

# **Cruises : Legal Aspects<sup>1</sup>**

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## **1. Cruise policies and strategies**

### **1.1. On the regional E.U. level**

The E.U. Commission laid out its strategic goals for the European maritime policy in the 2009 Communication on Strategic Goals and Recommendations for the E.U. Maritime Transport Policy until 2018, identifying key areas, where action by the E.U. would strengthen the competitiveness of the sector, while enhancing its environmental performance.

The European Parliament highlighted the importance of cruise tourism for the growth of the tourism sector in Europe; it therefore called on the Commission, together with the Member States, to assess the resources required and existing port and nautical infrastructure, and to standardise the sorting of waste and recycling, in order to create innovative planning actions for these areas by developing the concept of the smart port city<sup>3</sup>.

The promotion of the cruise business is part of the broader E.U. policy and strategy of sustainable development of the so-called “blue economy”, that includes cruise tourism.

The E.U. maritime tourism policy<sup>4</sup> focuses on the following items :

Promotion of the “blue” economy : “blue” growth<sup>5</sup>, also in jobs<sup>6</sup>

- Taking into account the seasonality of the tourism sector
- By a favourable fiscal regime for the sector

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<sup>1</sup> The text reflects the situation as of 19 April 2018.

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<sup>3</sup> P8\_TA(2015)0391, New challenges and concepts for the promotion of tourism in Europe, European Parliament resolution of 29 October 2015 on new challenges and concepts for the promotion of tourism in Europe (2014/2241(INI)) (2017/C 355/10).

<sup>4</sup> DG Maritime Affairs & Fisheries. (2013). *Study in support of policy measures for maritime and coastal tourism at EU level*; Opinion of the Committee of the Regions — European strategy for coastal and maritime tourism, 2014/C 415/03 (paragraphs 43 – 45 on the cruise sector).

<sup>5</sup> Communication from the Commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions Blue Growth opportunities for marine and maritime sustainable growth /\* COM/2012/0494 final \*/ (paragraph 5.3. on Maritime, coastal and cruise tourism); Opinion of the Committee of the Regions on ‘Blue growth: opportunities for marine and maritime sustainable growth’ (2013/C 62/10) (paragraphs 20-25 on maritime, coastal and cruise tourism).

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European strategy for more growth and jobs in coastal and maritime tourism, com(2014) 86 final, Brussels, 20.2.2014; Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘A European Strategy for more Growth and Jobs in Coastal and Maritime Tourism COM(2014) 86 final (2014/C 451/10).

- Reducing the red tape for the sector.

The protection of the environment (marine ecosystem) is pursued by a sustainable “green” approach, i.a. :

- waste management avoiding marine pollution from littering
- the development and use by the cruise industry of more energy-efficient ships with lower (even zero) emission, in particular cruise liners, based on the use of renewable energies from wind, solar and wave power, and linked with fuel-cell technologies.

In the field of Human Resources, development of skills in tourism and attracting skilled personnel is pursued.

With respect to port infrastructure<sup>7</sup> and services : the construction of cruise terminals<sup>8</sup> and in conformity with Schengen immigration requirements (cfr. the security factor below) is promoted. Interconnections with other modes of transport is thereby to be ensured.

Another goal is age-friendly tourism and accessibility for passengers with reduced mobility (i.a. by adapting port terminals to their needs).

The development of the next generation of passenger cruise ships (as means of transport) is one of the specific objectives pursued by the E.U.<sup>9</sup> With respect to cruise ship building, a threefold goal is pursued in the development of innovative cruise vessels :

- improved quality with regard to passengers’ rights, on the basis of operators’ best practices
- safety
- environmental friendliness (see above).

Also the security concern is an element of the policy : cfr. the Transport White Paper, Annex I, 1.4.<sup>10</sup>

## **1.2. On the Belgian national level**

The cruiseports of Oostende and Zeebrugge co-operate in the “Belgian Coast Cruise Project” in order to promote cruise tourism in their ports and to reinforce the market position of their ports in the world cruise market<sup>11</sup>.

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<sup>7</sup> Directorate General for Maritime Affairs and Fisheries. (2009). *Tourist facilities in ports - Growth opportunities for the European maritime economy :economic and environmentally sustainable development of tourist facilities in ports.*

<sup>8</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strategic goals and recommendations for the EU’s maritime transport policy until 2018 (COM/2009/0008 final).

<sup>9</sup> (Council decision of 3 December 2013 establishing the specific programme implementing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) (2013/743/EU).

<sup>10</sup> COM(2001) 370 of 12 September 2001.

<sup>11</sup> Haven Zeebrugge. (2014). *Belgian Coast Cruise Project*. <http://www.poz.be/nl/node/807>.

“The strategic policy plan for coastal tourism and recreation (2015-2020)” adopted by the Flemish regional government and the Province of West-Flanders includes the promotion of cruise operations (departure and destination) in Belgian seaports<sup>12</sup>. The building of the cruise terminal infrastructure in Zeebrugge is one of the achievements in this respect<sup>13</sup>.

As mentioned above, Zeebrugge port has built a cruise terminal, Brussels Seaport is building a cruise terminal and Antwerp Port plans to build a cruise terminal.

Towards the end of the last century there was a general flagging-out of the Belgian merchant fleet (to Luxembourg) inspired by the intent to improve its competition position on the international market. The operational cost had risen too high, due to onerous social and fiscal legislation and regulation under socialist governments. A reverse evolution could be witnessed as from the turn of the century.

## **2. The legal regime**

### **2.1. Public regulation**

#### **2.1.1. Supranational legislation**

As a cross-border activity almost by its very nature, cruise shipping is governed by a legal regime that consists of national (Belgian), regional (E.U. secondary legislation/regulation) and global (I.M.O. generated) components. The supranational legislation either has direct effect (e.g. E.U. Regulation) or must be implemented (e.g. E.U. Directive) in the Belgian legal order.

#### **2.1.2. Specific regulation**

The maxim “*lex specialis generali derogat*” expresses that principle that in the interrelationship between the general and the specific rules of the body of law, the specific legal regime prevails over the general regime. This principle applies both in private law and in public law.

Hence cruise activity is subject to the general regime to the extent that specific rules do not deviate from it.

Cruise activities may be part of broader legal categories (e.g. package travel, (maritime) passenger transport/carriage<sup>14</sup>, consumer contracts, etc.) that are addressed by specific legal regimes.

Consumer protection legislation generally applies horizontally cross-sector wise, save specific exceptions. This is relevant as the cruise passenger is normally qualified as a consumer. Horizontal cross cutting consumer protection provisions apply also on cruise contracts.

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<sup>12</sup> L. PHLYPO and S. GHEYSEN, *Strategisch beleidsplan voor toerisme en recreatie aan de Kust 2015-2020*, Brugge, Westtoer, 2014, p. 41 ([www.toerismevlaanderen.be](http://www.toerismevlaanderen.be)).

<sup>13</sup> L. PHLYPO and S. GHEYSEN, *Strategisch beleidsplan voor toerisme en recreatie aan de Kust 2015-2020*, Brugge, Westtoer, 2014, p. 37 and 49 ([www.toerismevlaanderen.be](http://www.toerismevlaanderen.be)).

<sup>14</sup> E.g. : Directive 2009/45/EC on safety rules and standards for passenger ships; Regulation (EC) Nr. 725/2004 enhancing ship and port facility security.

Transport services (carrier liability) however are sometimes excluded from the consumer protection legislation, because they are already specifically addressed by the international transport related treaties (carrier liability conventions).

For this reason E.U. consumer protection legislation generally excludes transport services from its scope of application.

The cruise activity and the cruise vessel are one of the many types of respectively maritime operations and concomitant types of sea-going vessels (besides e.g. passenger liner, ferry, tanker, bulk-carrier, container, ro-ro, dredger, ice-breaker etc. operations/vessels).

A number of legal/regulatory precepts are common for all types of maritime operations and vessels. Some may be specific for certain types, like cruise, but there are very few legal rules or regulations specifically applicable to cruises.

A cruise vessel/operation in the first place belongs to the broader category of maritime passenger vessel/transport operation.

Cruise activities are within the scope of the international public law instruments, such as UNCLOS<sup>15</sup>, SOLAS<sup>16</sup>, COLREGs<sup>17</sup>, MARPOL<sup>18</sup> and overall those with regard to the liability of the ship owner and operator (e.g. the Collision Convention, Athens Convention on passenger transportation (PAL), Ship Arrest Convention, Salvage Convention, International Convention on Civil Liability for Oil Pollution Damage (“CLC”), Convention on Limitation of Liability for Maritime Claims (“LLMC”), Bunker Oil Convention, Wreck Removal Convention).

The International Convention for the Safety of Life at Sea (SOLAS) contains specific rules for specific classes of vessels, such as passenger vessels, but not for cruise vessels. The International Association of Classification Societies (IACS) issued Common Structural Rules (CSR) but did not develop technical standards specifically for cruise vessels.

Legal regimes generally also apply to cruises in their capacity of maritime activities next to other maritime activities (e.g. transportation) or to cruises as part of broader categories of maritime activities (supply of services).

