucial to implementing new rules that are capable of providing definitive solutions to the issues still affecting the global travel and tourism sector.

⁽³²⁾ See, above all, F. MORANDI, *The assistance to tourists in emergency situations. Commitment of States, role of service providers and traveller protection*, in Giureta, 2020, 294-295.

⁽³³⁾ See “UNWTO Framework Convention on Tourism Ethics”, approved September 15, 2017, approved by the UNWTO General Assembly with Resolution A/RES/707(XXII) during the 22nd biannual session in 2017, which implemented the “Global Code of Ethics for Tourism”, adopted with resolution A/RES/406(XII) from the 13th UNWTO Generale Assembly in Santiago (27th of September-October 1st 1999), the fundamental goal of which is to promote responsible, sustainable, and accessible tourism, following the Manila Declarations of 1980 on world tourism and those of 1997 on the social impact of tourism, as well as the Tourism Charter and Tourism Code adopted in Sofia in 1985 under the auspices of UNWTO. The text is available online at <https://www.unwto.org/global-code-of-ethics-for-tourism>. In particular, according to Article 10, paragraph 1, the term “right to tourism” refers to «the prospect of direct and personal access to the discovery and enjoyment of the planet’s resources constitutes a right equally open to all the world’s inhabitants». See., for all, F. MORANDI, *The UNWTO draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Provider*, cit., 207.

PART II
THE EU REGULATION ON TRAVELLER PROTECTION

CHAPTER IV

THE EU REGULATION OF PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENTS

SUMMARY: 1. The Directive (EU) 2015/2302. – 2. The nature and contents of Directive (EU) 2015/2302. – 3. The definition of “package travel”. – 4. The definition and regulation of “linked travel arrangements”. – 5. Information obligations and the content of the package travel contract. – 6. Changes to the package travel contract. – 7. Responsibility for the performance of the package. – 8. Price reduction and compensation for damages. – 9. Obligation to provide assistance. – 10. Insolvency protection. – 11. Recent developments.

1. The Directive (EU) 2015/2302

Twenty-five years after the first regulation, the European Parliament and the Council have established new rules on “package travel and linked travel arrangements”. Directive 2015/2302, hereinafter referred to as the “new PTD” or the “new Directive”⁽¹⁾, is currently the reference text governing the sector⁽²⁾.

⁽¹⁾ 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 December 2015) [2015] OJ L326/1.

⁽²⁾ See J.M. BECH SERRAT, *Consumer travel law*, in C. TWIGG-FLESNER (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham, 2016, 360, and F. MORANDI, *The new European regulation of package travel and linked travel arrangements*, in *Diritto dei trasporti*, 2017, 99, as well as the essays collected by V. FRANCESCHELLI - F. MORANDI - C. TORRES (eds.), *The New Package Travel Directive*, Estoril-Lisbon, 2017, and in C. TORRES - F. J. MELGOSA ARCOS - L. JÉGOUZO - V. FRANCESCHELLI - F. MORANDI - F. TORCHIA (eds.), *Collective Commentary about The New Package Travel Directive*, Estoril-Lisbon, 2020; for some specific aspects, see also A. DE VRIES, *Travel intermediaries and responsibility for compliance with EU travel law: a scattered legal picture*, in *European Consumer and Market Law*, 2106, 5(3), 119;

The new regulatory framework repeals the previous Directive 90/314/EEC on “package travel, package holidays and package tours” in force since 1 July 2018 (according to Article 28, Member States shall adopt and publish by 1 January 2018, the period from which Directive 90/314/EEC was repealed), the laws, regulations, and administrative provisions necessary to comply with the new Directive (Article 28(1)), and shall apply those measures from 1 July 2018 (Article 28(2)), and amends Regulation 2006/2004 and Directive 2011/83/EU.

The new Directive applies to “package travel contracts” (Article 3(3)), to “linked travel arrangements” (Articles 3(5) and 19), and to the contract between traveller and retailer (depending on how Member States apply Article 13(1-2) of the new PTD).

Considering that tourism plays an important role in the economy of the European Union (EU) and that this market has undergone significant changes since the adoption of Directive 90/314/EEC, the new regulation seeks to adapt the legislative framework to these developments⁽³⁾.

Over the past two decades, technological evolution and digital innovation have profoundly transformed the tourism industry and the travel market. The contractual relationships and formal links between travellers, retailers, and organisers have been deeply affected⁽⁴⁾.

The action taken by the EU in the sector became increasingly crucial over time in the attempt to find a right and equitable balance between the need for protection of tourists and the economic interests of operators, and to create the conditions for traders to operate according to rules that guarantee fair

M. B. M. LOOS, *Precontractual information obligations for package travel contracts*, in *European Consumer and Market Law*, 2016, 5(3), 125-130; J. LUZAK, *Vulnerable travellers in the digital age*, in *European Consumer and Market Law*, 2016, 5(3), 130-135; F. MORANDI, *The New Italian Regulation on Package Travel and Linked Travel Arrangements According to Directive 2015/2302/EU*, in *European Consumer and Market Law*, 2020, 9(3), 93.

⁽³⁾ At the international level, see the “International Code for the Protection of Tourists”, approved by the United Nations World Tourism Organization (UNWTO) General Assembly in the 24th session held in Marrakesh (Morocco) on 30 November 2021, Madrid, 30 November 2021 (for an analysis of the ICPT, see above Chapter III).

⁽⁴⁾ K. TONNER, *Does the new Package Travel Directive respond to the challenges of the IT world?*, in *European Consumer and Market Law*, 2016, 5, 117; as regards the effects of the collaborative economy, see I. Gonz  les Cabrera, *Collaborative Tourism Activities as a Response to the Crisis Generated in the Tourism Sector by the COVID-19*, in C. TORRES - F. J. MELGOSA ARCOS (eds.), *The Legal Impacts of COVID-19 in the Travel, Tourism and Hospitality Industry*, Estoril-Lisbon, 2022.

opportunities and effective competition.

At the same time, the new Directive seeks to improve transparency and remove ambiguities, increasing legal certainty for travellers and professionals, along with closing legislative gaps, avoiding the “grey zone” and combinations of travel services clearly not covered by the previous regulation ⁽⁵⁾.

2. The nature and contents of Directive (EU) 2015/2302

The new Directive is based on the main features of Directive 90/314/EEC, including information obligations, contractual amendments, the system of remedies, trader’s liability, and organiser’s insolvency.

The new PTD increases the level of traveller protection, taking into consideration new online booking models for combinations of standalone travel services, such as “customised” or “tailor-made” packages, “dynamic packages”, and “affiliate” or “click-through” online reservations (COM(2019)270 final; accompanied by the Staff Working Document SWD(2019)270 final ⁽⁶⁾. The new PTD overcomes the “pre-arrangement” requirement of the services included in the package travel ⁽⁷⁾.

According to Article 3(6) of the new PTD, a “traveller” is anyone who intends to conclude a contract or is entitled to travel on the basis of a contract, concluded within the scope of the Directive. It includes not only the “consumer” but also business travellers, unless the tourist services are purchased on the basis of a general agreement with the trader (Article 2(1)(c)).

Among the most relevant innovations, the extension of the scope of application of the new Directive is worth mentioning; a broader definition of “package travel” and the regulation of the “linked travel arrangement”; the enhancement of the information obligations and the traveller’s right to withdrawal; new rules in the event of lack of conformity and stricter rules for the organiser’s liability; the strengthening of traveller’s protection in the event of

⁽⁵⁾ The national transposition measures are available on the European Commission National transposition measures for the Package Travel Directive webpage.

⁽⁶⁾ Report from the Commission to the European Parliament and the Council on the provisions of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on *package travel and linked travel arrangements applying to online bookings made at different points of sale* (21 June 2019) COM(2019) 270 final (accompanied by the Staff Working Document SWD(2019) 270 final).

⁽⁷⁾ See CJEU 30 April 2022, in Case C-400/00, *Club-Tour, Viagens e Turismo SA v Lobo Gonçalves Garrido and Club Med Viagens Lda*, ECLI:EU:C:2002:272.

insolvency, also extended to linked travel arrangements; and the duty of assistance to travellers, especially in the event of unavoidable and extraordinary circumstances (COM(2021) 90 final) ⁽⁸⁾.

In order to achieve a full harmonization of the legislative framework (the politically controversial full harmonization approach could create difficulties in the implementation of the new rules in the Member State legal systems ⁽⁹⁾), Member States are not entitled to maintain or introduce in their national law any regulations diverging from those introduced by the Directive itself, “including more or less stringent provisions which would ensure a different level of traveller protection” (Article 4 of the new PTD). The provision must be carefully interpreted in order to avoid the risk that some countries are encouraged to implement rules that could be less protective than those currently in force, undermining the rights granted to travellers at the national level so far. According to Article 2(3) of the new PTD, EU law does not affect national general contract law, insofar as general contract law aspects are not regulated in the Directive.

The same purpose is also emphasised by the imperative character and the nature of the necessary application of the new rules set by Article 23 of the new PTD. The declaration by an organiser or trader acting exclusively as a travel service provider, as an intermediary, or in any other capacity, that a package or a linked travel arrangement does not constitute a package or a linked travel arrangement, cannot be exempt from the obligations imposed by the Directive (Article 23(1)).

The enforceability of the new PTD is also strengthened by the prohibition imposed on travellers to waive the rights conferred (Article 23(2) of the new PTD). The provision confirms the mandatory nature of the new regime according to which any contractual clauses or declarations by the traveller which exclude or limit, directly or indirectly, the granted rights or whose purpose is to avoid the application of the rules in question do not bind the traveller (Article 23(3)).

The general framework is then completed by the obligation binding the Member States to lay down adequate and effective means to ensure com-

⁽⁸⁾ Report from the Commission to the European Parliament and the Council on the provisions of Directive (EU) 2015/2302 of the European Parliament and of the Council on *package travel and linked travel arrangements* (26 February 2021) COM(2021) 90 final.

⁽⁹⁾ S. KEILER - F. MORANDI, *The Directive on package travel and linked travel arrangements: The traveller protection in a full harmonization approach*, in V. FRANCESCHELLI - F. MORANDI - C. TORRES (eds.), *The New Package Travel Directive*, cit.

pliance with the new regulation (Article 24 of the new Directive), and also through the implementation of all necessary measures and the adoption of effective, proportionate, and dissuasive penalties (Article 25).

3. The definition of “package travel”

With regard to content, Chapter I of the new PTD focuses on the scope of the new rules, innovating the notions of “travel service”, “package travel”, and “package travel contract”, and introducing the concept of “Linked travel arrangements”.

The new Directive applies to packages offered for sale or sold by traders to travellers and linked travel arrangements facilitated by traders for travellers (Article 2(1)).

It does not apply to: (a) packages and linked travel arrangements covering a period of less than 24 hours unless an overnight accommodation is included; (b) packages offered, and linked travel arrangements facilitated, occasionally and on a not-for-profit basis and only to a limited group of travellers; and (c) packages and linked travel arrangements purchased on the basis of a general agreement for the arrangement of business travel (Article 2(2) of the new Directive).

In this regard, Article 3(1) of the new Directive includes in the definition of “travel service” (a) the carriage of passengers⁽¹⁰⁾, according to which a contract concerning a voyage by freighter which, for an inclusive price, provides for a combination of travel and accommodation is a contract of transport); (b) the accommodation which is not intrinsically part of the carriage of passengers and is not for residential purposes; (c) the rental of cars, other motor vehicles, or motorcycles (the rental of cars, other motor vehicles, or motorcycles, has always been seen as a “tourist service”, as well as the hiring of all other vehicles, and rightly not as a transport service. So far, this new element would *prima facie* not cause any changes to the material scope. However, as car rental is meant as a distinct element, its combination with another tourist service would fall within the scope of the new regulation.) and (d) any other “tourist service”, not intrinsically part of a travel service mentioned above⁽¹¹⁾.

⁽¹⁰⁾ See CJEU 7 December 2010, in joined cases C-585/08 and C-144/09, *Pammer v Reederei Karl Schlüter GmbH & Co KG* (C-585/08) and *Hotel Alpenhof GesmbH v Heller* (C-144/09), ECLI:EU:C:2010:740.

⁽¹¹⁾ See Recital 17 for some examples. Financial and insurance products are generally excluded, as well as long-term language courses: CJEU 11 February 1999, in case C-237/97,

According to Article 3(2) of the new PTD, “package” means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if: (a) those services are combined by one trader before a single contract on all services is concluded; or (b) irrespective of whether separate contracts are concluded with standalone providers, those services are: (i) purchased from a single point of sale and selected before the traveller agrees to pay; (ii) offered, sold, or charged at an inclusive or total price; (iii) advertised or sold under the term “package” or similar; (iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of travel services; or (v) purchased from separate traders through linked online booking processes where the traveller’s name, payment details, and e-mail address are transmitted from the first trader to another and a contract with the latter is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.

Add to this that a combination of “travel services” where no more than one type of travel service as carriage, accommodation, or rental is combined with one or more “tourist services” is not a package if the latter services: (a) do not account for a significant proportion of the value of the combination (25% or more, depending on national legislation) and are not advertised as, or do not represent, an essential feature of the combination; or (b) are selected and purchased only after the performance of travel service.

In short, such an articulated and complex definition of package travel is likely to create some problems in the application of the new rules, so much so that in the currently pending revision proposal this will be one of the issues to be addressed.

4. The definition and regulation of “linked travel arrangements”

The new Directive also innovates the legal framework by introducing the notion of “linked travel arrangements” (Article 19(5)) in order to regulate even the very frequent cases in which online traders facilitate the procurement of travel services by travellers leading the traveller to conclude contracts with different travel services providers, including through linked booking processes, which do not contain the features of a package and in relation to which it would not be appropriate to apply all of the obligations applicable to package’.

AFS Intercultural Programs Finland ry, ECLI:EU:C:1999:69, according to which Directive 90/314/EEC does not apply to long-term student exchange travel.

It is clear that the purchase of a travel service on a stand-alone basis as a single travel service should constitute neither a package nor a linked travel arrangement (see Recital 9 of the new Directive).

The new figure results from the combination of at least two different types of travel services, for the purposes of the same trip or the same holiday, purchased with separate contracts from distinct suppliers, if a trader “facilitates”: (a) on the occasion of a single visit or contact with his point of sale, the separate selection, and payment; or (b) “in a targeted manner”, the procurement of at least one additional travel service from another trader, where that contract is concluded at the latest 24 hours after the confirmation of the booking of the first travel service. Where not more than one type of travel service as referred to in Article 3(1)(a), (b), or (c), and one or more tourist services as referred to in Article 3(1)(d) are purchased, they do not constitute a linked travel arrangement if the latter services do not account for a significant proportion of the combined value of the services and are not advertised as, or do not represent, an essential feature of the trip or holiday.

In particular, linked travel arrangements must be distinguished from independently booked travel services, linked websites that do not have the objective of concluding a contract with the traveller (do not “facilitate”), and links through which travellers are simply informed about further travel services in a general way (not “in a targeted manner”). For instance, where a trader includes on its website a list of operators offering services independently of any booking, or if “cookies” or metadata are used to place advertisements on websites.

According to the new Directive, such facilitation will often be based on a commercial link involving remuneration between a trader, who facilitates the procurement of additional travel services, and another trader, regardless of the method by which such remuneration could be based (e.g. number of clicks or turnover). Under Recital 13, those rules would apply, for example, where, along with the confirmation of the booking of a first travel service such as a flight or a train journey, a traveller receives an invitation to book an additional travel service available at the chosen travel destination, for instance, hotel accommodation, with a link to the booking website of another service provider or intermediary. As a matter of fact, the linked travel arrangements represent an alternative business model that often competes closely with packages, but do not constitute packages within the meaning of the new Directive, under which the organiser is liable for the proper performance of all travel services.

With reference to the linked travel arrangements, Chapter VI of the new Directive introduces specific rules for the protection of travellers in the event

of insolvency and provides for specific information obligations, also extended to traders not established in the EU that, by any means, direct such activities to a Member State.

According to Article 19(1) of the new PTD, traders facilitating linked travel arrangements shall provide security for the refund of all payments received from travellers insofar as a travel service is not performed as a consequence of their insolvency, and this security shall also cover the traveller's repatriation.

Pursuant to Article 19(2) of the new Directive, the same trader shall provide the traveller in a clear, comprehensible and prominent manner by means of the relevant standard form set out in Annex II (a trader's declaration as to the legal nature of the travel product being marketed must correspond to the true legal nature of the product concerned) with the information that the latter will benefit from insolvency protection, but will not benefit from any of the rights applicable exclusively to packages under the Directive and each service provider will be solely responsible for the proper contractual performance of his service.

It is worth noting that despite the aim behind the introduction of this new concept being innovative, practical implementation sometimes lacks effectiveness.

5. Information obligations and the content of the package travel contract

Chapter II of the new PTD governs the information and documentation obligations imposed on the organiser and the retailer and establishes the minimum mandatory content of the package travel contract.

The new Directive provides for detailed information obligations at every stage of the relationship between the organiser and the traveller, from pre-contractual negotiations (Articles 5 and 6) to the time of conclusion of the contract (Article 7).

Compared to the past, the EU legislator has strengthened the information that the trader is required to provide to the traveller, in terms of the type of information to be offered, how it must be presented, and the legal value to be attributed to the information.

The enhancement of information requirements to be considered essential for the protection of the traveller also stemmed from criticisms of the information paradigm in EU consumer law for taking too little account of the cognitive limitations of consumers revealed by behavioural studies.

Before the conclusion of the contract, the organiser and the retailer provide the traveller with the detailed "standard information form" reported in

Annex I or Annex II of the new Directive. It is the essential reference for operators to fulfil their legal obligations, while ensuring greater clarity for travellers, allowing them to be fully informed about tourist services.

The pre-contractual information is presented in a clear, comprehensible, and prominent manner. If provided in writing, it must be legible (Article 5(3) of the new PTD). The information is an integral part of the package travel contract, has binding value, and shall not be altered unless the contracting parties expressly agree otherwise (Article 6(1)).

Article 7 of the new Directive specifies the content of the agreement that the organiser and the retailer must provide to the traveller in paper form or, if the traveller agrees, on another “durable medium”. “Durable medium” means any instrument which enables the traveller or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored (Article 3 (11)). The contract is drafted in a plain and intelligible manner and, in so far as it is in writing, legible, while the information contained therein is presented in a clear, comprehensible, and prominent manner.

The violation of the information and documentation obligations by the organiser and the retailer is likely to give rise to civil liability and is accompanied by the provision of Article 8 of the new PTD, according to which the burden of proof relating to the fulfilment of the obligations in question is borne by the trader.

6. Changes to the package travel contract

The discipline of *ius variandi*, referred to in Chapter III (Articles 9-12 of the new Directive), regulates the cases in which a traveller can transfer a package travel contract to another traveller and the cases in which the organiser is allowed to modify the agreement.

In order to prevent disputes, the case of “transfer of the package travel contract” (Article 9 of the new PTD) is now enriched by more detailed provisions than those of Article 9 of the new PTD, with the corresponding provisions of Article 3 of the repealed Directive 90/314/EEC. In line with the purpose of strengthening the position of the traveller, the latter is allowed to transfer the contract *ad nutum* (instead of only in case of impossibility to use the package travel), with reasonable notice (given at the latest seven days before the start) to be transmitted on a durable medium (rather than in writing). The passive solidarity regime expressly refers to, in addition to the payment of the balance due, any additional fees, charges or other costs arising from

the transfer, which cannot be unreasonable and cannot exceed the expenses incurred by the organiser due to the transfer.

With the same *ratio legis* of recognising broader rights to travellers, Article 12 of the new PTD gives the latter the right to withdraw *ad nutum* from the contract at any time before the start of the package. In this case, however, the traveller may be required to pay an appropriate and justifiable termination fee to the organiser, corresponding to the price of the package minus the cost savings and income from alternative deployment of the travel services. With respect to off-premises contracts, Article 12(5) allows the Member States to provide in their national law that the traveller has the right to withdraw from the package travel within a period of 14 days without giving any reason.

The traveller also has the right to terminate the contract before the start of the package without paying any termination fee – with a full refund of any payments, but without additional compensation – in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package or the carriage of passengers to the destination. See also Sections I and K below⁽¹²⁾.

The issue has recently taken on great relevance in relation to the effects of the COVID-19 pandemic on package travel contracts⁽¹³⁾, with respect to which the European Commission has intervened on several occasions, at first with the Commission Notice Interpretative Guidelines on European Union passenger rights regulations in the context of the developing situation with

⁽¹²⁾ At the international level, see the UNWTO “Recommendations for the assistance to international tourists in emergency situations”, issued by UNWTO Secretariat in the framework of Decision CE/DEC/4(CXII), adopted by the Executive Council (EC) at its one hundred twelfth session held in Tbilisi (Georgia) on 15-17 September 2020.

⁽¹³⁾ See, in particular, the essays collected in F. MORANDI (ed.), *Tourism law faces COVID-19*, in *Italian Journal of Tourism Law*, 2020, 30, available in www.francoangeli.it/Riviste/sommario.aspx?anno=2020&idRivista=167&lingua=EN, and in C. TORRES - F. J. MELGOSA ARCOS (eds.), *The Legal Impacts of COVID-19 in the Travel, Tourism and Hospitality Industry*, Estoril-Lisbon, 2022; see also, J. M. BECH SERRAT, *Covid-19 Contractual Measures in Hospitality: Lessons from Problematic Regulation in Europe*, in *European Consumer and Market Law*, 2021, 10(2), 48; R. R. CHEN - E. GERSTNER - D. HALBHEER - P. ROMA, *Service Shutdowns and Compensation: Cash Refunds or Vouchers?*, 2021, No MKG-2021-1416 HEC Paris Research Paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801132; M. B. M. LOOS, *One Day I'll Fly Away...: Voucher Schemes for Cancelled Package Travel Contracts after the Outbreak of the Covid-19 Pandemic*, in *European Consumer and Market Law*, 2021, 10(3), 122.

Covid-19 (2020/C 89 I/01) of 18 March 2020⁽¹⁴⁾ and the Information on the package travel directive in connection with COVID-19 of 19 March 2020 (COM(2020) 550 final)⁽¹⁵⁾.

In order to deal with the pandemic by avoiding the collapse of the travel and tourism sector and to face the operators' liquidity crisis in the first phase of the emergency, several Member States adopted specific rules temporarily allowing organisers to issue vouchers as an alternative to a cash refund or to postpone reimbursement for cancelled package travels. According to the European Commission, under certain conditions, these rules were contrary to Articles 12(2), 12(3)(b), and 12(4) read in conjunction with Article 4 of the new PTD⁽¹⁶⁾.

The European Commission intervened with the Recommendation of 13 May 2020 (C(2020) 3125 final)⁽¹⁷⁾, on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the Covid-19 pandemic. As reported by the European Commission, the Recommendation recognises the unsustainable cash-flow and revenue situation for the transport and travel sectors, due to the numerous cancellations entailed by the coronavirus pandemic. The Commission therefore recommended ways in which vouchers could be made more attractive, as an alternative to reimbursement in money, in order to increase their acceptance by passengers and travellers. The Recommendation also pointed out what kind of Union schemes are available to support undertakings in the travel and transport sectors⁽¹⁸⁾.

However, despite the Commission's recommendations to make vouchers more attractive and adapt national rules accordingly, this has not happened in some Member States.

On 2 July 2020, the European Commission launched infringement pro-

⁽¹⁴⁾ Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 2020/C 89 I/01 (18 March 2020) OJ C891/1.

⁽¹⁵⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tourism and transport in 2020 and beyond (13 May 2020) COM(2020) 550 final.

⁽¹⁶⁾ See COM(2021) 90 final.

⁽¹⁷⁾ See European Commission, Commission Recommendation of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic (13 May 2020) C(2020) 3125 final.

⁽¹⁸⁾ See COM(2021) 90 final.

ceedings by sending letters of formal notice to Greece and Italy for being in violation of EU rules protecting rights of passengers: both Greece and Italy have adopted legislation allowing carriers to offer vouchers as the only form of reimbursement, measures that do not comply with EU rules on air passenger rights (Regulation (EC) 261/2004⁽¹⁹⁾) and on waterborne travel (Regulation (EU) 1177/2010⁽²⁰⁾), while Italy has taken measures that do not comply with EU rules on bus and coach travel (Regulation (EU) 181/2011⁽²¹⁾) and rail passenger rights (Regulation (EC) 1371/2007⁽²²⁾).

The same day, the Commission decided to start infringement proceedings by sending a letter of formal notice to Czechia, Cyprus, Greece, France, Italy, Croatia, Lithuania, Poland, Portugal, and Slovakia on the grounds that their national rules infringe EU law on consumers' and travellers' rights: these ten Member States were violating Article 12(4) of the new PTD, allowing organisers of package travel to issue vouchers, instead of reimbursement in money, for cancelled trips, or to postpone reimbursement far beyond the 14-day period, as set in the new Directive, instead of taking into account the Commission Recommendation of 13 May 2020, adopted to support the Member States in setting up attractive, reliable, and flexible voucher schemes⁽²³⁾.

On 30 October 2020, the European Commission sent reasoned opinions to Croatia, Lithuania, and Slovakia for not having corrected their legislation and launched an infringement procedure against Bulgaria, where specific national rules on package travel came into application in August, obliging travellers to accept a voucher or a refund within 12 months after the cancellation of their travel packages.

At the same time, the Commission also decided to close the infringements

⁽¹⁹⁾ Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (17 February 2004) [2004] OJ L46/1.

⁽²⁰⁾ Regulation (EU) 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (17 December 2010) [2010] OJ L334/1.

⁽²¹⁾ Regulation (EC) 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (3 December 2007) [2007] OJ L315/14.

⁽²²⁾ Regulation (EU) 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (28 February 2011) [2011] OJ L55/1.

⁽²³⁾ See European Commission July infringements package: key decisions.

that were open against Czechia, Greece, France, Italy, Poland, and Portugal since these countries have corrected their legislation, or the legislation they introduced has expired. Finally, the Commission also closed the infringement that was open against Cyprus, as there was no evidence that the Cypriot legislation was not in conformity with the EU Package Travel Directive⁽²⁴⁾, and the Commission itself acknowledges that the Covid-19 pandemic has highlighted various limitations of the protection framework⁽²⁵⁾.

In turn, the organiser can terminate the contract and provide the traveller with a full refund of any payments and any additional compensation, which is not due in cases where the minimum number of participants required by the contract is not reached (and he notifies the termination within the period fixed in the contract), or the tour operator is unable to perform the contract due to unavoidable and extraordinary circumstances (and he notifies the traveller without undue delay before the start of the package).

With reference to the changes of the contract allowed to the organiser, the price revision deserves particular attention because Article 10 of the new Directive introduces a new symmetry between the position of the trader and that of the traveller.

The organiser has the right to increase the price within the mandatory limits indicated by the new PTD, in case of changes in transport costs, taxes or fees on the travel services, or exchange rates. The price increase is only possible when the contract expressly provides for this by indicating the calculation methods, at the latest 20 days before the start of the package, if the trader notifies the traveller clearly and comprehensibly of it with a justification for that increase and a calculation, on a durable medium. If the price increase exceeds 8% of the total price of the package, the traveller is entitled to terminate the package travel contract and can accept a substitute package.

Unlike what was established in the past, the traveller also has the right to a corresponding reduction in the price if the costs of the package travel decrease due to the same circumstances, occurring after the conclusion of the

⁽²⁴⁾ European Commission October infringements package: key decisions webpage; for more detail on all decisions taken, consult the European Commission infringement decisions' register website.

⁽²⁵⁾ See M. B. M. LOOS, *One Day I'll Fly Away...: Voucher Schemes for Cancelled Package Travel Contracts after the Outbreak of the Covid-19 Pandemic*, cit., 122; see also J. M. BECH SERRAT, *Covid-19 Contractual Measures in Hospitality: Lessons from Problematic Regulation in Europe*, cit., 48; R. R. CHEN - E. GERSTNER - D. HALBHEER - P. ROMA, *Service Shutdowns and Compensation: Cash Refunds or Vouchers?*, cit.

contract and before the start of the package (without prejudice to the right of the organiser to deduct the actual administrative expenses, of which he is required to provide proof).

By reaffirming the general principle according to which the organiser cannot unilaterally change the contract terms other than the price, the new Directive regulates the variations of the other conditions of the package travel contract.

Pursuant to Article 11, the organiser is not allowed to change the conditions of the agreement unless he has reserved that right in the contract, the change is insignificant, and he informs the traveller in a clear, comprehensible, and prominent manner on a durable medium. In the event that, before the start of the package, the organiser is forced to significantly modify any of its main characteristics, or cannot fulfil the special requirements of the traveller, or he proposes to increase the price of the package by more than 8%, the traveller may accept a substitute package (of an equivalent or a higher quality without a price increase, or of lower quality or cost with an appropriate price reduction) or terminate the contract without paying a termination fee.

If the contract is terminated and the traveller does not accept a substitute package travel, the organiser is required to refund all payments without undue delay and, in any event, not later than 14 days after termination.

7. Responsibility for the performance of the package

The rules relating to the liability of the organiser introduced by Chapter IV (Responsibility for the performance of the package, Articles 13-16 of the new PTD) serve as the cornerstone of the new discipline of the package travel contract. It is one of the parts in which the new PTD differs more significantly from Directive 90/314/EEC, both from the point of view of the drafting of the rules and from the choices made by the legislator.

According to the general principle established by Article 13(1) of the new Directive, the organiser is responsible for the performance of the travel services included in the package, irrespective of whether those services are to be performed by the organiser or by other travel service providers.

In the latter regard, the EU Court of Justice has recently ruled that the organiser is responsible for the fulfilment of the obligations arising from a package travel contract in the event of non-performance or improper performance which is the result of the actions of an employee of a supplier of services. According to the EU Court of Justice (Third Chamber) in *X v Kuoni*

Travel Ltd⁽²⁶⁾, in a case of rape and assault on a tourist by an electrician and hotel employee, who was on duty and wore the uniform of staff members, that employee cannot be regarded as a supplier of services and the organiser cannot be exempted from its liability arising from such non-performance or improper performance.

The discipline of the organiser's liability is closely related to the notion of "lack of conformity", which Article 3(13) of the new Directive defines as a failure to perform or improper performance of the travel services included in a package. In the event of a lack of conformity, a series of contractual remedies is envisaged depending on the possibilities granted by the circumstances of the case.

The traveller is required to inform the organiser without undue delay, in compliance with the cooperation obligation deriving from the contract, in order to allow the organiser to become aware of any disservice and to act to properly fulfil the obligation. Recital 34 indicates that failure to do so can be taken into account when determining the appropriate price reduction or compensation for damages where such notice would have avoided or reduced the damage. According to Article 15, the traveller may address messages, requests, or complaints in relation to the performance of the package directly to the retailer through which it was purchased.

The organiser must remedy the lack of conformity, unless that is impossible or entails disproportionate costs, considering the extent of the lack of conformity and the value of the travel services affected (Article 12(3) of the new Directive). If the organiser fails to comply within a reasonable period set by the traveller or if it is necessary to remedy the lack of conformity immediately, the latter is allowed to remedy the defect personally and request reimbursement of the necessary expenses. If a lack of conformity substantially affects the performance of the package, and the organiser has failed to remedy it, the traveller may terminate the contract without paying a termination fee and, where appropriate, request a price reduction and/or compensation for damages.

Concerning the remedies, where a significant proportion of the travel services cannot be provided, the organiser must propose, at no extra cost, suitable alternative arrangements of equivalent or higher quality or of lower quality with an adequate price reduction. The traveller may reject the offered alternative arrangements only if they are not comparable to what was agreed

⁽²⁶⁾ CJEU 18 March 2021, in case C-578/19, *X v Kuoni Travel Ltd*, ECLI:EU:C:2021:213.

in the package travel contract, or the price reduction granted is inadequate (Article 13(5) of the new PTD). If no alternative is possible or the traveller refuses the offer, the latter has the right to a price reduction and/or compensation for damages and the organiser is also required to provide repatriation by an equivalent means of transport without undue delay and at no extra cost.

The regulation of the contract that binds the traveller and the retailer, and the responsibility of the latter, is one of the most complex features of the new rules on package travel and represents the issue on which the purpose of maximum harmonisation finds the greatest obstacles. In this regard, Article 13(1) provides that “Member States may maintain or introduce in their national law provisions under which the retailer is also responsible for the performance of the package”. In this regard, see also the similar discipline provided for the seller by Article 11 of Directive 2019/771 (the “new Consumer Sales Directive”) ⁽²⁷⁾. Considering the profound differences existing between the national laws of the Member States regarding the liability of the seller, the EU has renounced imposing a unitary model.

In a nutshell, the transposition of the new Directive follows two main models. The first scheme configures a co-responsibility of the organiser and the retailer and, therefore, the latter is also liable for the performance of the package travel contract, according to the principles of joint obligations. This is the case, for example, with French Order No 2017-1717 of 20 December 2017, whose Article 3 repeals Article L. 211 - 16 - I.1 of the Tourism Code; or with Article 12(1) of Greek Presidential Decree 7 of 16 January 2018; or with Article 35(3) of Portuguese Decree-Law No 17/2018 of 8 March 2018; or with Spanish Royal Decree-Law No 23/2018 of 21 December 2018, which amends Article 161 of the Royal Legislative Decree 1/2007 of 16 November 2007.

The second paradigm outlines distinct liabilities for each subject, according to which each is liable for the non-fulfilment of the obligations directly assumed. In other legal systems, on the contrary, the contract that binds traveller and retailer has been set up as an independent contract (an “Intermediary Travel Contract”), formally distinct from the package travel contract, following the traditional approach that dates back to Article 1(3) of the 1970 Brussels International Convention on Travel Contract (“CCV”): the organiser is responsible for the performance of the package travel contract and the retailer for the correct execution

⁽²⁷⁾ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (22 May 2019) [2019] OJ L136/28.

of the mandate received from the traveller (see Article 17 ff CCV on the travel intermediary liability). This is the case, e.g., with the German Civil Code, §651v, as last amended by Article 1 of the Act of 6 June 2017, and with the Italian Tourism Code, Article 50 ff of Legislative Decree No. 62 of 21 May 2018.

In any case, pursuant to Article 15 of the new PTD, the traveller may address messages, requests, or complaints in relation to the performance of the package directly to the retailer through which it was purchased. For the purposes of compliance with time-limits or limitation periods, the date of receipt by the retailer is considered as receipt by the organiser.

With particular reference to the situation where a booking error is made, Article 21 of the new Directive provides that a trader is liable for any errors due to technical defects in the booking system which are attributable to him and for errors made during the booking process, except in the event that they are attributable to the traveller or are caused by unavoidable and extraordinary circumstances.

8. Price reduction and compensation for damages

The new Directive introduces a significant change compared to the past by providing that the traveller has the right to an appropriate “price reduction” for any period during which there was a lack of conformity unless the organiser proves that the lack of conformity is attributable to the traveller (Article 14(1)). The remedy of the reduction of the price is conceived and modelled on the corresponding figure provided for by Articles 13 and 15 of the new Consumer Sales Directive (EU) 2019/771.

In parallel, the traveller is entitled to receive appropriate “compensation for any damage” suffered as a result of any lack of conformity (Article 14(2) of the new PTD) unless the organiser proves that this is attributable to the traveller, or to a third party (unconnected with the travel services included in the package) and is unforeseeable or unavoidable or is due to unavoidable and extraordinary circumstances (Article 14(3)). “Unavoidable and extraordinary circumstances” means a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken (Article 3(12)).

Without prejudice to the right to an adequate reduction of the price, the compensation obligation refers both to damages to the person of the traveller and to damages other than those to the person. According to Recital 34 of the new Directive, “compensation should also cover non-material damage, such as compensation for loss of enjoyment of the trip or holiday because of substantial problems in the performance of the relevant travel services”.

This is a direct reference to the leanings of the Court of Justice, expressed in the leading case *Leitner*, according to which European Union law “is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday”⁽²⁸⁾.

The new Directive does not provide for legal limitations and does not allow conventional limitations for “personal injury”, following a consolidated trend in the international regulation of transport contracts.

In this regard, the legislator has made an effort to align the discipline of compensation for damage with the provisions of international conventions and the EU regulation governing the standalone services included in the package travel contract.

On the one hand, the compensation is subject to the limitations provided for by the international conventions binding the EU. On the other hand, Member States may limit the compensation in the case of uniform rules not binding the EU. In any case, that limitation does not apply to personal injury or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package.

At the same time, any right to compensation or price reduction does not affect the rights of travellers under Regulation (EC) 261/2004⁽²⁹⁾. According to *HQ, IP, legally represented by HQ, JO v Aegean Airlines SA* a passenger who, under Directive 90/314/EEC, has the right to hold the organiser liable for reimbursement of the cost of his air ticket, can no longer claim reimbursement of the cost of that ticket from the air carrier on the basis of Regulation (EC) No 261/2004, even in case of insolvency of the organiser⁽³⁰⁾. According to *Libuše Králová v Primera Air Scandinavia* the passenger of a delayed flight is entitled to compensation provided for by Regulation (EC) 261/2004 even if the traveller and the air carrier have not entered into a contract between them and the flight is part of a package travel⁽³¹⁾. Compensation or price reduction must be deducted in order to avoid overcompensation.

⁽²⁸⁾ CJEU 12 March 2002, in case C-168/00, *Leitner v TUI Deutschland GmbH & Co KG*, ECLI:EU:C:2002:163.

⁽²⁹⁾ CJEU 10 July 2019, in case C-163/18, *HQ, IP, legally represented by HQ, JO v Aegean Airlines SA*, ECLI:EU:C:2019:585.

⁽³⁰⁾ CJEU 26 March 2020, in case C-215/18, *Libuše Králová v Primera Air Scandinavia*, ECLI:EU:C:2020:235.

⁽³¹⁾ See F. MORANDI - E. G. ROSAFIO, entry: *Denied boarding, delay and cancellation*, in *Oxford Encyclopedia of EU Law (OEEUL)*, edited by S. Garben and L. Gormley, Oxford, June 2022.

It is worth noting that the limitation period for introducing claims cannot be less than two years. It is interesting to compare the provision in question with the parallel issues regulated by Articles 10 and 11 of the new Consumer Sales Directive (EU) 2019/771, according to which a period of two years is considered reasonable (Recital 41) and a liability or limitation period of two years or more usually reconciles the interests of both the seller and the consumer (Recital 43), as well as by Article 11 of Directive (EU) 2019/770⁽³²⁾, according to which Member States should ensure that traders are liable for not less than two years from the time of supply, if under national law he is only liable for any lack of conformity that becomes apparent within a period of time after supply.

The organiser or retailer who has paid compensation, granted a price reduction, or fulfilled other obligations has the right to seek redress from any third parties which contributed to the harmful event.

In order to complete the traveller protection measures, in some Member States, the organiser is required to take out appropriate civil liability insurance for compensation for damages (to be indicated in the pre-contractual information).

9. Obligation to provide assistance

Alongside restorative remedies and compensatory obligations, the new Directive also introduces, in favour of the traveller, some obligations of assistance, which, especially in recent times, have become increasingly important. These measures follow the trend expressed by the EU regulations on transport contracts, according to which passengers are entitled to assistance with regard to their immediate practical needs in particular circumstances⁽³³⁾.

In particular, as long as it is impossible to ensure the traveller's return because of unavoidable and extraordinary circumstances, the organiser bears the cost of accommodation for a period not exceeding three nights (Article

⁽³²⁾ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (22 May 2019) [2019] OJ L136/1.

⁽³³⁾ In particular, see the common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (Regulation (EC) 261/2004), rail passengers' rights and obligations (Regulation (EC) 1371/2007), the rights of passengers when travelling by sea and inland waterway (Regulation (EU) 1177/2010), and the rights of passengers in bus and coach transport (Regulation (EU) 181/2011).

13(7) of the new PTD). The limitation does not apply to persons with reduced mobility, as defined in Article 2(a) of Regulation (EC) 1107/2006⁽³⁴⁾, and any person accompanying them, pregnant women, and unaccompanied minors, as well as persons in need of specific medical assistance.

The organiser also gives appropriate assistance to the traveller in difficulty, in particular by providing information on health services, local authorities, and consular assistance and assisting the traveller to make distance communications and helping the traveller to find alternative travel arrangements (Article 16 of the new Directive). The organiser is entitled to charge a reasonable fee for such assistance if the difficulty is caused intentionally by the traveller or through the traveller's negligence. This provision has taken on particular importance from the point of view of the protection of the traveller, especially in the period in which travel has been subject to drastic restrictions due to the COVID-19 pandemic. The outbreak has determined the adoption of some measures to ease the rigid rules on package travel contracts and has put a strain on the stability of the regulatory system established by the new Directive⁽³⁵⁾.

The organiser and the retailer must also provide the traveller with the necessary pre-contractual information on optional or compulsory insurance to cover the cost of termination of the contract by the traveller or the cost of assistance, including repatriation, in the event of accident, illness, or death (Article 5(1)(b) of the new Directive).

10. Insolvency protection

The protection of the traveller in the event of the organiser's insolvency has long been at the core of the EU's attention, and as a result of the serious consequences of the repeated cases of bankruptcy, which, especially in recent years, have affected the sector. The issue is thoroughly illustrated by the new Directive and is the subject of specific attention in Recitals 38 to 44. The importance of the issue is such that the term "insolvency" occurs 94 times among Recitals, Articles, and Annexes. As a matter of fact, the application of Article 7 of the repealed Directive 90/314/EEC encountered serious difficulties, both in terms of harmonisation of the laws of Member States and in

⁽³⁴⁾ Regulation (EC) 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (26 July 2006) [2006] OJ L204/1.

⁽³⁵⁾ At the international level, see the UNWTO "Recommendations for the assistance to international tourists in emergency situations".

terms of effective consumer protection.

In addition to this, the recent COVID-19 pandemic has severely tested the strength of the legal system envisaged by the new Directive and the structure itself of the relations between travellers and traders⁽³⁶⁾: on one hand, by questioning the balance of the opposing interests of the parties and, on the other hand, by testing the effectiveness of the assistance measures guaranteed to users and of the protection measures in the event of insolvency or bankruptcy of the organisers. The concerns arising from the recent bankruptcy cases of tour operators of international importance, combined with the financial difficulties encountered by traders, have had significant repercussions on the position adopted by the EU to deal with the emergency situation.

The question was immediately brought to the attention of the EU debate and was the subject of interventions by the Court of Justice on several occasions, starting with the decision pronounced in the leading case *Dillenkofer and ors v Germany*⁽³⁷⁾.

Article 17 of the new Directive requires the Member States to ensure that organisers provide security for the refund of all payments made by or on behalf of travellers insofar as the relevant services are not performed as a result of the organiser's insolvency. About the characteristics of the coverage, the security must be effective, include reasonably foreseeable costs and embrace the amounts of payments, as well as the cost for repatriations. If the transport is included, organisers must also provide security for the travellers' repatriation. A continuation of the package may also be offered.

In order to better safeguard the position of the traveller, the protection is granted regardless of the place of residence, the place of departure or where the package is sold irrespective of the Member State where the entity in charge of the insolvency protection is located. The principle refers to organisers, regardless of whether they are established in the EU, who sell or offer packages for sale in a Member State, or who by any means direct such activities in a Member State.

⁽³⁶⁾ With reference to the legal effects of the impact of COVID-19 on travel contracts, see the contributions cited above.

⁽³⁷⁾ CJEU 8 October 1996, in joined cases C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94, *Dillenkofer and ors v Germany*, ECLI:EU:C:1996:375; see also, CJEU 14 May 1998, in case C-364/96, *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG*, ECLI:EU:C:1998:226, and CJEU 15 June 1999, in case C-140/97, *Rechberger and ors v Austria*, ECLI:EU:C:1999:306; CJEU 16 February 2012, in case C-134/11, *Blödel-Pawlik v HanseMercur Reiseversicherung AG*, ECLI:EU:C:2012:98.

Pursuant to Article 18 of the new Directive, Member States recognize any insolvency protection an organiser provides under such measures of the Member State of his establishment and designate central contact points to facilitate the administrative cooperation and supervision of organisers operating in different Member States.

11. Recent developments

In conclusion, by innovating the previous legal framework, the EU intervened to address the profound transformations of the market and offer a response to the new challenges imposed by the online sale of package travel.

However, despite the relevant steps forward made by the new Directive at the time of writing, a proposal for revision is currently pending, according to COM(2021) 90 final. The broad definition of package travel and the new regulation of linked travel arrangements, among others, gave rise to questions from stakeholders and authorities. In addition, new challenges have emerged in relation to insolvency, especially in the context of the bankruptcies of major tour operators and the COVID-19 pandemic.

At the same time, the EU is about to adopt new rules on the digital market and digital services, including those relating to tourism services, which will have a significant impact on the regulation of package travel and linked travel arrangements⁽³⁸⁾.

In any case, the new regulation of the package travel contract and linked travel arrangements is thus proposed on the international scene⁽³⁹⁾ as the reference model for any legal initiative that intends to achieve the right balance between a high level of protection for travellers and a relevant degree of equal competition among businesses.

⁽³⁸⁾ See the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), and the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

⁽³⁹⁾ At the international level – after the experience of the International Convention on Travel Contracts (“CCV”), done at Brussels the 23 April 1970, which can now be considered substantially exhausted – see the UNWTO “International Code for the Protection of Tourists”.

CHAPTER V

THE ITALIAN EXPERIENCE ON PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENTS

SUMMARY: 1. The transposition of the Directive (EU) 2015/2302 in Italy. – 2. The key innovations introduced in the Italian Tourism Code. – 3. The notion of “package travel” and “linked travel arrangements”. – 4. The form of contract and information obligations. – 5. Changes to the package travel contract. – 6. The responsibility of the organiser. – 7. The compensation for damages. – 8. The “intermediate travel contract” and the responsibility of the retailer according to Italian law. – 9. Civil liability, duty of insurance, and protection in the event of insolvency or bankruptcy. – 10. Administrative protection. – 11. A few brief concluding remarks.

1. The transposition of the Directive (EU) 2015/2302 in Italy

In implementing Legislative Decree 21 May 2018, No. 62 ⁽¹⁾, Italy has fulfilled the obligations deriving from the Directive (EU) 2015/2302 of 25

⁽¹⁾ Concerning the implementation in Italy of the 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, see G. DE CRISTOFARO, *La nuova disciplina europea dei contratti di viaggio (dir. 2015/2302/UE) e le prospettive del suo recepimento nell'ordinamento italiano*, in A. FINESSI (ed.), *La nuova disciplina europea dei contratti di viaggio. La direttiva 2015/2302/UE e le prospettive della sua attuazione nell'ordinamento italiano*, Napoli, 2017, 13, and in *Nuove leggi civ. comm.*, 2017, 1099; previously, M. LOPEZ DE GONZALO, *La nuova direttiva sui pacchetti turistici e la normativa internazionale e comunitaria in tema di trasporto di persone*, in *Dir. mar.*, 2016, 405; G. CIURNELLI, *I contratti del turismo organizzato*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, in the VI ed., Torino, 2017, 350 (see currently the VIII ed, 2023); M. MAZIER - C. CAVANNA, *Introduzione alla nuova direttiva UE in tema di pacchetti turistici e di servizi turistici collegati*, in *Dir. mar.*, 2017, 275; F. MORANDI, *The new european regulation of package travel and linked travel arrangements*, in *Dir. trasp.*, 2017, 99; R. PASQUILLI, *La Direttiva 2015/2302/UE. Contenuto e forma del contratto di viaggio*, in *Riv. dir. civ.*, 2017, 1621; A. PEPE, “*Circostanze eccezionali*” ed esonero da responsabilità

November 2015⁽²⁾, regarding package travel and linked travel arrangements,

del tour operator nella nuova direttiva viaggi, in *Contr. impresa Europa*, 2017, 254; G. ROSSONI, *La Direttiva (UE) 2015/2302 relativa ai pacchetti turistici e ai servizi turistici collegati: una prima lettura*, in *Riv. it. Dir. tur.*, 2017, 88; G. TERLIZZI, *Modifiche unilaterali e cancellazione del pacchetto turistico. La normativa in vigore e le novità introdotte dalla direttiva 2015/2302 UE*, in *Oss. dir. civ. comm.*, 1/2018, 147; A. ZAMPONE, *Riflessioni sulla dir. (UE) 2015/2302 relativa ai pacchetti turistici ed ai servizi turistici collegati*, in *Dir. trasp.*, 2018, 1; see also, for a specific profile, G. BENELLI, *Utilizzazione commerciale di unità da diporto e pacchetti turistici*, comment to Giud. pace Torre Annunziata, 11 July 2018, No. 10550, in *Dir. trasp.*, 2019, 214. Lately, in particular, M. BRIGNARDELLO, *I contratti del «turismo organizzato» e di crociera. Esegesi delle disposizioni del capo I, titolo VI, del codice del turismo (articoli da 32 a 51 novies)*, Bari, 2023; see also, M. COLANGELO - F. MORANDI - V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, IV ed., Roma, 2025, 152, available at <https://romatrepress.uniroma3.it/libro/introduction-to-european-union-transport-law-iv-edizione/>, as well as the essays collected by G. CRICENTI - C. TINCANI (Eds.), *Trattato sul trasporto di persone e sul turismo organizzato*, Milano, 2025, 715.

⁽²⁾ For a first analysis of the implications relating to the transposition of Directive (EU) 2015/2302 in the various Member States of the European Union, see the studies published in the volume edited by V. FRANCESCHELLI - F. MORANDI - C. TORRES (eds.), *The New Package Travel Directive*, Lisboa, 2017, and in *Journal of European Consumer and Market Law*, n. 3/2016 (A. DE VRIES, *Travel intermediaries and responsibility for compliance with EU travel law: a scattered legal picture*, 119-125, M. B. M. LOOS, *Precontractual information obligations for package travel contracts*, 125-130, J. LUZAK, *Vulnerable travellers in the digital age*, 130-135); see also A. ASENSI MERAS, *Contratación on line de servicios turísticos y paquetes dinámicos de turismo*, in *Investigaciones Turísticas*, 12/2016, 163-182; A. BATUECAS CALETRÍO, *La contratación de viajes vinculados*, in *Aranzadi civil-mercantil*, 6/2016, 29; J. M. BECH SERRAT, *Consumer travel law*, in *Research Handbook on EU Consumer and Contract Law*, edited by C. TWIGG-FLESNER, Cheltenham, 2016, 360 ss.; C. BERENGUER-ÁLBALADEJO, *Luces y sombras de la nueva Directiva (UE) 2015/2302 del Parlamento Europeo y del Consejo, de 25 de noviembre de 2015, relativa a los viajes combinados y a los servicios de viaje vinculados*, in *International Journal of Scientific Management and Tourism*, 2/2016, 33; E. FÜHRICH, *Die neue Pauschalreiserrichtlinie. Inhalt und erste Überlegungen zur Umsetzung*, in *Neue Juristische Wochenschrift*, 2016, 1204 ss.; I. GONZÁLEZ CABRERA, *¿Estamos ante el mismo producto si se adquiere en línea un viaje combinado o distintos servicios de viaje vinculados?*, in *Revista de Derecho Civil*, 3/2016, 139-144; S. BERGMANN, *Die EU-Richtlinie: über Pauschalreisen und verbundene Reiseleistungen – eine lange Reise zum neuen Recht*, in *Verbraucher und Recht*, 2016, 43 ss.; I. GONZÁLEZ CABRERA, *Una nueva configuración legal del viaje turístico. Del viaje combinado al paquete dinámico*, in *Aranzadi civil-mercantil*, 7/2017, 29-66; P. HIENICKE, *Pauschalreise-Richtlinie – Neuer Wein in guten Schläuchen?*, in *Zeitschrift für Rechtspolitik*, 2016, 226 ss.; F. MORANDI - S. KEILER, *The Directive on package travel and linked travel arrangements*, cit., 401-413; A. PANIZA FULLANA, *Viajes combinados y servicios de viaje vinculados: replanteamiento de conceptos y sus consecuencias sobre la responsabilidad*, Madrid, 2017, 15 ss.; K. TONNER, *Die neue Pauschalreiserrichtlinie*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2016, 95 ss.; previously, S. KEILER, *Vorschlag: RL über Pauschal- und Bausteinreisen – Ein Zwischenbericht nach der Entschließung in 1. Lesung im Europäischen Parlament, das bereits den Namen der RL ändern will*, in *Ecolex. Fachzeitschrift für Wirtschaftsrecht*, 2014, 388 ss.

modifying the “Organized tourism contracts” discipline referred to in Chapter I of Title VI of Annex 1 – Legislative Decree 23 May 2011, No. 79, of the so-called “Tourism Code”⁽³⁾.

The new regulations came into effect on 1 July 2018 and apply to “package travel contracts” (Article 33, par. 1, letter *d*, of the Tourism Code), to “intermediate travel contracts” (Article 50 of the Tourism Code), and to “linked travel arrangements” (Article 49 of the Tourism Code) concluded as of this date.

By completely reforming the previous travel contract regulations, the legislative framework has been updated to the latest developments in the tourism sector, with the aim of adapting it to the reality of commercial traffic, eliminating ambiguity and filling in the regulatory gaps⁽⁴⁾.

⁽³⁾ For a first analysis of the new Articles from 32 to 51-novies of the Tourism Code, see A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio* (d.lgs. 21 maggio 2018, n. 62), in *Nuove leggi civili comm.*, 2018, 1307; G. GRISI - S. MAZZAMUTO, *Diritto del turismo*, II ed., Torino, 2018, 202; R. SANTAGATA, *Diritto del turismo*, IV ed., Torino, 2018, 267; comment to the D.lgs. 23 maggio 2011, n. 79, *Codice del turismo*, in V. CUFFARO (ed.), A. BARBA - A. BARENGHI (coord.), *Codice del consumo*, V ed., Milano, 2019, 1159.

