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Study on Online Hotel Reservation Systems

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Study on online hotel reservation systems

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EXECUTIVE SUMMARY

Online hotel reservation systems are increasing in importance and greatly facilitate cross-border consumer activity. The Internet has enabled hotels to contract directly with a huge number of potential customers. It has also revitalised the role of agents and lead to a new type of agent, the web agent or travel gate, selling a far wider range of accommodation on behalf of a far wider range of hotels. However, while online booking has increased the range of offers available, there are also some emerging worries due to examples of unfair commercial practices and lack of transparency related to such reservations. This study, conducted by Civic Consulting, looks at both pre-contractual and contractual matters concerning online hotel reservation systems, examines relevant Community rules, identifies gaps and, where needed, discusses possible policy options.

Key conclusions

The study shows that the impact of Community law on online hotel bookings is rather limited. So far there is no specific Community law to regulate the use of online hotel reservation systems. There are only general Community laws – principally the Directives on distance selling, unfair commercial practices, unfair consumer contract terms and package travel. The European Commission is currently proposing to update and consolidate the first and third of these into a Directive on consumer rights.[1] The provisions of the four directives above broadly target pre-contractual and contractual matters. The directive most designed with online bookings in mind is the Distance Selling Directive which, although it does not apply to accommodating contracts, contains information duties and a consumer right to withdraw from a contract which with some modifications could usefully be applied to online hotel bookings.

The Unfair Commercial Practices Directive contains rules which by banning unfair commercial practices generally can, in theory, influence the design, layout, content and booking procedures of online reservation systems. However, its rules are not website specific, their generality leaves them vulnerable to problematic interpretation and they are not enforceable by individual consumers as rights. This study catalogued a number of ways in which consumer welfare is currently not well served by the absence of a Community website-specific law governing online reservation systems. As online reservation systems continue to grow in importance for consumers, it seems inevitable that in the future more targeted legal responses will be necessary at Community level. The question is whether this should be as a single consolidating measure or otherwise remains open.

Whether as a specific online law or as a modification of existing/proposed Directives this study has identified a variety of ways in which the current inadequate legal framework for online consumer protection could be improved and more targeted protection for online consumers achieved. These have been listed in the course of this study and are catalogued below. They reflect a mix of techniques – requiring more information to be displayed on websites, controlling booking procedures and inserting terms into accommodation contracts.

Main recommendations

This study proposes to improve the legal protection of consumers with regard to online hotel bookings. The recommendations proposed reflect deficiencies uncovered in Community legislation and can be translated in policy options to remedy those shortcomings:

⇒ Community law could ensure that a website offering online hotel bookings allows a consumer to access and read prominently and conspicuously displayed information for each bookable hotel before the booking procedure is started (for a detailed list of items, see section 5.2).

[1] COM(2008) 614 final, Proposal for a Directive on consumer rights, 8.10.2008

⇒ Community law could ensure that, when a consumer starts an online booking procedure, the website is obliged to display in a prominent and conspicuous manner the number of bedrooms remaining at the specified price, and to display a summary of contract terms relating to cancellations by the consumer and hotel.

⇒ Community law could ensure that:

- A general consumer right to fair online booking procedures be created;
- The use of tick boxes in online reservation systems is prohibited if they are pre-ticked and if the consumer would so buy additional services or goods for an extra payment.

⇒ Community law could ensure that a provision equivalent to Art. 23 of Regulation 1008/2008 on the operation of air services in the Community is created for hotel online bookings, requiring the final price of a hotel bedroom to be displayed both before and during any booking procedure.

⇒ Community law could ensure that all websites which offer online bookings prominently and conspicuously display a statement specifying whether this is a hotel website which acts directly for the hotel; or an agent's website which is authorised to take bookings for hotels; or an agent's website which acts on behalf of the customer, not the hotel. The statement would also clarify the resulting contractual situation between the parties involved.

⇒ Community law could provide, where a website acts only as agent for a hotel, that the website should in all its content (including the content of websites it provides hyperlinks to) ensure that:

- The role of the agent and the role of the hotel is clearly separate and distinguishable;
- The contract of accommodation with the hotel is clearly and unambiguously distinguished from the website's terms of use;
- The agent should be prohibited from including in its website terms of use matters which properly belong to the contract between the hotel and the consumer;
- When a website wishes to convey information about the performance of the contract of accommodation it must do so in a way which clearly indicates the authority for the statement comes or is derived from the hotel and not the agent.

⇒ Community law could ensure that a non-contracting consumer who acquires in a legally permitted manner an entitlement to stay in a hotel can exercise the same rights as a contracting consumer regarding the performance of the accommodation contract.

⇒ Consideration should be given to permit the creation of a no-reason consumer right to withdraw from an online hotel reservation on giving appropriate notice without penalty and with a full refund. The right could be exercised within 14 calendar days of making the online booking and should not be exercisable less than 20 days before the scheduled date of arrival.

⇒ Finally, consideration should also be given to including an information notice, in the written contract terms, describing the legal position when the consumer cancels during this period.

1. INTRODUCTION

E-commerce is part of today's travel industry. According to the latest web statistics in Europe[2] about 348.1 million people (i.e., 43.4 % of the entire population) surf the Internet with travel and tourism services among the most popular products on the web. According to Eurostat, online travel sales in Europe accounted for about 16.1 % of the total market[3] in 2006, up from 12.9%[4] in 2005.[5]

Airlines, hotels, and tour operators, all of whom play an important role and have their own web sites, have been joined by 'travel gates'. These are websites or Internet portals, which allow a consumer to book a hotel either as a separate service or as part of a package. These travel gates are newcomers in the market and compete with existing offerors.

According to a study by Eurostat, 89% of all accommodation sector enterprises maintained a website or a homepage in 2005.[6] These websites are used not only for marketing purposes. The study revealed that:

- 63 % of all EU accommodation websites offer additional facilities, such as direct access to catalogues[7] and accommodation prices;
- 39 % of all accommodation sector websites have received orders by Internet;
- 47 % of Internet users said they had used the Internet for services related to travel and accommodation in the three month prior to the survey.

Such statistics suggest that the accommodation sector is a greater user of information technologies than other sectors of the economy.

1.1 From CRS to the Internet

The travel industry has been using new information technology since the 1960's. The trend began in the airline industry where Computer Reservation Systems (CRS's) were installed. A number of stages were involved. The first stage was the conversion of in-house booking systems to electronic systems. The second stage involved offering intermediaries like travel agencies direct electronic access to the booking systems. Originally, airlines were the owners of the CRS's. As more CRS's were established travel agents had to decide which CRS to join. As travel agents could only join one CRS it became important for all airlines and other travel industry suppliers to gain access to all CRS's. Since the larger airlines owned the CRS's, questions of fair access and fair competition arose. Legislation was required to ensure fair access for everyone and to avoid discrimination in favour of airline owners of CRS's.[8]

At that stage hotel bookings were typically made by phone or fax. Consumers had no access to CRS's and had to make their bookings directly with the hotel or through their local travel agent. All this changed with the arrival of the Internet. Whereas a CRS was based on complicated and expensive technology, the Internet facilitated the easy and cheap establishment of a website through which bookings could be made. Now it was possible for tour operators, hotels or at least hotel chains and smaller airlines, to enter the electronic marketplace and address themselves directly to consumers and, in the process, to circumvent the distribution chain, especially travel agents.

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[2] Eurostat, Panorama on tourism 2008, p.18.
[3] I.e., EUR 39.7 billion.
[4] I.e., EUR 30.2 billion.
[5] Eurostat, Panorama on tourism, p. 18.
[6] Eurostat, Bettina Knauth, Tourism and the Internet in the European Union, Statistics in focus, 20/2006.
[7] The contents of printed brochures are also available electronically.
[8] Cf. Peeters, Revision of the Regulation on Computer Reservation Systems, European Transport Law 43 (2008) pp. 405 et seq.

Naturally the influence and market power of CRS's decreased. However, as the new market matured new types of agents, Internet agents or travel gates, emerged. These are agents without shops who by harnessing the global reach of the Internet are able to offer a global or regional choice of hotels to consumers. This is a far wider range than the one-hotel or one-chain website can offer. These new Internet agents have rapidly proved themselves as indispensable to hotels and other service suppliers as traditional agents were in the past.

Other major advantages of the new technology for the travel industry are greater flexibility, in particular with regard to price. Depending on demand prices can be adjusted on a daily or shorter basis (yield management). The Internet also allows service suppliers to deliver much more detailed information about products than brochures or media advertisements. This carries the potential to greatly increase transactional transparency, a vital matter for consumers.

1.2 Types of contract between hotels, consumers and intermediaries

The emergence of different types of websites selling accommodation has led to consumers being confronted with a variety of often difficult-to-understand contractual and legal arrangements. The legal differences between the different website sellers may not be obvious or understandable to consumers because websites are generally poor in clearly and unambiguously defining contractual relations. Much greater clarity and transparency is, as will be seen, required. The legal arrangements created by online sellers of accommodation might not be new but their use in websites poses new and different challenges for consumer protection.

The different contract possibilities can be grouped as follows:

- Website (individual hotel, chain, franchise, management agreement, marketing consortium etc.) selling directly to consumers;
- Website (independent intermediary) selling as an agent for the hotel. Such websites account for the vast majority of online hotel reservations by consumers;
- Website (independent intermediary) buying as an agent for the consumer;
- Website (independent intermediary who previously buys inventory from a hotel) selling as principle (not as agent) to the consumer;
- Website which does not itself sell any accommodation but provides a forum or virtual place for others to do so, typically, a consumer-to-consumer ticket auction. This does not seem significant in terms of hotel accommodation and is not further discussed. Such sales are not covered either by Directive 93/13/EC on unfair terms in consumer contracts or Directive 97/7/EC on distance contracts;
- Website selling bundled services as a single product (typically hotel and flight) as packages either as principle or agent. Such sales are already subject to Directive 90/314/EEC on package travel which establishes both pre-contractual and contractual consumer protections with the aim of improving transparency and fairness to consumers. Whether an online seller sells a package or something short of a package is a tricky question of law which is being addressed in the context of possible revision of the Directive and does not need to be further discussed here. Where accommodation is not sold as part of a package, the transaction will typically fall within either of the first two possibilities above.

The Directive on package travel does, however, contain important consumer protection rules regarding pre-contractual and contractual information and also a limited right of withdrawal and cancellation, both of which are worthy of examination as possible models for protecting consumers when reserving hotel accommodation online.

The first four possibilities above all raise similar issues of transparency and fairness in terms of pre-contractual and contractual matters. Where agents are involved additional issues arise. Where the agent acts as agent for the hotel seller there is still only one consumer-relevant contract, the one linking the seller and the consumer. Where the agent acts for the consumer there are two consumer-relevant contracts, one between the seller and the consumer and one between the agent and the consumer. Most websites know enough about the law to be careful to state they act only as agents for hotels, but whether this is always so depends on Member States' law. There is no Community law on the matter.

1.3 Terms of Reference and structure of the study

The Terms of Reference (TOR) require that the study has to include both pre-contractual and contractual matters on online hotel reservation systems. This dual focus is not surprising, as it is difficult to totally separate the two. Cumulatively they have an obvious impact on consumer welfare[9].

The TOR summarise the current Community rules as follows: *"Several Directives regulate consumer rights in this field. Accommodation is not covered by the provisions on withdrawal right and pre-contractual information in the Directive on distance selling, but the general provisions in the Directive on unfair commercial practices (hereafter UCP) apply. Pursuant to the UCP, marketing towards consumers or the design of booking sites online should not mislead consumers. In case of an invitation to purchase certain material information shall be provided, such as the total price and the arrangements for payment. […] Moreover, the Directive on privacy and electronic communications secures consumers a right of reservation for unsolicited direct marketing by e-mail and a number of other means of communication …"*

The study will examine these and other relevant Community rules, identify any gaps and, where needed, discuss possible policy options. The principle Community laws which will be referred to in varying degree are:

- Directive 97/7/EC on distance selling[10]
- Directive 2000/31/EC on information society services (e-commerce)[11]
- Directive 93/13/EC on unfair terms in consumer contracts[12]
- Directive 2005/29/EC on unfair business to consumer (B2C) commercial practices[13]
- Directive 90/314/EEC on package travel[14]

The policy principles which will be used in the study to test both the current law and any reform options need to be clearly outlined at the outset, are:

[9] The study does not confine the examination of contractual issues to rights of cancellation and withdrawal, but also touches upon some other elements in hotel contracts where consumer welfare is currently not well served, to provide a more comprehensive picture. Consumer interests in online and offline accommodation contracts relating to guest safety, guest privacy, bedroom noise and hotel standards are therefore discussed in Annex I.
[10] OJ No. L 144/19 of 4.6.1997.
[11] OJ No. L 178/1 of 17.7.2000.
[12] OJ No. L 95/29 of 21.4.1993.
[13] OJ No. L 149/22 of 14.6.2005.
[14] OJ No. L 158/59 of 23.3.1990.