The question is rather whether cruises qualify as those other specifically regulated categories of activities or are on the contrary in some instances excluded from the application of a specific legal regime, both in the field of private and public law (cfr. *infra* : e.g. maritime passenger transport and package travel, cabotage, etc.).

For that purpose, the qualification and definition of “cruise” services is crucial (cfr. *infra*).

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<sup>15</sup> United Nations Convention on the Law of the Sea.

<sup>16</sup> International Convention for the Safety of Life at Sea, 1974 (SOLAS).

<sup>17</sup> International Regulations for the Preventing of Collisions at Sea, 1972 (COLREGS)

<sup>18</sup> International Convention for the Prevention of Pollution from Ships (MARPOL)

## 2.2. Self-regulation

Where there is no (mandatory) legislation/regulation, self-regulation may be relevant. In this respect the following sources of self-regulation can be mentioned.

Current safety levels in IWT (Inland Waterway Transport) are not only a product of legislation in force but also of practices developed over many years by the profession. Navigation on large convoys or on cruise ships is an example. Although according to the regulatory framework a skipper can navigate these vessels with the patent/boatmaster certificate, shipping companies have put in place a career management system that includes additional requirements in terms of experience and lifelong training<sup>19</sup>.

Cruise Lines International Association (CLIA) Europe was previously known as the European Cruise Council (ECC). The European Cruise Council (ECC) represents the leading cruise companies operating in Europe. It is the European wing of Cruise Lines International Association (CLIA), the world's largest cruise industry trade association with representation in North and South America, Europe, Asia and Australasia.

CLIA advances policies and in some cases calls for best practices in excess of existing legal requirements, intended to enhance operational safety, shipboard security, fire protection, environmental protection (waste management), health (ship medical facilities, public health (pre-boarding health screening in the context of communicable diseases), and other (passenger bill of rights).

CLIA thus issues various “Cruise Industry Policies”, but stresses that by promoting these practices and policies, it does not undertake to develop or enforce industry standards.

CLIA developed the *Cruise Industry Passenger Bill of Rights*, codifying cruise industry practices and expressing the cruise line’s commitment to the safety, comfort and care of guests in the event of a mechanical failure or shipboard emergency.

The ECC requires all its members to meet the ECC Standard On Blackwater<sup>20</sup> Discharges (April 2011)<sup>21</sup>. Reference can also be made to the ECC Statement of Commitment on the Environment.

## 3. The cruise concept : qualification

Depending on the legal context, the concept of cruises was classified differently, sometimes in a contradictory manner, as is illustrated below.

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<sup>19</sup> Commission staff working document Impact Assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications in inland navigation and repealing Council Directive 91/672/EEC and Council Directive 96/50/EC (COM(2016) 82 final) (SWD(2016) 36 final).

<sup>20</sup> Waste from toilets, urinals, medical sinks and other similar facilities is called "blackwater."

<sup>21</sup> All blackwater is to be processed through a Marine Sanitation Device (MSD), certified in accordance with national and/or international regulations, prior to discharge. For ships travelling regularly on itineraries beyond the territorial water of coastal states, discharge must take place only when the ship is more than 4 miles from shore and when the ship is travelling at a speed of not less than 6 knots.

In this respect the consideration was relevant that the cruise industry is part of the luxury segment of the maritime sector, that the ships include a complete hotel infrastructure, provide leisure activities and often bring passengers back to the port of departure<sup>22</sup>.

A basic distinction may be made between river cruises and maritime (ocean) cruises.

The differential cruise business or semi-cruise models may cause qualification problems for the purpose of application of the legal regime in various respects.

The main model of the major cruise lines focuses on providing “Onboard Hospitality and Entertainment” (OHE), where the transportation element is servile to entertainment. They may even limit themselves to onboard entertainment and activities rather than destination-based activities, abandoning the multiple-coast-check program and offering long term ocean-only cruises.

Another niche is the “Condominium/Residential Model” (CRM) that offers floating residency.

“Shore to Shore Floating Services” (SSFS) mobilizes conventionally land-based services (events, festivity, casino, etc.) on a floating infrastructure often consisting of immobile ships.

Ferry-services focus mainly on transportation and mobility with no or “Limited Onboard Involvement” (LOI)<sup>23</sup> : in some cases only tax free shops.

In this context the following cases were assessed.

The journey of a passenger on board of a cargo ship was qualified as a package travel contract for the purpose of application of the package travel contract law<sup>24</sup> (cfr. infra).

The distinctive criteria between a package travel contract and a maritime transport contract, (e.g. overnight boat trip or ferry service that includes accommodation in a cabin with bed and catering services : the excess of 24 hours and the overnight stay criteria (as opposed to the entertainment element) are problematic to distinguish cruise operations from transport operations.

Art. 3 of the Directive (EU) 2015/2302 and Art. 2 of the Belgian Act of 21 November 2017 on the sale of package travel, linked travel arrangements and travel services distinguish accommodation that is not intrinsically part of passenger transportation.

Recital 17 of the Directive (EU) 2015/2302 explains that only the combination of different types of travel services, such as accommodation, carriage of passengers by bus, rail, water or air, as well as rental of motor vehicles or certain motorcycles, should be considered for the purposes of identifying a package or a linked travel arrangement.

This means that in cases where (unlike in the case of a cruise), overnight accommodation is provided as part of passenger transport by road, rail, water or air, accommodation

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<sup>22</sup> Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (COM/2016/0274 final).

<sup>23</sup> M. MOZUNI and W. JONAS, “Rise of Alternative Business Models in the Era of Expensive Megaships”, in A. PAPATHANASSIS (ed), *Cruise Business Development, Safety, Product Design and Human Capital*, Cham, Springer, 2016, p. 59-60.

<sup>24</sup> E.U. Court of Justice, 7 December 2000, cases nr. C-585/08 and C-144/09.

should not be considered as a travel service in its own right if the main component is clearly transport.

#### **4. Specific rules on cruises**

Specific rules on cruises were issued in various fields.

##### **4.1. Goods and services classification and nomenclature**

Cruise related products and services are acknowledged for the purpose of statistics, customs and trade agreements, public procurement<sup>25</sup>, etc.

The E.U. instruments on statistics contain definitions and provisions that are specific to cruise activity, viz.:

Regulation (EU) No 692/2011 of the European Parliament and of the Council of 6 July 2011 concerning European statistics on tourism.

Commission Regulation (EU) No 1051/2011 implementing Regulation (EU) No 692/2011 concerning European statistics on tourism, as regards the structure of the quality reports and the transmission of the data

Directive 2009/42/EC on statistical returns in respect of carriage of goods and passengers by sea.

Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff identifies cruise ships as a particular type of goods. It established a nomenclature, known as ‘Combined Nomenclature’ or abbreviated to the ‘CN’, based on the International Convention on the Harmonised Commodity Description and Coding System (WCO) known as ‘the Harmonised System’ or abbreviated to the ‘HS’.

The Regulation (EC) nr. 451/2008 establishing a new statistical classification of products by activity (CPA) contains several cruise specific categories and identifies cruise ships as a particular type of goods. It is in accordance with the United Nations' Central Product Classification (CPC) and aligned with the Harmonised System (HS) (International Convention on the Harmonised Commodity Description and Coding System (WCO<sup>26</sup>) and the Combined Nomenclature (CN).

Commission Regulation (EU) 2017/2119 of 22 November 2017 establishes the ‘Prodcom list’ of industrial products provided for by Council Regulation (EEC) No 3924/91.

Those instruments define e.g. :

“Cruise passenger” as a sea passenger making a sea journey on a cruise ship. Passengers on day excursions are excluded. (Annex I, art. 2 (h) Directive 2009/42)

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<sup>25</sup> Commission Regulation (EC) No 213/2008 on the Common Procurement Vocabulary (CPV).

<sup>26</sup> World Customs Organisation.

“Cruise ship” (89.01) as a passenger ship intended to provide passengers with a full tourist experience. All passengers have cabins. Facilities for entertainment on board are included. Ships operating normal ferry services are excluded, even if some passengers treat the service as a cruise. In addition, cargo-carrying vessels able to carry a very limited number of passengers with their own cabins are excluded. Ships intended solely for day excursions are also excluded (Annex I, art. 2 (i) Directive 2009/42).

“Cruise passenger excursion” as a short visit by a cruise passenger to a tourist attraction associated with a port while retaining a cabin on board (Annex I, art. 2 (j) Directive 2009/42).

For the purpose of vessel classification, ICST<sup>27</sup>-COM distinguishes “Passenger ships” (sea passengers other than cruise passengers) (Annex VI, 35 Directive 2009/42) and “cruise ships” (cruise passengers only) (Annex VI, 36 Directive 2009/42).

The cruise ship building is designated with the CPA code 30.11.21.30.

The sea and coastal passenger water transport services on cruise ships are designated with the CPA code 50.10.12.

The exploitation of cruise vessels was defined as a specific category (nomenclature code (NACE<sup>28</sup>) 6110002) of waterborne passenger transportation (Belgian Royal Decree of 9 August 2002 listing the commercial activities).

