LEGAL STUDY FOR PORTABILITY AND SUSTAINABILITY OF THE PROJECT OF TOURISM IN NETWORK "VIAJANDO POR BESANAS"

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Legal study for portability and sustainability of the project of tourism in network "viajando por besanas"

On July 1st, 2011, the Foundation Universidade da Coruña, Paideia Foundation, and a research team from the University of A Coruña signed a counselling and technical assistance agreement in order to make a legal study for transferability and sustainability of the project of tourism in network "Viajando por Besanas."".

After several preliminary meetings held at the headquarters of the Paideia Foundation among representatives of each of the signatory entities, the subject of the study was agreed on the following matters::

1 º) The aim of the Paideia Foundation is to promote transferability and sustainability of the project once the development stage has been completed by the partners. To this end, it is interested in conducting a legal study where the legal issues that may arise in the future are analyzed, and that also facilitates the understanding of the actions and measures to be taken by the target entities of the Project.

2 º) The commission consists of two parts: a legal report on the subject matter of the agreement and an executive document to be used as a didactic guide for its proper implementation..

3 º) The index of the content of the legal report must be submitted to the Paideia Foundation by the Research Team on July 22nd, 2011 for approval.

4) On September 8th, the Research Team will send the Legal Report to the Paideia Foundation for acceptance and, where appropriate, for the suggestions and contributions by the Foundation.j6

5 º) On September 19th, the Research Team will give in the report for provisional acceptance, being the Paideia Foundation able to dispense the remarks it deems appropriate for its entire satisfaction in accordance with the terms of the agreement..

6º) On September 30th, the Research Team will give in the report for its final acceptance, once the Paideia Foundation checks that the work responds to that requested, and the requested corrections have been made, if any.

On July 22nd, 2011 the Research Team presented the index on the content of the legal report to the Paideia Foundation. Once the corrections proposed by the Foundation have been made, it is agreed that the report consists of the following matters:

On September 8th, 2011 the Research Team is giving in the Legal Report to the Paideia Foundation.

Attending on September 14th, 2011 at the headquarters of the Paideia Foundation, it is agreed to make some changes in the provisional text.

On September 19th, 2011, the Research Team gives in the text for its provisional acceptance.

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Being accepted in all its terms by the Paideia Foundation, it is turned to final, having the content included below.

LEGAL REPORT ON THE TRANSFERABILITY AND SUSTAINABILITY OF THE PROJECT OF TOURISM IN NETWORK *"VIAJANDO POR BESANAS"*

The project "*Viajando por Besanas*" is nearing completion. Just as envisaged in its goals, each participating region has produced a catalogue of activities susceptible of serving as tourism resources; tourism packages have been created, and their marketing has been started. At present, it deals with putting the product in the power of the several tour operators and offering the necessary tools for managing new proposals.

The project partners want this results transfer to be made with greater assurance of continuity and sustainability. Some legal keys which may help to achieve this goal are offered in the next pages.

I. SUBJECTS OF THE CONTRACT OF PACKAGE TRAVELS FROM A BUSINESS PERSPECTIVE. SPECIAL REFERENCE TO THE AUTONOMOUS COMMUNITIES OF GALICIA, CANTABRIA AND EXTREMADURA, AND THE CENTRAL REGION OF PORTUGAL

1. PRELIMINARY: DEMARCATION OF THE CURRENT REGULATIONS

In the territory of the Member States of the European Union, the reference regulations regarding the contract of package travels derives from the Directive 90/314/EEC of June 13th, on package travels, package holidays, and package tours (hereafter referred to as the PTD1.) By means of the aforementioned European Directive it was intended, in short, to establish a common legal framework to approximate *"the laws, regulations and administrative provisions of the Member States"* in this issue (art. 1 PTD.) Thus, it was intended to pursue the removal of the obstacles to free competition that could be derived from different legal systems[2], and at the same time, it was also intended to improve the consumer's position, since they could hire a package travel in any of the Member States of the European Union in similar conditions[3].

This being so, and focusing the issue on the Spanish and Portuguese legal ordinances; the current legislation due to which the provisions of the PTD are fulfilled is respectively specified in both the arts. 150 to 165 of the Spanish Royal Legislative Decree 1/2007 of November 16th -due to which the Consolidated Text of the General Law on the Defence of Consumers and Users and other complementary laws (*Ley General para la Defensa de los Consumidores, hereafter TRLGDCU, from its Spanish acronym*[4],)- and the Portuguese Executive Order Nº 61/2011 of May, 6th, which establishes the regime of Access and of the exercise of the activities of the travel agencies[5].

But, according to the referenced regulations, two further clarifications must be made. Indeed, as it will be hereinafter stated, and pursuant to package travels, the TRLGDCU lays down that *"the organizer and the retailer must have the status of travel agency according to the administrative regulation"*(art. 151.2 TRLGDCU.) For this reason, to the purposes of this report, and without prejudice to what will be stated supra on the impact of the Directive 2006/123/EC of the European Parliament and Council, of December 12th, 2006, concerning the services in the internal market[6]; these provisions detailed

1 DOCE Nº L 158 of September 23rd, 1990.

2 It is so deduced from the second statement of the PTD, in accordance with "the national laws of Member States concerning package travels, package holidays, and package tours; hereinafter referred to as 'packages', show many disparities and [...] national practices in this sector are markedly different, which gives rise to obstacles to the freedom to provide services in respect of packages and distortions of competition amongst operators established in different Member States.

3 Indeed, according to the third statement of the PTD, "the establishment of common rules on packages will contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States and Community consumers to benefit from comparable conditions when buying a package in any Member State."

4 BOE (Spanish Official Gazette) nº 287, of November 30th, 2007.

5 Diário da República, 1.ª série —Nº 88— May 6th, 2011.

6 DOUE nº L 376 of December 27th, 2006.

next will be pursued: the Law 14/2008 of December 3rd of Tourism of Galicia[7] (hereafter LTGal;) the Decree 42/2001 of February 1st -adapted in terms of travel agencies, tour guides, and active tourism in Galicia[8]- (hereinafter DGal;) Law 5/1999, of March 24th, of Tourism of Cantabria (hereinafter LTCant[9];) and the Decree 49/2011 of May 19th, due to which the tourism mediation activity developed by travel agencies, booking centres, and professional congress organizers in the area of the Autonomous Community of Cantabria[10] (hereinafter DCant) is regulated. And, finally, the Law 2/2011 of January 31st on Development and modernization of tourism in Extremadura[11] (hereinafter LTExtr,) and the Decree 119/1998 of October 6th, due to which the exercise of the travel agencies of the Autonomous Community of Extremadura[12] (hereinafter DExtr) is regulated.

Likewise, regarding the Portuguese legal system, and taking into account the objective scope of this report, it is necessary to dispense with the adaptations that might be introduced to the specific applicable rules by the Autonomous Regions of Azores and Madeira, ex art. 6 of the Constitution of Portugal.

2. LEGAL FORM OF ORGANIZERS AND TRAVEL RETAILERS: THEIR STATUS AS TRAVEL AGENCIES

A. Preliminary

Based on the definitions contained in art. 2 of the PTD, the contract of package is the *"agreement linking the consumer to the organizer and/or retailer"* (art. 2, section 5, PTD). In the same vein, within the PTD itself, the organizer would be *"the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer"* (art. 2, section 2, PTD.) While, in accordance with what has just been stated, the retailer would be "*the person who sells or offers for sale the package put together by the organizer"* (art. 2, section 3, PTD[13].).

This being so, the art. 151.1, letters b) and c) of the TRLGDCU repeats almost verbatim the definitions of the PTD, although it specifies that both the organizer and the retailer can be a *"natural person or legal personality."* Also, as it has been stated before, the art. 151.2 of the TRLGDCU lays down that "*the organizer and the retailer will have the status of travel agency according to the administrative regulation*[14]."

Thus, if two sections forming the art. 151 of TRLGDCU are put in relation, it can be infered that, even though the configuration and legal system of travel agencies depends on the relevant administrative regulations, in any case; they can be regarded as "travel agencies;" both the self-employed worker and those taking the form of company[15].