- *Transparency*, that is, the provision of the maximum amount of relevant information to the consumer before he/she enters the booking process so as to empower the consumer to make the most rational purchase choice and further to ensure that the booking stages of the reservation system allow consumers sufficient time to digest further information and respond to best advantage;
- *Absence of information which confuses consumers and causes uncertainty*, that is, ensuring the website not only does not contain false or misleading information which deceives consumers, but also information which confuses them and causes consumer uncertainty about key aspects of the proposed contract;
- *Fairness*, that is, ensuring that the website procedures leading up to making an online booking, as well as the terms of the contract made, are fair to consumers.

Based on the Terms of Reference, relevant Community legislation and the principles just outlined, the study will be conducted under the following main headings:

- Information duties – principally pre-contractual;
- Information duties – ban on unfair B2C commercial practices;
- Contract matters – adequacy of rights of cancellation and withdrawal and other matters;
- Conclusions.

2. INFORMATION DUTIES – PRINCIPALY PRE-CONTRACTUAL

In this chapter the study will examine the adequacy of current Community law regarding the transparency of pre–contractual information on websites used for online reservations. Bearing in mind that there is no specific Community law on this matter, the study will examine a variety of consumer Directives to gauge the extent to which their protections may be relevant to online reservation systems. As the examination proceeds, gaps in the laws applicability to websites selling accommodation will be identified. A more detailed discussion of gaps and how best to fill them is found near the end of chapters 3 and 4, with a summary of all recommendations at the end of chapter 5.

2.1 Directive 2000/31/EC on electronic commerce

2.1.1 Goal of the Directive and scope

The Directive on e-commerce regulates "information society services"[15] and applies to both pre-contractual and contractual matters. The Directive was adopted in 2000 and endeavours to establish a coherent Community legal framework to support e-commerce transactions within the EU.[16] It contains, inter alia, special rules regarding electronic contracting,[17] information duties[18] and liability.[19] It also sets up rules on the establishment of service providers,[20] codes of conduct[21] and online out-of court-dispute resolution.[22]

The Directive does not apply in certain areas.[23] Taxation, some questions or practices relating to cartel law, some activities of the legal profession and gambling are excluded. However, hotel or accommodation contracts or the delivery of other travel services are not excluded.

The E-Commerce Directive focuses on both B2C and B2B transactions. While the E-Commerce Directive allows the provider of information society services to derogate from some obligations in some B2B transactions,[24] if a business books hotel accommodation for business reasons online, the transaction will generally fall under the scope of the Directive.

2.1.2 Information society services and electronic contracts

"Information society services" are defined by Art. 1 (2) of Directive 98/34/EC as amended by Directives 98/48 and 2006/96 as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".[25]

The definition requires the service to be delivered on a "distance selling" basis, i.e., without the simultaneous physical presence of both parties.[26] If a contract is concluded but the service is not provided at a distance the prerequisites of the term of "information society service" are not fulfilled.[27]

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[15] Art. 2 (a) E-Commerce Directive.
[16] See Art. 1 E-Commerce Directive.
[17] Art. 9 E-Commerce Directive.
[18] Art. 5, 6, 10 E-Commerce Directive.
[19] Art. 12 E-Commerce Directive.
[20] Art. 4 E-Commerce Directive.
[21] Art. 16 E-Commerce Directive.
[22] Art 17 E-Commerce Directive.
[23] Art. 1 (5) E-Commerce Directive.
[24] Regarding information duties see below 2.1.3.3.
[25] Art. 1 (2) Directive 98/34/EC, OJ No. L 24/37 of 21.7.1998 as amended by Directive 2006/96/EC, OJ No. L 363/81 of 20.12.2006.
[26] See Art. 2 (4) Distance Selling Directive, definition "means of distance communication".
[27] Regarding exclusions see Annex V (1) Directive 98/34/EC as amended by Directive 2006/96/EC.

The Directive provides a catalogue listing examples of services not provided "at a distance". It expressly mentions the reservation of a plane ticket at a travel agency in the physical presence of the customer by means of a network of computers as not at distance.[28] Applying this example to hotel accommodation, booking a room at a travel agency in the physical presence of the hotel guest by means of a network of computers is not an information society service and is therefore not governed by the E-Commerce Directive. When a website provides an online reservation system (where both sides are at a distance) then that is an information society service.

2.1.3 Information duties

The information to be provided under the E-Commerce Directive can be divided into general information outside or prior to the formation of a contract and special pre-contractual information to be communicated before the formation of an electronic contract.

2.1.3.1 General pre-contractual information duties, Article 5

Art. 5 imposes general information duties on the service provider to inform recipients of a variety of matters,[29] including the name of the service provider, the geographic address at which the service provider is established, the contact details of the service provider including his/her e-mail address, if the provider is registered the trade register and its identification number, if applicable the supervisory authority, special information in case of regulated professions and if the provider undertakes an activity that is subject to VAT (value added tax) the VAT-ID-number.

Information regarding price is also required. If the information society service indicates a price, this price has to be indicated clearly and unambiguously. It must also be indicated whether the price is inclusive of tax and delivery costs.[30]

The service provider is obliged to render these items of general information easily, directly and permanently accessible to the recipients of the service and competent authorities.[31] This does not mean that the information has to be delivered or sent to the consumer. However, if a service such as an online hotel booking service is offered on a website, the consumer must be able to find the general information without difficulty.

Whether this means that the information has to be available always one-click-away from every website or sub-website can be doubted. It seems sufficient and reasonable to be able to find the general information one-click from the home-website.

The duty to provide these items of general information exists even if no contract is made.

The Directive does not state in which language the information has to be displayed. To require information to be available in all official languages of the EU seems excessive. To provide the information in the language of the state where the website is located should be sufficient. It is uncertain, whether the national legislators may require further general information and in particular the use of a certain language.

2.1.3.2 Special information for commercial communications, Article 6

The E-Commerce Directive also lays down special rules for commercial communications. "Commercial communication" is defined in Art 2 (f) as "any form of communication designed to promote the goods, services or image of a company …".

[28] Annex V (1) (c) Directive 98/34/EC as amended by Directive 2006/96/EC.
[29] Art. 5 (1) E-Commerce Directive.
[30] Art. 5 (2) E-Commerce Directive.
[31] Art. 5 (1) E-Commerce Directive.

Art.2 (f) of the Directive explicitly states that information supplied to enable access to the website – such as the domain name or the e-mail address – does not constitute a commercial communication as such. The same applies if the information is compiled in an independent manner and particularly, if no financial consideration exists.

Art. 6 of the Directive requires that both the commercial communication as such[32] and the person on whose behalf it is made[33] must be clearly identifiable. This would require a website selling accommodation as an agent to clearly identify both itself and the hotel on whose behalf it sells.

Further, the provision determines that promotional offers such as discounts, premiums, gifts[34] or promotional competitions or games[35] – if permitted in the state where the service provider is established – have to be clearly identifiable as such.[36] Their qualifying or participating conditions must be easily accessible. They must also be presented clearly and unambiguously.

2.1.3.3 Contracts concluded by electronic means, Articles 10 and 11

Art. 10 and 11 of the E-Commerce Directive set out the information duties that arise when a contract is concluded by electronic means. Art. 10 stipulates information requirements before the consumer places an order.[37] Art. 11 establishes the legal principles which must apply once the order is placed. The Art. 11 principles include acknowledging receipt of the order[38] and providing the technical means to identify and correct input errors.[39] Art. 11 also provides that receipt and acknowledgment happens when they can be accessed by the addressee.

While these information duties can be excluded in B2B transactions they cannot be excluded in B2C transactions.[40] Contracts which are made exclusively by exchange of electronic mail or by equivalent individual communications, are also excluded from these obligations.[41] This rule is not easy to explain. It means that individual communication is privileged and not subject of the information duties. "Individual communication" may mean, e.g., an individual email, sent either by the consumer to the hotel or by the hotel to the consumer asking for or offering accommodation, as the case may be – contrary to the booking platform in the Internet, which is addressed to the public. For hotel bookings the exemption is of limited importance.

2.1.3.3.1 Prior information, Article 10

The service provider has to provide the information stated in Art. 10 of the Directive "prior to an order being placed by the recipient of the service"[42]. The provider has to inform the recipient about the different technical steps necessary to conclude the contract, whether the contract will be filed by the service provider and whether it will be accessible, the technical means for identifying and correcting input errors prior to the placing of the order, and also the language offered for the conclusion of the contract.

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[32] Art. 6 (a) E-Commerce Directive.
[33] Art. 6 (b) E-Commerce Directive.
[34] Art. 6 (c) E-Commerce Directive.
[35] Art. 6 (d) E-Commerce Directive.
[36] Art. 6 (c), (d) E-Commerce Directive: "where promotional offers or promotional competitions or games are permitted in the Member State where the service provider is established."
[37] Art. 11 (1) E-Commerce Directive.
[38] Art. 11 (1) E-Commerce Directive.
[39] Art 11 (2) E-Commerce Directive.
[40] Art. 10 (1); Art. 10 (2); Art. 11 (1); Art. 11(2) E-Commerce Directive: "when otherwise agreed by parties who are not consumers."
[41] Art. 10 (4); Art. 11 (3) E-Commerce Directive.
[42] Art. 10 (1) E-Commerce Directive.

If the service provider is subject to relevant codes of conduct, he/she has to indicate this and inform about how they can be consulted electronically.[43]

Of considerable potential importance to consumers booking online is the obligation in Art. 10 (3) of the E-Commerce Directive that: "Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them".

This is not a complete obligation to display all contract terms. Rather the obligation seems to be limited to whatever the website chooses to provide them. It could certainly be improved and an unqualified obligation to display all contract terms created.

Further, Art.10 is not satisfied if an accommodation contract is just displayed online in a separate window without giving the booking guest the possibility to download or print it.

2.1.3.3.2 Formation confirmation, Article 11 (1)

Art. 11 (1) of the Directive requires the service provider to acknowledge a receipt of the recipient's order. Such a confirmation does not necessarily mean acceptance in the legal sense of leading to a contract. It is an administrative step between the contractual offer and its acceptance. The confirmation has to be considered as pre-contractual information to be delivered before the formation of the contract.

The receipt must also be sent without undue delay and by electronic means - "without undue delay" is probably close to immediately. A hotel sending a confirmation two or three days after receiving an order from a consumer would not fulfil this requirement. Sending a punctual email obviously suffices. Most, if not all, websites which take bookings provide a field in the booking website requiring a consumer to add his/her e-mail address. If a guest has no e-mail account but books a room via the Internet, it seems sufficient to display the confirmation on the website right after receiving the order, subject to compliance with data protection law which may require the consumers prior consent to such a public posting.

If a website needs time to check whether a bedroom is available the acknowledgement of the receipt must still be sent. Obviously this cannot be construed as an acceptance of the consumer's offer, which can be made later.

2.1.3.4 Unsolicited commercial communication, Article 7 (1)

Art. 7 of the E-Commerce Directive deals with unsolicited commercial communication by e-mail, i.e., spam. It requires, inter alia, that unsolicited commercial communications must be clearly and unambiguously identifiable as such by the recipient.[44] This must however be read with Point 26 of Annex I of Directive 2005/29 on unfair B2C commercial practices which (with some exceptions) bans "making persistent solicitations by … email".

2.1.4 Sanctions

The E-Commerce Directive does not provide any special sanction if a service provider fails to comply with its information obligations. Rather it requires Member States to create effective, proportionate and dissuasive sanctions. They are also obliged to ensure that court actions available under national law allow for the rapid adoption of measures in order to terminate any alleged or further infringements of the interest involved.[45]

[43] Art. 10 (2) E-Commerce Directive.
[44] Recital 30; Art. 7 (1) E-Commerce Directive: "where unsolicited commercial communication by e-mail is permitted by a Member State."
[45] Art. 18 E-Commerce Directive.

2.1.5 Relation to other Directives

The information duties laid down in the E-Commerce Directive are in addition to any information duties contained in other Directives, such as the Directive 93/7/EC on distance selling and Directive 90/314/EEC on package travel. The information duties are cumulative.

This leads to the following conclusion:

1. ***The E-Commerce Directive applies to websites selling online accommodation with both parties at distance***. The information duties it imposes relate to both general information rules for all websites and information designed to promote confidence in using the Internet for commercial transactions. At the level of general Internet usage the duties appear adequate. One clearly beneficial rule from a consumer view is the obligation to send an "acknowledgement" of the receipt of the consumer's order.

2.2 Directive 97/7/EC on distance selling

2.2.1 Information duties

The Distance Selling Directive imposes information duties on suppliers of services prior to the conclusion of a distance contract.[46] It further imposes a right to receive written confirmation of the information.[47] However, as stated earlier, Art 3 (2) of the Distance Selling Directive excludes contracts for accommodation, transport, catering or leisure services for specific dates or periods (the vast majority of such contracts) from most of this Directive's consumer protections, including its pre-contractual information duties. The Commission's Proposal for a Directive on consumer rights,[48] which intends to repeal the Distance Selling Directive and become its successor, proposes retaining the exclusion of accommodation and the other contracts from the information duties. Nevertheless it is still necessary to discuss the pre-contract information duties under the Distance Selling Directive (and its successor) to see how they would apply to online hotel bookings if the exemption were removed.