NACE-BEL 2008 in accordance with the EC Regulation 1893/2006 no longer specifies cruises as a distinct category of waterborne passenger transportation in code 50.1.

## **4.2. Immigration**

In the field of immigration, a Belgian interdepartmental circular letter dated 10 December 1998 was issued on the effect of the Schengen Agreement on border control and police and judicial cooperation. It applies to maritime transport, but for cruise operations it refers to specific control measures (art. 6M2, Chapter VI).

Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) provides for a special immigration regime for cruise passengers (exemption from entry/exit stamping of travel documents) (art. 11, 3 (d) and specific check procedures for cruise ships and depending on whether their itineraries comprise ports situated inside or outside the EU territory (Annex VI art. 3.2.)).

‘Cruise ship’ is defined by the Regulation as “a ship which follows a given itinerary in accordance with a predetermined programme, which includes a programme of tourist activities in the various ports, and which normally neither takes passengers on nor allows passengers to disembark during the voyage” (art. 2, 17).

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<sup>27</sup> International Classification of Ships by Type (for statistical purposes).

<sup>28</sup> Nomenclature statistique des Activités économiques dans la Communauté Européenne : cfr. Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community.



Clandestine disembarkation of illegal immigrants from cruise ships was judged a limited risk, as the operators themselves exert tighter controls<sup>29</sup>.

#### **4.3. Customs clearance**

Cruises (especially maritime) are often operated cross-border.

Council Decision 87/594/EEC of 30 November 1987 accepted, on behalf of the European Community, Annex F.3 to the International Convention on the simplification and harmonization of customs procedures. With respect to the location of customs offices at which customs formalities relating to travellers may be accomplished, this procedure standard specifies that in some instances, such as cruise ships, it may be possible for travellers to accomplish all the necessary customs formalities on board.

#### **4.4. Cruise passenger security**

Whereas the I.M.O. work on maritime security does not contain specific measures applicable to cruise ships, the E.U. Commission has addressed the subject of cruise passenger security in Europe in the Transport White Paper (see Annex I, 1.4.)<sup>30</sup>, where it was considered that cruise passengers deserve special attention. Given the nature of their journeys and their large number on board, cruise ships could be a target in the same way as other means of collective transport. Consequently, it was felt necessary that access to cruise ships should be the subject of tighter controls on people, their belongings and the ship's provisions.

The issue is part of port security requiring legislation on checks on cruise ship passengers and, where appropriate, crew members in the context of the relevant provisions such as the Common Manual for External Borders (cfr. *infra*).

#### **4.5. Health and sanitation on board**

Ships sail from country to country where different hygiene standards and rules for controlling diseases exist.

Mechanisms for communicable disease control in ships were elaborated under E.U. Decision No 2119/98/EC of the Council and the Parliament.

Epidemic outbreaks have been associated to cruise ships. In the European Union, a common policy for dealing with health threats related to ships was needed.

To address these issues the European Commission funded from 2006 until 2011 two European health programme projects in the area of maritime transport :

‘Assessing the usefulness of an EU ship sanitation programme and coordinated action for the control of communicable diseases in cruise ships and ferries’ (SHIPSAN) and ‘EU Ship Sanitation Training Network’ (SHIPSAN TRAINET)<sup>31</sup>.

The SHIPSAN ACT is a European Joint Action funded by the European Commission under the Health Programme (2008-2013), in which 33 partners from 24 European countries participate.

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<sup>29</sup> Feasibility study on the control of the European Union's maritime borders, 11490/1/03, REV 1, LIMITE, FRONT 102, COMIX 458.

<sup>30</sup> COM(2001) 370 of 12 September 2001.

<sup>31</sup> <http://trainet.shipsan.eu>

EU SHIPSAN ACT produced a State of the Art report, with a literature review on infectious diseases, surveys on practices of E.U. authorities on chemical, biological, radiological and nuclear (CBRN) incidents in maritime transport, hygiene inspection on fishing and inland vessels, and training needs on core capacities at points of entry. This action produced a ship inspection plan including competencies, roles and responsibilities and a code of conduct. The production of guidelines was planned to allow consistent preparedness planning in the E.U. based on shared and common standards, facilitating International Health Regulation (WHO) implementation.

The European Manual for Hygiene Standards and Communicable Disease Surveillance on Passenger ships<sup>32</sup> incorporates hygiene standards based on E.U. legislation and brings together best practice guidelines for passenger ships sailing within European waters. This manual is intended for passenger shipping companies and public health inspectors in European ports, who are responsible for passenger ship inspections.

#### **4.6. Passenger Safety**

The safety of passenger ships is regulated at three levels: (i) through international conventions to which E.U. Member States (and in rare cases the E.U. itself as a whole) are party, (ii) E.U. passenger ship safety legislation and (iii) national law.

The 1974 International Convention for the Safety of Life at Sea (the 1974 SOLAS Convention), as amended, contains internationally agreed safety standards for passenger ships engaged on international voyages.

For ships engaged in international voyages, including between two E.U. Member States, SOLAS is the most safety-relevant applicable convention. It is administered by the International Maritime Organization (I.M.O.), a U.N. body, and has been ratified by all E.U. Member States.

Resolutions adopted by the I.M.O. and other measures complement and interpret that Convention, such as the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code) adopted by the International Maritime Organization (I.M.O.) through Assembly Resolution A.741(18) of 4 November 1993.

At E.U. level, the most extensive legislative instrument is Directive 2009/45/EC regulating ships made of steel (or equivalent material) and high speed craft (HSC) engaged in domestic voyages.

Directive 2009/45/EC on safety rules and standards for passenger ships does not contain specific precepts for cruise vessels. Also it applies to ships operated in domestic services. For international service reference is made to I.M.O.

Similarly Directive (EU) 2016/1629 laying down technical requirements for inland waterway vessels, contains specific precepts for passenger vessels, but not exclusively for cruise ships.

#### **4.7. Vessel technical specifications and standards**

Commission regulation (EU) No 164/2010 of 25 January 2010 on the technical specifications for electronic ship reporting in inland navigation referred to in

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<sup>32</sup> European Manual for Hygiene Standards and Communicable Disease Surveillance on Passenger Ships, edition 2, April 2016.

Article 5 of Directive 2005/44/EC of the European Parliament and of the Council on harmonised river information services (RIS) on inland waterways in the Community and the Commission regulation (EC) No 415/2007 of 13 March 2007 concerning the technical specifications for vessel tracking and tracing systems referred to in article 5 of Directive 2005/44/EC of the European Parliament and of the Council on harmonised river information services (RIS) on inland waterways in the Community, recognise cruise ships and cruise activities as distinct categories.

Cruise ship tenders<sup>33</sup> are mainly made from materials other than steel or equivalent to minimise the weight to be carried on board the cruise ship. However, it is a moot point whether such vessels can be considered as passenger ships in their own right or simply equipment on board a cruise ship. Tender operation is regulated nationally, unless the tenders are deemed to operate outside the port area and are made of steel (a rare occurrence) in which case the Directive 2009/45/EC (cfr. *supra*) applies. The I.M.O. has developed and adopted non-mandatory guidelines for the construction, outfitting and use of tenders to provide a common standard for their use (MSC.1/Circ.1417 on Guidelines for passenger ship tenders)<sup>34</sup>.

## **5. Cruises meeting characteristics of other legal categories**

The question arose whether cruises meet the characteristics to qualify as other legal categories in several respects.

### **5.1. Cabotage**

Together with other types of maritime transport services, during (E.U. economic integration) transition periods, the category of cruise services in the Mediterranean has been exempted from the application of the Regulation EC/3577/92 on the freedom to provide maritime transport services within E.U. Member States (maritime cabotage), first in general for the E.U. founding member states and later on also upon the accession of Croatia to the European Union : exemptions were granted allowing Croatia till 31 December 2014 to reserve cruise services between Croatian ports by ships smaller than 650 gt, to Croatian ships<sup>35</sup>.

The Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide to maritime transport services within Member States (maritime cabotage), was declared applicable to cruise services.

In the case C-17/13 before the E.U. Court of Justice the question arose from the perspective whether a cruise which starts and ends, with the same passengers, in the same port of the Member State in which it takes place, is covered by the term ‘maritime cabotage’ within the meaning of Regulation No 3577/92.

The Court held that a cruise which starts and ends, with the same passengers, in the same port of the Member State in which it takes place, is covered by the term ‘maritime

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<sup>33</sup> Devices used to ferry passengers from cruise ships to shore and back.

<sup>34</sup> Commission staff working document accompanying the document Report from the Commission to the European Parliament and Council REFIT Adjusting course: EU Passenger Ship Safety Legislation Fitness Check, SWD/2015/0197 final.

<sup>35</sup> Act of 9 December 2011, amending Regulation n° EC/3577/92.

cabotage' within the meaning of Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). Consequently such a service falls under the European Union's transport policy.

