Joasia Luzak[[1]](#footnote-1)

**Vulnerable travellers in the digital age**

1. **Introduction**

While there are many issues that we may discuss with regard to changes to the regulation of the European consumer travel sector that will occur as a result of the adoption of the new Directive 2015/2302[[2]](#footnote-2), this article focuses on the missed opportunity for the European legislator to establish an additional layer of protection for vulnerable travellers in these new provisions.

Recently, not only academics but also national enforcement authorities placed more emphasis on distinguishing consumers, based on their capabilities and special needs, with regard to the level of consumer protection that they should be granted through European consumer law measures[[3]](#footnote-3). The Court of Justice of the European Union (hereafter, the “CJEU”) began to apply the benchmark of an “average consumer” in areas of consumer protection, in which this notion has not yet been adopted by the European legislator, potentially raising the bar for accessing consumer rights[[4]](#footnote-4). This naturally raises questions as to whether exceptions could and should be made from this high standard in order to provide more vulnerable consumers with an additional level of protection. This article discusses whether there is a need for the protection of vulnerable consumers in the travel sector, i.e., vulnerable travellers, specifically.

Generally, consumer protection has provided consumers with additional contractual rights due to their perceived relational weakness when they conclude contracts with professional parties[[5]](#footnote-5). All consumers suffer thus from certain vulnerabilities, most often described in terms of their problems with the assimilation of information[[6]](#footnote-6). However, vulnerable consumers may be distinguished from the general consumer group on the basis of: certain additional characteristics that hinder their perception and understanding of contractual information to an even greater extent (e.g. age); their increased susceptibility to unfair commercial practices (e.g. due to time constraints); and due to more severe consequences of falling victim to such practices (e.g. due to lack of financial solvency)[[7]](#footnote-7).

In this article, I first set the scene by placing the new Directive 2015/2302 within the European consumer *acquis* and then elaborate on the notions of an average and a vulnerable consumer, and their applicability in the travel sector (parts II-IV). I proceed then to discuss current trends in the travel sector, which illustrate whether vulnerable travellers conclude package travel contracts, at what rate and what sort of vulnerability we may expect (part V). Following part VI considers specifically the digital environment, in which an increased number of travelling contracts is concluded. This still relatively new contractual environment may disclose additional sorts of consumers’ vulnerability and also require legislators to adopt different measures to protect vulnerable consumers in the digital environment. Concluding, I suggest some measures that the European legislator failed to include in the Directive 2015/2302 that could have provided more protection to vulnerable travellers, especially when we consider travellers’ vulnerability due to their age, in particular, in the digital environment (art VII). This omission is especially striking when we consider the study on consumer vulnerability that the European Commission has just published[[8]](#footnote-8).

1. **Consumer’s & traveller’s notions in EU law**

The old Package Travel Directive[[9]](#footnote-9) was a rare bird in the world of European consumer law, with regard to the basic notion of the “consumer” it adopted. Its Article 2(4) defined a consumer as “a person who takes or agrees to take the package”. A person would fall within this definition only on the grounds of the type of contract, he or she concluded. This is contrary to the trend used in other European consumer law instruments, which define a “consumer” mainly as “any natural person who … is acting for purposes which are outside his trade, business, craft or profession”[[10]](#footnote-10). Thus, in other areas of European consumer law the classification occurs on the basis of the transaction’s purpose, personal against professional, rather than its type. When the notion of a “consumer” uses the transaction’s purpose as its denominator and it is interpreted narrowly, also persons concluding mixed contracts, partially for personal and partially for professional purposes, fall outside the scope of consumer protection[[11]](#footnote-11). However, as a result of the different framing of the notion of the “consumer” in the old PTD, its rules provided protection to persons concluding package travel contracts also for professional purposes, as well as those who combined travel for business and for pleasure[[12]](#footnote-12). This broad scope of protection has been upheld in the Directive 2015/2302, but, in order to avoid further confusion and legal uncertainty about the scope of the notion of the “consumer”, the European legislator introduced the new notion of a “traveller” in its Article 3 (6)[[13]](#footnote-13).

Since Directive 2015/2302 determines travellers’ and not consumers’ rights, we could wonder whether this Directive still falls within the scope of the *consumer acquis*. For the further analysis of the position of a vulnerable traveller, it is crucial to indicate that the European legislator seems to think so. Recital 3 of the Directive 2015/2302 refers to the legal basis used to justify the adoption of this new European law – Article 114 TFEU[[14]](#footnote-14). Through the adoption of these new rules, the European legislator still, therefore, aims to ascertain a high level of consumer protection. Through further harmonisation of the travel sector, the European legislator claims to decrease legal fragmentation, which stands in the way of conducting cross-border business and thus is “limiting consumers’ choice” (Recital 4). This, in turn, could lead to the creation of “a real consumer internal market in that area, striking the right balance between a high level of consumer protection and the competitiveness of businesses”. A careful analysis of the justifications used by the European legislator in the recitals of the Directive 2015/2302 clearly shows that the change of the terminology does not indicate an intention to remove this instrument from the *consumer acquis.* It is rather, indeed, a cosmetic change to prevent further reliance by proponents of the broad interpretation of the consumer’s notion on the definition provided in the Directive 2015/2302.