⁽⁴⁾ See J. M. BECH SERRAT, *Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis*, Berlin-Heidelberg, 2012, and S. KEILER - F. MORANDI, *Package travel and assisted travel arrangements: The proposal for a new directive in light of a possible full harmonisation approach*, in *Riv. it. Dir. tur.*, 2014, 5; see also E. GÓMEZ CALLE, *En torno a una posible revisión del régimen del viaje combinado*, in CÁMARA LAPUENTE (dir.) and ARROYO AMAYUELAS (coord.), *La revisión de las normas europeas y nacionales de protección de los consumidores*, Madrid, 2012, 385; S. KEILER, *Der Vorschlag für eine Änderung der Fluggastrechte-VO – Eine Analyse aus wissenschaftlicher Sicht*, in *RRa (Reiserecht aktuell)*, 2013, 163; A. PANIZA FULLANA, *Nuevas fórmulas de comercialización on line de servicios turísticos: subsunción en los tipos legales y distribución de responsabilidad*, Granada, 2013; *Proposals for a new Package Travel Directive*, in *Travel Law Quarterly*, 2013, 193-229 (D. GRANT, *An Introduction*, 193; S. MASON - M. GATENBY, *The Definition of ‘Package’ and ‘Assisted Travel Arrangement’*, 196; E. FUENTES, *Definitions of ‘Traveller’, ‘Trader’, ‘Organiser’ and ‘Retailer’*, 201; J. KOLATSIK - A. LOSY, *Information Obligations and Content of the Package Travel Contract*, 204; S. PRAGER, *Pre-Departure Changes*, 210; A. PADFIELD, *Performance of the Package*, 217; F. BREHANY, *The Insolvency Provisions*, 224); M. C. BERENGUER ALBALADEJO, *Nuevos horizontes en materia de viajes combinados*, in *Revista de Derecho Privado*, 5/2014, 35 ss.; J. D. CAMARGO GÓMEZ, *Contratación electrónica de paquetes dinámicos de turismo en el ordenamiento jurídico español*, in *Ars Iuris Salmanticensis*, 2/2014, 95; P. MARTÍNEZ ESPÍN, *Impacto sobre la protección del consumidor de la Propuesta de Directiva del Parlamento Europeo y del Consejo relativa a los viajes combinados y los servicios asistidos de viaje, por la que se modifican el reglamento (CE) n° 2006/2004 y la Directiva 2011/83/UE y por la que se deroga la directiva 90/314/CEE*, in *Aranzadi civil-mercantil*, 9/2014, 99-123; A. PANIZA FULLANA (dir.), *Paquete dinámicos: problemas y soluciones jurídicas desde una perspectiva internacional*, Madrid, 2014; Id., *La Propuesta de Directiva relativa a los viajes combinados y los servicios asistidos de viaje: ¿El reconocimiento de la nueva realidad?*, in *Aranzadi civil-mercantil*, 4/2014, 51-60.

Technological innovation has always been an integral part of mobility systems, and it is destined to change the common travel experience profoundly⁽⁵⁾. At the same time, the possibilities offered by the network have also revolutionised the world of travel service distribution. New promotion and sales systems have been added, and to a considerable extent have replaced traditional channels, which have transformed the way travel operators today relate to travellers⁽⁶⁾.

Given the relevant changes that have taken place in the European Union market, the new regime intervenes to achieve a “full harmonisation” of the regulations⁽⁷⁾ and favour the creation of an effective “European Union travel space”.

Given the level of detail of the Directive and the objective of maximum harmonisation pursued by the European Union legislator, the Legislative transposition Decree is faithful to the Directive (EU) 2015/2302, whose Italian version was accepted as “basic text”, even though not always technically correct from a legal point of view⁽⁸⁾.

⁽⁵⁾ Concerning the concept of *disrupting innovation* see the classic C. M. CHRISTENSEN, *The innovator's dilemma: When new technologies cause great firms to fail*, Boston, MA (USA), 1997; previously, J. L. BOWER, C. M. CHRISTENSEN, *Disruptive Technologies: Catching the Wave*, Harvard Business Review, January-February 1995; more recently C. M. CHRISTENSEN - R. McDONALD - E. J. ALTMAN - J. E. PALMER, *Disruptive Innovation: An Intellectual History and Directions for Future Research*, Special Issue on *Managing in the Age of Disruptions*. *Journal of Management Studies* 55, No. 7, November 2018.

⁽⁶⁾ Regarding the legal effects, above all, F. DELFINI, *Il commercio elettronico*, in E. PICOZZA - E. GABRIELLI (dir.), *Trattato di diritto dell'economia*, Padova, 2004, 245; ID., *La collocazione di pacchetti turistici tra negoziazione tradizionale e negoziazione telematica*, in *Dir. tur.*, 2004, 106; previously ID., *Contratto telematico e commercio elettronico*, Giuffrè, Milano, 2002, 85 e 137; see also M. COLANGELO - V. ZENO-ZENCOVICH, *La intermediazione on-line e la disciplina della concorrenza: i servizi di viaggio, soggiorno e svago*, in *Dir. inf.*, 2015, 48, and F. MORANDI, *I contratti turistici telematici*, in V. FRANCESCHELLI - E. TOSI (eds.), *La tutela dei consumatori in Internet e nel commercio elettronico. Contratti - Responsabilità - Rimedi*, Milano, 2012, 595.

⁽⁷⁾ See Recitals from 2 to 6 of the Directive (UE) 2015/2302; for a critical evaluation of the choice made by the European legislator in the Article 4 of the Directive (“Level of harmonization”) see S. KEILER - F. MORANDI, *Package travel and assisted travel arrangements*, cit., 5, and ID., *The Directive on package travel and linked travel arrangements: The traveller protection in a full harmonization approach*, in V. FRANCESCHELLI - F. MORANDI - C. TORRES (eds.), *The New Package Travel Directive*, cit., 401.

⁽⁸⁾ G. DE CRISTOFARO, *La nuova disciplina europea dei contratti di viaggio (dir. 2015/2302/UE)*, cit., 12, notes that in the Italian version of the Directive (UE) 2015/2302, according to the translation that appears in the official documents, always appears the expression “tourist services”, while in the other language versions the adjective “travel” is always used to qualify the services (*travel service*, *service de voyage*, *servicio de viaje*, *Reiseleistung*), except for the

The new rules differ from the wording of the European Union provisions only in cases where the need to confirm the new regulations to the national system's legal institutions has made a specific terminological adjustment indispensable. Purely by way of example, the Legislator uses the "package travel contract" formula, which, due to supposed requirements of adherence to the Directive text, has been maintained, instead of the expression "travel contract" which would have been more in line with the national legal tradition⁽⁹⁾.

On the contrary, some expressions adopted in the Legislative Decree respond to the need to offer a correct classification of the figures provided for by the Directive within the Italian law. In this sense, for example, the formula "excessively onerous" was chosen, instead of the non-technical "disproportionate costs" (Article 13, par. 3, lett. *b*, of the Directive); the term "compensation", instead of "reimbursement", which is technically more correct; the expression "withdrawal", instead of "cancellation" (Article 5, par. 1, letter *b*, of the Directive); the sole notion of "failure to perform", consistent with the Article 1218 of the Civil Code, which includes the hendiadys "failure to perform or improper performance" used by the Directive.

Through a closing provision – which is, however, likely to take on a broader scope in a systematic interpretation perspective – the Italian legislator then established that the Consumer Code⁽¹⁰⁾ provisions would apply for all not

particular category of services identified by Article 3, n. 1, lett. *d*, of the Directive for which the adjective "tourist" is used.

⁽⁹⁾ The Italian tradition dates back to the Law 27 December 1977, No. 1084, of "Ratification and execution of the International Convention on Travel Contract (CCV), signed in Brussels on 23 April 1970"; see V. ROPPO, *Commento alla Convenzione internazionale relativa al contratto di viaggio*, in *Nuove leggi civ. comm.*, 1978, 1757; G. ROMANELLI - G. SILINGARDI, *Contratti di viaggi organizzati*, in *Enc. giur.*, IX, Roma, 1988, 1; G. SILINGARDI - M. RIGUZZI - E. GRAGNOLI, *Responsabilità degli operatori turistici*, in *Riv. giur. circol. trasp.*, 1988, 24; V. CUFFARO, *Contratto turistico*, in *Dig. disc. civ.*, IV, Torino, 1989, 294; C. S. CARRASSI, *Il contratto di viaggio*, Torino, 1991, 531; V. BUONOCORE, *Il contratto di viaggio*, in V. BUONOCORE - A. LUMINOSO - G. FAUCEGLIA - G. CAPO - R. ROSAPEPE - T. D'AMARO (eds.), *Contratti d'impresa*, I, Milano, 1993, 797; G. SILINGARDI - V. ZENO-ZENCOVICH (eds.), *La tutela del turista*, Napoli, 1993; S. MONTICELLI, *Il contratto di viaggio*, in G. CIURNELLI - S. MONTICELLI - G. ZUDDAS, *Il contratto di albergo. Il contratto di viaggio. I contratti del tempo libero*, Milano, 1994, 129.

⁽¹⁰⁾ Article 32, par. 3, of the Tourism Code expressly refers to Legislative Decree 6 September 2005, No. 206 (the so-called "Consumer Code"). With regard to the complex relationships and the difficulty of coordination between the rules on the package travel contract and the guarantees given to the consumer, better see notes 22 and 24. Concerning the evolution of the links between Consumer Code and Tourism Code see V. CUFFARO, *Un codice "consumato"* (*codice del consumo, credito ai consumatori e codice del turismo*), in *Corr. giur.*, 2011, 1191.

provided for by the regulations on “Package travel contracts”.

In this regard, it is worth noting how, pursuant to Article 2, par. 3, of the Directive (EU) 2015/2302, European Union law «does not affect national general contract law such as the rules on the validity, formation or effect of a contract, insofar as general contract law aspects are not regulated in this Directive».

2. The key innovations introduced in the Italian Tourism Code

Taking into account the reduced margin of discretion given to the Member States through Article 4 of the Directive (EU) 2015/2302, in the rare cases in which the possibility of choice was offered, the Italian legislator has completed a very complex implementation process⁽¹¹⁾.

Without betraying the “political” objective of remaining as faithful as possible to the wording of European Union regulations, a significant effort was made to respect the legal institutions present in the national law, without prejudice to the further rights already provided for by the Tourism Code that protect the traveller⁽¹²⁾. As a matter of fact, with regard to the user protection

⁽¹¹⁾ For a first overview see the contributions published in *Juris tourisme*, 213/2018, 21, and in particular V. AUGROS, *L'expérience européenne: tour d'horizon et réflexions sur la transposition de la directive*, *ivi*, 21; C. TORRES, *L'Europe à l'avant garde de la protection des touristes: l'exemple portugais*, *ivi*, 24; F. MORANDI, *L'expérience italienne*, *ivi*, 28; F. J. MELGOSA ARCOS, *Application de la directive en Espagne: una transposition tardive*, *ivi*, 31. For a first analysis of the discipline introduced in Austria and Germany see, respectively, S. KEILER, *Bundesgesetz über Pauschalreisen und verbundene Reiseleistungen (Pauschalreisegesetz – PRG)*, in S. KEILER - A. KLAUSER (eds.), *Österreichisches und Europäisches Verbraucherrecht. Kommentar*, Verlag, Österreich, 2018, and E. FÜHRICH, *Das neue Pauschalreiserecht. Umsetzung der Pauschalreisertchtlinie (EU) 2015/2302 in deutsches Recht*, in *Neue Juristische Wochenschrift*, 2017, 2945; ID., *Basiswissen Reiserecht Grundriss des Pauschal und Individualreiserechts*, Vahlen, München, 2018; E. FÜHRICH - A. STAUDINGER, *Reiserecht. Handbuch des Pauschalreise-, Reisevermittlungs-, Reiseversicherungs- und Individualreiserechts*, München, VIII ed., 2018; A. STAUDINGER - R. RUKS, *Das neue Pauschalreiserecht – Auswirkungen für Veranstalter und Vertrieb*, in *ReiseRecht aktuell*, 2018, 2. The French experience is analyzed in L. JÉGOUZO - C. LACHÈZE (eds.), *La directive “travel” made in France (I) e (II)*, in *Juris tourisme*, 212/2018, 16, and 213/2018, 15.

⁽¹²⁾ Concerning the previous version of Articles 32-50 of the Tourism Code see, among others, S. CATERBI, *La nuova disciplina in tema di turismo*, in *Resp. civ. prev.*, 2011, 2393; G. DE CRISTOFARO, *La disciplina dei contratti aventi ad oggetto pacchetti turistici nel Codice del turismo (d. lgs. 23 maggio 2011 n. 79): profili di novità e questioni problematiche (Prima parte)*, in *Studium iuris*, 2011, 1143, e *(Seconda parte)*, *ivi*, 1282; M. E. LA TORRE, *Il turismo e le regole. Riflessioni sul codice della normativa statale in materia di ordinamento e mercato del turismo*, in *Riv. sc. tur.*, 2/2011, 41; M. LA TORRE - M. COCUFFIO, *I contratti del turismo organizzato*, in *Corr.*

regulations, Legislative Decree No. 62/2018 offers a significant strengthening of the “traveller” position – a different notion compared to that of “consumer” and “tourist”, previously accepted in the Italian legal system⁽¹³⁾ – and also

merito, 2011, 1156; G. MALAGOLI, *Il nuovo codice del turismo, contenuti e garanzie*, in *Contr. impr. Europa*, 2011, 813; N. SOLDATI, *Brevi note a margine del codice del turismo*, in *Contr.*, 2011, 835; A. ROSSI, *Tutela del turista: conferme e novità*, in *Danno resp.*, 2011, 989; E. M. TRIPODI, *Il Codice del turismo. Un primo commento*, in *Disc. comm. serv.*, 3/2011, 19; E. M. TRIPODI - G. CARDOSI, *Il codice del turismo. Guida alla nuova disciplina dopo il D.Lgs. 79/2011*, Rimini, 2011; M. GUARINI, *I contratti del turismo organizzato on line e la tutela del “turista”*, in S. COGLIANI - M. GOLA - M. A. SANDULLI - R. SANTAGATA (eds.), *L'ordinamento del mercato turistico*, Torino, 2012, 227; R. PASQUILI, *La prestazione dell'organizzatore nel contratto di viaggio*, Torino, 2012, 13; R. SANTAGATA, *La nuova disciplina dei contratti del turismo organizzato nel codice del turismo “dimidiato”*, in *Nuove leggi civili comm.*, 2012, 1114; E. GUERINONI, *Contratti e responsabilità nel Codice del turismo*, in *Corr. giur.*, 2012, 5; F. ROMEO, *Il contratto di viaggio. Tutele specifiche e risarcimento del danno*, Padova, 2011; C. TINCANI, *La responsabilità dell'organizzatore di viaggi nell'ultima disciplina nazionale*, in *Riv. it. Dir. tur.*, 6/2012, 5; A. VENCHIARUTTI, *Viaggi organizzati e tutela del turista*, Padova, 2012; E. GRAZIOUSO, *La vendita di pacchetti turistici. Aspetti sostanziali, processuali e risarcitori*, Milano, 2013; F. ROMEO, *Pacchetto turistico “all inclusive” e responsabilità del tour operator per i danni causati al turista dal terzo prestatore di servizi*, in *Contr.*, 2013, 7; R. CAMPIONE, *Contratti del turismo organizzato*, in V. ROPPO (dir.), *Trattato dei contratti*, IV, *Opere e servizi* – 2, Milano, 2014, 442; C. ALVISI, *Il diritto del turismo nell'ordine giuridico del mercato*, Torino, 2015, 174; C. ALVISI, G. TASSONI, *Commento agli artt. 32-51 cod. tur.*, in V. CUFFARO (ed.), *Codice del consumo*, IV ed., Milano, 2015, 1065.

⁽¹³⁾ With regards to the protection given to consumers and tourists in the previous regulations, see the rules referring to the “consumer” pursuant to Article 5 of Legislative Decree 17 March 1995, No. 111, of “Implementation of Directive No. 90/314/EEC on package travel, package holidays and package tours” (repealed by Article 146, par. 1, lett. e, of the Consumer Code) and later to Article 83, par. 1, lett. c, of the Consumer Code (repealed by Article 3, par. 1, lett. m, of Legislative Decree No. 79/2011), then to the “tourist” pursuant to Article 33, par. 1, lett. c, of the Tourism Code, see V. ROPPO (ed.), *Viaggi, vacanze e circuiti tutto compreso*, in *Nuove leggi civ. comm.*, 1997, 19; G. SILINGARDI - F. MORANDI, *La “vendita di pacchetti turistici”*, Torino, II ed., 1998 (I ed., 1996); L. PIERALLINI, *I pacchetti turistici. Profili giuridici e contrattuali*, Milano, 1998; G. TASSONI, *Il contratto di viaggio*, Milano, 1998; A. FLAMINI, *Viaggi organizzati e tutela del consumatore*, Napoli, 1999; V. BUONOCORE, *I contratti di trasporto e di viaggio*, Torino, 2003; A. SANTUARI, *Il contratto di viaggio “all inclusive” tra fonti interne e diritto transnazionale*, Padova, 2003; F. MORANDI, *I contratti di viaggio*, in F. MORANDI - M. M. COMENALE PINTO - M. LA TORRE, *I contratti turistici*, Milano, 2004; *Commento agli artt. 82/100*, in G. ALPA - L. ROSSI CARLEO (eds.), *Il codice del consumo. Commentario*, Napoli, 2005; S. MONTICELLI - M. GAZZARA, *Il contratto di viaggio*, in P. RESCIGNO - E. GABRIELLI (dir.), *Trattato dei contratti*, vol. 3: *I contratti dei consumatori*, edited by E. GABRIELLI and E. MINERVINI, Torino, 2005, 745 ss.; F. MOLFESE, *Il contratto di viaggio e le agenzie turistiche*, II ed., Padova, 2006; L. TULLIO, *La responsabilità dell'organizzatore e dell'intermediario dopo il codice del consumo*, in S. BUSTI - A. SANTUARI (eds.), *Attività alberghiera e di trasporto nel pacchetto turistico all inclusive; le forme di tutela del turista consumatore*, Trento, 2006, 119; A. ANTONINI, *Prestazione di servizi*

expressly addressed to the “professional”.

It must be acknowledged, however, that according to the same Article 4 of Directive (EU) 2015/2302, Member States are not entitled to maintain or introduce in their national law any regulations diverging from those established by the Directive itself, “including more or less stringent provisions which would ensure a different level of traveller protection”.

Likewise, in line with the traditional approach, the Tourism Code maintains the organiser’s position separate from that of the package travel retailer, regulating the obligations and responsibilities of the operators in a different manner, depending on the stipulation of a package travel contract or an “intermediate travel contract”.

With reference to the basic Directive criteria that guided the preparation of the wording, the Italian legislator considered it appropriate to retrieve the indications contained in the various “Recitals” of the Directive ⁽¹⁴⁾, in order to guarantee complete harmonisation of the package travel regulations and to favour its interpretation in conformity with the European Union law ⁽¹⁵⁾.

turistici e diritti del cliente danneggiato, in *Giust. civ.*, 1997, 393; A. VENCHIARUTTI, *La disciplina dei servizi turistici nel codice del consumo e linee di riforma a livello comunitario*, in *Dir. tur.*, 2007, 335; M. COCUCCHIO, *Viaggio turistico e vacanza rovinata*, Milano, 2010, 24; F. MORANDI, *Contratto di viaggio*, in N. IRTI (dir.), *Dizionario del diritto privato*, vol. *Diritto della navigazione*, edited by M. DEIANA, Giuffrè, Milano, 2010, 134; L. ROSSI CARLEO - M. DONA, *Il contratto di viaggio*, Napoli, 2010; previously, U. IZZO, “Vacanze comunitarie”. *Quale tutela per il turista italiano in vista dell’attuazione della Direttiva CEE in materia di viaggio “tutto compreso”*, in R. PARDOLESI (ed.), *Saggi di diritto privato europeo; persona, proprietà, contratto, responsabilità civile, privative*, Napoli, 1995, 320.

⁽¹⁴⁾ With the aim of achieving full harmonization of the rules of the Member States, the new European Union legislation on package travel makes an attempt to regulate every possible case through a typically Anglo-Saxon caseload approach, which attempts to offer, sometimes hypertrophied and redundant, a regulatory solution to all possible cases (in this sense, the structure of Directive (EU) 2015/2302 differs strongly from the approach of the previous Directive 90/314/EEC). For possible repercussions on contractual practice, see M. FOGLIA, *Il contratto autoregolato: le merger clauses*, Torino, 2015, 218, and G. BELLANTUONO, *I contratti incompleti nell’economia e nel diritto*, Padova, 2000; E. GABRIELLI, *Contratto completo e clausola di arbitrato*, in *Riv. dir. civ.*, 2001, II, 291; A. FICI, *Il contratto “incompleto”*, Torino, 2005, 217; G. CLERICO, *Incompletezza del contratto e responsabilità delle parti*, in *Riv. crit. dir. priv.*, 2005, 593; A. FICI, *Contratto incompleto*, in *Dig. disc. priv.*, Sez. civ., Agg. III, vol. I, I, A-G, Torino, 2007, 412; E. GUERINONI, *Incompletezza e completamento del contratto*, Milano, 2007, 27; F. BOTTONI, *Incompletezza del contratto e riserva di determinazione convenzionale*, Napoli, 2013; see also F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, 1996, 327.

⁽¹⁵⁾ In literature see L. A. SCARANO, *L’interpretazione conforme al diritto dell’UE nella*

From the systematic point of view, it was decided to place the provisions transposing the Directive into the “Code of the state legislation on tourism market regulation” (the so-called “Tourism Code” in Annex 1 – Legislative Decree 23 May 2011, No. 79)⁽¹⁶⁾.

At the national level, therefore, the new rules occupy Articles 32-51-*novies* of the Tourism Code, replacing the entire Chapter I of Title VI, relating to “Package travel contracts”, to which the amendment made to the Legislative Decree 6 September 2005, No. 206, of the Consumer Code, is added according to the provisions established by Article 27 of the Directive.

3. The notion of “package travel” and “linked travel arrangements”

With regard to the contents, Section I (*Package travel and linked travel arrangements*, Articles 32-33 of the Tourism Code) focuses on the scope of applying the new regulations on package travel contracts and related definitions, without substantial divergences between the proposed text and the corresponding Articles 2 and 3 of the Directive (EU) 2015/2302⁽¹⁷⁾.

The transposition Decree introduced into the Italian legislation the new

giurisprudenza civile di legittimità, in A. BERNARDI (ed.), *L'interpretazione conforme al diritto dell'Unione europea. Profili e limiti di un vincolo problematico*, Napoli, 2015, 200. With reference to the subject, in relation to package travel contract, see the question decided by Corte cost., 30 marzo 2012, No. 75, in *Dir. trasp.*, 2012, 455, with a comment by A. TAMBURRO, *Illegittimo il rinvio dell'art. 15 d.lgs. 17 marzo 1995 n. 111 alla Convenzione di Bruxelles del 1970 sul contratto di viaggio per la limitazione del risarcimento del danno alla persona*, in *Dir. tur.*, 2012, 30, with a comment by C. ALVISI and by G. TASSONI, *Contratto di viaggio e danni alla persona: la limitazione risarcitoria è costituzionalmente illegittima – Un doppio commento*, in *Resp. civ.*, 2012, 487, with a comment by F. ROMEO, *Viaggi tutto compreso e illegittimità della norma che prevede un massimale per il risarcimento dei danni alla persona*, in *Resp. civ.*, 2012, 1518, with a comment by S. VERNIZZI, *La consulta ed il limite risarcitorio per il danno alla persona*, in *Contr.*, 2013, 357, with a comment by E. RUFFO, *Pacchetti turistici all inclusive: addio al vecchio limite per il risarcimento dei danni alla persona*, in *Corr. giur.*, 2013, 901, with a comment by A. MACCARONE, *Il contratto di viaggio “tutto compreso” e i limiti alla risarcibilità del danno alla persona*.

⁽¹⁶⁾ Unfortunately, the proposal advanced by G. DE CRISTOFARO, *La nuova disciplina europea dei contratti di viaggio*, cit., 21 e 23, to insert the new regulation related to the package travel contract in the Civil Code – in a special Chief to be introduced in Title III of Book IV, dedicated to “Single contracts”, Chief (VII-*bis* or VIII-*bis*) that should be reasonably placed immediately after the one containing the contract regulation or the one containing the transport regulation – has not been accepted.

⁽¹⁷⁾ For a first analysis, see G. TASSONI, *Sub artt. 32-37*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1161.

rules of the European Union by innovating the discipline previously in force in the definition of “travel service”, in the concept of “package” and in the concept of “package travel contract”.

In particular, according to Article 33, par. 1, lett. a), of the Tourism Code, the definition of “travel service” includes passenger transport services⁽¹⁸⁾, ac-

⁽¹⁸⁾ In the absence of a different legislative definition, the relative notion is to be sought at a national level, in particular as the performance deducted in obligation in the contract for the transport of persons and baggage: see, also with regard to the relationship between main performance and ancillary services, G. ROMANELLI, *Il trasporto aereo di persone*, Padova, 1959, 10 and 15; A. FIORENTINO, *I contratti navali*, Napoli, 1959, 35; G. CATURANI - A. SENSALÉ, *Il trasporto. Esposizione critica di giurisprudenza e di dottrina*, Napoli, 1960, 11; M. IANNUZZI, *Del trasporto. Art. 1678-1702*, in *Commentario del codice civile Scialoja-Branca*, Bologna-Roma, 1970, 2; R. ROVELLI, *Il trasporto di persone*, Torino, 1970, 3; A. ASQUINI, *Trasporto di persone (contratto di)*, in *Noviss. Dig. it.*, vol. XIX, Torino, 1973, 612; A. FLAMINI, *Il trasporto amichevole*, Napoli, 1977, 28; G. SILINGARDI, *Contratto di trasporto e diritti del destinatario*, Milano, 1980; S. ZUNARELLI, *La nozione di vettore. Contracting carrier and actual carrier*, Milano, 1987, 213; G. RIGHETTI, *Trattato di diritto marittimo*, II, Milano, 1990, 533; P. GONNELLI - G. MIRABELLI, *Trasporto (contratto di)*, in *Enc. dir.*, XLIV, Milano, 1992, 1154; G. ROMANELLI, *Riflessioni sulla disciplina del contratto di trasporto e sul diritto dei trasporti*, in *Dir. traspr.*, 1993, 297; G. ROMANELLI - G. SILINGARDI, *Trasporto. I) Terrestre*, in *Enc. giur.*, XXXI, Roma, 1994, 1; ID., *Trasporto nella navigazione marittima e aerea*, *ivi*, 1; U. La Torre, *La definizione del contratto di trasporto*, Napoli, 2000, 154; V. BUONOCORE, *I contratti di trasporto e di viaggio*, Torino, 2003, 27; M. M. COMENALE PINTO, *Il trasporto di persone*, in F. MORANDI - M. M. COMENALE PINTO - M. LA TORRE, *I contratti turistici - I contratti di viaggio. Il contratto di trasporto di persone. I contratti di ospitalità*, Milano, 2004, 147 and 167; M. RIGUZZI, *Il contratto di trasporto*, in *Trattato di diritto privato*, directed by M. BESSONE, XIV, Torino, 2006, 6; S. BUSTI, *Contratto di trasporto terrestre*, in *Trattato di diritto civile e commerciale Cicu-Messineo-Mengoni-Schlesinger*, XXVI, t. 1, Milano, 2007, 29; A. ZAMPONE, *Il rischio dell'impossibilità della prestazione nel contratto di passaggio*, Napoli, 2008, 7 and 35; O. CAGNASSO - G. COTTINO, *Contratti commerciali*, Padova, 2009, 395; A. ZAMPONE, *Il trasporto marittimo di persone*, in F. DELFINI - F. MORANDI (eds.), *I contratti del turismo, dello sport e della cultura. Trattato dei contratti Rescigno-Gabrielli*, vol. 13, Milano, 2010, 432; S. ZUNARELLI - A. ROMAGNOLI, *Contratto di trasporto marittimo di persone*, in *Trattato di diritto civile e commerciale Cicu-Messineo-Mengoni-Schlesinger*, Milano, 2012, 45, 167 and 178 ss.; S. ZUNARELLI - C. ALVISI, *Trasporto*, in *Commentario del codice civile e codici collegati Scialoja-Branca-Galgano, Libro quarto: Obbligazioni art. 1678-1702*, edited by G. DE NOVA, Bologna, 2014, 2 e 21; A. LA MATTINA, *Del trasporto. Artt. 1678-1702*, in *Il Codice Civile. Commentario Busnelli*, Milano, 2018, 29; L. VERDE, *La prenotazione nel traffico passeggeri marittimo ed aereo*, in *Dir. traspr.*, 2019, 13, part. 20; in the most recent handbooks, see M. BRIGNARDELLO - M. CASANOVA, *Diritto dei trasporti*, II - *La disciplina contrattuale*, II ed., Milano, 2012, 100; A. ANTONINI, *Corso di diritto dei trasporti*, III ed., Milano, 2015, 237; S. ZUNARELLI - M. M. COMENALE PINTO, *Manuale di diritto della navigazione e dei trasporti*, vol. I, III ed., Padova, 2016, 390; A. LEFEBVRE D'OVIDIO - G. PESCATORE - L. TULLIO, *Manuale di diritto della navigazione*, Milano, 2016, 469 e 476; previously, see the classics A. ASQUINI, *Del contratto di trasporto*, in *Il codice di commercio Bolaffio-Rocco-Vivante*, vol. VI, Torino, 1935, 126, and S.

commodation that “does not constitute an integral part of passenger transport”, the rental of cars or other motor vehicles⁽¹⁹⁾, and any other travel services that “do not constitute an integral part of one of the travel services” indicated⁽²⁰⁾.

The “package travel” is characterised, according to Article 33, par. 1, lett. c), of the Tourism Code, through the combination by a single professional, via separate contracts with distinct suppliers under the conditions specified by law, “of at least two different types of travel services for the same trip or holiday”.

Applying the new regulation is limited, however, to travel packages whose duration is not less than 24 hours or does not include an overnight stay; therefore, simple excursions are excluded, with the aim of avoiding an unnecessary burden on the organiser in relation to situations where the need to protect

FERRARINI, *I contratti di utilizzazione della nave e dell'aeromobile*, Roma, 1947, 101.

⁽¹⁹⁾ See M. FRAGALI, *Albergo (contratto di)*, in *Enc. dir.*, vol. I, Milano, 1958, 988; G. B. FUNAIOLI, *Albergatore, albergo*, in *Noviss. Dig. it.*, vol. I, Torino, 1960, 439; L. GERACI - F. BENATTI, *Il contratto di albergo e la responsabilità dell'albergatore*, in *Corti Brescia Venezia Trieste*, 1975, 155; U. CARNEVALI - G. BONILINI, *La responsabilità dell'albergatore*, in *Nuove leggi civ. comm.*, 1979, 127 ss.; V. GERI, *La responsabilità civile dell'albergatore*, Milano, 1979; ID., *Albergatore (responsabilità del)*, in *Noviss. Dig. it., App.*, I, Torino, 1980, 198 ss.; F. MASTROPAOLO, *Il deposito*, in *Trattato di diritto privato Rescigno*, vol. XII, tomo I, *Obbligazioni e contratti*, Torino, 1985, 546 ss.; M. BUSSOLETTI, *Albergo (contratto di)*, in *Enc. giur.*, vol. I, Roma, 1988, 1 ss.; G. ZUDDAS, *Il contratto d'albergo*, in G. CIURNELLI - S. MONTICELLI - G. ZUDDAS, *Il contratto d'albergo, il contratto di viaggio, i contratti del tempo libero*, Milano, 1994, 14; R. PREDEN, *Albergo (contratto di)*, in *Enc. dir., App.*, II, Milano, 1998, 57; M. E. LA TORRE, *Dall'ospitalità all'albergo. Profili giuridici*, in *Rass. dir. civ.*, 1999, 274; G. IORIO, *Natura del contratto d'albergo e prestazioni accessorie*, in *Nuova giur. civ. comm.*, 2002, 22; G. CIURNELLI, *Pernottamento e ristorazione. Il contratto di albergo*, in *I nuovi contratti nella prassi civile e commerciale*, VIII, *Tempo libero*, edited by G. ZUDDAS, Torino, 2004, 243; M. LA TORRE, *I contratti di ospitalità*, in F. MORANDI - M. M. COMENALE PINTO - M. LA TORRE, *I contratti turistici*, cit., 269; G. ZUDDAS, *Il deposito in albergo e nei magazzini generali*, in V. BUONOCORE (dir.), *Trattato di diritto commerciale*, Sez. II, t. 3/IV, Torino, 2006, 3; F. M. D'ETTORE - D. MARASCIULO, *Il contratto d'albergo. Profili civilistici*, Milano, 2008; M. LA TORRE, *Premesse generali per uno studio sull'ospitalità fra rapporti di cortesia e autonomia negoziale*, in *Giust. civ.*, 2009, II, 105; ID., *I contratti di ospitalità*, in F. DELFINI - F. MORANDI (eds.), *I contratti del turismo, dello sport e della cultura*, cit., 33; ID., *I contratti di ospitalità*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 302.

⁽²⁰⁾ EU Court of Justice 7 December 2010, in joined Cases C-585/08 and C-144/09, *Pammer*, according to which a contract concerning a voyage by freighter, such as that at issue in the main proceedings in Case C-585/08, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

travellers is decidedly lower⁽²¹⁾.

Furthermore, the combination of individual travel services makes it possible to create a package travel only if they represent a portion equal to or greater than 25 percent of the value of the combination and are not advertised, do not represent an essential element, or are selected and purchased only after the start of the execution of a transport, accommodation or vehicle rental service (Article 33, par. 2, Tourism Code)⁽²²⁾.

During the transposition, care was taken to integrate the articulation with

⁽²¹⁾ The current Article 32, par. 2, lett. *a*, of the Tourism Code restricts the field of application and significantly innovates with respect to the previously applicable regulations, which had eliminated the requirement of duration not less than 24 hours or the presence of at least one overnight stay, originally provided for by Legislative Decree No. 111/1995. The legislator has thus complied with the provisions of the Article 2, par. 2, lett. *a*), of the Directive (EU) 2015/2302, since there is less need to protect travellers in the case of short journeys and to avoid unnecessary burdens for professionals (Recital 19), choosing not to avail themselves of the right granted by the Directive, to maintain or introduce corresponding provisions for packages and related travel services that cover a time frame of less than 24 hours and do not include accommodation (Recital 21).

⁽²²⁾ According to with Recital 17 of the Directive (EU) 2015/2302, the Italian legislator specifies that financial and insurance services, as well as long-term language courses are excluded from the application of the European Union regulations, in line with the jurisprudence of EU Court of Justice 11 February 1999, in Case C-237/97, *AFS Intercultural Programs Finland ry* (the Directive 90/314/EEC did not apply to journeys consisting of school exchanges lasting approximately six months or a year, which had as its purpose the fact that the student attended a school in a host country to familiarize himself with its society and its culture and during which the student would stay for free with a host family, as if he were a member of the same). Housing services for residential purposes are also excluded; with reference to tourist rentals, which in effect constitute a travel service, see V. CUFFARO, *Le locazioni turistiche*, in F. DELFINI - F. MORANDI (eds.), *I contratti del turismo, dello sport e della cultura*, cit., 119, and P. VALORE, *Sub artt. 52 e 53*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1426; F. LAZZARO - M. DI MARZO, *Le locazioni per uso abitativo*, Milano, 2007, 59; F. PERTOLATI, *La riforma della locazione abitativa*, in V. CUFFARO (dir.), *La locazione*, Bologna, 2009, 165; V. CUFFARO, *La locazione di immobili*, in *I contratti di utilizzazione dei beni*, vol. IX, *Trattato dei contratti* Rescigno-Gabrielli, Torino, 2008, 23; S. GIOVE, *Locazioni ad uso diverso dall'abitazione*, *ivi*, 175; P. SCALETTARIS, *Le locazioni dell'abitazione diversa da quella principale del conduttore*, in *Arch. loc. cond.*, 2012, 614; *Id.*, *Primi appunti sulle disposizioni in tema di locazione contenute nel nuovo "Codice del turismo"*, *ivi*, 124; C. SFORZA FOGLIANI, *Multiproprietà, locazioni turistiche ed altri temi immobiliari*, *ivi*, 2012, 1; M. TRIMARCHI, *La locazione*, in *Trattato di diritto civile del Consiglio Nazionale del Notariato*, edited by P. PERLINGIERI, Napoli, 2013, 92; G. BORDOLLI, *Le locazioni abitative transitorie*, in *Immobili proprietà*, 2014, 390; F. PADOVINI, *La liberalizzazione del mercato delle grandi locazioni ad uso non abitativo*, in *Nuove leggi civ. comm.*, 2015, 429; P. VALORE, *Delle locazioni turistiche*, in V. CUFFARO (ed.), *Codice del consumo*, Milano, ed. 2015, 1153; at a handbook level, M. COCUCCIO, *Le locazioni turistiche*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 135.

some indications present in recitals 17, 18 and 19, and to maintain the principle according to which the separate invoicing of the various elements within the same package does not relieve the organiser or the retailer from the obligations under the law, keeping unchanged the provisions established by the Tourism Code.

Once the reference to the contracts concluded in the State territory to cover a broader range of particular cases has been eliminated, it becomes clear that the current regulation also includes customised⁽²³⁾ and tailor-made packages⁽²⁴⁾, online contracts, and so-called dynamic packages, as well as services purchased from separate professionals through associated online booking processes (affiliates or dynamic click-through packages)⁽²⁵⁾.

As in the past, despite the term only appearing once in Recital 17, it is common ground that even the “cruise contract” constitutes a typical hypothesis of a package travel contract, characterised by the particular type of travel services offered by the organising ferry company⁽²⁶⁾.

⁽²³⁾ The EU Court of Justice, 21 March 2002, in Case C-400/00, *Club-Tour*, clarifies that the term “package” used in Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, must be interpreted so as to include holidays organised by travel agents, at the request of and in accordance with the specifications of a consumer or limited group of consumers, and that the term “pre-organised” combination used in Article 2(1) of Directive 90/314 must be interpreted so as to include combinations of tourist services put together at the time when the contract is concluded between the travel agency and the consumer.

⁽²⁴⁾ See A. VENCHIARUTTI, *La tutela del turista nei “viaggi su misura”*, in P. CENDON (ed.), *Persona e danno*, IV, Milano, 2004, 3757; see also R. CONTI, *Corte di giustizia, danno da vacanza rovinata e viaggi “su misura”. Ancora due vittorie per i consumatori*, in *Corr. giur.*, 2002, 1002.

⁽²⁵⁾ With reference to the scope of the new rules see A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1308.

⁽²⁶⁾ In addition to the contributions already mentioned regarding the package travel contract see S. POLLASTRELLI, *Il problema della responsabilità nel viaggio marittimo-aeronautico turistico*, Trieste, 2000, 56; D. PIPPIA, *La crociera turistica*, in F. MORANDI (ed.), *I nuovi contratti nella prassi civile e commerciale*, XVII, *Trasporto*, Torino, 2004, 257; M. BRIGNARDELLO, *Contratto di crociera e tutela del turista*, in *Dir. tur.*, 2005, 130; A. SANTUARI, *Le condizioni generali nel contratto di trasporto marittimo di persone e di crociera turistica, tra vessatorietà ed esigenze di tutela del turista-viaggiatore*, in *Dir. trasp.*, 2006, 95; ID., *Il contratto di trasporto di persone marittimo e per acque interne*, Trento, 2007, 79; S. POLLASTRELLI, *Il contratto di trasporto marittimo di persone*, Milano, 2008, 269; D. BOCCHESI, *La crociera turistica*, in F. MORANDI (ed.), *I contratti del trasporto*, vol. I, Bologna, 2013, 491; F. MORANDI, *Natura e disciplina del contratto di crociera turistica*, in A. ANTONINI (ed.), *Trattato breve di diritto marittimo*, IV, Milano, 2013, 25; G. BENELLI, *Le crociere con unità da diporto*, in M. M. COMENALE PINTO - E. G. ROSAFIO (eds.), *Il diporto come fenomeno diffuso. Problemi e prospettive del diritto della navigazione*, Roma, 2015, 523; see also the traditional E. SPASIANO, *Crociera (contratto di)*, in *Enc. dir.*,

In addition to simple excursions, the so-called “business travel” contracts, which result from a general agreement for the organization of travel of a professional nature concluded between a professional and another natural or legal person acting in the context of their commercial, business, craft or professional activity, are considered excluded if the package travel is the result of a combination by a single professional, or through the purchase of at least two different types of travel services for the same trip or holiday, by separate suppliers under the conditions indicated by the law⁽²⁷⁾.

The legislator has also dealt with the issue, which is particularly delicate due to its complexity and perceived as highly problematic by market operators, of “packages offered, and linked travel arrangements facilitated, occasionally and on a not-for-profit basis and only to a limited group of travellers” pursuant to Article 2, par. 2, lett. *b*), of the Directive (EU) 2015/2302. Taking advantage of the option granted by the European Union regulations, Article 32, par. 2, lett. *b*), of the Tourism Code, however, has limited the particular cases excluded from the transposition of the new regulations within strict margins of a subjective and objective nature, limiting it to packages and services facilitated or sold exclusively to its members by non-profit associations legitimized in accordance with the law, provided occasionally, not more than twice a year, and which are non-profit for a small group of travellers and without putting forth the offer to the public⁽²⁸⁾.

The definition of “package travel contract”, decidedly lacking from a technical-legal point of view if considered in relation to the Italian legal tradition, is formulated by Article 33, par. 1, lett. *d*), of the Tourism Code, in terms of “contract relating to the entire package or, if the package is provided on the

Milano, 1962, 401, and D. AMORE, *Crociera (contratto di)*, in *Noviss. Dig. it.*, V, Torino, 1960, 20.

⁽²⁷⁾ For some critical remarks on the notion of “travel services” see S. KEILER - F. MORANDI, *Package travel and assisted travel arrangements*, cit., 7; ID., *The Directive on package travel and linked travel arrangements*, cit., 404.

⁽²⁸⁾ With reference to the authorization system for the activity of travel agency, in the complex intertwining between State legislation and regional legislation, see, for all, after the entry into force of Legislative Decree No. 79/2011, M. MALO - A. PERINI, *Agenzie di viaggio e turismo*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 176 and 200; previously, see also A. CECCHETTI, *La disciplina dell'impresa turistica*, in M. GOLA - T. GROPPI (eds.), *Diritto pubblico del turismo*, Rimini, 2005, 158; S. DE NARDIS, *Profili pubblicistici delle strutture ricettive, delle agenzie di viaggio e turismo e delle professioni turistiche: problemi e prospettive (nelle Regioni ordinarie)*, in L. DEGRASSI - V. FRANCESCHELLI (eds.), *Turismo. Diritto e diritti*, Milano, 2010, 195; and M. P. CHITI, *Agenzie di viaggio*, in *Dig. disc. pubbl.*, vol. I, Torino, 1987, 105.

basis of separate contracts, the set of contracts concerning the travel services included in the package”⁽²⁹⁾.

The new European Union legislation does not offer significant indications with regard to reviewing the prevailing and consolidated interpretative orientation envisaged in the doctrine and adopted in jurisprudence with reference to the legal nature of the package travel contract, which must be framed in the typical scheme of the *locatio operis*, in the legal figure of the service contract as established by Article 1655 of the Civil Code⁽³⁰⁾.

Should a single agreement “related to the entire package” be set up, then a consensual contract is established by virtue of which a subject, organiser, undertakes to provide a package travel to another subject, traveller, through the payment of compensation⁽³¹⁾.

⁽²⁹⁾ The formule “package travel contract” has been maintained, for supposed requirements of adherence to Article 3, n. 3, of the Directive (EU) 2015/2302, instead of the expression “travel contract” more in line with the Italian legal tradition, which dates back to the cited Law No. 1977/1084; in addition to Authors cited in nt. 9, see F. MORANDI, *Contratto di viaggio*, in *Dizionario del diritto privato*, cit., 134, and G. DE CRISTOFARO, *La nuova disciplina europea dei contratti di viaggio*, cit., 13.

⁽³⁰⁾ On the evolution of the doctrinal debate – which had led to qualify the legal nature of the contract concluded by the organiser, from time to time, as transport, mediation, sale, mixed contract, unnamed *sui generis* contract, promise of the fact of the third – for all, see again G. SILINGARDI - F. MORANDI, *La “vendita di pacchetti turistici”*, cit., 128; in jurisprudence the question has been decided by Cass. civ., 6 January 1982, n. 7, in *Riv. giur. circ. trasp.*, 1982, 524; see also App. Milano, 20 October 1978, in *Arch. civ.*, 1979, 653; Pret. Taranto, 3 February 1984, *ivi*, 1984, 296; Trib. Roma, 17 January 1989, in *Nuova giur. civ. comm.*, 1989, I, 485, and in *Giur. It.*, 1991, I, 2, 66.

⁽³¹⁾ Concerning the complex question of the “cause” of the package travel contract, the jurisprudence intervened in the past on several occasions, enhancing the meaning of the “tourist purpose” – on which it now seems legitimate to make some further reservations, in addition to those already envisaged by a part of the specialized doctrine – emphasized by the changes made, at that time, with the introduction of the Tourism Code. In this regard, it seems interesting to also evaluate the implications of the survey formulated by G. DE CRISTOFARO, *The new European regulation of travel contracts*, cit., 12, which emphasizes that in the language versions of the text of Directive (EU) 2015/232 other than Italian, the adjective used to qualify the services inferred in the contract is not “tourist”, but “travel”. For a review of the jurisprudential evolution, see Cass. civ., Sez. III, 24 July 2007, No. 16315, in *Dir. tur.*, 2007, 375, with a comment by G. BENELLI, *La risoluzione del contratto di viaggio per impossibilità sopravvenuta di utilizzazione della vacanza*, in *Contr.*, 2008, 241, with a comment by C. CAVAJONI, *La “finalità turistica” come causa concreta del contratto di viaggio*, in *Dir. mar.*, 2009, 725, with a comment by C. ROSSELLO, *Nel contratto di viaggio “tutto compreso” la mancata realizzazione della finalità turistica comporta l’estinzione del contratto*, in *Danno resp.*, 2008, 845, with a comment by L. DELLI PRISCOLI, *Contratti di viaggio e rilevanza della finalità turistica*, in *Dir. prat. soc.*, 2008, 87, with a comment by C. S. CARRASSI, *Contratto*

Even if the package is provided based on formally distinct contracts, despite the various ways in which it is stipulated, the package travel contract appears to have an identical nature. The functional linking of the contracts relating to the individual services that make up the package travel does not alter the economic and social significance of the unitary “package travel contract”, attributable to a single overall agreement, nor does it relieve the organiser from the obligations and responsibilities deriving from the provision of “various types of travel services for the same trip or holiday”, pursuant to Article 33, par. 1, lett. c), of the Tourism Code.

In line with Article 19 of the Directive, Article 32, par. 2, lett. f), of the Tourism Code considerably innovates the internal legal framework by introducing the “linked travel arrangements” figure, which faithfully incorporates

di viaggio turistico e causa concreta, in *Giur. it.*, 2008, 1133, with a comment by B. IZZI, *Causa in concreto e sopravvivenze nel contratto di viaggio vacanza tutto compreso*, in *Nuova giur. civ. comm.*, 2008, 531, with a comment by S. NARDI, *Contratto di viaggio “tutto compreso” e irrealizzabilità della sua funzione concreta*, in *Obbl. contr.*, 2008, 13, with a comment by F. PAROLA, *Recesso dal contratto di compravendita di pacchetti turistici e impossibilità di utilizzazione della prestazione*; Cass. civ., Sez. III, 20 December 2007, No. 26958, in *Contr.*, 2008, 786, with a comment by L. BARBIERA, *Risoluzione per impossibilità sopravvenuta e causa concreta del contratto a confronto*, in *Corriere giur.*, 2008, 921, with a comment by F. ROLFI, *Funzione concreta, interesse del creditore ed inutilità della prestazione: la Cassazione e la rielaborazione del concetto di causa del contratto*; Cass. civ., Sez. III, 24 April 2008, No. 10651, in *Corr. giur.*, 2008, 1399, with a comment by V. MARICONDA, *Contratto di viaggio, mare sporco e diritti del consumatore*, in *Dir. tur.*, 2008, 349, with a comment by V. CORONA, *La tipizzazione della “finalità turistica” tra presupposizione e criteri di ripartizione del rischio*, in *Contr.*, 2009, 309, with a comment by A. GALATI, *Contratto di viaggio all inclusive e “causa concreta”*, in *Danno resp.*, 2009, 661, with a comment by M. LAGHEZZA, *Viaggio “tutto compreso”. Se il mare è calmo come l’olio*, in *Dir. trasp.*, 2009, 825, with a comment by A. ZAMPONE, *Sull’obbligo del tour operator di garantire la riuscita della vacanza*, in *Giur. it.*, 2009, 336, with a comment by F. ESPOSITO, *Impossibilità di effettuazione dei servizi e obblighi del tour operator*, in *Giust. civ.*, 2009, 2775, with a comment by M. COCUCCIO, *Un mare “fuori servizio”: mancanza di soluzioni alternative e ristoro per la “vacanza rovinata*, in *Nuova giur. civ. comm.*, 2008, 1257, with a comment by S. NARDI, *Una vacanza al mare. Il tour operator è Poseidone?*; Trib. Salerno, 13 January 2009, in *Giur. merito*, 2009, 2767, with a comment by M. DI MARZIO, *Il danno non patrimoniale da inadempimento dopo le Sezioni Unite*; Cass. civ., Sez. III, 20 March 2012, No. 4372, in *Contr.*, 2012, 769, with a comment by F. SANGERMANO, *La funzione economico individuale del contratto e il danno non patrimoniale da inadempimento*, in *Danno resp.*, 2012, 848, with a comment by L. CAPUTI, in *Dir. giust.*, 2012, 430, with a comment by E. GRAZIUSO, *Risarcimento del danno dal tour operator per una luna di miele irripetibile*, and in *Riv. dir. nav.*, 2012, 835, with a comment by M. CIMMINO, *Contratto turistico a scopo di immersioni subacquee, informazioni rilevanti e responsabilità del tour operator*; for further jurisprudential indications and critical reflections, see L. AMBROSINI, *Finalità turistica e allocazione del rischio di impossibilità della prestazione*, in *Riv. it. Dir. tur.*, 2014, 269.

the content of the European Union legislation. The new particular case is the combination of at least two different types of travel services for the same trip or the same holiday by separate suppliers, if a professional facilitates the purchase at the time of a single visit or a single contact with the point of sale, or rather, if it facilitates the targeted purchase within 24 hours of an additional service with another professional.

In this regard, Section VI (Article 49) of the Tourism Code provides for specific protection obligations in the event of insolvency or bankruptcy and timely information obligations in relation to linked travel arrangements, also extended to professionals not established in a Member State which by any means direct their activity to a Member State.

4. The form of the contract and information obligations

Section II (*Information obligations and content of the package travel contract*, Articles 34-37 of the Tourism Code) is practically identical to Articles 5, 6 and 7 of the Directive (EU) 2015/2302, regarding the information obligations that affect the organiser, the retailer and the content of the package travel contract⁽³²⁾. The information is binding for the contracting parties and, since they form an integral and substantial part of the relationship, cannot be modified without an express agreement between the contracting parties (Article 35, par. 1, of the Tourism Code).

Following the Directive's indications, Italian law establishes detailed information obligations at every stage of the agreement between tour operator, retailer and traveller, from the negotiations (Article 34, of the Tourism Code, *Pre-contractual information*) to the conclusion of the contract (Article 36 of the same Code, *Content of the package travel contract and documents to be provided before the start of the package*), up to the execution phase.

The regulations transposing the new EU rules confirm that package travel contracts are to be considered free-form contracts, accompanied, however, by specific duty of information and documentation obligations⁽³³⁾. Despite

⁽³²⁾ See F. ROMEO, *Il processo informativo nella commercializzazione dei contratti di viaggio*, in *La nuova disciplina europea dei contratti di viaggio*, cit., 29; R. PASQUILI, *Il contenuto e la forma del contratto di viaggio*, ivi, 47.

⁽³³⁾ B. SIRGIOVANNI, *Il processo informativo e la forma nella disciplina dei pacchetti turistici*, in G. VETTORI (ed.), *Contratto e responsabilità. Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli*, Padova, 2013, 1610; previously, A. VENCHIARUTTI, *Vendita di biglietti aerei e obblighi informativi dell'agente di viaggio*, in *Dir. tur.*, 2008, 391.

the uncertainties fuelled by an erroneous interpretation of the previous legislation, which have given rise to at least questionable judicial decisions, the problem now seems definitively clarified, albeit *incidenter tantum*, by the new formulation established by Article 36 of the Tourism Code.

The legislator, in fact, has established that package travel contracts should be drawn up in a simple and clear manner and in a “legible” language, “where [concluded] in writing” (par. 1). The legislator, therefore, leaves it up to the parties to choose whether to stipulate the contract in writing or if instead to use a different form, without prejudice to compliance with the duty of information and documentation obligations imposed by law⁽³⁴⁾.

Similarly, upon confirming the “informative”⁽³⁵⁾ or “protection”⁽³⁶⁾ form requirement option, the obligation of the organiser or of the retailer to provide a “copy or confirmation of the contract on a durable medium” is introduced (par. 2), as is the traveller’s right to receive a “paper copy” if the contract is concluded in the traveller’s presence (par. 3).

Prior to concluding the package travel contract, the “Standard information forms” attached to the law, which include those reported in Annex I and Annex II of the Directive (EU) 2015/2302, consider the various possible cases and represent the essential reference point for fulfilling the legal obliga-

On the question, in the opposite direction, Trib. Bari, 8 agosto 2000, in *Dir. trasp.*, 2000, 792, with a comment by B. FIORE, *Pacchetti turistici: forma del contratto, danno da vacanza rovinata e limite risarcitorio*; see also L. MODICA, *Vincoli di forma e disciplina del contratto. Dal negozio solenne al nuovo formalismo*, Milano, 2008, 222.

⁽³⁴⁾ Sui requisiti formali del contratto di pacchetto turistico indicati dal legislatore dell’Unione europea, cfr. R. PASQUILI, *Il contenuto e la forma del contratto di viaggio*, cit., 58.

⁽³⁵⁾ See R. PASQUILI, *Il contenuto e la forma del contratto di viaggio*, cit., 60.

⁽³⁶⁾ In the doctrinal debate see, above all, N. IRTI, *Strutture forti e strutture deboli (del falso principio di libertà delle forme)*, in *Studi sul formalismo negoziale*, Padova, 1997, 137; R. AMAGLIANI, *Profili della forma nella nuova legislazione sui contratti*, Napoli, 1999, 47; D. VALENTINO, *Obblighi di informazione, contenuto e forma negoziale*, Napoli, 1999, 15; M. MESSINA, “Libertà di forma” e nuove forme negoziali, Torino, 2004; T. FEBBRAJO, *L’informazione ingannevole nei contratti del consumatore*, Napoli, 2006; E. MORELATO, *Nuovi requisiti di forma del contratto. Trasparenza contrattuale e neoformalismo*, Padova, 2006, 49; L. MODICA, *Vincoli di forma e disciplina del contratto*, loc. ult. cit.; B. PASA, *La forma informativa nel diritto contrattuale europeo. Verso una nozione procedurale di contratto*, Napoli, 2008; S. LANDINI, *Formalità e procedimento contrattuale*, Milano, 2008, 113; S. PAGLIANTINI, *Forma e formalismo nel diritto europeo dei contratti*, Pisa, 2009, 65; E. FAZIO, *Dalla forma alle forme. Struttura e funzione del neoformalismo negoziale*, Milano, 2011, 73; G. BERTI DE MARINIS, *La forma del contratto nel sistema di tutela del contraente debole*, Napoli, 2013, 58; G. LA ROCCA, *Il problema della forma contrattuale*, Torino, 2017, 3.

tions by operators⁽³⁷⁾.

