

**Dynamic Packaging: Legal Aspects from the European Perspective**

by

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## **I. Scope of the Article**

The article covers the factual and legal problems associated with “Dynamic Packaging”. The article will examine the traditional distribution and product creation models used within the travel industry, the changes brought to that industry and examine the legal issues associated with that change.

The legal issues will focus upon the contractual arrangements between operators and suppliers and the contractual and liability issues between operator and consumer. As far as the legal issues are concerned, the paper will deal with these from the perspective of European Law, i.e. the EU Directive on Package Travel of 30 June 1990.

## **II. Factual Situation**

### 1. What is Dynamic Packaging?

Dynamic Packaging has become an industry buzzword, signifying a wide range of concepts. Some consider it a hype, some consider it the trend of the future. However, it is increasingly unclear, what dynamic packaging actually refers to. For this article, dynamic packaging shall refer to a technical and distribution solution, where a consumer can build a customized itinerary by assembling multiple travel components unaided, complete the transaction in real time and have the components or the complete trip priced on a current basis.

In this sense, dynamic packaging allows the consumer to build a package tour, consisting of several components, that has not been pre-packaged by an operator. It allows the operator to offer a number of components, that he can have real time access to and that can be priced concurrently with the market situation.

### 2. The Traditional Distribution Model

Prior to the advent of the internet and connectivity of consumers and suppliers, package tour operators would enter into contracts with supplier months ahead of the travel season. The suppliers would furnish operators with accommodation, transport and other ancillary services. These would be packaged by the operator and sold at an all-inclusive single price. The operator had to price the product months ahead of actual travel, as his prices had to go into a paper catalog. He could not react to a sudden shift in market interest, nor could he show flexibility in other issues. The consumer, especially the European consumer would book his travel months ahead and tended to book for one or to two-week vacations, usually taken in the summer months. The standard travel package limited options for consumers and providers. Itinerary were fixed and predetermined, as were travel dates, destinations, components, most of transport and price. The inventory-driven business model that was inherent in static packaging limited customization of the product. It did not allow for pricing or other flexibility and limited control over margins. Parallel to the creation of the product, distribution was straightforward: The tour operator or wholesaler would buy from the travel supplier, selling usually through an agent or other retailer directly to the consumer.

### 3. Changes in the Marketplace

A number of factors have led to a radical change in the leisure travel market place. As the most prominent factors we have to acknowledge these:

- **Consumer access to products and pricing**  
The consumer nowadays is able to find products directly and compare prices. Years ago, to compare prices, he would have to seek out numerous travel agencies and compare numerous catalogs. Oftentimes, his preferred travel agency would only carry a few operators and steer the consumer to the right direction. The consumer would not know what the hotel packaged by the operator would cost. With the initiating costs of communication and the ease of access to pricing data, the consumer today can find out with relative ease what any hotel in the world costs, what flight prices are and what the ticket to a holiday tour in any destination may cost.
- **Shifting consumer preferences**  
The drastic changes in lifestyle have also led to changes in the behavior of consumers. Europeans tend to have children later or not at all, freeing them from the school vacation schedule. They tend to take more but shorter vacations, often booking not in advance but only with a few days or week notice.
- **Better informed customers**  
The transparency of today's world and the ease of access to information has led to consumers being better informed than they were a decade or two ago. Today, any consumer can download software like Google Earth, allowing him to see a hotel and its vicinity on his PC. He does not have to rely on pictures of the operator any more.
- **More demand for custom products itineraries**  
The market itself has become far more segmented than it used to. The customers place a high value on individual products, catering to their interest. Special products that cater to Golf enthusiasts or offer enthusiasts have been established and more and more the customer wishes to be not the consumer of a pre-packaged vacation but to steer the package himself.
- **Emergence of multiple distribution channels**  
Again, the amount of distribution channels accessible to consumers and to operators nowadays has multiplied. Where there was only the option to either call a hotel directly or to book it through a travel agent, nowadays hotel brokerages sites, internet travel agencies and other players in the market all distribute products to the consumer.
- **Pressure on margins**  
The Airlines have (nearly) all stopped paying commission to agents; the hotels are trying to drive consumers directly to their sites, cutting out the middlemen. Even tour operators have started to erode the commissions of travel agents. All these are factors that require the intermediaries to branch out into new businesses, as to stop the erosion of the profit base.
- **Change in business requirements for suppliers**

Suppliers have sought to become more independent, while the operators seek to have more exclusivity and try to leave room for demand changes. The deal is not done months ahead of the season, but later and later.