In this regard, we could anticipate that, also in the Law of Portugal, travel agencies hold exclusivity regarding organization and sale of package travels. Furthermore, these agencies are equally likely to be configured as natural or legal persons (cfr. arts. 3.1 4.1 and 1.3 Decree-Law nº 61/2011.)

7 DOG nº 246 of December 19th, 2008.
8 DOG nº 36, February 20th, 2001.
9 BOC nº 3 (extraordinary,) of March 26th, 1999.
10 BOC nº 105 of June 2nd, 2011.
11 DOE nº 22 of February 2nd, 2011.
12 DOE nº 119 of October 17th, 1998
13 This initial approach to the figures of organizer and retailer must be completed in the first place, with a brief reference to the so-called "Booking centrals." This is because, although these centrals are not authorized to organize or sell package travels, the truth is that, as tourism brokerage firms, they tend to participate in the process of marketing by managing the booking of such travel (cfr. art. 45.2 LTGal, art. 15 Dcant, and art. 85 LTExtr.) Furthermore, even if they are not the subject of the package contract, the involvement of companies or associations responsible for providing the travel agency organizer the specific elements from which the travel is formed must be taken into account.
14 Within the framework of the powers that the Autonomous Communities have regarding "tourism promotion and management in their territorial area," (art. 148.1.18.ª CE) the configuration of the organizer and retailer of package travel as a travel agency is also specifically reflected. And in terms of what concerns us here, in the art. 45.1 of the Law 14/2008, of December 3rd on Tourism of Galicia (Galician Official Gazette nº 246 of December 19th,) according to which: "The tourism brokerage firms organizing or marketing package travels must necessarily belong to the group of travel agencies.
15 However, this approach was not the one followed in the state regulations on travel agency, which confined the consideration of travel agencies to companies incorporated in form of business, anonymous, or limited entity (cfr. art. 1.1 of the Order of April 14th, 1988, due to which the rules governing travel agencies and their activities are approved.) Thus, in contradiction to the rules governing the contract of package, the possibility for the self-employed worker to operate as an organizer or retailer of a package was precluded at the state level. However, it must be noted that the state rules on the subject matter of study have been currently repealed by the Real Decree 39/2010 of January 15th, due to which various state rules on access to tourism activities and their exercise are repealed (Spanish Official Gazettenº 30 of February 4th.).

However, the configuration of the organizer and/or detailer of the package travel as "travel agency," both in Spain and Portugal can be questioned with regard to the aforementioned Directive 2006/123/EC of the European Parliament and Council of December 12th, 2006 on services in the internal market. Indeed, one of the objectives of the Directive in question is "*the elimination of obstacles hindering the development of service activities among Member States"* (statement of conditions 1st;) the exclusivity for provision of packages by travel agencies would be wrong with this pursued aim, specially as PTD does not bind the organizer and/or retailer to establish itself as a travel agency."

B. Consideration of the issue in the regulatory framework of the Autonomous Communities of Galicia, Cantabria, and Extremadura

In the proper scope of this report, the several rules with administrative nature confirm the pointed conclusion. In fact, the configuration of the travel agencies as "businesses" in generic terms is a common denominator in the respective Galician, Cantabrian, and Extremaduran Decrees. Thus, with merely illustrative purposes, the content of the art. 45.1 of the LTG could be reproduced, under which:

"Those companies which professionally and usually counsel, mediate, organize, and market tourism services and package travels will be considered travel agencies[16]."

On the other hand, the autonomous regulations do not require companies engaged in a tourism intermediation to have any specific legal form. And they merely establish their classification into three categories[17]: a) wholesale travel agencies[18]; b) retail travel agencies[19]; and c) wholesale and retail travel agencies[20]

Apart from the economic capacity requirements, which will be analyzed below, the organizer or retailer is obliged to inform the competent body of tourism that meets the requirements set in the regulations in force to exercise the tourism mediation activity; that has the documentation proving this, and that is committed to keep its completion till the cessation of the exercise of such activity[21].

Legally speaking, the so-called statement of compliance must include the data necessary to identify the company, the activity to be developed and, where appropriate, the premises open to the public[22]. Based on this general description, the aforementioned statement of compliance will include specific content depending on the applicable specific rule. Thus, in the area of the Autonomous Community of Cantabria, the statement in question must expressly refer the following requirements (art. 6 DCant):

a) having obtained the Register Inscription at the Tax Agency and at the Social Security in activity to be exercised;

b) having the enterprise the titles evidencing ownership or availability of the building in which its headquarters will be located and, where applicable, of the premises open to the public;

c) having the municipal opening license for such tourism activity, when there are premises open to public;

d) having certificate issued by body or technician competent in the field attesting to the completion of the current legislation on prevention and protection against fire, when there are premises open to the public;

16 See, in similar terms, art. 2.1 DCant and art. 79.1 LTExtr.
17 See art. 45.1 LTGal, art. 2.1 DCant and art. 79.3 LTExtr. The classification in question is interesting because the requirements regarding the financial capacity that is requirable to travel agencies for the exercise of their activity vary depending on the specific category.
18 They would be those which plan, develop, and organize all kinds of tourist services to be offered to retail travel agencies, or wholesale and retail travel agencies; without being able to offer or sell their tourist services directly to the user or consumer.
19 It refers to those travel agencies that sell tourist services organized by wholesale travel agencies, or those which plan, develop, organize and sell all kinds of tourist services, being not able to offer them to other agencies.
20 Those travel agencies authorized to combine activities characteristic of wholesale and retail travel agencies.
21Thus, under the provisions of Directive2006/123/CE, of the European Parliament and Council, of December 12th, 2006, concerning the services in the internal market, whose incorporation into thet. Spanish legal system has been carried out with general nature, by the Law 17/2009 of November 23rd, on free access to service activities and its exercise (Spanish Official Gazette nº 283 of November 24th.) The requirement of obtaining the administrative approval, or license or title to start and develop the tourism mediation activities is removed. In this regard, cfr. art. 28 LTGal, art. 17 LTCant, and arts. 48 and 78 LTExtr. However, it must be noted that not every current legislation on the subject has been adapted to the provisions of the aforementioned Community Directive; in fact, both the DGAL (arts. 5 onwards) and the DExtr (arts. 4 onwards) continue to make reference to the acquisition and reversal of license to exercise the tourism activity.
22 Cfr. Appendix VII of the Order of May 10th, 2010 due to which the official forms of statement of compliance and previous communication regarding activities related to tourism services are approved and advertised (Galician Official Gazette nº 107, of June 8th;) and which have been amended by the Order on May 30th, 2011 (Galician Official Gazette nº 110, of June 9th) - art.6 DCant and art. 48.3 LTExt.

e) having obtained at the Spanish Patent and Trademark Office the registration of the mark and/or trade name that is intended to be used by the company;

f) having formed a deposit and signed an insurance policy in the terms to be inspected next.

In the case of Galicia, the specific content of the statement of compliance would be formed, however, by the following terms (cfr. Appendix VII of the Order of May 10th, 2010):

a) supporting documents of the applicant natural or legal person;

b) statement of compliance of subscription with permanent validity to a liability insurance covering the risks derived from the exercise of the activity;

c) statement of compliance for the availability, if any, of premises where the activity is exercised by the holder;

d) statement of compliance of having requested the trade name in the Spanish Office of Patents and Trademarks;

e) supporting documents of the availability of the use of the trademark by the holder of the agency;

f) municipal opening license or otherwise its application.

In this vein, please note that once the statement of compliance has been made, the autonomous regulations under review have the registration of trade by the competent Administration of tourism, the travel agency in the corresponding General Register of Companies, and Tourism activities[23].

C. Consideration of the issue from the perspective of the Law of Portugal

With regard to the legislation applicable to travel agencies in the central region of Portugal, it can be said that it corresponds essentially to what has already been reviewed regarding the Autonomous Communities of Galicia, Cantabria, and Extremadura.

