

# *Fordham International Law Journal*

---

*Volume 17, Issue 3*

1993

*Article 2*

---

## Package Travel Contracts: Remarks on the European Community Legislation

Stefano Zunarelli\*

\*

Copyright ©1993 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Package Travel Contracts: Remarks on the European Community Legislation

Stefano Zunarelli

## **Abstract**

Although Directive No. 90/314 has had some positive effects, albeit inferior to prior expectations, the new legislation has proven innovative in legally qualifying the positions of all subjects involved in package travel. An analysis of each provision shows the dramatic impact that the Directive has had on the conclusions reached by Italian doctrine and jurisprudence on the basis of the national and international applicable regulations. Directive No. 90/314 represents a notable improvement in the protection of the consumer/traveler. While the Community Directive accomplishes the aim of harmonizing legislation within the Member States, Directive No. 90/314 by no means intends to be exhaustive.

# PACKAGE TRAVEL CONTRACTS: REMARKS ON THE EUROPEAN COMMUNITY LEGISLATION

*Stefano Zunarelli\**

## CONTENTS

Introduction.....	489
I. Content of the Directive: Comparison Between the Notions of “Organizer” and “Retailer” and Between the Notions of “Organizing Travel Agent” and “Intermediary Travel Agent” According to the Brussels Convention.....	490
II. Organic Character of the Directive: The Most Significant Improvements Vis-à-Vis The Provisions Contained in the CCV .....	494
III. The Policy of Liability Framed in Directive No. 90/314: Its Derivation From the Concept of Liability for Entrepreneurial Risk .....	497
IV. The Organizer’s and the Retailer’s Position: Joint and Several Liability or Alternative Liability.....	499
V. Limitations of the Organizer’s and the Retailer’s Liability .....	502
VI. Considerations Regarding the Implications of the Directive’s Discipline in Relation to the Organizer and the Intermediary/Retailer .....	507
VII. Considerations Concerning the Immediate Applicability of the Directive .....	508
Conclusion .....	510

## INTRODUCTION

Legal experts have recently noted changes that have been introduced by European Community (“EC” or “Community”) institutions in regulating transportation. In December 1986, for example, the EC Commission approved Regulations that constituted the first systematic attempt to harmonize maritime compe-

---

\* Professor of Transportation Law, University of Bologna, Italy. Partner, Silingardi, Zunarelli, Bassi, Bologna, Italy.

tion law.<sup>1</sup> The same tendency has been observed in the regulation of aviation law. In the past, strict aviation laws resulted in a rigid distribution of routes, as well as bilateral administrative control of tariffs. Current regulations, however, provide larger free competition areas for the airlines.

Council Directive No. 90/314 ("Directive No. 90/314" or "the Directive") of June 13, 1990<sup>2</sup> on package travel, package holidays and package tours is evidence of the increased contribution of Community institutions in framing regulations in the area of transport law. Prior to this Directive, Community legislative organs had only intervened in regulating conditions and access to the different forms of carriage. With Directive No. 90/314, the Community has, for the first time, expressed its intent to affect directly the content of carriage contracts addressing specific sectors. According to its preamble, Directive No. 90/314 was adopted to increase the level of the rights and contractual obligations of travel package consumers.<sup>3</sup>

Although Directive No. 90/314 has had some positive effects, albeit inferior to prior expectations, the new legislation has proven innovative in legally qualifying the positions of all subjects involved in package travel. An analysis of each provision shows the dramatic impact that the Directive has had on the conclusions reached by Italian doctrine and jurisprudence on the basis of the national and international applicable regulations.

*I. CONTENT OF THE DIRECTIVE: COMPARISON BETWEEN  
THE NOTIONS OF "ORGANIZER" AND "RETAILER" AND  
BETWEEN THE NOTIONS OF "ORGANIZING TRAVEL AGENT"  
AND "INTERMEDIARY TRAVEL AGENT" ACCORDING TO THE  
BRUSSELS CONVENTION*

Directive No. 90/314, notwithstanding the adoption of different terminology,<sup>4</sup> refers to the same classifications as in the

1. Commission Regulation No. 4057/86, O.J. L 378/14 (1986).

2. Council Directive No. 90/314, O.J. L 158/59 (1990).

3. *See id.* preamble, O.J. L 158/59, at 59-60 (1990) (citing EC attempts to regulate tourism, focusing on harmonization of Member State legislation, consumer protection and establishment of guidelines for Community tourism policy).

4. The wording chosen by the Community legislators reveals inaccuracy in the use of legal terminology. One example of this lack of precision in the language is the definition of "package," which consists of the phrase "offered for sale at an inclusive price." Council Directive No. 90/314, art. 2(1), O.J. L 158/59, at 60 (1990).

Brussels Convention of April 23, 1970 (the "CCV") concerning travel contracts.<sup>5</sup> In particular, the definition of "package,"<sup>6</sup> in Directive No. 90/314 corresponds directly to "the organized travel contract"<sup>7</sup> as defined in the CCV. Both provisions emphasize performance, which is the object of the contract, and the conditions for determining the consideration due to the organizer. The only difference between Article 2(1) of Directive No. 90/314 and Article 1(2) of the CCV is that a more limited application of the Directive provision exists which exclusively regulates services whose performance "covers a period of more than twenty-four hours or includes overnight accommodation."<sup>8</sup>

In terms of the object of the travel contract, both legislative texts specify that the object must consist of a pre-arranged combination of no fewer than two elements — either transport and accommodation or transport and other tourist services not ancillary to transport or accommodation.<sup>9</sup> The performances that comprise the contract's object, refer to the transport of the traveler,<sup>10</sup> to the traveler's lodging,<sup>11</sup> and to other tourist services not ancillary to transport and accommodation.<sup>12</sup>

A proper interpretation of Directive No. 90/314, that the "tourist service" connected to transport or accommodation must account for a significant portion of the package, remains ambiguous. From a literal reading of the text, the provisions of Directive No. 90/314 could be considered inapplicable to contracts in which transportation is connected to another service, whose economic incidence is negligible. Such a reading of the provision, however, might lead to unacceptable results. Consider, for ex-

---

5. International Convention on Travel Contracts, Apr. 23, 1970, *reprinted in* 9 I.L.M. 699 (1970) [hereinafter CCV].

6. Council Directive No. 90/314, art. 2(1), O.J. L 158/59, at 60 (1990).

7. CCV, *supra* note 6, art. 1(2), 9 I.L.M. at 699.

8. Council Directive No. 90/314, art. 2(1), O.J. L 158/59, at 60 (1990); CCV, *supra* note 6, art. 1(2), 9 I.L.M. at 699.