The Court considered that it is true that the transport services listed in Article 2(1)(a) to (c) of Regulation No 3577/92 are described as having different departure and arrival ports. However, according to the Court that list, which is introduced by the term 'in particular', is not exhaustive and cannot have the effect of excluding from the scope of that regulation transport services presenting all the essential characteristics of maritime cabotage contained in the above-mentioned phrase 'maritime transport services within a Member State' (referring to Case C-251/04 Commission v Greece, paragraphs 28 and 32).

The question arose whether Greece could apply national manning rules to Community cruise liners exceeding 650 gt, which carry out island cabotage (See Case C-288/02 Commission v Greece, paragraph 29).

The Court considered that all cruise services normally provided for remuneration in the maritime waters of a Member State fall within the ambit of the concept of 'maritime transport services within a Member State' defined in art. 1(1) and art. 2(1) of Regulation No 3577/92.

The fact that its departure and arrival ports are one and the same and that its passengers are the same throughout the itinerary, cannot, according to the Court, render Regulation No 3577/92 inapplicable to such a cruise.

The Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (COM/2014/0232 final) discusses (in 3.3.) the question whether the cabotage leg of an international cruise service falls within the scope of the Regulation. The Commission is of the opinion that the Regulation only applies when passengers are embarked and disembarked in the Member State where the cabotage leg takes place.

When reference is made to cabotage, the operations by E.U. carriers are meant. Greece has liberalised its cabotage market even more widely than required by the Regulation by opening the maritime cabotage to cruise ships registered in a third country (Law 3872/2010).

The qualification of E.U. carrier may be subject to substantive ownership (at least 50 percent national equity) and effective control requirements (management by nationals). The operation may require the manning by a majority of E.U. national crew.

## **5.2. Passenger transport**

Regulation (E.U.) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway aims to ensure the basic protection of passengers who travel by sea and inland waterway using passenger services or cruises in the event of transport disruption (delayed or cancelled departures), by imposing duties on the service provider viz. : information, care/assistance (supply of food and beverage, accommodation,

communication, transport), rerouting, compensation and reimbursement. It also imposes special duties on the operator vis-à-vis disabled passengers/customers or passengers with reduced mobility.

With certain exceptions, the Regulation applies to maritime and inland waterway passenger services operated from or to ports in the E.U. and to cruise services with a port of embarkation in the E.U.

The interrelationship between the Regulation (EU) No 1177/2010 and the Package travel Directive 90/314/EEC is addressed by the Regulation : the former does not apply in cases where a package tour is cancelled for reasons other than cancellation of the passenger service or the cruise (recital 20 of Regulation 1177/2010).

The Regulation N° 1177/2010 distinguishes between “commercial passenger services” on the one hand and “cruise services” on the other hand and reflects their different characteristics in the different scope of the rights that it grants to passengers. Commercial passenger services are passenger transport services operated between ports according to a published schedule. Cruises are defined as waterborne (by sea or inland waterway) services operated exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board (art. 3 (t) Regulation No 1177/2010).

The Regulation 1177/2010 applies in respect of passengers travelling on a cruise where the port of embarkation is situated in the territory of a Member State. However articles 16(2), 18, 19 and 20(1) and (4) of the Regulation do not apply to those passengers (art. 2 (c) Regulation 1177/2010).

Contrary to commercial passenger services, cruises do not have a binding published schedule, therefore cruise passengers have no right under the Regulation to choose between rerouting and reimbursement in the event of cancelled or delayed departure (this issue is referred to the contract that the passenger concludes for the cruise services), neither a right to compensation in the event of delayed arrival.

### **5.3. River operation**

In the case C-17/13 before the E.U. Court of Justice the issue of distinguishing maritime from river cruises arose.

The non-E.U. (Swiss) river cruise operator claimed that the concept of ‘maritime cabotage’ applies only to services that involve true sea transport and that the river cruise at issue does not involve such transport because, with the exception of the short passage through territorial sea, it takes place in internal (non-maritime) waters.

The Swiss operator had applied for an authorisation to cross a stretch of Italian territorial sea because the size of the cruise vessel did not permit it to navigate an inland canal connecting two points of its itinerary.

Italy had rejected the application on the ground that maritime cabotage was reserved for ships flying the flag of a Member State of the European Union.

The European Court of Justice observed that river cruise services fall within the scope of Council Regulation (EEC) No 3921/91 of 16 December 1991 laying down the

conditions under which non-resident E.U. carriers may transport goods or passengers by inland waterway within a Member State.

The Court ruled that the term 'sea' referred to by Regulation No 3577/92 is not limited to territorial sea within the meaning of the United Nations Convention on the Law of the Sea, signed in Montego Bay (Jamaica) on 10 December 1982, entered into force on 16 November 1994 and approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998, but also covers internal maritime waters which are on the landward side of the baseline of the territorial sea (referring to Case C-323/03, paragraphs 25 to 27).

It considered that even if the Swiss operator's claim that the sole crossing of a stretch of sea in itself is too short to confer a maritime nature on the cruise, were well founded, (although according to the Advocate General even where only a limited part of a cruise takes place at sea, that suffices for the transport service to be classified as 'maritime cabotage') also other sections of the river cruise itinerary were situated in areas of navigation that form part of the internal maritime waters of the Italian Republic.

#### **5.4. Multimodal operation**

As opposed to cargo transportation, there is no enacted legislation on multimodal passenger transportation.

For the application of the package travel contract regime the transport mode or combination of transport modes is irrelevant.

#### **5.5. Regular service**

In the case C-537/11 the European Court of Justice ruled that a cruise ship falls within the scope of Article 4a(4) of Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels with regard to the criterion of 'regular services', as laid down in its art. 2(3g), if it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.

#### **5.6. Tax exempted travel**

Very short (lasting only a few hours) cruises, exiting the national customs territory either or not by leaving the territorial waters and proceeding to the high seas without making a call abroad or at best making only a token (symbolic) port call, are sometimes organised with the sole goal of allowing travellers to purchase goods on board, that are exempted from indirect taxes and charges, such as VAT, customs and excise duties on products (spirits, tobacco, coffee, tea, perfumes, ICT devices, etc.). After the boat trip, the goods bought on board benefit from the duty-free exemption allowance for personal use or consumption when entered into the national territory. In this way the practice may distort competition with mainland traders.

In the case C-158/80 the EU Court of Justice ruled that a person who, during a cruise departing from a port of a Member State, does not call at a non-member country or who makes only a token call there and does not remain there for an appreciable period, that is to say, a period during which he has in fact an opportunity of making purchases,

cannot be considered as a traveller coming from a non-member country, within the meaning of the regulation. Consequently the exemptions of customs duties, excise and turnover taxes on import provided for by Regulation 1544/69 and Directive 69/169 for goods contained in the personal luggage of travellers coming from a non-member country, cannot apply. The argument of simulation or abuse of right/fraud was not advanced.

In the case C-74/91 The European Court of Justice rejected the position that on the basis of art. 27(5) of the Sixth Directive (VAT), which allows the Member States to maintain, under certain conditions, special derogating measures intended to simplify the collection of the tax, cruises must be exempted, for the sake of simplification, even where they take place between two ports in Member States, on the alleged ground that sea transport operations are as a general rule carried out almost exclusively on the high seas, that is to say outside Community waters. The Court considered such exemption to be contrary to art. 26 of the Sixth Directive, that limits the derogation to transactions performed outside the Community.

The proposal<sup>36</sup> for a differential monetary exemption value between on the one hand “sea ferry or cruise passengers” and on the other hand “air travellers” was not retained by the Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries.

## **5.7. Tourism**

Services in the field of transport, falling within the scope of Title VI of Part Three of the TFEU (Treaty on the Functioning of the European Union), are excluded from the field of application of the EU Services Directive n° 2006/123 (art. 2,2 (d)).

On the other hand, services in the field of tourism are covered by this Directive (Recital 33).

The question arises under which category (either “transport” or “tourism”) cruise operations are to be classified in this respect.

In the case C-340/14, the European Court of Justice examined whether the transportation of passengers by open sloop on internal waterways with the main purpose of providing, for payment, tours and rentals for festive occasions, is a service to which the provisions of Directive 2006/123 apply, having regard to the exception set out in art. 2(2)(d) of that directive in respect of services in the field of transport.

The Court considered that *prima facie* transport means : conveying people or goods from point A to point B, so that when the starting and end point of a boat trip are the same, it does not constitute a service in the field of transport.

The Court held that the main purpose of the activity forms the criterion to define cruise services either as transport (conveyance) or as tourism (event related purposes : entertainment/recreation).

## **5.8. Competitive activity**

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<sup>36</sup> European Parliament legislative resolution on the proposal for a Council directive on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries (COM(2006)0076 - C6-0078/2006 - 2006/0021(CNS)).

The Commission of the European Union ruled on the compatibility of state aid for the building of cruise vessels with competition law precepts, thereby assessing the cruise market<sup>37</sup>.

In concentration cases the Commission assessed the relevant market of cruise operators<sup>38</sup>, cruise terminal operators<sup>39</sup> and cruise shipbuilding<sup>40</sup>.