After the conclusion of the travel contract, the organiser or the retailer fulfils the information obligations by providing the traveller with a copy or confirmation of the contract on paper or on a “durable medium” (in accordance with Article 36 of the Tourism Code), understood as any tool that allows the traveller to store information so that it can be accessible in the future for a period of time appropriate to the purposes for which it is intended and which allows for the identical reproduction of the information stored (pursuant to Article 33, par. 1, lett. *n*, of the Tourism Code)⁽³⁸⁾.

⁽³⁷⁾ The new rules have been promptly implemented by the organisers and the related associations, which made the updated contract forms, the new general sales conditions and the standard information forms available to tour operators and travel agents for package travel contracts concluded from 1st July 2018. With reference to the previous legislation, see G. DE NOVA, *Tipico e atipico nei contratti della navigazione, dei trasporti e del turismo*, in *Dir. traspr.*, 1995, 715, also in G. SILINGARDI - A. ANTONINI - F. MORANDI (eds.), *Dai tipi legali ai modelli sociali nella contrattualistica della navigazione, dei trasporti e del turismo*, Milano, 1996, 363; Id., *La novella al codice civile in tema di clausole vessatorie e i contratti turistici*, in *Contr.*, 1997, 85; A. MUSIO, *Contratti di viaggio e clausole vessatorie*, in *Dir. tur.*, 2005, 26; previously, M. ARATO, *Le condizioni generali di contratto ed i viaggi turistici organizzati*, in *Riv. giur. circ. traspr.*, 1982, 449.

⁽³⁸⁾ On the evolution of questions relating to information obligations, the requirements of form and the content of the contract, in addition to the contributions already mentioned, see also F. BUSNELLI, *Itinerari europei nella “terra di nessuno tra contratto e illecito”: la responsabilità da informazioni inesatte*, in *Contr. impr.*, 1991, 539; G. DE NOVA, *Informazione e contratto: il regolamento contrattuale*, in *Riv. trim. dir. proc. civ.*, 1993, 705; U. BRECCIA, *La forma*, in V. ROPPO (ed.), *Trattato del contratto*, I, *Formazione*, Milano, 2006, 465; E. GABRIELLI - A. ORESTANO, *Contratto del consumatore*, in *Digesto disc. priv.*, Sez. civ., Torino, 2000, 235; F. DI MARZIO, *Riflessioni sulla forma nel nuovo diritto dei contratti*, in *Riv. crit. dir. priv.*, 2001, 396; A. JANNARELLI, *La disciplina dell'atto e della validità: i contratti tra imprese e tra imprese e consumatori*, in N. LIPARI (ed.), *Trattato di diritto europeo*, Padova, 2003, 3; L. ROSSI CARLEO, *Il diritto all'informazione: dalla conoscibilità al documento informativo*, in *Riv. dir. priv.*, 2004, 349; G. D'AMICO, *Formazione del contratto*, in *Enc. dir.*, *Annali*, II, 2, Milano, 2008, 581; F. VENOSTA, *Profili del neoformalismo negoziale: requisiti formali diversi dalla semplice scrittura*, in *Obbl. contr.*, 2008, 827; A. GENTILI, *La forma*, in A. ORESTANO (ed.), *Lezioni sul contratto*, Torino, 2009, 74; L. MODICA, *Formalismo negoziale e nullità: le aperture delle corti di merito*, in *Contr. impr.*, 2011, 16; S. PAGLIANTINI, *Neoformalismo contrattuale*, in *Enc. dir.*, *Annali*, IV, Milano, 2011, 770; R. FAVALE, *Il formalismo nel diritto dei consumatori*, in *Contr. impr. Europa*, 2012, 582; F. RENDE, *Le regole di informazione nel diritto europeo dei contratti*, in *Riv. dir. civ.*, 2012, 188; F. ROMEO, *Dovere di informazione e responsabilità precontrattuale dalle clausole generali alla procedimentalizzazione dell'informazione*, in *Obbl. contr.*, 2012, 178; the subject is often investigated in relation to financial market law: R. LENER, *Forma contrattuale e tutela del contraente debole “non qualificato” nel mercato finanziario*, Milano, 1996, 91; F. PROSPERI, *Violazione degli obblighi di informazione nei servizi di investimento e rimedi contrattuali (a proposito di Cass. Sez.un., 19 dicembre 2007, nn. 26724 e 26725)*, in *Contr. impr.*, 2008 943; A. BERTOLINI, *Problemi di forma e sanzioni di nullità della disciplina a tutela dell'investitore. Perequazione informativa o opportunismo*

With respect to the provisions established by Article 7, par. 1, lett. c), of the Directive (EU) 2015/2302, the Italian legislator specifies that among the information relating to “additional costs” to be provided to the traveller, there should also be information relating to “administrative and management fees”. Although this aspect may appear to be a secondary issue, the relative calculation in the event of a transfer of the package travel or price reduction, in fact, has often been the source of exhausting disputes between travellers and operators⁽³⁹⁾.

In order to establish a more effective reconciliation of the opposing interests of travellers and travel organisers, in compliance with the principle of good faith, it was also envisaged that the contract should specify the fact that the traveller is required to communicate “without delay”⁽⁴⁰⁾ any lack of conformity detected during the execution of the package, taking into account the circumstances of the case, so as to allow the defaulting operator to promptly find a remedy to the problem (Article 36, par. 5, lett. e, of the Tourism Code)⁽⁴¹⁾.

Following the indications established by the Directive, as mentioned, the internal transposing regulations confirm that the information provided to the traveller, in the pre-contractual phase, is an integral part of the

rimediale?, in *Resp. civ. prev.*, 2010, 2346; G. LA ROCCA, *Deficit cognitivi ed efficacia confessoria nelle condizioni generali di contratto*, in *Riv. dir. banc.*, 2016, 11; ID., *Sottoscrizione e forma informativa nei contratti del mercato finanziario*, *ivi*, 2017, 13.

⁽³⁹⁾ Article 35, par. 1, lett. c, of the Tourism Code responds to a need for clarity and allows a better reconciliation of the opposing interests of travellers and organisers. The provision in question is also coordinated with the Article 38, par. 2, of the same Code, regarding the transfer of the package travel contract to another traveller and with par. 5 of the same Article in the event of a price reduction.

⁽⁴⁰⁾ Note that the adverb is not present in the corresponding Article 7, par. 2, lett. e, of the Directive (EU) 2015/2302, which however refers to the following Article 13, par. 2, of the Directive, which specifies how the traveller is required to inform the organiser of the lack of conformity “without undue delay”; the expression in question returns then, in a still different formula, in the Article 42, par. 2, of the Tourism Code, which indicates how the dispute should be presented to the organiser “promptly”.

⁽⁴¹⁾ With reference to the various aspects of the complaint, as well as the question concerning the expiry of the terms established by the previous regulations, see Giud. pace Roma, 27 September 2001, in *Dir. mar.*, 2003, 574, with a comment by R. ABBATE, *Pacchetto turistico e tutela del consumatore*; Giud. pace Caserta, 28 May 2002, in *Dir. trasp.*, 2003, 229 with a comment by L. TULLIO, *La qualificazione del termine per la presentazione del reclamo nel contratto di viaggio*; Trib. Roma, 2 October 2003, in *Dir. trasp.*, 2005, 285, with a comment by L. TULLIO, *Interpretazioni discutibili ed inquietanti della normativa sul contratto di viaggio*; Cass. civ., Sez. III, 31 July 2006, No. 17444, in *Dir. mar.*, 2007, 840; Giud. pace Genova, 24 October 2007, in *Dir. tur.*, 2008, 35, with a comment by S. D'URSO, *Danno da vacanza rovinata e termine per il reclamo di cui all'art. 98 cod. cons.*; App. Genova, 28 December 2011, in *Dir. mar.*, 2013, 468.

package travel contract and cannot be modified unless explicitly agreed by the contracting parties. The binding nature of all the pre-contractual information and the content of the package travel contract are accompanied by the provision that the burden of proof relating to the fulfilment of the obligations in question is borne by the professional.

The legislator has also maintained the closure rule, which is already found in the previous Tourism Code text, which clearly states that it is explicitly forbidden to provide misleading information regarding the service offered, the price and the other elements of the contract, whatever the means by which this information is provided to the traveller, who is thus assisted by “reinforced” administrative protection⁽⁴²⁾.

5. Changes to the package travel contract

The *ius variandi* discipline, referred to in Section III (Articles 38-41 of the Tourism Code), reproduces the highly detailed provisions contained in Articles 9 to 12 of the Directive (EU) 2015/2302, which regulate the cases in which the traveller can assign the travel package contract to others and the specific hypotheses in which the tour operator is allowed to modify the contract’s content⁽⁴³⁾.

The case of the transfer of the contract also maintains in the new text its character of a bilateral contract, making an exception to the ordinary trilateral structure envisaged by Article 1406 of the Civil Code⁽⁴⁴⁾, and is enriched by

⁽⁴²⁾ With reference to the various aspects of the complaint, as well as the question concerning the expiry of the terms established by the previous regulations, see Giud. pace Roma, 27 September 2001, in *Dir. mar.*, 2003, 574, with a comment by R. Abbate, *Pacchetto turistico e tutela del consumatore*; Giud. pace Caserta, 28 May 2002, in *Dir. trasp.*, 2003, 229 with a comment by L. TULLIO, *La qualificazione del termine per la presentazione del reclamo nel contratto di viaggio*; Trib. Roma, 2 October 2003, in *Dir. trasp.*, 2005, 285, with a comment by L. TULLIO, *Interpretazioni discutibili ed inquietanti della normativa sul contratto di viaggio*; Cass. civ., Sez. III, 31 July 2006, No. 17444, in *Dir. mar.*, 2007, 840; Giud. pace Genova, 24 October 2007, in *Dir. tur.*, 2008, 35, with a comment by S. D’URSO, *Danno da vacanza rovinata e termine per il reclamo di cui all’art. 98 cod. cons.*; App. Genova, 28 December 2011, in *Dir. mar.*, 2013, 468.

⁽⁴³⁾ See S. PAGLIANTINI, *Modifiche anteriori e recesso da un contratto di pacchetto turistico secondo il canone della dir. 2015/2302/UE: per un repertorio (frastagliato) di problemi teorici e pratici a prima lettura*, in *La nuova disciplina europea dei contratti di viaggio*, cit., 65, and V. BATTISTELLA, *Sub artt. 38 e 39*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1220.

⁽⁴⁴⁾ G. SILINGARDI - F. MORANDI, *La “vendita di pacchetti turistici”*, cit., 61, e G. TASSONI, *Il contratto di viaggio*, cit., 206.

a series of more detailed provisions than in the past, with the aim of preventing possible disputes.

In accordance with the provisions established by the European Union regulations, the notice period is extended to 7 days (instead of the previous 4), the notification must be given on a durable medium (rather than in writing), and the transfer can take place *ad nutum* (instead of in the case of being unable to benefit from the package travel). The passive solidarity regime is expressly referred to, in addition to the price, to any rights, taxes and other additional costs, including any administrative and management fees (rather than, more generically, to additional expenses that may derive from the transfer), with the obligation that they are effective, reasonable, do not exceed the actual costs incurred and are proven by the organiser.

With reference to the contract modifications that the organiser is allowed to undertake, the price revision regulation, which introduces a new symmetry between the position of the tour operator and that of the traveller depending on the increase or decrease of some elements of the package travel, deserves special consideration (Article 39 of the Tourism Code).

The organiser is recognised as having the right to increase the price of the package travel within the mandatory limits specified by the law⁽⁴⁵⁾, depending on the variation of transport costs, taxes or travel service fees and exchange rates. As in the past, a price increase can only take place up to twenty days prior to departure, on the condition that the contract expressly specifies this aspect and indicates the methods of calculation, while the percentage of increase in the total price of the package travel product is increased to 8%, beyond which the traveller is entitled to withdraw from the contract⁽⁴⁶⁾. In the presence of similar causes, the traveller has the right to a corresponding reduction in the price if the costs of the package travel decrease, less administrative expenses and (adds the Italian legislator) document processing costs. It is worth noting that, while the organiser cannot increase the price, regard-

⁽⁴⁵⁾ In addition to the indication of the mandatory causes in which the increase is allowed, which present some elements of more detail with respect to the provisions of previous Article 40 of the Tourism Code, the new regulation sets another series of limits: the contract expressly provides for it, indicates the calculation methods, specifies that the traveller is entitled to a corresponding price reduction (Article 39, par. 1); is given after clear and precise communication on the durable support by the organiser to the traveller, together with the justification of this increase and the calculation methods (Article 39, par. 4).

⁽⁴⁶⁾ See Article 39, par. 3, of the Tourism Code (previous Article 40, par. 2 and par. 3), which implements the provision of Article 11, par. 2, of the Directive (EU) 2302/2015.

less of its origin, in the twenty-day period preceding the start of the trip, the traveller's right to obtain a corresponding price reduction refers to the entire time period that precedes the departure, from the conclusion of the contract until the beginning of the execution of the package travel⁽⁴⁷⁾.

Reference is made to the general principle according to which the organiser cannot unilaterally change the conditions of the package travel contract with regard to the price; the regulation regarding the variations of the other package travel contract conditions, introduced by Articles 40 and 41 of the Tourism Code, does not differ from the corresponding regulation of Articles 11 and 12 of the Directive (EU) 2015/2302⁽⁴⁸⁾.

It is worth pointing out that, compared to the Italian version of the European Union rules, the national legislator has correctly used the technical terms corresponding to the true nature of the regulated legal institutions and thus, in particular, has preferred to use the term "withdrawal" in place of the term "resolution" used improperly in the Italian language version of the Directive.

However, the questions relating to the widespread use of "elastic" clauses for the purposes of evaluating or qualifying the contractual changes and consequent obligations remain (apparently) unsolved. As a result, for example, the formulas "of minor importance", "in a significant manner", "unjustified" delay, "reasonable" period, "adequate" price reduction, and standard costs for a "reasonable" withdrawal have remained unaltered. The principles of good faith referred to in Articles 1175 and 1375 of the Civil Code are, in any case, destined to guide the interpreter in applying the European Union regulations.

In exercising the possibility explicitly set out in Article 12, par. 5, of the Directive (EU) 2015/2302, moreover, for contracts negotiated away from business premises, the national legislator has introduced a special regulation regarding the withdrawal of repentance, which presents significant deviations

⁽⁴⁷⁾ According to Article 39, par. 1, of the Tourism Code the traveller is entitled to a reduction in the price corresponding to the decrease in costs in relation to the circumstances indicated by the law that occur "after the conclusion of the contract and before the start of the package". In this way an evident asymmetry is determined with respect to the provision of the following par. 4, according to which the organiser can increase the price of the trip only upon notice to the traveller "at least twenty days before the beginning of the package".

⁽⁴⁸⁾ See M. MUSI, *Sub art. 40*, and A. CLARONI, *Sub art. 41*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1234 e 1249; S. PAGLIANTINI, *Modifiche anteriori e recesso da un contratto di pacchetto turistico secondo il canone della dir. 2015/2302/UE*, cit., 65; G. TERLIZZI, *Modifiche unilaterali e cancellazione del pacchetto turistico*, cit., 147; see also M. GAMBINI, *Il recesso nella contrattazione turistica: da rimedio solutorio a strumento di riequilibrio delle posizioni contrattuali*, in *Riv. dir. priv.*, 2016, 451.

from the general regulations dictated by the Consumer Code⁽⁴⁹⁾. Actually, European Union legislation allows the Member States to provide for, in national law, the traveller to have the right to withdraw from the package travel contract “within a period of 14 days without giving any reasons”. Article 41, par. 7, lett. g), of the Tourism Code instead establishes that the right to withdraw *ad nutum* and without penalties must be exercised by the traveller within a period of five days from the conclusion of the contract or from the subsequent date on which the traveller receives the contractual conditions and the preliminary information.

The right of withdrawal is then completely ruled out if the traveller has had access to offers with “significantly reduced rates compared to the current offers”, without prejudice to the burden for the organiser to document the price change by adequately highlighting the exclusion of the right to withdrawal. However, this is a choice substantially consistent with provisions set out by Article 2, par. 1, of Legislative Decree No. 62/2018, which establishes, in implementing provisions regarding Article 27 of the Directive (EU) 2015/2302, that the provisions of Sections I to IV of Chapter I, Title III, of Legislative Decree No. 206/2005 (Articles 48-67 of the Consumer Code) do not apply to organized tourism contracts governed by the Tourism Code⁽⁵⁰⁾.

6. The responsibility of the organiser

The responsibility of the organiser regarding the non-execution or defective execution of the obligations established in the package travel contract, introduced by Section IV (*Execution of the package*, Articles 42-46 of the Tourism Code), is configured by paying specific attention to the need to bring the European Union discipline to the general, domestic law models and the need to conform, as is possible, the supranational legislation to the Italian

⁽⁴⁹⁾ See the discipline of the right of withdrawal pursuant to Title III, Chapter I, Section II, Articles 52-59 of the Consumer Code, as amended by Legislative Decree 21 February 2014, No. 21, implementing Directive 2011/83/EU on consumer rights, amending Directives 93/13/EEC and 1999/44/EC and repealing Directives 85/577/CEE and 97/7/CE.

⁽⁵⁰⁾ See also the exceptions provided for by Article 59, lett. n, of the Consumer Code, according to which the right of withdrawal pursuant to Articles 52-58 for (distance contracts and) contracts negotiated away from business premises is excluded in relation to “the supply of housing for non-residential purposes, transport of goods, car rental services, catering services or services concerning leisure activities if the contract provides for a specific date or period of performance”.

legal tradition. In fact, this is the part where the new regulation introduced by Legislative Decree No. 62/2018 differs more from Directive (EU) 2015/2302, both from the point of view of the literal formulation of the laws, and from the point of view of the substantial choices made in the Tourism Code.

First of all, worth highlighting is the clear separation between the position of the organiser and that of the retailer of the package travel, which definitively resolves all questions regarding the relative liability regime – supportive or partial, supportive but subsidiary, or “structurally differentiated”⁽⁵¹⁾ – arising after the defective formulation of Article 14, par. 1, of Legislative Decree No. 111/1995⁽⁵²⁾, then incorporated in Article 93, par. 1 of the Consumer Code⁽⁵³⁾ and finally reiterated by Article 43, par. 1, of the Tourism Code⁽⁵⁴⁾.

After having established the general principle of responsibility of the organiser for the improper execution of the services provided by the package travel contract (Article 42, par. 1, of the Tourism Code)⁽⁵⁵⁾, the national legislator attributes specific value to the application of good faith principles, pursuant to Articles 1175 and 1375 of the Civil Code, and of responsibility to the associates and collaborators, pursuant to Article 1228 of the same Code. In particular, it is confirmed that the organiser is responsible for the execution of the promised services, irrespective of the fact that they must be provided by the organiser himself, by the associates or collaborators when they are acting in the exercise of their functions, by the third parties whose work the organ-

⁽⁵¹⁾ See G. SILINGARDI - F. MORANDI, *La “vendita di pacchetti turistici”*, cit., 128.

⁽⁵²⁾ Pursuant to Article 17, par. 1, Legislative Decree No. 111/1995, “in the event of failure or inadequate fulfillment of the obligations assumed with the sale of the package, the organiser and the retailer are required to pay damages, according to their respective responsibilities, if they do not prove that the failed or incorrect fulfillment has been determined from the impossibility of the service deriving from a cause not attributable to them [...] The organiser and the retailer are exempt from the responsibility referred to in Articles 15 and 16, when the failed or inexact execution of the contract is attributable to the consumer or it depended on the fact of a third party of an unforeseeable or unavoidable nature, or of a fortuitous event or of force majeure”.

⁽⁵³⁾ The Consumer Code reiterated the principle, taking care to specify, however, that “the differences in the quality standards of the promised or advertised service are considered to be inexact fulfillment” (in the second part of the Article referred to in the text).

⁽⁵⁴⁾ According to the previous regime, therefore, “without prejudice to the obligations envisaged by Article 42, in the event of failure or inadequate fulfillment of the obligations assumed with the sale of the tourist package, the organiser and the intermediary are required to pay damages, according to the respective responsibilities. The differences in the quality standards of the promised or advertised service are considered to be incorrect”.

⁽⁵⁵⁾ See E. ORRÙ, *Sub artt. 42 e 43*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1263 e 1288.

iser relies upon or other travel service providers⁽⁵⁶⁾.

The legislation regarding the organiser's liability is closely related to the notion of "lack of conformity"⁽⁵⁷⁾ – understood as any "non-fulfilment of the travel services included in a package" – which Article 33, par. 1, lett. p), of the Tourism Code attributes to the general principle of the debtor's liability established in Article 1218 of the Civil Code, thus simplifying the definition offered by Article 3, n. 13, of the Directive (EU) 2015/2302.

In this regard, it should be emphasised that, in favour of adopting a general clause of attribution of responsibility, the legislator has turned down any reference to the "discrepancy of the *quality standards of the promised or advertised service*"⁽⁵⁸⁾ to which the previous Article 43, par. 1, second part, of the Tourism Code referred to as a parameter for the purpose of assessing the existence of an incorrect fulfilment by the organiser and the retailer⁽⁵⁹⁾.

In case of lack of conformity, if one of the travel services is not carried out according to what was agreed in the package travel contract, the traveller is obliged to promptly inform the organiser, in compliance with the cooperation obligations deriving from the contract with corresponding services concluded with the tour operator, thus placing the latter in a position to become aware

⁽⁵⁶⁾ Article 42, par. 1, of the Tourism Code expressly refers to the regulation of the liability of the auxiliaries pursuant to Article 1228 of the Civil Code.

⁽⁵⁷⁾ See A. FINESSI, *Prestazione di servizi "non conformi" al contratto di viaggio e rimedi contrattuali esperibili dal viaggiatore nella dir. 2015/2302/UE: prospettive di attuazione nell'ordinamento giuridico italiano*, in *La nuova disciplina europea dei contratti di viaggio*, cit., 101.

⁽⁵⁸⁾ On the value of voluntary standards and the reference to standards as criteria for evaluating and measuring the quality of performance, in general, see M. CIMMINO, *Qualità della vacanza ed inesatto adempimento*, Napoli, 2008 (part. 133 and 161); with reference to the corresponding principle of compliance with the contract envisaged for the sale and guarantees of consumer goods, see G. DE CRISTOFARO, *Difetto di conformità al contratto e diritti del consumatore. L'ordinamento italiano e la Direttiva 99/44/Ce sulla vendita e le garanzie dei beni di consumo*, Padova, 2000, 53; M. P. MANTOVANI, *La vendita dei beni di consumo*, ESI, Napoli, 2009, 22; see also G. AMADIO, *Difetto di conformità e tutele sinallagmatiche*, in *Riv. dir. civ.*, 2001, I, 889; ID., *La conformità al contratto tra garanzia e responsabilità*, in *Contr. impr. Europa*, 2001, 10; E. GABRIELLI, *Aliud pro alio e difetto di conformità nella vendita di beni di consumo*, in *Riv. dir. priv.*, 2003, 657; M. RABITTI, *Garanzie convenzionali nella vendita di beni di consumo tra promessa al pubblico e regole di formazione del contratto*, in *Contr. impr.*, 2008, 945.

⁽⁵⁹⁾ The choice of recognizing an improper performance in all those hypotheses in which the travel service does not correspond to the qualitative level contractually due would have implied the need for further regulatory measures aimed at identifying parameters technical and uniform criteria on which to base the rating system: A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1320.

of any disruption or disservice and to intervene with the aim of properly fulfilling the obligation⁽⁶⁰⁾.

The Italian legislator, in line with the intermediation function attributed by the Tourism Code to the retailer, specifies that the communication can take place “either directly or through the retailer” (Article 42, par. 2, of the Tourism Code)⁽⁶¹⁾. The organiser is obliged to remedy the inconvenience, unless this proves to be impossible or excessively onerous⁽⁶²⁾, taking into account the extent of the lack of conformity and the value of the tourism services involved. If the organiser does not remedy the issue within a reasonable period set by the traveller with regard to the duration and characteristics of the package, the traveller can remedy the defect personally and request reimbursement of necessary, reasonable and documented expenses.

In transposing the Legislative Decree, on the other hand, some significant references to the fundamental institutes of domestic law, that had been appropriately proposed in the preparatory texts, have disappeared. In particular, the reasonableness of the period set by the traveller to obtain the elimination of the lack of conformity must be established according to good faith principles, to avoid fatiguing disputes, thus allowing the best balance between the needs of travellers and tour operators.

⁽⁶⁰⁾ The new text of the Tourism Code shows a slight discrepancy with respect to the literal tenor of the Directive (EU) 2015/2302: Article 42, par. 2, of the Tourism Code specifies that the dispute should be presented to the organiser “promptly”, while the corresponding Article 13, par. 2, of the Directive (EU) 2015/2302 states that the traveller must inform the tour operator of the lack of conformity “without undue delay”; in the same way, Article 36, par. 5, lett. *e*, of the Tourism Code establishes that the contract must specify the fact that the traveller is required to communicate “without delay” any lack of conformity detected during the execution of the package (the adjective “undue” referred to the delay is missing), while the correlative Article 7, par. 2, lett. *e*, of the Directive (EU) 2015/2302, merely referring to the following Article 13, par. 2, of the Directive without further specification.

⁽⁶¹⁾ The provision implements Article 15 of the Directive (EU) 2015/2302, transposed in Article 44 of the Tourism Code, which recognizes to the traveller the possibility of contacting the organiser through the seller: it is established in fact that “the Member States ensure that the traveller can send messages, requests or complaints relating to the execution of the package directly to the seller through whom you purchased”, that will be required to forward them without undue delay to the tour operator, so that “for the purposes of compliance with the terms or limitations, the date on which the seller receives messages, requests or complaints pursuant to the first paragraph is considered the date of receipt also for the organiser”.

⁽⁶²⁾ The expression “excessively onerous” replaces the reference to the fact that the remedy “entails disproportionate costs”, referred to in Article 13, par. 3, lett. *b*, of the Directive (EU) 2015/2302.

The attempt to enhance the general principles also included a reference to Article 1227 of the Civil Code, establishing the traveller's contributory negligence in case of failure or delayed notification of any lack of conformity detected during the execution of a travel service⁽⁶³⁾. It is reasonable to believe, however, that failure to explicitly recall the principles indicated above does not in any way prejudice the concrete and full application in relation to the specific cases. On the other hand, it is the same Recital 34 of the Directive (EU) 2015/2302 which clearly indicates that the traveller is obliged to inform the organiser without undue delay, taking into account the circumstances of the case, of any lack of conformity he perceives during the execution of a service included in the package travel contract, to the point that "failure to do so may be taken into account when determining the appropriate price reduction or compensation for damages where such notice would have avoided or reduced the damage".

In the presence of a lack of conformity, a number of various remedies are granted to the traveller, depending on the fact whether the organiser may or may not intervene with remedial action or adopt a remedial measure⁽⁶⁴⁾. Firstly, according to the new regime, the organiser of the travel package is obliged to take action to remedy the lack of conformity, according to the same logic with which the right of the clients to request that the contractor eliminate, at their own expense, the differences or defects of the work or service, pursuant to Article 1668, par. 1, of the Civil Code⁽⁶⁵⁾. Secondly, a particularly significant element of novelty with respect to the previous regulation of organized tourism contracts is represented by the fact that the traveller is entitled to an adequate price reduction for the period during which there was a lack of conformity, unless the organiser can demonstrate that this defect is attributable to the traveller

⁽⁶³⁾ The legislator has failed to reiterate the provisions of the previous Article 49, par. 3, of the Tourism Code, pursuant to which "the failure to present the complaint can be assessed for the purposes of Article 1227 of the Civil Code". In doctrine, for the applicability of the Article 1227 of the Civil Code to the case in question, A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1329; G. GRISI - S. MAZZAMUTO, *Diritto del turismo*, cit., 213; R. SANTAGATA, *Diritto del turismo*, cit., 306, nt. 79.

⁽⁶⁴⁾ For the configuration of a hierarchical graduation between remedial interventions and secondary remedies, in the event that the subsequent fulfillment is impossible or excessively expensive, see G. GRISI - S. MAZZAMUTO, *Diritto del turismo*, cit., 209; A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1332.

⁽⁶⁵⁾ The qualification of the package travel contract as a service contract, proposed by G. SILINGARDI - F. MORANDI, *La "vendita di pacchetti turistici"*, cit., 128, has found wide acceptance in doctrine and fully legitimizes the parallelism with the discipline of the Article 1655 and followings.

(Article 43, par. 1, of the Tourism Code)⁽⁶⁶⁾. Thirdly, the European Union legislation provides in any case for the traveller's right to compensation for damages suffered as a result of the organiser's failure to fulfil the obligations taken on after stipulating the package travel contract, according to the new regulations established by Article 14 of the Directive (EU) 2015/2302.

In line with the general discipline concerning the termination of the contract, the travel organiser is not obliged to remedy the lack of conformity only in cases where the exact fulfilment (or alternative remedial solution) is impossible or entails disproportionate costs; this latter hypothesis must be evaluated on the basis of the extent of the lack of conformity and the value of the travel services involved⁽⁶⁷⁾.

The Tourism Code also introduces a new hypothesis of legal resolution of the package travel contract for cases in which the organiser does not remedy the lack of conformity contested by the traveller within the reasonable period established by the latter, provided that the non-fulfilment by the tour operator has little importance in regard to the user's interest (pursuant to Article 42, par. 5, of the Tourism Code, which makes an express reference to Article 1455 of the Civil Code)⁽⁶⁸⁾. This change represents a further example of how the national legislator, while respecting the stringent constraints imposed by the level of detail of the European Union rules, has made an interesting effort to bring the remedies provided for by the Directive within the general details of the civil regulations⁽⁶⁹⁾.

⁽⁶⁶⁾ The reduction of the price of the tourist package is independent of any evaluation of the eventual non-fulfilment and of the existence of reasons for exemption from the responsibility of the organiser. The regulation in question repeats the scheme of the price reduction in the sale of consumer goods, as per Article 1492 of the Civil Code, so that the admissibility of the accumulation of the remedy of the price reduction with the right of the traveller to compensation for damages does not seem to be revocable.

⁽⁶⁷⁾ The expression "entails disproportionate costs" used in Article 13, par. 3, lett. *b*, of the Directive (EU) 2015/2302 has been appropriately interpreted as "excessive burdens", not differently from what was foreseen at the time of transposition into Article 130 of the Consumer Code of Article 3 of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale and guarantees of consumer goods.

⁽⁶⁸⁾ Article 42, par. 5, of the Tourism Code offers an interpretation oriented to the general principles regarding obligations and contracts of the expression "significantly affects the performance of the package" used in Article 13, par. 6, of the Directive (EU) 2015/2302.

⁽⁶⁹⁾ A further hypothesis of legal resolution also occurs in the event that the organiser fulfills the obligation to offer alternative solutions if, due to circumstances not attributable to the tour operator, it is impossible to supply, in the course of execution, a part substantial, by value or quality, of the combination of the tourist services agreed in the contract (Article 42,

Within this perspective, the configuration is also placed as a hypothesis of partial supervening impossibility not attributable to the debtor – framed within the scope of Article 1464 of the Civil Code, which gives rise to an alternative obligation on the part of the tour operator – in the event that “due to circumstances not attributable to the organiser it is impossible to provide, during the execution, a substantial part, by value or quality, of the combination of the travel services agreed in the package travel contract” (Article 42, par. 8, of the Tourism Code)⁽⁷⁰⁾. The remedial system established by the legislator envisages that the organiser is required to offer, without additional costs to the traveller, adequate alternative solutions, of quality where possible equivalent or higher than those specified in the contract, or of a lower quality with an adequate price reduction, which the traveller can refuse only if not comparable to what agreed in the travel package contract or if the reduction of the price granted is inadequate⁽⁷¹⁾.

In this regard, it is still necessary to highlight that (in contrast with the provisions of European Union legislation) if it is impossible for the organiser to provide alternative solutions or the traveller rejects the appropriate alternative solutions that have been proposed, Article 42, par. 10, of the Tourism Code, recognises the latter only the right to reduce the price, whereas Article 13, par. 6, comma 2, of the Directive (EU) 2015/2302 also allows compensation for damages⁽⁷²⁾.

par. 10, of the Civil Code, in relation to par. 8 of the same Article).

⁽⁷⁰⁾ The wording of the provision in question differs significantly from Article 13, par. 5, of the Directive (EU) 2015/2302, from which it derives directly, which is limited to referring to the hypothesis in which “a significant proportion of the travel services cannot be provided as agreed in the package travel contract”. Article 42, par. 5, of the Tourism Code, in fact, completes the description of the case by introducing some additional qualification elements, capable of better defining the scope of application and the legal effects, recalling the concepts of “supervening circumstances”, which are “not attributable to the organiser”, and affect the “value and quality” of the tourist services included in the package.

⁽⁷¹⁾ In considering that the Italian legislator has reported the impossibility not already to the remediation of the lack of conformity, but to the execution of the services deducted in obligation, circumscribing the scope of the remedial case, A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1334 s., observes that the choice between alternative solutions is not freely attributed to the professional, who will be required first of all to offer a package of superior quality or equivalent and, only in the event that it is impossible or excessively burdensome, can propose a journey of lower quality with adequate price reduction, thereby innovating with respect to the previous Article 41, par. 4, of the Tourism Code.

⁽⁷²⁾ It should also be noted that Article 42, par. 10, of the Tourism Code does not reproduce the words “without terminating the package travel contract” which closes the Article 13, par. 6, comma 2, of the Directive (EU) 2015/2302.

Finally, the organiser's liability regime is completed by the provision of a mandatory series of exclusion clauses indicated by Article 43, par. 3, of the Tourism Code, in accordance with the provisions established by Article 14, par. 3, of the Directive (EU) 2015/2302. The traveller is not entitled to compensation for damages resulting from the non-fulfilment of the obligations within the travel package contract in the event that the tour operator demonstrates that the lack of conformity is attributable to the traveller or a third party unrelated to the provision of the travel services and is unpredictable or unavoidable or due to unavoidable and extraordinary circumstances⁽⁷³⁾.

Essentially, there is a system of strict liability for business risk, from which the organiser can be exonerated only by proving the existence of one of the causes of exclusion expressly provided for by the law, according to the consolidated model starting from the transposition of Directive 90/341/EEC by Legislative Decree No. 111/1995⁽⁷⁴⁾.

7. The compensation for damages

Once the responsibility of the package travel organiser has been ascertained, the traveller has the right to receive, without unjustified delay, adequate compensation for any damage that they may have suffered as a result of a lack of conformity (Article 43, par. 2, of the Tourism Code).

Without prejudice to the right to receive an adequate price reduction depending on the period during which the lack of conformity took place, the com-

⁽⁷³⁾ The notion of "inevitable and extraordinary circumstances" is defined by Article 33, par. 1, lett. o, of the Tourism Code as "a situation beyond the control of the party invoking such a situation and whose consequences would not have been avoided even by adopting all reasonable measures", in accordance with Article 3, n. 12, of the Directive (EU) 2015/2302. The EU Court of Justice has had occasion to intervene recently on the parallel notion of "exceptional circumstance": with judgment of 26 June 2019, in the case C-159/18, *André Moens v. Ryanair Ltd.*, clarified that the Article 5, par. 3, of the Regulation (EC) No. 261/2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91, read in the light of Recitals 14 and 15 thereof, must be interpreted as meaning that the situation whose "exceptional circumstance" is ascertained must be considered a circumstance that could not have been avoided even if all the necessary measures had been taken pursuant to that provision (in this case, the presence of fuel on an airport runway, which led to the closure of this runway).

⁽⁷⁴⁾ Concerning the nature of the travel organiser's responsibility, following the common thread that links current European Union legislation to the original provision introduced by the repealed Directive 90/314/EEC, see G. SILINGARDI - F. MORANDI, *La "vendita di pacchetti turistici"*, cit., 209.

pensation obligation borne by the package travel organiser refers both to damages to the traveller as a person and damages other than those to the person.

Article 46 of the Tourism Code dictates specific regulations for compensation regarding the “ruined vacation damage” ⁽⁷⁵⁾, without substantially diverging from the characterisation that was given to this aspect by the previous Article 47 of the Tourism Code ⁽⁷⁶⁾, as introduced by Legislative Decree No.

⁽⁷⁵⁾ The compensation for damage caused by ruined holidays is definitely gained after the leading case represented by the EC Court of Justice’s ruling 12 March 2002, in Cause C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, commented, limited to Italian doctrine, by C.S. CARRASSI, *L’interpretazione da parte della Corte di Giustizia Ce delle norme comunitarie è, indiscutibilmente, vera nomofilachia?*, in *Danno resp.*, 2002, 1099; P. M. PUTTI, *Danno da vacanza rovinata*, in *Contr.*, 2002, 952; R. CONTI, *Corte di giustizia, danno da vacanza rovinata e viaggi “su misura”. Ancora due vittorie per i consumatori*, in *Corr. giur.*, 2002, 1002; G. FIENGO, *Dovuto l’indennizzo per il danno morale derivante dal mancato godimento di una vacanza “tutto compreso”*, in *Dir. pubbl. comp. europeo*, 2002, 1149; M. FRAGOLA, *La Corte di giustizia riconosce la risarcibilità del danno morale “da vacanza rovinata” alla luce dell’ordinamento comunitario*, in *Dir. com. scambi internaz.*, 2002 287; A. PALMIERI, in *Foro it.*, 2002, IV, c. 331; R. SCARCIGLIA, *Viaggi “tutto compreso”, emotional distress e risarcibilità del danno morale in caso di “mancata vacanza”*, in *Dir. pubbl. comp. europeo*, 2002, 1152; L. SESTA, *Danno da vacanza rovinata e danno morale contrattuale*, in *Giur. it.*, 2002, 1801; F. FARKAS, *Il danno da vacanza rovinata: nuove tendenze e vecchie questioni*, in *Nuova giur. civ. comm.*, 2003, 864; M. FRAGOLA, *Tutela del turista e danno risarcibile: la Corte di Giustizia riconosce la risarcibilità del danno da vacanza rovinata alla luce dell’ordinamento comunitario*, in *Rass. dir. civ.*, 2003, 633; P. MENGOZZI, *Il risarcimento del danno morale da vacanza rovinata dopo la sentenza della Corte di giustizia CE del 12 marzo 2002*, in *Contr. impr. Europa*, 2003, 589.

⁽⁷⁶⁾ Before the entry into force in 2011 of the Article 47 of the Tourism Code, in its original formulation, see L. ROSSI CARLEO, *Turismo organizzato e vacanza rovinata: la risarcibilità del danno*, in *Riv. dir. imp.*, 1995, 477; C. VACCÀ, *La “vacanza rovinata” e la tutela dei diritti del fruitore dei servizi turistici*, in *Riv. dir. comm.*, 1992, I, 909; F. MORANDI, *Il danno da vacanza rovinata*, in P. CENDON - P. ZIVIZ (eds.), *Il danno esistenziale. Una nuova categoria della responsabilità civile*, Giuffrè, Milano, 2000, 623; G. LOFFARI, *La vacanza rovinata*, in P. CENDON (ed.), *Trattato breve dei nuovi danni*, III, Padova, 2001, 2431; M. CAVALLARO, *Prassi applicativa e sistema nel “danno da vacanza rovinata”*, in *Rass. dir. civ.*, 2002, 23; A. GUERINONI, *Il danno da vacanza rovinata*, Piacenza, 2003; S. POLLASTRELLI, *Il risarcimento del danno morale nei viaggi turistici organizzati*, in *Dir. traspr.*, 2003, 43; M. RIGUZZI, *Il danno da vacanza rovinata*, in *Dir. tur.*, 2003, 8; A. ARLOTTA, *Il contratto di viaggio e le conseguenze del suo inadempimento: danno da vacanza rovinata e overbooking*, in *Nuova giur. civ. comm.*, 2004, II, 456; E. PALMERINI, *Il danno da vacanza rovinata e le altre fattispecie tipizzate*, in E. NAVARRETTA (ed.), *I danni non patrimoniali. Lineamenti sistematici e guida alla liquidazione*, a cura di E. NAVARRETTA, Milano, 2004, 473; M. LAZZARA, *Danno da vacanza rovinata e quantificazione del risarcimento*, in *Dir. tur.*, 2005, 233; M. P. RIZZO, *Considerazioni sulla risarcibilità del danno da vacanza rovinata*, in *Attività alberghiera e di trasporto nel pacchetto turistico all-inclusive*, cit., 173; R. CAMPIONE, *Il*

79/2011⁽⁷⁷⁾.

A more incisive intervention of the complete rewriting of the particular case could have perhaps been reflected negatively on the concrete application of a provision with respect to which there is now univocal and consolidated orientation, both in the jurisprudence of merit⁽⁷⁸⁾ and in that

danno da "vacanza rovinata" alla luce della nuova concezione del danno non patrimoniale, in *Riv. trim. dir. proc. civ.*, 2007, 978; M. S. CENINI, *Risarcibilità del danno non patrimoniale in ipotesi di inadempimento contrattuale e vacanze rovinate: dal danno esistenziale al danno da "tempo libero sacrificato"?*, in *Riv. dir. civ.*, 2007, II, 629; L. NOCCO, *Itinerari della giurisprudenza. Il danno da vacanza rovinata*, in *Danno resp.*, 2007, 624; M. TESCARO, *Il danno da vacanza rovinata "atipico"*, in *Resp. civ.*, 2007, 1019; A. GALLI - B. MONTI, *Il danno da vacanza rovinata*, II ed., Milano, 2008; L. SAVANNA, *Contratti di viaggio e responsabilità: il danno da vacanza rovinata*, Torino, 2008; E. GUERINONI, *Disciplina dei contratti turistici e danno da vacanza rovinata*, Milano, 2009; N. ORTU, *Il risarcimento del danno da vacanza rovinata. Gli orientamenti della dottrina e della giurisprudenza*, in *Resp. civ. prev.*, 2009, 2531; C. ROSSELLO, *Il "danno da vacanza rovinata" dopo le Sezioni Unite del 2008 sul nuovo statuto del danno non patrimoniale*, in *Nuova giur. civ. comm.*, 2009, II, 488; E. BACCIARDI, *Danno da vacanza rovinata e altre fattispecie*, in E. NAVARRETTA (ed.), *Il danno non patrimoniale. Principi, regole e tabelle per la liquidazione*, Milano, 2010, 597; S. CATERBI, *Il danno da vacanza rovinata. Dal volo cancellato all'overbooking: responsabilità e risarcimento*, Milano, 2010; M. COCUCCIO, *Viaggio turistico e vacanza rovinata*, cit., 24; M. MAGGIOLO, *Il danno non patrimoniale da inadempimento*, in *Trattati brevi. Responsabilità civile. Danno non patrimoniale*, directed by S. PATTI, edited by S. DELLE MONACHE, Torino, 2010, 675.

⁽⁷⁷⁾ See R. CAMPIONE, *Il rimedio risarcitorio nella dir. 2015/2302/UE*, in *La nuova disciplina europea dei contratti di viaggio*, cit., 131, and G. DE CRISTOFARO, *La disciplina dei contratti aventi ad oggetto "pacchetti turistici" nel "codice del turismo"*, cit., 1285; M. R. MOTTOLA, *Il danno da vacanza rovinata a seguito del d.lgs. 23 maggio 2011, n. 79*, in P. CENDON (ed.), *Trattato dei nuovi danni*, IV, Padova, 2011; F. ROMEO, *Il "nuovo" danno da vacanza rovinata: primi rilievi sull'art. 47 c. tur.*, in *Resp. civ.*, 2011, 565; M. COCUCCIO, *Inadempimento del contratto di viaggio: la vacanza "rovinata"*, in *Giur. merito*, 2012, 1584; C. VADALÀ, *Il danno da vacanza rovinata nel codice del turismo. Note di prima lettura*, in *Riv. it. Dir. tur.*, 2012, 11; S. MAZZAMUTO, *Il danno non patrimoniale contrattuale*, in *Europa dir. priv.*, 2012, 437; P. GENTILE, *Il danno da vacanza rovinata*, in *Rass. dir. civ.*, 2013, 273; M. GIORGIANNI, *Il "nuovo" danno da vacanza rovinata*, in P. CENDON (ed.), *Trattato breve dei nuovi danni*, III, *Figure emergenti di responsabilità*, Padova, 2014, 837; G. MALGIERI, *Il punto sul danno da vacanza rovinata*, cit., 237; N. SOLDATI, *Responsabilità del tour operator per omissione di informazioni e danno da vacanza rovinata*, in *Riv. it. Dir. tur.*, 2014, 338; R. DI NAPOLI, *Risarcimento del danno da vacanza rovinata: istituti, formule, giurisprudenza*, IV ed., Rimini, 2016; M. MANFRON, *Il danno da vacanza rovinata e il danno non patrimoniale da inadempimento*, in *Danno resp.*, 2016, 310; M. SIGNORELLI, *Il "danno da vacanza rovinata" nel codice del turismo: un percorso giurisprudenziale. Prima parte*, in *Resp. civ. prev.*, 2017, 96, e *Seconda parte*, *ivi*, 448; L. CANNATA - A. CONTE - E. TOCCAFONDO, *Il risarcimento del danno da vacanza rovinata*, in *Danno resp.*, 2019, 212.

⁽⁷⁸⁾ In jurisprudence see App. Milano, 21 June 1988, in *Dir. traspr.*, 1990, I, 258, with a comment by M. DEIANA, *Una discutibile decisione in tema di responsabilità dell'intermediario di viaggi*; Trib. Roma, 6 October 1989, in *Resp. civ. prev.*, 1991, 512, with a comment by C. VACCÀ,

Inadempimento contrattuale e risarcimento del danno non patrimoniale: vacanze da sogno e vacanze da incubo; Trib. Lecce, 21 September 1990, and Pret. Monza, 7 December 1990, in *Foro it.*, 1990, I, c. 3060, with a comment by R. PARDOLESI; Trib. Bologna, 15 October 1992, in *Contr.*, 1993, 327, with a comment by A. AMBANELLI, *La responsabilità dell'intermediario nel contratto di viaggio*; Pret. Genova, 13 July 1994, in *Giur. merito*, 1995, 463, with a comment by G. GIACCHERO, *Contratto di viaggio: obblighi e responsabilità nell'intermediazione e nell'organizzazione*; Trib. Torino, 8 November 1996, in *Resp. civ. prev.*, 1997, 819, with a comment by M. GORGONI, *I giudici e l'inadempimento del contratto di viaggio*, ed in *Dir. mar.*, 1998, 1197, with a comment by R. ABBATE, *La direttiva della CE 90/314, concernente i viaggi, le vacanze ed i circuiti "tutto compreso" nel quadro della disciplina comunitaria del turismo. L'efficacia delle disposizioni anteriormente all'attuazione della direttiva e il danno da vacanza rovinata*; Trib. Monza, 4 December 1996, in *Contr.*, 1997, 478, with a comment by C. VACCÀ, *Responsabilità del "tour operator" tra fatto colposo del terzo e responsabilità dell'ausiliario*; Pret. Roma, 11 December 1996, in *Nuova giur. civ. comm.*, 1997, I, 875, with a comment by V. ZENO-ZENCOVICH, *Il danno da vacanza rovinata: questioni teoriche e prassi applicative*; Giud. pace Milano, 28 December 1997, in *Giud. pace*, 1999, 58, with a comment by S. PALMIERI, *Natura giuridica del c.d. danno da vacanza rovinata*; Giud. pace Napoli, 16 July 1998, n. 6627, in *Nuovo dir.*, 1999, 685, with a comment by Nappi; Pret. Ivrea, 21 September 1998, in *Danno resp.*, 1999, 565, with a comment by M. GRANIERI, *Contratti di viaggio e risarcibilità del "danno da vacanza rovinata"*; Trib. Torino, 8 November 1996, in *Giur. it.*, 1997, I, 2, 58; Trib. Torino, 28 November 1996, in *Riv. giur. circ. trasp.*, 1998, 1005, with a comment by G. BENELLI, *"Overbooking" alberghiero e responsabilità dell'organizzatore di viaggio*; Trib. Milano, 4 June 1998, in *Contr.*, 1999, 39, with a comment by E. GUERINONI, *Il danno "da vacanza rovinata"*; Giud. pace Siracusa, 26 March 1999, in *Giust. civ.*, 2000, I, 1205, with a comment by T. SERRA, *Inadempimento del contratto di viaggio e danno da vacanza rovinata*; Giud. pace Bari, 21 April 1999, in *Arch. giur.*, 1999, 876; Trib. Treviso, 14 January 2002, in *Giur. merito*, 2002, 1196, with a comment by M. PESCAROLLO, *In tema di vendita di "pacchetto turistico" e di danno da "vacanza rovinata"*; Trib. Milano, 7 February 2002, in *Danno resp.*, 2003, 553, with a comment by F. AGNINO, *Mare splendido: se non ci fossero tutte quelle ciminiere! Ovvero: come rovinarsi l'agognata vacanza*; Giud. pace Ravenna, 20 May 2002, in *Giur. it.*, 2003, 258, with a comment by D. GENNARI, *Breve rassegna in materia di danno da vacanza rovinata*; Trib. Roma, 19 May 2003, in *Dir. giust.*, 2003, 30, 55; Giud. pace Milano, 16 August 2003, in *Giud. pace*, 2004, 238; Trib. Roma, 2 October 2003, in *Dir. trasp.*, 2005, 285 with a comment by L. TULLIO, *Interpretazioni discutibili ed inquietanti della normativa sul contratto di viaggio*; Trib. Roma, 26 November 2003, in *Dir. tur.*, 2004, 232, with a comment by A. TURCO, *Sul rifiuto della proposta alternativa del tour operator in caso di modifiche dopo la partenza*; Trib. Roma, 11 May 2004, in *Danno resp.*, 2005, 297; Trib. Castellammare di Stabia, 29 March 2005, in *Contr.*, 2005, 1008; Trib. Milano, 16 September 2005, n. 10090, in *Resp. civ.*, 2006, 400, with a comment by A. MIGLIAVACCA, *Il danno da vacanza rovinata trova spazio anche nell'infortunistica stradale*; Trib. Rimini, 28 December 2005, in *Contr.*, 2006, 785, with a comment by E. GUERINONI, *Obblighi di avviso e di intervento e "rovina" della vacanza*; Trib. Marsala, 5 April 2007, in *Danno resp.*, 2008, 185, with a comment by M. BONA, and in *Nuova giur. civ. comm.*, 2008, 277, with a comment by V. DELLA MONACA, *Risarcimento del danno da vacanza rovinata a causa dello smarrimento del bagaglio*; Trib. Napoli, 30 December 2008, in *Corr. merito*, 2009, 353; Giud. pace Genova,

of legitimacy⁽⁷⁹⁾ established over the past twenty years.

As opposed to the past, the legislator decidedly improved the criterion

24 December 2007, in *Dir. tur.*, 2008, 35, with a comment by S. D'URSO, *Danno da vacanza rovinata e termine per il reclamo di cui all'art. 98 cod. cons.*; Trib. Marsala, 5 April 2007, in *Resp. civ. prev.*, 2007, 1902, with a comment by S. VERNIZZI, *Perdita del bagaglio consegnato: il vettore aereo risponde (limitatamente) del pregiudizio non patrimoniale conseguente al suo inadempimento contrattuale?*; Trib. Saluzzo, 25 February 2009, in *Giur. merito*, 2009, 2765, with a comment by M. DI MARZIO, *Il danno non patrimoniale da inadempimento dopo le Sezioni Unite*; Trib. Padova, 19 March 2010, in *Giur. merito*, 2012, 1583, Giud. pace Salerno, 10 May 2010, *ivi*, Trib. Nola, 9 September 2010, *ivi*, 1581, e Trib. Milano, 7 January 2011, *ivi*, 1581, with a comment by M. COCUCCIO, *Inadempimento del contratto di viaggio: la vacanza rovinata*; Trib. Ferrara, 11 June 2010, in *Riv. it. Dir. tur.*, 2012, 83, with a comment by M. MONTANARI, *I limiti alla risarcibilità del danno da vacanza rovinata ed il difficile equilibrio tra salvaguardia dell'interesse del creditore e gravità dell'inadempimento*; Trib. Bergamo, 28 September 2010, *ivi*, 104, with a comment by A. LODI, *La responsabilità del tour operator: obblighi informativi, inadempimento del terzo e danno da vacanza rovinata*; App. Genova, 28 December 2011, in *Dir. mar.*, 2013, 468; Trib. Palermo, 16 January 2013, in *Giur. merito*, 2013, 2098; Trib. Reggio Emilia, 30 March 2016, in *Riv. it. Dir. tur.*, 2017, 300, with a comment by M. MONTANARI, *Danno da vacanza rovinata da sinistro stradale*; in the opposite direction to compensation, but now isolated, see Trib. Venezia, 24 September 2000, in *Contr.*, 2001, 580, with a comment by E. GUERINONI, *Danno da vacanza rovinata e art. 2059 c.c.*, e Giud. pace Cagliari, 24 January 2000, in *Giud. pace*, 2001, 70; for an analysis of the decisions of the jurisprudence see also L. NOCCO, *Il danno da vacanza rovinata e i giudici di pace*, in G. COMANDÉ (ed.), *Il danno nella giurisprudenza dei giudici di pace*, Milano, 2009, 164.