1. **Average consumers & travellers**

Recent developments in European consumer law show the increased importance of the benchmark of an “average consumer” that courts use to assess when consumer protection should be granted to individuals[[15]](#footnote-15). This benchmark has, so far, only been mentioned by the European legislator in one instrument of European consumer law, i.e., the Unfair Commercial Practices Directive (hereafter, the “UCPD”)[[16]](#footnote-16). The CJEU has, however, also prior to the implementation of the UCPD used this benchmark in its case law, to determine whether a consumer could be misled by a given commercial practice[[17]](#footnote-17), as well as to evaluate the likelihood of confusion in trademark law[[18]](#footnote-18).

The CJEU assumes that an average consumer is “reasonably well informed and reasonably observant and circumspect”[[19]](#footnote-19). Average consumers should thus read (pre-)contractual information provided to them and understand it, as long as it is transparent, and would not easily be misled[[20]](#footnote-20). The understanding of this benchmark adopted by the CJEU, excludes from the scope of consumer protection consumers who would either not pay attention to the terms provided to them or not take an effort to understand them. This interpretation may thus leave many consumers unprotected, since empirical research shows that most consumers nowadays either ignore disclosures[[21]](#footnote-21) or do not understand them[[22]](#footnote-22). We should, however, recall that in the area of unfair commercial practices providing a high standard of consumer protection was only one of the European legislator’s aims[[23]](#footnote-23). The other goals were to ensure fair competition rules in the internal market and to stimulate cross-border trade[[24]](#footnote-24), which aims could justify the narrow delimitation of the notion of an average consumer and, consequently, of the scope of consumer protection.

Interestingly, as mentioned above[[25]](#footnote-25), the CJEU recently started to apply the benchmark of an average consumer in its assessment of the transparency of standard terms and conditions under the Unfair Contract Terms Directive (hereafter, the “UCTD”)[[26]](#footnote-26). This transplant of the average consumer’s benchmark from the context of unfair commercial practices to unfair contract terms occurred despite the different unfairness test applied by the two directives[[27]](#footnote-27) and despite the lack of a reference to an average consumer in the UCTD. This raises a question, whether the CJEU will now apply the benchmark of an average consumer to determine the scope of consumer protection across the whole *consumer acquis*. This is a relevant question to consider in this contribution, since, as mentioned above, Directive 2015/2302 remains within *consumer acquis* and thus the CJEU could introduce a benchmark of an average traveller, as well.

It is possible that the CJEU will continue to only apply the benchmark of an average consumer within the assessment of the impact that information provided to consumers could have on them. That is to say, in establishing either the unfair character of a trader’s commercial practice or of a trader’s standard term and condition. However, since the CJEU, without a legislative basis for this action, extended the scope of application of the average consumer’s benchmark from the area of unfair commercial practices to unfair contract terms, we could, as well, speculate that in the future this benchmark will be applied in other areas of European consumer law[[28]](#footnote-28). How could the average traveller’s benchmark apply to package travel contracts? For example, when establishing whether the information provided to travellers with regards to the package was clear, comprehensible and prominently displayed, pursuant to Article 5 (3) of the Directive 2015/2302, the courts could apply the average traveller’s benchmark when setting the standard for the assessment of such disclosure’s transparency.

1. **Vulnerable consumers & travellers**

Since the benchmark of an average consumer limits the scope of consumer protection to a particular group of reasonably well informed, observant, and circumspect consumers, consumer protection measures would fail to encompass within their scope the most needing, prone to behavioural biases, less informed and relationally weak consumers, who may form quite a large group[[29]](#footnote-29). To prevent such a negative effect, the UCPD has also introduced a notion of a “vulnerable consumer” in its scope, in order to deter the exploitation of especially vulnerable consumers. Vulnerable consumers might be particularly affected by the commercial practice, even if it is directed at a general public[[30]](#footnote-30). As grounds for vulnerability, Article 5 (3) of the UCPD names, indicatively[[31]](#footnote-31), mental or physical infirmity, age or credulity of consumers, to an extent that these grounds could be reasonably foreseeable to the trader.

If the CJEU continues to apply the benchmark of the average consumer to other areas of consumer protection than protection against unfair commercial practices, it begs the question whether the alternative benchmark of the vulnerable consumer should be applied in other consumer *acquis*, as well. For example, in *Kásler*, the CJEU adopts the standard of a “reasonably well informed and reasonably observant and circumspect” consumer for understanding of the consumer credit agreement provisions[[32]](#footnote-32). What if, for instance, the type of a given consumer credit was attractive especially to elderly people and affected mostly them, and the trader could expect this, based on the previously conducted, own market research. Under the UCPD provisions, national courts and the CJEU should then use an average elderly person as a benchmark in the assessment of the unfairness of market practices concerning the credit provision. However, other consumer protection measures, such as, e.g., the UCTD or Directive 2015/2302 that do not even contain the average consumer’s notion, do not foresee such a possibility. Of course, when the courts start applying the average consumer’s benchmark without a legislative basis for this, we might, as well, expect that they would also begin to imply a benchmark of a vulnerable consumer in their enactment of the consumer *acquis*.