Indeed, as is has been stated before, and according to arts. 3.1 and 4.1 of the *Decree-Law 61/2011*, the organizing and selling of package travels is an activity characteristic of the travel and tourism agencies registered in the National Register of Travel and Tourism Agencies (RNAVT, from its name in Portuguese[24].) Likewise, according to art. 1.3 of the aforementioned *Decree-Law*, travel agencies are also configured as natural or legal persons[25]. And the beginning of its activity -ex art. 6 of *Decree-Law 61/2011*- is subject, along with compliance with economic requirements to be exposed below, to the "mere prior communication" (equivalent to the statement of compliance) required for the registration in the RNAVT [26].

In general, Portuguese law provides that the aforementioned "mere prior notification" must identify the applicant, the holders of the company, and its administrators or managers (if corporation;) as well as the location of premises. On the other hand, as specific terms, the art. 7 of the aforementioned Decree-Law 61/2011 states the following:

22 Cfr. Appendix VII of the Order of May 10th, 2010 due to which the official forms of statement of compliance and previous communication regarding activities related to tourism services are approved and advertised (Galician Official Gazette nº 107, of June 8th;) and which have been amended by the Order on May 30th, 2011 (Galician Official Gazette nº 110, of June 9th) - art.6 DCant and art. 48.3 LTExt.

23 Cfr. arts. 29 and 30 LTGal; art. 19 LTCant and art. 6.2 Dcant; and art. 52 LTExt.

24 According to the aforementioned art. 3.1 of the Decree-Law 61/2011, "As agências de viagens e turismo desenvolvem, a título principal, as seguintes actividades próprias: a) A organização e venda de viagens turísticas [...]"; likewise, according to the provisions of the art. 4.1 of the aforementioned Decree-Law; "Só as agências de viagens e turismo inscritas no registo nacional das agências de viagens e turismo (RNAVT) [...] podem exercer em território nacional as actividades previstas no n.º 1 do artigo 3."

25 According to the art. 1.3 of the Decree-Law 61/2011: "São agências de viagens e turismo as pessoas singulars ou colectivas cuja actividade consiste no exercício das actividades referidas no n.º 1 do artigo 3º." Also, according to that established in the 2nd art. of the Decree-Law 61/2011, travel agencies can be marketers and/or organizers: "1 — As agências de viagens e turismo podem ser agências vendedoras e ou agências organizadoras. 2 — São agências vendedoras as empresas que vendem ou propõem para venda viagens organizadas [...], elaboradas por agências organizadoras. 3 — São agências organizadoras, também designadas operadores turísticos, as empresas que elaboram viagens organizadas [...] e as vendem ou propõem para venda directamente ou através de uma agência vendedora."

26 Specifically, the 6th art. of the Decree-Law 61/2011 provides as follows: "[…] o acesso e o exercício da actividade das agências de viagens e turismo dependem de inscrição no RNAVT por mera comunicação prévia, tal como definida na alínea b) do n.º 2 do artigo 8.º do Decreto -Lei n.º 92/2010, de 26 de Julho, e dependem ainda do cumprimento dos seguintes requisitos: a)Subscrição do fundo de garantia de viagens e turismo (FGVT), nos termos do artigo 32.º; b) Contratação de um seguro de responsabilidade civil, nos termos do artigo 35.º".

a) access code to permanent certificate of the so-called "Business Register;"

b) stating the name adopted for the travel and tourism agency, and brands to be used, accompanied by a non-certified copy of the registration of trademarks;

c) non-certified copy of the mandatory liability insurance policy and proof of payment of the corresponding award or initial fraction;

d) non-certified copy of the receipt of the subscription to Travel and Tourism Guarantee Fund, or of equivalent warranty in other Member State of the European Union or of the European Economic Area;

e) proof of payment of the required fee for registration in the RNAVT.

D. Conclusions

On the basis of Directive 2006/123/EC of the European Parliament and Council, of December 12th, 2006, concerning the services in the internal market, it can be concluded that, at present, the organizing and selling of package travels is not an exclusive activity of travel agencies.

But the specific configuration made of a package by the organizer or retailer does not corroborate the findings suggested in Spanish and Portuguese laws, being thus possible to deduce from such regulations the three conclusions next:

1. The organizer or retailer of a package must have the status of travel agency and may be either a natural or legal person. In the latter case, it is not required that the organizer or retailer takes a particular corporate form.

2. It is necessary to formulate a statement of compliance or a prior communication, to be followed by register in the corresponding Register of Tourist Activities or equivalent; being the basic requirement for the exercise of the tourist activity.

3. The organizer or retailer of a package must meet some requirements of an economic nature in the terms to be discussed below.

3. ECONOMIC AND MATERIAL REQUIREMENTS

A. Preliminary

The protection of the contracting of a package regarding the breach of the obligations arising from the provision of services provided by the organizer or retailer is another objective of the PTD. That is the reason why the art. 7 of the PTD imposes upon the organizer or retailer the duty to constitute a security to guarantee the repayment of money paid and compensation for repatriation costs[27] in the event of insolvency or bankruptcy.

Coherently with the content of the Directive; the art. 163 of TRLGDCU sets as obligation of the organizer or retailer the one consisting of "*building and maintaining with permanent validity a deposit in the terms determined by the Tourism Administration authority* [...] [28]."

In a broader sense, the *Decree-Law 61/2011* of May 6th, provides a measure of protection for those contracting packages consisting of the creation of a Travel and Tourism Guarantee Fund, which will jointly liable for the payment of consumer loans resulting from breach of services contracted to agencies (cfr. art. 31 Decree-Law 61/2011[29].)

27 Specifically, in accordance with the art. 7 PTD: "The organizer and/or retailer party of the contract shall provide sufficient evidence of security for the consumer in the event of insolvency."

28 Cfr. arts. 6 and 16 Dgal; arts. 6 and 10 Dcant; and arts. 4 and 14 DExtr.".

29 In this regard, it must be noted that the PTD is a Least Directive, hence that Member States could adopt stricter regulations that increase the level of consumer protection planned in the field covered by the Directive itself.

In addition to the specific guarantees that are directly derived from the PTD, the various regulations regarding travel agencies set an additional requirement aimed at reaffirming the equity capacity of the travel agencies, namely; contracting a liability insurance by which damages arising from its activity are guaranteed[30].

Finally, specific regulations concerning travel agencies also provide a range of material requirements for such agencies to perform their duties. In short, such requirements relate to the premises where the travel agencies develop their activity[31].

B. Financial requirements

As it has been stated before, collateralization for consumers and the underwriting of a liability insurance are the two main measures that the legal system introduces in order to ensure the financial ability of travel agencies.

With regard to securities in the area of Autonomic Rights relevant to the purposes of this report, it may be argued that the regulation is substantially identical. Indeed, in the regulatory framework of the Autonomous Communities of Galicia, Cantabria, and Extremadura the regime of the aforementioned securities can be bounded as follows:

1. The type of security to be demanded consists of the creation of a deposit, individual or collective, through one of the next means: a) cash deposit or public holdings in the Government Depositary; b) bank guarantee; c) surety bond; d) solidarity award fund.

2. The amount of the deposit varies depending on its individual or collective character, and on the particular type of travel agency. Thus, the minimum amount of individual bonds will be: a) 60,101.21 EUR for retail travel agencies; b) 120,202.42 EUR, for wholesale travel agencies; c) 180,303.63 EUR, for wholesale and retail travel agencies. The minimum amount of collective bonds will be fifty percent of the sum of the considered individual bonds; and in no case will it be less than 2,400,000 EUR for national partnerships, or 300,000 EUR for autonomic associations. The amounts stated should be increased in the amount of 12,000 EUR for each additional premisse if travel agencies had more than six units and deposit were individual; and 6,000 EUR per premisse in the same case provided that the warranty were collective[32].

3. The deposit will be subject to the performance of liabilities required to travel agencies by virtue of final court decision or award. And its execution, total or partial, will bind the travel agency to replace it in its initial amount in a maximum period of fifteen days. Likewise, in case the activity is ceased by the travel agency, the deposit will be subject to the fulfilment of the liabilities that may be required in virtue of final court decision or award for one year.