2.2.1.1 Before conclusion of the distance contract, Article 4

Before making a distance contract the consumer has to be informed of certain details regarding the supplier and the service. Particularly, the following information has to be delivered:[49] the identity of the supplier and, in the case of contracts requiring payment in advance, his/her address; the main characteristics of the goods or services; the price of the goods or services including all taxes; where appropriate the delivery costs; the arrangements for payment, delivery or performance; with the existence of a right of withdrawal; the cost of using the means of distance communication, where it is calculated other than at the basic rate; the period for which the offer or the price remains valid; and, where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

[46] Art. 4 Distance Selling Directive. A distance contract is defined by the Directive as "any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded." Art.2 (1).
[47] Art. 5 Distance Selling Directive.
[48] COM (2008) 614 final of 8.10.2008.
[49] Art. 4 (1) Distance Selling Directive.

All information has to be delivered in good time before the conclusion of the contract. It must be communicated in a clear and comprehensible manner. Also the commercial purpose of the supplier must be stated clearly. [50]

2.2.1.2 Written confirmation of information, Article 5

Under Article 5 (1) the consumer must be provided with written confirmation (or confirmation in another durable form accessible to the consumer) before making the contract of most of the information listed in Art. 4 above.

If the consumer has not received this information before entering into the contract, the listed information still has to be delivered to the consumer "in good time during the performance of the contract, or, at latest, at the time of delivery where goods not for delivery to third parties are concerned".[51]

The Directive states further that in any event the consumer must be provided with written information on the conditions and procedures for exercising the right of withdrawal, the geographical address of the supplier's business place to which the consumer may send his/her complaints, information on after-sales services and guarantees, and also information on the conditions for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.[52]

Excluded from these information duties are services performed through the use of a means of distance communication if they are supplied on only one occasion and invoiced by the operator of the means of distance communication.[53] However, this exemption does not include the geographical address of the supplier's business place to which the consumer may address his/her complaints.

2.2.1.3 Non-performance, Article 7 (2), (3)

An information duty not excluded by Art. 3 (2) of the Directive and thus applicable to contracts for the provision of accommodation, transport, catering or leisure services arises when the supplier does not perform the contract[54] because the goods or services are unavailable. Then he/she is obliged to inform the customer about this. Further, if the Member States determine in their national laws that the supplier has to deliver other goods or services in such a case, the Directive requires information to be provided to the consumer regarding this possibility.[55]

2.2.2 Sanctions

If the supplier does not comply with the information duties the right to withdraw extends from a period of seven working days to a three-month period.[56] Other consequences are not determined by the Directive. The sanctioning of a violation of the information duties imposed by the Directive is left to the discretion of the Member States.[57]

This leads to the following conclusion:

[50] Art. 4 (2) Distance Selling Directive.
[51] Art. 5 (1) Distance Selling Directive.
[52] Art. 5 (1) Distance Selling Directive.
[53] Art. 5 (2) Distance Selling Directive.
[54] Art. 7 (2) Distance Selling Directive.
[55] Art. 7 (3) Distance Selling Directive.
[56] Art. 5 (2) Distance Selling Directive.
[57] Art. 11 Distance Selling Directive.

2. ***The Distance Selling Directive does not apply to websites selling hotel accommodation.*** However, some information duties listed could be usefully applied and amplified for hotels and would improve transaction transparency. These include details regarding the supplier and the service (e.g. contact details, main characteristics of the service, final price, arrangements for payment, etc.) to be delivered in good time before the conclusion of the contract. A requirement of written confirmation is already provided by the E-Commerce Directive (2000/31/EC), where the acknowledgement of receipt has to be considered as pre-contractual information to be delivered before entering the contract.

2.3 Directive 90/314/EEC on package travel

2.3.1 Information duties

The Package Travel Directive imposes a variety of pre-contractual and contractual information duties on organisers and/or retailers of packages. Depending on the time when the contract is made, the Directive requires information to be provided before the contract is concluded,[58] in the contract itself,[59] and before the start of the journey.[60]

The amount of information which an organiser must provide to a consumer prior to making a package contract depends on whether a brochure is used or not. The Directive distinguishes between information which has to be included within a brochure and information to be delivered outside of a brochure.

The word "brochure" refers only to print-media. At the time of adoption of the Directive, about 18 years ago, brochures and catalogues were the main advertising and solicitation media used. The Internet and the world wide web were not yet developed.

Over the years, recognizing the advantages of the Internet, travel sellers and consumers alike started to use these new media to spread or to receive information about tours and destinations.[61] Nowadays, the colourful printed travel brochures compete with much more colourful travel websites. The "brochure" has even been interpreted by some authorities as including modern forms of communication such as Internet websites.

Whether the information duties developed for the use of paper brochures have to be equally applied to websites marketing travel services is not decided. It is however a question which needs to be clarified at a Community level.[62] Until now it has been left to the Member States to interpret this term.

[58] Art. 3 (2) Package Travel Directive.
[59] Art. 4 (2); Annex Package Travel Directive.
[60] Art. 4 (1) (b) (i) – (iv) Package Travel Directive.
[61] See above Introduction, 1.1.
[62] See below, Gaps of legislation, 2.4, and Working Document of the Commission, Summary of Responses, p. 4 seq.

If "brochure" is interpreted as including online offers, the organiser has a duty to inform the consumer, particularly about the price of the package.[63]

The information must be indicated on the website in a legible, comprehensible and accurate manner.[64]

If the organiser does not produce a brochure the Directive requires, prior to the conclusion of the contract, that general information about passport and visa requirements is provided to the consumer, as well as information about health formalities.[65] This information must be transmitted to the consumer in writing or in another appropriate form.

Following from this, in case of online booking the duty is probably satisfied if the consumer can read this information on the hotels' or organisers' website. A narrow interpretation of this obligation could imply that the consumer should be provided with a printable version of the information.[66]

2.3.2 Contractual information – within the contract, Article 4 (2)

Art. 4 (2) and the Annex of the Package Travel Directive set out the terms which have to be stated in the package contract. They are partly identical to the information to be provided in a brochure,[67] but some go further and are more detailed.

If a package covers accommodation the organiser must provide information about its location, its tourist category or degree of comfort, its main features, its compliance with the rules of the host Member State and the meal plan.[68]

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[63] The organiser must further deliver information to the consumer about:

- The destination and the means, characteristics and categories of transport used;
- The type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;
- The meal plan;
- The itinerary;
- General information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;
- Either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;
- Whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation. Art. 3 (2) Package Travel Directive.

[64] Art. 3 (2) Package Travel Directive.

[65] Art. 4 (1) (a) Package Travel Directive.

[66] Cf. Art. 5 Distance Selling Directive: "durable medium available and accessible to him before conclusion of the contract."

[67] See above 2.3.2.

[68] Depending upon the particular package, the contract must, according to the Annex of the Package Travel Directive, state:

- The travel destination(s) and periods of stay with dates;
- The means, characteristics and categories of transportation, the dates, times and points of departure and return;
- The location of accommodation, the location, its tourist category or degree of comfort, its main features, its compliance with the rules of the host Member State concerned and the meal plan;
- Whether a minimum number of participants is required for the package and the deadline for informing the consumer in the event of cancellation;
- The itinerary;
- Visits, excursions or other services which are included in the package;
- The name and address of the organizer, the retailer and, where appropriate, the insurer;
- The price of the package, an indication of the possibility of price revisions and an indication of any dues, taxes or fees chargeable for certain services if not included in the package;
- The payment schedule and method of payment;

This information must be set out in writing or in another appropriate form which is comprehensible and accessible to the consumer. The contract terms must also be communicated to the consumer before concluding the contract. Further, the consumer has to be provided with a copy of the terms of the contract.[69] Exemptions can be made for last minute bookings where the requirements might be impracticable, depending on the interval between booking and departure.[70]

Regarding online bookings the question arises whether it is sufficient that the consumer can read the contractual information on the website or whether it is necessary that the organiser provide the consumer with a written or downloaded printed copy of the contract. It seems sufficient that the consumer can download the contract and save it. However, this needs to be clarified.

2.3.3 After conclusion of the contract – before start of the journey, Article 4 (1) (b) (i) - (iv)

After making the contract consumers must be provided with certain further information covering a variety of basic details about the tour.[71] The organiser must deliver this information a short time before the beginning of the tour – as pre-contractual information outside of a brochure – in writing or another appropriate form. Usually the consumer will receive this information with the travel confirmation.

It is again an open question whether it is sufficient to provide this information on the organiser's website or whether it is necessary to provide the consumer with a printable version.[72]

2.3.4 Sanctions

The Package Travel Directive does not provide for sanctions if an organiser or retailer fails to comply with the information duties. However, if an organiser or retailer violates these duties, it can be expected that sanctions will be applied under national law.

This leads to the following conclusion:

- Special requirements which the consumer has communicated to the organizer or retailer when making the booking, and which both have accepted;
- Periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract.

[69] Art. 4 (2) (b) Package Travel Directive.

[70] Art. 4 (2) (c) Package Travel Directive; exemptions exist, e.g., in Germany, UK, Cyprus, Slovakia, see Schulte-Nölke (ed.), EC-Consumer Law Compendium - Comparative Study. www.ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf, p. 272.

[71] Art. 4 (1) (b) Package Travel Directive.

[72] The information to be provided is the following:

- Times and places of intermediate stops and transport connections and details of the place to be occupied by the traveller;
- The name, address and telephone number of the organizer's and/or retailer's local representative or of a local agent on whose assistance a consumer in difficulty can call;
- If no representatives or agencies exist, an emergency telephone number or other information enabling him to contract the organizer and/or the retailer;
- Special contact details in the case of journeys abroad by minors;
- Further information on optional insurance policies for cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.

3. ***The Package Travel Directive (90/314/EC) places extensive pre-contractual information duties on organisers, which are related to the nature of package travel***. Even though online hotel booking does not involve a transport element and the Directive's travel-related information duties are not directly applicable, many of the Directive's other information duties are equally relevant to hotel consumers as package consumers. Since there is currently no information law at Community level for hotels and since package consumers planning to stay in a hotel are in the same position as hotel consumers planning to stay in the same place, there is no reason in equity to confine relevant information duties to package consumers only. Other hotel information relevant to non-package travellers could also be included.

2.4 Gaps and recommendations on pre-contractual information duties

At Community level, there are no specific pre-contractual information duties imposed on websites providing online hotel booking services. The pre-contractual information duties of the Package Travel Directive may serve as a model to bridge this gap, but they must be adapted to the context of hotel bookings. Some provisions are relevant for package bookings only, whereas others, like the duty to provide information about the location or about the services which are included in the price, can be transposed. Furthermore, some information duties which apply specifically to hotel bookings could also be added.

Community law should ensure that a website offering online hotel bookings permits a consumer to access and read (at the same time and in or through the same place/webpage as any photographic details of the hotel) the following information before the booking procedure is started:

- The name, address and contact details for the hotel, corporate name and contact details of hotel owner and (where applicable) manager;
- Directions for reaching the hotel by public and private transport, an address for making complaints; distance from city/town centre, visitor attractions and transport connections, as appropriate;
- Check-in and check-out times, stay-overs and early release policies;
- Any approval or tourist grade, any entitlement to the use of leisure and other hotel facilities, any meal entitlements;
- Any mandatory or recommended health requirements for staying in the area or region of the hotel;
- A statement of hotel compliance with local laws and regulations;
- A statement that any photographic or other graphic representation of the hotel, its setting or location is binding on the hotel and forms part of the contract of accommodation;
- The full text of all the standard contract terms (if any) used by the hotel in a way that ensures consumers are aware that these constitute the legal rules governing the performance of the booking being made;
- A statement, where a hotel does not have standard contract terms, along the following lines: "The hotel does not have standard terms for contracts made through this website. However, the booking still creates a contract between the hotel and you and you will both be subject to legal requirements under the accommodating contract as regards the making and performance of the accommodation contract".

This leads to the following conclusion:

4. ***Currently there are substantial gaps concerning pre-contractual information duties for online hotel bookings.*** Community law should therefore ensure that a website offering online hotel bookings permits a consumer to access and read (in or through the same place/webpage as any photographic details of the hotel) detailed information before the booking procedure is started, including all the standard contract terms or the legal rules governing the performance of the accommodation contract.

3. INFORMATION DUTIES – BAN ON UNFAIR COMMERCIAL PRACTICES

3.1 Directive 2005/29/EC on unfair commercial practices

3.1.1 Goal of the Directive

Before an accommodation contract is made online, the content of the website is mere advertising and, as such, has to comply with the law regulating advertising. Currently the most relevant piece of Community legislation is Directive 2005/29/EC on unfair business to consumer (B2C) commercial practices.[73] The transposition period for this Directive ended on the 12th of June 2007.

Before Directive 2005/29/EC came into force the principal relevant law was Directive 84/450/EEC on misleading advertising.[74] It was limited to misleading advertising and did not include the wider concept of unfair commercial practices. Any controls in this wider area were left to national law. Directive 2005/29/EC introduced the broader concept of unfairness of commercial practices and significantly expanded the scope of Community legal control over all forms of pre-contractual information provisions.

