

Dynamic Packaging: Liability from a Dutch prospective

Over the last few years the Dutch travel industry has changed a lot. Consumers are better informed about destinations and ways of spending their vacation due to the many TV shows about travelling and lodging abroad. The Internet has also contributed to the growth of knowledge of the consumers in this respect and made booking trips and accommodation more accessible. Due to the latter consumers are no longer dependent on the information they receive from holiday brochures and other information that is coming from travel agents and tour operators. They have become more active and instead of buying a "readymade package" they compose their own vacation according to their specific personal wishes. This led to a change of the role of the travel agent and tour operators. In many cases these consumers request travel agents to book the various parts of their holiday. Of course the travel agents also anticipated on this new trend by nowadays offering consumers many possibilities to fulfil their holiday wishes.

As a result of the Package Travel Directive the tour operator became liable in case he sold a "ready made" package travel to the consumer. The developments I just pointed out bring us to the question whether the consumer has any kind of legal protection when he lets a Dynamic Packager, that could be for instance a travel agent, compose a package according to his own wishes. In that case the services can be bought of at least three different suppliers, but are put together by the Dynamic Packager. Who is responsible for the correct execution of the holiday and who is liable for possible damages? Whether a consumer can derive any rights from the legislation that was implemented in The Netherlands on basis of the Package Travel Directive depends on the answer to the question if a travel contract was established between himself and the Dynamic Packager. To be able to answer this question in a positive way Dutch law demands 1) that the counterparty of the consumer is a travel organiser and 2) that a previously organised package was sold.

These demands and the interpretation of the relevant paragraphs of the Dutch law in respect to Dynamic Packaging were the main questions in a court case in which my firm litigated on behalf of the Travel Guarantee Fund (later on I will explain what the fund exactly is). I will use this case to explain and illustrate the demands for liability of the selling party according to Dutch law. Before doing so I will shortly explain what consequence the Package Travel Directive and the well-known Garrido-case had for Dutch travel law.

The Package Travel Directive and Dutch Civil Law

The Package Travel Directive originated from the year 2002. The goal of the Directive was to raise the level of consumer protection but it only protects consumers who buy a previously composed package from a travel organiser. The Package Travel Directive has been implemented in the Dutch Civil Code in article 500-513 of the seventh book of the Code. According to Dutch law a consumer is only

protected when a travel contract as defined by this law has been established. This is the case when:
“a travel organiser obliges himself to deliver a in advanced organised travel that includes a overnight stay or that lasts a period exceeding 24 hours and also includes two of the following services:

- Transportation
- Accommodation
- Any other tourist service that has no relation to the accommodation, or the transportation that is a significant part of the trip. (For instance the well know example a ticket to Disney Land.)”

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A travel contract can only be established if the seller of the services can be qualified as a travel organiser as defined by Dutch Law. Dutch law defines a ‘travel organizer’ as *everyone that offers previously organized travels in his own name as one’s trade or profession*”. The last criterion was not explicitly mentioned and is a particular of Dutch law, which was introduced by the Dutch legislator. The reason for this introduction was that the Dutch legislator wanted to avoid that the reseller, in most cases the travel agent, could be held liable. After all, the basic principle of an agent is that the agent does not act in his own name; he merely sells travel products of a travel organiser and services of tourism suppliers.

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The European Court of Justice gave the Directive a broader scope with the ruling in the well-known Club Tours vs. Garrido case. In this case the Court interpreted the concept “of previously organized” in such a way that the travel agent who composes a package it self on request of a client is considered a travel organiser as defined by the Directive. This ruling raised the level of consumer protection. It clarified what exactly has to be understood under “previously organised”. Because of the broad interpretation of “previously organised” Dynamic Packaging can be brought under the scope of the Directive.

The consequence of this ruling is that practically every booked trip is brought under the scope of the Directive.¹ The question now is how to deal with this criterion in relation to Dynamic Packaging. In the following I will discuss this in the framework of the aforementioned legal proceeding.