This being the case, in the event of Portugal, the protection measure of consumer consists of the creation of a Travel and Tourism Guarantee Fund (FGVT,) to which travel agencies must contribute 6,000 EUR when they are vendor travel agencies; and 10,000 EUR for those agencies which are organizers, or both vendors and organizers.

These amounts, which must be replaced if used, will be paid progressively: at the moment of registering in the RNAVT, the vendor travel agencies will have to provide 2,500 EUR, while the remaining types of agencies will have to pay 5,000 EUR. The remaining capital will be paid through annual contributions at a rate equivalent to 0.1% of the turnover of the agency in the previous year (arts. 31 to 33 of the Decree-Law 61/2011.)

Along with measures to protect consumers which have just been outlined, travel agencies must also contract a liability insurance covering the risks arising from the development of their business. Particularly, the relevant insurance must cover three levels or liability blocks -the business operating; indirect or subsidiary civil liability; and liability for pure economic or financial loss. And the amount insured under the policy must be at least 450,000 EUR, at a rate of 150,000 EUR for each of the three levels mentioned[33].

In the Portuguese law, the obligation to contract a civil liability insurance is also configured as a requirement to access the activity for travel agencies. By means of this insurance, whose minimum amount of coverage must reach 75,000 EUR, it is intended to ensure compensation for property loss and harm caused to customers or third parties due to acts or omissions by the travel agency or its representatives (cfr. arts. 35 and 36 of the Decree-Law 61/2011.)

C. Material Requirements

Given the way travel agencies have been traditionally developing their activity, it is not surprising that the specific regulations on the subject contain some provisions concerning the conditions that premises or establishments open to the public used in the intermediation tasks must meet.

As relevant here, both DGal and DExtr state, in two separate provisions, the features of the premises; which, in short, could be realized in the following ones[34]:

1) They must be allocated only and exclusively to the object and purpose characteristic of travel agencies.

2) They must be independent of adjoining premisses. Although, it is exceptionally allowed to be set up in large areas where commercial activities are carried out as a whole.

3) They must be served by travel agencies' own staff.

4) The sign must appear in the exterior of the premises. It must contain the name, group, and identification code of the travel agency[35].

However, at present there is no burden on travel agencies requiring them to develop their activity through premises or establishments open to the public. On the contrary, the reverse trend is found in a regulatory countersigning in the Laws on Tourism of the Autonomous Communities of Galicia and Extremadura themselves. Thus, the art. 45.4 LTGal stipulates that, in due form, "*special attention will be paid to those entities that provide such services via Internet.*" And the 79.5 LTExt clearly states that "*Travel agencies whose sole purpose is the distance selling of tourism services and products can be created without being required to have premisses open to the public*[36]."

In this vein, please note that in the Portuguese law there is not already either an obligation on the part of travel agencies to exercise their activity in a premisse. And, unlike what happened in the previous regulation, represented by the *Decree-Law nº 209/97*, of August[37] 13th, the current *Decree-Law 61/2011* no longer provides that travel agencies must have at least a premisse to serve customers[38].

30 Cfr. art. 6 DGal, arts. 6 and 11 DCant, art. 4 DExtr and arts. 6 and 35 Decree-Law 61/2011.

31 Cfr. art. 6 DGal, art. 5 DCant and arts. 4 and 5 DExtr.

32 At this specific point, the regulations of the Autonomous Communities of Galicia and Extremadura have a small difference in relation to the amounts outlined, since in the referred legislations both the amount of collective securities and the amount to be increased in case travel agencies had more than six units are slightly higher. And, in accordance with the provisions in the Galician and Extremaduran regulations, the overall amount of collective deposit will not be less than 2,404,048.41 EUR by association of state or regional character; and the amount in which the deposit is to be increased for each new premisse exceeding the number of six is estimated at 12,020.24 EUR if the security were individual, and 6,010.12 EUR in case it were collective..

34 Cfr. art. 6.1.b DGal and art. 5 DExtr.

35 See also art. 5 DCant.

36 In the area of the Autonomous Community of Cantabria, it is DCant in its art. 17 that establishes the legal regime of the tourist mediation activity by electronic means. According to the foretold provision, "The travel agencies [...] which offer and provide their services in whole or in part, by electronic means of the information society must also meet the provisions of this Decree, the regulation under Laws 34/2002 of July 11th on Services of Information Society and Electronic Commerce, and 59/2003, of December 19th on Electronic Signature and other regulations applicable to contracts via electronic means or by telephone."

37 Diário da República, 1.ª série A —Nº 186— 13 de Agosto de 1997. The aforementioned Decree-Law was also amended several times, standing out the one carried out by the Decree-Law nº 263/2007 of July 20th (Diário Da República, 1. ª série —N.º 139— 20 de Julho de 2007.)

38 Specifically, under the provisions of art. 11.1 of the Decree-Law 209/97, of August 13th, tourism and travel agencies must "dispor, no mínimo, de um estabelecimento para atendimento dos clientes".

D. Conclusions

1. Organizers or retailers of packages, as travel agencies, should provide enough securities to protect the interests of consumers. Within the sphere of Spanish law, the measure in question consists of the formation of a deposit to ensure, in particular, the restitution of the money paid as well as the compensation for repatriation costs in case of insolvency or bankruptcy. Within the sphere of Portuguese law the measure in question is set with a wider scope, since it provides for the establishment of a guarantee fund to jointly and severally meet the payment of loans resulting from breach of services contracted to travel agencies.

2. Similarly, organizers and retailers of a package travel must engage a civil liability insurance to cover the inherent risks of developing their business activity.

3. Organizers or retailers can conduct their tourist activities, in whole or in part, via electronic means.

However, if premisses or establishments open to the public are used, they must meet the conditions established for the purpose in the specific regulations regarding terms of travel agencies.

4. AGREEMENTS OF COOPERATION BETWEEN ORGANIZERS AND RETAILERS

A. Package travels offered by travel agencies accredited by various authorities

The organization and marketing of a package can be directly carried out by a single travel agency. Likewise, it is also possible that in package arrangements and in its further marketing, several tour operators are involved, which are bound by arrangements or agreements of collaboration.

Then, especially in cases in which the package involves the intervention of several travel agencies, we may consider the requirements that would be requirable to these subjects, when they had been established in different Autonomous Communities or States. In other words, within the regulatory framework of reference in this report, we may consider, eg. the demands that a travel agency that aimed to market in Extremadura a package organized by wholesaler travel agency registered in the Autonomous Community of Galicia would have to meet in the central region of Portugal.

This being like that, it can be held, along the lines of the principle, that the activity within the area of the Autonomous Communities of travel agencies registered in other Autonomous Communities or in other Member States of the European Union or EEA is subject to the prior presentation of the statement of compliance as well as the compliance with the other set requirements; especially those pertaining to ensure the economic capacity of the travel agency by the bond formation and the engagement of liability insurance[39].

In this regard, the provisions of art. 50 LTExt are highly enlightening, according to which:

> "1. Tourism enterprises established in other Autonomous Communities, in EU Member States, or in States members of the Agreement on EEA, which, relying on the free provision of services, perform on a temporary or casual way their activity in the Autonomous Community of Extremadura, *will be able to do it without any restriction, by presenting a communication at the competent authority on tourism*; showing the dates during which the provision will be carried out; in order to establish the temporary or regular exercise of such activity.
> […]
> 3. Tourism enterprises established in other Autonomous Communities legally exercising an activity of services w*ill be able to establish in the Autonomous Community of Extremadura, fulfilling the requirements that are referred or linked to the establishment from which they intend to carry out the service activity.*
>
> 4. Tourism enterprises established in the European Union or in States associated to the Agreement on European Economic Area w*ill be able to establish in Extremadura, having to provide a supportive certificate on their empowerment in the Administration of origin and submit statement of compliance or prior communication of beginning of activity before the Tourism Administration for this purpos*e, according to this law and its regulations on development for the initiation and pursuit of tourism activities."