Also the competition distortion issue came up in the context of the public procurement on the basis of a tender for scheduled maritime passenger transport in order to fulfil a public service obligation. Besides the maritime public service obligation, the same operator also offered commercial cruise services outside of the public procurement tender.

The duty to keep separate accounts of the public service obligation operations and the commercial cruise operations for the purpose of transparency in order to disclose state aid was at stake<sup>41</sup>.

## **5.9. Fiscal transit**

The transit stops (intended for excursion and sightseeing) as opposed to the turnaround stops (intended for the embarkation of new passengers or for final disembarkation) in the port of a third (non E.U.) country were also qualified as “stops” for the purpose of the fiscal exemption regime of sales on board of the cruise vessel (case C-58/04).

The report from the Commission to the Council on the place of taxation of the supply of goods and the supply of services, including restaurant services, for passengers on board ships, aircraft, trains or buses drawn up in accordance with Article 37(3) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (COM/2012/0605 final) addresses the specific situation of supplies offered on board cruises (3.5).

In this context a mere stopover for the purpose of visit/sightseeing/excursion was distinguished from the first point of embarkation or the last point of disembarkation.

## **5.10. Package travel**

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<sup>37</sup> Commission decision of 20 May 2008 on State aid implemented by France for building the cruise vessel *Le Levant* (C 74/99 (ex-NN 65/99), notified under document number C(2007) 5419 (2008/746/EC); Commission decision of 20 July 2005 on the State aid implemented by France for two cruise ships with a view to the development of French Polynesia (notified under document number C(2005) 2731) (2006/219/EC).

<sup>38</sup> Commission decision of 24 July 2002 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement. (Case No COMP/M.2706 - Carnival Corporation/P&O Princess) (notified under document number C(2002) 2851) (2003/667/EC).

<sup>39</sup> Commission Decision of 17/06/2010 declaring a concentration to be compatible with the common market (Case No COMP/M.5756 - DFDS / NORFOLK) according to Council Regulation (EC) No 139/2004.

<sup>40</sup> Commission Decision of 27/03/2006 declaring a concentration to be compatible with the common market (Case No IV/M.4104 - AKER YARDS / CHANTIERS DE L'ATLANTIQUE) according to Council Regulation (EEC) No 4064/89. Summary of commission decision of 5 May 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.4956 — STX/Aker Yards).

<sup>41</sup> EFTA surveillance authority decision No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten service (Norway).



Package travel implies a combination of at least 2 out of 3 constituent components, that are prearranged and sold at an inclusive price, viz. (i) transport (travel), (ii) accommodation (lodging and catering) and (iii) other tourist services (entertainment, practice of sport, excursions, attendance of cultural or sport events, etc.).

In the case C-585/08 before the E.U. Court of Justice, the question arose whether the services offered in case of a voyage by a freighter (cargo carriage vessel) are comparable to a cruise.

The European Court of Justice held that a contract concerning a voyage by freighter, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation that corresponds to the concept of 'package' within the meaning of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in the sense of art. 2(1) of Directive 90/314.

The further qualification criteria require that the other tourist service is significant (substantial) and not ancillary (art. 3,1 (b) and that the travel exceeds 24 hours or includes an overnight stay (art. 2,2) (Directive 2015/2302).

Services, which are intrinsically part of another travel service, are not considered as travel services in their own right. This includes, for instance, transport of luggage provided as part of carriage of passengers, minor transport services such as carriage of passengers as part of a guided tour or transfers between a hotel and an airport or a railway station, meals, drinks and cleaning provided as part of accommodation, or access to on-site facilities such as a swimming pool, sauna, spa or gym included for hotel guests. This also means that in cases where, unlike in the case of a cruise, overnight accommodation is provided as part of passenger transport by road, rail, water or air, accommodation is not considered as a travel service in its own right if the main component is clearly transport (Recital 17 and art. 3,1 (b) EU Directive 2015/2302).

However Rome I (art. 6,4 (b) and Brussels Ibis (art. 17,3) Regulations qualify in an implied manner a package travel contract in the sense of Directive 90/314/EEC as a contract of carriage (cfr. *infra*).

The Directive (EU) 2015/2302 on package travel and linked travel arrangements replacing the Directive 90/314/EEC is to be transposed by the EU Member countries by 1 January 2018 and to become effective by 1 July 2018 (art. 28).

The new directive updates current E.U. rules on package holidays by aiming to adapt to travel market developments in order to meet the needs of consumers and businesses in the digital era.

The Belgian act of 21 November 2017 on the sale of package travel, linked travel arrangements and travel services has transposed the Directive (EU) 2015/2302 into Belgian law. Hence its origin is supranational.

As mentioned above the International Convention on Travel Contracts (CCV), Brussels, April 23, 1970 was denounced by Belgium.

## **6. Cruises and passenger carrier liability**

As mentioned before, a cruise qualifies as a package travel.

As a package travel, a cruise includes a component part that consists of passenger transportation.

As passenger carrier liability is often governed by a supranational or an international instrument, the question of the interrelationship between the package travel contract liability regime and the passenger carriage liability regime arises.

Art. 5,2 EEC Directive 90/314<sup>42</sup> allows the Member States to limit the compensation for malperformance in accordance with the international conventions governing services included in the package and art. 19 § 3 (old) Belgian Act of 16 February 1994 allows the package travel organiser to invoke the exonerations and limitations in international conventions governing services included in the package. For maritime cruises this means the maritime passenger carrier liability conventions, viz. the Athens 1974 (PAL) as amended (PALProt).

The EU Directive 2015/2302 (Recital 35 and art. 14, 4 and 5) and the (new) implementing/transposing Belgian Act of 21 November 2017 (art. 51 and 52) are aligned with the provisions of international conventions on maritime carrier liability and address the interrelationship between the package travel contract liability regime and the supra- and international treaties governing the passenger carrier liability regimes (EU Regulation 392/2009<sup>43</sup> adopting the PALProt on maritime passenger carrier liability and EU Regulation 1177/2010 on maritime and inland navigation passenger rights).

The International Convention on Travel Contracts (CCV), Brussels, April 23, 1970 was denounced by Belgium.

This convention distinguishes the package travel organizer liability for damage due to malperformance in the organization on the one hand and liability from any component part service provided by the package travel organizer himself on the other hand. In the former case the CCV provides the limitation regime itself (art. 13) and in the latter case it refers to the rules governing such services (art. 14) : for the passenger carriage services, in the case of cruises this means the maritime carrier liability convention(s).

## **7. Cruises and consumer protection**

E.U. Consumer protection contract law is transposed and implemented in Book VI of the Belgian Code of Economic Law. It also applies on cruise contracts.

A special regime is e.g. elaborated with respect to the withdrawal period in case of distance sale (art. VI. 47 Belgian Code of Economic Law), save for catering and leisure services on a certain date or in a certain period (art. VI.53,12° Code of Economic Law). The provider is however under a duty to inform the consumer that no withdrawal right will apply (art. VI.45,11° Code of Economic Law).

### **7.1. Package travel**

The EU Directive 2015/2302 on package travel and linked travel arrangements addresses its interrelationship with consumer protection legislation.

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<sup>42</sup> EU Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

<sup>43</sup> EU Regulation 392/2009 dated 23 April 2009, implementing the Athens Convention of 13 December 1974 (PAL ) as amended by the 2002 Protocol (PALProt).

The information requirements laid down in this directive are without prejudice to the information requirements laid down in other applicable European Union legislation, such as Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Directive 2006/123/EC on services in the internal market, and EU Regulation 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway.

Also the general consumer protection legislation does not exclude package travel from its field of application.

The Directive 2006/123/EC of the European parliament and of the council of 12 December 2006 on services in the internal market does not exclude from its scope the package travel contracts as tourism services.

The council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not exclude package travel contracts from its scope of application.

The Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') does not exclude package travel contracts from its scope of application.

The same goes for the Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers and the Directive 2006/114/EG concerning misleading and comparative advertising.

EU Directive 2015/2302 adapted certain EU consumer protection legislative acts. In particular, EU Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) applies to infringements of this Directive.

Also EU Directive 2015/2302 amended Directive 2011/83/EU on consumer rights (i.a. distance and off-premises sale) to ensure that certain consumer rights laid down in that directive also apply to package travel. This Directive 2011/83/EU on consumer rights did not apply to contracts which fell within the scope of the former Council Directive 90/314/EEC on package travel, package holidays and package tours (art. 3, 3 (g)).

The Directive 2015/2302 is without prejudice to rules on the protection of personal data laid down in Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, to be replaced by the General Data Protection Regulation (GDPR) 2016/679<sup>44</sup>, and to the Union rules on private international law, including Regulation (EC) No 593/2008<sup>45</sup> and Regulation (EU) No 1215/2012<sup>46</sup>.

## **7.2. Protected consumer ?**

Another problem arises with respect to the protection (e.g. compensation for malperformance) of the traveller when the cruise contract was concluded and paid (cruise

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<sup>44</sup> Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>45</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

<sup>46</sup> Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

purchased) by another person for account or in favour of a beneficiary : e.g. by an employer for his employees (as rewards or in the context of team building activities, etc.) or by a merchant for his customers (as a gift).