The legal proceeding

A broad interpretation of the definition “previously organised” benefits the consumer but not the Dynamic Packager who often is a travel agent. That circumstance caused the Dutch Association of Travel Agents (“ANVR”) to raise another question, namely what exactly can be considered a package? An important question because we can only speak of a contract for travel – as defined in the Dutch Civil Code – when a ‘package’ has been sold. On basis of the definition of a travel contract and the liability that goes a long with that, travel agents have an interest in an answer to this question: no package, no consumer protection, and no liability on the basis of the Dutch Travel Law and therefore no costs, such as insurance premiums, for the Dynamic Packager. *Was a travel contract –as defined by the Dutch Civil Code – established if a travel agent - upon request of a consumer - combines,*

¹ M.B. Loos

books and sells several travel products/tourist services to this consumer? To answer this question the court had to determine what exactly a package of tourist services is

The other interested party is the Travel Guarantee Fund. This is a fund that guarantees the advance payments that travellers make to travel organisation. If a travel organisation goes in to bankruptcy proceedings the amount that its customers have paid in advance will due to the bankruptcy no longer. Both parties then have lost their money. That means the traveller can no longer go on his trip and when the organisation goes in to bankruptcy proceedings, it can no longer pay for the services that the traveller is entitled to, all the reservations such as hotel and flight, will be cancelled. Imagine this happens during your holiday. The Guarantee Fund solves this problem by being a guarantor for the payments that were made by the traveller and in case of bankruptcy of the travel organisation will take over the commitment of the travel organisation. The financial means are coming from the payments that travellers and the travel organisation made to the fund. This financial back up can only be obtained when the travel organisation is a member of the Guarantee Fund and is given for package travels, which includes packages that are tailor made by a travel agency. The Association and the Guarantee Fund wanted to get this matter clarified and brought it before a Dutch court. The Guarantee Fund interest lies in the fact that whenever a travel agent can be qualified as a tour operator whilst acting as a Dynamic Packager he is obliged to make a financial contribution to the Guarantee Fund.

It is in the interest of The Association that dynamic packaging will not lead to liability for the travel agent. Its solution for escaping liability under the Directive and the Garrido-ruling lies in the criterion "*in his own name*", introduced by the Dutch legislator. The Association argued that as long as a travel agent sells separate parts of a trip and bills these parts separately the legal criterion "selling in his own name" has not been fulfilled. In accordance, there is no package – as defined by law - and therefore no travel contract was established. Thus the travel agent acting as a dynamic packager cannot be held liable. From this point of view consumers would not be protected when the tourist services he buys are billed separately and the dynamic packager (travel agent) mentions on the invoice that he did not act on his own name.

The Guarantee Fund on the other hand concludes from the latter that the consequence of the Garrido-ruling is that the Dutch criteria "in his own name" and previously organised" are no longer relevant for the answer to the question whether a travel contract was established because a travel contract can also be established when a travel agent on request of a consumer combines several tourist services. The Association pointed out that the Garrido-case does not lead to this conclusion because it was a Portuguese case and Portuguese law does not make a distinction between the travel agent who is just an intermediate and the travel organiser. To disprove this thesis of the Guarantee Fund the Association also referred to some rulings of English Courts that ruled that one can only speak of package travel when it is sold for an all-inclusive price, meaning that the consumer has to buy the whole package and he cannot buy single parts of the package.

In the opinion of the Guarantee fund in this case the Package Travel Directive leaves room for different interpretation. Therefore it requested the Court to present two preliminary questions to the European Court of Justice:

1. *Must the Package Travel Directive be explained in such a manner that a travel enterprise which combines services of different suppliers in a package, whether or not on the initiative of a consumer, must be qualified as a travel organiser, even if he informs the client that he is selling these services in the name of the supplier and bills the services separately?*
2. *Must the Package Travel Directive be explained in such a manner that a travel enterprise which sells a package which was composed by someone else, and adds, whether or not on the initiative of a consumer, one or more tourist services as meant in the Directive, originating from another supplier than the supplier of the package, whom is the liable party for the whole package?*

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The ruling

At first the Court examined whether in the case of Dynamic Packaging the requirement of Dutch law that “*previously composed combination of services*” is met. The Court answers this question affirmatively on the basis of the Garrido-case: at the moment the consumer enters into the contract with the travel agent it is already set out which services the consumer buys, it is a previously organised combination as meant by the Directive.