Whether this implication would indeed occur, we may doubt, based on the CJEU’s case law to date that does not mention such a possibility. Especially the *Van Hove* case, provided the CJEU with an opportunity to elaborate on the scope of protection of vulnerable consumers. In this case, the insurance provided to a consumer aimed at protecting him or her against the risk of a default on the mortgage loan payments due to the borrowers’ incapacity for work. It seems thus, that the commercial practice of providing such insurances could affect mostly vulnerable consumers, i.e., consumers who might already have a limited potential on the employment market, e.g., because of their age or mobility. The CJEU applied, however, the standard benchmark of an average consumer, without considering the possibility that this contract could affect vulnerable consumers and thus the standard would need to be adjusted[[33]](#footnote-33).

This disassociation of vulnerable consumers from the average consumer group may also be important in the travel sector. While the Directive 2015/2302 does not introduce a concept of an “average traveller”, this argument may soon no longer suffice, since, as mentioned above, neither did the UCTD. If, at one point, the CJEU needs to assess whether the mandatory information provided under the Directive 2015/2302 to travellers was transparent pursuant to its Article 5(3), it may rely on the already established perception of transparency, of a reasonably well informed, and reasonably observant and circumspect traveller. If, indeed, this high standard for the assessment of the understanding of disclosures applies, vulnerable travellers, e.g., seniors or minors, or travellers with reduced mobility, may require the CJEU to establish an additional level of protection for them.

Perhaps surprisingly, the concept of a vulnerable traveller is not foreign to the Directive 2015/2302, contrary to the benchmark of an average consumer. While the old PTD did not consider in its provisions vulnerable travellers, Directive 2015/2302 mentions them in its Recital 25 that appeals to traders to consider specific and foreseeable needs of travellers who are particularly vulnerable. As grounds of vulnerability, Recital 25 indicates only age and infirmity, but it is conceivable that also other characteristics could lead to such a classification, similarly as under the UCPD. Despite this general call to traders to take into account potential vulnerability of travellers, Directive 2015/2302 does not introduce any specific duties for the traders related to the travellers’ vulnerability. It also does not set any vulnerability-related standards for the national enforcement authorities to consider in their assessment of compliance by the traders with the Directive’s provisions. The only special provision, in this regard, is Article 5 para a (viii) of Directive 2015/2302 that obliges the trader to provide travellers with information on the suitability of a given package travel for persons with reduced mobility. However, even this limited information should only be provided upon the traveller’s request, thus the trader still does not need to anticipate the travellers’ vulnerability and their special needs. As a result, also this provision does not force traders to consider the vulnerability of travellers and does not oblige them to accommodate consumers’ special needs of their own motion.

Due to the lack of special provisions granting additional protection to vulnerable travellers, aside the insertion of a new information obligation related to the travellers’ reduced mobility, it is hard to foresee how traders in various Member States, but also national courts, will assess and address such travellers’ needs. This seems to be an important omission in the scope of the Directive 2015/2302, especially, considering the mention of vulnerable travellers in its Recital 25, which shows us that the European legislator did consider this issue. Especially surprising is the lack of any provisions that would consider the other ground for vulnerability mentioned in Recital 25 of the Directive 2015/2302 – the age of travellers. Considering that the travellers’ age is also relatively easy for the tour organizers to foresee, as well as that certain package travel contracts are targeted at particular age groups, this is a surprising oversight.

Before I continue in part VII with the assessment of what provisions could have been introduced to the Directive 2015/2302 to improve the position of vulnerable travellers, especially considering their age, I want to shortly introduce current trends in the travel sector. The next sections illustrate whether and what types of consumers nowadays choose to arrange a package travel and may give us some insights as to the scope of protection of vulnerable travellers.

1. **Traveling trends in XXI century**

The first thing that attracts attention when analysing the statistical data regarding the European travel sector is the decline in the travellers’ choice for package travel options[[34]](#footnote-34). Instead, travellers’ tend to choose more often nowadays to organize their holidays and trips through separately booking various travel services. We may thus wonder, generally, whether package travel is the future of the travelling sector, and whether the European legislator’s focus should really be on the rules harmonizing this type of contract.

Even though one might guess that vulnerable travellers may perceive package travel as a safe option, eliminating some of the risks related to going on holidays[[35]](#footnote-35), statistics reveal that also travellers that could be perceived as vulnerable due to their age, started to book their holidays individually. It was 42 % of the young travellers (age 15-24) as well as 35% of the elderly travellers (these are travellers over the age of 55) who booked at least one non-package trip a year[[36]](#footnote-36). Also the OECD report of 2014 mentions that tourists are nowadays more open to self-guided holidays[[37]](#footnote-37). Still, the European legislator while revising the old PTD has not decided to forego the notion of a “package” and to regulate all travel contracts equally. While the European legislator has introduced a wider notion of “package” in Directive 2015/2302, in comparison to the old PTD[[38]](#footnote-38), as well as has regulated other linked travel arrangements[[39]](#footnote-39), travellers are bound to still receive different level of protection, depending on the contract they have concluded, even if they experience the same travelling issues.