9. Council Directive No. 90/314, art. 2(1)(c), O.J. L 159/59, at 60 (1990); CCV, *supra* note 6, art. 1(2), 9 I.L.M. at 699.

10. "Consumer," in the language of Directive No. 90/314, is defined as ". . . the person who takes or agrees to take the package . . . or any person on whose behalf the principal contractor agrees to purchase the package . . . or any person to whom the principal contractor or any of the other beneficiaries transfers the package . . ." Council Directive No. 90/314, art. 2(4), O.J. L 158/59, at 60 (1990).

11. "Accommodation," is the language used in Directive No. 90/314. *Id.* art. 2(1)(b), O.J. L 158/59, at 60 (1990).

12. *Id.* art. 2(1)(c), O.J. L 158/59, at 60 (1990).

ample, a contract made by a group of opera amateurs to attend an opera performance. In this instance, the ticket price will be negligible compared to the transportation costs. Since the consumers have entered into the contract primarily to attend the opera performance, however, it would be absurd to deprive the consumers of any legal protection under Directive No. 90/314. The "significance" of the tourist services, mentioned in Article 2(1)(c) of the Directive, must be determined on a case-by-case basis.<sup>13</sup> The determination of whether a particular consumer deserves protection should rest on a judicial interpretation of the consumer's principal interest.

Another source of ambiguity in Directive No. 90/314 concerns the "inclusive price," which means the agreed total amount for complete performance of the contract by the travel organizer.<sup>14</sup> In the last part of Article 2(1) of the Directive, the legislators appropriately indicates that "[t]he separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under the Directive."<sup>15</sup> It appears contradictory to oppose the notion of a global uniform price for the package. As a matter of fact, the Community legislators, who also referred to the CCV, stressed that the "inclusive price" for the organizer does not have to be formally intended, but substantively, as the assumption of an economic risk by the organizer in rendering his service.<sup>16</sup>

Comparing the classification of subjective standards, as observed before, Article 2(a) and Article 2(2) of the Directive and

13. *Id.*

14. *Id.* art. 2(1), O.J. L 158/59, at 60 (1990). The Directive's preamble states that, ". . . the price established under the contract should not in principle be subject to revision except where the possibility of upward or downward revision is expressly provided for in the contract . . ." *Id.* preamble, O.J. L 158/59, at 60 (1990). Furthermore, the text of the Directive states

The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is calculated, and solely to allow for variations in [transportation costs, dues, taxes, fees and exchange rates].

*Id.* art. 4(4)(a), O.J. L 158/59, at 61 (1990).

15. *Id.* art. 2(1), O.J. L 158/59, at 60 (1990).

16. Eddy Wymeersch, *Le contrat touristique: Etude de la convention sur le contrat de Voyage*, in *RAPPORTS BELGES AU IXE CONGRÈS DE L'ACADÉMIE INTERNATIONALE DE DROIT COMPARÉ* 201, 205-07 (Jean Limpens ed., 1974). See Thérèse R. Houle, *Le régime juridique des agences de voyages*, 17 *CAHIERS DE DROIT* 353, 363-66 (1976) (discussing role of travel organizer); Arato, *Le Condizioni Generali di Contratto ed i Viaggi Turistici Organizzati*, in *I RIVISTA DI DIRITTO COMMERCIALE* 376 (1982) (discussing package travel contracts).

Article 1(2) and Article 1(5) of the CCV express the same notion with regard to the "package organizer," although they use different terms. Nevertheless, the "retailer," as designated in the Directive, and the "intermediary travel agent," in the CCV, differ from one another.

First, Directive No. 90/314 does not require that the "retailer" engage in regular activity. "Non occasional" activity, however, is required both in the Directive<sup>17</sup> and in the CCV for the "organizer."<sup>18</sup> There might be cases, therefore, where a subject is qualified as a "retailer" under the Directive, but is not included in the notion of a "intermediary travel agent" under the CCV. The disparity between the Directive and the CCV is evident in the case of a sport franchise, which offers a package arranged by a professional organizer, giving fans the opportunity to attend a game played abroad. The sport franchise, although not characterized as an "intermediary travel agent," according to the CCV, will be regarded as a "retailer" under the Directive.

Additionally, the activity of a subject who works as a intermediary tour agent is relevant in the Directive only when the intermediary also participates in supplying the package or, to use the definition adopted in the CCV, when he intervenes in the conclusion of an "organization travel contract."<sup>19</sup> The Directive, unlike the CCV, does not cover situations in which the "intermediary" intervenes in supplying "une ou des prestation isolées permettant d'accomplir un voyage ou un séjour quelconque" (one or more isolated performances that allow to make one trip or any accommodation).<sup>20</sup> The role of "retailer" necessarily includes another subject who has assumed the role of "organizer."

---

17. Council Directive No. 90/314, art. 2(2), O.J. L 158/59, at 60 (1990).

18. The CCV uses the wording "habitually or regularly" for "non-occasional" activity. CCV, *supra* note 5, art. 1(5), 9 I.L.M. at 699.

19. *Id.* art. 1(1), 9 I.L.M. at 699.

20. A different conclusion could be reached following article 2(1) of Directive No. 90/314, which states, "[t]he separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive." Council Directive No. 90/314, art. 2(1), O.J. L 158/59, at 60 (1990). From a literal reading of this provision, it could be assumed that, in order to have a "package," it is necessary to consider the offered performances in their entirety, required to compute the consideration, regardless of any separate billing. As a consequence, the mediator, who offers a plurality of separate, yet coordinated performances, would be regarded as an "organizer," not as a "retailer." This literal interpretation of art 2(1), however, conflicts with the general spirit of the Directive.

II. *ORGANIC CHARACTER OF THE DIRECTIVE: THE MOST SIGNIFICANT IMPROVEMENTS VIS-À-VIS THE PROVISIONS CONTAINED IN THE CCV*

Directive No. 90/314 represents a notable improvement in the protection of the consumer/traveler. As a result, it is necessary to examine the organic character of the Directive, as concisely elaborated by the Community legislators. The text of the Directive contains the principles that rule almost every aspect of package travel and accommodations.