With regard to the Portuguese Law, the question is directly addressed in the art. 10 of the Decree-Law 61/2011 of May 6th. According to the foretold provision, the travel agencies legally established in a Member State of the European Union -or European Economic Area- will be able to freely operate in the Portuguese territory provided that they previously submit the documentation supporting the engagement of both securities equivalent to the contribution of the so-called Guarantee Fund on Travel and Tourism; and the liability insurance before the competent authority. Everything else, the performance of the aforementioned travel agencies in the Portuguese territory will also be subject to the remaining conditions to exercise the activity which, according to the current regulations, are applicable to them[40].

B. Conclusions

1. Organizers and retailers of travel packages, as tourism services operators, can be freely established in any of the Autonomous Communities or Member States of the European Union (or EEA) with no limitations other than those arising from compliance of laws and regulations that are applicable to them.

2. In connection with the foregoing, the submitting of the statement of compliance or equivalent, as well as the constitution of the securities designed to ensure their economic capacity, are the main requirements to establish and develop the activity of a travel agency in a State/Autonomous Community other than the one in which the authorization to carry out tourism mediation tasks was initially obtained.

II. TOURISM MARKETING SERVICES VIA INTERNET FROM THE POINT OF VIEW OF THE RIGHT TO DEFENCE OF COMPETITION

The marketing of tourism services by means of a single website by several independent economic operators can cause problems from the point of view of the Right to defence of competition. The study on the precautions to be taken regarding the prohibition of collusion on prices imposed by the Antitrust Right is required.

1. THE RIGHT TO DEFENCE OF COMPETITION

The Spanish Constitution recognizes the freedom of enterprise within the framework of market economy (art. 38.) Among the different possible economic models, the constituent opted for a system based on free competition. The freedom of competition between various economic operators is considered the ideal system to achieve the economic progress of the country. Instigated by the desire to overcome their rivals and gain customers, business people will promote R&D, increase the supply of products, improve their quality, reduce prices, foster efficiency, etc.

The system of free competition, for which people have gone, entails however a significant risk; since, as it has been correctly expressed, it inherently includes the germ of the self-destructiveness. And due to the uncertainties and risks that freedom to compete entails for employers, it is likely that they are tempted to restrict competition by means of treaties or agreements (price fixing, market sharing, etc.) If this happens, claimed benefits of free competition fail to appear. For example, prices will not be reduced if service stations agree on a fixed price per gallon of gasoline; nor innovation will happen just as much if phone companies share markets.

39 Cfr. arts. 24, 28.4 and 45.3 LTGal; art. 14.1 Dcant; and art. 50 LTExt.

40 Specifically, the art. 10 of Decree-Law 61/2011, of May 6th, provides the following: "1 — As agências de viagens e turismo legalmente estabelecidas noutro Estado membro da União Europeia ou do espaço económico europeu para a prática da actividade podem exercê -la livremente em território nacional.
2 — Sem prejuízo do disposto no número anterior, as entidades aí referidas que pretendam exercer em Portugal actividades de agência de viagens e turismo devem apresentar previamente ao Turismo de Portugal, I. P., a documentação, em forma simples, comprovativa da contratação de garantias equivalentes às prestadas pelas empresas estabelecidas em Portugal, previstas nos artigos 31.º, 32.º, 35.º e 36.º 3 — As entidades que operem nos termos dos números anteriores ficam sujeitas às demais condições de exercício da actividade que lhes sejam aplicáveis, nomeadamente às constantes dos n.os 3 e 4 do artigo 5.º e dos artigos 14.º a 31.º".

The threat of competition restrictions caused by the employers themselves has favoured the birth of a section of law known as Right to defence of competition. In Spain, it is chaired by Law 15/2007 of July 3rd on Defence of Competition, which mainly prohibits collusive behaviour (eg. fixing prices or market sharing,) and abuse of dominant position (eg. when a company that enjoys a dominant position limits production or distribution entailing an unreasonable prejudice to businesses or consumers.) It is also extremely important the Law of the European Union, which also prohibits such practices in the arts. 101 and onwards of the Treaty on the Functioning of the EU.

2. PRICE AGREEMENTS

A. General Comments

The type of paradigmatic collusive behaviour is probably the price agreement. It is an agreement by which two or more companies decide to set the prices of their products or services. It is a frontal attack which has as leading character one of the main elements of free competition; which is the price. And it outstandingly affects to the interests of consumers, so it is considered an "extremely serious" behaviour [41]. That is the reason why the Law bans in the first of its articles, and within it, the first of several cases of collusive behaviour included:

"Article 1. Collusive behaviour

1. Any agreement, decision or collective recommendation, or concerted or consciously parallel practice, which is aimed to, produces or may produce the effect of preventing, restricting, or distorting competition in all or part of the domestic market and, in particular those consisting of: a) Price fixing, directly or indirectly, or other commercial or service conditions are forbidden (…)".

B. Meaning of agreement

It is not necessary that we have a contract regarding the legal sense or an agreement meeting certain formalities (stated in writing or deed) to consider that there is pricing. In terms of the Right to Competition, there is agreement when there the wills between at least two parties meet. Its way of expression is irrelevant as long as it constitutes the faithful expression of such wills[42]. Thus, no formalities are required to consider that there is an agreement within the meaning of art. 1 of this Law.

C. Arrangements within partnerships

The fact that prices are set by an association established by employers would not eliminate the legal prohibition; since it reaches agreements, decisions, and recommendations (non-binding agreements) adopted by the associations or within them. Take for instance, in this regard, a case decided by the Spanish Competition Tribunal[43], which imposes a fine of 25 million pesetas to the Association of Manufacturers and Retailers of Bread of Zaragoza and Province. The reason for the fine is not other one than having adopted a recommendation that from a certain date the price of bread set by the Association would be applied; prices, incidentally, higher than those that had been previously charged.

D. Exceptions to ban on pricing?

D.1 Exceptions to the prohibition of restrictions of competition

Not all restrictions to free competition are automatically prohibited. On the contrary, Right to competition has established a set of checks and balances, so restrictions can sometimes avoid legal prohibition:

41 Resolution of the Spanish Competition Tribunal of September 25th, 1995, AC 1995\1800, FD 4.
42 Judgement of the ICC of October 26th, 2000, T-41/96, Bayer AG, ap. 69.
43 Resolution of September 25th, 1995, AC 1995\1800..

Firstly, it may happen that certain restrictions generate significant efficiencies that fully outweigh the entailed restriction to competition. In order to avoid losing these efficiencies, the section 3 of art. 1 of the Law provides an exception to the general prohibition of collusive behaviour:

"3. The prohibition in section 1 will not be applied to agreements, decisions, recommendations, and practices that contribute to improving the production or marketing, and distribution of goods and services, or to promote technical or economic progress, without requiring any prior decision for this purpose, provided that:

a) They allow consumers or users to equally participate in their advantages.

b) They do not impose on the concerned undertakings restrictions which are not indispensable to the attainment of those goals, and

c) They do not allow the participating companies the possibility of eliminating competition with regard to a substantial part of products or services mentioned."

The decision of the Spanish Competition Tribunal in the case *Código PAOS*[44] is a good example of how the first exception operates. Here, the Tribunal authorizes the implementation of an Advertising Code of Practice of the Advertising Food to minors, the prevention of obesity and health. The Spanish Competition Tribunal believes that by accepting the self-regulatory code of advertising, companies gave up some freedom regarding their business strategy, and thus, incurred in a restriction of competition prohibited by Article 1 LDC. However, the Tribunal authorizes the agreement (there was then a system of prior authorisation,) since the Code, when trying to limit food advertising aimed at child population, contributed to the protection of general interests (the promotion of healthy diets and combating childhood obesity,) and made partakers of its benefits to consumers.

Secondly, as an exception to the prohibition of restrictions on competition, there are agreements of little importance: it may happen that the involvement of the Competition is so unimportant that the Law does not bother to ban it. The exception is regulated in art. 5 of the LDC, which states that the prohibitions contained in articles 1 to 3 of the Law are not applied to any conduct which, due to its poor importance, are unable to significantly affect the competition.