According to Art. 1 the Directive has two purposes: the functioning of the internal market and consumer protection. Differences in national laws dealing with commercial practices generally were an obstacle to the free movement of goods and services and needed harmonisation.[75] Harmonising consumer protection was necessary both to protect consumers and to protect business. The Directive "indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive".[76] "The high level of convergence … through this Directive creates a high common level of consumer protection."[77] Harmonisation "will considerably increase legal certainty for both consumers and business."[78]

3.1.2 Relevance for online hotel booking

The Unfair Commercial Practices Directive regulates marketing generally and as such clearly applies to websites which provide information while selling hotel accommodation and thus engage in B2C commercial practices. As will be seen, the scope of the Directive is so broad that it covers all aspects of online selling, including website design and layout, any advertising, the booking process and any statement or omission (or sequence of same) with a view to ensuring that consumers are not treated unfairly or mislead. Whether it applies sufficiently to specific online issues is a different question, which will be considered later in this chapter. For the Directive to apply all that is required is that the consumer can access the accommodation website.

A website addressed to business customers only (e.g. travel agents or travel departments of enterprises) does not fall within the scope of the Directive, but may derive some protection from Directive 2006/114/EC, the successor to Directive 84/450/EEC, which focused just on misleading advertising.[79]

Directive 2005/29/EC does not as such affect contract law.[80] Once the online contract is made national contract law (as modified by any relevant Community laws) applies generally to any legal disputes between the hotel and the consumer.[81]

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[73] OJ No. L 149/22 of 14.6.2005.
[74] OJ No. L 250/17 of 19.9.1984, replaced by Directive 2006/114/EC, OJ No. L 376/21 of 27.12.2006.
[75] Recital 5 Unfair Commercial Practices Directive.
[76] Recital 8 Unfair Commercial Practices Directive.
[77] Recital 11 Unfair Commercial Practices Directive.
[78] Recital 12 Unfair Commercial Practices Directive.
[79] See below 3.1.3.4.
[80] Art. 3 (2) Unfair Commercial Practices Directive.

However, the Directive can have a post-contract effect. For example, if the website contains the terms of the accommodation contract or any complaint procedures for dealing with disputes and these involve the use of unfair B2C commercial practices, these are subject to the Directive. Also the Directive applies as soon as the unfair practice is used in the Internet regardless of whether a contract is made. The Directive also applies to the content of a website which is not sourced from a hotel but is part of a selling agent's website information. This is typically the larger part of the content of a selling agent's website.

Directive 2005/29/EC is also without prejudice to Community or national rules relating to the health and safety aspects of products.[82] Insofar as health and safety aspects of the hotel are concerned, there are no such special rules.

This leads to the following conclusion:

5. ***The Unfair Commercial Practice Directive (2005/29/EC) applies fully to websites selling online hotel accommodation,*** but it applies in a general and not specific way. It applies to any website information, both pre- and post contractual. Also, consumers have no individual rights in cases of infringement of the Directive. This is left to collective mechanisms, although consumers may have rights under other consumer legislation.

3.1.3 Structure of the Directive

3.1.3.1 Scope of application: consumer - trader

The Directive applies to B2C commercial practices. A consumer is a natural person who is acting for purposes which are outside his/her trade, business, craft or profession.[83] Non-profit organisations such as parishes, sport clubs etc. are not natural persons. If such an organisation books a hotel for its members, it cannot rely on the provisions of the Directive. If the not-for-profit organisation does not have a separate legal personality it might however be covered by the Directive.

The key determinant of the scope of the Directive is the B2C "commercial practice". This is defined as: "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".[84]

Since product means "any goods or service"[85] the definition above clearly applies to hotel accommodation.

A trader is defined as any natural or legal person who is acting for purposes relating to his/her trade, business, craft or profession, as well as anyone acting in the name or on behalf of a trader, Art. 2 (b) of the Directive. A hotel is typically a trader. So is an agent selling on behalf of a hotel.

These definitions do not leave much wriggle-room for a website selling hotel accommodation to avoid the Directive if for no other reason than a website will not know in advance whether a person books as a consumer or non-consumer. As long as the website is open to the public, it must meet the standards provided by the Directive. The only way of avoiding the Directive is to operate a website which consumers do not have access to.

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[81] The relevant contract law provisions are reviewed below in chap. 4.
[82] Art. 3 (3) Unfair Commercial Practices Directive.
[83] Art. 2 (a) Unfair Commercial Practices Directive.
[84] Art. 2 (d) Unfair Commercial Practices Directive.
[85] Art. 2 (c) Unfair Commercial Practices Directive.

3.1.3.2 Type of harmonisation

The Directive on unfair commercial practices was originally proposed by the Commission as a regulation.[86] This would have had the major advantage of ensuring an identical law in all Member States and it would have helped to ensure that websites selling online in the Community were subject to exactly the same rules. The proposal for a regulation was, however, dropped during the legislative process, although the idea of full harmonisation[87] was retained (even if full implementation was partially postponed).

Although Member States are free to transpose the Directive into their own legal systems (with the possibility of variable approaches), the fact that the Directive is intended to create full harmonisation, means that the danger of variable applications of the law to different websites in different Member States, while present, is perhaps not so real. There is no doubt, however, that any proposed Community measure directed at websites selling hotel accommodation online would have a more consistent cross-border impact, if it were adopted as a regulation and not as a directive.

Another proposal designed to ensure that cross-border marketing is not subject to variable national approaches (which was canvassed but rejected during the debates on the 2005 Directive), is the country-of-origin principle. For a website, this principle would have meant that, if it complied with the national law which it was subject to, all other Member States would accept this compliance as satisfying their own legal requirements as well. This principle would obviously have improved Directive 2005/29/EC (as it stands now), but it would still not be as effective as choosing a regulation to regulate websites which sell accommodation online.

This leads to the following conclusion:

6. ***The Directive on unfair commercial practices entails the risk of variable applications of the law to different websites in different Member States.*** Consumers who buy online should enjoy the same level of legal protection no matter where the online seller is located in the Community. If any measure specifically targeted at online reservation systems were enacted as a regulation, this would have the advantage of ensuring that websites offering online reservation services in the Community would be subject to exactly the same rules. A regulation is also likely to be more effective than the country-of-origin principle in overcoming variable national approaches.

3.1.3.3 What are unfair commercial practices?

While Directive 2005/29/EC bans unfair commercial practices generally it focuses particularly on two types of practices – misleading and aggressive practices. However, the definition of unfair is important as setting the baseline for judging all B2C commercial practices.

Art. 5 (2) states that a commercial practice is unfair: "if … it is contrary to the requirements of professional diligence and … it materially distorts … the economic behaviour with regard to the product of the average consumer…".

A material distortion occurs by "using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise"[88].

[86] COM (2002) 585.
[87] Recital 14 Unfair Commercial Practices Directive.
[88] Art. 2 (e) Unfair Commercial Practices Directive.

A transactional decision is "any decision taken by a consumer whether, how and on what terms to purchase, make payment … or exercise a contractual right in relation to a product, whether the consumer decides to act or refrain from acting"[89].

The emphasis in the definition of a transactional decision is important for online hotel reservations. It means that a commercial practice can still be regarded as unfair even where a consumer decides not to buy and suffers no financial loss. This could arise where a newspaper advertisement of a special offer leads a consumer to go online to book, but discovers the offer is no longer available at that price.

The "average consumer" is not defined in the Directive itself, but the recitals in the Directive refer to definitions from the case law of the European Court of Justice.[90] This indicates that the average consumer is reasonably well-informed and reasonably observant and circumspect. He/she is a careful, not a casual or hasty reader. Social, cultural and linguistic factors must be taken into account in assessing the reaction of the average consumer.[91] The fact that the test is the reaction of a careful consumer does give more scope to websites to use borderline advertising and will make successful criminal proceedings (where proof of consumer reaction beyond all reasonable doubt is required) difficult.

3.1.3.4 Misleading actions and misleading omissions

The general ban in Directive 2005/29/EC on unfair commercial practices is supplemented by two further bans on misleading practices – one in Art. 6 on misleading actions and one in Art. 7 on misleading omissions. These bans are further supplemented in Annex I of the Directive by a blacklist of always-illegal commercial practices. This list is of particular potential relevance for online reservations and will be discussed shortly.

Of the two bans in Articles 6 and 7, only the latter will be further examined because the former – lies and mere untruths – are not typically used by traders for obvious reasons.

Commercial practices and particularly advertising is more likely to mislead by leaving material information out. Art.7 deems a commercial practice misleading "if, in its factual context, taking account of all its features and circumstances and the limitations of the communications medium, it omits material information …"[92] Because a website can display huge amounts of information there is no scope for claiming the information was left out because there was no space for it. Material information is defined in Art. 7 (3) as main characteristics of the product, the geographic address and identity of both trader and agent, price inclusive of taxes and payment and performance arrangements.[93]

On a website an invitation to purchase is only likely to be made when the full details of the accommodation to be booked are displayed so that the booking can be made. This might only occur at a late stage in a booking procedure. The definition of an invitation to purchase in Art. 2 (i) says it means "a commercial communication which indicates characteristics of the product and the price … and thereby enables the consumer to make a purchase". The consumer is only enabled to make the purchase when all details, including availability and dates etc are known. This is typically only known during the later stages of a booking. All other information on the website will therefore not amount to an invitation to purchase and so the question of when it is misleading is left to general interpretation. The alternative approach of requiring in legislation detailed information to be displayed overcomes this weakness.

[89] Art. 2 (k) Unfair Commercial Practices Directive.
[90] ECJ C-210/96 of 16.7.1996 - Gut Springenheide.
[91] Recital 18 Unfair Commercial Practices Directive.
[92] Art. 7 (1) Unfair Commercial Practices Directive.
[93] Art.7 (4) Unfair Commercial Practices Directive.

A website can mislead, not only by omission, but also by confusion. This in fact appears to be a far more common occurrence on websites selling hotel accommodation than the simple omission of relevant information. The Unfair Commercial Practices Directive contains a specific provision which probably addresses this question and deems such information to be misleading. Art. 7 (2) states: "It shall also be regarded as a misleading omission when … a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information ..." which causes or could cause the consumer to make a transactional decision he/she might otherwise not have made. This may still be too general to combat specific types of confusion caused by online hotel websites and recommendations on this matter are made later in this chapter.

This leads to the following conclusion:

7. ***The general ban of misleading information contained in Directive 2005/29/EC only applies to an invitation to purchase***, which represents a small part of website information. The ban of website information which can confuse consumers may be too general to deal with specific website information problems.

3.1.3.5 Aggressive commercial practices

Aggressive commercial practices are defined in Art. 8. Such practices are characterized by harassment, coercion or undue influence which significantly impair the average consumer's freedom of choice.[94] "Undue influence" is defined as exploiting a position of power in relation to the consumer so as to apply pressure in a way which significantly limits the consumer's ability to make an informed decision.[95]

Art. 9 enumerates circumstances which must be taken into account to determine whether the prerequisites of harassment, coercion or undue influence are present. These are timing, location, nature, persistence, use of threatening or abusive language or behaviour, exploitation of any specific misfortune of the consumer, onerous or disproportionate barriers where a consumer wishes to exercise rights under the contract, such as to terminate the contract.

3.1.3.6 The Blacklist in Annex I

Annex I of Directive 2005/29/EC "contains a list of commercial practices which in all circumstances shall be regarded as unfair"[96]. The Annex lists 31 practices which are banned for all types of industry; 23 are misleading practices and the other 8 are aggressive practices. Some of these have potential relevance to websites providing online hotel reservation systems and must be mentioned:

- Points 2 and 4 – Displaying a quality mark or equivalent without authorisation or claiming that a product is approved by a public or private body when it is not. This prohibits website claims that a hotel has or will receive a grade or star or other accommodation standards approval;
- Point 5 – Making an invitation to purchase at a specified price knowing it will not be able to supply the service "at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising … and the price offered (bait advertising)". This has two important implications for online reservation systems, particularly airline sales, but also hotel sales (even though the ban is confined to invitations to purchase). Firstly, and perhaps not widely appreciated, it means that any website invitation must remain open for a reasonable period of time.

[94] Cf. recital 16 Unfair Commercial Practices Directive.
[95] Art. 2 (j) Unfair Commercial Practices Directive.
[96] Art. 5 (5) Unfair Commercial Practices Directive.

This should curb a website's ability to open and close offers at will depending on demand and should significantly restrict the use of yield management techniques. Secondly, it means that enough places (airline seats, hotel rooms) must be made available at the specific price in relation to a reasonably anticipated demand (typically based on past marketing experience). The latter requirement might be difficult to verify, as consumers would always require the intervention of competent authorities to check whether the supply was enough. An alternative approach might be to require a website to display the remaining number of bedrooms at the specified price. This is technically feasible, as some websites have done so in the past;

- Point 7 – Falsely stating a product will be available only for a limited time merely to evoke a pressurised consumer response;
- Point 10 – "Presenting rights given to consumers in law as a distinctive feature of the trader's offer";
- Point 20 – Describing a product as "gratis", "free" or words to similar effect, if this is not the case;
- Point 25 – Making persistent and unwanted solicitations to the consumer's home by email;
- Point 31 – Creating the false impression that the consumer has already won or will win a prize, when in fact taking action in relation to claiming the prize is subject to the consumer paying money or incurring a cost.