⁽⁷⁹⁾ In the most recent jurisprudence, with reference to the published and commented decisions, see Cass. civ., 24 May 1997, n. 4636, in *Contr.*, 1997, 477, with a comment by C. VACCÀ; Cass. civ., 9 November 2004, in *Contr.*, 2005, 103; Cass. civ., 27 June 2007, n. 14837, in *Dir. tur.*, 2008, 301, with a comment by P. CARMAGNANI, *La responsabilità del tour operator dalla CCV al codice del consumo*; Cass. civ., 24 April 2008, n. 10651, in *Dir. tur.*, 2008, 349, *cit.*; Cass. civ., Sez. III, 6 July 2009, n. 15798, in *Giust. civ.*, 2010, 1957, with a comment by C. CONFORTO, *Se il turista si ammala in viaggio, che vacanza è?*, ed in in *Resp. civ.*, 2011, 35, with a comment by G. AMORE, *Negligenza informativa e danno da vacanza rovinata*; Cass. civ., Sez. III, 13 November 2009, n. 24044, in *Resp. civ. prev.*, 2010, 1314, with a comment by E. GRAZIOUSO, *Il danno da vacanza rovinata tra vecchi orientamenti e nuove prospettive*; Cass. civ., 20 March 2012, n. 4372, *cit.*; Cass. civ., Sez. III, 11 May 2012, n. 7256, in *Giust. civ.*, 2012, 2018, with a comment by M. DI MARZIO, *Vacanza: il danno non patrimoniale può superare quello patrimoniale*; Cass. civ., 9 October 2012, n. 17227, in *Resp. civ. prev.*, 2012, 6501, with a comment by E. BACCIARDI, *Vendita di autocaravan e risoluzione per inadempimento: è risarcibile la perdita della vacanza "immaginata"?*; Cass. civ., 14 June 2016, n. 12143, in *Dir. mar.*, 2017, 466; Cass. civ., Sez. VI, 16 marzo 2017, n. 6830, to be published in *Riv. it. Dir. tur.*, 2019, with a comment by A. COSTANTINI and S. A. BEVILACQUA, *Rapina nel villaggio e responsabilità del tour operator per il danno da vacanza rovinata*; Cass. civ., Sez. III, 6 July 2018, n. 17724, with a comment by N. SOLDATI, *Danno da vacanza rovinata e risarcimento del danno provocato da terzi*, *ivi*.

for attributing responsibility to the organiser or to the retailer, depending on the different legal nature of the package travel contract and the intermediate travel contract⁽⁸⁰⁾.

Furthermore, through regulations that are finally clear, the interpretative question was definitively resolved concerning the improper provision of a double limitation period – three years, with reference to personal injury (pursuant to previous Article 44, par. 2, of the Tourism Code), and one year for compensation of the damage other than that to the person (pursuant to previous Article 45, par. 3, of the same Code) – in favour of a single three-year term⁽⁸¹⁾.

If the non-fulfilment of the services that are the object of the package is not of minor importance as established by Article 1455 of the Civil Code⁽⁸²⁾,

⁽⁸⁰⁾ This is the sense of the wording “according to the responsibility deriving from the violation of the obligations assumed with the respective contracts” contained in Article 46, par. 1, of the Tourism Code. On the different nature attributed to the two different contracts and the resulting effects, see, *below*, par. 8.

⁽⁸¹⁾ See R. CAMPIONE, *Il rimedio risarcitorio nella dir. 2015/2302/UE*, cit., 139. With a strongly equivocal disposition and a consequent seriously uncertain interpretation, the original wording of Article 47, par. 2, of the Tourism Code provided that the damage due to ruined holiday should be subject to the three-year limitation period for personal injuries (pursuant to Article 44, par. 2, of the Tourism Code) and the one-year limitation period for damages other than those at person (pursuant to Article 45, par. 3, of the same Code). With reference to the previous legislation, see A. BOTTI, *Danno da vacanza rovinata e termine prescrizionale*, in *Dir. tur.*, 2004, 119; A. M. MANCALEONI, *Responsabilità dell'organizzatore di una crociera turistica e prescrizione del danno da vacanza rovinata*, in *Dir. tur.*, 2006, 249.

⁽⁸²⁾ For the exclusion of the claim for compensation of the injured in the presence of a minor injury or in relation to the characteristics of the travel see Giud. pace Venezia, 8 giugno 2000, in *Dir. trasp.*, 2001, 833; Trib. Roma, 24 aprile 2002, in *Dir. tur.*, 2003, 245, with a comment by G. GULLETTA, *Rilevanza della meta del viaggio ai fini della esclusione del risarcimento per danno da vacanza rovinata*; Trib. Torino, 21 novembre 2003, in *Dir. tur.*, 2007, 62, with a comment by M. MAZIER, *Risarcimento del danno psichico al turista in assenza del danno da vacanza rovinata*; Giud. pace Roma, 3 giugno 2005, in *Dir. tur.*, 2006, 245, with a comment by A. VENCHIARUTTI, *Disagi nel corso di una vacanza: nessun danno senza inadempimento dell'operatore turistico*; Giud. pace Roma, 18 giugno 2005, in *Dir. tur.*, 2006, 369, with a comment by S. MAGNOSI, *La necessaria “capacità di adattamento” del turista esclude il danno da vacanza rovinata*; Giud. pace Polla, 26 settembre 2005, in *Dir. tur.*, 2006, 357, with a comment by A. VENCHIARUTTI, *Soddisfazione personale del turista (alla ricerca dell'anima gemella). Luci e ombre nella vicenda del danno da vacanza rovinata*; Trib. Roma, 10 novembre 2005, in *Dir. mar.*, 2006, 1310; Giud. pace Roma, 25 novembre 2005, in *Dir. mar.*, 2006, 1320, with a comment by F. MACRÌ, *Responsabilità dell'agenzia di viaggi e del “tour operator”: un orientamento che si consolida*; Trib. Torino, 28 novembre 2005, in *Foro it.*, 2006, I, c. 1952; App. Roma, 22 dicembre 2005, in *Dir. tur.*, 2007, 38, with a comment by P. CARMAGNANI, *Il danno da vacanza rovinata tra “contrattualità dello svago” e “patrimonialità del pregiudizio”*;

the traveller may ask the organiser or the retailer, according to the responsibility deriving from the violation of the obligations taken on via the respective contracts, in addition to and independently from the resolution of the contract, a compensation for the damage regarding the vacation time spent unnecessarily and to the unrepeatability of the lost opportunity.

More generally, the internal regulations that implement the new European Union legislation tend to maintain a clear distinction between the various types of damage, mainly from the point of view of limiting the compensation obligation and the limitation of the right to compensation, and make a significant effort in attempting to align the provisions with regard to the package travel contract of the applicable regime to the individual services offered to the traveller, particularly if deriving from international Conventions or European Union rules⁽⁸³⁾.

In particular, the Tourism Code does not provide for legal limitations and does not allow conventional limitations for personal injury⁽⁸⁴⁾, following a trend now largely consolidated in the maritime and transport regulations,⁽⁸⁵⁾ which constitute the matrix on which the discipline of the responsibility of the package travel organiser was created upon⁽⁸⁶⁾.

With reference to prejudices, other than those regarding the person, the

Giud. pace Palermo, 22 aprile 2008, in *Corr. merito*, 2008, 789, e Giud. pace Genova, 24 ottobre 2007, in *Dir. tur.*, 2008, 35, with a comment by S. d'Urso, *Danno da vacanza rovinata e termine per il reclamo di cui all'art. 98 cod. cons.*; Cass. civ., Sez. III, 19 ottobre 2017, n. 24607, in *Foro it.*, 2017, I, c. 3614, with a comment by A. PALMIERI; App. Reggio Calabria, 4 ottobre 2018, n. 666, e Trib. Roma, 2 agosto 2018, n. 16070, in corso di pubblicazione in *Riv. it. Dir. tur.*, 2019, with a comment by C. LEANZA, *Responsabilità dell'organizzatore di viaggio per la mancata fruizione dei servizi turistici offerti*.

⁽⁸³⁾ According to Recital 35 of the Directive (UE) 2015/2302 "In order to ensure consistency, it is appropriate to align the provisions of this Directive with international conventions regulating travel services and with the Union passenger rights legislation".

⁽⁸⁴⁾ An exception to the principle could perhaps be represented by the Article 43, paragraph 4, code tur. that would allow the application of the "limitations" – without further specification and so possibly also those relating to personal injury – provided for by the international Conventions in force, which bind Italy or the European Union, relating to the extent of the compensation or to the conditions to which it is owed by a retailer who provides a tourist service included in a package.

⁽⁸⁵⁾ Article 43, par. 5, of the Tourism Code, in fact, establishes the limits within which a conventional limitation of compensation for damages is possible "except for personal injuries".

⁽⁸⁶⁾ The provisions regarding the package travel contract are substantially based on the experience of the general discipline of the international maritime and air transport system; see A. PEPE, "Circostanze eccezionali" ed esonero da responsabilità del tour operator nella nuova direttiva viaggi, in *La nuova disciplina europea dei contratti di viaggio*, cit., 153.

national legislator has instead made use of the faculty for the Member States through Article 14, par. 4, of the Directive (EU) 2015/2302, to allow the parties to agree on a limitation of the compensation due by the organiser⁽⁸⁷⁾. As a result, it was established that the contract could provide for a limitation of the compensation due by the organiser for all other prejudice suffered by the traveller, except for personal injury or damage caused intentionally or through fault, provided that this limitation is not, in any case, less than three times the total price of the package (Article 43, par. 5, of the Tourism Code).

The new regime also provides for the organiser to apply the limitations established by the international Conventions in force that bind Italy or the European Union, relating to the extent of the compensation or to the conditions in which it is due from a supplier who provides a travel service included in a package⁽⁸⁸⁾. The logic behind this is to be found, once again, in the need to align the discipline of the compensation obligation and the liability regime of the package travel organiser with the provisions established by international Conventions that regulate the individual services offered⁽⁸⁹⁾.

Similarly inspired, is Article 43, par. 6, of the Tourism Code, which establishes that the rights of the travellers provided by the European Union legislation, in addition to international Conventions, on transport will, in any case,

⁽⁸⁷⁾ The “General terms and conditions of the package travel contract” adopted by the most representative associations of the organisers and retailers generally provide that “the package travel contract may provide for the limitation of compensation due by the organiser, except for damages to the person or those caused intentionally or through negligence, provided that this limitation is not less than three times the total price of the package” (see the general conditions set by Assoviaggi and Fiavet, signed by Adiconsum), or are limited to refer to the law (for example, the general conditions set by ASTOI).

⁽⁸⁸⁾ At present, however, there’s no treaties or regulations in force for Italy and within the European Union which provide for legal restrictions or, even less, which allow for conventional limitations for compensation for personal injury. In this regard, it should be noticed that the national legislator, referring to the “international conventions in force that *bind Italy*” (Article 43, par. 4, of the Tourism Code), made use of the faculty recognized by Article 14, par. 4, of the Directive (EU) 2015/2302, to limit the compensation due by the organiser even in cases where the limitation derives from “international Conventions *not binding the Union*”.

⁽⁸⁹⁾ According to Recital 35, where the organiser is liable for failure to perform or improper performance of the travel services included in the package travel contract, he must be able to invoke the limitations of the liability of the service providers set out in such international Conventions on transport, expressly referring to “the Montreal Convention of 1999 for the Unification of certain Rules for International Carriage by Air, the Convention of 1980 concerning International Carriage by Rail (COTIF) and the Athens Convention of 1974 on the Carriage of Passengers and their Luggage by Sea”.

remain unaffected ⁽⁹⁰⁾, while specifying that the compensation or the price reduction granted under the Tourism Code and those established according to European Union regulations and international Conventions are deducted from one other.

In line with what is already established by the previous Tourism Code, the organiser or retailer, who has granted compensation or a price reduction, or paid compensation for damages or has been forced to comply with other legal obligations regarding assistance or repatriation, has the right of recourse against those who contributed to the occurrence of the circumstances or the event that caused the damage, the price reduction or other obligations required by law ⁽⁹¹⁾. Article 51-*quinquies* of the Tourism Code confirms the hypothesis of legal subrogation already provided for by the previous Tourism Code, establishing that the package travel organiser who has compensated the traveller for damages is subrogated, within the limits of the compensation paid, in all the rights and actions due by the traveller towards third parties responsible for the damages.

Finally, it is important to highlight that the new regime introduces different terms for the prescription of the organiser's compensation obligation: the right to compensation for personal injury and damage due to ruined vacation shall be extinguished after three years, starting from the date of return of the traveller to the place of departure (respectively, Articles 43, par. 8, and Article

⁽⁹⁰⁾ See Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004, of the European Parliament and of the Council of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91; Regulation (EC) n. 1371/2007 of the European Parliament and of the Council, of 23 October 2007, on rail passengers' rights and obligations; Regulation (EC) n. 392/2009 of the European Parliament and of the Council, of 23 April 2009, on the liability of carriers of passengers by sea in the event of accidents; Regulation (EU) n. 1177/2010 of the European Parliament and of the Council of 24 November 2010, concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004; Regulation (EU) n. 181/2011 of the European Parliament and of the Council, of 16 February 2011, concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004.

⁽⁹¹⁾ In this perspective, the Article 51-*quinquies* of the Tourism Code incorporates the provisions of Article 22 of the Directive (EU) 2015/2302 and coordinates with the provisions of Article 42, par. 1, of the Tourism Code on the responsibility of the organiser for the fact of the service provider. In jurisprudence, in this sense, see Cass. civ., 11 December 2012, n. 22619, in *Dir. mar.*, 2014, 109; Cass. civ., 3 December 2009, n. 25396, in *Giust. civ.*, 2010, I, 1393; Cass. civ., 29 February 2008, n. 5531, in *Danno resp.*, 2008, 582.

46, par. 2, of the Tourism Code); the right to the reduction of the price or to compensation for damages other than those to the person shall be extinguished, instead, after two years, starting from the same terms (Article 43, par. 7, of the same Code).

The Italian legislator has also made an interesting attempt to align the statute of limitations established by the Tourism Code for personal injuries with those prescribed by other legal provisions governing individual travel services, so as not to compromise the possibility of the tour operator to make claims against the relative supplier⁽⁹²⁾. In this sense, in order to align the expiry date of the respective compensation obligations, it was opportunely established that the traveller's right to compensation for personal injury shall be extinguished in the longest period provided for by the provisions governing the individual services included in the package.

8. The “intermediate travel contract” and the responsibility of the retailer according to Italian law

The intermediate travel contract regulations and the retailer's liability, found in Section VII “*Retailer's liability*” (Articles 50-51-*quater* of the Tourism Code)⁽⁹³⁾, constitute one of the most original features of the new rules on the subject of package travel.

The Italian legislator has worked within the limits set by the Directive (EU) 2015/2302, fully taking advantage of the margins established by Article 13, par. 1, comma 2, of the European Union legislation, which states that “Member States may maintain or introduce in their national law provisions under which the retailer is also responsible for the performance of the package”.

Faithful to national legal tradition, Article 50 of the Tourism Code identifies the relation between traveller and retailer as an autonomous “intermedi-

⁽⁹²⁾ The fact that the alignment of the prescription terms refers only to the compensation obligation resulting from the liability of the organiser for damages to the person is probably explained by the fact that on the occasion of the cause of other damages often operates a short limitation period, also considering the fact that the two-year deadline set by the current Article 43, par. 7, of the Tourism Code lengthens the annual limitation period established previously by the abrogated Article 45, par. 3, of the same Code.

⁽⁹³⁾ See I. MALAGUTI, *Sub artt. 50 e 51-quater*, e A. MONTESANO, *Sub artt. 51-51-ter*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1369 e 1385.

ate travel contract”, formally distinct from the “package travel contract”⁽⁹⁴⁾. Consistent with the traditional approach, the transposition Decree keeps the position of the organiser appropriately separate from that of the retailer of package travel or individual services, while regulating obligations and responsibilities differently⁽⁹⁵⁾.

⁽⁹⁴⁾ In the past, the question has been the subject of numerous disputes (which now seem destined to be resolved definitively in the sense indicated in the text), especially in relation to the criteria of imputation of liability applicable to the organiser and / or the seller of tourist packages: the jurisprudence of legitimacy has often been uncertain with respect to the exact qualification of the relationship between traveller, retailer and organiser of the travel package, and to the consequent identification of the respective areas of responsibility: see Cass. civ., 28 November 2002, No. 16868, in *Corr. giur.*, 2003, 583, with a comment by E. GUERINONI, *Penale per la disdetta del viaggio e diritti dell'agenzia intermediaria*, and in *Dir. tur.*, 2003, 349, with a comment by A. CORRADO, *Il turista deve rimborsare all'agenzia di viaggi la penale anticipata al tour operator*; Cass. civ., Sez. III, 10 February 2005, No. 2713, in *Dir. tur.*, 2005, 337, with a comment by G. BAILETTI, *Responsabilità solidale del venditore e dell'organizzatore di viaggi?*, in *Dir. traspr.*, 2007, 129, with a comment by A. TAMBURRO, *Responsabilità solidale o alternativa dell'organizzatore e del venditore di pacchetti turistici?*, and in *Resp. civ. prev.*, 2005, 464; Cass. civ., Sez. III, 13 November 2009, No. 24044, in *Giust. civ.*, 2010, I, 1683 with a comment by M. COCUCCIO, *Responsabilità del venditore di pacchetto turistico per infortunio del turista durante un'escursione*; Cass. civ., 19 January 2010, No. 696, in *Foro it.*, 2010, I, c. 841; already before, Cass. civ., 19 January 1999, No. 460, in *Contr.*, 1999, 903, with a comment by C. POZZI, *Intermediario e organizzatore di viaggio: applicazioni della CCV del 23 aprile 1970*. In the jurisprudence of merit, in various way, see Pret. Conegliano, 4 February 1997, in *Resp. civ. prev.*, 1997, 818, with a comment by M. GORGONI; Trib. Perugia, 3 May 1997, in *Rass. giur. umbra*, 1998, 44, with a comment by G. CIURNELLI; Giud. pace Milano, 28 December 1997, in *Giud. pace*, 1999, 58, with a comment by S. PALMIERI, *Natura giuridica del c.d. danno da vacanza rovinata*; Trib. Roma, 3 June 2002, in *Contr.*, 2002, 932; Trib. Roma, 7 February 2003, in *Dir. tur.*, 2003, 353, with a comment by A. CORRADO, *op. ult. cit.*; Trib. Roma, 2 October 2003, in *Dir. traspr.*, 2005, 285, with a comment by L. TULLIO, *Interpretazioni discutibili ed inquietanti della normativa sul contratto di viaggio*; Trib. Reggio Emilia, 21 February 2004, in *Foro it.*, 2004, I, c. 2555; Giud. pace Parma, 19 March 2004, in *Dir. tur.*, 2005, 273, with a comment by F. SCORTECCI, *Ancora sulla responsabilità del venditore e dell'organizzatore della vacanza*; Trib. Napoli, 17 May 2005, in *Corr. merito*, 2005, 878; Giud. pace Casoria, 7 September 2005, in *Giud. pace*, 2006, 138, with a comment by V. AMENDOLAGINE, *Responsabilità dell'intermediario-organizzatore di pacchetti turistici “tutto compreso” per i disagi arrecati all'utente e risarcibilità del danno esistenziale in re ipsa*; Trib. Lucca, 28 January 2006, n. 45, in *Resp. civ. prev.*, 2007, 611, with a comment by S. VERNIZZI, *Brevi note in materia di responsabilità dell'organizzatore di viaggi e dell'intermediario (venditore)*; Trib. Torino, 8 October 2007, in *Dir. tur.*, 2008, 159, with a comment by C. TINCANI, *I presupposti della responsabilità dell'intermediario di viaggio*; Trib. Prato, 2 September 2008, in *Foro it.*, 2008, I, c. 3346; previously, see also Trib. Roma, 23 March 1988, in *Giur. it.*, 1991, I, 66, and Trib. Milano, 26 November 1992, in *Resp. civ. prev.*, 1993, 856.

⁽⁹⁵⁾ In addition to already indicated above – especially included G. SILINGARDI - F.

With a truly innovative projection, it also provides a specific legal framework for the particular case, qualifying the intermediate travel contract as a special sub-type of the mandate contract pursuant to Article 1703 of the Civil Code ⁽⁹⁶⁾. In fact, upon introducing regulations regarding the retailer's

MORANDI, *La "vendita di pacchetti turistici"*, cit., 128, and G. TASSONI, *Il contratto di viaggio*, 255 – see M. DEIANA, *Il contratto di turismo organizzato*, in *Dai tipi legali ai modelli sociali nella contrattualistica della navigazione, dei trasporti e del turismo*, cit., 569; M. CAVALLARO, *La responsabilità dell'intermediario e dell'organizzatore di viaggi nella disciplina della "vendita di pacchetti turistici"*, in *Riv. crit. dir. priv.*, 1999, 431; V. CUFFARO - G. TASSONI, *Viaggio [contratto di]*, in *Digesto*, IV ed., Agg., Torino, 2000, 760; L. TULLIO, *La responsabilità dell'organizzatore e dell'intermediario dopo il codice del consumo*, cit., 119; Id., *La responsabilità dell'organizzatore e dell'intermediario di viaggi turistici*, in *Studi in onore di Cesare Massimo Bianca*, vol. III, Milano, 2006, 991; P. STANZIONE - A. MUSIO, *I contratti relativi alla fornitura di servizi turistici*, in *La tutela del consumatore*, in *Trattato di diritto privato*, directed by M. BESSONE, XXX, Torino, 2009, 399; L. ROSSI CARLEO - M. DONA, *Il contratto di viaggio turistico*, Napoli, 2010, 141; G. DE CRISTOFARO, *La disciplina dei contratti aventi ad oggetto "pacchetti turistici" nel "codice del turismo"*, cit., 1284; F. ROMEO, *Il contratto di viaggio. Tutele specifiche e risarcimento del danno*, Padova, 2011, 156; S. MAZZAMUTO, *Il contratto di diritto europeo*, Torino, 2012, 431; R. PASQUILI, *La prestazione dell'organizzatore nel contratto di viaggio*, Torino, 2012, 164; A. RUOTOLO, *La responsabilità del tour operator e dell'intermediario*, in *L'ordinamento del mercato turistico*, cit., 241; C. TINCANI, *La responsabilità dell'organizzatore di viaggi nell'ultima disciplina nazionale*, in *Riv. it. Dir. tur.*, 2012, 5; F. ROMEO, *Pacchetto turistico "all inclusive" e responsabilità del tour operator per i danni causati al turista dal terzo prestatore di servizi*, in *Contr.*, 2013, 7; L. AMBROSINI, *Finalità turistica e allocazione del rischio di impossibilità della prestazione*, in *Riv. it. Dir. tur.*, 2014, 269; R. CAMPIONE, *I contratti del turismo organizzato*, cit., 474; G. MALGIERI, *Il punto sul danno da vacanza rovinata - certezze, novità, questioni aperte*, in *Danno resp.*, 2014, 237; N. SOLDATI, *Responsabilità del tour operator per omissione di informazioni e danno da vacanza rovinata*, in *Riv. it. Dir. tur.*, 2014, 338; A. VENCHIARUTTI, *I contratti del turismo organizzato nel codice del turismo*, in G. ALPA (ed.), *I contratti del consumatore*, Milano, 2014, 1171. For the joint responsibility, instead, C. S. CARASSI, *Tutela del turista nei viaggi a forfait. Finalmente una risposta adeguata del legislatore italiano? Commento al decreto legislativo 17 marzo 1995, n. 111*, in *Corr. giur.*, 1995, 904; C. VACCÀ, *Commento agli artt. 14-19*, in *Viaggi, vacanze e circuiti tutto compreso*, *Commentario al d.lgs. 17 marzo 1995, n. 111*, edited by V. ROPPO, in *Nuove leggi civ. comm.*, 1997, 57; M. TOMMASINI, *Interventi normativi sulla responsabilità degli operatori turistici nei contratti di viaggio tutto compreso (dalla convenzione internazionale del 1970 al decreto legislativo n. 111 del 1995 attuativo della direttiva CEE. 314/90)*, in *Giust. civ.*, 2000, II, 262.

⁽⁹⁶⁾ The contract forms most commonly used by operators repeat the typical outline of the mandate with representation, pursuant to Article 1704 of the Civil Code, which is accompanied by the presumption of burdens established by Article 1709 of the same Code. With reference to the communications and to the booking confirmation, the conditions of contract Assoviaggi, Fiavet and ASTOI make explicit reference to the travel agency, as agent of the traveller. For a clear configuration as a mandate contract, see Cass. civ., Sez. III, 28 November 2002, No. 16868, in *Dir. traspr.*, 2003, 1080; previously see App. Firenze, 26 September 2001, in *Dir. mar.*, 2003, 519, with a comment by S. POLLASTRELLI, *Brevi considerazioni sulla configurazione*

responsibility, the first part of the provision in question explicitly refers to the “mandate given to the retailer by the traveller”, thus unambiguously clarifying the nature of the relationship that binds the package travel intermediary and the user of the service.

This implies, above all, pursuant to Article 1719 of the Civil Code, that the traveller is obliged to provide the retailer with the necessary means for the execution of the mandate and, if the travel agent takes on the obligation, towards the organiser, of the payment of the fee and the cancellation penalties for the trip under the intermediate travel contract, the traveller is required to reimburse the funds advanced to provide for such payments⁽⁹⁷⁾.

This solution is entirely consistent with the provisions established by Article 42, par. 2, of the Tourism Code, which enables the traveller to challenge the organiser for any lack of conformity, detected during the execution of a service provided by the package travel contract, “directly or through the retailer”. The same meaning is also covered by Article 44, par. 1, of the Tourism Code which, in implementing Article 15 of the Directive (EU) 2015/2302, establishes how the traveller (principal) is entitled to contact the organiser via the retailer (agent), addressing messages, requests or complaints relating to the execution of the package.

However, in this regard, it should be noted that, for the purposes of compliance with the terms or periods of limitation, the date on which the retailer receives messages, requests or complaints relating to the services provided by the organiser is considered the date of receipt for the latter as well. This provision reconciles, not without a certain difficulty, attributing to the retailer the quality of the agent and seems rather to reflect a configuration of the travel agent position, substantially symmetrical, to that which the organiser of the package travel takes on with respect to the user of the service⁽⁹⁸⁾.

The provisions regarding the intermediate travel contract essentially re-

dell'organizzatore e dell'intermediario di viaggio; Trib. Firenze, 25 September 2001, in *Dir. mar.*, 2003, 553.

⁽⁹⁷⁾ In jurisprudence, it has intervened, definitively, Cass. civ., Sez. III, 20 September 2002, No. 16868, in *Dir. tur.*, 2003, 349, with a comment by A. CORRADO, *Il turista deve rimborsare all'agenzia di viaggi la penale anticipata al tour operator*.

⁽⁹⁸⁾ The provision seems to resent of the different configuration of the relationship between traveller and retailer adopted in other Member States of the European Union, in which a system of joint liability exists between the retailer and the organiser of the package travel. Circumstance that also explains the reserve clause contained in the opening of Article 15 of the Directive (EU) 2015/2302, where it is without prejudice to what established by the following Article 13, par. 1, comma 2, of the Directive.

late to four distinct profiles: the identification of the obligations borne by the retailer, the liability regime in the event of contractual non-fulfilment, the compensation obligation and the expiry time-limits of the right to compensation for damages.

Once the relationship between traveller and retailer as an “intermediate travel contract” has been identified, the Tourism Code establishes certain specific travel agent obligations, which follow the mandate given by the user.

In addition to completing the legal activity, which consists of stipulating a valid and effective package travel contract, in the name and on behalf of the traveller, according to the specific mandate with representation, the regulations identify precise information and documentation obligations, substantially corresponding to those borne by the organiser (Articles 34-36 of the Tourism Code).

Added to these is a specific commitment on the retailer’s part to indicate to the traveller that he’s acting as an intermediary in stipulating the package travel contract, in line with what was envisaged by Article 19, par. 2, of the International Convention on Travel Contract (CCV). In compliance with the principle of legitimate expectations, pursuant to Article 51-*bis* of the Tourism Code, the retailer that fails to provide the traveller with the standard information form and the information regarding the organiser, or that fails to inform the traveller that they are acting as a mere retailer, is considered as the organiser⁽⁹⁹⁾.

Furthermore, among the retailer’s responsibilities is the obligation to provide any legal and material activity resulting from taking on the mandate and, in particular, to promptly forward any messages, requests or complaints to the organiser relating to the execution of the package travel formulated by the traveller (according to Article 44, par. 1, of the Tourism Code).

The legislative framework is completed by the obligations of protection in the event of insolvency or bankruptcy pursuant to Article 47 of the Tourism Code, as well as attributing to the retailer the organiser’s obligations in the event that the package travel is provided by a tour operator established outside the European Union, except for the burden of proof that the latter is compliant with EU legislation (according to Article 51-*ter* of the Consumer Code).

With reference to the retailer’s liability regime, Legislative Decree No.

⁽⁹⁹⁾ See F. ROMEO, *Il processo informativo nella commercializzazione dei contratti di viaggio*, cit., 43.

62/2018 establishes specific regulations and clear rules on the responsibility of the intermediary regarding the sale of packages and booking travel services, which are kept separate from that of the travel organiser, according to the widely consolidated approach in national law.

As previously mentioned, applying Article 13, par. 1, comma 2, of the Directive (EU) 2015/2302 is one of the most delicate and complex issues, on which the Directive offers greater autonomy to the Member States, and represents a particularly significant element of the new regulation of package travel contracts.

Unlike the solution adopted in other European Union Member Countries, the domestic legislator has provided for a retailer's liability regime that is formally distinct and structurally differentiated with respect to the package travel organiser⁽¹⁰⁰⁾. The travel agent is liable to the traveller essentially for the violation of the obligations contractually taken on when stipulating the intermediate travel contract. The contract that binds the traveller and the retailer is expressly considered as an independent intermediate travel contract, whereby the travel agent is liable to the tourist on the basis of the rules established by the mandate, because the fulfilment of the obligations taken on must be assessed with regard to the diligence required by the service of the corresponding professional activity.

The contractual responsibility of the retailer, therefore, derives from the non-fulfilment of the mandate given to him by his client and does not instead pertain to the exact fulfilment of the package travel provided by the organ-

⁽¹⁰⁰⁾ In the Italian legal system, the proposal to provide for a joint liability (possibly subsidiary) of the retailer in the event of non-fulfilment by the organiser, although made at the time of the work of the competent Parliamentary Commission, was not accepted. The introduction of a passive solidarity relationship between co-debtors, although possible from a juridical point of view, suffers from a series of substantial contraindications, related to the actual situation of the Italian travel market and to the conditions in which the agencies established on the national territory operates. A different solution would be contrary to the Italian legal tradition; would contrast with the setting of the entire Legislative Decree of transposition (which sees clearly differentiated roles, obligations and responsibilities of organiser and retailer, which last operates as the traveller's agent, that is in the name and in the interest of the user and not of the tour operator); would be contradictory with respect to the internal division of responsibilities (organiser and retailer are responsible for the violation of the obligations assumed under the stipulation of separate contracts); it would almost always result in a traveller's action against the retailer, who also acts as his own agent; would force retail travel agencies to ensure the responsibility (not only of their own, but also of fact) of the organiser and third-party suppliers, with obvious negative economic effects.

iser⁽¹⁰¹⁾. In other words, a specific regulation has been introduced regarding the liability for non-fulfilment towards the traveller by the travel organiser or the retailer, distinguishing the respective contractual responsibilities according to the substantial diversity of the stipulated contracts, the obligations agreed upon and economic services carried out by the tour operator and travel agent⁽¹⁰²⁾.

As a result, the retailer is not responsible towards the consumer for the breach by the tour operator, nor for the non-fulfilment by the suppliers of the single services included in the package travel, but only for the improper execution of the services to which he is directly and personally obliged under the stipulation of the intermediate travel contract. According to the general regulations, Article 50 of the Tourism Code also provides that the retailer is responsible on his behalf ("regardless of whether the service is provided by the retailer"), on behalf of auxiliaries ("auxiliaries or designates when they are exercising their functions") and on behalf of "third parties" to render the service⁽¹⁰³⁾.

The general attribution of the liability criterion is also based on the ordinary outline of assessment of the liability of the agent, considering that the exact fulfilment of the obligations taken on by the retailer towards the traveller must be evaluated with regard to the diligence required for carrying out the service of the corresponding professional activity⁽¹⁰⁴⁾. In particular, with regard to the agent's activity, the retailer is responsible for *culpa in eligendo* in choosing the organiser of the package travels or the service provider with which to conclude the contract in the name and on behalf of the traveller⁽¹⁰⁵⁾.

⁽¹⁰¹⁾ It should also be noted, incidentally, that the legislator also felt free to return to the use of the traditional terminology "intermediate travel contract", at least in Article 50 of the Tourism Code.

⁽¹⁰²⁾ See A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1324.

⁽¹⁰³⁾ In accordance with Article 1228 of the Civil Code; see A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1327.

⁽¹⁰⁴⁾ With regard to the determination of the content of the obligation of the retailer, with reference to the rules established in terms of mandate with representation and, thus, above all to artt. 1710 and followings, 1387 and followings, and 1176, par. 2, of the Civil Code, see Trib. Bologna, 15 October 1992, in *Contr.*, 1993, 327, with a comment by A. AMBANELLI, *La responsabilità dell'intermediario nel contratto di viaggio*, which in this case considered the intermediary «certainly negligent in choosing the package travel organiser».

⁽¹⁰⁵⁾ See Trib. Roma, 25 January 1978, in *Giur. merito*, 1979, I, 338; Trib. Orvieto, 11 February 1992, in *Foro it.*, 1992, I, c. 1571, with a comment by V. Roppo; Trib. Roma, 25 January 1978, in *Giur. merito*, 1979, I, 338; Trib. Bologna, 15 October 1992, cit.

With reference to the possibility of a booking error, however, the indications provided by Article 21 of the Directive (EU) 2015/2302 must be considered binding, to the point of envisaging the provision of a different liability regime⁽¹⁰⁶⁾.

According to Article 51, par. 1, of the Tourism Code, the retailer is responsible for errors due to technical defects in the booking system that are attributable to him and, if he has agreed to organize the booking of a package or travel services that are included in linked travel arrangements, for the mistakes made during the booking process. Once the outline of the particular case is identified, the criterion of attribution of responsibility for non-fulfilment is based on greater rigidity than the simple reference to the agent's professional diligence parameter. It is in fact envisaged that the professional can be freed only by positively identifying the cause that led to the occurrence of the adverse event and proving that it is one of the hypotheses strictly defined by the law as causes for exemption (pursuant to Article 51, par. 2, of the Tourism Code); namely that booking errors are attributable to the traveller or are due to unavoidable and extraordinary circumstances.

With regard to the compensation obligation, the retailer is also affected by the regulation of damage due to ruined holidays established by Article 46, par. 1, of the Tourism Code, which reinforces the distinction between the debt position of the organiser of the package travel and that of the retailer. In fact, consistent with the different legal nature of the relationships, the traveller can request, in addition to and independently with regard to the termination of the contract, compensation for damage, correlated to the unnecessarily spent vacation time and the unrepeatability of the lost opportunity "to the organiser or retailer, according to the responsibility deriving from the violation of the obligations taken on through the respective contracts"⁽¹⁰⁷⁾.

Last but not least, the traveller's right to compensation for damage suffered as a result of the non-fulfilment by the intermediary travel agent – including the specific case of liability in the event of a booking error (Article

⁽¹⁰⁶⁾ Article 21, par. 2, of the Directive (EU) 2015/2302 introduces a specific discipline for the hypothesis of liability of the seller in case of booking error, establishing that "a trader shall not be liable for booking errors which are attributable to the traveller or which are caused by unavoidable and extraordinary circumstances".

⁽¹⁰⁷⁾ According to Article 51-*quinquies* of the Tourism Code, the retailer who has compensated the damage caused by a third party has the right of recourse provided for in par. 1 and the right of subrogation in the position of the traveller referred to in par. 2; see A. FINESSI, *La responsabilità del professionista nella nuova disciplina dei contratti di viaggio*, cit., 1328.

51) – will expire in two years from the date of return of the traveller to the place of departure⁽¹⁰⁸⁾.

9. Liability, duty of insurance, and protection in the event of insolvency or bankruptcy

The issue regarding the protection of the traveller in the event of insolvency or bankruptcy of the organiser and the retailer has long been the focus of attention of the European Union legislator.

Applying Article 7 of Directive 90/314/EEC, concerning package travel, package holidays and package tours, has encountered objective difficulties, both in terms of the harmonisation of the legislation of the individual Member States and in terms of the effective protection of users⁽¹⁰⁹⁾.

In line with the provisions of the Tourism Code, the new regulation of the package travel contract and the intermediate travel contract confirms yet again, above all, that the organiser and the retailer are required to take out insurance for civil liability in favour of the traveller regarding compensation for damages deriving from the violation of the specific obligations taken on through the respective contracts (Article 47, par. 1, of the Tourism Code) and to indicate the details in the pre-contractual information to be provided to the traveller (Article 34, par. 1, lett. *i*, of the Tourism Code).

This is a general provision which is entirely consistent with the legislative policy choices already made by the national legislator through Article 19 of the Tourism Code, whereby it establishes that, in order to carry out their activity, the travel and tourism agencies are required to stipulate adequate

⁽¹⁰⁸⁾ However, the three-year limitation period established by Article 46, par. 2, of the Tourism Code for the compensation of damage due to ruined holiday, as well as the different periods of limitation established for the responsibility of the organiser of the package travel remains valid in case (a) of failure to indicate the quality of intermediary (pursuant to Article 51-*bis* of the Tourism Code) and (b) in hypothesis of an organiser established outside the European Economic Area (Article 51-*ter* of the Tourism Code).

⁽¹⁰⁹⁾ The implementation of Article 7 of the Directive 90/314/CEE has been at the center of the international debate and has repeatedly been the subject of interventions by the Court of Justice of the European Union, starting with the first decision on the matter, pronounced in the leading case *Dillenkofer*: see EC Court of Justice, 8 October 1996, in jointed Causes C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, in *Riv. it. dir. pubbl. comunit.*, 1997, 112; among others, see also EC Court of Justice, 14 May 1998, in Cause C-364/96, *Verein für Konsumenteninformation*, in *Contr.*, 1998, 628, with a comment by A. CORRADO, *Rischi di insolvibilità o fallimento dell'organizzatore e tutela del viaggiatore*.

insurance policies to guarantee the exact fulfilment of the obligations taken on towards customers through the travel contract in relation to the total cost of the services offered⁽¹¹⁰⁾.

The right to stipulate other traveller assistance insurance policies (Article 47, par. 10, of the Tourism Code) is expressly without prejudice, and is accompanied by a corresponding information obligation, to be provided to the traveller during the pre-contractual phase, regarding the possibility of taking out insurance to cover the costs of unilateral withdrawal from the contract or the costs for assistance, including the return trip, in the event of accident, illness or death (pursuant to Article 41, par. 1, lett. *b*, of the Tourism Code).

The traveller protection regime is completed by the obligation placed on the Member States by Article 17 of the Directive (EU) 2015/2302 to ensure that the organisers on the territory provide a guarantee for reimbursing all the amounts paid by or on behalf of travellers to the extent that the services offered are not carried out as a result of the organiser's state of insolvency. This is a protection obligation which Article 18 of the same Directive requires to be taken on by professionals who facilitate linked travel arrangements, with regard to reimbursing all the payments they receive from travellers to the extent that a travel service is not carried out due to the state of insolvency of the same professionals.

As far as the transposition in Italy is concerned, the events are well known regarding the National Guarantee Fund, established at the Presidency of the

⁽¹¹⁰⁾ All the Italian Regions had already intervened, since a long time, by regulating the activity of travel and tourism agencies, providing the obligation for tour operators and travel agents to ensure civil liability towards their customers. according to Constitutional Court, 5 April 2012, No. 80, the subject must be traced "for prevalence, to the sphere of exclusive state legislative competence in the matter of civil law" and is therefore removed from regional legislative autonomy. In synthesis, see M. MALO - C. COLALUCA, *Competenze normative e fonti*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 39; see also C. GIUNTA, *L'art. 76 Cost. nei giudizi in via d'azione: il Codice del turismo in cerca di delega*, in www.federalismi.it, 2012; L. RIGHI, *Il turismo nel "tiro alla fune" Stato-Regioni: la ridondanza dell'eccesso di delega*, in *Riv. it. dir. tur.*, 2012, 29; P. SABBIONI, *Il codice della normativa statale in materia di turismo, ovvero: ma a cosa è servita la riforma del criterio di riparto della potestà legislativa tra lo Stato e le Regioni?*, in www.forumcostituzionale.it, 2012; L. SALTARI, *Inflazione regolativa nel turismo*, in www.astrid-online.it, 1/2013; S. MANGIAMELI, *Come risolvere un assetto oscillante e confuso tra Stato e Regioni: il caso del turismo*, in *Italiadecide, Rapporto 2014. Il Grand Tour del XXI secolo: l'Italia e i suoi territori*, Bologna, 2014, 189; L. GRIMALDI, *La potestà legislativa regionale in materia di turismo nella Costituzione (prima e dopo il 2001), nella giurisprudenza costituzionale e nel progetto di riforma "Renzi-Boschi"*, in www.dirittifondamentali.it, n. 2/2015.

Council of Ministers by Article 21 of Legislative Decree No. 111/1995⁽¹¹¹⁾, later transposed into Article 100 of the Consumer Code and finally reproduced in Article 51 of the Tourism Code, now repealed, which gave rise to the opening of infringement procedure No. 2014/4094 by the European Commission⁽¹¹²⁾ as a result of the inadequacy of the financial allocation and due to the limitation on trips abroad⁽¹¹³⁾.

The current traveller protection and assistance system is still the same structure introduced by Article 9, par. 1, lett. *b*), of the Law 29 July 2015, No. 115⁽¹¹⁴⁾, which envisaged the obligation, for the organiser and the retailer, to stipulate insurance policies or provide bank guarantees capable of ensuring reimbursement of the price paid for the purchase of the package travel and the immediate reimbursement for the traveller in case of the operator's insolvency or bankruptcy⁽¹¹⁵⁾. It still represents the essential reference point

⁽¹¹¹⁾ Established at the Presidency of the Council of Ministers (later transferred to the Ministry for Cultural Heritage and Activities and Tourism) to allow the reimbursement of the price and the repatriation in the event of insolvency or bankruptcy of the organiser or retailer, as well as to provide an immediate economic availability in the event of forced return of travellers from non-EU Countries during emergencies, whether or not attributable to the behaviour of the organiser (pursuant to Article 21 of Legislative Decree No. 111/1995), the National Guarantee Fund is annually fed by a quota equal to 4 per cent of the amount of the fee for the mandatory insurance policies of the organiser and of the retailer (the adjustment of the amount from 1 to 2 per cent was due to Article 15, par. 2, of the Law of 5 March 2001, No. 57, while the last increase was envisaged by Article 4 of the Law of 6 August 2013, No. 97, which amended Article 51, par. 2, of the Tourism Code, meanwhile introduced by Legislative Decree No. 79/2011).

⁽¹¹²⁾ After sending a complementary formal notice pursuant to Article 258 TFEU on 23 January 2014, the procedure No. 2012/4094 - Infringement in transposition of Directive 90/314/CEE concerning package travel, package holidays and package tours, started against Italy, was finally archived by the European Commission with decision of 7 December 2017, after the intervention operated by the national legislator with the Article 9 (Provisions concerning package travel, package holidays and package tours. Infringement procedure No. 2012/4094) of the Law of 29 July 2015, No. 115, containing "Provisions for the fulfilment of the obligations deriving from Italy's membership of the European Union - European Law 2014".

⁽¹¹³⁾ See, in particular, the Parliamentary Acts of the XVII Legislature and the Dossier of the Research Department of the Senate of the Republic on the Bill A.S. n. 588, Provisions for the fulfilment of obligations deriving from Italy's membership of the European Union - European Law 2013, May 2013, n. 16, 45.

⁽¹¹⁴⁾ The original deadline of 1 January 2016, envisaged for the entry into force of the new regime, was extended to 30 June 2016 by Article 1, par. 348, lett. *b*, of the Law of 28 December 2015, No. 208.

⁽¹¹⁵⁾ On the insurance obligations imposed on the organiser and the retailer, as a condition for the opening of travel agencies, see, at a manual level, M. MALO - A. PERINI, *Agenzie di*

today in guaranteeing an adequate protection for the traveller and offers an effective answer to a question that the European Union legislator considers of fundamental importance⁽¹¹⁶⁾.

With reference to the new regulations⁽¹¹⁷⁾, it is worth highlighting how, at the national level, the expression “insolvency” referred to in Article 17-19 of the Directive (EU) 2015/2302⁽¹¹⁸⁾ has been interpreted broadly, extending its meaning to include, according to a custom that has always been followed in the travel contract, cases of “insolvency or bankruptcy” (most recently, pursuant to Article 47, par. 2, of the Tourism Code)⁽¹¹⁹⁾.

Furthermore, the obligation to protect the traveller has been extended – in addition to the professionals who facilitate linked travel arrangements (pursuant to Article 49, par. 1, of the Tourism Code, which incorporates Article 19, par. 1, of the Directive EU 2015/2302) – also to the package travel retailer⁽¹²⁰⁾.

It is also worth noting that traveller protection is also guaranteed via the provision of the obligation to stipulate “insurance policies or bank guarantees” which assist the package travel contracts. According to the methods already widely tested in Italy, organisers and retailers can form consortiums or another kind of associations suitable to collectively fulfil – via, as well,

viaggio e turismo, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 191; see also, for the civil law profiles, G. CIURNELLI, *I contratti del turismo organizzato*, cit., 373.

⁽¹¹⁶⁾ The topic returns several times in the Directive (EU) 2015/2302 and is the subject of specific attention in Recitals 38 to 44. The importance of the question is such that the term “insolvency” occurs 94 times in the Directive, among Recitals, legislative text and attachments.

⁽¹¹⁷⁾ For a first comment see T. PELLEGRINI, *Sub artt. 51-quinquies-51-sexies*, in *D.lgs. 23 maggio 2011*, n. 79, *Codice del turismo*, cit., 1404.

⁽¹¹⁸⁾ Article 7 of the Directive 90/314/EEC provided, instead, that “the organiser and/or the retailer” part of the contract should provide sufficient evidence of having guarantees to ensure, “in the event of insolvency or bankruptcy”, the repayment of deposited funds and repatriation of the consumer.

⁽¹¹⁹⁾ Incidentally, note that, following the reform introduced with Legislative Decree 12 January 2019, No. 14, concerning the Code of business crisis and insolvency, the term “bankruptcy” in the current legal provisions must be understood to be replaced with the term “judicial liquidation”, without prejudice to the continuity of the cases (Article 349), after eighteen months from the date of its publication in the Official Journal (Article 389).

⁽¹²⁰⁾ The literal formulation of Article 47 of the Tourism Code presents some terminological imprecision: while there is no doubt that the guarantee that assists “package travel contracts” also refers to the cases of insolvency or bankruptcy of the organiser “or the retailer” (par. 2), the fact that “intermediaries”, in addition to organisers, may form consortia or other kind of association (par. 3) must be understood as referred to the “retailers” pursuant to Article 33, par. 1, lett. l, of the Tourism Code.

the establishment of a special fund for covering the relative risks and via the direct involvement of companies and associations in the insurance sector category – forms of reinsurance (Article 47, par. 3, of the Tourism Code). With regard to the coverage features, note that Article 47, par. 4, of the Tourism Code, adds to the requirements, set by Article 17, par. 2, of the Directive (EU) 2015/2302, for which the guarantee “shall be effective and shall cover reasonably foreseeable costs”, the further parameter with respect to “adequacy to turnover”, in an attempt to make the commitment required by the commercial operator both proportionate and sustainable.

In order to further safeguard the position of the traveller it was established that the guarantee in case of insolvency or bankruptcy of the organiser should also cover the payment “of food” and the accommodation before repatriation and that the refunds are, in any case, paid without delay at the request of the traveller (pursuant to Article 47, par. 2, of the Tourism Code)⁽¹²¹⁾.

With regard to the mutual recognition of protection in the event of insolvency (or bankruptcy), pursuant to Article 18 of the Directive (EU) 2015/2302, the Tourism Code excludes the obligation to provide the relative guarantee in the event that the organiser or retailer established in another European Union Country already has a professional liability insurance or other equivalent or comparable guarantee, regarding the purpose and coverage provided in terms of risk or capital insured or ceiling guarantee, as well as any exclusions from the coverage⁽¹²²⁾.

With reference to direct relations between the Member States, Article 48, par. 2, of the Tourism Code, identifies in the Ministry of Cultural Heritage and Activities and Tourism – Tourism Directorate⁽¹²³⁾ the central contact

⁽¹²¹⁾ While Article 17, par. 5, of the Directive (EU) 2015/2302 refers to the obligation to pay reimbursements, without undue delay, only to tourist services that have not been performed, the national legislator has opted for a more immediate solution for travellers, omitting to refer to the fact that the delay should not be “undue” and providing for immediate repayment as a general obligation that extends to all case.

⁽¹²²⁾ Article 47, par. 9, of the Tourism Code expressly refers to the provisions of Article 33 of Legislative Decree 26 March 2010, No. 59, implementing Directive 2006/123/EC relating to services in the internal market. Organisers or retailers established outside the European Union who sell or offer for sale packages travel in Italy or in another Member State are in any case obliged to provide a guarantee of traveller protection in the event of insolvency or bankruptcy equivalent to that provided for by the Tourism Code for the tour operator or travel agent established within the European Union.

⁽¹²³⁾ According to D.P.C.M. 8 February 2019, No. 25, the national administrative functions in the field of tourism have been reallocated at the Ministry of Agricultural, Food

point to facilitate administrative cooperation and monitoring of the organisers and retailers operating in countries other than the European Union.

10. Administrative protection

From an administrative protection point of view, in compliance with the provisions established by Article 25 of the Directive (EU) 2015/2302, the legislative transposition decree introduces a new system of sanctions against the organiser or the retailer that violate the legal provisions, providing for a detailed system of financial penalties, both principal and incidental, with regard to non-compliance with the regulations on organized tourism contracts.

The creation of a special regime responds to the need to offer coverage on possible violations of the legal provisions to complement the ordinary contractual remedies and effectively supports the European Union legislator's request, which obliges the Member States to introduce, into their respective legal systems, effective, proportionate and dissuasive sanctions ⁽¹²⁴⁾.

Actually, the protection system envisaged by the national legislator is rather complex and stretches out at various levels, made evident by the “reserve clause” that accompanies the new types of administrative offenses introduced by Article 51-*septies* of the Tourism Code. The administrative penalties for violations regarding organized tourism contracts apply to the professional, the organiser or the retailer “unless the fact constitutes a crime”, or “constitute a type of administrative offense sanctioned by regional laws” ⁽¹²⁵⁾, or gives rise to “improper commercial practice” sanctioned by the Consumer Code ⁽¹²⁶⁾, or

and Forestry Policies, reorganised as “Ministry of Agricultural, Food, Forestry and Tourism Policies”, pursuant to Article 1, par. 9, of Decree-Law 12 July 2018, No. 86, converted, with amendments, by the Law of 9 August 2018, No. 97. In this regard, see the contrary opinion of the Council of State expressed the opinion n. 2957 - Deal n. 02107_2018, of the 28 December 2018, and the critical reflection by M. MALO, *Il turismo, ciliegina sulla torta del Ministero delle politiche agricole alimentari e forestali*, in *Riv. it. dir. tur.*, 2019, 5.

⁽¹²⁴⁾ For a first analysis see F. CECCHINI, *Sub artt. 51-septies-51-novies*, in *D.lgs. 23 maggio 2011, n. 79, Codice del turismo*, cit., 1412.

⁽¹²⁵⁾ According to the Article 51-*novies* of the Tourism Code, the Regions provide for effective, proportionate and dissuasive administrative sanctions for violations of the provisions on package travel contracts, within the scope of the functions reserved to them pursuant to Articles 117 and 118 of the Constitution.

⁽¹²⁶⁾ Considering the combined provisions of Articles 51-*septies* and 51-*octies* of the Tourism Code: a) if the conduct constitutes an improper commercial practice, only the Consumer Code will be applied (under the clause of reserve of Article 51-*septies*, par. 1); b) if

if the sanctioning tools provided by the Consumer Code are highlighted (art 51-*septies*, par. 1, of the Tourism Code).

In short, the decree implementing Directive (EU) 2015/2302 provided for: the classification of unlawful behaviours expressly referable to the violation of the regulations concerning package travels; the determination of the minimum and maximum amount of administrative pecuniary sanctions established according to the violations; referral to the Consumer Code for what was not otherwise provided; a salvation clause so as to avoid the concurrence of offences and thus, in particular, the prevalence of the special sanctioning system on particular types of crime and administrative and conduct offences already sanctioned by the Consumer Code considered as unfair commercial practices. Furthermore, with regard to the edictal limits established for administrative violations, the implementing decree has the merit of applying a well-defined sanction, with regard to the minimum and maximum limit, to specific prohibited conduct and establishing appropriately differentiated sanctioning levels to equally well-defined violations⁽¹²⁷⁾.

The provisions in question essentially represent the regulations for the closure of the system and the tool used to complete the regime of safeguarding the position of the traveller who turns to a professional, an organiser or a retailer for the conclusion of a package travel contract.

Article 51-*octies* of the Tourism Code attributes the function of *public enforcement* to the Antitrust Authority, in line with what the Antitrust Authority already exercises in various areas – particularly in matters of unfair commercial practices, according to Article 20 and following Articles and, in particular, Article 27 of the Consumer Code – following the same pattern adopted

the conduct constitutes a violation of one of the provisions of the transposition Decree, other than an improper commercial practice, the administrative pecuniary sanctions provided for by the Tourism Code will be applied; c) if it concerns the punishment of all the violations of the rules provided for in the Decree, even if these are not subsumable in the case of improper commercial practices identified in Article 20 and followings of the Consumer Code, or in one of those regulated by Article 51-*septies* of the Tourism Code the sanctioning regime of the Consumer Code will again be applied, where applicable, by virtue of the reference made by Article 51-*octies* of the Tourism Code to the instruments, including sanctions, provided for by the Consumer Code.

⁽¹²⁷⁾ For comparative purposes only, see the provision of Article 27, par. 9, of the Consumer Code, which provides a particularly wide range with reference to the generality of the cases, with the possibility of imposing sanctions which, in the basic hypothesis, range from a minimum of 5,000 to a maximum of 5,000,000 euro, to be commensurate taking into account the seriousness and duration of the violation.

for attributing new competences in the transposition of other community directives based on the reference to the Consumer Code provisions⁽¹²⁸⁾. The solution is also in line with the current competences of the Authority and enables to avoid unequal treatment between the subjects involved in the various preliminary activities that could be generated by a conduct considered in violation of obligations introduced by the new discipline and already provided for by the Consumer Code⁽¹²⁹⁾.

The Guarantor is thus entitled to intervene, of its own motion or at the initiative of every relevant person or organisation, in order to ascertain the violations of the provisions of Article 51-*septies* of the Tourism Code, inhibit the continuation of incorrect behaviour, eliminate the effects and impose administrative fines and ancillary administrative penalties, while making use, for this purpose, of the tools, including sanctions, provided for by the Consumer Code.

11. A few brief concluding remarks

In conclusion, the contents of the Directive have been carefully and rigorously transposed into the Tourism Code, following the EU legislator's intention to create a European Union travel space capable of effectively dealing with the profound changes in the market while offering an adequate response to the new challenges imposed by the online marketing of package travels and tourist services.