It is relevant to consider which groups of travellers are more prone to concluding package travel contracts, especially considering their age, which is one of the determinants of the consumers’ vulnerability. In 2014, 30% of European travellers chose an all-inclusive package travel option and 36% for a non-all-inclusive package. All-inclusive travel is most popular among travellers in the age group 25-34, as 38% of those chose to conclude such a contract. It is most popular in countries such as Turkey, Belgium, Lithuania and Luxembourg and least popular in, e.g., Finland, Sweden, Ireland and the Netherlands. Package travel that is not all-inclusive appeals to the youngest group of independent travellers; in the age group 15-24 43% of travellers have chosen for this option. It is also least attractive to elderly travellers, with only 32% of these travellers concluding such contracts. Not all-inclusive package travel contract is most popular: in France, Czech Republic and Slovakia; and least popular in: Moldavia or Estonia.

Considering this data, it seems that all-inclusive package travel is most popular with travellers in the age group that would not be perceived as vulnerable. Travellers aged 25-34 usually already have some travel experience and should not yet require special assistance on the basis of their age[[40]](#footnote-40). Non-all-inclusive travel is, however, most popular among very young travellers, who may have no prior experience with concluding a package travel contract and thus could require additional protection, e.g., by requiring the tour organizer to provide them with more extensive information on this type of contract.

While the above-mentioned statistics do not illustrate an overwhelming participation of elderly travellers in package travel contracts, other data shows that the group of elderly travellers is the most likely to book their holidays through a travel agency[[41]](#footnote-41). As a result, elderly travellers may be especially prone to fall victim to the tour organizer’s unfair commercial practices, regardless of whether they end up concluding a package travel contract[[42]](#footnote-42). Aside protection of the UCPD, elderly travellers may still be eligible for protection under Directive 2015/2302, provided their booking satisfied the conditions of a “package”.

1. **Traveling in the digital & sharing economy age**

Recital 2 of the new PTD mentions the Internet as an increasingly important medium in concluding package travel contracts. The European legislator expects many travellers to be digitalized and to increasingly conclude contracts online in the years to come. Flash Eurobarometer 414[[43]](#footnote-43) indicates the Internet as one of the main travellers’ sources of information about holidays, aside information provided by friends and family. Two thirds of travellers use the Internet when they arrange their holidays, but the numbers still significantly differ between various Member States; from 27% in Macedonia to 84% in Ireland. Interestingly, slightly more than half of the group of elderly travellers, which we could expect to be the least likely group to conclude online contracts, also uses the Internet to arrange their holidays. In this group, the percentages of participation in the digital environment change rapidly from year to year – compared to 45% of elderly travellers booking their holiday online in 2013[[44]](#footnote-44), it was already 51% in 2014[[45]](#footnote-45).

The fact that many travellers turn to the Internet to look for information about their holidays and to conclude online contracts, may lead to a different sort of vulnerability of consumers. The legislator and the national enforcement authorities may need to consider the introduction of new standards of protection, e.g., with regard to online disclosures and their transparency on the characteristics of travel destinations; the type of concluded contracts; the travellers’ rights and the online tour organizer’s obligations. This will be further discussed in the concluding section.

First, however, I would also like to briefly mention the new online trend of the so-called sharing economy, which allows consumers to either acquire second-hand commodities online or to rent such commodities from third parties through the use of online platforms[[46]](#footnote-46). Sharing economy regulation has not yet been harmonised by the European legislator and thus it is still the applicable national contract and tort law, which determines rights and obligations of parties in their triangular relations between the online platforms, service providers and their users[[47]](#footnote-47). Also in the travel sector the sharing economy has been widely popularized through the operation of such online platforms like Airbnb, Widmu or 9flats that enable travellers to cheaply rent accommodation[[48]](#footnote-48).