This leads to the following conclusion:

8. ***Some of the banned commercial practices listed in Annex I of Directive 2005/29/EC have potential relevance to websites providing online hotel reservation systems.*** It is illegal for any part of any website (whether a hotel's or an agent's) to claim a hotel has a grade when it does not. When a consumer starts the booking procedure the website must ensure the hotel has made sufficient supplies of rooms available at the advertised price and must also keep the offer open for a reasonable time.

3.1.4 Enforcement

Art. 11 of the Directive deals with its enforcement. Member States are obliged to enforce the Directive by adequate and effective means. These have to include a right of persons or organisations which are regarded under national law as having a legitimate interest in combating unfair commercial practices to take legal action and/or to bring them before an administrative authority.[97] The basics of such proceedings before courts or administrative authorities are outlined in Art. 11, but much discretion is left to the Member States for details of the procedure. The court or the administrative authority must have the right to order the cessation of unfair commercial practices.[98]

Member States are also obliged to lay down penalties for infringement of provisions which transpose the Directive. These penalties must be effective, proportionate and dissuasive.[99]

It is not possible to comment on how effective competent public and private consumer protection bodies are in combating the use of unfair B2C commercial practices on websites which provide online reservation services.

[97] Cf. recital 21 Unfair Commercial Practices Directive.
[98] Art. 11 (2) Unfair Commercial Practices Directive.
[99] Art. 13 Unfair Commercial Practices Directive.

If one judges by the incidence of questionable and/or questionably presented information on any random selection of such websites the impression is that they have not been much influenced by Directive 2005/29/EC. It is of course striking that individual consumers cannot assert any rights under the Directive. Whether conferring such rights would make much difference remains an open question.

This leads to the following conclusion:

9. ***It is not possible to assess the effectiveness of the enforcement of Directive 2005/29/EC in combating the use of unfair B2C commercial practices on websites which provide online reservation services.*** However, at present a significant effect on such websites cannot easily be observed. The Directive requires Member States to enforce its provisions by effective sanctions but only at the initiative of competent public and private consumer protection bodies. It is not clear whether giving enforcement rights to individual consumer would ensure more effective protection.

3.2 Other directives concerning unfair commercial practices with relevance for hotel bookings

3.2.1 Directive 2002/58/EC on Privacy and Electronic Communications

The Directive on Privacy and Electronic Communication[100] includes rules on unsolicited communication which also apply (in addition to the Unfair Commercial Practices Directive) to websites which offer online reservation services. It is not necessary to review this Directive for this study, except to refer to Art. 13 dealing with unsolicited communication.

This provision concerns automatic calling machines, fax, and e-mail. These means of communication may only be used when subscribers have given their prior consent ("opt-in"). The reason for this rule is the protection of the privacy of subscribers. These kinds of direct marketing may impose a burden and/or costs on the recipient which affect their privacy. In some cases the volume of unsolicited email may also cause difficulties for electronic communication networks.[101]

Art. 13 must be read in conjunction with Point 26 of Annex I of the Unfair Commercial Practices Directive, according to which persistent and unwanted solicitations by telephone, fax, and e-mail are unfair. Annex I of the Unfair Commercial Practices Directive operates without prejudice to Article 13 of Directive 2002/58/EC, i.e. both provisions operate cumulatively.

The one exemption under Art. 13 (2) allows the use of existing consumer details where there is an existing relationship between the offeror and the customer. The customer must however be informed in advance and have the right to refuse such usage.[102]

3.2.2 Directive 97/7/EC on Distance Selling

Art. 10 of the Distance Selling Directive requires the prior consent of the consumer for voice-mail and fax communications ("opt-in") and "no clear objection" by the consumer ("opt-out") for other means of communication, such as emails. If the two Directives overlap – and this is the case if a hotel advertises through e-mails – Directive 2002/58/EC on privacy prevails.

[100] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ No. L 201/37 of 31.7.2002 (hereinafter: Directive on Privacy and Electronic Communication).
[101] Recital 40 Directive on Privacy and Electronic Communication.
[102] Recital 41 Directive on Privacy and Electronic Communication.

The proposed successor to Art. 10 (Art. 11 of the Commission Proposal for a Directive on Consumer Rights) is somewhat weaker and only requires a trader to disclose his/her identity and the commercial purpose of the call.

3.3 Gaps and recommendations on contractual information duties

Possible gaps in the current protection under Community law of consumers who use websites which offer online hotel booking services and recommendations for dealing with them will be discussed in this section.

3.3.1 Contract terms

It is self-evident that the principle of transparency requires that consumers who are considering booking hotel accommodation online should, before making any purchase decision, be able to access and read the text of the full set of the standard written terms of the accommodation contract they are considering making. It is perhaps less evident (but still desirable) that when the consumer starts the booking procedure he/she should also be able to access and read at least a summary of the main contract terms applicable to them at that stage, as well.

At present there is no specific legal obligation on websites selling hotel accommodation to do either of these two things. As previously noted the Directive on Package Travel imposes such an obligation on package organisers (and benefits their consumers who stay in hotels) but the obligation does not apply to hotel bookings on their own. The Distance Selling Directive also requires some contractual information to be provided to consumers before a contract is made, but, it is not the full set of terms in the one place and, in any case, these obligations do not apply to online hotel bookings. Nor does the E-Commerce Directive impose an obligation on a website to provide the full set of the hotel's standard terms online.

This leads to the following conclusion:

10. ***At present there is no specific legal obligation on websites selling hotel accommodation to make the full set of the standard written terms of the contract accessible and readable for the consumer.*** Websites that sell accommodation (in whatever capacity, whether directly or through an agent and regardless of whether the website acts as agent for the seller or buyer) should therefore be required to display in one document or webpage the full text of all the standard contract terms used by the hotel. This information should be prominently and clearly displayed in a manner which enables the consumer to access and read it in conjunction with (at the same time and in or though the same place as) the website details of the hotel in question are located. Obviously this information does not have to include issues on which the consumer makes a choice, such as total price, stay dates, room type etc. There should be no technical difficulties for the typical agent's website in storing and displaying this kind of information.

3.3.2 Blurring the distinction between seller and agent

An important area of current concern which is not addressed in any directive (and especially not the Unfair Commercial Practices Directive) is the blurring of the distinction between agent and seller where the hotel sells through an independent intermediary. This is such a feature of many online reservation systems that it is even an endemic problem. The problem arises in two ways.

Firstly, an agent's website typically refers prominently in different places to its 'Terms of Use' or 'Conditions of Use' or 'Booking Conditions' etc.

To the average consumer such headings appear to refer to the rules which will govern the transaction they are thinking of making, that is, not just the booking process but also the contract of accommodation with the hotel as well as its performance. Of course this is a false impression. The terms of use are only the terms for using the agent's website. While it may be understandable for the agent to give them such prominence, even careful consumers can be easily mistaken into thinking they are the seller's terms. Even if counteracting indications can be found elsewhere on the site (as they typically are) this impression lingers. The consumer will frequently not see a difference between the seller and the agent.

Secondly, when one reads the websites terms of use there is often scope for further consumer confusion. The terms typically say the website acts only as agent for the seller for the unstated reason it does not wish to incur any liability regarding the performance of the contract. However, in addressing the reader a website may also use language, such as "all bookings we make on your behalf" or "when we make your reservation" which, taken with other indications, could be easily understood as suggesting the website is acting for the consumer. It is not unnatural for the average consumer to (perhaps naively) assume the website agent acts for him/her. He/she approaches the agent and the agent responds to the query.

A further source of consumer confusion over the distinction between seller and agent is that sometimes website terms appear to go beyond pre-contractual information and booking matters and stray into performance matters. Some website terms of use deal with questions of refunds and cancellations and even admission (the latter more with event bookings). Logically these matters should not appear at least in an agents terms (whatever about being displayed elsewhere on the website as the sellers terms or useful information) because they relate to the contract between the seller and the consumer and belong only there. A booking agent, if that is indeed the correct characterization, has no role as regards performance or non-performance of the contract it makes. These issues should be addressed in the seller's terms. Present practices merely tend to blur the distinction and confuse consumers.

It is true the agent can say, "the seller tells us to tell you …". But whether this will remove consumer confusion (especially when there are no seller terms to be found any where on the website to confirm the consumer suspicion that there might be another set of terms lurking somewhere) seems doubtful. Such an isolated reference to the seller's policy or terms will hardly dispel the consumer impression that the "terms of use" represent his/her contract with the seller.

Whether such practices deceive or mislead or merely confuse consumers under the Unfair Commercial Practices Directive and whether a court would hold that confusion resulted in an infringement of the Directive, while problematic, is not so much the issue. The issue is that no matter how the blurred distinction between seller and agent is categorized, the consumer suffers prejudice when not comfortably understanding what's going on.

Further, and aside from confusion the issue, the general provisions of the Unfair Commercial Practices Directive might not adequately address this problem because it only applies when the commercial practice affects consumer transactional behaviour. Here, the blurred distinction typically neither prevents nor encourages the making of the booking. It is nonetheless unsatisfactory that uncertainty should prevail over the roles of the different parties in the contract which is made.

Community law could ensure that all websites which offer online bookings prominently and conspicuously display a statement to the following effect:

- "This is a hotel website which acts directly for the hotel. No agent or intermediary is involved. When you make a booking through this website you make a contract with the hotel" or, as the case may be";

- "This is an agent's website which is authorised to take bookings for hotels. When you make a booking through this website you make a contract with the hotel and not with the agent";
- "This is an agent's website which acts on behalf of the customer, not the hotel. We make bookings at your request and on your behalf. When you make a booking through this website you make two contracts. The first contract is with us as agent for obtaining the accommodation for you and the second contract is with the hotel for the accommodation we book for you".

Where a website acts only as agent for a seller of accommodation, the website could be legally obliged to clearly and prominently:

- Distinguish between the role of the agent and the role of the hotel;
- Distinguish between the contract of accommodation which may/will be made between the consumer and the seller and the website's terms of use.

It is further recommended that:

- Any reference to the websites "Terms of Use" or the like should include additional words to signify that they are the agent's terms only and relate only to the booking procedure;
- Where a hotel has written standard terms for its accommodation contract (and appoints a website to sell on its behalf), the agent's website must clearly and prominently display the hotels contract terms in a way that ensures consumers are aware that these alone constitute the standard terms of the contract being made;
- Where a hotel does not have standard written terms that this must be stated and a reference included to the effect that although the hotel does not use standard contract terms, there may be legal requirements under the accommodating contract (see further below) which the hotel is still subject to as regards the making and performance of an accommodation contract;
- Any reference on the website to the websites terms of use must be immediately accompanied by words like "Hotels Terms of Contract" with a link to an explanation that each hotel which sells through the website may have its own contract terms which alone bind the consumer when the booking is made;
- The individual hotel's contract terms must be accessible on the part of the agent's website where the consumer accesses details of the individual hotel;
- The agent should be prohibited from including in its website terms of use matters which properly belong to the contract between the hotel and the consumer.

This leads to the following conclusion:

11. ***An important area of current concern which is not addressed in any directive is the blurring of the distinction between agent and seller*** where the hotel sells through an independent intermediary. Websites which offer online bookings should therefore be required to prominently and conspicuously state whether they act directly for the hotel, whether they act on behalf of the hotels or whether they act on behalf of the consumers. Any reference to "Terms of Use" or the like should include additional words to signify that they are the agent's terms only and relate only to the booking procedure. Any reference to the websites terms of use should be immediately accompanied by words like "Hotels Terms of Contract" with a link and an explanation that each hotel which sells through the website may have its own contract terms which alone bind the consumer when the booking is made.

3.3.3 Tick boxes and booking time limits

Tick boxes are a useful means of securing and recording express consumer consent to the different stages of booking online. As such they are not objectionable. Where their use becomes objectionable is when they are used to secure and record consumer assent to matters which consumers do not freely consent to and which are unfair. This arises principally as regards the sellers proposed contract terms and to a lesser extent to the website's terms of use. When ticked by the consumer during the booking process the contract is not yet made, its terms are strictly speaking pre-contractual and as such cannot be legally challenged by individual consumers but can be challenged by competent governmental and non-governmental consumer protection bodies.

When the booking is made and a contract comes into existence the hotel's terms may well contain unfair terms under Directive 93/13/EC on unfair terms in consumer contracts and so will not be legally enforceable against the consumer. The tick box assent will signify nothing. But the fact that the consumer has to tick the box and agree to the terms before making the contract, and despite the fact that the rights cannot be waived, will undoubtedly give the consumer the impression of being bound by them.

Another problem of such tick boxes is that they may be pre-ticked and that the consumer has to remove the tick if he/she does not wish to order additional services or goods. The Commission's proposal for a Consumer Rights Directive will solve this problem.[103] According to Art. 31 (3) of the proposal the consumer shall be entitled to reimbursement of additional payment he/she has made because "the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment". The recitals explain that "inferring consent by using opt-out-systems, such as pre-ticked boxes online should be prohibited."[104]

As regards the amount of time websites should allow consumers to complete the different stages of an online booking, it is difficult to generalise. Some limits may be necessary for technical reasons. When the limits are short the concern is whether they are being used for other reasons, such as depriving consumers of enough time to fully digest, reflect upon and respond to the questions being asked. However, if this was to lead to a consumer not using the website it would work against the website's interest.