In the logic of the European Union Parliament and of the Council, overcoming the supranational legal fragmentation will ensure a high level of protection for travellers and guarantee an appropriate balance of the interests of the parties, increasing the transparency of the regulatory framework while

⁽¹²⁸⁾ Consider, by way of example only, the transposition of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (so-called CRD IV), or Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015, on payment services in the internal market (so-called PSD2).

⁽¹²⁹⁾ The provision supplements (but does not replace) the sanctioning system currently envisaged by Article 27 of the Consumer Code, which therefore assigns to the Antitrust Authority the competence to intervene in the case of unfair commercial practices and in the event that the professional provides misleading information on the methods of the service offered, on the price and on the other elements of the contract, whatever the means by which this information is communicated to the traveller; see G. SEBASTIO, *La disciplina giuridica in materia di pubblicità nel settore dei viaggi e turismo e profili dell'intervento dell'autorità*, in *Giust. civ.*, 2001, 2291.

strengthening legal certainty for users and for companies in the sector.

The objective of implementing a full harmonization of the regulations regarding package travel and linked travel arrangements is also emphasized by the imperative nature of the Directive (EU) 2015/2302 and the nature of overriding mandatory provisions of the new European Union regulations, formally established by Article 23, which has been directly implemented in the provisions set out by Article 51-*sexies* of the Tourism Code.

In particular, the organisers or professionals cannot avoid the obligations imposed on them in the field of organised tourism contracts. Thus, the declaration to act exclusively as a supplier of a travel service, retailer, intermediary or any other title, or that a package or a linked travel arrangements does constitute a package or linked travel arrangements does not exempt them from applying the Tourism Code regulations.

The provision contained in par. 1 of Article 51-*sexies* of the Tourism Code finds correspondence in the opposite provision of Article 51-*bis* which, as mentioned, introduces a specific burden (although the title refers to an “obligation”) for the retailer to indicate his quality, establishing that the travel agent is considered as organiser if, in relation to a package travel contract, fails to provide the traveller with the standard information form and, if applicable to the package, information about the organiser, or fails to inform the traveller that he is acting as a retailer.

The unavoidable nature of the Directive’s transposing legislation and its necessary application are reinforced by the prohibition imposed on travellers to waive the rights conferred to them by the regulations governing package travel contracts and linked travel arrangements.

Article 51-*sexies*, par. 2, of the Tourism Code subtracts from the autonomy of the parties the possibility of derogating from the European Union legislation of travellers protection, through a very broad and general reference to the “rights conferred on them by the provisions of this Chapter”, in a similar way as the repealed Article 78, par. 1, of the Tourism Code (which previously established that «are null the contractual clauses or the added clauses of renunciation by the consumer to the rights provided for in this chapter or of limitation of the responsibilities envisaged by the operator»).

Finally, the peremptory certainty of the new regime is confirmed by the provision that the contractual clauses or the declarations that exclude or limit, either directly or indirectly, the rights recognised or whose purpose is to elude the application of the discipline in question do not bind the traveller.

The wording of Article 51-*sexies*, par. 3, the Tourism Code reminds the provision of Article 1229, par. 1, of the Italian Civil Code, where it establishes the invalidity of the liability waiver clauses, referring to any agreement that

excludes or limits in advance the debtor's liability for fraud or gross negligence.

The provision in question, however, covers a decidedly broader spectrum of cases: by referring to all "rights" in general recognized by the new legislation, it greatly expands the field of application; omitting any reference to the "intent" or "gross negligence" also extends to cases of slight negligence, affecting without distinction all the possible relevant cases under the subjective profile

With this in mind, the Italian legislator adhered faithfully to the new European Union legislation, taking care, at the same time, to operate according to the principle of maximum protection of travellers' rights and, concurrently, to guarantee professionals, organisers and retailers the possibility of operating in conditions of equal and effective competitiveness in exercising their respective economic activities.

The reduced margins of discretion established by the Directive have been exploited to the utmost by the national legislator, particularly with regard to the configuration of the intermediate travel contract as a distinct position with respect to the package travel contract and the contracts regarding linked travel arrangements, following a tradition at this point consolidated in national law.

An interesting effort was also made in attempting to bring the various figures governed by the Directive into the context of the general principles regarding obligations and contracts – significant, in this regard, is the constant reference to the standard of good faith in interpreting and executing the contract – and to conform the institutions of a public nature to the functions already assigned to the various subjects of the public organisation.

The new regulation on package travel contracts and linked travel arrangements is now called upon to measure itself with the reality of commercial traffic, both nationally and, above all, in the European Union context, as well as internationally. Through its application, useful information may be derived to assess the concrete effects of the new discipline on the rights of travellers and on the responsibility of professionals, organisers and retailers, and also in terms of harmonising the internal market and strengthening legal certainty for all the system's players.

In fact, by 1 January 2021, the Commission is required to present to the European Union Parliament and the Council a general report on applying Directive (EU) 2015/2302, if necessary accompanied by legislative proposals (pursuant to Article 26, par. 3), while the national legislator can intervene, within 24 months from the coming into force of the Legislative Decree No. 62/2018, in order to adopt any supplementary and corrective provisions of

the internal transposition regulations⁽¹³⁰⁾.

Nevertheless, even more so, it is essential to define precisely the reasons for a possible regulatory intervention, identifying the effective protection needs to achieve an appropriate balance of the interests at stake and to bring into focus the person's well-being⁽¹³¹⁾.

⁽¹³⁰⁾ This is the general procedure established by Article 31, par. 5, of Law No. 234/2012, laying down general rules on Italy's participation in the formation and implementation of European Union legislation and policies, to which Article 1, par. 1, of Law No. 163/2017 (Delegation to the Government for the implementation of European directives and the implementation of other European Union acts - European delegation law 2016-2017) expressly refers to the application of the principles, criteria and procedures contained therein to the purpose of adopting Legislative Decrees; see above, note 1.

⁽¹³¹⁾ See Corte cost., 30 marzo 2012, No. 75, in *Dir. trasp.*, 2012, 455, with a comment by A. TAMBURRO, *Illegittimo il rinvio dell'art. 15 d.lgs. 17 marzo 1995 n. 111 alla Convenzione di Bruxelles del 1970 sul contratto di viaggio per la limitazione del risarcimento del danno alla persona*, in *Dir. tur.*, 2012, 30, with a comment by C. ALVISI and by G. TASSONI, *Contratto di viaggio e danni alla persona: la limitazione risarcitoria è costituzionalmente illegittima – Un doppio commento*, in *Resp. civ.*, 2012, 487, with a comment by F. ROMEO, *Viaggi tutto compreso e illegittimità della norma che prevede un massimale per il risarcimento dei danni alla persona*, cit., in *Resp. civ.*, 2012, 1518, with a comment by S. VERNIZZI, *La consulta ed il limite risarcitorio per il danno alla persona*, in *Contr.*, 2013, 357, with a comment by E. Ruffo, *Pacchetti turistici all inclusive: addio al vecchio limite per il risarcimento dei danni alla persona*, in *Corriere giur.*, 2013, 901, with a comment by A. MACCARONE, *Il contratto di viaggio "tutto compreso" e i limiti alla risarcibilità del danno alla persona*; see also L. A. SCARANO, *L'interpretazione conforme al diritto dell'UE nella giurisprudenza civile di legittimità*, cit., 200.

CHAPTER VI

THE USE OF VOUCHERS AS AN ALTERNATIVE TO A CASH REFUND

SUMMARY: 1. Introduction. – 2. Vouchers according to the Law-Decrees No. 9/2020 and 18/2020. – 3. The effects on hospitality, transport and package travel contracts. – 4. The package travel contracts after Law No. 27/2020. – 5. The Commission Recommendation of 13 May 2020 on travel vouchers. – 6. Final remarks.

1. Introduction

As the former President of the European Central Bank, Mario Draghi wrote in the Financial Times on the 25th of March, «the coronavirus pandemic is a human tragedy of potentially biblical proportions. Many today are living in fear of their lives. Faced with unforeseen circumstances, changing our mind-set is necessary in this crisis. The shock we are facing is not cyclical. The loss of income is not the fault of any of those who suffer from it. The cost of hesitation may be irreversible». That is why the actions being taken by Governments to deal with such a difficult situation and to prevent our tourism systems from being overwhelmed must be brave and timely.

The Italian Governments response was swift. Some crucial measures were taken almost immediately and had an international impact. At the same time, several EU Member States adjusted their own legal systems and relaxed the rules relating to the travel sector.

We will focus on one of these in particular, concerning the travel and tourism sector. In the first phase of the emergency, to face the operators' liquidity crisis, the right to issue vouchers as an alternative to a cash refund has been the Italian way of supporting the financial needs of tour operators, carriers, and hoteliers.

2. Vouchers according to the Law-Decrees No. 9/2020 and 18/2020

To avoid the collapse of both the sectors, air transport and tour operators, in particular, the Italian Government adopted, on 17 March, Law-Decree No. 9/2020. Firstly, this law expressly provides that the COVID-19 emergency constitutes a case of supervening impossibility of performance. As such, according to the general principles of the Italian Civil Code, the consequence should be the termination of the contract and the right of the user to obtain a cash refund. However, Article 28 introduced an exception for air, rail, maritime, road and inland transport contracts (par. 1 & ff.), as well as package travel contracts (par. 5 & ff.) to be carried out in favour of people who are unable to use the services during the pandemic or in the areas affected by COVID-19.

Article 88, par 1, of Law-Decree No. 18/2020 (Decree “Cura Italia”), has extended the same provision to lodging contracts, and, again, to admission tickets for shows of any nature, including film and theatre performances, and entrance tickets to museums and other places of culture. Nevertheless, car rentals, restaurants, and other tourist services were excluded, probably due to market characteristics and/or the absence of an organised lobby that was able to inform the Government’s decisions.

In short, as an alternative to a cash refund, the Law enabled operators to provide customers requesting a refund with a voucher that had to be used within twelve months after the issue date. This voucher is an acknowledgment of credit towards individuals who have booked directly or through travel agencies or booking platforms and find themselves in one of the conditions of impossibility set forth by the Law. This provision applied to all contracts, regardless of the customer’s nationality or the registered offices of the travel agency, intermediary or website through which the booking was made.

Based on the provisions above, customers were required to notify the provider about the occurrence of one of the conditions qualifying as supervening impossibility, no later than 30 days after the expiry of the impediment, cancellation, suspension, or postponement of the event. Within 15 days of said notification, the provider should have made the reimbursement of the amount paid for the service or issued a voucher for an equivalent value that had to be used within a year from the issue date.

In this regard, despite some initial doubts, it is now clear that the option of using vouchers as an alternative to a cash refund is attributed to the carrier, the tour operator, or the hotelier, and not to the consumer (passenger, traveller, or host). In legal terms, it is probably an unusual kind of *ope legis* novation. The Law gives the operator the potestative right to transform an expired contract (due to the supervening impossibility) into a new contract between

the same parties of the previous agreement and with a limited duration. From a strictly legal point of view, it is technically an alternative obligation, whereby the debtor is freed by fulfilling one of the services deducted in obligation, which becomes simple when the debtor exercises the power of choice.

As for the scope of the rule, it concerns any provider and any passenger, traveller or host, regardless of their nationality and type of service offered (regardless of their being standard or low-cost).

In the end, this is a legal measure adopted in favour of the market to avoid its collapse due to the COVID-19 crisis. Despite having a substantial nature, since it impacts transport contracts, package travel contracts and accommodation facilities, its effects are obviously financial.

As far as the travel sector is concerned, the issue was not so much (or not only) the cancellations, but also and above all the cash liquidity of companies. As a matter of fact, tour operators could not cope with the refunds, and they could not return sums that were no longer available. Most contracts provide for agreements with foreign suppliers, and it is not automatic that the termination of the contract in Italy results in the termination of the agreement with the foreign supplier. On the contrary, a suspension or renegotiation of the contract is more frequently envisaged. So, from this point of view, the so-called “Cura Italia” (“Cure Italy”) Law-Decree was instead a “Save Travel” one.

3. The effects on hospitality, transport and package travel contracts

The provision adopted by the Italian Government offered immediate support to the sectors that had been mostly affected by the COVID-19 containment measures, since the whole country was declared a “red zone”, and a ban on leaving homes, along with the suspension of all travel activities, was imposed.

There were no relevant legal problems regarding the hospitality industry, and, at present, the only major difficulty that has been encountered concerns the relationship between hoteliers and online distribution. Online Travel Agencies, intermediaries operating on the electronic market, started to reimburse their users instantly. Therefore, hoteliers were wary of refunding cash and respecting the choice granted by the law. A certain dispute is opening, referring both to the reimbursement of the sums already paid and to the payment of any commissions to intermediaries, which are allegedly not due. The situation is still very uncertain and delicate. OTAs continue to reimburse their customers and issue invoices to operators.

For their part, the latter insist on challenging the legitimacy of the behaviour of the intermediary agencies. In fact, the law grants the hotelier the

right to offer a substitute service of equivalent quality, higher or lower, with a refund of the difference in price, or to reimburse the cost or, otherwise, to issue a voucher, to be used within one year of its issue, for an amount equal to the refund due. In this respect, the attitude of the OTAs appears to be strongly detrimental to the position of the hospitality operators and illegitimate from the point of view of compliance with the law, even before those of the contract.

The question appears more uncertain when it comes to transport contracts and air transport. The problem in Italy was immediately raised by consumer protection associations. In airline practice, it has been verified that low-cost carriers have almost always refunded the ticket price, while traditional airlines have often opted to issue the voucher. To put it briefly, the case of cancellation of the transport by the carrier falls within the scope of the European Union regulations on transport (air, maritime, rail, bus), which provide for the passenger's right to choose between an alternative journey or the reimbursement of the amount paid. The European Commission has confirmed these principles by publishing the "Interpretative guidelines on passenger rights regulations".

Nonetheless, if the passenger cannot – or no longer wishes to – travel because of the COVID-19 outbreak, the carrier has no legal obligation at the European level. Moreover, it is possible that national measures taken to deal with passengers may differ from one Member State to another and are not addressed in the Commission's guidelines. However, when the passenger cannot travel due to the measures taken under COVID-19, this is outside the cases governed by the EU regulations and, therefore, reference should be made to the national law. According to it, in certain circumstances, the carrier should reimburse the amount paid for the travel or issue a voucher of the same amount to be used within one year of the issue, within fifteen days from the communication whereby a passenger informs the carrier of the impossibility to travel. As far as the package travel contract is concerned, under certain circumstances, the Italian law allowed the organiser to issue a voucher in favour of the traveller, instead of reimbursing the price.

Once again, according to Article 28 of Law-Decree No. 9/2020, the potestative right of option – the power of choice – is up to the tour operator, and the traveller must surrender to the choice made by the organiser. Italian tour operators have always chosen to issue vouchers to their customers, with some of them even allowing vouchers to be transferred to other travellers who meet the conditions applicable to that contract.

However, there are also some practical problems in managing the voucher, for example, the voucher is usually personal and cannot be transferred to

another traveller, or some tour operators may not allow the change of destination. Furthermore, the annual deadline exposes the traveller to the risk that the voucher expires and cannot be redeemed. Perhaps, it is possible to envisage some solutions to facilitate the use of the voucher in case the situation continues for an extended period of time: the creation of a kind of “voucher bank” or the establishment of a clearinghouse (eventually managed by an international organisation), or the recognition of cash points to be redeemed, for example.

Finally, the use of the voucher gave rise to some commercial problems. Many travel agents who have reimbursed their customers still wait for the air carriers to return the sums paid. According to IATA estimates, which insist on the need to accept vouchers, the costs of refunds in the second quarter of the year would amount to over 35 billion US dollars.

4. Package travel contracts after Law No. 27/2020

The measures adopted according to Law-Decrees No. 9 and 18/2020 have recently taken a definitive structure with the conversion into law of the aforementioned provisions. According to the new Italian regulation, Article 88*bis* of Law No. 27 of 24 April 2020, containing economic support measures for families, workers and companies connected to the epidemiological emergency from COVID-19, refers expressly to the reimbursement of transport tickets, lodging contracts and tourist packages.

First, the law provision declares that pursuant to and for the purposes of Article 1463 of the Italian Civil Code, the supervening impossibility of performance occurs in relation to transport (air, rail, maritime, bus), hospitality and package travel contracts, stipulated:

- a) by the subjects against whom the quarantine with active surveillance has been ordered or the fiduciary homestay with active surveillance by the competent health authority, in implementation of the measures adopted by the Government, concerning contracts to be performed in the same quarantine period or homestay;
- b) by residents, domiciled or recipients of a ban prohibition of removal to the areas affected by the infection, as identified by the Decrees adopted by the Government, concerning the contracts to be executed during the period of effectiveness of the aforementioned Decrees;
- c) by the subjects tested positive for COVID-19, for which the quarantine with active surveillance or the fiduciary homestay with active surveillance by the competent health authority or hospitalisation at the health structures are available, concerning the contracts to be performed in the same period of stay, quarantine or hospitalisation;

- d) by subjects who have planned stays or trips with departure or arrival in the areas affected by the infection, as identified by the Decrees adopted by the Government, concerning the contracts to be executed during the period of effectiveness of the aforementioned Decrees;
- e) by subjects who have scheduled participation in public competitions or public selection procedures, events or initiatives of any nature, events and all forms of meetings in public or private places, including those of a cultural, recreational, sporting and religious nature, even if carried out in indoor venues open to the public, cancelled, suspended or postponed by the competent authorities in the implementation of the measures adopted by the Government, concerning the contracts to be executed during the period of effectiveness of the aforementioned provisions; and
- f) by the holders of travel documents or purchasers of package travel, purchased in Italy, whose destination is foreign countries, where landing, docking or arrival is prevented or prohibited due to the COVID-19 epidemiological emergency.

Conversely, under Article 41 of the Italian Tourism Code, the traveller may exercise the right to withdraw from package travel contracts to be performed during hospitalisation, quarantine with active surveillance, fiduciary homestay with active surveillance for the duration of the epidemiological emergency from COVID-19, in the areas affected by the infection, as identified by the Decrees adopted by Government, or in States where landing, docking or arrival is prevented or prohibited due to the epidemiological emergency situation from COVID-19.

In particular, within thirty days, the travellers shall notify the organiser of the occurrence of one of the reported situations by attaching the documentation proving the travel document or the tourist package contract and, if requested, the documentation certifying the scheduled participation in events or initiatives. In such cases, the organiser, as an alternative to the cash refund provided for in Article 41, par. 4 and par. 6 of the Italian Tourism Code, may:

- a) offer the traveller a substitute package of either an equivalent value, a higher quality or a lower quality with a refund of the price difference;
- b) proceed with the refund; or
- c) issue a voucher, also through the retailer, to be used within a year of its issue, for an amount equal to the refund due.

Notwithstanding Article 41, par. 6, of the Italian Tourism Code, on the one hand, the refund is paid and the voucher is issued as soon as the refunds or vouchers have been received from the individual service providers and in any case, no later than sixty days from the expected date of commencement of the trip. On the other hand, pursuant to Article 41, par. 5, lett. b), of the

Italian Tourism Code, the organiser can exercise the right of withdrawal from the package travel contracts, having as destination foreign States where the landing, docking or arrival, due to the epidemiological emergency, is prevented or prohibited, and in any case when the execution of the contract is prevented (in whole or in part) by measures taken due to this emergency by national, international or foreign State authorities. In such circumstances, as an alternative to the cash refund provided for in Article 41, par. 5 and 6, of the Italian Tourism Code, the organiser may offer the traveller a substitute package, proceed with the refund or issue a voucher, also through the retailer, to be used within a year of its issue, for an amount equal to the refund due. In this case, the refund is paid and the voucher is issued as soon as the refunds or vouchers have been received from the individual service providers, no later than sixty days from the expected date of commencement of the trip.

Interestingly, the carrier and the hotelier will refund the amount paid in favour of the person from whom they received the payment or issue a voucher of the same amount to be used within one year from its issue. It is also worth noticing that these provisions apply if the package travel has been purchased or booked through a travel agency or a booking portal, as well as by derogation from the conditions agreed upon.

Finally, it is important to emphasise that, with a general closing disposition, Article 88-*bis*, par. 11, Law No. 27/2020 provides that, even outside the cases considered, for all the contracts established with effect from 11 March 2020 to 30 September 2020, on the whole national territory – also for the services to be rendered abroad and for services in favour of foreign contractors – when the services are not rendered due to the effects deriving from the COVID-19-related state of emergency, the counter-performance already received may be returned through a voucher of the same amount, valid for one year from the date of issue.

Nonetheless, according to Article 12 of the Directive (EU) 2015/2302 on package travel and linked travel arrangements, in the event of unavoidable and extraordinary circumstances, both the traveller and organiser may terminate the package travel, with the latter having to provide the traveller with a full refund when it is prevented from performing the contract due to the same circumstances. In this context, the regulation introduced by the Italian law provides for remedies that are partially different from the rules established by European sources and introduces an exception to Article 41 of the Italian Tourism Code, by which the Directive has been transposed. The organiser has the choice to offer a full refund of the price within fourteen days of the notification sent by the traveller, or issue a voucher of the same amount to be used within a year, or offer an alternative package of travel.

It is partially in contrast with the Directive granting to travellers the right to obtain “a full refund of any payments” in case of withdrawal from the package travel contract, in the event of unavoidable and extraordinary circumstances. The Government seems aware of the problem, since it established that the provisions referred constitute mandatory rules of law (see Article 88-*bis*, par. 13, Law No. 27/2020). Thus, they prevail over foreign laws and any different agreements since the implementation of those rules was deemed crucial to protect the national economy.

There are, therefore, some serious doubts about the capacity of this discipline to withstand a possible lawsuit brought by travellers who require a full refund instead of the voucher or the alternative package offered by the organiser. The new legislative framework is supplemented by the provisions of Article 88-*bis*, par. 12, Law No. 27/2020, according to which the issue of the voucher fulfils the related refund obligations and does not require any form of acceptance by the recipient.

The provision in question was introduced expressly to clarify, beyond any interpretative doubt, that the potestative right of choice is attributed to the organiser of the package travel and not to the traveller. This means that the law introduces a further derogation from the arrangement of relations between the parties established by Directive (EU) 2015/2302 and by the Italian Tourism Code norms of transposition.

The contrast between the rules of the European Union and the new provisions of Article 88-*bis* Law No. 27/2020 is twofold. On the one hand, the recognition of the possibility of issuing a voucher instead of a cash refund in case of withdrawal of the traveller or cancellation of the package travel by the organiser. On the other hand, the attribution to the latter, rather than to the traveller, of the potestative right of choice between offering an alternative package, refunding cash or issuing a voucher.

5. The Commission Recommendation of 13 May 2020 on travel vouchers

In the end, on the 13th of May 2020, the European Commission presented a Recommendation [Com. Comm. C(2020) 3125 final of 13.05.2020] on vouchers offered to passengers and travellers as an attractive alternative to reimbursement for cancelled package travel and transport services in the context of COVID-19.

The Recommendation is part of the Commission package of guidelines and recommendation “Tourism and transport in 2020 and beyond” [Com. Comm. C(2020) 550 final of 13.05.2020], composed of three guidelines and a recommendation to help EU countries gradually lift travel restrictions, allow

businesses to reopen and ensure that people in Europe can benefit from a safe and relaxing Summer after months of confinement while respecting necessary health precautions.

The Commission is aware that cancellations entailed by the COVID-19 pandemic have led to an unsustainable cash-flow and revenue situation for the travel industry, as well as for the transport sector. The liquidity problems of organisers are exacerbated by the fact that they must refund the full price of the package to the traveller. At the same time, they themselves do not always receive reimbursement for prepaid services that are part of the package in a timely manner. This can *de facto* result in an unfair sharing of the burden among the operators in the travel ecosystem.

Additionally, if organisers or carriers become insolvent, there is a risk that many travellers and passengers would not receive any refund at all, as their claims against the former are not protected. The same problem may arise in a business-to-business context, in which organisers receive a voucher as reimbursement for prepaid services from carriers, which later become insolvent.

Firstly, the Recommendation recalls that on 19 March 2020, informal guidance on the application of the Package Travel Directive in connection with COVID-19 was published on the Commission's website, confirming the traveller's right to get a full refund, but also stating that it is possible for the traveller to accept a voucher. In particular, the Commission expressly reaffirms that vouchers that carriers or organisers may propose to passengers or travellers, as an alternative to reimbursement in money, are subject to the passenger's or traveller's voluntary acceptance. According to the Recommendation, making vouchers more attractive, as an alternative to a cash refund, would increase their acceptance by travellers and passengers. From the Commission's perspective, this would help ease operators' liquidity problems and could ultimately lead to better protection of the interests of passengers and travellers. To achieve this, the Commission recommends that vouchers have, *inter alia*, the following characteristics:

- a minimum validity period of 12 months;
- the organisers should automatically refund the amount of the voucher concerned to the traveller, at the latest, 14 days after the end of its validity period, if the voucher has not been redeemed;
- if the vouchers have a validity period longer than 12 months, the passengers should have the right to ask for reimbursement within 12 months after the issuance of the voucher concerned, as well as afterwards, subject to any prescriptive time limits;
- the travellers should be able to use vouchers for payments in respect of all

new bookings made before their expiry date, even if the payment or the service takes place after that date;

- the travellers should be able to use the vouchers towards payment for any transport services or package travel offered by the carrier or organiser;
- subject to availability and irrespective of any fare or price difference, the organisers should ensure that the vouchers allow travellers to book a package travel contract with the same type of services or of equivalent quality as the terminated package;
- the organisers should consider extending the possibility to use the vouchers for bookings with other entities that form part of the same group of companies;
- if the package travel was booked through a travel agency or other intermediary, the organisers should allow the vouchers to be used for new bookings also through the same travel agency or another intermediary;
- the vouchers should be transferable to another traveller without any additional cost if the providers of the services included in the package agree to the transfer without any additional cost;
- the vouchers should be issued on a durable medium, such as email or paper, indicate their validity period and specify all the rights attached to them; and
- the organisers are recommended to offer added value to vouchers than the value of the originally booked service to make them more attractive.

The Commission invites the Member States to actively consider setting up guarantee schemes for vouchers to ensure that, in the event of insolvency of the issuer of the voucher, passengers or travellers are reimbursed. They may also decide whether to introduce specific measures to provide support to operators to ensure that reimbursement claims caused by the COVID-19 pandemic are satisfied and, following the bankruptcy of a carrier or organiser, to cover reimbursement claims of passengers or travellers.

In the worst-case scenario, the Temporary Framework on State aid measures to support the economy in the current COVID-19 crisis, adopted by the Commission, could intervene. Based on Article 107(3)(b) of the Treaty, it would provide a basis for liquidity support, by allowing operators to receive, among others, direct grants, tax advantages, State guarantees for loans and subsidised public loans. In other words, according to the Commission, the alternative to liquidity problems arising from the fact that all travellers may opt for a cash refund seems to be the financial support to tour operators: as a matter of fact, the vouchers that the organisers may offer to passengers or travellers, as an alternative to cash reimbursement, would be subject to the passenger's or traveller's voluntary acceptance.

6. Final remarks

In the end, using vouchers as an alternative to a cash refund has been an interesting idea to deal with the pandemic by avoiding the collapse of the Italian travel and tourism sector. This is for sure, at least in the short term, without prejudice to the problem of its compatibility with the EU regulatory framework.

However, the real question is whether this can become the definitive long-term solution or not. The emergency required the adoption of extraordinary and urgent measures. The return to normal requires us to consider the relational framework of passengers, travellers and guests, on the one hand, and carriers, tour operators and hoteliers, on the other, taking into account all market components and the different types of travel services.

The global travel and tourism Industry has been ravaged by COVID-19, a classic example of a black swan event. While many are looking backwards to compare the current market environment with the post9/11 or other periods of the past, it is preferable to look straight ahead and try to address the tough questions weighing on our collective minds. If it is true that nothing will be the same as before – as people often say – then we must think of new rules that are fairer for tourists (passengers, travellers, or hosts) and equally sustainable for the EU market, working to build a new normal.

Nevertheless, as Mario Draghi said, «Speed is absolutely essential for effectiveness. The speed of the deterioration of private balance sheets must be dealt by equal speed in supporting each other in the pursuit of what is evidently a common cause». This is exactly what we are trying to do today.

PART III
INTRODUCTION TO ITALIAN TOURISM LAW

CHAPTER VII

INTRODUCTION TO ITALIAN TOURISM LAW

SUMMARY: 1. Italian tourism law. – 2. The Ministry of Tourism and the promotion of Italy's image abroad. – 3. The competences of the Italian Regions. – 4. Accommodation facilities. – 5. Agritourism. – 6. Tour operators and travel agencies. – 7. Professions in tourism. – 8. The Consumer Code. – 9. The Tourism Code. – 10. The hotel contract. – 11. The package travel contract. – 12. Present challenges and the future of tourism.

1. Italian tourism law

Italian Tourism Law has consolidated over time into a systematic and interdisciplinary structure⁽¹⁾.

This summary analysis of tourism law is here conducted and presented from the perspective of the “legal powers”⁽²⁾. The fundamental characteristics of the tourism system are examined, starting with the regulatory competences (of the State, the Regions, the European Union, the general international systems), moving on to the administrative competences (referring to the several actions available: administration, promotion, incentives, control over undertakings and professionals, taxation) and, finally, exploring the role of private autonomy through an analysis of the contracts that have shown considerable development over the years.

The use of tourism-related contracts has intensified, since they are now more generally governed by the tourism law. Tourism law is also linked to improved consumer protection and sustainability principles.

Reconstructing the source of Italian tourism law involves a multilevel inves-

⁽¹⁾ A summary of the evolution of tourism and tourism law in V. FRANCESCHELLI, *Le stagioni del turismo - Il Viaggio, il Diritto, la Vacanza*, Milano, 2021.

⁽²⁾ V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, VIII ed., Torino, 2022.

tigation⁽³⁾. Firstly, international conventions, UN Tourism soft law, and EU law must be considered. Moreover, concerning domestic law, constitutional provisions, the national legislative framework, and regional laws are highlighted.

As pointed out below, the Italian Regions have a general and exclusive competence in tourism, save for certain powers reserved for the State. In the current Italian constitutional system, tourism is a matter dealt with exclusively by the Regions.

Under Article 117 of the Constitution, in its original wording, the subject “tourism and the hotel industry” fell within the shared legislative and administrative competence of the State and its Regions. However, following the federal reform of Italy’s constitutional system by Constitutional Law No. 3 of 18 October 2001, amending Title V of Part Two, tourism is no longer mentioned in the Constitution, which means there is currently no direct constitutional relevance to tourism.

Furthermore, tourism may still be linked to fundamental constitutional values such as the protection of the landscape and the historical and artistic heritage (Article 9, comma 2, of the Italian Constitution) and the individual rights of freedom (Article 2 Const.); to essential rights relating to the freedom of movement⁽⁴⁾ (Article 16 Const.) or the social right to healthcare⁽⁵⁾ (Article 32 Const.) and education (Article 34 Const.); as well as to individual freedoms, particularly the freedom of private economic initiative (Article 41 Const.).

According to some scholars, tourism is a “social right.” Others write that it expresses a simple individual interest or preference, while others again propose an approach in line with the most recent case law of the Constitutional Court, describing it in terms of “social freedom”⁽⁶⁾.

As mentioned earlier, according to Article 117, comma 4, of the Constitution, tourism is a matter dealt with at the regional level. However, there are still some areas of relevance to tourism, for which Article 117, comma 3, provides a shared competence of the State and the Regions, i.e. in the field of tourism

⁽³⁾ M. MALO - C. COLALUCA, *Competenze normative e fonti*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 27.

⁽⁴⁾ For the infrastructure and transport system, see F. MORANDI - G. BENELLI, *Le infrastrutture dei trasporti e il demanio marittimo a finalità turistico-ricreativa*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 136; and for transport contracts, see F. MORANDI - V. CORONA - S. VERNIZZI, *Contratti della navigazione e dei trasporti*, *ivi*, 302.

⁽⁵⁾ For instance, wellness tourism, see A. SANTUARI, *Il turismo termale*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 278.

⁽⁶⁾ M. MALO - C. COLALUCA, *Il turismo nella Costituzione*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 5.

professions, health protection, sports regulations, territorial management, civil ports and airports, enhancement of cultural and environmental heritage, promotion, as well as organisation of cultural activities. Lastly, Article 117, comma 2, of the Constitution grants the State exclusive competence in certain matters that interfere with the tourism system, such as the protection of competition, the tax and accounting system, civil and private law, civil and social rights and the safety of the environment, the ecosystem and cultural assets.

In this perspective, the “precarious balance” between national and regional laws is the most critical point in the current framework of tourism legislation and governance powers⁽⁷⁾.

2. The Ministry of Tourism and the promotion of Italy’s image abroad

The current structure of the public organisation of tourism is based on the shared responsibility of the Regions and the Italian State.

This long-standing Italian tradition dates back to the *Associazioni Pro-Lo-co* (1881), followed by the *Automobil Club d’Italia* (ACI), the *Club Alpino Italiano* (CAI) (1863) and the *Touring Club Italiano* (TCI) (1894). The National Agency for the Development of the Tourism Industry (*Ente Nazionale per l’Incremento delle Industrie Turistiche* – ENIT) was founded in 1919, which, nowadays, is known as the National Agency for Tourism (ENIT S.p.A.) and is responsible for promoting Italy’s image abroad.

The Ministry of Tourism was first established in 1959 and witnessed considerable institutional challenges concerning the relationship between the State and the Regions.

The Ministry of Tourism was recently re-established by Italian Decree-Law No. 22 of March 1st, 2021, with the main objective of reshaping the tourism sector, which has been severely affected by the COVID-19 pandemic. As such, its main functions are coordinating, planning, and promoting national tourism policies, launching national strategies for the country’s competitiveness, including the “Made in Italy” brand, developing initiatives to increase supply, and supervising bodies such as ACI, CAI and ENIT, in addition to dealing with international and EU organisations and institutions.

Relations with the Regions are carried out, not only according to the principle of “loyal cooperation” and their involvement in the launch of tourism pol-

⁽⁷⁾ L. RIGHI, *Il “precario equilibrio” del turismo nel nuovo assetto dei rapporti fra Stato e Regioni*, in *Dir. tur.*, 2003, 127.

icies, but also through a “*memorandum of understanding*” and “agreements” adopted within the institutional framework of the State-Regions Conference.

Specifically, promoting Italian tourism abroad is entrusted to the ENIT S.p.A., a public company of the Ministry of Economy and Finance, which exercises shareholder rights, subject to the supervisory and control powers of the Ministry of Tourism. According to Article 25 of the Law Decree of 22 April 2023, No. 44, the Ministry’s in-house company is responsible for ensuring the support and promotion of national tourism, thus enhancing its attractiveness, including through appropriate measures to reduce seasonality, diversify the offering, and promote facilities and sites with a strong tourism vocation. It also provides specialized training for service providers and develops a digital ecosystem for the most efficient and rational use of goods and services offered in these sectors.

Indeed, the Italian Constitutional Court has resolved that, because of the fragmentation of Italy’s tourist offer, a single comprehensive promotional activity is required; the action must be proportionate and not general over the entire tourist sector, that is, the State can only attract what is necessary in order to provide the world with a single comprehensive image, thus legitimately exercising its functions through ENIT⁽⁸⁾.

3. The competences of the Italian Regions

The twenty Italian Regions and Autonomous Provinces of Trento and Bolzano have exclusive control over tourism.

Since 1970, when they were established to implement constitutional provisions – well before the 2001 constitutional reform – the Regions have actively worked on legislation and administration in tourism, accompanied by an equally significant administrative activity.

The scope and functions exercised by the Regions in the tourism field range from establishing regional tourism agencies to regulating tourism activities carried out by companies and individuals.

Regarding the former, a regional tourism agency is established autonomously by each Region and takes different forms according to the choices made in each territory. For instance, the promotion of the tourist offer in the most developed tourist regions is entrusted to these regional promotion agencies, typically set up as undertakings, and, in some cases, to fully-fledged

⁽⁸⁾ See the rulings delivered by the Constitutional Court on 1 June 2006, No. 214, and on 20 March 2009, No. 76.

Destination Management Organisations, based on a model that seems to be increasingly more successful at the local level.

In addition to the more strictly bureaucratic functions entrusted to the competent regional departments, the regional administrations have also established tourism promotion agencies organised in homogeneous territorial contexts and tourist information offices (*Uffici di Informazione e di Accoglienza Turistica* - IAT) at the local level.

Concerning the regulation of tourist activities, since the 1980s, regional regulations have governed, first of all, accommodation and travel activities and travel and tourism agencies at the territorial level.

Specific attention should be paid to the regulation of tourism professions, with regional regulations expected to be bound by the principles laid down by the State, but, in fact, are still struggling to find their final configuration.

4. Accommodation facilities

The regulations governing accommodation activities, such as hotels, are traditionally one of the fundamental components of tourist travel. Their structure has evolved over the centuries: *tabernae*, *xenodocheia*, inns, caravanserais, monasteries, post houses, pensions, *meublé*, up to the present day.

Nowadays, entrepreneurial inventiveness and the classifications made by regional laws have broadened the types of hospitality. In particular, the regional legislation has evolved considerably from the provisions of the repealed Law No. 217 of May 17th, 1983, the “Framework Law for Tourism”, which has served as the basis for the rules currently in force, introduced by the Italian Regions, which have general jurisdiction over tourism matters.

To summarise, under Article 8 of the Tourism Code, accommodation facilities may be divided into four basic categories⁽⁹⁾:

- a) hotel and hotel-like accommodation, which include but are not limited to hotels, residences, condohotels, motels, hotel-villages, scattered hotels, historical hotel residences, and beauty farms;
- b) non-hotel accommodations, which include rooms to let, bed-and-breakfast, holiday homes, furnished tourist homes, youth hostels; accommodation in the context of holiday farms, excursion refuges and mountain huts;

⁽⁹⁾ For an overview of the different types of accommodation, see, among others, L. RIGHI, *Le strutture ricettive*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 177.

- c) open-air accommodation, including campsites, tourist villages, marina resorts and campsites in the context of holiday farming activities;
- d) support-only facilities, including, in particular, equipped service areas.

Classifying the various accommodation facilities is also the responsibility of regional lawmakers, both in terms of categories and assignment criteria.

In general, Italian Regions adopt fairly uniform standards and use a star-based classification system. By way of example, hotels are classified as having 1 to 5 stars, taking into account the size and structural requirements of the services offered and the qualification of employees. Accordingly, hotels marked with 5 stars are given the additional designation of “luxury” when they meet the standards of international class accommodation facilities. Moreover, campsites are awarded 1 to 4 stars by regional laws, depending on the service offered, their location and the presence of recreational, cultural and sports facilities.

5. Agritourism

Agritourism is becoming more and more popular and needs special attention.

The most recent legislation offers special provisions for holiday farms to support agriculture and promote suitable forms of tourism in the countryside⁽¹⁰⁾.

The lawmakers aim to:

- a) protect, qualify and enhance the specific resources of the territory;
- b) encourage the maintenance of human activities in rural areas, multifunctionality in agriculture and the differentiation of agricultural sources of income, initiatives to protect the soil, the territory and the environment, as well as agricultural and forestry development;
- c) restore the rural building heritage while protecting the landscape;
- d) support and encourage local produce, food, and wine traditions;
- e) promote rural culture and food education.

Under the Law No. 96 of 20 February 2006, “holiday farms” refer to the reception and hospitality activities carried out by individual or associated farmers, including in corporate form, through the use of their own farm in connection with agricultural activities. According to Article 2135 of the Italian Civil Code, an agrarian entrepreneur is anyone who cultivates the land, carries out forestry, livestock farming and related activities.

⁽¹⁰⁾ For an analysis of the national framework, see S. BUSTI, *L'agriturismo*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 262.

The holiday farming activities allowed and supported by the law include:

- providing accommodation in lodgings or open spaces for campers;
- providing meals and beverages consisting mainly of their own products or from local farms, with preference given to typical products and traditional food products;
- organising tastings of farm produce, including wine tasting; and
- organising recreational, cultural, educational, sporting, hiking and horse-riding activities to promote the area and its rural heritage.

Moreover, holiday farming also includes the activities carried out by fishermen with regard to hospitality, the serving of meals consisting mainly of products deriving from fishing, as well as linked activities, including fishing tourism.

Among other things, the Regions are responsible for setting the criteria, restrictions and administrative obligations to carry out the activity, defining the principles to ensure the connection between holiday farming and the actual agricultural activities, which must remain prevalent, with particular reference to the working time required to carry them out, and regulating the procedures for issuing the license to conduct holiday farming activities.

6. Tour operators and travel agencies

The organisation and brokering of tourist services are also regulated in Italy on a regional basis⁽¹¹⁾.

In general, travel agencies are undertakings that carry out (including on-line-only) the production and organisation of travel, stays or cruises, for individuals or groups, the brokerage of these services or both, subject to obtaining a specific regional license.

Other activities or tourist services provided by travel agencies include:

- the assistance and reception of tourists;
- organising excursions, booking accommodation or catering services;
- renting cars or other means of transport;
- selling tickets for shows, fairs and events;
- providing information on and promoting tourist initiatives;
- organising conference services and fairs; and
- issuing policies to cover travellers' risks.

⁽¹¹⁾ For an analysis of the evolution of the regulatory framework and the regional legislation in this field, see M. MALO - A. PERINI, *Agenzie di viaggio e turismo*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 208.

It is worth mentioning that travel agencies may not have the same name as an Italian Municipality, Province or Region, or the same or similar name to that of other agencies operating on the national territory.

The companies' financial capacity is compared to the minimum capital for limited liability companies, which are also required to take out an insurance policy to cover liability towards customers.

They must also have insurance coverage, a bank guarantee, or participation in private funds for the reimbursement of the price and the return of tourists in case of bankruptcy or insolvency of the organiser or the intermediary⁽¹²⁾.

Moreover, the management of travel and tourist agencies must be entrusted to a person in possession of specific technical-professional skills, proven by the owner's registration in the list of technical directors or by the appointment of a technical director.

Finally, the Region is responsible for exercising administrative functions, supervising and monitoring travel and tourist agencies, along with imposing penalties in the event of violations of the laws governing the activity.

7. Professions in tourism

Currently, the regulation of tourism professions in Italy has a particularly complex profile. On the one hand, it falls within the competence of the State and the Regions. On the other hand, the national and regional regulations highlight compatibility issues with the European Union regulation⁽¹³⁾.

The evolution of the reference State legislation stems from the 1888 public safety regulations, from Article 11 of the repealed Law No. 217/1983, which identified for the first time tourist professions, establishing the fundamental principles of their development, to the current structure of the national legal basis.

Currently, under Article 6 of the Tourism Code, tourism professions provide services to promote tourism, as well as hospitality, assistance, touring and guiding services, aimed at enabling tourists to make the best possible use of their trip and holiday, including in terms of destination knowledge. Essential-

⁽¹²⁾ The obligation is set out in article 50(2) of the Tourism Code, implementing article 17 of Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked tourist services.

⁽¹³⁾ For the reconstruction of the legislative framework, see L. RIGHI, *Le professioni turistiche*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 238.

ly, tourism professions are activities carried out in an autonomous professional form, with the aim of providing various types of services to tourists.

According to the traditional approach, tourism professions may be divided into several categories, the most common being tourist guides, interpreters, and tour leaders. In the 1980s, conference organisers and tourist entertainers were added; some categories are associated with both tourism and sports, such as nautical instructors, ski instructors, mountain and speleological guides.

The Regions have also created additional tourism professions, including, among others, nature or hiking guides, horse or cycle tourism guides or leaders, scuba diving tourist guides. The creation of new types of professions and the relevant protection granted to tourists underpin the administrative regime of licensing, the latter being an instrument of administrative verification of the operator's technical suitability to carry out the activity.

For the exercise of the professions mentioned above, other EU citizens are treated in the same way as Italian citizens. However, as in other Member States, the Italian legislation has been repeatedly criticised by EU institutions⁽¹⁴⁾. Requiring a specific licence and registration on a tourist guide register or list has been regarded as unduly restricting tourist services. Therefore, the regulation of tourism professions has undergone a certain evolution, partly under the momentum of specific liberalising trends in favour of removing all barriers to the exercise of the relevant activities.

National lawmakers intervened with Article 3 of Law No. 97 of 6 August 2013, which provides for a "standard" licence, single and valid throughout the national territory (the so-called "national tourist guide") and a "special" licence that allows professionals to operate in "sites of particular historical, artistic or archaeological interest for which a specific qualification is required".

The difficulties in implementing the aforementioned State legislation and the lack of a framework regulation that inspires regional implementing regulations have led to a substantial paralysis of tourism policymaking. The severe uncertainty of the regulatory framework for tourism professions, which not even the Tourism Code has been able to overcome, still lingers today, with significant negative effects on the development of those professional activities.

Lastly, after more than ten years of substantial inertia and with the de-

⁽¹⁴⁾ See the three judgments of the Court of Justice of the European Communities of 26 February 1991, case C-180/89, case C-154/89 and case C-198/89, and of 22 March 1994, case C-375/92 concerning Italy, Greece, Belgium and Spain, respectively.

clared intent of avoiding an infringement procedure by the European Commission⁽¹⁵⁾, the Italian Legislator introduced the figure of the “national tourist guide”, intended as the professional who, in possession of a specific title or the necessary qualification, illustrates and interprets, during guided tours with individuals or groups of people, the value and significance, as testimonies of civilization of a territory and its community, of the tangible and intangible assets that constitute the Italian historical, cultural, museum, religious, architectural, artistic, archaeological and monumental heritage, also in correlation with the demo-ethno-anthropological, landscape, productive and food and wine contexts that characterize the territorial specificities (Article 2 of Law 13 December 2023, No 190).

8. The Consumer Code

On the other hand, as mentioned, private-law measures are, and remain, a matter of national law. The national legal basis includes, first of all, the Civil Code, as well as the Consumer Code (Legislative Decree No. 206 of 6 September 2005) and the “Tourism Code” (Legislative Decree No. 79 of 23 May 2011), with particular reference to the provisions governing tourist package contracts.

Tourists are often consumers. Accordingly, certain legal provisions for tourism are included in the Consumer Code, with tourists benefiting particularly from the protection rules provided for consumer contracts⁽¹⁶⁾. Moreover, the Consumer Code also includes the regulations on timeshare, regulated by Articles 69-81, as well as the provision applicable to travel contracts in Articles 82-100, later incorporated in the so-called “Tourism Code”.

The Consumer Code is the peak of a process developed over the last few decades and brings together, in a single text, the provisions of 21 different measures. It applies to the relations between consumers and undertakings qualified by the “Consumer Act”. The Consumer Code consists of 146 articles divided into six parts⁽¹⁷⁾, covering all stages of consumption, from purchase

⁽¹⁵⁾ See L. RIGHI, *La legge n. 190/2023 e la nuova disciplina della professione di guida turistica (ormai definitivamente solo) “nazionale”*, in *Riv. it. Dir. tur.*, 41/2024, 51.

⁽¹⁶⁾ On the Consumer Code and the tourism sector, see A. M. MANCALEONI, *Prime note in margine al Codice del Consumo*, in *Dir. tur.*, 2005, 385; A. VENCHIARUTTI, *La disciplina dei servizi turistici nel codice del consumo e linee di riforma a livello comunitario*, *ivi*, 2007, 329; and V. CUFFARO, *Un codice “consumato” (codice del consumo, credito ai consumatori e codice del turismo)*, in *Corr. giur.*, 2011, 1189.

⁽¹⁷⁾ Part I - General Provisions (Articles 1-3); Part II - Education, Information, Advertising

to consumer protection actions. It includes, among others, rules previously regulated in the Civil Code, as the rules on unfair terms and conditions, and the rules on “warranties and guarantees”. The Consumer Code also regulates the rules on distance selling and off-premises contracts, previously regulated by legislative decrees.

9. The Tourism Code

The Tourism Code (Annex 1 to Legislative Decree No. 79 of 23 May 2011, as amended, known as the “Code of State regulations on the organisation and market of tourism”) was drafted in an attempt to draw up general rules regarding tourism, within the limited authority given to the State by the Italian Constitution, following the 2001 constitutional reform.

The fragile balance that the Italian Constitution draws between National Law and Regional Law immediately led to the intervention of the Constitutional Court, which declared a large part of the Code to be unconstitutional⁽¹⁸⁾.

Therefore, the actual extent of the Tourism Code is now limited to those rules that the Regions did not challenge before the Constitutional Court. It also covers regulations about tourism professions, some general rules about tourism activities, rules on package travel contracts, and the organisation of national tourism promotion.

Despite its pompous name, the “Tourism Code” does not cover those areas which are, as we have seen, exclusive to the State law⁽¹⁹⁾.

(Articles 4-31); Part III - *The Consumer Relationship* (Articles 33-101); Part IV - *Safety and Quality* (Articles 102-135); Part V - *Consumer Associations and Access to Justice* (Articles 136-141-decies); Part VI - *Final Provisions* (Articles 142-146).

⁽¹⁸⁾ With sentence No. 80 of 5 April 2012, the Constitutional Court declared “the constitutional illegitimacy of Article 1, paragraph 1, of Legislative Decree No. 79 of 23 May 2011 (“Code of the State regulations on the subject of the organisation and tourism market” – “*Codice della normativa statale in tema di ordinamento e mercato del turismo*”), where it provides for the approval of Article 1, limited to the words “necessary for the unitary exercise of administrative functions” and “and other rules on the matter”, as well as Articles 2, 3, 8, 9, 10, 11, paragraphs 1, 12, 13, 14, 15, 16, 18, 20, paragraphs 2, 21, 23, paragraphs 1, 2, 30, and paragraphs 1, 68 and 69 of Annex 1 of Legislative Decree No. 79 of 2011”; for all of which, see L. RIGHI, *Il turismo nel tiro alla fune Stato-Regioni: la ridondanza dell'eccesso di delega dimezza il codice*, in *Riv. it. Dir. tur.*, 2012, 29.

⁽¹⁹⁾ On the Tourism Code, see M. MALO, *Primi dubbi sul codice del turismo*, in *Riv. it. Dir. tur.*, 2011, 9.

The Tourism Code is currently divided into eight sections⁽²⁰⁾ and deals with tourism enterprises (Articles 4-5), tourism-related professions (Articles 6-7), accommodation facilities (Articles 8-17) and travel agencies (Articles 18-21).

It also addresses, in a very general manner, the various types of tourism (Articles 22-31), rental of tourist homes (Articles 52-53), tourism organisation (Articles 54-65) and dispute resolution (Articles 66-69).

As previously mentioned, the Tourism Code also contains rules on package travel contracts (Articles 32-51-*novies*)⁽²¹⁾, according to the provisions transposing Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements, transposed in Italy by Legislative Decree No. 62 of 21 May 2018.

10. The hotel contract

The Italian Civil Code does not provide a definition for hotel contracts and merely regulates specific aspects of the relationship between the hotelkeeper and the guest⁽²²⁾.

While the hotel contract is not one of the “types” regulated by the Code, it has undoubtedly become more standardised over time. Thus, these contracts have their own “historical” definition and development, having evolved from reception and accommodation against payment to a range of services, including the rental of accommodation and the provision of services.

The hotel contract is traditionally defined as the contract by which one party, referred to as the hotelkeeper, provides the other party, referred to as the guest, with accommodations, possibly board, and other accommodation-related services⁽²³⁾.

⁽²⁰⁾ Title I - General provisions (Articles 1-5); Title II - Profession and training in the tourism sector (Articles 6-7); Title III - The tourism market (Articles 8-17); Title IV - Travel and tourism agencies (Articles 18-21); Title V - Types of tourism products and related national circuits of excellence (Articles 22-31); Title VI - Contracts (Articles 32-53); Title VII - Organisation (Articles 54-69).

⁽²¹⁾ See F. MORANDI, *I contratti di viaggio alla prova del codice del turismo*, in *Riv. it. Dir. tur.*, 2012, 5.

⁽²²⁾ For all, see M. LA TORRE, *Il contratto di albergo*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 358.

⁽²³⁾ According to M. FRAGALI, *Albergo (contratto di)*, in *Enc. dir.*, Vol. I, Milano, 1958, 964, an hotel contract may be defined as a contract whereby against payment, one party (the hotelkeeper) undertakes to provide the other party (the guest or client) with accommodation and board, and to provide it with those services which make a stay at paid accommodation premises comfortable.

In recent times, doctrine and case law have emphasised the causal relevance of the so-called “accommodation-related services”, highlighting the ancillary services offered by the hotelkeeper. Suffice it to say that the Italian Supreme Court has resolved that the hotel contract governs a range of services, including accommodation rental and the provision of services, without such accommodation rental having to be construed as dominant consideration in relation to the other services⁽²⁴⁾.

Conversely, the Civil Code regulates the “hotel deposits” as a type of deposit contract. In fact, the Civil Code distinguishes between the deposit in the general storage spaces (Article 1787) and the hotel deposit (Article 1783). The provisions on storage in hotels are intended to regulate the deterioration, destruction, or removal of items that guests bring with them, enacting an obligation of custody and a strict liability of the hotelkeeper.

Under the Law No. 316 of 10 June 1978, Italy ratified the Convention on the Liability of Hotelkeepers concerning the Property of their Guests, signed in Paris on December 17th, 1962, adding Articles 1463 *et seq.* to the Italian Civil Code. Moreover, pursuant to Article 1783 of the Code, hotelkeepers are liable for any deterioration, destruction, or removal of any property of their hotel guests.

The hotelkeepers’ liability may be *limited* or *unlimited*. In the case of property “brought” into the hotel, the liability is limited to the value of the damaged, destroyed or stolen property, up to a maximum of one hundred times the daily rental price of the accommodation. In case of items “handed over” by the guest to the hotelkeeper for safekeeping, the liability is unlimited, and the damage must be fully compensated.

The hotelkeeper is also liable without limitations if he or she refuses to take custody of the property that he or she is required to accept, i.e., paper money or paper securities, cash, and valuables. The hotelkeeper may only refuse to accept any dangerous property or that of excessive value that is bulky in nature, taking into account the hotel’s level and operating conditions.

However, the hotelkeeper shall not be liable if the property’s deterioration, destruction, or removal is caused by the guest, the persons accompanying the guest (in his or her service or visiting him or her), force majeure, or the nature of the property.

Finally, the Civil Code deals with the hotelkeepers’ claims (Article 2760), granting them the privilege on the property brought into the hotel in the

(24) Italian Supreme Court No. 7070 of 22 January 2002.

event of non-payment by the guest. It is, one might say, the modern evolution of the *actio in factum* granted by the Roman praetor centuries ago.

If the hotel contract can be considered the prototype of hospitality contracts⁽²⁵⁾, the provisions on hotel storage are general and apply to all accommodation establishments and similar localities⁽²⁶⁾.

11. The package travel contract

From a strictly civil law point of view, the core of tourism regulations is the package travel contract, which, in Italy, is traditionally known as the “travel contract”⁽²⁷⁾.