This Article does not analyze every provision of the Directive aimed to qualify the position of the consumer. Rather its purpose is to focus on the harmonizing legislative intent found in the following provisions concerning: the promotion of packages,<sup>21</sup> the conclusion of the transportation contract,<sup>22</sup> the administrative assistance to the consumer,<sup>23</sup> the assistance during the journey,<sup>24</sup> the possibility for the consumer to transfer his booking to another suitable person,<sup>25</sup> the limitations on price revision,<sup>26</sup> the consequences of cancellation or alterations,<sup>27</sup> the liability of the organizer and of the retailer,<sup>28</sup> and the securities given by these subjects.<sup>29</sup>

One of the most significant improvements in the Directive, compared to the CCV, is the capacity for the consumer to sell his right to travel. Article 8 of the CCV provides for the possibility to derogate from the provision concerning the consumer's right to transfer his booking.<sup>30</sup> In effect, this provision has been largely derogated by the general contractual conditions of "tour operators."<sup>31</sup> In the Directive, although the legislators have limited the traveler's right to transfer his booking only under circumstances "where the consumer is prevented from proceeding with the package . . . having . . . given . . . reasonable notice of his

21. Council Directive No. 90/314, art. 3, O.J. L 158/59, at 60-61 (1990).

22. *Id.* arts. 4(1)(b) & 4(2), O.J. L 158/59, at 61 (1990).

23. *Id.* art. 4(1)(a), O.J. L 158/59, at 61 (1990).

24. *Id.* arts. 4(1)(b)(ii)-(iii), & art. 5(2), O.J. L 158/59, at 61, 62 (1990).

25. *Id.* art. 4(3), O.J. L 158/59, at 61 (1990).

26. *Id.* art. 4(4), O.J. L 158/59, at 61 (1990).

27. *Id.* arts. 4(5) & 4(6), O.J. L 158/59, at 61-62 (1990).

28. *Id.* art. 5, O.J. L 158/59, at 62 (1990).

29. *Id.* art. 7, O.J. L 158/59, at 63 (1990).

30. CCV, *supra* note 5, art. 8, 9 I.L.M. at 701.

31. *Id.*



intention before departure,"<sup>32</sup> the consumer's right cannot be excluded by means of a contractual clause.

Moreover, the express acknowledgment of the probatory value of the particulars contained in the travel brochure deserve mention.<sup>33</sup> In contrast to Article 11 of the CCV, the Directive also imposes a duty not to increase the stated price, during the twenty days prior to the stipulated departure date.<sup>34</sup>

Still relevant is the Directive provision that allows the organizer, as well as the consumer, to withdraw from the contract if there is an alteration in the program.<sup>35</sup> On the contrary, the CCV provides only for the traveler's right to reimbursement for the amount already paid.<sup>36</sup>

The protection, accorded by the Directive in Article 4(6), is a "double standard" protection.<sup>37</sup> In fact, if the organizer cancels the package before the agreed date of departure or there are conditions for the consumer to withdraw from the contract<sup>38</sup> the consumer is entitled to compensation for non-performance of the contract.<sup>39</sup> The Directive, however, is extremely vague, and the right to compensation might be excluded by an agreement between the parties, if appropriate.<sup>40</sup> Moreover, in order for the consumer to receive compensation, the Directive requires that the relevant Member State's law provide for such right.<sup>41</sup>

An increased level of protection for the consumer would have expanded even further if the original text, proposed by the Commission, had not been sensibly modified by the Council.<sup>42</sup>

---

32. Council Directive No. 90/314, art. 4(3), O.J. L 158/59, at 61 (1990).

33. *Id.* art. 4(2)(b), O.J. L 158/59, at 61 (1990).

34. *Id.* art. 4(4)(b), O.J. L 158/59, at 61 (1990); CCV, *supra* note 5, art. 11, 9 I.L.M. at 702.

35. *Id.* art. 4(5)-(6), O.J. L 158/59 at 61-62 (1990).

36. CCV, *supra* note 5, art. 10(3), 9 I.L.M. at 702.

37. Council Directive No. 90/314, art. 4(6), O.J. L 158/59, at 62 (1990).

38. Council Directive No. 90/314, art. 4(5), O.J. L 158/59, at 61-62 (1990).

39. *Id.* art. 4(6)(b), O.J. L 158/59, at 62 (1990).

40. *Id.* art. 4(6), O.J. L 158/59, at 62 (1990).

41. The relevant Member State, according to Article 1, should be the state where the packages are sold or offered for sale. Council Directive 90/314, art. 1, O.J. L 158/59, at 60 (1990).

42. The draft Council Directive concerning package travel and package holidays was presented by the Commission on March 23, 1988. This proposal included package holidays and package tours. Commission Proposal No. 88/C 96/06, O.J. C 96/5 (1988).

For example, in the original draft, the Directive covered journeys, whose length was less than twenty-four hours or which did not last until the next day.<sup>43</sup> Moreover, in order to identify the hotels, the final version of the Directive no longer requires the addresses, but only their location.<sup>44</sup> The right of the consumer to transfer the booking<sup>45</sup> is subject to greater limitations than it was in the original draft, with regard to the previously mentioned reasons,<sup>46</sup> and time constraints.<sup>47</sup> Similarly, the draft established that the organizer may cancel the package within twenty-one days before departure, when the number of persons enrolled is less than the minimum number required.<sup>48</sup> In the Directive, however, the twenty-one-day requirement, has been changed to "within the period indicated in the package description."<sup>49</sup> Finally, Article 7 of the Directive, instead of providing for a specific insurance obligation, as in the draft,<sup>50</sup> has shifted to a more generic duty to provide "sufficient evidence of security for the refund of the money paid over and for the repatriation of the consumer in the event of insolvency."<sup>51</sup>

---

43. *See id.*, art. 2, O.J. C 96/5, at 6 (1988) (not specifying that journeys must last more than twenty-four hours).

44. Council Directive No. 90/314, art. 3(2)(b), O.J. L 158/59, at 61 (1990).

45. *Id.* art. 4(3), O.J. L 158/59, at 61 (1990).

46. Council Directive No. 90/314 permits a consumer to transfer his reservation when "prevented from proceeding with the package." *Id.* The Draft required only "serious reasons," which included sickness and bereavement. Commission Proposal No. 88/C 96/06, art. 4(3), O.J. C 96/5, at 7 (1988).

47. Council Directive No. 90/314 permits a consumer to transfer his reservation with "reasonable notice" to the organizer or retailer. Council Directive No. 90/314, art. 4(3), O.J. L 158/59, at 61 (1990). The Draft, in contrast, required notice of "not less than one week before departure date." Commission Proposal No. 88/C 96/06, art. 4(3), O.J. C 96/5, at 7 (1988).