To whom does the protective legislation apply : the beneficiary natural person, who attended the cruise or the contracting legal person who ordered and paid for the cruise ?

The issue was addressed and solved by art. 1,5 of the Belgian Package Travel Act of 16 February 1994, that defined the protected traveller as the person who enjoys the benefit of the contract, irrespective of who concluded the contract or paid the price for it.

The repealed Directive 90/314/EEC also defined the consumer (protected by its regime) as “the person who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’) (art. 2,4)

This Directive 90/314/EEC explained in its preamble that “... the consumer should have the benefit of the protection introduced by this Directive irrespective of whether he is a direct contracting party, a transferee or a member of a group on whose behalf another person has concluded a contract in respect of a package”.

The Belgian Supreme Court<sup>47</sup> ruled (against the EU Directive 90/314/EEC) on the other hand that according to the Belgian Package Travel Contract Act of 16 February 1994 the buyer of a package travel, non-traveller (i.e. who is not the physical person travelling), does not qualify as the protected traveller, so that in the relationship between this non-travelling buyer and the travel organiser the regime of the Package Travel Contract Act of 16 February 1994 does not apply.

The new EU Directive 2015/2302 defines in its art. 3 (6) the “traveller” (as protected by its regime) also as the person who is entitled to travel on the basis of a contract concluded within the scope of the Directive.

The new EU Directive 2015/2302 excludes from its field of application the package travel that is bought by a general agreement for the arrangement of business travel between a travel organiser and another professional (art. 2,2,c). Consequently a framework contract between an employer of travellers and a cruise company is outside the scope of the EU Directive.

Travellers who did not contract the cruise themselves, but travel outside the context of a framework contract, remain protected by the regime of the new directive.

### **7.3. Transport**

E.g. the Directive 2011/83/EU on consumer rights did not apply to contracts for passenger transport services, with the exception of article 8(2) (information requirements for distance contracts) and articles 19 (cost of the payment transaction) and 22 (express consumer consent with extra payment) (art. 3,3 (k)).

The Directive 2006/123/EC of the European parliament and of the council of 12 December 2006 on services in the internal market excludes from its scope : services in the field of transport, including port services, falling within the scope of Title V of the Treaty; (art. 2, 2 (d)).

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<sup>47</sup> Cass., 15 May 2014.

## **8. Cruises and labour law**

The precepts of maritime labour law are very relevant for cruise operations, as they relate to passenger vessel operations, but they are not specific for cruise operations.

A few examples of relevant but not cruise specific rules and precepts follow.

In the “French sailors” Case 167/73 the European Court of Justice ruled that a French law requiring a certain proportion of a French-flagged ship’s crew to be of French nationality could not be enforced and had to be repealed because it was contrary to the EU precept of the free movement of persons for E.U. nationals.

Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) divides the responsibilities of all matters relating to manning of cruise liners carrying out mainland and island maritime cabotage between the flag state and the host state (art. 3).

### **8.1. Binding sectoral collective agreements**

In Belgium Joint Committees (employer-employee occupational consultation committees) are endowed with legislative/regulatory initiative and powers in specific economic sectors. In the present subject matter this is the case for the relevant sectors of inland navigation (nr. 139), transport (nr. 226), port activities (nr. 301), hotel business (nr. 302), entertainment business (nr. 304), merchant navy (nr. 316). The Joint Committee nr. 316 for the Merchant Navy concludes the (binding) collective agreements between the employer and employee representative organisations.

There are no such bodies specifically for the cruise business.

### **8.2. International law implemented by Belgium**

The Act of 3 June 2007 on the seafarers' employment contract has conformed the Belgian law to the international conventions.

#### **8.2.1. Maritime Labour Convention (MLC)**

The Maritime Labour Convention (MLC) 2006 of the International Labour Organisation (ILO) protects the sailors by setting minimum safety, wellbeing and labour conditions. Its degree of specificity is limited to the distinction between passenger ship and other than passenger ships. It does not acknowledge cruise operations as a specific category.

Belgium has ratified the MLC on 20 August 2013.

Signatory countries are entitled to inspect and apply the MLC on vessels flying the flag of non-signatory countries, when they berth in a port of a signatory country (flag and port state control issue).

The ILO Maritime Labour Convention (MLC) was incorporated into EU law by means of Council Directive 2009/13/EC of 16 February 2009 implementing the Social Partners’ Agreement.

The ILO's international standards for this sector establish the minimum conditions for "decent work" and address almost all aspects of work including minimum requirements for work on a ship (such as minimum age, medical fitness and training) provisions on the conditions of employment such as work and rest time periods, wages, leave, repatriation, accommodation, recreational facilities, food and catering, occupational safety and health protection, medical care, welfare and social security protection. In addition, they address issues such as pensions and an internationally recognized document for seafarers (a seafarers' identity document) to assist in border control matters.

### **8.2.2. Standards of Training, Certification and Watchkeeping for Seafarers (STCW)**

The IMO Maritime Safety Committee, at its ninety-first session, first considered proposals to amend the existing requirements of the STCW Convention<sup>48</sup> and the Code relating to passenger ships to address new challenges posed by the increased size of modern passenger ships and the large number of passengers on board, in particular concerning cruise ships.

The amendments to the STCW Convention and Code relating to passenger-ship specific training and to Parts A and B of the STCW Code comprise 4 distinct levels of training and familiarization: (i) passenger ship emergency familiarization, (ii) passenger ship crowd management training, (iii) passenger ship crisis management and (iv) human behaviour training, and ro-ro passenger ship training.

E.U. Directive 2008/106/EC, in particular Regulation V/2 of Chapter V of Annex I, includes mandatory minimum requirements for the training and qualifications of masters, officers, ratings and other personnel on passenger ships.

Amendments to regulations I/14 and V/2 of the STCW Convention and section A-V/2 of the STCW Code to improve the safety of (ro-ro and non-ro-ro) passenger ship safety have been actively promoted by the E.U., in particular after the Costa Concordia accident in January 2012.

These amendments are set out in the Annex of MSC 96/25/add.1. Paragraph 12.6 of the MSC 96 report (MSC 96/25) indicates that the amendments were foreseen to be adopted at MSC 97<sup>th</sup> session.

### **8.3. Conflicts of labour and social security laws**

The cruise sector activities often raise issues of conflicts of labour and social security law in case of employment of migrant workers or when the operator is established abroad, but operates in an E.U. member state, employing personnel that lives locally.

In accordance with Article 13(2)(a) of EU Regulation Nr. 1408/71 on the application of social security schemes to employed persons and their families moving within the European Community, a person is in principle subject to the social security legislation

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<sup>48</sup> International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention).

of the State in whose territory he/she is employed and is to contribute to that State's social security scheme.

In the case C-620/15 before the European Court of Justice employees worked on board of cruise ships on French rivers and were for the full duration of their contracts posted to ships sailing exclusively in France.

The German employer however claimed that Swiss social security legislation applies to the employees concerned, relying on E 101 certificates stating that they are affiliated to the Swiss social security scheme. Art. 14(2)(a)(i) of the EU Regulation Nr. 1408/71 provides that a person employed by a branch and who is a member of the travelling or flying personnel of an undertaking operating international passenger transport services is to be subject to the legislation of the State in whose territory such branch is situated. The European Court of Justice held that without prejudice to abuse of right or fraud on the part of the worker or his employer however that the E 101 certificate issued in accordance with Article 12a(1a) of Regulation (EEC) No 574/72 is binding.

In the case C-292/14 Greek seamen, living in Greece were employed by a non-E.U. Member State (Malta<sup>49</sup>) established cruise vessel operator, whose vessel flew the Maltese flag, but whose actual head office was established in Greece. The operator became insolvent and the sailors' salaries remained unpaid. The question arose whether the sailors could claim from the Greek state on the basis of the employee protection guarantee<sup>50</sup> in case of employer insolvency. The European Court of Justice ruled affirmatively.

The various transport sectors, including inland waterways are within the scope of the E.U. Working Time Directive 2003/88/EC. However, it was not possible to reach agreement to apply the Directive's general rules on minimum daily and weekly rest periods or on limits to night work to mobile workers in Inland Water Transport (IWT) and other transport sectors. This was due to the distinctive working conditions and particular features of their activities (e.g. working and living at the workplace for certain periods, mainly cross-border activities). It was therefore provided that Member States must take the necessary measures to ensure that such workers are entitled to "adequate rest", without expressing this principle in specific units of time.

The absence of EU rules on numerical limits on daily and weekly working time, and night work of (IWT) mobile workers opened the way to a diversity of national rules, which created difficulties for transport companies and did not in all cases ensure sufficient protection for workers. This is particularly true for hotel personnel working in the river cruise industry. As the passenger navigation season lasts around eight months, hotel staff is away from home for a very long time. They often have to put up with very long working days and being accommodated for protracted periods in very small cabins.

Article 14 of the Working Time Directive provides for other instruments at E.U. level containing more specific working time requirements for certain occupations or occupational activities. Such specific requirements have been laid down by specific Directives for seafarers and for mobile transport workers in civil aviation and in cross-

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<sup>49</sup> Before 2004.