Travel contracts bring together transport, accommodation, vehicle rental or other services and generate that *causa turismi*, which modifies the causal element of the individual types of contract by overcoming and supplementing the causal element of the contracts of the services it comprises.

Furthermore, the regulation of the package travel contract also becomes, with the transposition of Directive (EU) 2015/2302⁽²⁸⁾, the basis of EU Tourism Law. Indeed, it serves as the common European legal basis of tourism.

Following the transposition of the European Union regulations by the Italian lawmakers, with the enactment of Legislative Decree No. 62 of 21 May 2018, the package travel contract is now governed by articles 32-51-*novies* of

⁽²⁵⁾ See M. LA TORRE, *I contratti di ospitalità*, in V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, cit., 345.

⁽²⁶⁾ Under Article 1786 of the Civil Code (premises and venues used as hotels), the provisions also apply to the proprietors of nursing homes, public entertainment venues, bathing facilities, inns, sleeping carriages and the like.

⁽²⁷⁾ On package travel contracts, the bibliography is impressive; see, for all, G. SILINGARDI - F. MORANDI, *Il contratto di “pacchetto turistico”*, Torino, 1996 (II ed. 1998); G. TASSONI, *Il contratto di viaggio*, Giuffrè, 1998; A. VENCHIARUTTI, *Viaggi organizzati e tutela del turista*, Padova, 2012; lastly, M. BRIGNARDELLO, *I contratti del «turismo organizzato» e di crociera*, Bari, 2023.

⁽²⁸⁾ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked tourist services, on which, see V. FRANCESCHELLI - F. MORANDI - C. TORRES (eds.), *The New Package Travel Directive*, Estoril, 2017, available in <http://intranet.esbte.pt/newpackagetraveldirective/>; and C. TORRES - J. MELGOSA ARCOS - L. JÉGOUZO - V. FRANCESCHELLI - F. MORANDI - F. TORCHIA (eds.), *Collective Commentary about The New Package Travel Directive*, Estoril, 2020, available in <http://intranet.esbte.pt/collectivecommentary/>. Lastly, see also, M. COLANGELO - F. MORANDI - V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, IV ed., Roma, 2025, 152, as well as the essays collected by G. CRICENTI - C. TINCANI (Eds.), *Trattato sul trasporto di persone e sul turismo organizzato*, Milano, 2025, 715.

the Tourism Code (TC) ⁽²⁹⁾. The new regulations came into effect on July 1st, 2018, and apply to “package travel contracts” [art. 33(1)(d) TC], “intermediate travel contract” (art. 50 TC) and “linked travel arrangements” (art. 49 TC) concluded as of that date.

By deeply reforming the previous travel contract rules, the legislative framework was updated to include the latest developments in the tourism sector so as to achieve a “full harmonisation” of the Member States’ national laws, for the creation of a genuine internal market, ensuring a high level of consumer protection across the Union.

Considering the level of detail in EU regulations, the harmonisation is faithful to the Directive, and its Italian version was accepted as “basic text”, even though not always technically correct from a legal point of view. The new rules differ from the wording of the EU provisions only when a terminological adjustment was necessary to conform the new regulations to national legislative frameworks.

Likewise, in line with the traditional approach, the Tourism Code keeps the organiser’s position separate from the package travel retailer’s one, regulating the obligations and responsibilities of the operators in a different manner, depending on the stipulation of a “package travel contract” or an “intermediate travel contract”.

According to the “political” objective of remaining as faithful as possible to the EU regulations, an effort was made to offer a significant consolidation of the “traveller” position – a different notion compared to that of “consumer” and “tourist”, previously introduced in the Italian legal system – without undermining the additional rights already granted by the Tourism Code.

Article 33(1)(a) TC includes, in the definition of “travel service,” the provision of passenger transport, an accommodation that “is not an integral part of passenger transport”, the “rental” of cars or other motor vehicles, and any other tourist service that “is not an integral part of one of the tourist services” mentioned. Under article 33(1)(c), the “package travel” is characterised by the combination of contracts offered by single providers or by individual contracts offered by multiple providers, under the conditions set by applicable rules and regulations, “of at least two different types of tourist services within a single trip or holiday”.

⁽²⁹⁾ See F. MORANDI, *Le nuove regole dell'unione europea sui pacchetti turistici e i servizi turistici collegati nell'esperienza italiana*, in *Resp. civ. prev.*, 2019, Part I, 1102, and Part II, 1422; and *Id.*, *The New Italian Regulation on Package Travel and Linked Travel Arrangements According to Directive 2015/2302/EU*, in *EuCML - Journal of European Consumer and Market Law*, 2020, 93.

However, the application of the new rules is limited to package travels, the duration of which exceeds 24 hours or includes an overnight stay; therefore, simple “excursions” are excluded in order to avoid an unnecessary increase of obligations for the organiser in relation to situations where the need to protect travellers seems minor.

In addition, the combination of individual tourist services can only give rise to a package travel if they account for at least 25% of the value of the combination and are not advertised or otherwise represent an essential element or are selected and purchased only after the beginning of the transport, accommodation or vehicle rental service. The principle that invoicing the different elements of the same package separately does not exempt the organiser or the seller from their obligations under the law shall remain in force.

The current regulation also covers customised and tailor-made packages, online contracts and dynamic packages, as well as services purchased from separate professionals through affiliate or click-through.

As in the past, it is not disputed that the “cruise contract” is a typical package travel contract, characterised by the particular type of tourist services offered by the organising shipping company.

Compared to the previous rules, the new ones significantly improve the travellers’ position and establish a new framework for their relations with the organiser of the package travel.

Among other things, the scope of application of the new rules has been widened, and new cases of package travel and linked travel arrangements have been identified accordingly:

- more stringent information obligations, with the burden of proof of proper fulfilment borne by the professional;
- more rights in the event of withdrawal;
- specific protection in the event of a lack of conformity of the service;
- stricter rules for the organiser’s liability;
- specific rules on the professional’s liability in case of booking error;
- the possibility to contact the organiser through the seller and more extended limitation periods;
- the extension of the obligations to assist the traveller’s return in case of need;
- the non-derogation of the rules relating to the rights of the traveller and the unavailability of those rights by the owners;
- protection in case of insolvency or bankruptcy, also extended to linked tourist services; and
- administrative protection in case of breach of the law by the organiser or the seller.

The regulation of travel brokering contracts and the seller's liability (Articles 50-51-*quater* TC) is one of the most original features of the new rules on package travel.

National lawmakers have acted within the strict limits enacted by the Directive, making full use of the margins allowed by Article 13(1)(2), where it provides that Member States may maintain or introduce into their national law provisions whereby the seller is also held liable for the performance of the package.

Consistent with the domestic legal tradition, Article 50 TC identifies the relationship between the traveller and the seller as an autonomous "intermediate travel contract", formally separate from the "package travel contract", keeping the organiser's and seller's positions separate and regulating obligations and responsibilities differently. With a particularly innovative provision, it also establishes a specific legal framework for such a case, qualifying an intermediate travel contract as a special subtype of the mandate contract under Article 1703 of the Italian Civil Code.

In line with past provisions, the new regulation of the package travel contract and the intermediate travel contract reconfirms that the organiser and the seller are required to ensure civil liability for the compensation of damages deriving from the violation of the obligations assumed with the respective contracts [Article 47(1) TC]. They must also include the details of such coverage in the pre-contractual information provided to the traveller [Article 34(1)(i) TC].

The current configuration of the tourist protection and assistance system has remained the same as the one introduced by Article 9(1)(b) of Law No. 115 of 29 July 2015. Thus, the organiser and the intermediary are obliged to take out insurance policies or provide bank guarantees that can cover the refund of the price paid for the purchase of the package travel and the immediate return of the tourist in cases of insolvency or bankruptcy of the operator.

In accordance with widely experimented methods, organisers and sellers may set up *consortia* or other forms of association suitable to operate collectively, also by setting up a special fund to cover the relevant risks and through the direct involvement of insurance companies and trade associations, also envisaging forms of insurance [Article 47(3) TC].

12. Present challenges and the future of tourism

With the start of the new millennium, tourism law is also called upon to consider the challenges to be faced, in a situation made even more uncertain by recent events that have deeply shaken the world of tourism and the travel

market.

The urgent measures adopted by the national government to deal with the economic and social emergency resulting from the COVID-19 pandemic have only partially affected the world of travel, which is still waiting for a structural intervention⁽³⁰⁾.

The experience gained during the most severe phase of the crisis will drive changes in travel agents' business practices, not only in direct customer relations but also in relations with individual tourism service providers and tour operators. Moreover, the changes in the market will also have significant direct effects from a legal point of view, given that the management of cancellations and the renegotiation of contracts is already engaging operators beyond the prospect of a real economic result⁽³¹⁾.

However, environmental, economic, and social sustainability remain at the top of the legal agenda, from the perspective outlined by the Sustainable Development Goals of the UN 2030 Agenda, which still awaits a tangible and effective response at the national level.

Tourism – and thus tourism law – has recently been confronted with the digital revolution, having become a mass phenomenon when the Internet was launched and improved.

We had just got used to accepting the triangular structure of travelling (the traveller, the travel and the tourist agency, and the tourism service provider) when this geometric configuration was transformed by digital “disruptive innovation”.

Tourists have been organising their trips through the Internet more fre-

⁽³⁰⁾ Concerning the legislative actions on tourism following the COVID-19 pandemic, see the articles published in the Special Issue *Il diritto del turismo affronta il COVID-19/ Tourism law faces COVID-19*, edited by F. MORANDI, on *Rivista italiana di Diritto del turismo/ Italian Journal of Tourism Law*, 30/2020, available in <https://www.francoangeli.it/Rarste/sommario.aspx?anno=2020&idRivista=167&lingua=en>.

⁽³¹⁾ Among the most significant measures adopted in Italy, there is Decree-Law no. 18 of 17 March 2020, converted into Law no. 27 of 24 April 2020, of which article 88-*bis* focused on the issue of “Reimbursement of travel, accommodation and package travel tickets”. It was later amended by Decree-Law No. 34 of 19 May 2020 (the so-called “Relaunch” Decree), converted into Law No. 77 of 17 July 2020, on urgent measures on health, labour and economic support, aligning with the provisions provided by the Ministry of Health and Social Affairs and the European Commission. In a nutshell, considering that there is a supervening impossibility of performance pursuant to article 1463 of the Civil Code, the carrier, the manager of the accommodation facility or the organiser of the tourist packages have been given the right to offer the passengers, guests or travellers a voucher as an alternative to the refund of the consideration paid, to be used within 18 months of issue.

quently, in such a way that the relationship between tourists and tourism service providers has changed profoundly. Tourism law must comply with the increasingly important role played by online platforms. In this respect, tourism is profoundly changing its shape.

Finally, the international dimension will increasingly affect the development of tourism law. By its very nature, tourism and tourism law have always had a natural supranational vocation, yet this structural characteristic is now enhanced by the scale of the phenomenon, to the point that it deeply affects the law as well.

It is no coincidence that the UNWTO General Assembly officially adopted the 2019 International Convention on Tourism Ethics, a major step towards making the global tourism industry fairer, more ethical, and increasingly transparent.

This has recently been complemented by the 2021 UNWTO *Recommendations for the assistance to international tourists in emergency situations*, addressed to the Member States to support governments and the private sector in their efforts for international tourism recovery (in the framework of the COVID-19 pandemic), while guaranteeing an appropriate degree of protection of international tourists in the event of an emergency caused by such unavoidable and extraordinary circumstances⁽³²⁾.

Finally, the General Assembly of the World Tourism Organization, during the 24th session held in Madrid from November 30 to December 3, 2021, approved Resolution A/RES/732(XXIV), officially adopting the “International Code for the Protection of Tourists” (ICTP)⁽³³⁾. The Code provides principles and recommendations for the protection of tourists in emergency situations and for the safeguarding of the rights of travellers, with the stated objective of harmonising minimum protection standards globally and providing sufficient guarantees to international tourists in the post-COVID-19 world⁽³⁴⁾.

Last but not least, as we have always maintained, tourism is about happiness and sharing experiences. However difficult and complex the challenges

⁽³²⁾ See F. MORANDI, *The assistance to tourists in emergency situations*, in *Giureta*, vol. XVIII, 2020, 287.

⁽³³⁾ The World Tourism Organization, *International Code for the Protection of Tourists*, UNWTO, Madrid, 2022.

⁽³⁴⁾ See L. MASALA - F. MORANDI, *The UN Tourism International Code for the Protection of Tourists: A Milestone and a New Starting Point*, in *Giureta*, vol. XXII, 2024, 581, as well as the contributions published in F. J. MELGOSA ARCOS - A. GÓMEZ - L. JÉGOUZO (Dirs.), *El Código Internacional para la Protección de los Turistas*, Madrid, 2024.

of the future may seem, tourism law is and must remain linked to the pleasure of travelling and the serenity of the holiday, to the beauty of discovering new places and getting to know other cultures, to tolerance for different civilisations and openness to the world, and the pleasure of meeting and the ability to welcome others.

Learning about tourism law is thus a way of investing in hope and to prepare ourselves for the joy of travelling, while fully developing the capacity to welcome. It is a new opportunity to face current difficulties, return to the centrality of the individual and outline a tangible prospect of change in our economic and social reality.

PART IV
CURRENT LEGAL ISSUES IN AIR LAW

CHAPTER VIII

AIR CARRIER'S LIABILITY IN THE EU

SUMMARY: 1. Introduction. – 2. Background. – 3. Scope of application. – 4. General guidelines. – 5. Obligation to inform passengers of their rights. – 6. Liability for damage to the person. – 6.1. Compensation in the case of death or injury. – 6.2. Advance payments. – 7. Liability for passenger delays. – 8. Liability for delay, destruction, loss, or damage to baggage. – 9. Liability of contracting and actual carriers. – 10. Action and jurisdiction. – 11. Obligation of insurance.

1. Introduction

The European Union's action in the air transport sector has become increasingly crucial over time, particularly in terms of regulating passenger rights and air carrier liability, as well as market regulation.

Council Regulation (EC) No 2027/97 of 9 October 1997 ⁽¹⁾, as amended by Regulation (EC) No 889/2002 ⁽²⁾ of the European Parliament and of the Council of 13 May 2002, is the reference text governing air carrier liability in the event of accidents.

The regulatory framework is supplemented by Regulation (EC) No 261/2004 of the European Parliament and of the Council, of 11 February 2004 ⁽³⁾, establishing common rules on compensation and assistance to passen-

⁽¹⁾ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (17 October 1997) [1997] OJ L285/1.

⁽²⁾ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (30 May 2002) [2002] OJ L140/2.

⁽³⁾ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (17 February 2004) [2004] OJ L46/1.

gers in the event of denied boarding, cancellation, or long delay of flights⁽⁴⁾.

A proposal for revision is currently pending, which should jointly cover both regulations aimed at strengthening passengers' rights and ensuring equal conditions for airlines through a consistent and effective application of the relevant rules⁽⁵⁾.

2. Background

The original reasons for introducing EU regulations on air carrier liability stem from a twofold need: on the one hand, to ensure effective protection for passengers involved in aircraft accidents, and on the other, to guarantee that air carriers can operate in the market under conditions of genuine competition.

The need to overcome the regime established by the 1929 Warsaw Convention, especially as regards the limits of liability, and the uncertainty as to whether a revision of the Convention would be possible, urged the Council to adopt Regulation (EC) No 2027/97 on air carrier liability in the event of accidents. The aim was to achieve the same level and type of liability in both domestic and international transport, in order to enhance the legal protection of passengers and achieve full harmonisation of air carrier liability rules. The regulatory intervention anticipated some of the fundamental provisions of the 1999 Montreal Convention⁽⁶⁾ on international air transport, with particular reference to the regulation of air carrier liability for passengers' injuries in the event of an accident⁽⁷⁾.

⁽⁴⁾ See, in the perspective of synthesis, F. MORANDI - E. ROSAFIO, *Denied Boarding, Delay and Cancellation*, in *Oxford Encyclopedia of EU Law (OEEUL)*, Oxford University Press OUP, 2022.

⁽⁵⁾ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air.

⁽⁶⁾ Convention for the Unification of Certain Rules for International Carriage by Air (signed 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309.

⁽⁷⁾ Among other, see M. MILDE, *The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New "non-Warsaw" Convention of 28 May 1999*, in *Annals of Air and Space Law*, 1999, 24, 155; T. J. WHALEN, *The New Warsaw Convention: The Montreal Convention*, in *Air and Space Law*, 2000, 25(3), 12; P. M. DE LEON - W. EYSKENS, *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization*

Following the final approval of the text of the 1999 Montreal Convention, it became necessary to adopt Regulation (EC) No 889/2002, amending Regulation (EC) No 2027/97, in order to align EU regulation with the new international framework, thus creating the current uniform system of air carrier liability in case of accidents⁽⁸⁾.

3. Scope of application

Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002, implements the provisions of the 1999 Montreal Convention relating to the transport of passengers and their baggage by air, and also lays down certain additional provisions. The 1999 Montreal Convention was approved on behalf of the European Community by Council Decision of 5 April 2001 (2001/539/EC).

As far as the scope of application is concerned, EU regulations refer firstly to the “Community air carrier” (Article 3(1)(b) of Regulation (EC) No 2027/97), meant as an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Regulation (EC) No 1008/2008⁽⁹⁾.

In relation to the territorial scope of reference, the rules apply not only to

and Consolidation of the Warsaw System, in *Journal of Air Law and Commerce*, 2000–2001, 66(3), 1155; B. CHENG, *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, in *International and Comparative Law Quarterly*, 2004, 53(4), 833; E. GIEMULLA - R. SCHMID - W. MULLER-ROSTIN - R. DETTLING-OTT - R. MARGO, *Montreal Convention*, Kluwer Law International, 2006; R. LAWSON, *The Montreal Convention 1999 at 21: Has It Come of Age or Passed Its Sell-by Date?*, in *Air and Space Law*, 2020, 45(3), 265; G. N. TOMPKINS JR., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States*, Kluwer Law International, 2020; more in general, I. H. PH DIEDERIKS-VERSCHOOR, *An Introduction to Air Law*, 9th ed., Kluwer Law International, 2009; M. E. GIEMULLA AND L. WEBER, *International and EU Aviation Law. Selected Issues*, Kluwer Law International, 2011; M. COLANGELO - F. MORANDI - V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, IV ed., Roma, 2025, 173, available at <https://romatrepress.uniroma3.it/libro/introduction-to-european-union-transport-law-iv-edizione/>.

⁽⁸⁾ E. GIEMULLA - R. SCHMID, *Council Regulation (EC) No. 2027/97 on Air Carrier Liability in the Event of Accidents and its Implications for Air Carriers*, in *Air and Space Law*, 1998, 23(3), 98.

⁽⁹⁾ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (1 October 2008) [2008] OJ L293/3, repealing Regulation (EEC) No 2407/92 to which the original text of the provision referred.

air transport between the Member States of the European Union, but also to that within a single Member State (Article 1 of Regulation (EC) No 2027/97), while the 1999 Montreal Convention refers only to international transport, wherein the place of departure and the place of destination are located either within the territories of two State Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party.

4. General guidelines

The general principle guiding the entire regulatory framework is established by Article 3(1) of Regulation (EC) No 2027/97, which states that the liability of an air carrier regarding passengers and their baggage shall be governed by all provisions of the 1999 Montreal Convention relevant to such liability. To the point that, according to Article 2 of Regulation (EC) No 2027/97, the concepts contained in the Regulation, which are not specifically defined, shall be equivalent to those implemented in the Convention.

In this sense, as confirmed several times by the EU Court of Justice, the provisions of the Montreal Convention are an integral part of the EU legal framework, although the Court has jurisdiction over a preliminary ruling concerning its interpretation, in compliance with the rules of international law which apply to the Union⁽¹⁰⁾, thus confirming the full compatibility of international regulations with the rules introduced by Regulation (EC) No 2027/97, in addition to Regulation (EC) No 261/2004⁽¹¹⁾.

From the perspective of legally protected interests, as mentioned above, EU policymakers sought to pursue two-fold purposes.

On the one hand, the objective is to extend the scope of protection of passenger rights and raise the protection threshold, especially regarding information obligations, liability criteria, compensation for damages, and insurance obligations. The aim is to remove obstacles to the exercise of EU citizens' rights, in line with measures designed to guarantee a set of common rights for passen-

⁽¹⁰⁾ See CJEU 10 January 2006, in case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, ECLI:EU:C:2006:10.

⁽¹¹⁾ Among others, see CJEU 22 December 2008, in case C-549/07, *Wallentin-Hermann v Alitalia–Linee Aeree Italiane SpA*, ECLI:EU:C:2008:771; CJEU 6 May 2010, in case C-63/09, *Walz v Clickair SA*, EU:C:2010:251; CJEU 23 October 2012, in joined cases C-581/10 and C-629/10, *Nelson and ors v Deutsche Lufthansa AG and ors*, ECLI:EU:C:2012:657.

gers on all means of transport within the EU, and to ensure that these rights are enforced effectively⁽¹²⁾. For some time, the European Commission has also highlighted the need to define a consistent interpretation of EU regulations on passenger rights and to ensure their effective and harmonised implementation, in order to guarantee equal conditions in the sector and a European standard of protection for citizens⁽¹³⁾. Most of the issues relating to passenger rights are associated with regulatory gaps and the uneven implementation, within Member States, of Regulation (EC) No 2027/97, as well as Regulation (EC) No 261/2004, which weakens the individual rights of users and undermines equal conditions among carriers. Only a coordinated action by the European Union can tackle these issues, improving the implementation of the rules, clarifying the fundamental principles and implicit rights of passengers, which have occasioned several disputes against airlines, as well as improving and better coordinating the enforcement strategies implemented at the national level.

On the other hand, these reasons are accompanied by the need to establish a system of effective concurrency among companies and to guarantee equal opportunities for air transport operators in an increasingly competitive international context. This circumstance makes it necessary to establish consistent rules at the EU level, as well as with regard to air carrier liability, in order to avoid the implementation of different regimes that would result in an undue competitive advantage for some companies. As a matter of fact, the implementation of different liability provisions ends up translating into an unbalanced risk, resulting in actions for compensation, costs to be incurred, and the possibility of offering better rates. Essentially, levelling the rules is considered crucial in a context where the financial implications for the air transport sector are taken into account and to ensure that air carriers operate under harmonised conditions in a liberalised market⁽¹⁴⁾.

Finally, the importance of the protected interests has induced international policymakers to establish the non-derogation of the rules relating to liabili-

⁽¹²⁾ See the Commission Communication, EU Citizenship Report 2010 'Dismantling the obstacles to EU citizens' rights (27 October 2010) COM(2010) 603 final.

⁽¹³⁾ See the White Paper Roadmap to a single European transport area - Towards a competitive and resource-efficient transport system (28 March 2011) COM(2011) 144 final.

⁽¹⁴⁾ Proposal for a Regulation of the European Parliament and of the council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (13 March 2013) COM(2013) 130 final.

ty and compensation for damages in favour of the air carrier. Article 26 of the Convention states that any provision that seeks to relieve the liability of the carrier or to fix a lower limit is null and void, while Article 25 of the Convention provides that the airline may stipulate higher liability limits than those set out in the 1999 Montreal Convention or no limits of liability whatsoever.

In addition, the application of the framework established by the 1999 Montreal Convention is to be considered as mandatory, so any clause provided for by the contract of carriage and all special agreements entered into before the damage occurred, by which the parties purport to infringe the rules laid down by Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void, according to Article 49 of the Convention.

5. Obligation to inform passengers of their rights

Compared to the provisions of the 1999 Montreal Convention, Regulation (EC) No 2027/97 is noteworthy first of all for introducing a series of information obligations for air carriers selling air transport services within the European Union. However, in the case of transports performed by non-EU air carriers, information requirements shall apply only in relation to carriage to, from, or within the Union.

First of all, airlines are required to make available to passengers, regardless of how they are marketed, a summary of the main provisions governing liability for passengers and their baggage, including the time limits to file a claim for damages and how to make special declarations of interest (Article 6.1 of Regulation (EC) No 2027/97). In order to comply with this information requirement, EU air carriers shall use the notice contained in the Annex. The Annex to Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002, reports the content of the information notice relating to the air carrier liability for passengers and their baggage applied by EU air carriers as required by EU rules and regulations and the 1999 Montreal Convention.

All air carriers are also required, in respect of carriage by air provided or purchased within the EU, to provide each passenger with a written specification of:

- the applicable limit for that flight on the carrier's liability in respect of death or injury, if such a limit exists;
- the applicable limit for that flight on the carrier's liability in respect of destruction, loss of, or damage to baggage and a warning that baggage greater in value than this figure should be brought to the airline's attention at check-in or fully insured by the passenger prior to travel;

- the applicable limit for that flight on the carrier's liability for damage occasioned by delay.

The information obligations provided for by Regulation (EC) No 2027/97 are part of a long-standing legal tradition in the European Union's legislative experience, aimed at promoting awareness of passengers' rights in order to raise the level of protection (see Communication from the Commission to the European Parliament and the Council "Protection of air passengers in the European Union").

6. Liability for damage to the person

According to the general provision of Article 3 of Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002, the regime of liability of an EU air carrier in respect of passengers and their baggage shall be governed by all the provisions of the 1999 Montreal Convention which are relevant to such liability. In short, policymakers made a clear choice in harmonising the regulations of the European Union with the framework established at the international level, making recurring references to the Montreal system, thus confirming the alignment already adopted before the revision of the 1929 Warsaw Convention.

6.1. *Compensation in the case of death or injury*

In this perspective, the general principle of liability is established by Article 17(1) of the 1999 Montreal Convention, pursuant to which the air carrier is liable for the death or bodily injury of a passenger, upon condition only that the accident which caused the damage took place on board the aircraft or during embarking or disembarking operations.

Basically, despite some uncertainties in its interpretation, the scope of the air carrier's liability begins when the passenger enters the carrier's sphere of control and ends when the passenger leaves the carrier's sphere of control.

Moreover, the original text of Regulation (EC) No 2027/97 had already been inspired by the so-called "two-tier system" envisaged in Article 21 of the 1999 Montreal Convention, which ultimately relinquished the limitation to the air carrier's liability for personal injury to passengers.

Although there are no financial limits to the liability for passenger injury or death, for damages not exceeding 151,800 Special Drawing Rights (SDRs) – the amounts mentioned in terms of Special Drawing Right in the 1999 Montreal Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund, according to Article 23 of the Convention; the original amount of 100,000 SDRs was last adjusted on 2024, pursuant to Article 24 of the Convention – the air carrier cannot

challenge compensation claims and shall not be able to exclude or limit its liability. Above such amount, the air carrier can defend itself against a claim by proving that it was not negligent or otherwise at fault and, in particular, that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

However, the particularly strict liability regime for air carriers of persons and baggage established by the 1999 Montreal Convention is diluted by the following provision of Article 2 of the Convention, reading that the carrier shall be wholly or partly exonerated from its liability to the claimant by proving that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation.

With reference to the distribution of the burden of proof, it is up to the passenger to demonstrate that they have entered into a valid contract of carriage, that they have suffered damage to their person or baggage and that the damage has occurred during the time period in which they had been entrusted to the carrier. The air carrier, on the other hand, is responsible for identifying the cause of the damage, being liable for damages deriving from an unknown cause, and providing the evidence required by the Convention. The more complex position attributed to the air carrier is largely justified by the need to ensure greater protection for passengers.

In any case, personal injuries that may be the subject of compensation are limited to the case of death or “bodily injury” of a passenger, with the express warning that, in any action, punitive, exemplary, or any other non-compensatory damages shall not be recoverable (Article 29 of the Convention). In particular, according to the most common interpretation, psychological damage is excluded from the sphere of application of the 1999 Montreal Convention, as can also be seen from the terminology used by international legislators who have refrained from making express reference to “mental injury” or, more generally, to “personal injury”. The most recent case law of the EU Court of Justice, however, has recognized the possibility of compensation for damages of a non-pecuniary nature incurred by passengers in air transport, within the framework of compensation for damages due to destruction, loss, or damage to baggage⁽¹⁵⁾, or focusing on the notion of “further compensation” provided for by Article 12 of Regulation (EC) No 261/2004⁽¹⁶⁾. Added to this is the

⁽¹⁵⁾ CJEU 6 May 2010, in case C-63/09, *Walz v Clickair SA*, cit.

⁽¹⁶⁾ CJEU 13 October 2011, in case C-83/10, *Sousa Rodríguez and ors v Air France SA*,

position expressed regarding the compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package travel, so-called “damage for ruined vacation”⁽¹⁷⁾, according to Directive (EU) No 2015/2302⁽¹⁸⁾.

International policymakers have then specified that the existence of an “accident” is a precondition for the liability of a passenger air carrier, so that, although there is no univocal interpretation, the possibility of compensation for damages deriving from foreseeable harmful events or factors that are not external to the passenger ought to be excluded.

Furthermore, applying Article 17(1) of the 1999 Montreal Convention, the Court of Justice recently stated that the concept of “accident” as meant by such provision, covers all situations occurring on board an aircraft, when an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations arise from a hazard typically associated with aviation⁽¹⁹⁾.

6.2. *Advance payments*

For further protection of passengers and their dependants, Article 5 of Regulation (EC) No 2027/97, in line with Article 28 of the 1999 Montreal Convention, stipulates that in case of passenger death or injury, the EU air carrier shall make an advance payment, without delay and in any case not later than 15 days from the identification of the person entitled to compensation, in the form of a “lump sum” to cover immediate economic needs.

Such an advance payment to a natural person or persons entitled to claim compensation is calculated on a basis proportional to the hardship suffered and shall not be less than 16,000 SDRs per passenger in the event of death.

ECLI:EC:C:2011:652, on the recent decisions made by the EU Court of Justice on the subject of compensation for non-pecuniary damage in the transport of persons.

⁽¹⁷⁾ CJEU 12 March 2002, in case C-168/00, *Leitner v TUI Deutschland GmbH & Co. KG*, ECLI:EU:C:2002:163, compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package travel, referred to Article 5 of Directive 90/314/CEE, now repealed by Directive (EU) 2015/2302.

⁽¹⁸⁾ 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 [2015] OJ L326/1.

⁽¹⁹⁾ CJEU 19 December 2019, in case C-532/18, *GN v Niki Luftfahrt GmbH*, ECLI:EU:C:2019:1127, concerning a claim for compensation brought by the former on account of scalding suffered on a flight.

It is important to highlight that an advance payment shall not be construed as a recognition of liability and may be offset against any amounts subsequently paid as damages by the EU air carrier. Note that the amounts are not returnable, except when the carrier is wholly or partly exonerated from its liability to the claimant or the person who received the advance payment was not the one entitled to compensation.

7. Liability for passenger delays

The reference to Article 3(1) of Regulation (EC) No 2027/97 allows the application of the regime provided for by the 1999 Montreal Convention to damages for delay⁽²⁰⁾.

As a matter of fact, uniform legislation does not expressly identify the notion of delay, it does not provide criteria to establish it, nor does it define the timespan of the air carrier's liability, which therefore remains entrusted to the interpretation and application of case law. On this matter, the EU Court of Justice has offered particularly significant clarifying elements, establishing that, furthermore, Article 6 of Regulation (EC) No 261/2004 shows that the EU rules and regulations include the notion of "flight delay", which is considered only by reference to the scheduled departure time and, unlike cancellation, a flight is "delayed" if it is operated in accordance with the original planning and its actual departure time is later than the scheduled departure time⁽²¹⁾.

The reference regulatory framework is thus completed by the protection granted to passengers in accordance with Regulation (EC) No 261/2004, which establishes a protection system in the event of flight cancellation or long delay, along with common rules on compensation and assistance in the event of denied boarding. However, the passenger rights introduced by the European Union must not be confused with those established by the 1999

⁽²⁰⁾ Among others, see P. S. DEMPSEY - S. O. JOHANSSON, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, in *Air and Space Law*, 2010, 35(3), 207; T. VAN DER WIJNGAART, *Montreal Convention: To Whom Is the Carrier Liable in the Event of Delay?*, in *Air and Space Law*, 2016), 41(6), 511.

⁽²¹⁾ The leading cases are CJEU 19 November 2009, in joined cases C402/07 and C432/07, *Christopher Sturgeon and ors v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA*, paras 31-32, ECLI:EU:C:2009:716; see R. LAWSON AND T. MARLAND, *The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon in Harmony or Discord?*, in *Air and Space Law*, 2011, 36(2), 99.

Montreal Convention: whilst the Regulation establishes uniform rights to assistance applicable to all passengers, regardless of their individual circumstances, the Convention provides for individual compensation for damages, assessed on a case-by-case basis according to the individual circumstances of the passenger. According to Article 19 of the 1999 Montreal Convention, an air carrier is liable for damages towards passengers occasioned by delay unless it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures. However, pursuant to Article 22 of the 1999 Montreal Convention, the liability for damage occasioned by delay is limited to 6.303 SDRs for each passenger (§ 1), unless such damage was proven to be the result of an act or omission by the carrier, its servants, or agents acting within the scope of its employment, carried out with the intent to cause damage or recklessly and with knowledge that damage would probably result (§ 5).

With regard to the sphere of indemnifiable damage, the EU Court of Justice has adopted a line particularly favourable to the injured party, establishing that the term “damage”, which underpins Article 22(2) of the 1999 Montreal Convention, setting the limit of an air carrier’s liability for the damage resulting, *inter alia*, from the loss of baggage, must be interpreted as including both material and non-material damage⁽²²⁾.

It is also worth highlighting that a recent decision ruled by the EU Court of Justice stated that Articles 19, 22, and 29 of the 1999 Montreal Convention must be interpreted as meaning that an air carrier which has concluded a contract of international carriage with an employer of persons carried as passengers, such as the employer at issue in the main proceedings, is liable to that employer for damage occasioned by a delay in flights on which its employees were passengers pursuant to that contract, on account of which the employer incurred additional expenditure⁽²³⁾.

8. Liability for delay, destruction, loss, or damage to baggage

Regulation (EC) No 2027/97 and the 1999 Montreal Convention provide for a parallel regulation of air carrier liability for delay, on the one hand, and

⁽²²⁾ See the leading case CJEU 6 May 2010, in case C-63/09, *Walz v Clickair SA*, cit.

⁽²³⁾ CJEU 17 February 2016, in case C-429/14, *Air Baltic Corporation AS v Lietuvos Respublikos specialiųjų tyrimų tarnyba*, ECLI:EU:C:2016:88.

for destruction, loss, or damage to baggage, on the other.

The liability rules for baggage delay match those relating to passenger delay, given that the baggage accompanies the passenger and follows the passenger's fate. According to Article 19 of the 1999 Montreal Convention, an air carrier is liable for damage unless it proves that it and its servants and agents took all reasonable measures to avoid the damage or it was impossible to take such measures.

The air carrier is also liable for destruction, loss, or damage to baggage, regardless of whether it is checked or unchecked baggage (Article 17(2)), even though, in the case of checked baggage, the event which caused the destruction, loss, or damage must occur on board the aircraft or during any period within which the checked baggage was entrusted to the carrier. Moreover, the carrier is not liable if and to the extent that the damage resulted from an inherent defect, quality, or vice of the baggage. Otherwise, in the case of unchecked baggage, including personal items, the carrier is liable only if the damage resulted from its fault or that of its servants or agents.

It is worth noticing that the EU Court of Justice stated that the term "damage", which underpins Article 22(2) of the 1999 Montreal Convention that sets the limit of an air carrier's liability for the damage resulting, *inter alia*, from the loss of baggage, must be interpreted as including both material and non-material damage⁽²⁴⁾.

As far as compensation is concerned, the liability for baggage delay, destruction, loss, or damage is limited to 1,288 SDRs (Article 22.2 of the Convention). However, a passenger can benefit from a higher liability limit by making, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and by paying a supplementary fee. The supplementary amount shall be based on a tariff which is related to the additional costs involved in transporting and ensuring the baggage concerned over and above those for baggage valued at or below the liability limit, and the tariff shall be made available to passengers on request (Article 3(a) Regulation (EC) No 2027/97). In that case, the carrier will be liable to pay an amount not exceeding the one declared, unless it proves that the amount is greater than the passenger's actual interest in delivery at the destination.

If the baggage is damaged, delayed, lost, or destroyed, the passenger must complain in writing to the air carrier forthwith after the discovery of the damage (Article 31 of the Convention). In the case of damage to checked baggage,

⁽²⁴⁾ See the leading case CJEU 6 May 2010, in case C-63/09, *Walz v Clickair SA*, cit.

the passenger must complain in writing within seven days, and in the case of delay within 21 days, in both cases from the date on which the baggage was placed at the passenger's disposal. According to EU Court of Justice in *Finnair Oyj v Keskinäinen Vakuutusyhtiö Fennia* ⁽²⁵⁾, Article 31 of the Montreal Convention must be interpreted as meaning that the complaint must be made in writing, failing which no action may be brought against the carrier, where under certain conditions a complaint recorded in the information system of the air carrier fulfils the requirement of being in a written form.

As regards the legitimacy to act for compensation, the right to compensation and the limits to a carrier's liability in the event of loss of baggage apply also to a passenger who claims that compensation by virtue of the loss of baggage checked in another passenger's name, provided that the lost baggage did contain the first passenger's items ⁽²⁶⁾.

9. Liability of contracting and actual carriers

The 1999 Montreal Convention devotes several specific provisions to regulating the case in which the “contracting carrier”, as a principal carrier, makes a contract of carriage with a passenger – or with a person acting on behalf of the passenger – and another “actual carrier” performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not a successive carrier (Articles 39-48).

The information notice contained in the Annex to the Regulation (CE) No 2027/97 summarises the liability rules by providing that if the air carrier actually performing the flight is not the same as the contracting air carrier, the passenger has the right to address a complaint or to file a claim for damages against either. If the name or code of an air carrier is printed on the ticket, that air carrier is assumed to be the contracting air carrier.

Basically, the international framework confirms the principle of joint and several liability of the contracting carrier and the actual carrier, in line with what was already established by the 1961 Guadalajara Convention (see Regulation (EC) No 1008/2008): if an actual carrier performs the whole or part of carriage, both the contracting carrier and the actual carrier shall be subject

⁽²⁵⁾ CJEU 12 April 2018, in case C-258/16, *Finnair Oyj v Keskinäinen Vakuutusyhtiö Fennia*, ECLI:EU:C:2018:252.

⁽²⁶⁾ CJEU 22 November 2012, in case C-410/11, *Espada Sánchez and ors v Iberia Líneas Aéreas de España SA*, ECLI:EU:C:2012:747.

to the rules of the 1999 Montreal Convention, the former for the whole of the carriage considered in the contract, the latter solely for the carriage which it performs (Article 40 of the 1999 Montreal Convention).

10. Action and jurisdiction

With a system closure arrangement, Article 29 of the 1999 Montreal Convention establishes that any action for damages, however founded, whether under the Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in the Convention without prejudice to the question as to who the persons who have the right to bring suit are and what their respective rights are.

According to a rather widespread opinion in Anglo-American case law, Article 29 of the 1999 Montreal Convention would give rise to the so-called “principle of exclusivity of action”, whereby only those actions expressly provided for by the uniform regulations would be available against the air carrier. As a matter of fact, the main objective of international policymakers was to avoid that a non-contractual action could dodge the application of the uniform regime and the EU Court of Justice has adopted a less restrictive interpretation of the uniform regime⁽²⁷⁾.

The subject of liability and compensation for damages deriving from international air transport based on different regulations has been addressed several times in the past and has sometimes given rise to different solutions. As far as the European Union is concerned, the Court of Justice has clarified that, from the point of view of claims, the discipline of Regulation (EC) No 261/2004 does not show any incompatibility with the rules established by the 1999 Montreal Convention⁽²⁸⁾.

Concerning the limitation of actions, Article 35 of the 1999 Montreal Convention provides that the right to compensation for damages shall be extinguished if an action is not brought within a period of two years from the

⁽²⁷⁾ See CJEU 10 January 2006, in case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, cit., and CJEU 23 October 2012, in joined cases C-581/10 and C-629/10, *Nelson and ors v Deutsche Lufthansa AG and ors*, cit.

⁽²⁸⁾ See CJEU 10 January 2006, in case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, cit., for an in-depth examination of the issues relating to the possible scope of overlap between Regulation (EC) No 261/2004 and the 1999 Montreal Convention.

date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

Article 33 of the 1999 Montreal Convention provides that the plaintiff has the option to bring an action for damages in the territory of one of the State Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination (§ 1) ⁽²⁹⁾. Furthermore, with a particularly favourable provision for plaintiff, in respect of damage resulting from the death or injury of a passenger, an action may be brought also in the territory of a State Party where, at the time of the accident, the passenger has their principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft, pursuant to a commercial agreement, and where that carrier conducts its business of carriage of passengers by air from premises leased or owned by the airline itself or by another carrier with which it has a commercial agreement (§ 2).

In this regard, ruling on a particular issue relating to a claim for compensation for damages resulting from the cancellation of one flight and the delay of another flight, the EU Court of Justice ruled that the Court of a Member State, hearing an action to obtain both compliance with the flat-rate and standardised rights provided for in Regulation (EC) No 261/2004, and compensation for further damage falling within the scope of the 1999 Montreal Convention, must assess its jurisdiction, for the first head of claim, in the light of Article 7(1) of Regulation (CE) No 1215/2012, and, for the second head of claim, in the light of Article 33 of the 1999 Montreal Convention ⁽³⁰⁾. In addition, Article 33(1) of the 1999 Montreal Convention must be interpreted as governing not only the allocation of jurisdiction between the State Parties to the Convention, but also the allocation of territorial jurisdiction between the courts of each of those States.

⁽²⁹⁾ See G. N. TOMPKINS JR., *The Montreal Convention and the Meaning of 'Destination' in Article 33(1)*, in *Air and Space Law*, 2007, 32(3), 224.

⁽³⁰⁾ CJEU 7 November 2019, in case C 213/18, *Guaitoli and ors v EasyJet Airline Co. Ltd*, ECLI:EU:C:2019:927.

11. Obligation of insurance

Article 50 of the 1999 Montreal Convention requires parties to ensure that air carriers are adequately insured to cover their liability under that Convention and Article 3(2) of Regulation (EC) No 2027/97 establishes that an EU air carrier shall be insured up to a level that is adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with such Regulation.

Currently, the insurance obligation is established by Article 6 of Regulation (EC) No 785/2004, of the European Parliament and of the Council of 21 April 2004, according to which, for liability in respect of passengers, the minimum insurance cover shall be 250,000 SDRs per passenger. For liability with regard to baggage, the minimum insurance coverage shall be 1,288 SDRs – the original amount of 1,000 SDRs was amended by Commission Regulation – per passenger in commercial operations.

Finally, it should be recognised that having established uniform liability limits for loss of, damage to, or destruction of, baggage and for damage occasioned by delay, which apply to all travel on EU carriers, will ensure simple and straightforward rules for both passengers and airlines and enable passengers to recognise when additional insurance arrangements are necessary before travelling.

CHAPTER IX

DENIED BOARDING, DELAY, AND CANCELLATION

SUMMARY: 1. Regulation (EC) No. 261/2004. – 2. Denied boarding. – 3. Cancellation of flight. – 4. Long delay. – 5. Recent developments.

1. Regulation (EC) No. 261/2004

In order to ensure the strengthening and recognition of passenger rights in the liberalized air transport market, Regulation (EC) No. 261/2004 (“Regulation”) ⁽¹⁾ introduced a system of minimum and standardized protection in the event of flight cancellation or long delay, in addition to common rules on compensation and assistance to passengers in the event of denied boarding ⁽²⁾, the latter being an aspect already regulated by the previous Regulation (EEC) No. 295/2001 ⁽³⁾. The Regulation came into effect on 17 February 2005 and was followed by the repeal of Regulation (EEC) No. 295, pursuant to its Article 18.

⁽¹⁾ Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91 (17 February 2004) [2004] OJ L46/1.

⁽²⁾ Among others, I. DIEDERIKS-VERSCHOOR, *An Introduction to Air Law*, 9th edn., Kluwer Law International, 2009; E. GIEMULLA - L. WEBER, *International and EU Aviation Law. Selected Issues*, Kluwer Law International, 2011; see also V. CORREIA, *The evolution of air passengers' rights in European Union law*, *The Aviation & Space Journal*, 2011, April/June (2) 8; J. PRASSL, *Reforming Air Passenger Rights in the European Union*, in *Air and Space Law*, 2014, 39(1), 59; M. BOBEK - J. PRASSL (eds.), *Air Passenger Rights. Ten Years On*, Hart Publishing, 2016; in a synthesis perspective, see M. COLANGELO - F. MORANDI - V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, IV ed., Roma, 2025, 166, available at <https://romatrepress.uniroma3.it/libro/introduction-to-european-union-transport-law-iv-edizione/>.

⁽³⁾ Council Regulation (EEC) No. 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (8 February 1991) [1991] OJ L36/5.

Regulation No. 261/2004 completed the legislative framework for air passenger transport, which was already regulated by Regulation (EC) No. 2027/97⁽⁴⁾, on air carrier liability in the event of accidents, which anticipated and then implemented the 1999 Montreal Convention on the Unification of Certain Rules for International Carriage by Air⁽⁵⁾, with particular reference to the regulation of air carrier liability for passenger injuries in case of accident. According to the decision of the European Union Court of Justice (“Court”) in *Walz v Clickair SA* (par. 20)⁽⁶⁾, the Montreal Convention 1999 is an integral part of the Union’s legal framework, although the Court has jurisdiction to give a preliminary ruling concerning its interpretation, in observance of the rules of international law which apply to the Union. Application of domestic law is limited to residual cases.

As a matter of fact, the legislation provides that, in the event of a breach deemed significant, the passenger is entitled to obtain what the regulation recognises in each case, with reference to compensation, ground assistance, and the option of a refund of the full ticket price or an alternative flight. In other words, EU rules and regulations guarantee a basic level of protection

⁽⁴⁾ Council Regulation (EC) No. 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (17 October 1997) [1997] OJ L285/1, as amended by Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents (30 May 2002) [2002] OJ L140/2.

⁽⁵⁾ Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999 (entered into force: 4 November 2003) 2242 UNTS 309. Among the others, see M. MILDE, *The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New “non-Warsaw” Convention of 28 May 1999*, in *Annals of Air and Space Law*, 1999, 24, 155; T. J. WHALEN, *The New Warsaw Convention: The Montreal Convention*, in *Air and Space Law*, 2000, 25(3), 12; P. M. DE LEON - W. EYSKENS, *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, in *Journal of Air Law and Commerce*, 2000-2001, 66(3), 1155; B. CHENG, *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, in *International and Comparative Law Quarterly*, 2004, 53(4), 833; E. GIEMULLA - R. SCHMID - W. MÜLLER-ROSTIN - R. DETTLING-OTT - R. MARGO, *Montreal Convention*, Kluwer Law International, 2006; R. LAWSON, *The Montreal Convention 1999 at 21: Has It Come of Age or Passed Its Sell-by Date?*, in *Air and Space Law*, 2020, 45(3), 265; G. N. TOMPKINS JR., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States*, Kluwer Law International, 2020; more in general, I. H. PH. DIEDERIKS-VERSCHOOR, *An Introduction to Air Law*, cit.; M. E. GIEMULLA and L. WEBER, *International and EU Aviation Law. Selected Issues*, cit.; M. COLANGELO - F. MORANDI - V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, cit.

⁽⁶⁾ CJEU 6 May 2010, in case C-63/09, *Walz v Clickair SA*, EU:C:2010:251.

and do not affect the passenger's opportunity to act on the basis of a different regime that may guarantee more advantageous compensation.

In several of its rulings, the Court of Justice of the EU has confirmed the compatibility of Regulation No. 261/2004 with domestic law and the 1999 Montreal Convention, particularly with Articles 19, 22, and 29. The following is worth noting: «[a]ny delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause almost identical damage for every passenger, for which redress may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals, and accommodation, as well as the opportunity to make telephone calls. Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis»⁽⁷⁾. It is clear from Articles 19, 22 and 29 of the 1999 Montreal Convention that they merely govern the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis, that is to say for compensation, from the carriers liable for damage resulting from that delay⁽⁸⁾.

Article 12 of the Regulation expressly recognises the passenger's right to obtain "further compensation" relative to that provided for therein, from which the amount obtained in accordance with Regulation No. 261/2004 should be deducted. As a result, the rules offered by Regulation No. 261/2004 and other regulations that consider the same cases coexist, without any conflict between them. According to the EU Court of Justice: «the meaning of "further compensation" [...] must be interpreted to the effect that it allows the national court to award compensation, under the conditions provided for by the Convention for the unification of certain rules for international

⁽⁷⁾ CJEU 10 January 2006, in case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, ECLI:EU:C:2006:10; see J. WEGTER, *The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention*, in *Air and Space Law*, 2006, 31(2), 133.

⁽⁸⁾ See CJEU 10 January 2006, in case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, cit., paras 43-44; see also CJEU 23 October 2012, in joined cases C-581/10 and C-629/10, *Nelson and ors v Deutsche Lufthansa AG and ors and TUI Travel plc and ors v Civil Aviation Authority*, ECLI:EU:C:2012:657.

carriage by air or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air. On the other hand, that meaning of “further compensation” may not be the legal basis for the national court to order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care under Article 8 and Article 9 of Regulation No. 261/2004»⁽⁹⁾.

Regulation (EC) No. 261/2004 applies to any operating air carrier carrying passengers departing from a Member State and any EU carrier operating a flight to an EU country⁽¹⁰⁾. The carrier is deemed to be acting on behalf of the contracting carrier if it performs the carriage and meets the obligations provided for by the Regulation, even if it has not entered into the relevant contract.

Pursuant to Article 3(1), the Regulation applies to passengers departing:

- from an airport located in the territory of a Member State;
- from an airport located in a third country to an airport situated in the territory of a Member State, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is an EU carrier.

The foregoing applies, pursuant to Article 3(2), provided that passengers:

- have a confirmed reservation on the flight concerned and, except in the case of cancellation as referred to in Article 5, present themselves for check-in – as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated – no later than 45 minutes before the published departure time; or
- have been transferred by an air carrier or tour operator from the flight on which they held a reservation to another flight, irrespective of the reason.

Passengers who travel free of charge or at a reduced fare, not available (directly or indirectly) to the public, are not covered by the Regulation, with the notable exception of holders of tickets issued under a frequent flyer program or other commercial initiatives of air carriers or tour operators. Passenger

⁽⁹⁾ CJEU 13 October 2011, in case C-83/10, *Rodríguez and ors v Air France SA*, ECLI:EU:C:2011:652.

⁽¹⁰⁾ In this regard, see the notion of EU carrier in Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (31 October 2008) [2008] OJ L293/3.

rights established by Directive (EU) 2015/2302⁽¹¹⁾ – which amended Regulation No. 2006/2004⁽¹²⁾ and Directive 2011/83/EU⁽¹³⁾ of the European Parliament and of the Council and repealing Council Directive 90/314/EEC⁽¹⁴⁾ – on package travel and linked travel arrangements remain unaffected, bearing in mind that the Regulation does not apply in cases when a package holiday is cancelled for reasons other than flight cancellation.

In the event of the cases provided for therein (denied boarding, flight cancellation, and long delayed departure), the Regulation establishes minimum levels of protection, including recognizing cumulatively the right to obtain financial compensation from the carrier (Article 7); the right to obtain reimbursement of the full price of the ticket or boarding on an alternative flight (Article 8); the right to receive free assistance on the ground, in the form of food, accommodation, transport, and telephone expenses that are deemed necessary, as established by the Regulation (Article 9).

With reference to Article 16 (Infringements) of Regulation No. 261/2004, the EU Court of Justice ruled that «where an individual complaint has been made by a passenger to the body designated by each Member State [...] following the refusal by an air carrier to pay to the passenger the compensation provided for in Article 7(1) of the regulation, that body is not required to take enforcement action against the carrier with a view to compelling it to pay the compensation»⁽¹⁵⁾.

The allocation of jurisdiction under Regulation No. 261/2004 poses problems, particularly regarding those cases (such as delay) that could fall under

⁽¹¹⁾ 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 December 2015) [2015] OJ L326/1.

⁽¹²⁾ Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (19 December 2004) [2004] OJ L364/1.

⁽¹³⁾ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (22 November 2011) [2011] OJ L304/64.

⁽¹⁴⁾ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (23 June 1990) [1990] OJ L158/59.

⁽¹⁵⁾ CJEU 17 March 2016, in joined cases C-145/15 and C-146/15, *Ruijsenaars and ors v Staatssecretaris van Infrastructuur en Milieu*, ECLI:EU:C:2016:187.

both Regulation No. 261/2004 and the 1999 Montreal Convention, and in the case of a request for further compensation pursuant to Article 12. In this regard, the EU Court of Justice has established that the court of a Member State hearing an action to obtain both compliance with the flat-rate and standardized rights provided for in Regulation No. 261/2004, and compensation for further damage falling within the scope of the 1999 Montreal Convention, must assess its jurisdiction, for the first head of claim, in the light of Article 7(1) of Regulation (EU) No. 1215/2012⁽¹⁶⁾, and, for the second head of claim, in the light of Article 33 of that Convention⁽¹⁷⁾. The same ruling provided that Article 33(1) of the Montreal Convention must be interpreted, as regards actions for damages falling within the scope of that Convention, as governing not only the allocation of jurisdiction as between the States Parties to the Convention, but also the allocation of territorial jurisdiction as between the courts of each of those States.

2. Denied boarding

Firstly, the legal classification of the cases provided for in the Regulation depends on whether the denied boarding occurs in scheduled or non-scheduled transport. Indeed, Regulation No. 261/2004 applies to both of them.

Based on Article 2(1)(j) of the Regulation, “denied boarding” refers to «a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation».

The EU Court of Justice interpreted the concept of “flight” within the meaning of Regulation No. 261/2004 as consisting essentially in an air transport operation, being as it were a “unit” of such transport, performed by an air carrier which fixes its itinerary⁽¹⁸⁾.

The Regulation separates the category of volunteers – according to Article 2(1)(k), this category includes “persons who have presented themselves

⁽¹⁶⁾ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (20 December 2012) [2012] OJ L351/1.

⁽¹⁷⁾ CJEU 7 November 2019, in case C-213/18, *Guaïtoli and ors v EasyJet Airline Co Ltd*, ECLI:EU:C:2019:927.

⁽¹⁸⁾ CJEU 10 July 2008, in case C-173/07, *Emirates Airlines – Direktion für Deutschland v Diether Schenkel*, ECLI:EU:C:2008:400, para 40.

for boarding under the conditions laid down in Article 3(2) and responded positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits" – from the category of passengers to whom boarding is denied against their will. The carrier shall immediately pay compensation only to the latter.