- The internet

Obviously without the connectivity supplied by the internet a number of these changes would not have occurred. The technology, its availability and use of friendliness have made a number of the changes resided before possible.

Dynamic packaging is not the only solution to the problems created by those challengers. However, dynamic packaging may provide tools in meeting the challenges ahead and creating solutions to product creation and distribution. Why is this? Dynamic packaging thrives on real-time access to concurrently priced available travel products. The model allows the seller of travel products to complement the single product by packaging and with other services, creating a packaging and selling them at an inclusive price.

Dynamic packaging can in this way, through real-time pricing and availability information, offer the consumer further services and increase the supplier's margin. The consumer has more flexibility in creating packages and is not tied to a pre-packaged static solution, the seller may balance out different commission or margin rates among the products packed dynamically.

### **III. Legal Issues**

There are several layers of legal issues concerned with dynamic packaging.

The presentation will give an overview of legal issues between supplier and packager and look at the legal relationship between customer and operator in dynamic packaging relationships, while not discussing the legal relation between technology provider and operator, nor the IT issues associated with Dynamic Packaging.

#### **1. Operator / Supplier**

The legal relationship between operator and supplier is one which is nearly exclusively driven by contracts. There is no special legal framework within Europe that addresses the legal relationship with the exception of generally applicable international laws, such as the Montreal Convention, governing liability issues. It has to be noted, however, that such a contractual arrangement will not necessarily be entered into. In a number of cases, the packager may simply make use of data available to the general public, or by integrating the supplier's services or offerings into his product through an affiliate program.

Therefore, the subsequent remarks only address the perfect situation, where a contractual arrangement is the basis of the packaging.

#### **a. Access**

One of the major issues that should be addressed in a contract between operator and supplier is the question of access to the data. In this regard, the contractual parties are well advised to regulate not only the availability of data time wise, but also the way

data can be accessed. In view of segment costs of CRS the parties will in view of technical progress usually opt for some integration or feed via XML or other tools.

b. Availability

Another major issue to address in contracts is availability and the real time updating of availability data. As the packages are created dynamically, the scarcity of the source, i.e. the suppliers travel products has to be taken into account. Since dynamic packaging involves real-time access to data, the parties must ensure that the availability data is current and takes into account the possibility of multiple users having access to the site.

c. Pricing

The parties will seek an arrangement as to pricing that allows the supplier and the operator to modify prices according to current demand; pricing arrangements will also need to address issues of erroneous pricing.

Also, the parties should establish whether prices are exclusive.

d. Liability

As the dynamic packager may be a tour operator, who is liable for the performance of his suppliers obligations, he is well advised to have provisions in place to recover possible expenditure towards customers for quality problems of the supplier. This should include rules on evidencing claims, time to bring forward claims of the operator, insurance, surety for claims and also some obligation of the supplier to furnish the operator with information in case of litigation of claims of consumers based on actions or omissions of the supplier.

d. Other issues

Other issues to be addressed in the contract depend on the relationship between supplier and operator. They may range from exclusivity, to joint marketing to other issues that will not necessarily be different in dynamic packaging situations compared to other relationships between operator and supplier.

2. Operator/Consumer

The relationship between consumer and operator tends to be at the core of problems installing dynamic packaging solutions. The reason for this is the highly regulated nature of this legal relationship.

a. Package Travel Law Regime in Europe

To understand the legal issues associated in Europe with dynamic packaging, it is necessary to give a short overview of the legal regime concerning travel. Pursuant to the European Package Travel Directive, which has been transformed into national law in all member states of the European Union, tour operators hold a wide liability for their travel products. Throughout all the European countries, the EU regime distinguishes between the supplier of travel, i.e. airline, hotel, the intermediary, i.e. a travel agent and the operator, i.e. the person that organizes package travel. The application of all these rules depends on the qualification of the consumer's contractual partner as an operator in the sense of the Package Travel Directive. This distinction is

not one of academic nature alone, but rather one of high importance in practical terms: the strict liability for non-fulfillment of the travel contract and the need to furnish the consumer with adequate security for insolvency at the time of the consumer's payment are two of the legal requirements that tie to the qualification as an operator.

b. The Operator

Who is this operator, how does the European law define this person?

The answer to these questions is relatively straightforward at first glance, becoming more clouded as matters are examined more in detail.