As regards reform options, an obvious possibility is to confer a general right on consumers to fair booking procedures in online reservation systems. Current rules in the Directive on unfair commercial practices are directed towards combating deception, whereas the problems under discussion are not obvious deceits.

[103] COM (2008) 614.
[104] Recital 47.

If a general fairness requirement was favoured it would address these issues. It would, however, hardly make sense to confine it to hotel accommodation reservations. It would have to apply to all online reservation systems.

As far as pre-ticked boxes are concerned, the problem will be adequately solved by the Commission's proposal for a Consumer Rights Directive.

This leads to the following conclusion:

12. ***Pre-ticked boxes can currently be used to record online consumer assent to matters which consumers do not freely consent to and which are unfair.*** Any pre-ticked boxes which may cause an additional payment for the consumer, should therefore be prohibited. The problem will be adequately solved by the approach suggested in the Commission's proposal for a Consumer Rights Directive proposal. In addition, it could be considered to create a general consumer right to fair online booking procedures.

3.3.4 Price transparency

There is no rule in the Community legislation reviewed requiring the final price for a hotel bedroom (inclusive of all compulsory extra payments) to be displayed at all times on a website. There is nothing specific in Annex I of the Unfair Commercial Practices Directive, so that only the general ban on unfair commercial practices applies. This would mean, where the existence of an add-on charge is not indicated at the time of booking or only the type of charge and not the amount is indicated, the Directive might be infringed. There may even be add-ons whose existence is not disclosed during booking which are not charged at the time of booking and are only payable on check-in, such as city taxes.

Again, the proposal for a Consumers Rights Directive includes a provision addressing this problem. According to its Art. 5 (1) (c), the trader has to inform about the "price inclusive of taxes" before conclusion of the contract. For the hotel sector, a more specific provision may be needed, as this Art. 5 (1) (c) does not clarify, which other fees have to be indicated.

For many years now price transparency has been a highly controversial issue regarding the advertising of airline prices. The Community recently dealt with the problem in Art. 23 of Regulation 1008/2008[105] on the operation of air services in the Community. Art. 23 applies to all air fares, including those offered on the Internet and states: "[T]he final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication."

Taxes and surcharges or fees have to be indicated separate. These rules apply "at the start of any booking process".

This provision is worth considering for improving the transparency of hotel prices displayed on online reservation systems. Although the problem of price transparency has not been as great for the advertising of hotel room rates as for airfares, there is no reason in principle why airlines and hotels should be treated differently.

This leads to the following conclusion:

[105] Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24.9.2008 on common rules for the operation of air services in the Community (Recast), OJ No. L 293/3 of 31.10.2008.

13. ***There is no rule in the current Community legislation requiring the final price for a hotel bedroom to be displayed at all times on a website***. A provision equivalent to Art. 23 of Regulation 1008/2008 requiring the final price of a hotel bedroom to be displayed both before and during any booking process could be adopted for all online reservation systems and, in particular, for websites selling hotel accommodation.

3.3.5 Non-contracting consumers

Online hotel bookings can raise issues concerning the legal status of those who are not parties to the booking made online. One person might make a booking for someone else without the latter being named as a contract party. The same applies to tour bookings and group bookings generally. A person may also buy accommodation from a website which does not act as agent for the hotel but has already bought the room from the hotel and is selling it on. Further, hotel tickets may be auctioned online. In each case there is a lack of clarity at Community level whether the non-contracting party can assert legal rights under the accommodating contract.

This is a familiar topic of contract law known as "privity of contract". There are instances where national law allows non-contracting parties to sue under a contract made for their benefit. Typically, however, this requires an explicit national provision to allow it. It is not known how national laws apply in the present context. Then, there can be cases where a contract might not be made for the particular consumer's benefit. A consumer might acquire a ticket or voucher entitling them to accommodation as an online gift or in an online draw, but when the purchase was made it was not known who would benefit and it becomes difficult to say the contract was made for the specific person's benefit.

The question raised here is whether the scale of online booking and of consumer prejudice arising from this uncertainty requires a Community measure to confer rights on non-contracting consumers. On balance it is suggested that consumer welfare requires clarity on the matter.

This leads to the following conclusion:

14. ***There is a lack of clarity at Community level whether a non-contracting party can assert legal rights under the accommodating contract.*** A non-contracting consumer who acquires an entitlement to stay in a hotel through a third party should be able to exercise the same rights as a contracting consumer regarding the performance of the accommodation contract.

3.3.6 Hotel confirmation of website booking

When a website agent issues an email confirming a hotel booking, the email typically comes from the website agent, not from the hotel. In such cases if the hotel overbooks or if a problem arises so that the hotel is unaware of the booking, the consumer can arrive at the hotel to find no room at all or no room at the contract rate.

One way of protecting consumers against this risk is to require the hotel itself to send a reminder or greeting email to the consumer close to the date of arrival, not confirming the booking (which could cause confusion) but "looking forward" to the guests arrival. If this requirement was widely known and understood consumers would learn to expect an email from the hotel and would be put on guard if none arrived.

This leads to the following conclusion:

15. ***Regardless of how the online booking is made, the legislator could consider legally obliging hotels to send a reminder or greeting email*** no earlier than 7 and no later than 3 days before the date of arrival to online bookers regarding their anticipated arrival. This would help prevent cases where the hotel overbooks or where a problem arises so that the hotel is unaware of the booking, and the consumer consequently arrives at the hotel to find no room at all or no room at the contract rate.

4. CONTRACT MATTERS - RIGHTS OF CANCELLATION AND WITHDRAWAL

4.1 Introduction

The Terms of Reference of this study require two related contract issues to be considered, i.e. rights of cancellation and withdrawal from the contract. As stated in section 1.3, it is difficult to separate some contract issues from others and ignore the latter, especially when there are important consumer welfare issues at stake. For this reason, the present chapter will examine the adequacy of current rights of cancellation and withdrawal, while some other contract issues, i.e. the hotel's contract obligations towards the consumer regarding personal and property safety, noise and the hotel's standards, will be presented in Annex I. These latter issues are seldom, if ever, addressed in online accommodation contracts, but go to the heart of consumer expectations when booking hotel accommodation.

Currently, there is no consumer right under Community law to withdraw without consequence from an online hotel reservation. The position is ruled by national law which typically says that a consumer cancellation is merely an advance notice of intent not to perform the contract promise to occupy and pay for a room as agreed. While contract law typically will not force a consumer to go ahead with an accommodation contract, it does require damages to be paid by the consumer for the hotel's loss which follows the breach. Contract law will allow a hotel to include a contract term which estimates its likely loss in the event of a consumer cancellation and so long as that is a reasonable pre-estimate the consumer has to pay it.

From this perspective when one considers the possibility of creating a Community right for a consumer to be able to withdraw from an online contract, one is essentially talking about denying and/or controlling both the reason for withdrawing and the amount (if any) of damages the hotel should be entitled to be paid, and also identifying the circumstances in which any such right might be exercised, plus associated information duties.

Currently consumer rights of cancellation and withdrawal as exist under Community law can be found in two consumer protection measures - the Distance Selling Directive and the Package Travel Directive. As has been noted already, their application to contracts for hotel accommodation is very limited. Nevertheless, the cancellation rights under both Directives must be scrutinized in some detail to see whether they could usefully be extended to online hotel bookings.

4.2 Directive 97/7/EC on distance selling

4.2.1 Goal of the Directive

Directive 97/7/EC on distance selling is a consumer protection measure which approximates rules on distance contracts between consumers and suppliers.[106] Because distance selling promotes cross-border consumer activity the Directive was seen as facilitating the completion of the internal market.[107] The Directive explicitly recognises the role of the Internet and teleshopping in this regard.[108]

A further objective of the Directive was to prohibit the supply of goods or services not ordered by the consumer but involving a demand for payment.[109] This does not play a role within the context of this study. The Directive sets minimum standards of consumer protection but allows Member States to enact rules establishing a higher level of protection.[110]

[106] Art. 1 Distance Selling Directive.
[107] Recital 2 - 4 Distance Selling Directive.
[108] Recital 3 Distance Selling Directive.
[109] Recital 5; Art. 9 Distance Selling Directive.
[110] Art. 14 Distance Selling Directive.

Art. 6 of the Directive provides for a right to withdraw from a distance contract without penalty and without giving a reason within a certain time. However, this right is usually not applicable to online hotel bookings.[111] The Commission Proposal for a Directive on Consumer Rights [112] which will replace, among others, the Distance Selling Directive, does not propose changing this.

4.2.2 Scope of the Directive, Article 2

The Directive governs distance contracts between a supplier and a consumer. Consumer is defined as any natural or legal person who is acting for purposes which are outside his/her trade, business or profession.[113] A supplier is any natural or legal person who is acting in his/her commercial or professional capacity.[114] Thus, the Directive does not regulate B2B distance contracts.

A distance selling contract is any contract for goods or services which is concluded by a supplier and a consumer under an organized distance sales or service-provision scheme.[115] The distance selling scheme must be run by the supplier. Further he/she must – for the purpose of the contract – make exclusive use of one or more means of distance communication up to and including the conclusion of the contract. Therefore, the whole distribution or at least a relevant part of it has to be dealt over the distance selling system.

The Directive applies not only to sales through the Internet and by e-mail, but also to all contracts not concluded by the parties at a face-to-face meeting, such as standard letters, catalogues, telephone, radio or television.[116]

4.2.3 Exemptions, Article 3

Most parts of the Distance Selling Directive do not apply to the vast majority of online hotel bookings. Art. 3(2) excludes from the Directive contracts for the provision of accommodation, transport, catering, or leisure services, when these services are provided on a specific date or within a specific period,[117] which is the case with most hotel bookings. The parts of the Directive which do not apply to online or offline hotel bookings are the rules dealing with information duties (Art. 4, prior information; Art. 5, written confirmation of information),[118] the obligation on the supplier to execute an order within a minimum of 30 days after the order is placed (Art. 7 (1) and also with the right to withdraw (Art. 6 (1), Art. 6 (2)).

Although not explicitly mentioned, package travel contracts are probably also excluded from most parts of the Directive as well. Certainly, a majority of Member States thought so because they excluded such contracts when transposing the Directive.[119]

4.2.4 Right to withdraw, Article 6

The right to withdraw entitles the consumer to withdraw from any distance contract within a certain period of time and without giving any reason. The supplier is not allowed to penalize the withdrawal.

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[111] See Art. 6 (3) Distance Selling Directive.
[112] COM (2008) 614.
[113] Art. 2 (2) Distance Selling Directive.
[114] Art. 2 (3) Distance Selling Directive.
[115] Art. 2 (1) Distance Selling Directive.
[116] Art. 2 (4); Annex I Distance Selling Directive.
[117] Art 3 (2) Distance Selling Directive.
[118] See above 2.2.
[119] An "exemption from the exemption" is Belgium, which granted the right to withdraw also for package travel contracts.

The only amount the consumer has to pay is the direct cost for returning the goods.[120] This period is usually referred as the "cooling-off period". During this time the consumer has the opportunity to examine the products bought.

The duration of the right to withdraw and the beginning of the cooling-off period depend on whether the supplier has sent a written confirmation of information to the customer as required under Articles 5 and 4 of the Directive.[121] These information duties also include information regarding the right of withdrawal.

Generally, the key dates for service contracts are the date the contract is made or the date when the supplier complies with the obligations set out in Art. 5.[122] If the supplier fulfils its obligation the consumer has at least 7 working days in which to withdraw from the contract. The period for exercising the right to withdraw from a service contract starts either from the day of the conclusion of the contract or from the day where the supplier has fulfilled the obligations of Art. 5 – whichever is later.[123]

The proposal of a Consumers Rights Directive will harmonise the cooling-off periods of the different Directives. The cooling-off period will be 14 days, which are calculated on the basis of calendar days, not any longer working days as the existing Directive does.[124]

If the supplier does not send the confirmation of information as required by Art. 5 the right to withdrawal is extended by up to three months. The period starts from the day of conclusion of the contract.[125] If the supplier fulfils his/her obligations within a period of three month after conclusion of the contract, the cooling off period lasts 7 working days and starts with the fulfilment of the obligations.[126]

When the consumer withdraws the supplier has to reimburse the sum paid by the consumer free of any charge. The reimbursement has to be made as soon as possible but no later than 30 days after the withdrawal.[127]

Some contracts within the Directive's scope are excluded from the right to withdraw, if the parties do not agree otherwise. [128] These include contracts to be performed within a very short period of time after being made and also contracts for special goods and services, such as newspaper or gaming and lottery services. As previously mentioned, this exclusion is retained in the Commission's Proposal for a Consumer Rights Directive.[129] The exclusion is supposedly justified because "the conclusion of the corresponding contracts implies the setting aside of capacity which, if a right of withdrawal was introduced, the trader may find difficult to fill"[130].