On the other hand, pursuant to Article 12, volunteer passengers waive their right to request compensation in addition to that granted by the Regulation, in exchange for the benefits aforementioned (in fact, Article 12 specifies "without prejudice to relevant principles and rules of national law, including case-law"). In addition to these benefits, the assistance referred to in Article 9 and, alternatively, reimbursement of the ticket price or re-routing on another flight are also provided. According to the 1999 Montreal Convention, unlike a delay, it does not regulate cases of non-performance of carriage. Regarding denied boarding and flight cancellation, there is no possibility of overlap between the 1999 Montreal Convention and Regulation No. 261/2004.

Should the denied boarding of a scheduled flight be considered a delay (at least in the event that the passenger takes a different and later flight than the one listed on the ticket), and therefore failure to perform the service, the matter seems to become more delicate, as there could be a mismatch between the 1999 Montreal Convention and Regulation No. 261/2004.

However, in this case as well, and as explained further below, full coexistence between the legislations involved can occur by associating Regulation No. 261/2004 with the recognition of certain levels of protection for the passenger, if applicable, without affecting the carrier's liability regime.

3. Cancellation of flight

Flight cancellation is governed by Article 5 of the Regulation and is defined as follows: «the non-operation of a flight which was previously planned and on which at least one place was reserved» (Article 2(1)(l) of the Regulation).

According to the EU Court of Justice, cancellation «must be interpreted as meaning that... it does not refer only to the situation in which the aeroplane in question fails to take off at all, but also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aeroplane were

transferred to other flights»⁽¹⁹⁾.

Furthermore, the EU Court of Justice specified that «there is a cancellation where the delayed flight for which the booking was made is “rolled over” onto another flight, that is to say, where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned – but independently of the flight for which the passengers so transferred had made their bookings»⁽²⁰⁾.

Pursuant to Article 8(1), passengers are entitled to reimbursement of the full ticket price, without any deductions whatsoever, or to the use of an alternative flight that is more convenient, or to a return to the initial point of departure on a return flight, thus meeting the needs of a passenger who has entered into a contract of carriage that includes two flights. There is also the right to obtain assistance in accordance with Article 9(1) and (2), and therefore receive, free of charge, meals and refreshments in a reasonable proportion relative to the waiting time; hotel accommodation if necessary; and transport between the airport and place of accommodation.

The passenger (and this is the most complex issue) is awarded “the right to compensation by the operating air carrier” unless he or she was notified of the cancellation within the timeframe, and under the conditions provided for by the regulations (e.g. at least two weeks before the scheduled time of departure).

Article 5(3) provides that «an operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken».

In the latter case, the cancellation by the carrier is not voluntary, and it is similar to the impediment that generates the temporary or final impossibility of execution. Nevertheless, the airline appears to be required, even in such cases, to provide the measures set forth in Articles 8 and 9, given that the carrier’s obligations only exclude compensation in this instance. In particular,

⁽¹⁹⁾ CJEU 13 October 2011, in case C-83/10, *Rodríguez and ors v Air France SA*, cit.

⁽²⁰⁾ CJEU 19 November 2009, in joined cases C-402/07 and C-432/07, *Sturgeon and ors v Condor Flugdienst GmbH (C-402/07)* and *Böck and Lepuschitz v Air France SA (C-432/07)*, ECLI:EU:C:2009:716, para 36; see R. LAWSON - T. MARLAND, *The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon in Harmony or Discord?*, in *Air and Space Law*, 2011, 36(2), 99; S. GARBEN, *Sky-High Controversy and High-Flying Claims? The Sturgeon Case Law in Light of Judicialactivism, Euroscepticism and Eurolegalism*, in *Common Market Law Review*, 2013, 50(1), 15.

circumstances such as the closure of a portion of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute “extraordinary circumstances” within the meaning of this regulation, and they did not release air carriers from their obligations as laid down in Articles 5(1)(b) and 9 of the Regulation to provide care⁽²¹⁾.

The EU Court of Justice case law regarding the notion of “extraordinary circumstances” referred to in Article 5(3) is worthy of note. First of all, given the severe consequences for airlines, this article «must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of “extraordinary circumstances” within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. In this sense, the 1999 Montreal Convention is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No. 261/2004»⁽²²⁾.

It was later specified⁽²³⁾, that an operating air carrier, under Article 5(3) of Regulation No. 261/2004, read in the light of Recital 14 of that Regulation, «in order to be exempted from its obligation to compensate passengers in the event of a long delay or cancellation of a flight [...] may rely on an “extraordinary circumstance” which affected a previous flight which it operated using the same aircraft, provided that there is a direct causal link between the occurrence of that circumstance and the delay or cancellation of the subsequent flight, which is for the national court to determine, having regard in particular to the conditions of operation of the aircraft in question by the operating air carrier concerned».

In this sense, «a situation where an airport’s set of mobile boarding stairs collides with an aircraft cannot be categorised as “extraordinary circumstances” exempting the air carrier from its obligation to pay the passengers compensation in the event of a long delay to a flight operated by that aircraft»⁽²⁴⁾.

On another occasion, the EU Court of Justice ruled that «an air carrier has an obligation, in respect of the reasonable measures that it is required to

⁽²¹⁾ CJEU 31 January 2013, in case C-12/11, *McDonagh v Ryanair Ltd*, ECLI:EU:C:2013:43.

⁽²²⁾ The leading case can be found in CJEU 22 December 2008, in case C-549/07, *Wallentin-Hermann v Alitalia–Linee Aeree Italiane SpA*, ECLI:EU:C:2008:771.

⁽²³⁾ CJEU 11 June 2020, in case C-74/19, *LE v Transport Aéreos Portugueses SA*, ECLI:EU:C:2020:460.

⁽²⁴⁾ CJEU 14 November 2014, in case C-394/14, *Siewert and ors v Condor Flugdienst GmbH*, ECLI:EU:C:2014:2377.

implement in order to guard against extraordinary circumstances, to organise its resources in good time in order to provide a certain minimum “reserve time” after the scheduled departure time, so as to be able, if possible, to operate the flight after the extraordinary circumstances have come to an end»⁽²⁵⁾.

As a result of this Court’s strict line of interpretation, the position of air carriers seems to be increasingly burdensome. A further example comes from the judgment of the Court of 23 March 2021⁽²⁶⁾, according to which Article 5(3) «must be interpreted as meaning that strike action which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the conditions laid down by national legislation, in particular the notice period imposed by it, which is intended to assert the demands of that carrier’s workers and which is followed by a category of staff essential for operating a flight does not fall within the concept of an “extraordinary circumstance” within the meaning of that provision».

In some judgments, the Court has decided to consider events as falling within the notion of “extraordinary circumstance”, with consequent exemption of the carrier from the obligation to pay compensation. In one particular case⁽²⁷⁾, it was determined that «the presence of petrol on a runway of an airport which led to its closure and, consequently, the long delay of a flight to or from that airport, falls within the concept of “extraordinary circumstances” within the meaning of that provision, when the petrol in question does not originate from an aircraft of the carrier that operated that flight». This must be regarded as a circumstance which could not have been avoided even if all reasonable measures had been taken within the meaning of Article 5(3) of Regulation No. 261/2004.

In another case⁽²⁸⁾ «the unruly behaviour of a passenger which has justified the pilot in command of the aircraft in diverting the flight concerned to an airport other than the airport of arrival in order to disembark that passenger and his baggage falls within the concept of “extraordinary circumstances”, within the meaning of that provision, unless the operating air carrier contributed to the occurrence of that behaviour or failed to take appropriate measures in view of the warning signs of such behaviour, which it is for the

⁽²⁵⁾ CJEU 12 May 2011, in case C-294/10, *Eglītis and Ratnieks v Latvijas Republikas Ekonomikas ministrija*, ECLI:EU:C:2011:303, para 22.

⁽²⁶⁾ CJEU 23 March 2021, in case C-28/20, *Airhelp Ltd v Scandinavian Airlines System Denmark – Norway – Sweden*, ECLI:EU:C:2021:226.

⁽²⁷⁾ CJEU 26 June 2019, in case C-159/18, *Moens v Ryanair Ltd*, ECLI:EU:C:2019:535.

⁽²⁸⁾ CJEU 11 June 2020, in case C-74/19, *LE v Transport Aéreos Portugueses SA*, cit.

national court to verify» (para 48). Consequently, «an operating air carrier may rely on an “extraordinary circumstance” which affected a previous flight which it operated using the same aircraft, provided that there is a direct causal link between the occurrence of that circumstance and the delay or cancellation of the subsequent flight, which is for the national court to determine, having regard in particular to the conditions of operation of the aircraft in question by the operating air carrier concerned» (para 55).

Of further interest is the interpretative solution reached in the same context⁽²⁹⁾ concerning the air carriers’ obligation to pay compensation. In particular, «for an air carrier to re-route a passenger, on the grounds that the aircraft carrying that passenger was affected by an extraordinary circumstance, by means of a flight operated by that carrier and resulting in that passenger arriving on the day following the day originally scheduled, does not constitute a “reasonable measure” releasing that carrier from its obligation to pay compensation under Article 5(1)(c) and Article 7(1) of the regulation, unless there was no other possibility of direct or indirect re-routing by a flight operated by itself or any other air carrier and arriving at a time which was not as late as the next flight of the air carrier concerned or unless the implementation of such re-routing constituted an intolerable sacrifice for that air carrier in the light of the capacities of its undertaking at the relevant time, which is a matter for the national court to assess» (para 61).

In the case of connecting flights, when there are two flights which are the subject of a single reservation, departing from an airport located within the territory of a third country, and going to an airport located in a Member State via the airport of another Member State, a passenger who suffers a delay of three hours or more in reaching his or her final destination may bring his or her action for compensation under the Regulation against the Community air carrier that performed the second flight if the cause of that delay arose from the first flight operated, under a code-share agreement, by a carrier established in a third country⁽³⁰⁾.

The Interpretative Guidelines on EU passenger rights regulations in the context of the ongoing COVID-19 situation, adopted on 18 March 2020⁽³¹⁾, clarify how certain provisions of EU passenger rights legislation apply in the

⁽²⁹⁾ *Ibidem*.

⁽³⁰⁾ CJEU 12 November 2020, in case C-367/20, *SP v KLM Royal Dutch Airlines*, ECLI:EU:C:2020:909.

⁽³¹⁾ Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 (18 March 2020) [2020] OJ C891/1.

context of the outbreak, notably with respect to cancellations and delays⁽³²⁾. The European Commission has established that the measures taken by national authorities to contain the pandemic must be considered extraordinary circumstances within the meaning of Article 5(3), resulting in a waiver of the right to compensation. Therefore, the air carrier is not exempt from all its other obligations, including the obligation to offer care under Article 9 of the Regulation, even for an extended period.

With Recommendation (EU) No. 2020/648⁽³³⁾, the European Commission also intervened regarding vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic. Carriers and organisers may propose vouchers with certain characteristics to passengers or travellers, as an alternative to reimbursement in money, and subject to the passenger's or traveller's voluntary acceptance, under certain circumstances.

The burden of proof of whether and when the passenger was informed of the flight cancellation lies with the operating carrier.

4. Long delay

The delay issue deserves special attention because it is covered by Regulation No. 261/2004 and by both the 1999 Montreal Convention and Regulation (EC) No. 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air⁽³⁴⁾.

Regulation No. 261/2004 does not contain a definition of "flight delay". Article 6 establishes the thresholds beyond which passengers are entitled to protection. The thresholds, beyond which the delay is considered long, are the following:

- a) two hours or more for all intra-EU flights of 1,500 km or less;

⁽³²⁾ See also C. EROTOKRITOU - C.-I. GRIGORIEFF, *EU Regulation No. 261/2004 on Air Passenger Rights: The Impact of the COVID-19 on Flight Cancellation and the Concept of Extraordinary Circumstances*, in *Air and Space Law*, 2020, 45(Special issue), 123.

⁽³³⁾ Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic (14 May 2020) [2020] OJ L151/10.

⁽³⁴⁾ In particular, see P. DEMPSEY - S. JOHANSSON, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, in *Air and Space Law*, 2010, 35(3), 207; T. VAN DER WIJNGAART, *Montreal Convention: To Whom Is the Carrier Liable in the Event of Delay?*, in *Air and Space Law*, 2016, 41(6), 511.

- b) three hours or more for all intra-EU flights of more than 1,500 km and for all other flights between 1,500 km and 3,500 km; and
- c) four hours or more for all flights that do not fall within the aforementioned cases.

Although the Regulation was unquestionably a step forward in the protection of passengers, the failure to expressly recognise compensation in case of delay, which is the most frequent case of default, did not seem to have a substantial impact on passenger rights. The debate on doctrine and in national Courts focused on whether long delays could qualify as cancellations. Once again, the interpretation of the EU Court of Justice was fundamental in this regard.

According to the leading case, although it did not “expressly follow from the wording” of Regulation No. 261/2004, the EU Court of Justice decided that «[i]t is clear [...] that the Community legislature adopted a notion of “flight delay” which is considered only by reference to the scheduled departure time and which implies as a consequence that, after the departure time, the other elements pertaining to the flight must remain unchanged’, and, unlike cancellation, a flight is “delayed” if it is operated in accordance with the original planning and its actual departure time is later than the scheduled departure time»⁽³⁵⁾.

As a result of the affirmation of the principle that «passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of Regulation No. 261/2004»⁽³⁶⁾, the EU Court of Justice established that «Articles 5, 6 and 7 of Regulation No. 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the

⁽³⁵⁾ CJEU 19 November 2009, in joined cases C-402/07 and C-432/07, *Sturgeon and ors v Condor Flugdienst GmbH* (C-402/07) and *Böck and Lepuschitz v Air France SA* (C-432/07), cit., para 31 and 32.

⁽³⁶⁾ CJEU 19 November 2009, in joined cases C-402/07 and C-432/07, *Sturgeon and ors v Condor Flugdienst GmbH* (C-402/07) and *Böck and Lepuschitz v Air France SA* (C-432/07), cit., para 54.

arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier»⁽³⁷⁾.

This judgment, which constituted a step forward in the protection of air passengers, created a great stir due to the non-literal interpretation of Regulation No. 261/2004 by the Court of Justice and due to its severe impact on the position of air carriers.

5. Recent developments

The extremely wide range of case law makes the need for legislative intervention even more evident, in order to restore the effectiveness of passengers' rights and make it possible for carriers to operate on the basis of definite rules.

Fundamentally, the evolution of regulations relating to common rules on compensation and assistance to passengers in the event of denied boarding and the cancellation or long delay of flights bears testament to the sensitive nature of the issue and the special attention policy makers have paid to the need to protect users.

At the time of writing, a proposal for revision is pending that would jointly address Regulation No. 261/2004 and Regulation (EC) No. 2027/97, seeking to strengthen the rights of passengers and ensure equal conditions among air carriers through the consistent and effective application of the pertinent rules (see COM(2013) 130 final)⁽³⁸⁾.

⁽³⁷⁾ CJEU 19 November 2009, in joined cases C-402/07 and C-432/07, *Sturgeon and ors v Condor Flugdienst GmbH* (C-402/07) and *Böck and Lepuschitz v Air France SA* (C-432/07), cit., para 69.

⁽³⁸⁾ Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No. 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (13 March 2013) COM(2013) 130 final.

CHAPTER X

HANDLING

SUMMARY: 1. Introduction. – 2. Ground handling services. – 3. The 2018 IATA Standard Ground Handling Agreement (SGHA). – 4. Liability and indemnity. – 5. Ground handling services according to the EU. – 6. Directive 96/67/EC in the EU aviation liberalisation process. – 7. Ground handling for third parties and self-handling. – 8. Landside and airside operations. – 9. Centralised infrastructures and access to installations. – 10. Separation of accounts. – 11. Safety and Security, Social and Environmental Protection. – 12. Recent developments.

1. Introduction

Managing airport infrastructure requires implementing complex services to ensure its functionality and operability.

In particular, *handling* or *ground handling* services include activities, ancillary or instrumental to the air carrier's transport, being carried out at the airport. They aim to ensure assistance to aircraft, passengers, baggage, freight and mail, provided by the airport operator, another service provider (*third-party handling*), or the air carrier on its own (*self-handling*).

The fundamental importance of handling services for air transport has determined the adoption of standard contracts at the international level and has led the European Union to regulate their operation⁽¹⁾.

⁽¹⁾ See C. DUSSART-LEFRET - C. FEDERLIN, *Ground Handling Services and EC Competition Rules*, in *Air & Space Law*, 1994, 19(2), 50; W. DESELAERS, *Liberalisation of Ground Handling Services at Community Airports*, in *Air & Space Law*, 1996, 21(6), 260; K. KARLSSON - J. J. CALLAGHAN, *Air Transport Liberalisation Comes Down to the Ground: Recent E.C. Developments in the Ground Handling Sector*, in *European Competition Law Review*, 1999, 20(2), 86; R. ABEYRATNE, *Ground Handling Services at Airports as a Trade Barrier*, in *Journal of World Trade*, 2008, 42(2), 261; D. DE BOURNONVILLE - C. BLACKSHAW, *Ground handling at European Airports: a look at the potential effects of the draft new Ground handling Regulation proposed by the European Commission*, in *The Aviation & Space Journal*,

2. Ground handling services

At a global level, the International Air Transport Association (IATA), the trade association representing the world's airlines that supports aviation with global standards and industry policy on critical aviation issues, has identified and classified the services that are part of the handling activities.

According to the 2018 IATA Standard Ground Handling Agreement (SGHA) – the standard procurement contract generally used to govern the relations between air carriers and handling operators – ground handling services are divided into two large groups. The *airside* handling activities encompass all support services for aeronautical operations; the *landside* handling activities concern the services provided in the part of the airport that interfaces with the surrounding area.

3. The 2018 IATA Standard Ground Handling Agreement (SGHA)

The new version of the 2018 IATA SGHA replaces the previous text of 2013, according to the usual five-year frequency. Among the other revisions, mention should be made of the duty of data protection (Article 1.1), the conventional prohibition of self-handling (Article 3.3), the reference to the standard practices and procedures of handler and IATA in the case of absence of instructions by the carrier (Article 5.3), the obligation to comply with the maintenance and safety criteria of the equipment in use to the operator (Articles 5.13 and 5.14), the introduction of an electronic receipt format (Article 7.1), the right to interrupt the service if the carrier fails to pay one or more services (Article 7.3) or in case the airline manifests its insolvency (Article 11.8), the agreed procedure to change the fees for the service (Article 11.11).

4. Liability and indemnity

In particular, Article 8 SGHA regulates the “Liability and indemnity” of the carrier and the handler.

The carrier cannot make any claim against the handler and shall indemnify it against any liability for claims or suits, including costs and expenses, in respect of delay, injury or death of persons carried or any employee of the carrier, and in case

2011, 10(4), 2; S. ZOLEA, *Ground handling*, in *Encyclopaedia of European Union Law*, Oxford University Press, 2022.

of damage to or delay or loss of baggage, cargo, mail and property (Article 8.1), or loss to third parties caused by the operation of the carrier's aircraft (Article 8.2), arising from an act or omission of the handling company, unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result.

The handler cannot make any claim against the carrier and shall indemnify it against any legal liability for claims or suits, including costs and expenses, in respect of injury to or death of any employees, damage to or loss of property of the handling company, arising from an act or omission of the carrier, unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result (Article 8.3).

According to Article 9, if the dispute fails to be mutually resolved, the parties may elect to resolve it through arbitration.

5. Ground handling services according to the EU

A specific list of ground handling services is contained in the Annex of Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports⁽²⁾, the first identification of ground handling activities by a regulatory text. The eleven categories of services indicated include ground administration and supervision, passenger, baggage, freight and mail handling, ramp handling, aircraft services, fuel and oil handling, aircraft maintenance, flight operations and crew administration, surface transport and catering services.

The different services carried out at the airport form many separate markets, according to the opinion of the European Commission (since Case IV/M.786 *Birmingham International Airport* of 1997⁽³⁾) and the approach adopted by the Court of Justice since 2002⁽⁴⁾, which have qualified handling services as a business activity subject to the EU rules on competition.

⁽²⁾ Council of the European Union Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports, OJ L 272, 25.10.96.

⁽³⁾ European Commission case No. IV/M.786 - *Birmingham International Airport*, of 25 March 1997, OJ C 67/6, 4.3.97.

⁽⁴⁾ Court of Justice of the European Communities, Sixth Chamber, of 24 October 2002, in case C-82/01, *Aéroports de Paris v Commission of the European Communities*, ECLI:EU:C:2002:617.

6. Directive 96/67/EC in the EU aviation liberalisation process

The regulation on handling services is part of the broader liberalisation process of air transport in the EU ⁽⁵⁾. The Directive clearly states the principle that most categories of ground handling services should be opened up to the maximum possible extent.

Nevertheless, the progressive liberalisation of handling services and self-handling may not come up against safety, security, capacity, and available space constraints. Therefore, Member States may sometimes limit the number of authorised suppliers of such categories of activities, provided the criteria for limitation are relevant, objective, transparent and non-discriminatory ⁽⁶⁾.

The EU regulation also allows Member States to impose public service obligations on airports serving peripheral or developing regions (Article 11).

7. Ground handling for third parties and self-handling

The Directive 96/67/EC applies to any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic, whose annual traffic is not less than 2 million passenger movements or 50.000 tonnes of freight. If only freight traffic thresholds are reached, it does not apply to ground handling services exclusively reserved for passengers (Article 1.2). On the contrary, in airports with lower traffic volumes, the handling services may be provided by the airport's managing body under a monopoly regime.

Member States shall ensure free access to the market by suppliers of ground handling services to third parties (Article 6.1). Furthermore, self-handling by airport users is generally allowed, albeit with some exceptions, with-

⁽⁵⁾ B. J. H. CRANS, *Liberalization of Airports*, in *Air & Space Law*, 1996, 21(1), 10; J. BALFOUR, *Air Transport Liberalisation in the EU: the current legal framework and anticipated developments*, in *Travel Law Journal*, 1998, (4), 168; M. R. PEETERS, *The European Commission's Airport Package*, in *Air & Space Law*, 2008, 33(3), 244; R. ABEYRATNE, *Law and Regulation of Aerodromes*, Springer, 2014; L. O. BLANCO - B. VAN HOUTTE (eds.), *EU Regulation and Competition in the Transport Sector*, Oxford University Press, 2017; M. COLANGELO - V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, 3rd ed., 2019, available at <http://romatrepress.uniroma3.it/libro/introduction-to-european-union-transport-law-iii-edizione>.

⁽⁶⁾ See European Commission decision of 14 January 1998, *Düsseldorf Airport*, OJ No L 173/45, 18.6.98; Court of Justice of the European Union, First Chamber, of 11 September 2014, in case C-277/13, *European Commission v Portuguese Republic*, ECLI:EU:C:2014:2208 Economic and Social Committee Opinion of 13 September 1995, OJ C 301, 13.11.95.

out exclusion depending on the amount of annual passenger or freight traffic (Article 7.1). The rights recognised by the Directive also apply to third-country suppliers of ground handling services and third-country airport users under conditions of strict reciprocity (Article 20).

The Directive does not affect the application of the rules of the Treaty (Article 100.2 TFEU represents its legal basis), especially those of competition⁽⁷⁾.

8. Landside and airside operations

The process of opening up to competition is based on the parameters of the type of services provided (landside or airside) and the methods of production (ground handling for third parties or self-handling). Regarding the first category, the *landside* services have been fully liberalised, while the *airside* only partially, depending on airport capacity and security needs.

Considering that the operations on the *airside* are located in a particularly sensitive area of the airport, the Directive does not impose complete freedom and requires a minimum degree of opening-up of both self-handling and services to third parties. However, for baggage handling, ramp handling, fuel and oil handling, freight and mail, Member States may not limit the number of suppliers to fewer than two for each category of ground handling service (Article 6.2). Moreover, they can neither directly nor indirectly control authorised service suppliers: at least one may not be directly or indirectly controlled by the managing body of the airport, or by any airport user who has carried more than 25% of the passengers or freight during the year preceding, or by a body controlling or controlled directly or indirectly by the managing body or any such user (Article 6.3). Member States may reserve the right to self-handle no fewer than two airport users, provided they are chosen based on relevant, objective, transparent and non-discriminatory criteria (Article 7.2).

⁽⁷⁾ See Court of Justice of the European Communities, Sixth Chamber, of 16 October 2003, in case C-363/01, *Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG*, ECLI:EU:C:2003:548; see also European Commission decision of 14 January 1998 relating to a proceeding under Article 86 of the EC Treaty, IV/34.801 *FAG - Flughafen Frankfurt/Main AG*, and European Commission decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty, IV/35.613 - *Alpha Flight Services/Aéroports de Paris*.

9. Centralised infrastructures and access to installations

Airport infrastructures may also encounter structural limitations due to complexity, cost or environmental impact, which do not allow their separation or duplication. For example, baggage handling systems, defrosting, water purification, and fuel distribution are among the factors that allow the managing body of the airport to retain exclusive operation of the infrastructure (Article 8) and require suppliers of ground handling services and self-handling airport users to use centralised infrastructures.

The management of these infrastructures is based on the principles of transparency, objectivity, and non-discrimination, ensuring that access to ground handling service providers or self-handling airport users is not hindered⁽⁸⁾. The managing body is entitled to collect a fee for the use of airport installations of an amount that accounts for the interest of that body in making a profit (Article 16.3)⁽⁹⁾.

10. Separation of accounts

Since the managing body of the airport may also provide ground handling services, its decisions may significantly affect competition among ground handling service providers. In order to ensure fair competition in the sector, airports are required to separate the accounts for their infrastructure management and regulatory activities on the one hand, and for the supply of ground handling services on the other (Article 4). The same transparency requirements apply to the airport user and the supplier of ground handling services.

To avoid cross-subsidies between exclusive and other activities, along with preventing the handling services from being provided below cost, an airport may not subsidise its ground handling activities using the profit resulting from its role as the airport authority (Recital 20).

11. Safety and security, social and environmental protection

To ensure high standards and guarantee the quality of services, Member States may make the ground handling activity of a supplier or self-handling

⁽⁸⁾ CJEC, Second Chamber, of 5 July 2007, in case C-181/01, *Deutsche Lufthansa AG v ANA - Aeroportos de Portugal SA*, ECLI:EU:C:2007:412.

⁽⁹⁾ CJEC, Sixth Chamber, of 16 October 2003, in case C-363/01, *Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG*, cit.

user conditional upon obtaining approval from a public authority independent of the airport's managing body (Article 14). As per usual, the measures adopted must comply with the principles of non-discrimination, objectivity, and free access to self-handle. They must also be concerned with maintaining a sound financial situation, having sufficient insurance coverage, ensuring the security and safety of installations, aircraft, equipment, and personnel, as well as protecting the environment, and complying with relevant social legislation⁽¹⁰⁾.

12. Recent developments

Over time, the ground handling regulation has been the subject of several studies (SH&E 2002, ECORYS 2008, ARC 2009, Booz 2009, SDG 2010, etc.), a report on the application of the Directive (Report from the Commission COM(2006) 821 final)⁽¹¹⁾, a European Parliament resolution of 2007⁽¹²⁾, a stakeholders' public consultation (2009-2010 Impact assessment for a possible revision of the Directive 96/67/EC)⁽¹³⁾.

The resulting European Commission's "Proposal of regulation on ground handling services at Union airports and repealing Council Directive 96/67/EC" (COM(2011) 824 final) has never been adopted.

The trouble with acting on a crucial matter for airports, airlines, and passengers, which is a strategic issue for the efficient use of air transport infrastructure and the performance of the aviation system in general, is today heightened by the need to consider the impact of the evolution of the air transport sector after COVID-19 pandemic on the regulation of ground handling.

⁽¹⁰⁾ CJEC, First Chamber, of 9 December 2004, in case C-460/02, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:2004:780; CJEC, Second Chamber, of 14 July 2005, in case C-386/03, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2005:461.

⁽¹¹⁾ European Commission, Report from the Commission of 15 October 2006, COM(2006) 821 final, 24 January 2007.

⁽¹²⁾ European Parliament Resolution of 11 October 2007 on airport capacity and ground handling: towards a more efficient policy 2007/2092(INI).

⁽¹³⁾ European Commission proposal of regulation on ground handling services at Union airports and repealing Council Directive 96/67/EC, COM(2011) 824 final, 1 December 2011; see also European Commission, Commission staff working paper, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. An Aviation Strategy for Europe, SEC(2011) 1439 final.

CHAPTER XI

THE REGULATION OF DRONES

SUMMARY: 1. Introduction. – 2. The evolution of the regulatory framework. – 3. Classification, certification, registration, and operations rules. – 4. The flying rules. – 5. The operator's liability. – 6. Privacy and personal data protection. – 7. The "Drones Strategy 2.0". – 8. Some closing remarks.

1. Introduction

Disruptive technological innovation⁽¹⁾, a typical feature of mobility systems since the beginning, has recently had a profound impact on remotely piloted aircraft and their operations as well⁽²⁾.

Their growing spread⁽³⁾ highlights the development of a constantly expanding sector⁽⁴⁾, favoured by the prospect of using unmanned aircraft in multiple fields, both military and civilian⁽⁵⁾.

These devices' extreme flexibility allows for their use in a growing and

⁽¹⁾ C. M. CHRISTENSEN, *The innovator's dilemma: when new technologies cause great firms to fail*, Boston, MA (USA), 1997; see also J. L. BOWER - C. M. CHRISTENSEN, *Disruptive Technologies: Catching the Wave*, in *Harvard Business Review*, January-February 1995; C. M. CHRISTENSEN - R. McDONALD - E. J. ALTMAN - J. E. PALMER, *Disruptive Innovation: An Intellectual History and Directions for Future Research*, Special Issue on "Managing in the Age of Disruptions", in *Journal of Management Studies*, 55, No. 7, November 2018.

⁽²⁾ A. MASUTTI - F. TOMASELLO, *International Regulation of Non-Military Drones*, Cheltenham, 2018.

⁽³⁾ According to Italian Civil Aviation Authority, as of March 31, 2021, about 40,000 operators were registered in Italy, over 76% more than in 2019.

⁽⁴⁾ See Sesar Joint Undertaking, *European Drones Outlook Study*, November 2016, at www.sesarju.eu/sites/default/files/documents/reports/European_Drones_Outlook_Study_2016.pdf.

⁽⁵⁾ See FAA Aerospace Forecast 2021-2041 at www.faa.gov/data_research/aviation/aerospace_forecasts/.

diverse number of activities, ranging from the security sector to institutional ones, as well as in scientific and commercial fields⁽⁶⁾.

This is further highlighted by the burgeoning development of the professional Italian drone market, which is expected to grow steadily alongside the integration of vertical services into industrial processes⁽⁷⁾.

Demand mainly focuses on agriculture and forestry, real estate and construction, industry and energy, the press and media, logistics and transport, entertainment, security, and public health⁽⁸⁾.

In this regard, the COVID-19 pandemic has highlighted the potential for drones' use in population monitoring, the delivery of medical supplies, the communication of social distancing guidelines, and the sanitation of buildings and roads⁽⁹⁾.

More recently, their use in environmental and landscape protection has been highlighted, making them a tool potentially employable to combat climate change and foster sustainable development⁽¹⁰⁾, alongside the protection of individuals and human rights⁽¹¹⁾.

Unmanned aerial vehicles are among the most interesting technological innovations, offering extraordinary development opportunities⁽¹²⁾; however, they also pose a significant new challenge from a legal standpoint.

⁽⁶⁾ B. FRANCHI, *L'evoluzione della normativa internazionale e UE relativa agli unmanned aircraft, detti anche «droni»: profili ricognitori*, in *Resp. civ. prev.*, 2018, 1790.

⁽⁷⁾ See Osservatorio del Politecnico di Milano, *Il mercato dei droni in Italia*, 2019, at www.osservatori.net/it/ricerche/osservatori-attivi/droni.

⁽⁸⁾ See Drone Industry Insights, *Drone Market Report 2021-2026*, at <https://droneii.com/project/drone-market-in-2021-2026>.

⁽⁹⁾ F. GASPARI, *La regolazione multilivello degli aeromobili a pilotaggio remoto e la disciplina speciale dell'ENAC nel contesto della pandemia da Covid-19*, in *Riv. dir. nav.*, 2020, 139; M. LAMON, *Il ruolo dei mezzi aerei a pilotaggio remoto durante l'emergenza sanitaria del Covid-19*, in *Giureta*, 2020, 177; ID., *La rivoluzione aeronautica dei sistemi aerei a pilotaggio remoto e il loro esercizio nella lotta alla pandemia da Covid-19*, in *Dir. mar.*, 2021, 249; see also M. FARDO, *Utilizzo dei droni nel contrasto al Covid-19. Il complesso bilanciamento tra la salute pubblica e la riservatezza personale*, in *Giur. pen. trim.*, 1/2020, 101.

⁽¹⁰⁾ L. TAFARO, *Dai mezzi aerei a pilotaggio remoto ai «droni»: le nuove rotte della tutela della persona e dello sviluppo sostenibile*, in R. BELLOTTI - L. TAFARO (eds.), *Mezzi aerei a pilotaggio remoto: questioni teoriche e profili applicativi*, Napoli, 2021, 1; G. MASTRODONATO, *Droni e tutela dell'ambiente: il ruolo della pa committente e regolatrice*, *ibid.*, 143.

⁽¹¹⁾ P. RIVELLO, *L'impiego dei droni nella prospettiva del diritto umanitario, del codice penale e del codice di procedura penale*, in *Mezzi aerei a pilotaggio remoto*, *cit.*, 39.

⁽¹²⁾ See the report ANIA, *Droni, Il mercato prende quota*, 20 novembre 2020, at www.ania.it/ricerca-avanzata/-/asset_publisher/XIyLeujL9irt/content/id/334219.

In the absence of a specific legal definition, both within the Italian legal system and at the EU and international level⁽¹³⁾, the noun “drone” does not yet have a clear legal value⁽¹⁴⁾. Many different expressions can be found in the various regulatory sources and sectoral studies, even if they essentially refer to the same matter⁽¹⁵⁾.

The term is often used in its generic meaning with reference to any remotely piloted vehicle, regardless of its features and purposes of use. In this perspective, it refers to both aerial drones and drones used on dry land (so-called “Rovers”), as well as those used on the water surface or underwater (so-called “ROVs”, Remotely Operated Vehicles, or “UAVs”, Autonomous Underwater Vehicles)⁽¹⁶⁾.

The latter, in particular, deserve special attention, not just because they are becoming increasingly popular for recreational, scientific, and professional purposes, but also because they are subject to specific legislative regulations. As a matter of fact, Article 27-*bis* of the *Codice della nautica da diporto* (Italian Recreational Boating Code)⁽¹⁷⁾ provides for a special regulation for remotely operated recreational craft in order to safeguard navigation safety, human life at sea, and maritime rescue⁽¹⁸⁾.

Currently, also in Italy, the term “drone” generally refers only to unmanned aerial vehicles, encompassing aircraft with wildly varying charac-

⁽¹³⁾ The term is often used in the technical documents of the European Aviation Safety Agency (EASA), which used it for the first time in the A-NPA of 31 July 2015, *Introduction of a regulatory framework for the operation of drones*.

⁽¹⁴⁾ B. FRANCHI, *Gli aeromobili a pilotaggio remoto: profili normativi ed assicurativi*, in *Resp. civ. prev.*, 2014, 1771.

⁽¹⁵⁾ B. FRANCHI, *L'evoluzione della normativa internazionale e UE relativa agli unmanned aircraft, detti anche «droni»: profili ricognitori*, cit., 1791.

⁽¹⁶⁾ U. LA TORRE, *I nuovi veicoli volanti*, in *Riv. dir. nav.*, 2010, 553.

⁽¹⁷⁾ See Article 27-*bis* (Remote control pleasure craft) d.lgs. 18 July 2005, No. 171, as inserted by Article 12 d.lgs. 12 November 2020, n. 160.

⁽¹⁸⁾ In *L'automazione nei trasporti marittimi, aerei e terrestri*, in *Dir. trasp.*, 2019, 297 and ff., see L. ANCIS, *Navi pilotate da remoto e profili di sicurezza della navigazione nel trasporto di passeggeri*, 427; R. TRANQUILLI-LEALI, *La tutela della sicurezza dei passeggeri nel trasporto marittimo tra comandante della nave e pilota da remoto*, 467; U. LA TORRE, *Navi senza equipaggio e Shore Control Operator*, 487; V. CORONA, *Le obbligazioni del vettore nel trasporto di cose con navi autonome o pilotate da remoto*, 519; A. XERRI, *Riflessioni in tema di responsabilità nel contesto dell'automazione navale*, 551; S. BEVILACQUA, *Porti e automazione: spunti in materia di responsabilità delle imprese di sbarco*, 557; P. ZAMPELLA, *Navi autonome e navi pilotate da remoto, spunti per una riflessione*, 583.

teristics⁽¹⁹⁾. The words “Unmanned Aerial Vehicle” (UAV)⁽²⁰⁾ are less and less used in favour of the more popular “Unmanned Aircraft System” (UAS), which refer to the aircraft as a whole, including all of its system components, and “Remotely Piloted Aircraft System” (RPAS), which draw attention to the fact that the system does not operate in a fully automated manner, but there is always a pilot who is, in any case, responsible for the flight. Within the framework of the Italian legal system, these are specifically referred to as *Aeromobili a Pilotaggio Remoto* (APR – Remotely Piloted Aircraft) and *Sistemi Aeromobili a Pilotaggio Remoto* (RPAS - Remotely Piloted Aircraft Systems).

As a matter of fact, the legislation in force refers almost exclusively to aerial drones, and its development moves forward together with their technical progress and the spread of their use⁽²¹⁾.

The question concerning the applicability of the rules established in aeronautics to the use of land and sea drones still remains open.

A significant part of the doctrine has long favoured a unified vision of remotely piloted aircraft regardless of the environment (air, sea, or land) in which they are used.

This approach is aligned with the European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103 (INL)), which «Underlines that autonomous transport covers all forms of remotely piloted, automated, connected, and autonomous ways of road, rail, waterborne, and air transport, including vehicles, trains, vessels, ferries, aircrafts, drones, as well as all future forms of

⁽¹⁹⁾ P. MENDEZ DE LEON, B. I. SCOTT, *An Analysis of Unmanned Aircraft Systems under Air Law*, in A. ZAVRŠNIK (ed.), *Drones and Unmanned Aerial Systems. Legal and Social Implications for Security and Surveillance*, Berlin, 2016, 186, and B. I. SCOTT (ed.), *The Law of Unmanned Aircraft Systems: An Introduction to the Current and Future Regulation under National, Regional and International Law (Aviation Law and Policy)*, Alphen aan den Rijn, 2016.

⁽²⁰⁾ U. LA TORRE, *Gli UAV: mezzi aerei senza pilota*, in R. TRANQUILLI-LEALI - E. G. ROSAFIO (eds.), *Sicurezza navigazione e trasporto*, Milano, 2008, 112; B. FRANCHI, *Aeromobili senza pilota (UAV): inquadramento giuridico e profili di responsabilità – I parte*, in *Responsabilità civile e previdenza*, 2010, 738; U. LA TORRE, *I nuovi veicoli volanti*, in *Riv. dir. nav.*, 2011, 556.

⁽²¹⁾ N. CARNIMEO, *Approccio regolatorio a sistemi tecnologici complessi. Profili evolutivi nel settore aeronautico e spaziale*, in R. BELLOTTI - L. TAFARO (eds.), *Mezzi aerei a pilotaggio remoto*, cit., 79; B. FRANCHI, *Aeromobili senza pilota (UAV): inquadramento giuridico e profili di responsabilità – II parte*, in *Responsabilità civile e previdenza*, 2010, 1213; S. PANZERI, *I sistemi aerei a pilotaggio remoto (SAPR): profili giuridici*, in *Giureta*, 2016, 39 and 42; D. RAGAZZONI, *Sistemi aerei a pilotaggio remoto: spunti di qualificazione*, in *Revista Latino Americana de Derecho Aeronautico*, 2016, 415; L. NAPOLITANO, *I droni ad uso civile nella prospettiva legislativa*, in *Mezzi aerei a pilotaggio remoto*, cit., 56.

developments and innovations in this sector»⁽²²⁾.

With specific reference to the Italian legal system, it is believed that part of the regulations relating to aerial drones could be extended, by analogy, to sea and land ones for which no specific regulation is currently in force, pursuant to Article 12, §2, of the Regulation, for rules concerning similar cases or matters and having the same underlying *ratio* (23).

As a matter of fact, the “internal analogy” provided for by Article 1 of the Code of Navigation, pursuant to which the Code itself, laws, regulations, and practices relating thereto apply to maritime, inland, and air navigation, seems to be applicable, whilst where no applicable item of navigation law is found nor provisions applicable by analogy, general civil law applies⁽²⁴⁾.

2. The evolution of the regulatory framework

Aerial drones for civil use, which will be the sole topic of this essay, fall within the notion of aircraft referred to in Article 743, §2, of the Code of Navigation, pursuant to which remotely piloted aircraft are also considered aircraft, being defined as such by the special laws, by ENAC regulations, and, limitedly to military aircraft, by the decrees of the Ministry of Defence⁽²⁵⁾.

As already noted, they are actually *sui generis* aircraft, considering that their specific features require both *ad hoc* provisions and harmonisation with the rules laid down by the Code of Navigation for traditional aircraft⁽²⁶⁾.

Even though the legislator intended to dispel all doubts regarding the qualification of UASs as aircraft, the provision in question nevertheless resulted in a lively doctrinal debate focused particularly on the nature of their inclusion in the aircraft category.

⁽²²⁾ See §§ “Autonomous means of transport. a) Autonomous vehicles”, No. 24, and “b) Drones (RPAS)”, No. 30.

⁽²³⁾ L. TAFARO, *Dai mezzi aerei a pilotaggio remoto ai «droni»*, cit. 13.

⁽²⁴⁾ A. LEFEBVRE D’OVIDIO - G. PESCATORE - L. TULLIO, *Manuale di diritto della navigazione*, XVI ed., Milano, 2022, 59; A. ANTONINI, *Corso di diritto dei trasporti*, III ed., Giuffrè, Milano, 2015, 50; M. CASANOVA - M. BRIGNARDELLO, *Corso breve di diritto dei trasporti*, II ed., Milano, 2020, 13; S. ZUNARELLI - M. M. COMENALE PINTO, *Manuale di diritto della navigazione e dei trasporti*, IV ed., Milano, 2020, 74.

⁽²⁵⁾ G. MASTRANDREA - L. TULLIO, *La revisione della parte aeronautica del codice della navigazione*, in *Dir. mar.*, 2005, 1201, part. 1218; ID., *Il compimento della revisione della parte aeronautica del codice della navigazione*, *ivi*, 2006, 699.

⁽²⁶⁾ S. VERNIZZI, *L’aeromobile. Dato tecnico e funzionale. Profilo statico e dinamico*, Aracne, Roma, 2020, 87 e 186.

In a nutshell, according to one opinion, these aircraft would be ontologically different from traditional ones: the legislator would have resorted to a *fictio juris*, so that those regulations governing manned aircraft would apply to them only «insofar as they are compatible with them»⁽²⁷⁾. Other scholars believe that medium and large-sized UASs should be deemed as fully-fledged aircraft, indeed having all the technical and functional features required by international, EU, and domestic aviation regulations for their qualification as such, limiting the scope of the aforementioned *fictio juris* for domestic regulation to small-sized ones only⁽²⁸⁾.

Given the difficulty of comparing all such vehicles to traditional aircraft, though, most consider it nonetheless preferable to resort to the *fictio iuris* tool anyway, so that it will be necessary to assess the applicability of the individual provision dictated for traditional aircraft to UASs based on their actual compatibility⁽²⁹⁾.

Pursuant to Article 743, §2, of the Code of Navigation, the Ente Nazionale per l'Aviazione Civile (ENAC, the Italian Civil Aviation Authority) intervened on the matter several times. Italy was the first country in the European Union to adopt a consistent set of rules on the subject, by publishing the ENAC Regulation of 16 December 2013 on “Mezzi aerei a pilotaggio remoto” (Remotely piloted aircraft)⁽³⁰⁾. Revised and amended several times to adjust domestic technical regulations to those published by the International Civil Aviation Authority (ICAO) and the European Union, it was recently replaced by the ENAC UAS-IT Regulation of 4 January 2021, which is currently in force.

Furthermore, the first international regulatory reference to remotely piloted aircraft was Article 8 (“Pilotless aircraft”) of the Convention on Inter-

⁽²⁷⁾ U. LA TORRE, *Gli UAV: mezzi aerei senza pilota*, cit., 93.

⁽²⁸⁾ B. FRANCHI, *Aeromobili senza pilota (UAV) – II parte*, cit., 1221-1225; the doubt does not arise for the international and EU legal system.

⁽²⁹⁾ S. VERNIZZI, *L'aeromobile*, cit., 91.

⁽³⁰⁾ The ENAC Regulation, the first edition of which dates back to 16 December 2013, amended several times, has reached the third edition of 11 November 2019. See E. G. ROSAFIO, *Considerazioni sui mezzi aerei a pilotaggio remoto e sul regolamento ENAC*, in *Riv. dir. nav.*, 2014, 796; A. L. M. SIA, *Profili attuali della disciplina giuridica dei mezzi aerei a pilotaggio remoto ed il regolamento dell'Ente nazionale dell'aviazione civile italiana (ENAC)*, in *Dir. trasp.*, 2014, 761; R. LOBIANCO, *Mezzi aerei a pilotaggio remoto: brevi osservazioni sul regolamento ENAC*, in *Resp. civ. prev.*, 2017, 2065; C. SEVERONI, *Il regime di responsabilità per l'esercizio dei mezzi a pilotaggio remoto*, in E. PALMERINI - M. A. BIASIOTTI - G. F. AIELLO (eds.), *Diritto dei droni. Regole, questioni e prassi*, Milano, 2018, 72.

national Civil Aviation of 7 December 1944 on international civil aviation⁽³¹⁾. With reference to unmanned aircraft, as it is known, this provision mandates that, for pilotless flights over the territory of a contracting State, a special authorisation be issued by that State, and that each contracting State undertake to make sure that such flight is controlled to obviate danger to civil aircraft⁽³²⁾.

ICAO's technical regulations on remotely piloted aircraft find, therefore, application also in Italy, including the Manual on Remotely Piloted Aircraft Systems (RPAS - ICAO Document 10019 AN/507), adopted with the purpose of providing guidance on technical and operational issues applicable to the integration of RPAS in non-segregated airspace and aerodromes.

In brief, in order to develop a regulatory framework for unmanned aviation, the ICAO has progressively amended the Annexes to the 1944 Chicago Convention⁽³³⁾. In particular,

- Annex 2 – “Rules of the Air” now contains high-level Standards regarding certification, licensing, operating rules, and special authorisations;
- Annex 7 – “Aircraft Nationality and Registration Marks” now defines RPAs as unmanned aircraft and ensures that nationality and registration marks can be applied regardless of the size or configuration of aircraft;
- Annex 13 – “Aircraft Accident and Incident Investigation” extends the definition of “accident” to include unmanned aircraft too⁽³⁴⁾.

⁽³¹⁾ Implemented with the Legislative Decree 6 March 1948, No. 616, in force in Italy since 8 June 1948.

⁽³²⁾ See, among others, R. ABEYRATNE, *Relating unmanned aerial vehicles-Issues and challenges*, in *European Transport Law*, 2009, 503; ID., *Unmanned aircraft systems. The civil aviation (revised) perspective*, there, 2011, 239; ID., *Remotely Piloted Aircraft Systems: Some Unexplored Issues*, in *Air & Space Law*, 2016, 289; see also A. MASUTTI - F. TOMASELLO, *International Regulation of Non-Military Drones*, cit., 38.

⁽³³⁾ According to ICAO, Coordinates Magazine article (April 2018), available at www.icao.int/safety/UA/Pages/Publications.aspx, all but one of the 19 Annexes will be amended to accommodate RPAS requirements (Annex 5 - Units of Measurement to be Used in Air and Ground Operations will not be affected): the RPAS Panel is actively progressing work on amendments to Annex 6 - Operation of Aircraft, Annex 8 - Airworthiness of Aircraft, Annex 10 - Aeronautical Telecommunications. Future amendments will relate to Annex 11 - Air Traffic Services, Annex 17 - Security, Annex 18 - The Safe Transport of Dangerous Goods by Air, and Annex 19 - Safety Management.

⁽³⁴⁾ The amendment to Annex 13 also attributes to the national aeronautical authorities the investigation of accidents and serious incidents occurring to unmanned aircraft: for Italy, the competence lies with the Agenzia Nazionale per la Sicurezza del Volo (ASNV - National Agency for Flight Safety), as required, also by Article 25 of the ENAC UAS-IT Regulation of 4 January 2021.

More recently, ICAO has adopted on 7 March 2018 (applicable from 2 November 2022) an amendment to Annex 1 – “Personnel Licensing”, introducing a regulatory structure for the issuance of a remote pilot licence (RPL) and the provision of a global framework for the regulation of RPA licensing to support international flights operating under instrument flight rules (IFR)⁽³⁵⁾.

When drafting sector regulations, ICAO clearly indicated that «RPAs act like and are treated like manned aircraft. UASs that cannot meet these requirements will be dealt with separately»⁽³⁶⁾. In line with this approach, the European Union legislation has also focused extensively on UASs, considering their growing importance in civil aviation.

As an EU Member State, Italy is directly impacted by the evolution of the EU regulatory framework, committed to defining standards for drones and providing all necessary services to ensure the sustainable development of a rapidly growing market.

In this context, the action of the European Commission is supported, on a technical level, by the European Union Safety Agency (EASA), the agency with responsibility for civil aviation safety, with further coordination with EUROCONTROL – the pan-European, civil-military organisation dedicated to supporting European aviation – and the European Organisation for Civil Aviation Equipment (EUROCAE), for the development of worldwide recognised industry standards for aviation.

The regulatory framework of the European Union is currently governed by Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018, on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency (the so-called “Basic Regulation”)⁽³⁷⁾.

The Basic Regulation defines unmanned aerial vehicles as «any aircraft operating or designed to operate autonomously or to be piloted remotely without a pilot on board» (Article 3, No. 30). It also introduces the essen-

⁽³⁵⁾ In order to assist Member State in implementing or to supplementing their existing UAS regulations, ICAO offers a template through its ICAO Model UAS Regulations titled Parts 101, 102 and 149.

⁽³⁶⁾ See www.icao.int/safety/UA/UASToolkit/Pages/FAQ.aspx.

⁽³⁷⁾ Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) 2111/2005, (EC) 1008/2008, (EU) 996/2010, (EU) 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) 552/2004 and (EC) 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) 3922/91.

tial requirements to ensure that unmanned aerial vehicles ⁽³⁸⁾ for civil use ⁽³⁹⁾ can be used in the airspace of the Single European Sky ⁽⁴⁰⁾, considering the fact that «since unmanned aircraft also operate within the airspace alongside manned aircraft, this Regulation should cover unmanned aircraft, regardless of their operating mass» ⁽⁴¹⁾.

Unlike the previously mentioned items of legislation ⁽⁴²⁾, the Regulation adopts a brand-new approach and introduces requirements based on the level of operational risk, according to principles inspired by criteria of *proportionality* (as risk increases, requirements become stricter) and *progression* (requirements are constructed in such a way as to favour the growth of the sector) ⁽⁴³⁾.

⁽³⁸⁾ Annex IX establishes the essential requirements for “unmanned aircraft”, defined as «any aircraft operating or designed to operate autonomously or to be piloted remotely without a pilot on board» (Article 3, No. 30, of the Regulation).

⁽³⁹⁾ According to Article 2, par. 3, the Regulation shall not apply to aircraft and equipment to control aircraft remotely, while carrying out military, customs, police, search and rescue, firefighting, border control, coastguard or similar activities or services under the control and responsibility of a Member State (lett. a) and the design, production, maintenance, and operation of aircraft the operation of which involves low risk for aviation safety, as listed in Annex I (lett. d).

⁽⁴⁰⁾ M. P. RIZZO, *La gestione del traffico aereo in Europa tra competenze di enti internazionali e prerogative statali*, Villa San Giovanni, 2004, 87; A. MASUTTI, *Il ritardo nel trasporto aereo. Prevenzione e responsabilità*, Torino, 2008, 35; M. M. COMENALE PINTO, *Dei servizi della navigazione aerea*, in B. FRANCHI - S. VERNIZZI (eds.), *Il diritto aeronautico fra ricodificazione e disciplina comunitaria*, Milano, 2007, 95; A. ANTONINI - C. SEVERONI, *L'organizzazione l'uso dello spazio aereo nel cielo unico europeo*, in M. P. RIZZO (ed.), *La gestione del traffico aereo: profili di diritto internazionale, comunitario ed interno*, Milano, 2009, 71; L. TROVÒ - F. TONEATTO, *La liberalizzazione dei servizi aerei*, in R. LOBIANCO (ed.), *Compendio di diritto aeronautico*, Milano, 2021, 135; V. VINCENZI, *L'Unione europea rafforza il cielo unico*, in *Dir. mar.*, 2010, 316; L. TROVÒ, *Il processo di integrazione degli spazi aerei europei: dalla riorganizzazione in blocchi funzionali verso la globalizzazione dell'Air Traffic Management (ATM)*, in *Giureta*, 2011, 439; A. XERRI, *Cielo Unico Europeo: riflessioni su un diritto aeronautico europeo*, in F. PELLEGRINO (ed.), *Regole e pratiche della navigazione aerea in Europa: verso un'armonizzazione*, Milano, 2012, 67; L. TYTGAT, *La regolamentazione del Cielo Unico Europeo: nuovi scenari*, *ivi*, 93; G. MARCHIAFAVA, *Le regole dell'aria comuni per il traffico aereo*, in *Libro dell'anno del diritto* 2014, Roma, 2014.

⁽⁴¹⁾ See Recitals 25 and 26.

⁽⁴²⁾ A. MASUTTI, *Proposals for the Regulation of Unmanned Air Vehicles use in Common Airspace*, in *Air & Space Law*, 34, 1, 2009, 1; L. MATTIONI, *Nuove prospettive per una regolamentazione europea dei sistemi aerei a pilotaggio remoto*, in *Riv. dir. nav.*, 2017, 719.

⁽⁴³⁾ A. ZAMPONE, *L'impiego dei droni nelle operazioni in ambito civile, tra realtà operativa e prospettive di ulteriori opportunità*, in *Rivista marittima*, Ottobre 2021, 46; see also L.

Such regulatory choices are based on the EASA provisions included, first of all, in the document of 29th May 2015 titled *Concept of Operations for Drones: A risk-based approach to regulation of unmanned aircraft* ⁽⁴⁴⁾, as well as in Opinion No. 01/2018, *Introduction of a regulatory framework for the operation of unmanned aircraft systems in the 'open' and 'specific' categories* ⁽⁴⁵⁾.