Take for instance, the resolution of the Council of the National Commission of Competition in the subject "*Corral de las Flamencas*"[45]. The company El Corral de las Flamencas, S.L., is a company that sells clothing under the brand "Flamenco." The Council of the National Commission of Competition found that El Corral de las Flamencas was fixing the resale price to its distributors; that is, they indicated at what price they had to sell its products. This conduct is, in principle, pricing; which in theory is forbidden by Law. Nevertheless, the Council considered that the conduct was not suitable to significantly affect competition, as it was a company with a market share slightly significant (less than 1%) and distributed by means of a network of scattered sale, subject to inter-brand competition against the one which had little bargaining power; which reduced the effectiveness of the conduct. The Council therefore considered not applicable the prohibition imposed by the LDC.

The resolution "Corral de las Flamencas" is, of course, significant. However, in order to properly understand it, we must notice that the market share to be taken in consideration on the purpose of the Right to defence of competition is the *reference market*. The definition of this market is a technical and complex task which results from the combination of the product and geographic market. Basically, to define a market, real alternative sources of supply to which customers of undertakings may turn must be identified, regarding both products or services and the geographic situation of suppliers[46]. Consequently, there may be a market that is reduced to a city, or a region, or a province, or an autonomous community. Companies that have a minimum share in the Spanish market may have a very large share in the reference market, which is, as it has been pointed out, the one of interest regarding the application of the Right to defence of competition.

44 Resolution of January 2nd, 2006, JUR\2006\46691 (Case Code PAOS.)
45 Resolution of December 3rd, 2009, AC\2010\75.
46 See Communication from the Commission concerning the definition of reference market regarding the Community regulations on competition (Official Journal nº C 372 of 09/12/1997 pages 5-13.

D.2 Exceptions in the case of price agreements

The possibility that anti-competitive agreements may escape the prohibition must be undertaken with great caution in the case of price agreements. The reason is that that pricing is considered one of the most serious restrictions of free competition (these serious restrictions are known as hardcore restrictions,) so that the assumptions which may obviate the ban are exceptional. Proof of this is that even the Regulation of the Law on Defence of Competition[47] clarifies in its art. 2 ("Conducts excluded from the concept of least importance") that "of least importance" does not mean those conducts among competitors aimed, directly or indirectly, alone or in combination with other controlled factors by the participating companies: "a) Pricing of the products to be sold to third parties." This rule highlights the suspicion aroused by the price agreements, but does not prevent in any case that pricing escapes the legal prohibition[48]. The European Commission has also highlighted the severity of price agreements in several of its Communications: in the Guidelines regarding the application of section 3 of Article 81 of the Treaty[49], the Commission notes that "It is unlikely that serious restrictions of competition meet the conditions of section 3 of Article 81. Generally, these types of restrictions are prohibited by regulations of exemption per categories, or they are considered particularly serious restrictions in the guidelines and communications of the Commission. Generally, such agreements fail (at least) the first two conditions of paragraph 3 of Article 81.

They neither create objective economic benefits nor benefit consumers. For example, a horizontal agreement setting prices limits production, leading to a misallocation of resources. Moreover, it also transfers value from consumers to producers, since it leads to higher prices without quid pro quo for consumers in the reference market. On the other hand, in general, these types of agreements also fail to meet the criterion of indispensability test under the third condition" (section 46.) Meanwhile, in the Guidelines on the applicability of article 101 of the Treaty on Functioning of the European Union on agreements of horizontal cooperation[50], since they discuss the arrangements on marketing (agreements involving cooperation among competitors for the sale, distribution, or promotion of their substitutes;) the Commission states that "generally, pricing is unjustifiable" (section 246).

In short, as price agreements are serious attacks to free competition, it is really difficult that they can escape the ban. Due to which is very risky to rely on a possible "acquittal" resolution by the Council of the National Commission of Competition to one of these agreements.

3. THE PROBLEM OF PRICING IN MARKETING OF TOURISM SERVICES VIA INTERNET

A. General approach

After the previous sections, we can understand the problem that arises when several employers sell tourism services on the same website: there is the risk that such businesses, either directly or through a partnership, agree the prices that are going to demand for contracting their services on this website. When doing so, they would clearly be engaging in conduct prohibited by the Law on Defence of Competition. It is true that employers could be benefited, since they would avoid starting a price war which could make them all lose money. But what the Law precisely wants is this fight to occur in benefit of consumers and the economic system in general.

A different question is that it is a third independent entrepreneur (for instance, a travel agency,) who implements a website, individually negotiates prices with different providers of tourist services, and even configures packages. In this case, there would not be a problem of horizontal price agreement among the providers of services (of course, provided they do not agree to negotiate similar prices with the agency.) It cannot be ruled out, however, that any vertical agreements[51] restraint of competition existed; which exceeds the purpose of this report.

47 The Royal Decree 261/2008 of February 22nd.

48 The Council has stated in the resolution "El Corral de las Flamencas," mentioned above, that in those cases where the resale price fixing does not have capacity to significantly affect competition in the market, the article 3 of the Rules of LDC may be applicable. It provides that "Notwithstanding the provisions of the preceding articles and regarding those stated in articles 5 and 53.1.b) of Law 15/2007 of July 3rd, the Council of the National Commission of Competition may declare the articles 1 to 3 of the aforementioned Law on conducts, which, in response to their legal and economic context, are not suited to significantly affect competition" (FD 3) not applicable.

49 Communication from the Commission (2004/C 101/08.)

50 Communications from the Commission (2011/C 11/01.)

51 Vertical agreements are agreements or concerted practices entered by two or more companies operating, for the purposes of the agreement or agreed practice at a different level of production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. See art. 1 of Regulation (EU) nº 30/2010 of the Commission, April 20th, 2010 on the application of article 101, section 3 of the Treaty on Functioning of the European Union to certain categories of vertical agreements and concerted practices.

B. Lack of efficiencies to "justify" the agreement

Pricing for the marketing of tourism services on a website does not involve efficiencies that enable the agreement to escape the ban. Undoubtedly, the marketing of tourism services by several economic operators through a website provides very significant benefits and efficiencies. Consumers will be able to find information more easily and compare different available offers. Nevertheless, these efficiencies can be achieved without setting prices; i.e. price fixing is not indispensable for the marketing of services through the web[52]. Subsequently, we believe that under current legislation is not feasible to organize a marketing system in a tourism services web in which prices are set by the service providers themselves in agreement. Therefore, as currently proposed, the Project "Viajando por Besanas" can present transferability problems.

C. An alternative legal system

Several companies may organize a system of marketing of tourism services on the web that does not fall into the prohibition of price fixing. The basic premise is clear: the various entrepreneurs involved must act completely independently in determining their prices. Regarding this, it is advised that the price to put on the web is the same that each employer independently set for their activity outside of the web (the web price may be updated, for example, as the price to put on the web of the entrepreneur and that is applied to customers that contract directly with them.) Furthermore, it would be important for Internet users to proceed with the individual identification of the companies, and that the tender selection system were fully transparent[53]. Finally, in case packages were marketed, the consumer should be able to choose among different services individually, being able to know in advance the prices of these services. It should not be difficult to establish the possibility that Internet users configured their own packages choosing between different accommodations, meals, activities, etc. options, which would be reflected in the net with their respective prices.

With the above caveats, we believe that marketing of tourism services through a website is impeccable from the point of view of the Right to competition: on the one hand, it produces outstanding efficiencies and verifiable benefits to consumers; on the other, it encourages competition among entrepreneurs who market their own products through it (employers would be able to change the prices down to attract customers, which is the essence of free competition.) However, it must be noted that the organs of competition and courts often rely on circumstantial evidence to ascertain the existence of violations of the Law on Defence of competition.

For this reason, it is necessary not only not agreeing the prices, but it is also convenient to take the necessary precautions to defend themselves against possible complaints. In this regard, a price record which irrefutably gathers the natural and competitive changes of prices in the services offered by different service providers would be helpful. Conversely, if an analysis of prices offered over time shows very significant similarities, though indeed there were no agreement of prices by service providers, the sign of price agreement (or concerted practice or consciously parallel) could be too obvious to not prevail at trial.