As a basic definition, an operator is such an entity that preorganizes (at the latest at the time of the booking through the consumer) at least two components of travel into one, seamless package, lasting for more than 24 hours. These services can be of any kind, as long as they are not minor, purely ancillary services or minor services, such as food half-board hotel stays, or a visa service

The combination of these individual elements of travel into one package does not have to take place prior to the customer actually booking the trip: ad-hoc combinations, as long as disparate travel components are organized by the operator into one package suffice, as do combinations organized at the request of the consumer. This should not be confused with an intermediary selling several components that are not organized: by booking a flight and a rental car with an agent, the agent does not yet become an operator. Indicators of this organization are, e.g., a single price for all components or a catalogue or other advertising for the "package".

Thus, it becomes clear where the problem is: dynamic packaging may constitute a package, and thus render the packager responsible as a tour operator. Therefore, also intermediaries can become tour operators, and thus be confronted with liability issues usually associated with the operator's business. This situation also illustrates the problem: By foraying into dynamic packaging quite easily the dynamic packager becomes a tour operator: This will be the case if through the dynamic packaging process two or more individual components of travel are organized into a single, seamless package. As this organization does not have to take place any time prior to the actual booking through the customer, the real time packaging can suffice to constitute a package in the sense of the EU Package Travel Directive.

c. Legal Consequences

The operator holds wide liability for the performance of not only his contractual obligations, but is responsible for the performance and quality of his suppliers. The operator thus is not only responsible for the organization of the package itself, but also for the quality of the accommodation, e.g., if accommodation is part of the package. For claims of the consumer aside from damages (remedy, self-remedy with a claim for reimbursement, reduction in price and termination of the contract), the operator does not have to be at fault. Considering that (nearly) any defect – a negative deviation between the is-quality of the trip compared to the should-quality of the trip – is



sufficient for claims, the dynamic packager may find himself easily subjected to claims of his consumer.

The courts – esp. in Germany – have also held that the operator is under an obligation to have an agent at the destination, enabling the customer to contact his operator at the destination. Therefore, the operator either needs his own people at the destination, or at least contractually arrange for a third party to act as agent.

Apart from the contractual obligations of the operator, the courts have also held that the operator – under tort law – is under an obligation to control the supplier's and their offerings regularly and ascertain that safety and other requirements are met. Failure to do so is basis for a claim for damages, in cases where the consumer was injured to suffered damages due to a breach of the duty of care of the operator.

In terms of financial obligations, the operator pursuant to the EU Directive can only require a payment on the travel price prior to departure if he provides adequate security for the traveler in case of insolvency.

As these requirements are only a few of the requirements existing, the problem becomes clear: as far as the packager aims for a lean and fast operation, that may stress technology, he finds himself regulated by a legal regime that had the typical traditional operator in mind. This legal regime creates difficulties, as the packager will need to conform to these legal standards, as otherwise, he may be haunted by consumer claims.

#### d. Conclusion

Dynamic Packaging in legal terms will be treated not different from other tour operations. The laws regulating tour operations apply, and pose a significant burden for the packager to conform to these. The packager will need to ascertain that minimum standards are kept and that he does not rely solely on access to suppliers without having validated the quality of their offerings.

## Dynamic Packaging



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## Dynamic Packaging

- Dynamic Packaging
  - What is it?
  - Who does it?
  - How do they do it?
- What are the problems?

## Traditional Models

- Traditional creation of packages
- Traditional distribution

## Changes in the marketplace

Consumer access to products and pricing  
Shifting consumer preferences  
Better informed consumers  
Custom product itineraries  
Multiple distribution channels  
Pressure on margins  
Change in business requirements for suppliers  
Internet

## How to respond to the changes

Dynamic Packaging can be on answer

## Dynamic Packaging – what is it?

Buzzword?

Hype?

Something real?

Elements:

- real time access

- real time pricing

- on the spot combination of multiple travel components

- through consumer

## Dynamic Packaging – Legal Issues

Three layers:

- operator – technology provider

- operator – supplier

- operator - consumer

## Dynamic Packaging

Operator – supplier:

- contractual arrangement – not always

- if there is one – what should be covered?

  - access

  - availability

  - liability

  - pricing

  - other issues

## Dynamic Packaging

### Operator – Consumer

What is an operator?

- two or more components of travel

- pre-organized

- into one package

Dynamic Packaging?

Consequences?

- Applicability of the regulations for operator

## Dynamic Packaging

### Liability Issues of Operator:

- Strict liability

- Remedy/Self-remedy

- Reduction of price for defects

- Termination

Fault required:

- Damages for material losses

- Damages for non-material losses

## Dynamic Packaging

### Providing security

- through bonding scheme (e.g. UK)

- through insurance (e.g. Germany)

## Dynamic Packaging

### Problematic Issues?

- Operator liability is answer of law to omniscient operator –

- Dynamic Packager is not traditional operator

Solutions?

## Dynamic Packaging