Section VII, devoted to unmanned aircraft, grants extensive powers to the European Commission. Under the provisions of Articles 57 (implementing acts) and 58 (delegated powers) it is called upon, in particular, to adopt:

i) implementing acts aimed at establishing detailed forecasts concerning specific rules and procedures regarding the operation of unmanned aircraft, personnel and remote pilots, as well as the organisations involved in such operations, as well as

ii) delegated acts to establish detailed rules on specific conditions for the design, production and maintenance of unmanned aircraft, engines and their parts, with binding effect on manufacturers and users of unmanned aircraft in the EU.

According to Article 76, the Commission is assisted in exercising these powers by EASA, which does so upon request and through opinions issued under and within the scope of its mandate.

This regulatory framework is complemented by the

– Delegated Regulation (EU) 2019/945 of 12th March 2019 ⁽⁴⁶⁾, on unmanned aircraft systems and on third-country operators of unmanned aircraft systems ⁽⁴⁷⁾, and the

– Implementing Regulation (EU) 2019/947 of 24th May 2019 ⁽⁴⁸⁾, on the rules and procedures for the operation of unmanned aircraft.

NAPOLITANO, *I droni ad uso civile nella prospettiva legislativa*, cit., 65; M. LAMON, *La rivoluzione aeronautica dei sistemi aerei a pilotaggio remoto e il loro esercizio nella lotta alla pandemia da Covid-19*, cit., 258.

⁽⁴⁴⁾ See www.easa.europa.eu/document-library/general-publications/concept-operations-drones.

⁽⁴⁵⁾ See www.easa.europa.eu/document-library/opinions/opinion-012018.

⁽⁴⁶⁾ Amended by Delegated Regulation (EU) 2020/1058 of 27 April 2020.

⁽⁴⁷⁾ See Article 41 of the Delegated Regulation (EU) 2019/945.

⁽⁴⁸⁾ Amended by Implementing Regulation (EU) 2020/639 of 12 May 2020, as regards standard scenarios for operations executed in or beyond the visual line of sight, by Implementing Regulation (EU) 2020/746 of 4 June 2020, as regards postponing dates of application of certain measures in the context of the COVID-19 pandemic, and by Implementing Regulation (EU) 2021/1166 of 15 July 2021, as regards postponing the date of application for standard scenarios for operations executed in or beyond the visual line of sight.

Following the new performance and risk-based approach⁽⁴⁹⁾, built upon the aircraft's features, unmanned aircraft's operations are now classified into three categories – “open”, “specific” and “certified” – with different corresponding legal regimes and operational requirements.

The aforementioned Implementing Regulation (EU) 2019/947 is reinforced by the two Executive Decisions issued by EASA ED 2019/021/R of 10th October 2019 and ED 2020/022/R of 17th December 2020, containing guidelines and compliance methodologies for its consistent adoption by the Member States and operators in the sector⁽⁵⁰⁾.

In addition, reference should be made to the U-space regulatory framework, which should permit safe aircraft operations in all areas and for all types of unmanned operations. Supported by clear and simple rules, it aims to create and harmonise the necessary conditions for manned and unmanned aircraft to operate safely in the U-space airspace, to prevent collisions between aircraft, and to mitigate air and ground risks.

These are the provisions, applicable from 26th January 2023, introduced by

- the Delegated Regulation (EU) 2021/664 of 22nd April 2021, on a regulatory framework for the U-space;

- the Implementing Regulation (EU) 2021/665 of 22nd April 2021 amending Implementing Regulation (EU) 2017/373, as regards requirements for providers of air traffic management/air navigation services and other air traffic management network functions in the U-space airspace designated in controlled airspace;

- the Implementing Regulation (EU) 2021/666 of 22nd April 2021 amending Regulation (EU) No. 923/2012 SERA, as regards requirements for manned aviation operating in U-space airspace⁽⁵¹⁾.

In general terms, a large and exceptionally detailed legislation *corpus* results from it, intended as a whole to allow the full integration of Unmanned Aerial System navigation within the Single European Sky system.

In a nutshell, the current set of rules and regulations has the following main characteristics: the disappearance of the distinction between profes-

⁽⁴⁹⁾ M. HUTTUNEN, *Drone operations in the Specific Category: a unique approach to aviation safety*, in *The Aviation & Space Journal*, 2019, 2, 2; B. I. SCOTT, *Open Skies for Unmanned Aircraft in Europe: An Outlier or a New Approach?*, in *Air & Space Law*, 46, 1, 2021, 60.

⁽⁵⁰⁾ See the AMCs (*Acceptable Means of Compliance*) and the GMs (*Guidance Materials*), the ED 2019/021/R specifies on 5 that the relevant EU regulation does not apply to UAS operated in closed spaces.

⁽⁵¹⁾ M. HUTTUNEN, *The U-space concept*, in *Air & Space Law*, 44, 1, 2019, 69.

sional flight and recreational flight; the equalisation of UASs to traditional aircraft; the introduction of an EASA-recognised “registration” system for UAS operators; the provision of registration of the UAS only if it is a certified aircraft to be used for certain types of activities; the breakdown of operative rules in three classes – open, specific, and certified⁽⁵²⁾.

As mentioned above, ENAC promptly aligned to the new international and European Union technical regulations by adopting the ENAC UAS-IT Regulation of 4th January 2021, which also established the requirements applicable to the operations that, pursuant to Article 2, §3, lett. a), of Regulation (EU) 2018/1139, are excluded from EU legislation, and other aspects staying within the competence of Member States and, regarding Italy, remain subject to the regulations established by the national aviation authority.

In particular, completing the provisions of the Implementing Regulation (EU) 2019/947, the ENAC UAS-IT Regulation governs the registrations and operations subject to declaration (with the obligation to use the Italian D-Flight platform), pilot certificates (with the peculiarity for Italy of entrusting some tasks to recognised entities, and introducing the obligation of planning operations in BVLOS on the D-Flight platform), communication of events and investigations (as for traditional aircraft), sanctions for non-compliance with the Regulation (with reference to the EU Regulations, the Code of Navigation, and the ENAC legislation), insurance (mandatory for all operations, with reference to the EU Regulations and Articles 965 and 1015 of the Code of Navigation), security (according to the text agreed with the Ministry of the Interior and with accessibility of data to the Public Security Authority), data protection and privacy (sensitive data processing in accordance with EU Regulations and national laws), and tariffs.

ENAC is also updating all the regulatory and explanatory instruments of a lower hierarchy than the ENAC UAS-IT Regulation – such as circulars, guidelines for national standard scenarios, information notes, FAQs – to adapt them to the new legal framework. At the same time, during the last year, it has implemented a policy accompanying users towards the implementation of the European Union legal framework and has set up a National Drones Observatory with the major institutional and private stakeholders to coordinate national positions on the various technical tables set up by ICAO,

⁽⁵²⁾ A. ZAMPONE, *L'impiego dei droni nelle operazioni in ambito civile, tra realtà operativa e prospettive di ulteriori opportunità*, cit., 50; see also L. NAPOLITANO, *I droni ad uso civile nella prospettiva legislativa*, cit., 65; M. LAMON, *La rivoluzione aeronautica dei sistemi aerei a pilotaggio remoto e il loro esercizio nella lotta alla pandemia da Covid-19*, *ivi.*, 258.

EASA, and JARUS headquarters and contribute to the creation of a common position with respect to sector regulation. As proposed by ENAC, through the UNAVIA association, the Italian industry is represented on the main international tables for the definition of the technical standards necessary to guarantee the safety of CE-marked products for drones, pursuant to Regulation (EU) 2019/945⁽⁵³⁾.

The legal framework is currently completed by a set of measures adopted by the European Commission to address the unique safety challenges of emerging air mobility concepts and services and ensure that their operations will be as safe as those in manned aviation.

The package targets two emerging areas: manned “VTOL” or piloted “air taxis”, small commercial aircrafts making short flights on demand capable of vertical take-off and landing, as well as higher-risk (so-called “specific category”) unmanned drone operations.

The measures will introduce new EU-wide airworthiness certification requirements and procedures for manned and unmanned VTOL, addressing both the physical integrity and the digital security risks that could impact their safe operation. They also include “air taxi” pilot licence requirements, rules on integration into airspace (definition of flight paths, take-off and landing rules, and so forth), and specific rules enabling these aircraft to perform emergency medical services and rescue operations.

In detail, the new package issued in March and April 2024 includes:

- Delegated Regulation (EU) 2024/1107 laying down detailed rules for the continuing airworthiness of certified UAS and their components, and on the approval of organisations and personnel involved in these tasks,
- Delegated Regulation (EU) 2024/1108 as regards the initial airworthiness of unmanned aircraft systems subject to certification and third-country operators of unmanned aircraft systems,
- Implementing Regulation (EU) 2024/1109 about competent authority requirements and administrative procedures for the certification, oversight and enforcement of the continuing airworthiness of certified UAS,
- Implementing Regulation (EU) 2024/1110 concerning the initial airworthiness of UAS subject to certification and the rules and procedures for the operation of unmanned aircraft,
- Implementing Regulation (EU) 2024/1111 regarding the establishment

⁽⁵³⁾ A. QUARANTA, *Il Regolamento ENAC UAS-IT di completamento della disciplina comunitaria*, Roma, 31 marzo 2021.

of requirements for the operation of manned aircraft with a VTOL capability.

According to the Commission, this regulatory framework reaffirms the EU's position as a global leader in aviation safety and innovative air mobility, unlocking the market's full potential and setting new standards for urban transportation in the 21st century and beyond.

Finally, note that State drones⁽⁵⁴⁾ and those equivalent to them⁽⁵⁵⁾, where the provisions of the Code of Navigation do not apply (in line with the provisions of Article 3 of the 1944 Chicago Convention), are outside the scope of application of the technical regulations issued by ENAC concerning the discipline of civilian drones in national airspace⁽⁵⁶⁾.

3. Classification, certification, registration, and operations rules

European Union legislation establishes seven EU-marked UAS classes for their introduction to the EU market and use in the Single European Sky. They are identified in ascending order by codes C0 to C6:

- C0: maximum take-off mass (MTOM) less than 250 gr, maximum speed in level flight equal to 19 m/s, and maximum vertical height attainable above take-off point limited to 120 m.

- C1 – MTOM less than 900 gr, maximum speed in level flight equal to 19 m/s, and maximum attainable height less than 120 m.

- C2 – MTOM less than 4 kg and maximum attainable height less than 120 m.

- C3 – MTOM less than 25 kg, characteristic dimension less than 3 m, and maximum attainable height less than 120 m.

- C4 – MTOM less than 25 kg, maximum attainable height equal to or greater than 120 m, and/or characteristic dimension equal to or greater than 3 m.

As can be seen, the primary criterion adopted by the legislator for drones' classification is the aircraft's MTOM, as the risk on the ground and for other aircraft posed by impact with them increases proportionally to the drone's mass.

The Annex to Regulation (EU) 2020/1058 introduced two further classes, C5 and C6, for drone use in specific-category operations:

⁽⁵⁴⁾ See Article 744 Code of Navigation.

⁽⁵⁵⁾ See Article 748, §1, Code of Navigation.

⁽⁵⁶⁾ Regulation (EU) 2018/1139, Delegated Regulation (EU) 2019/945, and Implementing Regulation (EU) 2019/947. See F. GASPARI, *La regolazione multilivello degli aeromobili a pilotaggio remoto*, cit., 139; M. LAMON - M. BONAZZI, *I droni a supporto della pubblica sicurezza*, in *Giureta*, 2021, 165.

- C5 comprises UASs that are not fixed-winged (e.g., “multicopters”), complying with the same technical characteristics as class C3, except for excluding the limitation to the maximum attainable height at 120 m.

- C6 comprises UASs having the same characteristics as Class C3, except for a non-electric battery power supply and/or the ability to fly at a maximum height exceeding 120 m, equipped with a system capable of preventing violations by the remote pilot of the maximum horizontal and vertical extensions of the flight, as set by the manufacturer.

Regardless of the class of belonging, all UASs shall be able to be controlled safely by remote pilots with increasing levels of expertise: for classes C0 and C1, no specific level of expertise is required; for classes C2 and C3, safe use of the aircraft is calibrated to a remote pilot with the qualifications mandated by law; for class C4, the standard is that of any foreseeable operating situation. Finally, compliance shall be secured with all regulations regarding manufacturing, product conformity, and marketing.

Lastly, a “certified” category is envisaged for UASs meeting one or more of the following characteristics: a) having a characteristic dimension equal to or greater than 3 m and being designed to fly over gatherings of people; b) being designed for the transport of people; c) being designed for the transport of hazardous goods. These UASs are subject to the certification procedures of the aircraft and its components as required for traditional aircraft by the relevant EU legislation. They are further required to register following the procedures established by the civil aviation authorities. Registration in more than one country at a time is not allowed.

Except UASs personally built by privates, unmanned aircraft which are not subject to registration shall nonetheless bear a unique serial number issued by the manufacturer and compliant with the ANSI/CTA-2063-A-2019 standard, “Small Unmanned Aerial Systems Serial Numbers”, 2019.

4. The flying rules

As anticipated, Article 3 of Regulation (EU) 2019/947 establishes a classification system for flight operations based upon increasing levels of operative risk: UAS operations are thus classified as either “open”, “specific”, or “certified”.

Regardless of the operational category, EU regulation establishes that Member States shall provide and maintain accurate registration systems for UAS whose design is subject to certification and for UAS operators whose operation may present a risk to safety, security, privacy, and protection of personal data or the environment. Obligation to register for UAS operators

(i.e., the UAS's owner or lessee) aims to identify and attribute potential civil or criminal liability.

"Open" category operations are low-risk ones for which neither prior authorisation by the civil aviation authority nor any operational declaration by the remote pilot is required. The category is subdivided into three sub-categories (A1, A2, A3), which may be summarised as follows:

- A1: fly over people but not over assemblies of people;
- A2: fly close to people;
- A3: fly far from people.

These are those operations carried out by UASs belonging to the classes above C0-C4 within their foreseen operational limits. All open category operations shall be carried out by keeping the aircraft in VLOS mode ("visual line of sight", i.e., always within the pilot's field of vision), except in follow-me flight mode (i.e., with the UAS always following the pilot within a set radius) and whenever an observer helps the remote pilot. The aircraft shall always be kept within a maximum height of 120 m from the earth's surface, except when flying over an artificial obstacle exceeding 105 m of height (e.g. a tall building, a wind turbine, etc.), in which case the maximum flight height can be increased by up to 15 m above this latter within a horizontal radius of 50 m from it, at the operator's request; explicit consent to overflight by the owner or responsible manager of the artificial obstacle is nevertheless required. For all open-category operations, it is always expressly forbidden to fly over groups of people; finally, the carriage of hazardous substances is not permitted under any circumstance, nor is the partial or total release of the material carried during the operation (e.g., as in the case of a drone carrying a fertiliser not harmful to human health to be spread on cultivated fields). Specific provisions are introduced to fly over uninvolved persons and for nocturnal flights; a minimum distance from residential, commercial, industrial, or recreational areas, and the use of UASs in an urban environment are also regulated.

The "specific" category entails a medium operational risk and comprises any operation not meeting even one of the general requirements provided for the open category, namely: when using a drone with MTOM > 25 kg; flying higher than 120m above ground level; when dropping material; when operating a drone in an urban environment with an MTOM > 4 kg or without a class identification label; when the flight is not performed in VLOS mode but in BVLOS (Beyond Visual Line Of Sight); when carrying hazardous goods or releasing material during the operation; when the UAS belongs to Classes C5 or C6. All drone operators in the specific category need to register themselves, not the actual drone, and need specific operational authorisation from the civil aviation authority of the State of registration before starting

the flight. Taking into consideration that specific category operations require prior issuance of authorisation under certain conditions, there are four different ways to operate in the specific category: submit a declaration based on a Standard Scenario (STS) ⁽⁵⁷⁾; obtain an operational authorisation following a Predefined Risk Assessment (PDRA) ⁽⁵⁸⁾; obtain an operational authorisation without a PDRA ⁽⁵⁹⁾; have a Light UAS Operator Certificate (LUC) ⁽⁶⁰⁾. The UAS operator must also draft an operational risk assessment accompanied by the corresponding mitigation measures. This shall be drafted according to the SORA methodology (Specific Operations Risk Assessment), developed by JARUS (Joint Authorities for Rulemaking on Unmanned Systems), and thoroughly described in the Easy Access Rules for Unmanned Aircraft Systems manual published by EASA. The operator is mandated to attach to the request a declaration stating that the planned operation complies with all applicable national and EU regulations, in particular regarding data and privacy protection, civil liability, insurance, safety, and environmental protection. Upon obtaining the authorisation from the civil aviation authority, the operator is free to carry out the operation as planned. Before each flight session, the operator or pilot shall request an appropriate airspace reservation via NOTAM and verify the absence of any overlaps with other operations car-

⁽⁵⁷⁾ STS is a predefined operation, described in Appendix 1 to Regulation (EU) 2019/947, that will become applicable from the 1st of January 2024. It is one of the various possibilities for the operators to start their operations. An operator is not required to obtain an operational authorisation to conduct an operation covered by an STS. It should be first checked if the operation can be accommodated under an STS. If it is so, then submitting a declaration to the national civil aviation authority of the State of registration is sufficient.

⁽⁵⁸⁾ The Predefined Risk Assessment (PDRA) is an operational scenario for which EASA has already carried out the risk assessment and has been published as an acceptable means of compliance (AMC) to Article 11 (risk assessment) of Regulation (EU) 2019/947.

⁽⁵⁹⁾ When conducting an operation not covered by an STS or a PDRA, applicants are required to conduct a risk assessment, identify mitigations and comply with safety objectives. The Specific Operations Risk Assessment (SORA) is a methodology developed for this purpose. EASA published the SORA as an Acceptable means of compliance to Article 11 to Regulation (EU) 2019/947.

⁽⁶⁰⁾ LUC is a certificate issued to a UAS operator by the national aviation authority in cases where it has demonstrated the ability to meet the levels of safety prescribed in the regulations without the need for constant oversight. The LUC assigns different privileges based on the maturity demonstrated by the operator, such as to conduct operations covered by standard scenarios without submitting a declaration, or self-authorise operations conducted by the UAS operator and covered by a PDRA without applying for an authorisation, or self-authorise all operations conducted by the UAS operator without applying for an authorisation.

ried out in BVLOS within the same area. Under Article 13 of Implementing Regulation (EU) 2019/947, cross-border operations and operations carried out outside the territory of the State of registration always fall within the specific category.

Lastly, “certified” category operations are those characterised by the highest level of risk. In particular, operations including the transport of passengers on board, both against payment and free of charge, such as the air taxi, always fall within the certified category. Drone operations in urban or rural environments using pre-defined routes in airspaces where U-space services are provided, including operations of unmanned drones carrying packages for delivery services, as well as the international flight of certified cargo drones conducted in instrumental flight rule (IFR), are comprised. Operations involving the carriage of hazardous substances can be ascribed to the specific rather than certified category if these are carried in unbreakable containers⁽⁶¹⁾. The approach used to ensure the safety of these flights is very similar to the one used for manned aviation. The operative risk cannot be adequately mitigated in the absence of certification of the aircraft and the operator. These UAVs will always need to be certified (i.e. have a type certificate and a certificate of airworthiness), the UAS operator needs an air operator approval issued by the national aviation authority, and the remote pilot is required to hold a pilot licence certifying his expertise, pursuant to Regulation (EU) 2018/1139, following the same criteria for manned aircraft. Certified category operations are entirely subject to the rules of the air in force in the Single European Sky for traditional aircraft, referred to by Implementing Regulation (EU) 2012/923, Regulation (UE) 2012/965 and Regulation (EU) 2011/1332, in line with the size and technical features of the unmanned aircraft used. All certifications listed above have EU-wide validity, whilst recognition at the EU level of certificates or qualifications for UAS operators and/or remote pilots issued by third countries is subject to the signing of bilateral agreements between these latter and the EU. The European Commission and EASA will also verify that the safety requirements under which third countries issue such certifications provide a minimum level of safety similar to that guaranteed by EU legislation. As, to date, no such bilateral agreement has been signed, all UAS users and pilots from extra-EU countries must obtain the afore-described EU certifications to fly drones in the Single European Sky.

⁽⁶¹⁾ Given the current state of the art in the drone industry, the only UAS operations that can be carried out in the certified category are military ones with NOTAM emissions.

Concerning the safety of the flight, it is worth reiterating that all rules and operational requirements described above, especially those concerning authorisations and the aircraft types admitted to the different operational categories, have been developed by EU policymakers by following a meticulous risk-based approach aimed at minimising the ground and air risks posed by UAVs' use for each type of operation, in line with the general principles on safety and security outlined in Annex IX of Regulation (UE) 2018/1139. Additionally, specific rules of conduct for UAV operators and remote pilots for each operation type are provided so that operations can be carried out most safely.

5. The operator's liability

The panorama of EU legislation lacks an instrument expressly dedicated to the liability profiles arising from the operation of unmanned aircraft. Nevertheless, this circumstance should not be considered a shortcoming but a conscious choice of legislative policy.

At present, it has been considered appropriate to establish differentiated operational limitations depending on the characteristics of the craft, the pilot's skills, the type of operations and the specifications of the areas, with a view to a proper assessment of the related risks, to minimise the opportunities for collisions and damage to third parties.

Unmanned aircraft are aircraft in any case, and the operator is still responsible for operating the vehicle: the absence of ad hoc rules does not preclude recourse to the discipline of liability related to the operation of the aircraft in force within the Member States. When transport services by UAS become effective, the rules concerning carrier liability for death and personal injury and loss of or damage to baggage and cargo will also apply.

The responsibility arising from the operation of unmanned aircraft essentially concerns flight collisions and liability for third-party damage on the ground. The increasingly widespread use of UAVs raises significant problems regarding civil liability, especially for people and goods on the surface.

Since the early stages of commercial civil aviation, establishing an effective system of protection has been of great importance to safeguard those who, whilst not participating in the flight, could bear the consequences of accidents. At the EU level, awareness of the issue appears in the "Declaration on remotely piloted aircraft (drones). Framing the future of aviation", signed in Riga on 6 March 2015, which mentioned the user's responsibility amongst the fundamental principles for future legislation on remotely piloted aircraft. This notwithstanding, no specific EU-wide legislation on the matter has been

passed to date. Whilst the classification of drone activities on increasing levels of operative risk and the provision of an EU mandatory insurance for third-party liability have partially uniformed the matter, the applicable responsibility regime still falls within Member States' domestic legislations.

At the global level, to set up an effective protection system for those who not only did not participate in the flight but also could not foresee the accident and adopt the necessary prevention measures, the Rome Convention of 7 October 1952 on third-party damage on the surface by aircraft established a regime of strict liability. The Convention applies to damage caused in the territory of a Contracting State by an aircraft registered in the territory of another Contracting State.

Any person who suffered damage on the surface shall be entitled to compensation upon proof that the damage was caused by an aircraft in flight or by any person or thing falling from that place, irrespective of actual fault or misconduct. There is no right to compensation if the damage is not a direct consequence of the accident that caused it or if the damage results from the mere passage of the aircraft through the airspace following the applicable air traffic regulations.

The operator would not be liable for damages in the following cases only: a) the accident occurred when the device was used unlawfully, despite the use of due diligence to prevent it; b) the damage was a direct consequence of an armed conflict or civil unrest, or it occurred following the loss of the availability of the device as a result of an act of a public authority; c) the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage it or of his employees or supervisors. In case of partial contribution of these to damage, their right to compensation shall be proportionally reduced to the extent to which such negligence or wrongful act or omission contributed to the damage.

The liability regime applies from the preparatory operations for take-off until the conclusion of landing. Such a wide scope of application is balanced by a compensatory limit, valued in gold francs Poincaré and increasing with the aircraft's MTOM. The operator is not entitled to any compensatory limit if the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, or if a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it.

According to EU regulation, the following subjects respond jointly for third-party damage on the surface: 1) the remote pilot, or any natural person who is responsible for the safe conduct of unmanned aircraft, having been piloting the aircraft manually, or, if the latter was flying in autonomous mode,

monitored the route whilst being capable of intervening at any time, according to Article 3(31) Regulation 2018/1139; 2) the operator of an unmanned aircraft system (UAS), or any natural or legal person who uses or intends to use one or more UASs, according to Article 2(2) Implementing Regulation 2019/947. The UAS operator who was ordered to pay compensation for third-party damage can make a claim against the remote pilot or any person referred to by point 1) above; these are commonly employees of the former or professionals enlisted for specific tasks.

Regarding the related insurance coverage, Regulation (EC) 2004/785 introduced a harmonised regime on minimum insurance requirements for air carriers and aircraft operators relative to the insurance of passengers, baggage, goods, and third parties; such regime applies to UASs as well, but not to model aircraft with MTOM less than 20 kg.

It is worth highlighting that the 1952 Rome Convention does not apply to damages resulting from the collision of a UAS with a manned aircraft (so-called “drone strikes”) or a more general disruption to air traffic from drone use, urging the adoption in the near future of appropriate legislation.

From the perspective of responsibility, alongside the position of the operator, the role of the vehicle manufacturer becomes significant.

Concerning the product liability issues, the unmanned aircraft, the engine, propellers and their parts, as well as the related remote control devices, are aeronautical products in all respects. Regulation (EU) 2019/945 establishes specific conformity requirements for UAS belonging to the “open” category, which are subject to the safety and health protection requirements of Directive 2006/42/EC on machinery, concerning risks other than those related to flight safety. The Regulation also establishes specific obligations on manufacturers (especially for assessment and declaration of conformity and affixing of the CE marking), authorised representatives, importers and distributors to preserve the EU market from risks to the safety and health of persons arising from non-compliant products.

The possible lack of conformity of the UA with respect to the specifications set forth in Regulation (EU) 2019/945 or to those set forth in Directive 2006/42/EC opens up significant liability profiles, especially in the event that an injury to the user or third parties is attributable to such a defect. It is evident, in such circumstances, that the EU legislation interferes with producer liability for defective products according to Directive 85/374 EEC, together with the implementing legislation of each Member State. From this point of view, the injured third party could well flank or even prefer the liability of the operator, that of the manufacturer, its authorised representatives or even the importer, in the case of UA produced in a third country.

On the other hand, UAVs belonging to the “specific” and “certified” categories are subject to the provisions of Article 40, which establishes the conditions under which the design, production and maintenance of UAVs must be certified. In such a case, the product must comply with the requirements set out in the Regulations (UE) 748/2012, (UE) 640/2015 and (UE) 1321/2014. The same considerations regarding product liability can be reiterated with reference to certified UAVs, although the defect must also be assessed with reference to the additional and above-mentioned regulations.

Finally, concerning the identification of the responsible parties and the liability regime applicable to the case, it is important to highlight that in the near future, when such UAs will be used for the transport of passengers and for the distribution of goods, the liability of the operator, the carrier and the producer could be combined.

6. Privacy and personal data protection

Possible relevant conflicts between the use of UASs and the protection of privacy and personal data have been known for a long time and still give rise to growing concerns as aircraft technology, the width of their fields of use, and the refinement of the cameras and other devices they can be equipped with keeps improving.

The different levels of invasiveness of data processing resulting from the use of such aircraft culminated in the “Opinion 01/2015 on Privacy and Data Protection Issues relating to the Utilisation of Drones”, issued on 16th June 2015, emphasising the urgent need to provide safeguards to the right to privacy and the protection of personal data appropriate to the specific technical-operational characteristics of UASs and providing policy recommendations thereupon.

Moving from there, Regulation (EU) 2016/679 (the so-called GDPR) was issued, wherein particular relevance was given to the need to assign responsibility to the data controller and the person in charge, urging them to have a proactive behaviour and be able to prove the adoption of measures ensuring the application of the regulation.

Such accountability principle is actualised in the complementary concepts of privacy by design and privacy by default, laid down in Article 25, by which the necessary guarantees must be put in place to meet the provisions of the regulation and protect the rights of data subjects, taking into account the overall context where the processing is carried out and the inherent risks for the rights and freedoms of data subjects, both in the processing design and planning phases, as well as in its implementation phase. In light of Recital

78, such principles ought to encompass also the manufacturer of the vehicles relative to the software wherewith they are equipped: remedies such as face blurring, pseudonymisation, data minimisation, *et similia* should therefore be adopted in the first place before processing data, to effectively provide for the elimination or, at least, the minimisation of any harm to privacy.

Current EU regulations on UASs do not seem to clash with the principles enclosed in the GDPR: indeed, the content of Recitals 28 and 31 of Regulation (EU) 2018/1139 points out that the rules for UAS operations outlined by Implementing Regulation (EU) 2019/947 have been drafted by taking in due account also potential harms to confidentiality and personal data resulting from drones use in those circumstances. In addition, according to the provisions of Annex IX to the Basic Regulation, the unmanned aircraft must have the corresponding and specific features and functionalities which consider the principles of privacy and protection of personal data by design and by default. Therefore, the need for a manufacturer's involvement in implementing the principles contained in Article 25 of the GDPR seems to be confirmed.

In short, the risk assessment regarding the safety of the operations carried out by UASs shall also incorporate the principles of EU privacy and data protection rules; furthermore, the fact that the processing is carried out by using unmanned aircraft and that, as a consequence, such processing is characterised by high invasiveness should be treated in the same way as those «risks of varying likelihood and severity» mentioned in Article 25, par. 1, of the GDPR, providing the calibration of «appropriate technical and organisational measures» for the effective implementation of the concepts of privacy by design and privacy by default contained in the aforementioned Regulation (EU) 2016/679, with respect to the individual processing that is intended to be designed and put in place.

It is undisputed that the involvement and responsibility of manufacturers, coupled with increased awareness of UAS owners, operators, and users, would contribute to minimising the risk in those cases where obtaining prior consent to the processing is not possible. However, each Member State may «lay down national rules to make subject to certain conditions the operations of unmanned aircraft for reasons [...] including public security or protection of privacy and personal data in accordance with the Union law» (Article 56.8 Regulation 1139/2018). Exceptions in domestic law must be justified by an appropriate regulatory basis and respond in any case to the principles of proportionality, precaution, and necessity with regard to the objectives pursued, such as the use of remotely piloted aircraft by the police for security purposes, activities and services in the field of civil protection or for health and safety reasons.

7. The “Drones Strategy 2.0”

In the framework of the European Green Deal, to achieve climate neutrality by 2050 and the digitalisation of the economy, to strengthen the Union’s competitiveness and empower people with a new generation of technologies, the European Commission published its “Smart and Sustainable Mobility Strategy” in December 2020, in which it announced the intention to adopt a Drone Strategy 2.0 in 2022. The aim was to foster the development of drones into a vector for the smart and sustainable mobility of the future and «to enable drones to contribute, through digitalisation and automation, to a new offer of sustainable services and transport, while accounting for possible civil/military technological synergies». The emerging drone sector and manned eVTOLs should help achieve this twin green and digital transition. The Commission’s Sustainable and Smart Mobility Strategy (SSMS), adopted in December 2020, and the linked Zero Pollution Action Plan (the zero pollution vision adopted with 12.5.2021 COM/2021 400 final) provide an ambitious roadmap aimed at putting European transport firmly on track for a sustainable, smart and resilient future.

Consequently, the Communication “A Drone Strategy 2.0 for a Smart and Sustainable Unmanned Aircraft Eco-System in Europe” [29.11.2022 COM(2022) 652 final] sets out a vision for further developing the European drone market. The new strategy lays out how Europe can pursue large-scale commercial drone operations while offering new opportunities in the sector, based on the EU’s safety framework for operating and setting the technical requirements of drones, which is the world’s most advanced. Thanks to the EU’s comprehensive regulatory framework and unleashing the potential of the EU drone market and services, the Commission envisions the following drone services becoming part of European life by 2030: emergency services, mapping, imaging, inspection and surveillance within the applicable legal frameworks by civil drones, as well as the urgent delivery of small consignments (such as biological samples or medicines); Innovative Air Mobility (IAM) services, such as air taxis, providing regular transport services for passengers, initially with a pilot on board, but with the ultimate aim of fully automating operations.

The EU updated framework aims to advance the integration and use of drones across Europe in two fundamental directions: implementing actions to further build the European drone services market, on the one hand, and adopting programs to strengthen the European drone civil, security and defence industry capabilities and synergies, on the other hand.

Concerning the first aspect, the Commission intends to amend the Standardised European Rules of the Air and the Air Traffic Management/

Air Navigation Services Regulation to integrate drone safely and piloted eVTOL operations and continue to promote coordinated research on integrated Communication, Navigation and Surveillance technologies to ensure the convergence between ATM and U-space environment. At the same time, building the Union drone services market requires facilitating aerial operations, adopting new European standard scenarios for low to medium-risk aerial operations, developing Innovative Air Mobility, introducing rules for the “certified” category of drone operations, the operational requirements applicable to eVTOL (vertical take-off and landing vehicles to transport passengers) and the design and operations of vertiports within urban areas (the EASA published specifications for their construction in March 2022). The Commission wants to ensure that society accepts and supports drones: to address concerns over noise, safety and privacy, the Strategy calls for national, regional and local municipalities to ensure that drone services align with citizens’ needs. It will also fund the creation of an online platform to support sustainable IAM implementation by authorities, communities, municipalities, industry stakeholders, and stakeholders and promote the human dimension (knowledge, training, skills, competencies).

As regards the second profile, the Commission is committed to developing a Strategic Drone Technology Roadmap to strengthen the European drone civil, security and defence industry capabilities and synergies. The strategy intends to continue funding research and innovation on drones and their integration into the airspace to identify priority areas and reduce existing strategic dependencies. Aware of the need to facilitate exchanges between civilian and defence sectors, the Commission is adopting new standard scenarios for civil operations that could facilitate corresponding military use cases.

On the military side, drones have been used in the defence sector for the last 30 years, but the drone capabilities in Europe remain less mature than in other regions of the world, whilst their potential contribution to future European strategic autonomy is widely recognised to build a stronger and more capable Union in security and defence. The theme is tragically current in this period, characterised by the severe return of war in Europe.

The Drone Strategy 2.0 should, therefore, contribute not only to the objectives set out in the “Smart and Sustainable Mobility Strategy” (SSMS) but also to the objectives of the “Action plan on synergies between civil, defence and space industries” adopted in February 2020, and which includes an EU Drone Technologies flagship project. That Action plan identified several areas of possible cross-fertilisation whereby defence projects may benefit from innovative developments of SMEs for civilian drones, and civil aeronautics may benefit from developments in the field of defence.

In summary, the EU Drone Strategy 2.0 provides a comprehensive roadmap for the safe, efficient, and sustainable integration of drones into European society and airspace, promoting innovation and economic growth while addressing regulatory and societal challenges, as well as guaranteeing the security of the Union through the military use for the defence of peace and freedom.

8. Some closing remarks

As mentioned at the beginning, Italy was the first country in the European Union to adopt a consistent set of rules on drones, subsequently revised and amended several times to adapt the legal system to the regulations of the International Civil Aviation Authority (ICAO) and the European Union.

The ENAC UAS-IT Regulation of 4th January 2021, currently in force, still represents a major example and a fundamental point of reference in the international scenario as well as in the European Union context for the completeness of the regulation and the balance of the choices made by the Italian authorities.

The analysis hitherto conducted shows that the decision, promoted by the well-known Riga Declaration and implemented in practice as of 2018, to bestow regulatory power in the UAS field to European institutions was undoubtedly adequate, as it has resulted in a thorough standardisation of the legislative framework for the civil use of drones at EU level, with the establishment of specific types of operations according to the technical characteristics of the UAS used and common safety standards.

With particular reference to Italy, this has overcome the previous national framework that saw the purpose of the operation, whether recreational or professional, as one of the fundamental criteria for identifying the applicable rules, giving rise to numerous interpretative doubts and misunderstandings in terms of application. Therefore, the new approach will undoubtedly favour the future development of the sector.

However, the task of the EU lawmaker cannot be considered complete.

The implicit reference made by the EU rules to the domestic legislation of each Member State on civil liability for third-party damage caused by UAS on the ground or to aircraft during flight may indeed be a source of uncertainty as to interpretation and regulatory harmonisation, hindering industry growth, particularly concerning cross-border professional services.

This matter does not pose particular problems for the Italian legal system. Indeed, the matter was subject to a recent reform at a time when the issue was already manifesting itself at a smaller scale compared to the present day.

Therefore, the Italian lawmaker must undoubtedly be credited with hav-

ing detected such an issue at its earliest stages, especially when revising the definition of aircraft currently contained in Article 743 of the Code of Navigation, equating UASs to traditional aircraft and thus applying thereto the provisions of the Code itself, albeit on a residual basis with respect to specific rules applying to remotely piloted aircraft.

However, the risk that the same matter might not be adequately regulated in the rest of Europe suggests that the EU should take appropriate actions, so as to truly harmonise EU-wide, not just insurance and processing of collected data, but also those rules pertaining to civil liability for damage caused by UASs to any party other than the organisers and participants to the operations.

Furthermore, as correctly highlighted by the law, another gap to be noted regards the critical relationship between liability for the aircraft operation and the hypotheses in which the operator is responsible, also jointly, for the performance of specialised professional activities where an essential role is played by the use of UASs.

The ongoing technological evolution that characterises the drone industry requires continuous verification and progressive adaptation of the rules of responsibility, to be verified and harmonised also with the rules applicable to the profiles of liability deriving from the application of artificial intelligence.

In such a context, issues might arise connected to privacy protection, liability for the consequences of drone hacking, for air pollution, contamination, and poisoning, and contractual liability as well ⁽⁶²⁾. It would indeed be desirable for the current instruments and provisions, aimed at raising awareness and consciousness (e.g., the aforementioned Data Protection Authority Handbook), to clearly define each actor's specific responsibilities in these contexts, in order to provide guidance to operators for the best protection of all interests concerned.

In the end, when we consider the set of rules and resources implemented in practice, the technological context increasingly affects the possibilities of humans doing and innervates relationships both between persons and between persons and things ⁽⁶³⁾. In other words, bringing the individuals back to the centre stage, even when it refers to the utilisation of drones, legal reasoning must always consider that the use of the vehicle is a constitutive compo-

⁽⁶²⁾ See A. ZAMPONE, *L'impiego dei droni nelle operazioni in ambito civile*, cit.

⁽⁶³⁾ See F. CABITZA, *Deus in machina? L'uso umano delle nuove macchine, tra dipendenza e responsabilità*, in L. FLORIDI - F. CABITZA, *Intelligenza artificiale. L'uso delle nuove macchine*, Milano, 2021, 6.

ment of human cognition, and it is the originating environment that forces us to reconsider our own notion of humanity⁽⁶⁴⁾.

⁽⁶⁴⁾ See F. PARISI, *La tecnologia che siamo*, Torino, 2019, 3.

CREDITS

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The contributions published in Part I essentially draw on a series of studies conducted over time on tourist protection, developed through a particularly important and significant collaboration with UN Tourism (formerly UNWTO), which began during the COVID-19 pandemic and is still ongoing⁽¹⁾. I am particularly grateful and honoured to have the privilege of cooperating with Alicia Gómez Alapont, the Agency's Director of Legal Affairs and International Standards, and her invaluable collaborators Miguel Ángel Susino Lauroba and Emily Steinmayr, as well as Jennifer Court, with whom we have completed several relevant projects⁽²⁾.

⁽¹⁾ See in particular the Massive Open Online Course on "Introduction to International Travel and Tourism Law" that I designed for the UNWTO Tourism Online Academy and I taught together with Alicia Gómez Alapont, UN Tourism Director of Legal Affairs and International Standards, Diego Augusto Benitez, Professor at the University National University of Río Negro (UNRN, Argentina), and Carlos Llorente Gómez De Segura, Professor at the IE University (Madrid, Spain), available at <https://www.unwto-tourismacademy.ie.edu/product/introduction-to-international-tourism-and-travel-law>.

⁽²⁾ The "World Tourism Law Lab", «the UNWTO Observatory that provides data on tourism and travel regulation at the global, regional and national levels, produces reports and offers support to Member States, as well as Affiliate Members and third countries, in order to achieve international cooperation in solving global problems and to be a center for harmonizing the actions of Nations (according to the purposes and principles of the Charter of the UN)» I proposed in 2020, has finally been created. The Observatory is a flagship initiative endorsed by the UNWTO 25th General Assembly, held in Samarkand, Uzbekistan, on 18-19

I would also like to express special thanks to Alessandra Pirante, the former Regional Director for Europe at UN Tourism, with whom I also had the honour and privilege of collaborating and implementing important legal initiatives.

In partnership with Professor Diego Augusto Benitez, especially, and other renowned international Colleagues, I contributed to the drafting of the “UNWTO Recommendations for the assistance to international tourists in emergency situations” (2020)⁽³⁾ and particularly the “UNWTO International Code for the Protection of Tourists” (2022)⁽⁴⁾.

Therefore, among the most relevant publications from which the present

October 2023, with Resolution 757(XXV). In particular, the first Observatory, the UNWTO “Tourism Law Observatory for Latin America and the Caribbean”, is a joint initiative of UN Tourism and the Inter-American Development Bank (IDB), created to collect, organize, analyse and disseminate tourism regulations in the Latin American and Caribbean region (“LAC”). On 3 September 2024, the head office of the Observatory was officially inaugurated at the United Nations House in Montevideo, Uruguay, being the first thematic office of UN Tourism, with a specialized focus on legal issues related to Tourism Law. The Observatory started its activities for 2025 on the basis of a survey conducted in 2024 of States members of UN Tourism in the Americas. Through its digital platform, the Observatory regularly analyses, updates and disseminates tourism laws and regulations across the region with the support of a network of academic collaborators. For further information and the free access to database, see <https://www.untourism.int/tourism-law-observatory-for-latin-america-and-the-caribbean>. Currently, a new UN Tourism Law Observatory for the Middle East is set to be established, to serve as a knowledge hub and digital platform that systematically collects, organizes, analyses, updates and disseminates tourism-related laws and regulations in the region, with the support of a network of individual experts and academic collaborators, as well as issue publications, recommendations, and organize conferences and seminars on topics of special interest. The initiative aligns with the broader mandate of UN Tourism’s Tourism Law Observatories, which «represent a long-term, large-scale initiative led by UN Tourism to be developed across its five different regions, with a view to fostering the progressive harmonization of Tourism Law at the international level, thus enhancing legal security and benefiting all tourism operators» (see more at <https://www.untourism.int/news/un-tourism-to-open-tourism-law-observatory-in-the-middle-east>).

⁽³⁾ In particular, Prof. Diego Augusto Benitez and Justice Charlotte Wezi Mesikano Malonda, Judge of the High Court of Malawi, for the “UNWTO Recommendations for the assistance to international tourists in emergency situations”, in 2020.

⁽⁴⁾ Together with the aforementioned Prof. Diego Augusto Benitez and Justice Charlotte Wezi Mesikano Malonda, also Mr. John J. Downes, International Tourism Law Consultant (United Kingdom), Prof. Julio Facal, Republic University of Montevideo (Uruguay), Prof. Claudia Lima Marques, Federal University of Rio Grande do Sul (Brazil), Miss Sarah Prager, Barrister - Bar of England and Wales (United Kingdom), Prof. Christine Riefa, University of Reading (United Kingdom), Prof. Haien Shen, China University of Political Science and Law (China), for the “UNWTO International Code for the Protection of Tourists” (2022).

contents derive, I am pleased to refer, in particular, to F. MORANDI, *The UNWTO draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Provider*, in V. FRANCESCHELLI - F. MORANDI - C. TORRES (Editors), *Sustainable Tourism Law*, Estoril-Lisbon, 2018, 203-234; F. MORANDI, *The assistance to tourists in emergency situations*, in *Giureta - Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, vol. XVIII, 2020, 287-296; L. MASALA - F. MORANDI, *The UN Tourism International Code for the Protection of Tourists: A Milestone and a New Starting Point*, in F. J. MELGOSA ARCOS - A. GÓMEZ - L. JÉGOUZO (Directors), *El Código Internacional para la Protección de los Turistas*, Madrid, 2024, pp. 187-205, and in *Giureta - Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, vol. XXII, 2024, 581-600.

Furthermore, Part II of the volume collects some works relating to the regulation of package travel contracts, a topic to which I have dedicated in-depth research for a long time, supported by the experience as a Consultant to the Italian Government⁽⁵⁾ of drafting the Legislative Decree No. 62 of 21 May 2018⁽⁶⁾, transposing the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending the Italian Tourism Code⁽⁷⁾ and the Italian Consumer Code⁽⁸⁾.

Contributions edited in Italian and international journals include, following the Table of contents, F. MORANDI, *The new European regulation of package travel and linked travel arrangements*, in *Diritto dei trasporti*, 2017, 99-112; F. MORANDI, entry: *Package travel contract and linked travel arrangements*, in *Oxford University Press - Online Encyclopaedia of EU Law*

⁽⁵⁾ As a Coordinator of the Study Group established at the Legislative Office of the Ministry of Cultural Heritage and Activities and Tourism - MiBACT, by decree of the Director of the DG for Tourism of the Mibact rep. no. 389 of 25 October 2017, devoted to legal studies on tourist guides and EU Directive 2015/2302.

⁽⁶⁾ D.lgs. 21 maggio 2018, n. 62, “Attuazione della direttiva (UE) 2015/2302 del Parlamento europeo e del Consiglio, del 25 novembre 2015, relativa ai pacchetti turistici e ai servizi turistici collegati, che modifica il regolamento (CE) n. 2006/2004 e la direttiva 2011/83/UE del Parlamento europeo e del Consiglio e che abroga la direttiva 90/314/CEE del Consiglio”.

⁽⁷⁾ See Articles 1 and 3 of the Legislative Decree No. 62/2018, “Modifiche all’Allegato 1 al decreto legislativo 23 maggio 2011, n. 79”, repealing the “Chapter I of Title VI of Annex 1 to Legislative Decree 23 May 2011, n. 79” (“Organized tourism contracts”), introducing the new text of Articles 32-51-*novies* of the Italian Tourism Code, concerning package travel contracts and linked travel arrangements.

⁽⁸⁾ See Article 2 of the Legislative Decree No. 62/2018, “Modifiche al decreto legislativo 6 settembre 2005, n. 206”.

(OEEUL), edited by S. Garben and L. Gormley, Oxford, September 2022; F. MORANDI, *The New Italian Regulation on Package Travel and Linked Travel Arrangements According to Directive 2015/2302/EU*, in *EuCML - Journal of European Consumer and Market Law*, München, 2020, 93-103, and F. MORANDI, *The new European Union regulation on package travel and linked travel arrangements within the Italian experience*, in C. TORRES - F. J. MELGOSA ARCOS - L. JÉGOUZO - V. FRANCESCHELLI - F. MORANDI - F. TORCHIA (Editors), *Collective Commentary about The New Package Travel Directive*, Estoril-Lisbon, 2020, 901-950⁽⁹⁾; F. MORANDI, *The Use of Vouchers as an Alternative to Cash Refund: The Italian Way to Deal with the Pandemic*, in C. TORRES - F. J. MELGOSA ARCOS (Editors), *The Legal Impacts of COVID-19 in the Travel, Tourism and Hospitality Industry*, Estoril-Lisbon, 2022, 181-192, and in G. G. CARBONI (Editor), *Gli effetti del coronavirus su società, economia e istituzioni*, Udine, 2020, 82-91. Some in-depth information is also reported in F. MORANDI - C. TINCANI, *Responsibility for the performance of the package - Comment on Article 13, par. 1, paragraph 2, of the Directive (EU) 2015/2302*, in C. TORRES - F. J. MELGOSA ARCOS - L. JÉGOUZO - V. FRANCESCHELLI - F. MORANDI - F. TORCHIA (Editors), *Collective Commentary about The New Package Travel Directive*, Estoril-Lisbon, 2020, 320-342. Previously, I had the opportunity to intervene on this topic with S. KEILER - F. MORANDI, *Package travel and assisted travel arrangements: The proposal for a new directive in light of a possible full harmonisation approach*, in *Rivista italiana di Diritto del turismo – Italian Journal of Tourism Law*, 2014, 5-11, and F. MORANDI - S. KEILER, *The Directive on package travel and linked travel arrangements: The traveller protection in a full harmonization approach*, in V. FRANCESCHELLI - F. MORANDI - C. TORRES (Editors), *The New Package Travel Directive*, Estoril-Lisbon, 2017, 401-413.

The international publishing landscape still lacks a comprehensive Tourism Law Handbook that adequately describes the general principles and key topics of the Italian legal system.

In this sense, the short essay reported in Part III, which I worked on with Prof. Vincenzo Franceschelli, provides a first introductory understanding of the subject and paves the way for further developments in the field. See, in this regard, the reported V. FRANCESCHELLI - F. MORANDI, *Introduction to Italian Tourism Law*, in C. TORRES - F. J. MELGOSA ARCOS - L. JÉGOUZO - V.

⁽⁹⁾ See also F. MORANDI, *L'expérience italienne dans l'adoption de la directive (UE) 2015/2302*, in *Juristourisme*, 213, 10/2018.

FRANCESCHELLI - F. MORANDI (Editors), *Tourism Law in Europe*, Estoril-Lisbon, 2022, 305-323 ⁽¹⁰⁾.

The last section of the book, Part IV, is dedicated to current legal issues in the aviation sector ⁽¹¹⁾. It refers, in particular, to the protection of passengers in air transport, the regulation of airport handling services, and the regulation of the use of drones at the national level in Italy and the European Union.

In this perspective, of particular relevance are the following analyses, research, and studies carried out with Elisabetta G. Rosafio, to whom I am particularly grateful, F. MORANDI - E. G. ROSAFIO, entry: *Air carriers' liability*, in *Oxford University Press - Online Encyclopaedia of EU Law (OEEUL)*, edited by S. Garben and L. Gormley, Oxford, June 2022; F. MORANDI - E. G. ROSAFIO, entry: *Denied boarding, delay and cancellation*, in *Oxford University Press - Online Encyclopaedia of EU Law (OEEUL)*, edited by S. Garben and L. Gormley, Oxford, June 2022; F. MORANDI, entry: *Handling*, in *Elgar Concise Encyclopaedia of Aviation Law*, edited by A. Masutti and P. Mendes De Leon, 2023; as well as F. MORANDI - L. ANCIS - F. TONEATTO - C. SEVERONI - S. VERNIZZI, *The legal regulation of drones*, in M. GRAZIADEI - M. TORSSELLO (Editors), *Rapports Nationaux Italiens au XXIe Congrès International de Droit Comparé - Asunción 2022 | Italian National Reports to the XXIst International Congress of Comparative Law - Asunción 2022*, Napoli, 2022, 301-351.

Many other topics and issues addressed in recent years have been the subject of international publications ⁽¹²⁾. They are not listed here because they cover a different broad range of subjects and scientific fields, extending from environmental protection to park management ⁽¹³⁾, from ecotourism to territo-

⁽¹⁰⁾ The synthesis of the Italian regulation of the tourism sector draws inspiration from by the now "classic" handbook V. FRANCESCHELLI - F. MORANDI, *Manuale di diritto del turismo*, VIII ed., Torino, 2022 (which represents the fundamental text for the study of the subject, as well as being the first tourism law handbook published in Italy, the first edition of which dates back to 1999).

⁽¹¹⁾ See also M. O. FOLCHI - M. M. COMENALE PINTO - U. LA TORRE - F. MORANDI - R. TRANQUILLI-LEALI (Editors), *XXXIV Jornadas latinoamericanas de derecho aeronáutico y espacial*, Padova, 2010.

⁽¹²⁾ A more comprehensive list of scientific publication is available in <https://iris.uniss.it/cris/rp/rp04660>.

⁽¹³⁾ F. MORANDI - F. NICCOLINI - M. SARGOLINI (Editors), *Parks and territories. New perspectives and strategies*, Trento, 2012; A. MOSSA - J. A. CAMÚÑEZ RUIZ - F. MORANDI, *Current state of the first UNESCO Global Geopark: a case study of the Geological and Mining Park of Sardinia, Italy*, in *GeoJournal of Tourism and Geosites*, 2018, 403-418.

rial development planning⁽¹⁴⁾, from the competitiveness of SMEs⁽¹⁵⁾ to cultural and creative industries⁽¹⁶⁾, from innovation⁽¹⁷⁾ and communication in the tourism sector⁽¹⁸⁾ to the knowledge economy⁽¹⁹⁾.

By analysing some crucial issues that tourism, travel and transport law must address in the contemporary age, the book intends to provide an in-depth overview of key topics, highlighting the strengths and weaknesses of the current legal framework and presenting insights into future perspectives and challenges in an ever-evolving global landscape.

Considered together, these publications wish to testify to an unceasing curiosity for scientific research, driven by the awareness of the need for a trans-disciplinary approach to address complex subjects, and a constant interest in exploring new horizons of knowledge, from an investigative perspective that always places the dignity of the human person at its centre.

⁽¹⁴⁾ D. MARZO - F. MORANDI - F. NICCOLINI - M. SARGOLINI - A. TOLA - A. USAI (Editors), *Manuel européen de bonnes pratiques sur l'organisation et la planification écotouristique*, Pisa, 2012.

⁽¹⁵⁾ A. USAI - D. PORCHEDDU - F. MORANDI - S. CARDINALI - M. DEL GIUDICE (Editors), *Entrepreneurship & SMEs in Emerging Markets: Competitiveness & Innovation in Knowledge Economy*, proceedings of the SGBED - The Society for Global Business & Economic Development, 6th Research Symposium, 2017.

⁽¹⁶⁾ G. BALATA - R. PORCU - A. USAI - F. MORANDI - A. TOLA, *Pushing towards technological innovation in the cultural and creative industry of Sardinia*, in *Rivista Piccola Impresa/Small Business*, n. 3/2018, 10-37.

⁽¹⁷⁾ A. USAI - F. MORANDI - M. IESU - G. FOLINO, *Innovation in Tourism Sector. Strategic Projects and Technological Transfer Processes for the Competitiveness of the European Market*, Milano, 2025.

⁽¹⁸⁾ M. IESU - A. USAI - F. MORANDI, *Innovation in Tourism Communication. Strategic Models to Create Sustainable Value for Destination*, Milano, 2025.

⁽¹⁹⁾ A. USAI - D. PORCHEDDU - F. MORANDI - S. CARDINALI - M. DEL GIUDICE (Editors), *Entrepreneurship & SMEs in Emerging Markets: Competitiveness & Innovation in Knowledge Economy*, cit.

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By analysing some crucial issues that tourism, travel and transport law must address in the contemporary age, the book provides an in-depth overview of key topics, highlighting the strengths and weaknesses of the current legal framework and presenting insights into future perspectives and challenges in an ever-evolving global landscape.

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