<sup>50</sup> Cfr. Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer.

border rail services, based on European agreements concluded by the social partners for the sectors concerned.

Directive 1999/63/EC on working time for seafarers<sup>51</sup> does not contain any specific provisions for cruise workers.

Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF), provides for a working time regime for seasonal work of mobile workers in inland waterway transport on passenger vessels. It defines :

- ‘mobile worker’ : as a worker employed as a member of travelling personnel by an undertaking which operates transport services for passengers or goods by inland waterway.
- ‘season’ : as a period of no more than 9 consecutive months out of 12 months in which activities are tied to certain times of the year as a result of external circumstances, e.g. weather conditions or tourist demand.

## **9. Cruises and Port Law**

### **9.1.Waste Disposal**

The Directive 2000/59/EC addressed Port Reception Facilities (PRF) for ship-generated waste (cfr. infra).

### **9.2. Competition distortion by state aid**

State aid (within the meaning of Article 107 of the Treaty on the Functioning of the European Union (TFEU)) issues were raised with respect to the public funding for the building of cruise terminals. Council Regulation (EC) No 659/1999 laying down detailed rules for the application of article 93 of the EC Treaty applies.

The E.U. Commission considered that<sup>52</sup> :

- For a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative criteria must be met: (i) use of state resources (public funds) (ii) selective advantage to the beneficiary undertaking and (iii) (potential) distorting effects on competition and trade between Member States.
- According to the European Court of Justice jurisprudence, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purpose of the E.U. competition law. The Commission established in a series of decisions

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<sup>51</sup> *OJ L* 167, 2 July 1999, p. 33.

<sup>52</sup> Commission Decision of 11 March 2014 in State aid case SA.35720 (2014/NN) — United Kingdom — Liverpool City Council Cruise Liner Terminal.



that the exploitation of some types of ports infrastructure, including cruise terminals<sup>53</sup>, can be considered as being of an economic nature.

The use of the infrastructure, i.e. whether the infrastructure shall be commercially exploited or not, determines whether its construction constitutes an economic activity and falls within the scope of the E.U. state aid rules. It is irrelevant for the classification of a certain activity as economic whether a private investor would carry it out or not<sup>54</sup>.

- The public grant selectively advantages the beneficiary terminal operator as it strengthens its position vis-à-vis other competing port operators. The grant does not distort competition between the users (cruise shipping companies) if they are all eligible for equal and non-discriminatory access to the Terminal for use at market rates.
- The lifting of the restriction in the use of the cruise terminal from only as a "port of call" to a "turnaround port", was not found relevant in this respect. Ports of call handle only transit vessels, in contrast to "turnaround ports" where cruise journeys start and end. The latter are considered more attractive as they generate more income for cruise terminal operators.
- The investment contributes to an objective of common interest, in particular the E.U. maritime transport policy.
- The public funding was necessary because for lack of it, neither the beneficiary nor any market investor would have undertaken the investment.
- With respect to proportionality, the cruise industry is subject to high seasonal variations, since transport of passengers by cruise ships is significantly reduced during winter time, which means that port revenues from cruise passengers are more volatile (i.e. subject to higher risk) and lower than the revenues from other types of ports that operate throughout the whole year. In view of this, a relatively higher aid intensity for cruise terminals than for other types of port infrastructure (e.g. freight ports) should not be regarded as unusual.

Consequently the aid was found necessary and proportional to address a well-defined objective of common interest and does not affect competition and trade between Member States to the extent that would be contrary to the common interest. On these grounds, the Commission concluded that the aid is compatible with the internal market pursuant to Article 107(3)(c) TFEU.

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<sup>53</sup> For cruise terminals see Commission Decision of 19.06.2013 in State Aid case no. SA.35738 (2012/N) - *Aid for the upgrading of Katakolo port*, OJ C 204 of 18.07.2013; Commission Decision of 02.07.2013 in State Aid case no. SA.35418 (2012/N) – *Extension of Piraeus port*, OJ C 256 of 05.09.2013.

<sup>54</sup> Joined cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v. Commission* and T-443/08 *Feistaat Sachsen and Land Sachsen Anhalt v. Commission* [2011] ECR II-0000. See also Case T-128/89 *Aéroports de Paris v. Commission* [2000] ECR II-3929, confirmed by the ECJ in Case C-82/01P [2002] ECR I-9297 and Case T-196/04 *Ryanair v. Commission* [2008] ECR II-3643, paragraph 88.

The General Block Exemption Regulation nr. 651/2014 (GBER) was amended in 2017 by extending it to ports and airports as regards aid for infrastructure building.

### **9.3. Port Services**

Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports pursues accessibility of ports and facilitation via simplification, but exempts passenger services from its application (art. 10), because the market access for providers of cargo-handling and passenger services is granted by means of public contracts (recital 38).

### **9.4. Port fees and charges**

In the case C-435/00 the European Court of Justice held that art. 1 of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries does not allow the application in a Member State of different harbour dues for domestic or intra-Community traffic on the one hand and traffic between a Member State and a third country on the other hand, if that difference is not objectively justified by the cost of the harbour services provided.

The Council<sup>55</sup> authorised a reduced rate of electricity tax for electric power directly provided to vessels at berth in a port ('shore-side electricity') pursuant to Article 19(1) of Directive 2003/96/EC and in line with Commission recommendation 2006/339/EC on the promotion of shore-side electricity for use by ships at berth in Union ports.

It is an environmentally less harmful way to satisfy the electricity needs of vessels lying at berth in ports, compared with the burning of bunker fuels by those vessels for on-board generation of electricity.

The measure pursues the reduction of ship CO<sub>2</sub> emissions at berth in ports, thus improving overall air quality.

The measure is however not specific for cruise ship, as it also applies to other passenger and cargo vessels.

### **9.5. Port Security**

The matter of port security (the question of checks on cruise ship passengers and, where appropriate, crew members) is addressed in the Common Manual for External Borders.

The EU Schengen Catalogue, EU Council, External Border Control, Removal and Readmission, Recommendations and Best Practices, February 2002, contains Recommendation 9.1.3. on cruise ships.

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<sup>55</sup> Council Implementing Decision (EU) 2015/993 of 19 June 2015 authorising Denmark to apply a reduced rate of taxation on electricity directly provided to vessels at berth in a port, in accordance with Article 19 of Directive 2003/96/EC; Council Implementing Decision 2014/722/EU of 14 October 2014 authorising Germany to apply a reduced rate of taxation on electricity directly provided to vessels at berth in a port in accordance with Article 19 of Directive 2003/96/EC.

The Code of Practice on Security in Ports (Geneva 2003), is the product of the cooperation between the International Labour Organization (I.L.O.) and the International Maritime Organization (I.M.O.).

The amendment of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) created a new Chapter XI-2 on special measures to enhance maritime security. This Chapter XI-2 of SOLAS is supplemented by the International Ship and Port Facility Security (ISPS) Code, which contains, inter alia, requirements that relate to the security of the ship and to the immediate ship/port interface. The overall security of port areas was left to further joint work between ILO and IMO.

The E.U. security policy is less developed in other transport domains than aviation. The overall objective of the EU's maritime transport security policy is to protect citizens and economies from the consequences of unlawful intentional acts against shipping and port operations. The basis of the E.U. legislation was the International Ship and Port Security (ISPS) Code on security in ports and on ships laid down by the International Maritime Organization (I.M.O.). The ISPS Code was introduced in the EU legislation in 2004 with the Maritime Security Regulation 725/2004. It was complemented by Directive 2005/65/EC that addressed elements of port security not covered by the Regulation. The EU maritime security legislation transposing and enhancing the ISPS Code, provides a harmonised interpretation, implementation and monitoring of the international rules. It is applicable to ships engaged in international and domestic voyages and the ports and port facilities serving them. The Member States ensure that security assessments are periodically reviewed, taking into account changing threats. The E.U. Commission undertakes inspections to monitor the application of this legislation. An alleged option would be to consider some security issues for ferries and cruise ships based on a dialogue with the Member States and the stakeholders.

## **10. Cruises and environment protection**

The Commission decision (EU) 2016/611 of 15 April 2016 on the reference document on best environmental management practice, sector environmental performance indicators and benchmarks of excellence for the tourism sector under Regulation (EC) No 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (notified under document C(2016) 2137) must be mentioned.

This sectoral reference document (SRD) primarily covers Best Environmental Management Practices (BEMPs) within organisations that provide accommodation, food and beverage services, or that manage tourism destinations or offer and reserve travel, accommodation or activities for tourism (travel agents and tour operators). This document does not directly target the cruise sector. However, a number of the BEMPs described may, to a certain extent, also be applicable to cruises.

### **10.1. Ballast water**

The I.M.O. International Convention for the Control and Management of Ships' Ballast Water and Sediments (Ballast Water Management or BWM Convention), London 3 February 2004, entered into force on 8 September 2017 and applies indiscriminately to all types of vessels (art. 1,12).