Could the provisions of the new Directive 2015/2302 be applicable to sharing economy contracts? The definition of package in Article 2 para 2 of Directive 2015/2302[[49]](#footnote-49) is broad but still requires a combination of at least two different types of travel services[[50]](#footnote-50). Online platforms like Airbnb enable travellers to acquire mainly accommodation, which is one of the types of travel services listed in paragraph 1 of this provision. Imagine though that the given Airbnb listing includes an offer of a guided walk in the city, in which the accommodation is located; or the Airbnb listing’s owner offers the traveller a car, a motorcycle, or a bicycle to use during the traveller’s stay in his accommodation. In the first case scenario, a guided walk in the city could likely be considered as another tourist service that is not intrinsically part of the accommodation. However, its value is likely not to be significant when comparing it to the value of the accommodation and thus a combination of an offer for accommodation and a guided city walk would probably fall outside the definition of a package. In the second case scenario the assessment is more complicated, since if the location of the accommodation is distant, the traveller may very well perceive the availability of a vehicle as an essential feature of the Airbnb listing. The value of the vehicle given to the traveller’s disposal and its relation to the value of the rented accommodation may thus be decisive in determining whether a traveller concluded a package travel contract. Of course, to talk about a conclusion of a package travel contract there needs to be a professional trader that offers such a package to travellers. If a package travel contract may be concluded through an online platform, we may question whether the online platform would have the information obligations and bear the liability of the tour organizer or whether it would be its particular user, i.e., the owner of the accommodation. This distinction is relevant since, e.g., the owner of the accommodation may not be perceived as a trader in all national laws of the Member States if he is a private party that only occasionally rents out his own apartment[[51]](#footnote-51). Even if the accommodation’s owner uses a professional party – the online platform – as his or her intermediary, this may not change the perception of the national law on this party’s character as non-trader.

Since sharing economy is largely under-regulated at the moment and there are more questions than ready answers as to the rights and obligations of the parties in such triangular relationships, there are additional risks involved for travellers concluding such contracts. Namely, travellers may not easily identify who they are concluding a contract with, what type of contract it may be and thus what rights and obligations the parties to this contract may have[[52]](#footnote-52). This assessment may be even more difficult for vulnerable travellers and, therefore, it is essential that also their needs are considered by the European legislator when it finally decides to tackle harmonisation of such new digital services.

1. **Additional protection for vulnerable travellers – missed opportunities**

Since the European legislator acknowledges in Recital 25 of Directive 2015/2302 the existence of vulnerable travellers, we could have expected that it would provide an additional layer of protection for them. The most pressing, considering the above-discussed case law of the CJEU, seems to be the need for the adoption of a different standard for the assessment of compliance of the tour organizer with the transparency requirements of mandatory disclosure required by the Directive 2015/2302. However, the European legislator could also have anticipated needs of vulnerable travellers with regard to information on specific, additional issues as to their travel plans (e.g., access to hotel facilities for travellers with reduced mobility), as well as their problems with assimilation of such information. Therefore, the mandatory information for vulnerable travellers may need to be drafted and presented to them in a different than standard, more approachable form. Below I briefly address these two requirements on an example of senior and young travellers as vulnerable travellers.

Vulnerability due to age, i.e. vulnerability of senior and young travellers, provides us with a good example for a case study, since such a vulnerability is listed in Recital 25 of Directive 2015/2302 and should be reasonably easy to foresee for the tour organizer. Senior travellers may have various age related disabilities that will, e.g., require a different approach to the provision of information to them[[53]](#footnote-53). Young travellers, due to their contractual and financial inexperience, as well as the lack of time to consider the choices they make due to their busy pursuit of successful career and family lives, may diverge from the average consumer standard, and make poor contractual choices they could use additional protection from[[54]](#footnote-54).

Senior travellers tend to choose different holiday options than other travellers, due to their higher preference for risk-avoidance[[55]](#footnote-55). Seniors may perceive package tours as a safe holiday option, since such a choice does not force them to individually select and evaluate the reliability of different services and service providers and, additionally, provides them with comprehensive holidays. When they choose upfront a package travel encompassing transport, accommodation, an all-inclusive board and even some optional tours, this means they do not have to worry about particularities of their holidays during the trip. Due to this vulnerable travellers’ need for safe choices, the European legislator could have considered the introduction of additional insurance and liability obligations for tour organizers for these passengers. For example, the European legislator could have prescribed an insolvency scheme that would not only ensure a possibility of repatriation of a senior traveller[[56]](#footnote-56), but rather secure such traveller’s option to continue with the unchanged program of the package tour. This could have made package travel even more attractive to this group of consumers, by further minimizing their risks of concluding such contracts. Currently, however, Article 17 paragraph 1 of the Directive 2015/2302 only provides for an option of a continuation of a package.

Moreover, senior travellers could need the tour organizer or a retailer to provide them with a different scope of information than other travellers. The tour organizer could reasonably foresee problems of senior travellers with such issues as mobility or illumination, as well as other various age related disabilities that could impede their activities. Thus, additional information as to lifts in the hotel or the quality of the hotel lighting, the ease of access to the beach or a swimming pool, etc. could prove to be essential information for these travellers. Article 5 para a (viii) of Directive 2015/2302 does not fully guarantee that this information reaches the senior traveller, unless this traveller takes the initiative in asking the right questions to the tour organizer, and then only with respect to the traveller’s needs regarding his or her mobility.

Young travellers, as mentioned above, would be less experienced in concluding such package travel contracts and may require the tour organizer to specifically indicate certain rights and obligations that the package travel contract grants them. Thus, the scope of the information duties may not need to change to accommodate their needs, but they would be likely to benefit from more attention being drawn to contractual provisions.