E. Colophon: The example of the "Menorcan Self-Drive Car Hire Association" matter[54]

Below we present a Resolution from the National Competition Commission Council which is extremely enlightening in the parallels it presents for the purpose of this report. It will allow us to better understand the theoretic aspects that have been related to now.

The Menorcan Self-Drive Car Hire Association (AEMASC) was created in 1986 with the aim of representing its members interests in the self-drive car hire sector on the Island of Menorca. It has 43 associated companies, the majority of which are micro-companies with less than 5 employees. At the general assembly held in

52 It is clear from the resolution of the Council of the National Commission of Competition of November 10th, 2009, which is summarized in the next section.

53 See the FJ 2 of Resolution of the Council of the National Commission of November 10th, 2009.

54 Resolution of the National Competition Council dated 10th November 2009.

2006, the association agreed to create a reservations centre for car hire through the Internet. The website **www.rentacarmenorca.es** was therefore created, which was the result of a project funded by Ministry of Finance for the Government of the Balearic Islands.

The price for rental services on the website where just one price for the customer, calculated by AEMASC as the average price of the participating companies on the website, on the basis of a set of equal rental terms. To determine this, AEMASC requested its members to send prices they thought reasonable and later calculated the average. This price did not link the associated members to any other channels where they could be present..

AEMASC was reported for agreeing prices. In the resolution that resulted from this complaint, the Council considered that the reservations centre effectively implied that there was a price fixing agreement. This means, according to the Council, that the independent commercial initiative of each participating business is expressly limited and this is substituted by a common commercial policy, especially in that appertaining to price fixing of the services offered. According to the Council, the AEMASC initiative very seriously overreached what a business association can do regarding knowledge, respect and application of the LDC: in promoting and applying in its area aprice agreement between companies that produces a very serious breach of article 1 LDC.

The accused party alleged in vain that no anti-competitive effects had been produced and that the practice did not have any competence to produce them. According to the association, after six months of working, the turnover was 2,720 euros, with a total of 48 rentals carried out through the reservation centre. The Council considered that although the rentals undertaken only represented 0.02% of the total rentals undertaken, the objective of the agreement was anti-competitive and was potentially much more restrictive towards the competition than the figures indicated (amongst other things because there was a growing tendency in using Internet services and due to the weight this carried for the group of AEMASC members in offering these services in Menorca.)

We must especially highlight a couple of paragraphs from the Council's resolution, which due to their importance we must reproduce inextenso. In them the Council stresses the beneficial effects that the initiative can have on the association, but warns of the need to always ensure the independence of commercial policies of each of the members associated to it, especially in those appertaining to price fixing:

> "To the extent that the Internet sales centre of AEMASC was also an intent of cooperation between small and medium size companies in the self-drive car rental sector of Menorca, with the aim of strengthening the access to other commercialisation routes on the web, with a more efficient sharing out of the costs generated and a greater probability of success of their services through this channel, we will highlight, with greater assurance, that these small businesses can be effective competitors when facing other larger companies, like those that tender in this market. In fact, the Council understands that this is the main argument regarding competition in the allegations from the defendant, when it pointed out that it was trying to create a sales centre to "give access to the web, at zero cost, to companies with a reduced volume of vehicles."
>
> However, these initiatives always have to ensure there is an independent commercial policy for each of those associated to it, especially when referring to price fixing within the business association, but also when relating to an objective entry that is transparent and neutral by the bidders of those associated, in everything that DI has pointed out regarding selection and information available. Thus, DI manifested that the reservations centre of AEMASC also contained operating elements that made individual identification of companies impossible and did not favour a system of transparent selection of offers among those competitors whose behaviour we suppose is independent."
>
> On the other hand, the Council states that the reservations centre is viable without the forbidden anti-competitive elements that the agreement contained. This statement is significant, as the association alleged that the information tool created and developed at the centre of the association was only a means of being able to compete on the Internet, especially with the large multi-nationals in the sector. In fact for the accused party the, standardisation of conditions, including an average price, was" an operating need of the system, as the simplicity of the hiring procedure is an essential requirement for this type of e-commerce to be taken up by the consumers."

However, the Council did not share this opinion, as AEMASC itself had offered the National Competition Commission itself "the commitment to change its website in such a way it would include prices and conditions of rental freely applied by each of the companies that make it up, in such a way that this website becomes, not only a tool for small companies to compete against those that are more powerful, but also a competititive instrument between the small companies that make up the Association, which would not only maintain the current competition levels, but would make way for a more open and competitive market. AEMASC promised to keep watch over and guarantee the correct running of the system." As we can see, AEMASC itself considered the reservations centre viable without the anti-competitive elements detected by the Council.

The association's allegations that they were a non-profit-making organisations, where one business could not benefit more than another, could not be used as a shield because the highest body making this decision established a sole rental rate for reservations that were made on the website. Nor could they use the fact that belonging to the central reservations was voluntary and free for companies and that these could drop out or market their products through other channels where they fixed other prices.

In short, the Council considered that the association had breached its prohibition of fixing prices established by LDC, due to mitigating circumstances, it imposed a fine of just 1,000 €, as well as of course warning AEMASC, to abstain from carrying out similar agreements in the future.

III. REQUIREMENTS A WEBSITE MUST MEET TO MARKET TOURIST SERVICES FROM THE POINT OF VIEW OF ACT 34/2002, DATED 11TH JULY, ON INFORMATION SOCIETY SERVICES AND ELECTRONIC COMMERCE (LSSI)

We request that the requirements a website that markets tourist services must meet should be set out according to the LSSI viewpoint. The report is not about aspects alien to this Act (data protection, disloyal competition, etc.)

1. CONTRACTING GOODS OR SERVICES ELECTRONICALLY CONSTITUTES AN INFORMATION SOCIETY SERVICE

The marketing of tourist services through a website constitutes a information society service according to LSSI[55]. Physical or legal persons that provide this service are called service providers of the information society[56]. These providers shall have LSSI applied to them if they are established in Spain or are domiciled in another State but offer their services through a permanent establishment situated permanently in Spain (art.2.) Furthermore as well as having to keep to LSSI regulations, information society service providers established in Spain shall be subject to all other provisions of Spanish law that are applicable to them, depending on the activity they perform, regardless of the use of electronic means for the performance of the said activity. (art.2.4.).

2. OBLIGATIONS OF THE INFORMATION SOCIETY'S SERVICE PROVIDERS

LSSI subjects the service providers of the information society to three main types of obligations: general information obligations, information obligations related to contracting and obligations referring to advertising. These obligations decisively influence in a website's configuration to provide tourist services through the Internet.

A. General information obligations

According to art. 10 of the Act, the service providers of the information society are obliged to have the means that allow the service recipients as well as the competent bodies, to electronically, permanently, easily, directly

55 See annex to the LSSI.
56 Ibid.

and freely access, certain information. The obligation to supply this information will be considered it has been accomplished if the provider includes it on his website or Internet area.

Therefore, when services are provided through a website on the Internet, it will be sufficient to include this information in it. The information can be contained on the home page of the service provider or inserted into inner pages related to the type of information it is dealing with and that can be accessed through a clearly visible link, and whose heading unequivocally alludes to that information (e.g. a tab with the heading "who we are")[57].

The information the provider must supply is the following:

a) Its name or corporate name; its residence or address or, if not, the address of one of its permanent establishments in Spain; its email and any other data that allows us to establish direct and effective communication with it.

b) the data entered in the Companies Register in which, if applicable, it is entered or those of any other public register where it is recorded to acquire a legal personality or for the sole purpose of advertising.

c) In the case that its activity may be subject to a previous administrative authorisation regime, the data relating to this authorisation and those identifying the relevant body in charge of its supervision.

d) If you practice a regulated profession you must indicate:

1st Data from the Professional body, if any, that you belong to and licence number.

2nd The official academic or professional title you hold.

3rd The European Union State or the Economic European Area where this title was issued, and if applicable, the corresponding approval or recognition.