48. Commission Proposal No. 88/C 96/06, art. 4(6)(b)(i), O.J. C 96/5, at 8 (1988).

49. Council Directive No. 90/314, art. 4(6)(b)(i), O.J. L 158/59, at 62 (1990).

50. The Draft required that organizers carry insurance to cover their liability under the Directive, and that a guarantee fund be created to cover unpaid claims made under the Directive. Commission Proposal No. 88/C 96/06, O.J. C 96/5, at 8 (1988).

51. Council Directive No. 90/314, art. 7, O.J. L 158/59, at 63 (1990). In Italy, the regional legislators have chosen to impose the duty on the travel agencies to stipulate insurance policies to guarantee specific performance of the duties vis-à-vis the consumers. *See, e.g.*, L.R. Lombardia, May 9, 1983, No. 39, art. 8; L.R. Emilia Romagna, June 16, 1986, No. 31, art. 6; L.R. Lazio, Sept. 17, 1986, No. 63, art. 30; L.R. Veneto, Aug. 28, 1986, No. 66, art. 8.

### III. THE POLICY OF LIABILITY FRAMED IN DIRECTIVE NO. 90/314: ITS DERIVATION FROM THE CONCEPT OF LIABILITY FOR ENTREPRENEURIAL RISK

At first glance, it appears that the substantial policy of liability in the Directive No. 90/314 leads to a significant improvement in consumer protection. The Directive provides more rigorous legislation for the enterprises that operate in the package travel sector. However, some aspects of the legislation do not seem to have accomplished this objective.

The discipline concerning the liability of the organizer in the CCV rests largely upon the concept of fault liability, even though a majority of legal experts have also encountered elements of strict liability.<sup>52</sup> In fact, the organizer in the CCV is liable for the non-performance of the organization's duties,<sup>53</sup> even when non-performance depends on his employees.<sup>54</sup> The organizer is also liable for services that he renders directly, according to the rules regulating those services.<sup>55</sup> In addition, the organizer is liable for the damages suffered by the consumer because of the non-performance of the service, even for services that should have been performed by third parties chosen by the organizer.<sup>56</sup> The organizer, however, could be exempt from liability for the damage suffered by the consumer if the organizer proves that he acted with due care in choosing third parties.<sup>57</sup> The majority of legal experts have criticized the distinction between damage suffered by the consumer "because of" and "on the occasion of" the transport. This distinction has been elaborated by Italian jurisprudence in regulating the liability of the maritime passenger carrier.<sup>58</sup>

---

52. See Silingardi Riguzzi, *Rischio d'impresa dell'organizzatore di viaggi e assicurazione della responsabilità civile*, in Riv. GIUR. CIRCOLAZ. TRASP. 654 (1980).

53. CCV, *supra* note 5, art. 13(1), 9 I.L.M. at 702.

54. *Id.* art. 12, 9 I.L.M. at 702.

55. *Id.* art. 14, 9 I.L.M. at 702.

56. *Id.* art. 15(1), ¶ 1, 9 I.L.M. at 703.

57. *Id.* art. 15(1), ¶ 2, 9 I.L.M. at 703.

58. According to the prevalent interpretation in Italian jurisprudence, the burden of proof for injuries that occurred because of transport rests on the plaintiff, who must prove the existence of a causal nexus between the transport and the damage (the plaintiff must prove the specific causation of the damage). On the other hand, the defendant must prove that the injury was the consequence of something that was unforeseeable by him or by his employees, or the consequence of force majeure. For accidents taking place on occasion of transport, the plaintiff must prove only that it was an accident which happened during the journey, and that it would have not taken place with-

With Directive No. 90/314, the Community legislators have adopted a policy that, despite some ambiguities in the text, appears closer to the principles of strict liability or, according to a formula very popular among Italian lawyers, of liability "for entrepreneur risk." For example, Article 5(2) covers the organizer's and/or the retailer's liability for damages to the consumer for failure to perform or improper performance of the contract, "unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services."<sup>59</sup> Although fault is presumed under the Directive, the last clause of Article 5(2) employs a formula that is typical of a policy of liability for fault.<sup>60</sup>

The second part of the provision, however, limits the circumstances under which the organizer's liability is discharged. Article 5(2) states that the organizer and/or the retailer could be exempted from liability vis-à-vis the consumer only if the organizer can prove that: (i) "the failures which occur in the performance of the contract are attributable to the consumer;"<sup>61</sup> (ii) "such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable;"<sup>62</sup> (iii) such failures are due to force majeure;<sup>63</sup> and (iv) such failures are due "to an event which the organizer and/or retailer or the supplier of services, even with

---

out the occasion of the journey. The carrier, in this instance, must prove that he has done everything to ensure the safety of the passenger, according to the criteria of due care of the carrier and caution of the passenger. See Cass. 29.3.1979, n. 1803, in I GIUR. IT. 690 (1980); see also Cass. 7.2.1960, n. 244, in DIRITTO MARITIMO 557 (1962), with comment by Abbate, *Questioni in Tema di Ripartizione dell'onere della Prova nel Contratto di Passaggio*; Cass. 9.8.1972, n. 2658, in DIRITTO MARITIMO 137 (1974); App. Napoli 25.2.1981, in DIRITTO MARITIMO 385 (1981), with comment by Dani.

59. Council Directive No. 90/314, art. 5(2), O.J. L 158/59, at 62 (1990).

60. Council Directive No. 90/314, art. 5(2), O.J. L 158/59, at 62 (1990). The last clause of Article 5(2) of Directive No. 90/314 states,

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

*Id.* art. 5(2), O.J. L 158/59, at 62 (1990).

61. *Id.* art. 5(2), O.J. L 158/59, at 62 (1990).