Senior travellers would also be likely to differently approach the information revealed to them, especially online. While an elderly consumer may have more experience with contract conclusion and could have time at his or her disposal to search for and analyse available information, he or she may be less informed about the modern technology, and his or her various age-related disabilities may hinder proper receipt of information[[57]](#footnote-57). Other reported problems of elderly consumers that hinder their assimilation of information are social isolation, lack of self-confidence, lower competence, lack of sound judgment, or diminished eyesight[[58]](#footnote-58). With regard to this last problem, the avoidance of the small font by the tour organizer or the retailer is even more crucial, considering the possibility of reduced vision of such travellers. Potentially, their attention span could also vary from that of an average consumer and the information would need to be more concise to reach them. Furthermore, the data above showed that also senior travellers currently commonly use the Internet to book their package travel. Such travellers may, however, be less savvy with the Internet and if information is hidden somewhere on the website, e.g., when it requires clicking on a few hyperlinks to reach it, it may escape the attention of a senior traveller. The national enforcement authority might thus potentially differently assess the tour organizer’s and a retailer’s compliance with the requirement of transparent disclosure of essential package travel information, depending on whether their services would be likely to affect senior travellers.

One last thing to mention is that due to the senior travellers’ perceived gullibility, tour organizers may more often subject them to unfair commercial practices[[59]](#footnote-59). This could have also been anticipated by the European legislator, e.g., by placing additional information obligations on the tour organizers. Previous empirical research showed that if traders have been instructed to empathize with an elderly consumer or even just made to think more about him or her and his or her situation, this diminished the risk of them using an unethical selling tactic[[60]](#footnote-60).

The above suggestions are just an example of what rights and obligations the European legislator could have considered when drafting Directive 2015/2302. Obviously, we can leave it to the market to respond to the travellers’ vulnerabilities, but the whole concept of consumer protection is based on the assumption of the need for a more interventionist approach, due to the market’s imperfections in regulating itself. This justification should also apply to the scope of protection of vulnerable travellers and we could expect more initiative of the European legislator in this area. Especially, since the European Commission has now long worked on a study on consumer vulnerability, which was finally published in January 2016[[61]](#footnote-61). This study includes policy implications for tackling consumer vulnerability, among other things, in online transactions. While the study did not investigate the extent of the travellers’ vulnerability, at least one of its suggested policy measures, namely the improvement of the quality and transparency of information, could apply also to the travel sector. It seems, thus, that European travellers might have benefited from more protection, if only the new Directive 2015/2302 had been finalized a year later.