At present there is no direct E.U. law on ballast water, although Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 23 October 2014 on the prevention and management of the introduction and spread of invasive alien species recognises the BWM Convention as one of the possible management measures for invasive species of concern. See also the European Environment Agency.

## **10.2. Air pollution**

The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) (e.g. also Annex VI Regulations for the Prevention of Air Pollution from Ships) apply indiscriminately to all types of vessels.

The Energy Efficiency Design Index (EEDI) sets technical standards for improving the energy efficiency of certain categories of ships which will, in turn, lead to less CO<sub>2</sub> emissions. The EEDI applies only to the new ships and there are no specific measures in place for existing ships.

The 63rd Marine Environment Protection Committee of the I.M.O. in 2012 stressed that the EEDI cannot be used for existing ships and the use of Energy Efficiency Operational Index (EEOI) is currently not mandatory. Furthermore, vessel types with high relevance in Europe such as cruise ships and ferries are not yet covered by the EEDI. Therefore, developing such a measure in a European context would require the E.U. to replace or supplement existing efficiency standards adopted at the global level. In this respect special attention was paid by the E.U.<sup>56</sup> to environmental standards for Arctic cruise ship tourism (cfr. I.M.O. Polar Code).

Directive 2014/94/EU on the deployment of alternative fuels infrastructure provides for the shore-side electricity supply during mooring time for inland waterway vessels and seagoing ships in maritime and inland ports in conformity with the technical specifications set out in point 1.7 of Annex II.

## **10.3. Waste (garbage from ships (marine litter))**

The International Convention for the Prevention of Pollution from Ships (1973) and its Protocol (1978) (MARPOL 73/78), address in particular sewage (Annex IV) and garbage (Annex V).

The EU Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues (PRF Directive) has the same aim as MARPOL, viz. the protection of the marine environment. Its main precepts are :

- Creation of an adequate port reception facility for garbage from ships, that call at the port
- Development of a waste removal plan
- Timely declaration by the ship of the quantity of the ship's garbage to be discharged

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<sup>56</sup> Joint staff working document :The inventory of activities in the framework of developing a European Union Arctic Policy Accompanying the document Joint communication to the European Parliament and the Council Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps (SWD/2012/0182 final) nr. 2.3.

- Contribution by the ship in the cost of reception, removal and processing
- Exchange of information on discharge for the purpose of enforcement.

On the Belgian national (federal) level, the EU directive 2000/59 was transposed via the Royal Decree on the ships inspection with respect to discharge of ship garbage and cargo residue, amending the Royal Decree of 20 July 1973 containing the Maritime Inspection Regulation.

On the Belgian Flemish (regional) level it was transposed by the Decree of the Flemish Government containing the Flemish Regulation on the sustainable management of recyclable and waste material (VLAREMA) (see section 5.2.10).

Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues (PRF Directive) applies to recreational craft, including cruise ships, but it does not contain any specific provisions on cruise activities.

However in this context the cruise operations show a few special features.

Given the increasing size and the number of passengers transported by its vessels, the cruise sector was said to produce significant amounts of waste to be delivered in accordance with the Directive.

The on-board treatment of sewage is significant : for cruise ships it is assumed to be up to 80% and can be up to 100% for the larger sized modern cruise ships. In the shipping sector, cruise vessels in particular have incinerators on board.

Regarding the information obligation burden imposed by the PRF Directive, it was indicated that it generally takes between 30-60 minutes to complete and submit the advance waste notification, but an average sized cruise ship spends roughly 8 man-hours to retrieve and/or estimate the necessary information on the amounts of waste to discharge<sup>57</sup>.

A proposal was launched for a Directive of the European Parliament and of the Council on port reception facilities for the delivery of waste from ships, repealing Directive 2000/59/EC and amending Directive 2009/16/EC and Directive 2010/65/EU<sup>58</sup>.

The Commission staff working document, accompanying the document Communication from the Commission “A European Strategy for Plastics in a Circular Economy” (COM(2018) 28 final) addresses the issue of plastic waste from sea-based sources such as shipping, including cruise ships.

The Packaging and Packaging Waste Directive (PPWD) n° 94/62/EC applies on top of these legal requirements : in most Member States, packaging is governed by Extended Producers Responsibility (EPR) schemes, defining the fees to be paid by producers.

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<sup>57</sup> Commission staff working document, impact assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on port reception facilities for the delivery of waste from ships, repealing Directive 2000/59/EC and amending Directive 2009/16/EC and Directive 2010/65/EU (COM(2018) 33 final, SWD(2018) 22 final).

<sup>58</sup> Cfr. the The Commission staff working document containing an impact assessment, accompanying the document.

Those rules on sewage deliveries intending to avoid illegal discharges and thus to protect the marine environment, apply indiscriminately to cruise activities.

## **11. Jurisdiction and arbitration**

### **11.1. Jurisdiction**

EU Regulation n° 1215/2012 dated 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis) contains the jurisdiction regime.

Consumer contracts providing for an inclusive price a combination of travel and accommodation, are governed by the special jurisdiction regime of the Regulation (art. 17,3 Regulation).

The consumer is protected by mandatory (save limited party autonomy as per art. 19) rules to the effect of guaranteeing the consumer the opportunity to institute proceedings in the court of the country of his/her domicile (art. 17) and by the restriction to bring actions against the consumer only in the court of the country of his/her domicile (art. 18).

The contractual forum selection clause is valid and effective, subject to :

- the restrictions as per art. 19 Regulation Brussels Ibis Regulation, referred to above
- substantive validity under the national law of the designated court
- evidence in writing or equivalent (electronic) format (art. 25 Brussels Ibis Regulation).

### **11.2. Arbitration**

U.K. established cruise lines may apply the ABTA<sup>59</sup> code of conduct that provides for an arbitration scheme to resolve disputes.

In Belgium cruise lines may stipulate the travel contract conditions of the Belgian Travel Dispute Commission (Commission de Litiges Voyages).

These conditions provide for Alternative Dispute Resolution (ADR) via mediation or arbitration for package travel contract disputes,

This Commission is not competent for bodily injury claims, extra-contractual disputes, non-inclusive travel or assistance insurance, etc.

The same issue as the one discussed below with respect to the choice of law arises, viz. the distinction between the legal status of the consumer contract partner and the consumer third party beneficiary of a contract concluded by a professional.

## **12. Choice of Law**

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<sup>59</sup> Previously: Association of British Travel Agents.

The E.U. Regulation 593/2008 (Rome I) contains a conflicts of laws regime, with universal application : it means that it applies regardless whether the applicable law is or is not the law of a Member State (art. 2).

The normal regime is party autonomy in the choice of law (art. 3 Rome I Regulation). For lack of an express choice of law, the law of the service provider's country of residence applies (art. 4,1(b) Rome I Regulation).

The Rome I Regulation contains however specific conflicts of laws rules for (i) passenger transportation (art. 5,2) and (ii) for consumer contracts and in particular for package travel contracts (art. 6).

In case of a passenger transportation contract, for lack of an express choice, the law of the passenger's country of residence applies if the place of departure or destination are situated there (art. 5,2 first subparagraph).

The choice of law for a contract of passenger transportation is further restricted to a limited number of options (art. 5,2 second subparagraph).

In case of consumer contracts the law of the consumer's country of residence mandatorily applies (art. 6,1). A limited party autonomy in the choice of law is offered, provided that the mandatory protections guaranteed by the law of the consumer's country of residence are respected (art. 6,2).

In case a passenger transport contract qualifies as a consumer contract, it is however excluded from the consumer contract regime, except when it amounts to a package travel in the sense of Directive 90/314/EEC (art. 6,4 (b)).

As a consumer, the passenger is protected by the mandatory application of the protective legal provisions of his/her country of residence (art. 6 Rome I Regulation).

The contractual choice of law is valid and effective, subject to :

- the restrictions referred to above
- the consent and material validity according to the designated national law (art. 10 Rome I Regulation)
- the formal validity according to the law of the consumer's country of residence (art. 11 Rome I Regulation).

The criterion for the application of the conflicts of laws regime protecting the consumer, is the capacity of the customer concluding the contract (art. 6 Rome I Regulation). However the customer concluding the contract may be a person acting in a professional capacity (e.g. the employer or the merchant) whereas the beneficiary may be a natural person acting in a private capacity outside any trade or profession.

The Regulation does not expressly acknowledge the case where the contract is concluded by a customer acting in a professional capacity (e.g. employer or merchant) in favour of a third natural person acting in a private capacity.

With respect to the case of passenger transportation the problem is solved, because the Rome I Regulation directly imposes the application of the law of the passenger's

country of residence, irrespective of the contracting customer's country of residence (art. 5,2 Regulation).

The same solution however cannot be found in case the beneficiary is a consumer.

Art. 8 of the Rome I Regulation determines the national law applicable to the employment contract.

### **13. Conclusion**

Cruise operations are to a large extent governed by the legal regime of maritime passenger activities.

In that capacity the applicability of the consumer protection, package travel and carrier liability regimes are relevant issues.

A few interesting qualification issues have arisen, such as : cabotage, maritime or river operation, transit.