62. *Id.*

63. *Id.* See Council Directive No. 90/314, 4(6)(b)(ii), O.J. L 158/59, at 62 (1990). Article 4(6)(b)(ii) defines *force majeure* as "unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care have been exercised." *Id.*

all due care, could not foresee or forestall."<sup>64</sup>

Notwithstanding some poor wording choices,<sup>65</sup> it appears that the Community legislators' intent in issuing Directive No. 90/314 was to exempt the organizer and/or the retailer in cases of failure to perform or improper performance. This exemption, however, is granted only when proof is supplied that the failure to perform was determined by events not related to the package, either as an accidental case or force majeure.<sup>66</sup>

#### IV. THE ORGANIZER'S AND THE RETAILER'S POSITION: JOINT AND SEVERAL LIABILITY OR ALTERNATIVE LIABILITY

The concept adopted in Directive No. 90/314 regarding the organizer's and the retailer's positions concerning their liability has not been expressed appropriately. The Community legislators' use of the formula "organizer and/or retailer" is open to various interpretations.<sup>67</sup> While the Community Directive accomplishes the aim of harmonizing legislation within the Member States, Directive No. 90/314 by no means intends to be exhaustive.

According to one interpretation, the formula provides the Member States with the legislative choice between a policy of joint and several liability and a policy of liability for failure to perform or improper performance by either the organizer or the retailer. This interpretation is strengthened by comparing the current text of the Directive<sup>68</sup> with the draft proposed by the Commission.<sup>69</sup> The Commission's draft stated that the Member States must adopt measures necessary to guarantee that in the event of failure to perform the services, the organizer or, for the

---

64. *Id.* art. 5(2), O.J. L 158/59, at 62 (1990).

65. For example, a failure cannot show "unforeseeable" character or be "unavoidable"; and an "event" cannot be "forestalled."

66. It would be interesting to compare the formula contained in the Article 4(6)(b) of Directive 90/314 with the definition of "accidental case" and "force majeure" as expressed in Cass. 29.3.1979, n.1803, *in I GIUR. IT.* 690 (1980). See Council Directive No. 90/314, art. 4(6)(b)(ii), O.J. L 158/59 at 62 (1990) (discussing force majeure).

67. See Council Directive No. 90/314, art. 2(5), O.J. L 158/59, at 60 (1990) (defining contract for purposes of Directive); *id.* art. 4(1), O.J. L 158/59 at 61 (1990) (discussing organizer and/or retailer's responsibility to provide consumers with visa and passport information); *id.* arts. 5(1), 5(2) & 5(4), O.J. L 158/59 at 62 (1990) (outlining Member State actions necessary for implementation of Directive); *id.* arts. 6-7, O.J. L 158/59 at 63 (1990) (discussing dispute resolution and provisions for insolvency).

68. Council Directive No. 90/314, art. 5(2), O.J. L 158/59, at 62 (1990).

69. Commission Proposal No. 88/C 96/06, art. 5(2), O.J. C 96/5, at 8 (1988).

States which use the other term, the retailer, is liable vis-à-vis the consumer.<sup>70</sup>

It cannot be denied, however, that in certain situations this interpretation is not satisfactory. In fact, this interpretation legitimizes the eventual choice of some Member States' legislators to exclude the liability of the organizer for the damages due to failure to perform or improper performance of the contract. A similar legislative choice, at a national level, would contradict the intent of Directive No. 90/314. Considering that the Directive aims to protect the consumer, the Directive's goal would not be fulfilled if the consumer were deprived of his right to hold liable the organizers, who are generally solvent. Moreover, such an interpretation conflicts with specific provisions in the Directive.<sup>71</sup>

For example, it would be contradictory to deny the consumer the right to sue the organizer while allowing the retailer to receive contribution from the various services' suppliers, but not from the organizer. The consequence would be particularly incongruous in the situation where damages arise from the improper performance of the organizer's duties, which should be the retailer's responsibility.

The same formula, "the organizer and/or retailer," is employed in Article 6 of Directive No. 90/314, which establishes the duty of prompt assistance to a consumer in difficulty.<sup>72</sup> Community legislators intended to directly regulate the rights and obligations of the parties. Therefore, the Community legislators did not intend to permit the Member States to decide whether the "organizer and/or retailer" should be liable for the consumer/traveler's damages.

Another interpretation of the Directive's use of the words "organizer and/or retailer" derives from the letter of introduction contained in Directive No. 90/314.<sup>73</sup> Paragraph 22 of the introduction states,

[T]he organizer and/or retailer party to the contract should

70. *Id.*

71. *See* Council Directive No. 90/314, art. 1, O.J. L 158/59, at 60 (1990) (stating that Directive aims to approximate Member State legislation); *id.* art. 5, O.J. L 158/59, at 62 (1990) (referring to liability for failure to perform or non-performance); *id.* art. 8, O.J. L 158/59, at 63 (1990) (giving Member States power to adopt more stringent regulations).

72. *Id.* art. 6, O.J. L 158/59, at 63 (1990).

73. *Id.* intro., O.J. L 158/59 at 60 (1990).

be liable to the consumer for the proper performance of obligations arising from the contract . . . moreover the organizer and/or retailer should be liable for the damage resulting for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services.<sup>74</sup>

Regarding the right to sue for damages, the use of the word "and," rather than "and/or" indicates the legislators' decision to regard both the organizer and the retailer as defendants of the alleged violation. Therefore, only a system of joint and several liability would fulfill the Directive's aims. Nevertheless, this interpretation, although proposing better protection of the consumer's rights, does not classify the meaning of the formula "and/or" in the Directive. In effect, it is very difficult to follow the legislator's intention.

The first part of Article 5(1) of the Directive, which regulates the liability policy concerning the package services, provides a good textual reference.<sup>75</sup> In the first part of this provision, the legislator establishes that "Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the contractual obligations."<sup>76</sup> The legislator's choice of the term "to ensure" indicates an intent to create the right to sue for damages against at least one of the two categories. Therefore, Member State legislators might state that, in the case that the consumer can not act against the person (organizer or retailer) who is directly responsible, the consumer can still sue the other subjects mentioned in the provision.<sup>77</sup>

The procedure expressed in Directive No. 90/314 regarding the identification of the defendant in a consumer action for

---

74. *Id.* intro., ¶ 22, O.J. L 158/59 at 60 (1990).

75. *Id.* art. 5(1), O.J. L 158/59, at 62 (1990). Article 5(1) states Member states shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.

*Id.*

76. *Id.* art. 5(1), O.J. L 158/59, at 62 (1990).

77. *Id.* art. 5(2), O.J. L 158/59, at 62 (1990).

damages appears in this sense, similar to the one afforded in Article 11(2) of the 1978 United Nations Convention on the Carriage of Goods By Sea ("the Hamburg Rules"),<sup>78</sup> which governs international maritime transport.