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3. See e.g. S de Vries, ‘Consumer protection and the EU Single Market rules – The search for the ‘paradigm consumer’ (2012) 4 *Journal of European Consumer and Market Law* (*euvr*) 228-243; V Mak, ‘The Myth of the ‘Empowered Consumer’: Lessons from Financial Literacy Studies’ (2012) 4 *euvr* 254-263; B Duivenvoorde, ‘The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive’ (2013) 2 *euvr* 69-79; I Domurath, ‘The Case fo Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law’ (2013) 3 *euvr* 124-138; M Coester, ‘Party Autonomy and Consumer Protection’ (2014) 3 *euvr* 170­-178; B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 29-60. [↑](#footnote-ref-3)
4. See CJEU 30 April 2014, Case C-26/13 *Kásler*, ECLI:EU:C:2014:282; CJEU 26 February 2015, Case C-143/13 *Matei*, ECLI:EU:C:2015:127; CJEU 23 April 2015, Case C-96/14 *Van Hove*, ECLI:EU:C:2015:262. [↑](#footnote-ref-4)
5. J M Bech Serrat, ‘Why is there a Separation between Distance Selling in the EU and the Tourism Industry?’ (2010) 33 *Journal of Consumer Policy (JCP)* 75-76; J Karsten, ‘Passengers, consumers and travelers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy’ (2007) 30 *JCP* 121-122. [↑](#footnote-ref-5)
6. Ch Twigg-Flesner & R Schulze, ‘Protecting rational choice: information and the right of withdrawal’ in G Howells et al. (eds.), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 145; H Luth, *Behavioural Economics in Consumer Policy* (Intersentia 2010) 48-50; T Hansen, ‘Perspectives on consumer decision making: An integrated approach’ (2005) 4 *Journal of Consumer Behaviour* 421. [↑](#footnote-ref-6)
7. See e.g. B Duivenvoorde (2013) (fn 3) 70-73. See also: European Commission, “Consumer vulnerability across key markets in the European Union” (January 2016) available online at <<http://ec.europa.eu/consumers/consumer\_evidence/market\_studies/docs/vulnerable\_consumers\_exec\_sum\_27\_01\_2016\_en.pdf>>. [↑](#footnote-ref-7)
8. See European Commission (fn 7). [↑](#footnote-ref-8)
9. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59 (“PTD”). [↑](#footnote-ref-9)
10. See e.g. definition adopted in Article 2(1) of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64 (“CRD”). [↑](#footnote-ref-10)
11. See e.g. Recital 17 of the CRD. [↑](#footnote-ref-11)
12. J Karsten (fn 5) 129; J Luzak, ‘European Private Law: Up in the Air?’ in M Bobek and J Prassl (eds), *Air Passenger Rights: Ten Years On* (Hart Publishing 2016) 299-301. [↑](#footnote-ref-12)
13. See Recital 7 of Directive 2015/2302 for the justification of the change. [↑](#footnote-ref-13)
14. The Treaty on the Functioning of the European Union, consolidated version in OJ 2012 C 326/47. [↑](#footnote-ref-14)
15. See fn 4. [↑](#footnote-ref-15)
16. See Art. 5 (2) (b) of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices [2005] OJ L149/22 (“UCPD”). [↑](#footnote-ref-16)
17. CJEU 16 July 1998, Case C-210/96 *Gut Springenheide*, *ECR* 1998, p I-4657; CJEU 16 September 1999, Case C-220/98 *Lifting*, *ECR* 2000, p I-117. [↑](#footnote-ref-17)
18. CJEU 22 June 1999, Case C-342/97 *Lloyd Schuhfabrik*, *ECR* 1999, p I-3819. See also: B Duivenvoorde (2015) (fn 3) 29-60. [↑](#footnote-ref-18)
19. See *Gut Springenheide* (fn 17). [↑](#footnote-ref-19)
20. See B Duivenvoorde (2015) (fn 3) 49-50, 67-69. [↑](#footnote-ref-20)
21. F Marotta-Wurgler, ‘Does Contract Disclosure Matter?’ (2012) 168 *Journal of Institutional and Theoretical Economics* 94; Committee on the Internal Market and Consumer Protection of the European Parliament (IMCO) (2011) *Consumer behavior in a digital environment* 80-81, << http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/464441/IPOL-IMCO\_ET%282011%29464441\_EN.pdf>>; S Furnell & A Phippen, ‘Online privacy: a matter of policy?’ (2012) C*omputer Fraud & Society* 15. See also: O Ben-Shahar & C Schneider, *More Than You Wanted to Know. The Failure of Mandated Disclosure* (Princeton University Press 2014) 74-78. [↑](#footnote-ref-21)
22. I Pollach, ‘A typology of communicative strategies in online privacy policies: Ethics, power and informed consent’ (2005) 62 *Journal of Business Ethics* 223; S Furnell & A Phippen (fn 21) 14-15. See also: O Ben-Shahar & C Schneider (fn 21) 80-86. [↑](#footnote-ref-22)
23. Recitals 1 and 4 of the UCPD. [↑](#footnote-ref-23)
24. Recitals 2-4 of the UCPD. [↑](#footnote-ref-24)
25. See (fn 4). [↑](#footnote-ref-25)
26. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29 (“UCTD”). [↑](#footnote-ref-26)
27. CJEU 15 March 2012, Case C-453/10 *Pereniĉová and Pereniĉ*, ECLI:EU:C:2012:144, para 46. See for a comparison, e.g. J Luzak, ‘Unfair commercial practice ≠ unfair contract term ≠ void contract. The CJEU’s judgment in the case C-453/10 (Pereniĉová and Pereniĉ)’ (2012) 6 *Ars Aequi* 428-432. [↑](#footnote-ref-27)
28. See e.g. about the notion of an average consumer that could be implied into the system of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ L165/63 (“ADR Directive”): E Théocharidi, ‘Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions’ (2016) 24 *European Review of Private Law* 103-116. [↑](#footnote-ref-28)
29. See B Duivenvoorde (2015) (fn 3) 197. [↑](#footnote-ref-29)
30. Recital 18 of UCPD. See also B. Duivenvoorde (2015) (fn 3) 24-26. [↑](#footnote-ref-30)
31. As to the indicative character of the vulnerability grounds, please see Recital 19 of UCPD and the EC Guidance SEC (2009) 1666, 29. [↑](#footnote-ref-31)
32. *Kásler* (fn 4) para 74. [↑](#footnote-ref-32)
33. *Van Hove* (fn 4) para 47. [↑](#footnote-ref-33)