4.2.5 Refunds, Article 7 (2)

Contrary to the right to withdraw, the right under Art. 7 (2) to a refund when the supplier does not perform, is not excluded for online hotel bookings. This means if a hotel, say, overbooks and fails to provide a bedroom, the consumer must be informed and must be able to obtain a refund of any payment as soon as possible but no later than 30 days.

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[120] Art. 6 (1) Distance Selling Directive.
[121] See below for Art. 5 and the duty to send a written confirmation of the information.
[122] The Directive distinguishes contracts regarding goods and contracts regarding services. For goods, the date of delivery is relevant.
[123] Art. 6 (1) 2. indent Distance Selling Directive.
[124] Art. 12 of the proposal, COM (2008) 614.
[125] Art. 6 (1) 4. indent Distance Selling Directive.
[126] Art. 6 (1) Distance Selling Directive.
[127] Art. 6 (2) Distance Selling Directive.
[128] Art. 6 (3) Distance Selling Directive.
[129] COM (2008) 614.
[130] Recital 36 of the Commission's Proposal, p. 16.

This leads to the following conclusion:

16. ***While the Distance Selling Directive applies in principle to online sales, most of it, including the right of withdrawal, does not apply to accommodation*** and other tourism contracts. The part of the Directive that applies when a hotel overbooks only gives a right to a refund and not to damages for consequential loss, though such loss would typically be recoverable under national law. It is not obvious why the right of withdrawal cannot be applied to online hotel bookings provided there is a fair cut-off point after which the right could not be exercised.

4.3 Directive 94/47/EC on time share

The Time Share Directive is another Directive in the field of tourism services which provides for a comprehensive right of withdrawal.[131] However, the scope of the Directive does not cover the booking of hotel accommodation. It applies only to the purchase of time shares of holiday apartments. Therefore, the study does not examine it further.

4.4 Directive 90/314/EC on package travel

The Package Travel Directive provides extensive types of consumer protection where a package is bought from a package organiser whether online or offline. Retailers are also sometimes made liable to the consumer. Among the protections conferred on package consumers is a right to withdraw from the contract but limited to when the organiser makes a significant alteration to the terms of the contract or cancels the package. As will be seen, the withdrawal right does not apply when the consumer wants to withdraw for any or no reason, unlike the withdrawal right under the Distance Selling Directive, though the impact of this is partially tempered by another right under the Package Travel Directive, the right to transfer the package booking to another consumer.

It is therefore proposed to examine the withdrawal rights under this Directive. Other aspects of the Directive, such as the question of when it applies and what is a package, lie beyond the scope of the present study. It is true that a package can be sold online either directly by a hotel or through a website acting as agent for a package organiser. However, accommodation is not sold on its own, and this is the main focus of this study; additionally, some of the Package Travel Directive's protections are predicated on the specific nature of a package which do not arise in the case of accommodation alone.

4.4.1 Grounds which may result in a withdrawal of the consumer

4.4.1.1 Alteration of contractual terms, Article 4 (5)

Under Art. 4 (5) of the Directive, when the organiser is forced to make a significant alteration of an essential term of the contract before the consumer departs on the package, the consumer is entitled to withdraw from the contract. While the key words "essential" and "significant" are not defined by the Directive,[132] the package price is expressly mentioned as an essential term.[133] The Directive does not deal with changes to a package that are not significant. These are dealt with under national law, which typically does not recognise them as justifying the consumer treating the undoubted breach of contract as a repudiation of the contract by the organiser thereby permitting consumer withdrawal.

[131] Art. 5 Time Sharing Directive. The original Directive was Directive 94/47/EC of 26. 10. 1994, OJ No. L 280/83 of 29. 10. 1994, which is now under review, cf. proposal for a revised Directive COM (2007) 303; position of Parliament of 22. 10. 2008, P6_TA-PROV (2008) 0511.
[132] Regarding to a significant alteration of the price see below 4.4.1.3.
[133] Art. 4 (5) Package Travel Directive.

4.4.1.2 Significant alteration, essential term, Article 4 (5) and (6)

If the organiser significantly alters an essential term of the contract he/she has a duty to inform the consumer about the change as soon as possible.[134] By imposing this information duty on the organiser the Directive aims to enable the consumer to make an appropriate decision about their further contractual relations. Once notified, the Directive provides the consumer with a choice: the consumer can reject the alteration and withdraw altogether from the contract without penalty, or the consumer can accept a "rider" to the contract, i.e., an additional contract clause which specifies the alteration and its impact on the price.

Where the consumer rejects the alteration and withdraws from the contract the Directive entitles him/her to receive a substitute package of equivalent or higher quality, if the organiser or retailer is able to offer one.[135] If the organiser offers a substitute package of lower quality he/she must refund the difference in price to the consumer. It follows from this that the consumer does not have to pay the difference if the organiser offers a package of higher quality.

The Directive does not determine whether the organiser is obliged to offer a substitute package of higher quality if no package of equivalent or lower quality is available. However, since the Directive provides the consumer with a right to choose between those alternatives it can be argued that such duty is included.

The consumer is not obliged to accept a substitute package. He/she can decide to no longer avail of any package and so is entitled to a full refund as soon as possible.[136] Additionally, and if "appropriate" (and with some exceptions listed below), the consumer can claim for damages for consequential loss (such as loss of enjoyment) for non-performance of the contract. The meaning of "if appropriate" is not clear, despite the fact that this condition is repeatedly used in the Directive to effectively limit consumer rights, because there has been no Court of Justice ruling on how it should be interpreted. There is little doubt that this means of depriving consumers of their rights for unstated reasons violates the principle of transparency.

4.4.1.3 Alteration of package price, Article 4 (4)

Significant alterations of the package price are governed by special rules in Art. 4 (4) of the Directive. Generally, once the contract is made significant alterations of the price are not allowed. Exceptions are recognized for the following three grounds:[137] first, variations in transportation costs, including the cost of fuel; second, variations in dues, taxes or fees chargeable for certain services especially at ports or airports; and third, variations in the exchange rates applied to the particular package.

The package organiser must further expressly reserve in the contract the possibility of an upward or downward revision of the price. The contract must state precisely how the revised price is to be calculated.

The Directive does not determine what size of a price increase results in a significant alteration. Generally, a price increase of 10 percent is considered as a significant alteration.[138]

The Directive prohibits any price increase in the last 20 days before departure.[139] If one is still made (of any size) it will amount to a significant alteration and the withdrawal right will apply.

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[134] Art. 4 (5) Package Travel Directive.
[135] Art. 4 (6) (a) Package Travel Directive.
[136] Art. 4 (6) (b) Package Travel Directive.
[137] Art. 4 (4) (a) Package Travel Directive.
[138] Cf. EC-Consumer Law Compendium, p. 279.

Whether the organiser is obliged to offer the consumer a lower price if the conditions permit is questionable. A price reduction is not explicitly mentioned. However, the wording of Art. 4 (4) refers to "upward or downward revision of the price" and might justify such an obligation.[140]

4.4.1.4 Failure to provide significant part of the package, Article 4 (7)

Post-departure the Package Travel Directive allows a limited consumer right of withdrawal which appears to be rarely used. Art. 4 (7) allows the consumer to withdraw from the contract after departure and to be returned home early if the organiser fails to provide a significant part of the package as agreed and if the organiser is either unable to offer a suitable alternative or if the consumer rejects it for good reasons. Again, this right is conditional on its use being "appropriate".

The "right to be brought home early" involves the organiser providing the consumer with an equivalent transport – at no extra cost – back to the place of departure or to another return-point to which the consumer has agreed. The organiser must also, if appropriate, compensate the consumer.

4.4.2 Cancellation by the package organiser, Article 4 (6)

The two grounds listed in the Directive on which the organiser can refuse to pay compensation for consequential loss when the consumer withdraws (due to a significant pre-departure essential-term alteration or a cancellation by the organiser) are: (a) If the organiser required a minimum number of participants to operate the package (and did not achieve that number)[141] and (b) If the package is cancelled due to force majeure. Overbooking is not considered force majeure.[142]

Outside these grounds, the consumer is entitled to compensation for consequential loss.[143] However, these rights may be excluded if the cancellation is caused by a consumer's fault.[144]

This leads to the following conclusion:

17. ***The limited right of consumer withdrawal under the Package Travel Directive applies to both pre- and post departure problems, only for reasons provoked by the organiser*** – significant alteration of an essential term and cancellation. The absence of a no-reason consumer right of withdrawal is partly mitigated by a consumer right to transfer the booking to another person. The consumer right of withdrawal under the Distance Selling Directive is a no-reason right, but it does not apply to online accommodation bookings. Both rights involve information duties that are more elaborated under the Distance Selling Directive, which specifies a period in which the consumer must exercise the right.

It seems legitimate to confine the withdrawal right under the Package Travel Directive to instances of significant alterations of essential terms. The pre-departure right could be applied to online hotel bookings where a similar significant change is made by the hotel to some essential feature (such as price, room type, special request) of the accommodation booked.

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[139] Art. 4 (4) (b) Package Travel Directive.
[140] Cf. EU- Consumer Law Compendium, p. 208.
[141] Art. 4 (6) (b) (i) Package Travel Directive; the requirement of a minimum number of participant must have been disclosed to the consumer in the brochure (Art. 3 (2) (g) and in the contract (Annex (g)).
[142] Art. 4 (4) (b) (ii) Package Travel Directive.
[143] See above, Art. 4 (6) (a), (b) Package Travel Directive.
[144] Art. 6 Package Travel Directive.

Since hotel bookings do not necessarily involve the same emotional expectations as package holidays, a right of withdrawal from an online hotel booking would not have to automatically involve a right to compensation for consequential loss. The post-departure right of withdrawal does not seem relevant to online hotel bookings (except perhaps where a person stays in a hotel for a lengthy period) because travel is not part of what is sold (even though one can have a package without travel).

4.5 Gaps and recommendations on the right to withdrawal

As can be seen from the preceding discussion there is currently no consumer right of withdrawal exercisable during a defined or undefined period from an online hotel reservation under Community law for any or no reason. The question is whether this is a gap in consumer protection which should be filled, say, by removing the exclusion of accommodation contracts from the Distance Selling Directive. The Commission has already indicated it does not wish to see this gap filled. Not surprisingly hotels are happy with this. At present, many live comfortably with the risk of consumer cancellation because they sometimes end up being paid twice for a room when a consumer does not show-up, once by a standard credit card deduction for the first night and second by re-selling the room.

The current exclusion of tourism contracts is based on the idea that a consumer usually makes a reservation for the service close to the date of arrival or performance. If withdrawal were allowed, the fear is that a supplier might be unable to cancel the service or sell it to others. It is claimed that a supplier of such tourism services carries a bigger risk then a seller of other goods or products because the latter will usually have the opportunity to sell the goods on other occasions.[145]

However, the current general exclusion surely exceeds the purpose of the provision. If the purpose is to protect suppliers of (what in their totality are perceived as) time-sensitive services against the financial risks of consumer cancellation, it does not have to extend to non-time sensitive offerings of such services. To meet the special needs of the tourism and transport industry it would be sufficient to exclude the right of withdrawal during a period before the date of arrival at the hotel. The period should be in line with the proposal of the Commission for a Consumers Rights Directive, which harmonises the different cooling-off periods within the existing acquis and suggests a period of 14 calendar days. The exclusion period before departure could follow the exclusion period for price alterations in the Package Travel Directive, which is 20 days (Art. 4 (4) (b)).

In any event it can be doubted whether it is necessary to relieve a hotel from the financial risk of advance distance selling of accommodation. Many goods, such as seasonal, fashion and even some electronic goods, are also time-sensitive. After the season – usually lasting three to six months – the goods are outdated and become shelf-warmers. They cannot be sold anymore or only at loss-making discounts.

From a consumer's point of view the need for protection for hotel bookings is equal to the need for protection for other services bought or ordered at a distance. The consumer has the same opportunities to know as much or as little about accommodation as other products bought online.

To balance the risk (and it is accepted a hotel does face a financial risk from a cancellation) it seems sufficient to only partly exclude a no-reason right to withdraw from tourism contracts by using a suitable cut-off point. A no-reason right would obviate the need to specify reasons like significant alteration of essential terms as in the Package Travel Directive.

[145] Cf. Recital 36 Proposal for a Directive on Consumer Rights, COM (2008) 614.

The right should only involve a right to a full refund and not (except where the hotel's act forces the consumer to withdraw) a right to consequential loss. The hotel right to impose a cancellation fee should be clarified. It should be explained by means of a clear statement which forms part of the contract and it should clarify that no fee will be imposed if the hotel is able to re-sell the bedroom.

Consideration should be given to amending the Distance Selling Directive in order to allow a no-reason right to withdraw from an online hotel reservation on giving appropriate notice, without penalty and with a full refund. The right must be exercisable within 14 calendar days of making the online booking and should not be exercisable less than 20 days before the scheduled date of arrival. Where the consumer is not entitled to exercise a right of withdrawal from the contract, a statement along the following lines should be included in the contract: "We are entitled to charge you a cancellation fee when you cancel the booking in the last 20 days before the scheduled date of arrival. The fee represents the loss we estimate we are likely to incur at the time of cancellation. This loss is typically the loss of profit we would have made if you had stayed with us. It does not include a figure for loss of profit on spending you might have made while in the hotel. We will not impose the fee until the scheduled date of arrival and if we are able to re-sell the bedroom we will not impose it at all".