#### V. LIMITATIONS OF THE ORGANIZER'S AND THE RETAILER'S LIABILITY

Directive No. 90/314 states that "[i]n the matter of damages arising from the non-performance or the improper performance of the services involved in the package, Member States may allow compensation to be limited in accordance with the international conventions governing such services."<sup>79</sup> This formula employed by the Community legislators affects the present legislative system.

The first part of the provision states that compensation might be limited "in the matter of damages arising from the non-performance or the improper performance of the services involved in the package."<sup>80</sup> The performances mentioned in the provision are, of course, those included in the package. The liability of the organizer and retailer, therefore, could only be limited to the extent established by specific international conventions with regard to those performances. As a consequence, the policy contained in the Directive and the policy of Article 13(2) of the CCV<sup>81</sup> concerning liability limitations for the tour operator are inconsistent. Article 13(2) of the CCV, in fact, gives the tour operator the chance to obtain the benefit of limiting liability with specific regard to damages arising from total or partial non-performance of his organizational duties.<sup>82</sup>

Although the Directive's introduction lists some of the Conventions of uniform law governing tour operator liability, there

78. United Nations Convention on the Carriage of Goods By Sea, art. 11(1), U.N. Doc. A/CONF. 89/13 (1978), reprinted in 17 I.L.M. 603, 615 (1978)[hereinafter the Hamburg Rules]. Article 11(1), states that, notwithstanding a contractual clause which excludes the carrier's liability for damages to merchandise in the possession of the performing carrier, the carrier is liable where the right of the plaintiff cannot be exercised against the performing carrier for jurisdictional reasons, according to the uniform international system. *Id.*

79. Council Directive No. 90/314, art. 5(2), ¶ 3, O.J. L 158/59, at 62 (1990).

80. *Id.*

81. CCV, *supra* note 5, art. 13(2), 9 I.L.M. at 702.

82. *Id.*



is no mention of the CCV.<sup>83</sup> Oddly, the Community legislators have mentioned the Paris Convention of 1962<sup>84</sup> concerning hotel-keeper's liability, but failed to mention the CCV, which is the text of uniform law that specifically governs the aims of the Directive. As a result, the Member States' legislators, in adopting the Directive, cannot refer to the limitations on liability for the tour operator as stated in the CCV.

The same conclusion can be reached on the basis of similar arguments with regard to the limitations on liability for the travel mediator, according to Article 22(2) of the CCV,<sup>85</sup> for damages arising from the non-performance of the duties for which the intermediary travel agent is personally liable. Despite the different opinions concerning the duty for the Member States' legislators to provide for the retailer's subsidiary responsibility, the Directive was intended to discipline the intermediary who intervenes as a retailer according to the Directive. The intermediary will be granted limitations from liability only as specified in the Directive. In the event of non-performance of contractual obligations (or of obligations derived from legislative provisions) intermediary/retailer shall be completely liable for the traveler/consumer's damages.

The Directive's rationale is consistent with the majority of Italian jurisprudence, including constitutional interpretation. The trend, in fact, is to subordinate to even more rigorous conditions the applicability of the limitations on liability in transportation matters.<sup>86</sup>

---

83. Council Directive No. 90/314, O.J. L 158/59, at 60 (1990). The introduction states

[I]n cases where the organizer and/or retailer is liable for failure to perform or improper performance of the services involved in the package, such liability should be limited in accordance with the international conventions governing such services, in particular the Warsaw Convention of 1929 in International Carriage by Air, the Berne Convention of 1961 on Carriage by Rail, the Athens Convention of 1974 on Carriage by Sea and the Paris Convention of 1962 on the Liability of Hotelkeepers . . . .

*Id.* (citing *e.g.* Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), Oct. 12, 1929, 137 L.N.T.S. 11 (1929), T.S. No. 876 (1929); Athens Convention of 1974 on Carriage by Sea, *reprinted in* 14 I.L.M. 945 (1974)).

84. *See id.* (citing Paris Convention of 1962 on the Liability of Hotelkeepers).

85. CCV, *supra* note 5, art. 22(2), 9 I.L.M. at 704.

86. C.Cost. 22.11.1991, n.420, in DIRITTO MARITIMO 66 (1992), with comment by Berlingieri, *Limitazione della Responsabilita: Quandoe e'd Legittima?*; Trib. Messina 15.7.1989, in I DIRITTO TRASPORTI 208 (1991), with comment by Bianca F., *Su un Caso di*

The Community legislators set up a further condition to the limitations on liability of the organizer and the retailer. If damage results to the consumer from failure to perform or from improper performance of the contract, the Directive provides that "the Member States may allow compensation to be limited in accordance with the international conventions governing such services."<sup>87</sup> Therefore, limitations on liability must be contemplated in an international convention. The Directive, however, applies to journeys that take place exclusively within one Member State. It must be established, therefore, whether the limitation on liability must be claimed by the organizer and the retailer even regarding damage arising from national transport. The answer should be positive, with the specification that, regardless of the fact that the national legislation provides for some sort of limitation,<sup>88</sup> the only limitation that can be claimed is the one contained in the international convention (which was recalled by the national legislation that adopted the Directive).<sup>89</sup> Of course, the limitation recalled by the national legislators must be contemplated in an international convention, which is enforceable.<sup>90</sup>

Some doubt remains concerning the further possible requirement that limitation of liability must consist of a uniform discipline concretely applicable in the case concerning failure to perform, resulting in damage to the consumer. If this theory were accepted, no limitation could be claimed regarding the liability for performances covered by national legislation. This con-

---

*Disapplicazione della Limitazione della Responsabilita dell'armato re.*; Pret. Genova 6.7.1991, in *I DIRITTO TRASPORTI* 161 (1993).

87. Council Directive No. 90/314, art. 5(2), O.J. L 158/59, at 62 (1990).

88. *See, e.g.*, Italian Navigation Code, art. 963 (concerning limitation of liability in domestic air carriage).

89. *See* L. 19 May 1932, n.81 (approving Warsaw Convention for the Unification of Certain Rules Concerning International Air Carriage, 1929); L. 3 Dec. 1962, n.1832 (approving Hague Protocol of 1955 to the Warsaw Convention); L. 11 June 1967, n.659 (approving Guadalajara Convention of 1961, supplementary to the Warsaw Convention); L. 18 Dec. 1984, n.976 (approving Berne Convention on International Rail Carriage, 1980 (COTIF)); L. 10 June 1978, n.316 (approving Paris Convention on the Liability of Hotelkeepers, 1962).