34. See Eurobarometer 414 (February 2015) <<http://ec.europa.eu/public\_opinion/flash/fl\_414\_en.pdf>>. [↑](#footnote-ref-34)
35. See further on this in the following section. [↑](#footnote-ref-35)
36. See (fn 34). The provided data does not clearly indicate how many of these travellers have only booked non-package holidays. [↑](#footnote-ref-36)
37. OECD Tourism Trends and Policies (2014) <<http://www.oecd-ilibrary.org/industry-and-services/oecd-tourism-trends-and-policies-2014\_tour-2014-en;jsessionid=1ppeh0hue5dn4.x-oecd-live-03>>. [↑](#footnote-ref-37)
38. Compare Art. 2 para 1 of the PTD with Art. 3 para 2 of the Directive 2015/2302. [↑](#footnote-ref-38)
39. See Art. 2 para 5 of the Directive 2015/2302. [↑](#footnote-ref-39)
40. On the effect that age may have on consumer capabilities see e.g. L Berg, ‘Consumer vulnerability: are older people more vulnerable as consumers than others?’ (2015) 39 *International Journal of Consumer Studies* 286. [↑](#footnote-ref-40)
41. Despite being the most likely group to book their holidays with a travel agency, in 2014 only 24% of the elderly travellers booked proceeded to do so, see (fn 34). [↑](#footnote-ref-41)
42. Some package tours will be also clearly targeted at a specific vulnerable group of consumers, e.g. summer camps or surfing schools for teenagers; or cruises for the elderly. [↑](#footnote-ref-42)
43. See (fn 34). [↑](#footnote-ref-43)
44. See Flash Eurobarometer 392 (February 2014) <<http://ec.europa.eu/public\_opinion/flash/fl\_392\_en.pdf>> 22. [↑](#footnote-ref-44)
45. See (fn 34) 25. [↑](#footnote-ref-45)
46. See e.g. R Botsman & R Rogers, *What’s mine is yours: The rise of collaborative consumption* (Harper Collins 2010); R Belk, ‘You are what you can access: Sharing and collaborative consumption online’ (2014) 67 *Journal of Business Research* 1595-1600; M Möhlmann, ‘Collaborative consumption: determinants of satisfaction and the likelihood of using a sharing economy option again’ (2015) 14 *Journal of Consumer Behaviour* 194. [↑](#footnote-ref-46)
47. See e.g. Ch Busch et al., ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’ (2016) 1 *Journal of european Consumer and Market Law (EuCML)* 9. [↑](#footnote-ref-47)
48. See on online platforms in the travel sector e.g. V Mak, ‘Private Law Perspectives on Platform Services’ (2016) 1 *EuCML* 19-25; E Terryn, ‘The sharing economy in Belgium – a case for regulation?’ (2016) 1 *EuCML* 47-48. [↑](#footnote-ref-48)
49. “‘package’ means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if: (a) those services are combined by one trader, including at the request of or in accordance with the selection of the traveller, before a single contract on all services is concluded; or (b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are: (i) purchased from a single point of sale and those services have been selected before the traveller agrees to pay, (ii) offered, sold or charged at an inclusive or total price, (iii) advertised or sold under the term ‘package’ or under a similar term, (iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or (v) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service. A combination of travel services where not more than one type of travel service as referred to in point (a), (b) or (c) of point 1 is combined with one or more tourist services as referred to in point (d) of point 1 is not a package if the latter services: (a) do not account for a significant proportion of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination; or (b) are selected and purchased only after the performance of a travel service as referred to in point (a), (b) or (c) of point 1 has started.” [↑](#footnote-ref-49)
50. Travel services are defined in Article 2 para 1 of the Directive 2015/2302 as: “(a) carriage of passengers; (b) accommodation which is not intrinsically part of carriage of passengers and is not for residential purposes; (c) rental of cars, other motor vehicles (…), or motorcycles (…); (d) any other tourist service not intrinsically part of a travel service within the meaning of points (a), (b) or (c)” [↑](#footnote-ref-50)
51. See on this issue also e.g. D Možina, ‘Retail business, platform services and information duties’ (2016) 1 *EuCML* 26-27. [↑](#footnote-ref-51)
52. See on this issue also e.g. Ch Busch et al. (fn 47) 7-8. [↑](#footnote-ref-52)
53. See e.g. B Duivenvoorde (2013) (fn 3) 75-76. [↑](#footnote-ref-53)
54. See e.g. L Berg (fn 40) 292; B Duivenvoorde (2013) (fn 3) 74-75. [↑](#footnote-ref-54)
55. K Vojvodic, ‘Understanding the Senior Travel Market: A Review’ (2015) 3 *Tourism in Southern and Eastern Europe* 479-488. [↑](#footnote-ref-55)
56. See Article 17 para 1 of the Directive 2015/2302. [↑](#footnote-ref-56)
57. See e.g. L Berg (fn 40) 286 on elderly consumers getting frustrated while trying to use smartphones. [↑](#footnote-ref-57)
58. See e.g. J Lee & H Soberon-Ferrer, ‘Consumer Vulnerability to Fraud: Influencing Factors’ (1997) 31 *The Journal of Consumer Affairs* 70-74; C Cohen, ‘Conmen and Confusion: Consumer Fraud and Vulnerable Older People in the Community’ (1998) 46 *Journal of the American Geriatrics Society* 118; K Cowart & P Drake, ‘Targeting Miss Daisy: Using age and gender to target unethical sales tactics’ (2013) 25 *Marketing Letters* 69; B Duivenvoorde (2013) (fn 3) 76. [↑](#footnote-ref-58)
59. See e.g. K Cowart & P Drake (fn 58) 73; S Scheibe et al., ‘Forewarning Reduces Fraud Susceptibility in Vulnerable Consumers’ (2014) *Basic and Applied Social Psychology* 272-279. [↑](#footnote-ref-59)
60. K Cowart & P Drake (fn 58) 73. [↑](#footnote-ref-60)
61. See European Commission (fn 7). [↑](#footnote-ref-61)