This leads to the following conclusion:

18. ***Under Community law there is currently no consumer right of withdrawal exercisable during a defined or undefined period from an online hotel reservation for any or no reason.*** Consideration should be given to amending the Distance Selling Directive to permit a no-reason right to withdraw from an online hotel reservation on giving appropriate notice, without penalty and with a full refund. The right could be exercisable until a certain period before the scheduled date of arrival. An information notice, to be included in the written contract terms, should describe the legal position when the consumer cancels during this period.

5. CONCLUSIONS

5.1 Findings

This study shows that the impact of Community law on online hotel bookings is rather limited, despite the fact that such bookings are increasing in importance and greatly facilitate cross-border consumer activity. The Internet has enabled hotels to contract directly with a huge number of potential customers. However, the Internet has also revitalised the role of agents and lead to a new type of agent, the web agent or travel gate, selling a far wider range of accommodation on behalf of a far wider range of hotels.

So far there is no specific Community law to regulate the growth in use of online hotel reservation systems. There are only general Community laws - principally the Directives on distance selling, unfair commercial practices, unfair consumer contract terms and package travel. The Commission is currently proposing to update and consolidate the first and third of these. The provisions of the four directives above broadly target pre-contractual and contractual matters. The directive most designed with online bookings in mind is the Distance Selling Directive which, although it does not apply to accommodating contracts, contains information duties and a consumer right to withdraw from a contract which with some modifications could usefully be applied to online hotel bookings. A key issue is whether the exclusion of bookings for accommodation and other tourism-related contracts should be retained. This study considers that it should not be excluded, except for bookings made less than 20 days before arrival.

The Unfair Commercial Practices Directive contains rules which by banning unfair commercial practices generally can, in theory, influence the design, layout, content and booking procedures of online reservation systems. However, its rules are not website specific, their generality leaves them vulnerable to problematic interpretation and they are not enforceable by individual consumers as rights. This study catalogued a number of ways in which consumer welfare is currently not well served by the absence of a Community website-specific law governing online reservation systems. As online reservation systems continue to grow in importance for consumers, it seems inevitable that in the future more targeted legal responses will be necessary at Community level. The question is whether this should be as a single consolidating measure or otherwise remains open.

Whether as a specific online law or as a modification of existing/proposed Directives this study has identified a variety of ways in which the current inadequate legal framework for online consumer protection could be improved and more targeted protection for online consumers achieved. These have been listed in the course of this study and are catalogued in the following final section. They reflect a mix of techniques – requiring more information to be displayed on websites, controlling booking procedures and inserting terms into accommodation contracts. In the interest of transparency and consumer protection this balance needs redressing and a number of recommendations are made to that end.

5.2 Summary of recommendations

This study proposes to improve the legal protection of consumers with regard to online hotel bookings. The recommendations proposed in the course of the study are summarised in this section. They reflect deficiencies uncovered in Community legislation and can be translated in policy options to remedy those shortcomings.

1. Community law could ensure that a website offering online hotel bookings allows a consumer to access and read (at the same time and in or through the same place/webpage as any photographic details of the hotel) the following prominently and conspicuously displayed information for each bookable hotel before the booking procedure is started:

- The name, geographic address and contact details for the hotel, corporate name and equivalent details of hotel owner and (where applicable) manager;
- Directions for reaching the hotel by public and private transport, an address for making complaints; distance from city/town centre, visitor attractions and transport connections, as appropriate;
- Check-in and check-out times, stay-overs and early release policies;
- Any approval or tourist grade, any entitlement to the use of leisure and other hotel facilities, any meal entitlements;
- Any mandatory or recommended health requirements for staying in the area or region of the hotel;
- A statement of hotel compliance with local laws and regulations;
- A statement that any photographic or other graphic representation of the hotel, its setting or location is binding on the hotel and forms part of the contract of accommodation;
- The full text of all the standard contract terms (if any) used by the hotel in a way that ensures consumers are aware that these constitute the legal rules governing the performance of the booking being made;
- A statement, where a hotel does not have standard contract terms, along the following lines: "The hotel does not have standard terms for contracts made through this website. However, the booking still creates a contract between the hotel and you and you will both be subject to legal requirements under the accommodating contract as regards the making and performance of the accommodation contract.";

2. Community law could ensure that, when a consumer starts an online booking procedure, the website is obliged to:
    - Display in a prominent and conspicuous manner the number of bedrooms remaining at the specified price;
    - Display a summary of contract terms relating to cancellations by the consumer and hotel.
3. Community law could ensure that:
    - A general consumer right to fair online booking procedures be created;
    - The use of tick boxes in online reservation systems is prohibited if they are pre-ticked and if the consumer would so buy additional services or goods for an extra payment.
4. Community law could ensure that a provision equivalent to Art. 23 of Regulation 1008/2008 on the operation of air services in the Community is created for hotel online bookings, requiring the final price of a hotel bedroom to be displayed both before and during any booking procedure.
5. Regardless of how the online booking is made, a hotel could be legally obliged to send a reminder or greeting email no earlier than 7 and no later than 3 days before the date of arrival to online bookers regarding the anticipated arrival.
6. Community law could ensure that all websites which offer online bookings prominently and conspicuously display a statement to the following effect:

- "This is a hotel website which acts directly for the hotel. No agent or intermediary is involved. When you make a booking through this website you make a contract with the hotel" or, as the case may be;
- "This is an agent's website which is authorised to take bookings for hotels. When you make a booking through this website you make a contract with the hotel and not the agent" or, as the case may be;
- "This is an agent's website which acts on behalf of the customer, not the hotel. We make bookings at your request and on your behalf. When you make a booking through this website you make two contracts. The first contract is with us as agent for obtaining the accommodation for you and the second contract is with the hotel for the accommodation we book for you".

7. Community law could provide, where a website acts only as agent for a hotel, that the website should in all its content (including the content of websites it provides hyperlinks to) ensure that:
    - The role of the agent and the role of the hotel is clearly separate and distinguishable;
    - The contract of accommodation with the hotel is clearly and unambiguously distinguished from the website's terms of use;
    - Any reference to the websites 'Terms of Use' or the like should be accompanied by additional words to signify that they are the agent's terms only and relate only to the use of the website booking procedure and not the contract made with the hotel;
    - Any reference on the website to the website's terms of use must be immediately accompanied by words like "Hotels Terms of Contract" with a link to an explanation that each hotel which sells through the website may have its own contract terms which alone bind the consumer when the booking is made;
    - The agent should be prohibited from including in its website terms of use matters which properly belong to the contract between the hotel and the consumer;
    - When a website wishes to convey information about the performance of the contract of accommodation it must do so in a way which clearly indicates the authority for the statement comes or is derived from the hotel and not the agent.
8. Community law could ensure that a non-contracting consumer who acquires in a legally permitted manner an entitlement to stay in a hotel can exercise the same rights as a contracting consumer regarding the performance of the accommodation contract.
9. Consideration should be given to permit the creation of a no-reason consumer right to withdraw from an online hotel reservation on giving appropriate notice without penalty and with a full refund. The right could be exercised within 14 calendar days of making the online booking and should not be exercisable less than 20 days before the scheduled date of arrival.
10. Finally, consideration should also be given to including an information notice, in the written contract terms, describing the legal position when the consumer cancels during this period.

5.3 Implementing study recommendations

The recommendations to improve the legal protection of consumers with regard to online hotel bookings listed above can, broadly speaking, be implemented into Community legislation in either of two ways – by amending existing/proposed Community consumer legislation or by the introduction of a new online-specific Community law. While the latter approach seems inevitable in the longer term, the Terms of Reference of this study require account to be taken of the Commission's current Proposal for a Directive on consumer rights.[146] Thus, suggestions as to how to incorporate the above recommendations into Community law will be confined (at some risk to the focus of the Proposal) to possible alterations/additions to it. Further, the following suggestions are expressed in general terms only and do not have the exactitude required for legislative drafting.

Two alternatives appear to be possible to modify the Proposal:

- The recommendations listed in section 5.2 above could with appropriate textual modifications be implemented in a new Chapter between Chapters IV and V.
- Failing this the recommendations could with varying difficulty be implemented as follows:

  Recommendations 1 and 2 – insert at end of Article 5 a new Article 5.4 starting with "In the case of online hotel reservations systems the following additional information shall be provided …";

  Recommendation 3 – insert as new Article between Articles 36 and 37 with appropriate statement to the effect that all of Chapter V shall with appropriate modifications apply to the new article;

  Recommendation 4 – insert additional appropriate sentence at end of Article 5 .1 (c);

  Recommendation 5 – does not easily fit into the Commission Proposal but could be included along with the new Article to be inserted between Articles 36 and 37;

  Recommendation 6 – insert as new Article after Article 7;

  Recommendation 7 – insert as new Article after Article 7 (although more appropriate to a specifying online law or as an amendment to the Unfair Commercial Practices Directive);

  Recommendation 8 – insert as new Article 3.5 (although more appropriate to a specific online law or as part of any proposal on a Community contract law);

  Recommendation 9 – delete "accommodation" in Article 20.3;

  Recommendation 10 – as with Recommendations 1 and 2 above.

[146] COM(2008) 614 final, Proposal for a Directive on consumer rights, 8.10.2008

ANNEX I: OTHER CONTRACT OF ACCOMMODATION ISSUES

Bedroom noise

The noise which a hotel customer can hear from elsewhere in the hotel or outside (together - external noise), can significantly impeded the customer's ability to use the room for its intended purpose, i.e. sleeping in it. From this perspective there is probably at least an implied term in all accommodation contracts that the room should be fit to be slept in, which in turn implies it must be adequately insulated from external noise. However, the frequency with which residents have cause for complaint about intrusive noise is such that an implied term alone is insufficient to protect consumer who book either online or offline.

While there are no binding Community standards on hotel bedroom noise insulation, most hotels are probably subject to some noise insulation standards set either in local building standards law or in hotel standards law, that is, compulsory/voluntary hotel standards set by state or private hotel registration/grading bodies.

Two reform approaches seem possible in order to deal with noise: one is to expressly identify in the hotel's standard contract terms (displayed on the website with the hotel details) the decibel level mentioned in the relevant noise insulation standards; the other approach would be to merely require information about the actual decibel levels of external noise which can be heard in the bedroom (or likely room) during defined night times. This would entail leaving it to national law to determine the legal significance of that figure.

It is acknowledged that bedroom noise is a large issue involving many interests. However, from the consumer's perspective it is a simple issue: the core requirement is a legal right to the absence of noise which prevent sleep.

A website offering online hotel bookings should display online and in a prominent position among the details for each hotel the level of external noise measured in decibels which can be heard in the room during normal sleeping times. A specific term should be included in all online and offline accommodation contracts requiring the hotel to promise that the consumer will not be subject to levels of external noise higher than that indicated on the website, except in force majeure situations such as emergency sirens/alarms.

Hotel standards

When booking online a consumer potentially has access to more information about a hotel than when booking offline. However, consumers are very much subject to a hotel-orientated version of what is on offer in the hotel and may sometimes have no alternative source of information about the standards of the hotel. While guest reviews can sometime help, they are not necessarily reliable and can be contradictory. The most reliable source of independent information about the hotel's standards is its grade given by a public or private grading body whose independence from the hotel is assured.

Although there is still no Community hotel grading system, it would be helpful for a consumer if grade information were provided, that is, not only the hotel's grade at the time of booking (where it has one), but also details of the grading scheme under which that grade was given, how independent the scheme is and when the hotel was last graded or visited by the grader. This information, however, needs to be supplemented by a legal contractual right for the consumer that the hotel will maintain that grade and that all the facilities the consumer will use are provided at that grade.

A website which offers online hotel booking should display the following information: (a) The hotel grade and when the grade was granted; (b) Details identifying the grader and its status vis-à-vis the hotel. It is also recommended that the accommodation contract should include a term stating that, while the consumer stays in that hotel, its standards and facilities will comply with that grade.

Guest personal and property safety

These two separate but related consumer welfare issues are not specific to online bookings. There is, however, an issue of online equity in that website terms of use often seek to deny liability for various consumer loss without indicating the circumstances in which liability might be imposed and often also giving the impression that liability issues are a matter of website choice which the website can and does choose to avoid. Of course this question of liability for consumer loss is bound up with the confusion referred to in section 3.3.2 between hotel terms and website agent terms of use.

At a minimum every website should be obliged to display neutral information about the basic rules of liability applicable to a consumer who suffers loss while staying in the hotel. Such rules may vary across national borders and may even impede the internal market in hotel services. While there is no Community law on hotel liability for consumer loss, it is noteworthy that in recent times Community legal initiatives have addressed comparable question of consumer welfare in air, sea and rail passenger contexts. Many of the reasons justifying such harmonisation apply equally to hotels.

A website which provides online reservation services should display an information notice describing in a consumer-friendly manner the liability rules which apply in the case of resident personal injury and property loss while staying in hotels bookable through that website. This information must be displayed as prominently as other details regarding the hotel. Further consideration should be given to creating Community rules in this area.

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