90. Some problems might arise from regarding the organizer and the retailer of the package as beneficiary of the liability's limitation. Just as the air carrier's liability's limitation, L.7 July 1988, n.274, the legislation regarding the air carrier's liability refers, with the due adjustments, to the one contained in the Montreal Protocol n.4 of 1974, which has modified the Warsaw Convention of 1929 in International Carriage by Air. This legislation, however, has not yet been enforced.

clusion, in the absence of any textual reference in the Directive, appears inadequate and inconsistent.

The provision might be interpreted as allowing the national legislators to hold the organizer and retailer liable as the suppliers of service and for the same amount.<sup>91</sup> The only limit for the Member States, due to the necessity of ensuring a common market in services,<sup>92</sup> is that such limit is responding to the one provided for in international conventions governing such services.

The Directive's introduction, as observed before, refers to some of the conventions of uniform law whose limitations on liability can be made applicable by the Member States for the organizer and the retailer. The Community legislators made a poor choice in including among the other texts of uniform law, the Athens Convention of 1974 on Carriage by Sea.<sup>93</sup> This Convention, although entered into force on April 28, 1987,<sup>94</sup> has been criticized by many, for the slight limits it places on the liability of maritime passenger carriers.<sup>95</sup> In order to balance the inadequacy of those limits, a specific protocol, modifying the Athens Convention was signed in London on March 30, 1990.<sup>96</sup>

A problem arises if limits on liability could be made applicable by a clause in the contract. This problem is connected with the ambiguity of the formula contained in the third paragraph of Article 5(2) of Directive No. 90/314, which could be considered as not excluding the legitimacy of such a contractual clause, even if requiring a generic authorization by Member States.<sup>97</sup> On the contrary, it must be stressed that according to Article 5(3), there may be no exclusion by means of a contractual clause from the provisions of Articles 5(1) and 5(2), with the exception

---

91. Council Directive No. 90/314, art. 5(1), O.J. L 158/59, at 62 (1990). The retailer and organizer may pursue the supplier, according to Article 5(1). *Id.*

92. *See id.*, O.J. L 158/59, at 59-60 (1990) (stating objective of ensuring common market in services).

93. Athens Convention of 1974 on Carriage by Sea, *reprinted* in 14 I.L.M. 945 (1974).

94. The Athens Convention of 1974, however, has been ratified only by a slight number of Member States, primarily states in which passenger ships are registered, including Spain and the United Kingdom.

95. In this regard, see *Trasporto (contratto di)- Diritto della Navigazione- Trasporto Marittimo*, in ENC. DIR. XLIV 1205 (Milano, 1972).

96. This protocol has not yet been enforced.

97. *See* Council Directive No. 90/314, art. 5(2), O.J. L 158/59, at 62 (1990) (stating, "Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.").

of the first paragraph of Article 5(2).<sup>98</sup> Consequently, Member States seeking to extend the international convention's suggested limits on liability to package suppliers must determine whether to adopt precise legislation specifying the international conventions to which they refer.

The fourth paragraph of Article 5(2) states the potential for Member States to limit compensation under the contract for "damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package."<sup>99</sup> The possibility of limiting compensation under the contract cannot be approved. In all international transportation conventions, as well as the CCV, limits on the supplier's liability may not be decreased by means of a contractual clause. The limitation may, however, be excluded with regard to the consumer.

Moreover, from an historical perspective, the benefit of limiting liability was introduced for the first time in the Brussels Convention of 1924, which required carriers to hold a mandatory liability policy.<sup>100</sup> Obligations to carry such a policy could not be excluded by means of a contractual clause. The doubts concerning the fairness of this provision and even its complying with the Italian Constitution are not removed by the requirement that the limitation must be reasonable.

The reasonableness argument is similar to the "adequacy" requirement articulated by the Italian Constitutional Court.<sup>101</sup> However, the adequacy criterion was mandated in order to evaluate the consistency of a policy of limiting liability with the fundamental principles of the Italian constitutional system.<sup>102</sup> Conversely, in a system characterized by complete and organic legislation, further limitations should not be introduced by a contractual clause, to the detriment of the consumer. An inter-

---

98. *See id.* art. 5(3), O.J. L 158/59, at 62 (stating, "[w]ithout prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.").

99. *Id.* art. 5(2), O.J. L 158/59, at 62 (1990).

100. Brussels Convention of 1924, International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 427, T.S. No. 931, 120 L.N.T.S. 157.

101. C. Cost. 6.5 1985, n.132, in *DIRITTO MARITIMO* 751 (1986), with comment by Fogliani.

102. *Id.* at 781.

vention of the Member States is necessary to exclude the legitimacy of those limitations' clauses.

#### VI. CONSIDERATIONS REGARDING THE IMPLICATIONS OF THE DIRECTIVE'S DISCIPLINE IN RELATION TO THE ORGANIZER AND THE INTERMEDIARY/RETAILER

The discipline contained in the Directive does not affect the reinstatement of the tour operator's position, which is associated with the service contractor by the most valued theoretical opinions and recent jurisprudence.<sup>103</sup> An innovation could only take place in the situation in which some Member States, opting for a different interpretation of the formula "organizer and/or retailer,"<sup>104</sup> chose a policy that considers the service retailer as the sole person liable to the consumer. In this instance, the organizer would be regarded as a sub-contractor of the retailer and in some cases, the organizer's position could be regarded as merely *mandatary* of the retailer, with the function of concluding contracts with suppliers for the performances within the package contract.

The Directive's effects are even more severe for the intermediary/service retailer. The Directive introduces the possibility of the retailer's liability for actions of the service supplier. As some commentators of the CCV have suggested, this perspective would determine a reconsideration of the traditional configuration of the intermediary/retailer who would be viewed as a contractor, assuming the same position as the organizer. The Directive would then follow the tendency, recently expressed in Italian jurisprudence,<sup>105</sup> as well as by the most recent international transportation conventions, that a mandatory framework should

---

103. Cass. 6.1.1982, n.7, in Riv. GIUR. CIRCOLAZ. TRASP. 524 (1982); Pret. Taranto 3.2.1984, in ARCH. CIV. 296 (1984); Silingardi-Riguzzi-Gagnoli, *Responsabilità degli Operatori Turistici*, in I Riv. GIUR. CIRCOLAZ. TRASP. 34 (1988); Deiana, *La Disciplina del Contratto di Organizzazione di Viaggio Turistico nei Viaggi Interni*, in II DIRITTO TRASPORTI 146 (1988).