The next question which was answered by the Court was whether the so called “in his own name” criterion for the Dutch situation has the consequence that the distinction between the liable travel organiser and the not liable agent (the reseller) should be maintained. The Court considers that despite the fact that this criterion was not explicitly mentioned in the Directive, this does not mean that this criterion should not be applicable. The court says that only when it would be a violation of the Directive, it should not be applicable. The court investigated whether that was the case and concluded there was no violation because of the fact that the Dutch legislator merely introduced this criterion to ensure that the reseller could not be held liable. The Directive left room for this because of the fact that the Directive explicitly states that the organiser and/or seller that is a party to the agreement should be liable. In the opinion of the court this does not include the one that acts in the name of another such as a travel agent. After all he merely acts on behalf of another party. In this respect the Court also appeals to the fact that the Dutch working committee, which evaluated the implementation of the Directive, did not make any remarks on this criterion. In the opinion of the Court the Dutch law therefore meets the requirements of the Directive and the consumers are protected accordingly to the Directive. The Garrido-case did not change this: the consumer’s counterparty can still act as an agent! The court argues that this is not a violation of the Directive. The motivation of this argument the court finds in the fact that the aforementioned working committee also perceived this possibility.

A mistake by the legislator is not likely because the history of this law explicitly motivates this ‘own name’ criterion. Furthermore, the court determines that it is not qualified to compare the laws

regarding the travel agreement because these are procedural laws. Therefore the court rules that the "in its own name criterion" is legally binding.

The answer to the question whether the travel agent indeed acts in his own name when a consumer requests the agent to compose a package of tourist services has to be found in the circumstances of every particular case. The court remarks that it is often not clear if an agent factually acts as such, because in most cases the agent does not present itself in that way. In the opinion of the court this should not automatically lead to the conclusion that an agent always acts in his own name when he composes a package of tourist services, because some agents might always state explicitly that they only acted as agent! The Association argued that an agent is not considered to act in his own name when he bills the several tourist services separately. But the court says that is not enough to be able to assume that the agent merely acted as an agent. There should be more circumstances relevant. For example the fact that the agent in his advertisement clearly states that he acts as an agent on behalf of others only and does not sell tourist services in his own name. He also should make this clear in all his contacts with the consumer, by for instance pointing out to the consumer that if he is not satisfied with the rendered services, the consumer can only address the supplier of the rendered service.

On the latter grounds the court decided that the claims of both parties should not be honoured. In the Courts opinion the law is already clear enough as it is and it is not in violation of the Package Travel Directive. The main question - whether Dynamic Packaging always leads to liability of the travel agent - has sadly enough not been answered.

In my opinion the Court could have acted braver, especially in the interest of the consumer. After all the goal and purpose of the Package Travel Directive is to raise the level of consumer protection. Here I also want to point out that a travel agent is protected from liability in all cases. He is also liable as a travel organiser when he sells a package from a foreign travel enterprise according to the Directive.

I think that the Guarantee fund correctly stated that the "in his own name" criterion in the case of Dynamic Packaging easily can lead to diminishment of consumer protection. It makes it easier for the travel agent to avoid liability. The court undervalued the fact that Dynamic Packaging changed the Dutch travel industry and with this ruling withholds consumers right on protection as the European legislator had meant to set out with the Package Travel Directive. The court also undervalued the fact that interpretation of legislation always should be done in light of the circumstances of the current time. This did not happen: the court held on to the distinction between the travel organiser and the travel agent, which differences have faded because of the phenomenon of Dynamic Packaging.