104. Council Directive No. 90/314, art. 5(2), O.J. L 158/59, at 62 (1990).

105. In Italy, there has been a consistent jurisdictional tendency to emphasize the content of art. 1741 of the Civil Code (concerning the carrier), which does not seem to be in contrast with the role covered by the transport intermediary. Cass. 9.11.1982, n. 5881, in DIRITTO MARITIMO 270 (1984); App. Genova 29.12.1973, in I FORO PAD. 406 (1979); Trib. Milano 13.3.1984, in DIRITTO MARITIMO 910 (1984); Trib. Milano 1.4.1985, in DIRITTO MARITIMO 132 (1986); App. Venezia 2.2.1988, in DIRITTO MARITIMO 471 (1989).

not be employed with regard to the activity of the transport intermediary, especially, but not exclusively, in cases where the intermediary bears the economic risk of the operation.<sup>106</sup>

This theory is consistent with the legislation, which states that the Member States should provide for a regime of joint and several liability of the organizer and the retailer of the package, or a regime of sole liability upon the retailer. The same reconstruction would be inadequate if the minimum level of guarantee offered by the Member States to the consumer consists simply of a subsidiary liability of the retailer. If the Member States interpret the Directive in this manner, the legislation would be inconsistent with the configuration of the mediator/retailer as a contractor of the package.

The only reconstruction that covers both hypotheses (joint and several liability of the organizer and retailer or merely subsidiary of the retailer) consists of the retailer assuming the role of the consumer's mandatory agent and being personally liable for the non-performance of the organizer, when the consumer cannot be compensated by the organizer. This reconstruction explains the lack of an explicit reference by the Community legislators to the possibility for the retailer to ask for the organizer's contribution. There is no need for contribution when the retailer is liable for the damages resulting to the consumer only in the event that the consumer cannot obtain compensation directly from the organizer.

## VII. *CONSIDERATIONS CONCERNING THE IMMEDIATE APPLICABILITY OF THE DIRECTIVE*

Community Directives are addressed to the Member States that have to adapt their internal legislation to the Directives' contents. Until the Directives are implemented by the Member States, they are not directly effective. However, the Court of Justice of the European Community has stated, on various occasions, that in certain situations the Directives can be directly ef-

---

106. See the comments regarding the discipline of the Guadalajara Convention of 1961, 500 U.N.T.S. 31 (1961) (concerning air carriage), the Athens Convention of 1974 on Carriage by Sea, *reprinted in* 14 I.L.M. 945 (1974) (concerning persons maritime carriage), the Hamburg Convention of 1978 *reprinted in* 17 I.L.M. 603 (1978) (concerning merchandise maritime carriage) and the Geneva Convention of 1980, *reprinted in* 19 I.L.M. 1131 (1980) (concerning transport) *in* LA NOZIONE DI VETTORE 198 (Milano, 1987).

fective, even though the Member States have not ratified the Directive, according to Article 189 of the Treaty of Rome.<sup>107</sup> The Directives are binding when the provisions of the Directive have the following characteristics: (i) impose duties of "non action," such as the duty to obey to a negative rule; and (ii) appear to be unconditional and sufficiently precise to exclude any discretion of the Member States.

In Directive No. 90/314, Articles 1, 2, 3 and 4 are provisions that can be qualified as unconditional and precise. Moreover, it is significant that in the only provision in which there is a reference to Member States' participation,<sup>108</sup> Community legislators state that they must ensure only that the Directive's principles are applied. The Community legislation, however, does not mention any legislative activity.

Article 5 gives rise to a more complicated issue. At first glance, this provision implies the necessity of Member States' implementation.<sup>109</sup> Careful analysis of the Directive, however, reveals that Article 5 only provides for negative duties. In regulating the limitations on liability for the organizer and the retailer, Article 5 implicitly prohibits Member States from changing the limitations on liability when implementing the provision in their internal legislation. As a result, an immediate abrogation of provisions which are in contrast with Article 5 exists at the end of the implementation period. With regard to the Italian legal system, Article 5 abrogates Articles 13(2), 15(2) and 22(2) of the CCV.<sup>110</sup>

Some doubts may arise with regard to the direct effectiveness of the provisions concerning the identification of the person liable (or of the persons liable) for the consumer's damages and concerning the liability policy. If, as observed before, the perspective employed is one that the Community legislators regulated a minimum level of liability for entrepreneur risk, strict liability of the organizer, and only a subsidiary liability of the retailer (even though the Member States can adopt a regime of

---

107. Treaty Establishing the European Economic Community, art. 189, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3, 78 (1958).

108. Council Directive No. 90/314, art. 4(2), O.J. L 158/59, at 61 (1990).

109. Council Directive No. 90/314, art. 5(1), O.J. L 158/59, at 62 (1990). Article 5(1) states, "Member States shall take the necessary steps . . ." *Id.*

110. Compare Council Directive No. 90/314, art. 5, O.J. L 158/59 at 62 (1990) with CCV, *supra* note 5, arts. 13(2), 15(2), & 22(2), 9 I.L.M. at 702-04.

joint and several liability for the organizer and the retailer), then the provision is directly effective.<sup>111</sup> In that case, if the Member States do not implement the liability policy, the Directive is immediately and directly effective, and prevails over any previous internal legislation regulating the matter.<sup>112</sup>

Even if the perspective employed is one that the Member States have discretion concerning who bears the liability for damages arising from non-performance of the service, the provision is still directly effective. Member States can only choose the person (the organizer or the retailer) who bears liability as designated by the Community Directive.

The Italian Government has already made its choice. According to the content of the provisions contained in the CCV, the Italian legal system has found the organizer liable for the consumer's damages for the entirety of the performances comprising the package and has regarded the retailer simply as the mandatory agent of the consumer. Therefore, the organizer is liable for damages resulting to the consumer, whether he has supplied the services or whether a supplier has rendered those services on his behalf, in accordance with the rigorous regime of liability envisioned in Directive No. 90/314.

### CONCLUSION

This Article does not intend to analyze issues of public international law, which in this context could arise from the contrast between the directly effective Directive and the enforcing international Convention, of which two Member States are parties. The purpose of this Article lies in the examination of how Directive No. 90/314 has modified previous legal patterns. Legal experts are now requested to carefully consider these changes and the Member States should implement the Directive through explanatory provisions.

---

111. *See van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105 (stating that Treaty provisions that are clear and unconditional have direct effect and create "individual rights which national courts must protect").

112. *Id.*