4th The professional standards applicable for undertaking this profession and the means we can find out about them, including electronic means.

e) The corresponding tax identification number.

f) When the information society service refers to prices, they should provide clear and precise information on the price of the product, indicating if it includes or does not include the applicable taxes, and if applicable, the postage costs, or guidelines of the Autonomous Communities with competencies in the matter.

g) The codes of conduct to which, if applicable, they are adhered to and the way to consult them electronically.

Also, in the case that a telephone number range to premium services is set up for access to the information society and this needs to be used on by service provider, this use and download of computer programmes to carry out dialling functions, should be made with the previous informed and express consent of the user. For that purpose, the service provider should provide at least the following information, which should be available in a clearly visible and identifiable way:

a) The characteristics of the service that shall be provided.

b) The functions the computer programmes that will be downloaded shall have, including the telephone number to be dialled.

c) The procedure to end the connection of premium tariff, including an explanation at a specific time when this ending is produced and

d) The necessary procedure to re-establish connection to the number before the premium tariff connection.

57 Cfr. website for frequently asked questions on LSSI from the Ministry of Industry, Tourism and Trade (http://www.mityc.es/dgdsi/lssi/faqs/Paginas/faq_obligaciones.aspx, cchecked on 31st August 2011.).

B. Information obligations relating to contracting

When the information society's services carry out electronic contracting activities, LSSI obliges them to meet certain information requirements just before contracting as well as after contracting.

a. Information obligations before contracting (art.27 LSSI)

The information society service provider that carries out electronic contracting activities shall have the obligation to make available to the recipient certain information, before the contracting procedure begins and these should be through suitable communication means that can provide the information clearly, comprehensively and irrefutably, permanently, easily and freely,. According to the Act, the obligation to provide this information shall be considered as complied with if the provider includes it in his website or Internet area.

The information that needs to be provided is the following[58]:

a) the different arrangements that have to be followed to sign the contract;

b) if the provider is going to file the electronic document where the contract is formalised and if this is going to be accessible;

c) the technical means he makes available to identify and correct errors in the introduction of data; and

d) the language or languages that the contract can be formalised in.

The Act clarifies the previous obligations when decreeing that it shall not be necessary to provide the information that is pointed out when:

a) both contracting parties thus agree and neither of them has the role of consumer, or

b) the contract has been exclusively signed via an exchange of email or other equivalent electronic type of communication.

On the other hand, the Act establishes a specific obligation relating to the general contracting conditions: the service provider should make these conditions previously available to the recipient at the start of the contracting procedure, in such a way that these can be stored and reproduced by the recipient..

b. Information after the contract has been signed (art.28 LSSI)

In the later phase after the contract has been signed, the offerer is obliged to confirm reception of the acceptance he made through one of following means:

a) the remittance of receipt acknowledgement by email or other equivalent electronic means of communication to the address the recipient has stated, within the following 24 hours after the reception of the acceptance, or

b) the confirmation, via means that are equivalent to those used in the contracting procedure, of the acceptance received; as soon as the recipient has completed this procedure, and as long as the confirmation can be filed by its recipient.

However it shall not be necessary to confirm the reception of the acceptance of an offer when:

a) both contracting parties thus agree and neither of them has the role of consumer, or

b) the contract has been exclusively signed via an exchange of email or other equivalent electronic type communication, when these means are both used exclusively to avoid the compliance of such an obligation.

Finally, the Act states that in cases where the obligation to confirm corresponds to a service addressee, the provider

58 If the provider specifically designs his electronic contracting services to be accessed through devices that have screens with a reduced size, it is necessary that it is provided permanently, easily, directly and with the exact Internet address where the information is made available to the recipient..

shall provide the compliance of this obligation, making some of the aforementioned means available to the addressee. This obligation is necessary whether the confirmation is directed to the provider himself or another addressee.

C. Obligations relating to advertising

The LSSI imposes a series of obligations relating to marketing communications[59], promotional offers and competitions. These obligations are complementary to the guidelines of these communications, offers and competitions and the current guidelines on marketing, advertising material and data protection (art.19.).

According to art. 20, marketing communications carried out electronically should be clearly identified as such and the physical or legal person in whose name they are undertaken should also be clearly identified. In case they take place through email or other equivalent electronic means of communication, they should include at the beginning of the message the word "advertising" or the abbreviation "adv." Also in the supposition of promotional offers, such as those that include discounts, prizes and gifts, and of competitions and promotional games, before they can be authorised, they should ensure that they are clearly identified as such and that the access conditions, and if applicable, those of participation should be easily accessible and be expressed clearly and irrefutably.

Article 21 establishes on the other hand, prohibition of sending advertising or promotional communications by electronic mail or another equivalent means of electronic communication when not solicited or expressly authorised by the recipients of these (spam). This prohibition is lifted when there is a prior contractual relationship, provided that the provider has legally obtained these recipient's contact details and used them to send commercial communications referring to products or services of its company that are similar to those used initially when contract with the customer was issued. In any event, the provider must offer the recipient the opportunity to object to the processing of data for promotional purposes, freely and easily, both at the time the information is collected and every time a commercial message is addressed to the recipient.

The recipient can also at any time revoke his consent to receive commercial communications by merely notifying the sender of his wishes. (art 22.1.) To that end, service providers must provide service recipients with simple, free means whereby to revoke their consent. Furthermore they must facilitate electronically accessible information about the said means..

When the service providers employ devices for storage and recovery of data from terminal equipment (cookies), they shall inform recipients of their use and finality of such devices in a clear and comprehensive manner, offering recipients the opportunity to refuse, simply and free of charge, to allow their data to be processed. The aforementioned shall not prevent any storage of or access to data for the purpose of carrying out or technically facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the recipient (art 22.2.)

3. REQUIREMENTS FOR WEB ACCESSIBILITY

The fifth additional provision of the LSSI states that public Administrations demand that not only the Internet websites whose design and maintenance they fund totally or partly but also the Internet pages of organisations and companies that are in charge of managing public services, shall adopt the necessary measures to make the information on their respective websites accessible to handicapped people and the elderly. Specifically at least the average level of accessibility to contents that is generally recognised shall be met[60]. However, in exceptional circumstances, this obligation shall not be applicable when a functionality or service does not have the technological solution that allows its accessibility.

59 By commercial communication we understand this as all forms of communication directed at promotion, direct or indirect, of image and of the assets or services of a company, organisation or person that carries out a Commercial, industrial, artisan or professional activity. See annex of LSSI.

60 As explained in the Statement of Reasons Royal Decree 1494/2007, dated 12 November, "accessibility criteria applicable to Internet websites are those that are collected, on an international level, in the Web Accessibility Initiative of the World Wide Web Consortium which has determined them in the form of commonly accepted guidelines in all internet spheres, such as reference specifications when website pages are made so that they are accessible to disabled people. Based on these guidelines the Web Accessibility Initiative has determined three levels of accessibility: basic, medium and high, which are known as levels A, AA or double A and AAA or triple A. These guidelines have been incorporated in Spain through Norma UNE 139803:2004, which establishes three levels of priorities. This Royal Decree specifies the degree of accessibility applicable to internet websites of the public administrations, establishing as a minimum obligatory level the compliance with priorities 1 and 2 of the cited NORMA UNE." Art. 5 of the Royal Decree establishes accessibility criteria applicable to Internet websites of public administrations or with public funding.

On the other hand, Internet websites of companies that provide services to the general public of particular economic significance, subject to the obligation established in article 2 of Act 56/2007, on Measures to Encourage the Information Society[61], should also should also satisfy the average level of the accessibility criteria for generally recognised contents. In the same way as with the previous case, exceptionally this obligation is not applicable when a functionality or service does not have a technological solution that allows its accessibility.

IV. IV. WEBSITE REQUIREMENTS FOR MARKETING TOURIST SERVICES FROM THE POINT OF VIEW OF PROHIBITING MISLEADING ADVERTISING THROUGH OMISSION

Information requirements for a website that markets tourist services must be set out to satisfy the demands set out by the Directive on unfair business practices[62] (DPCD) referring to the prohibition of misleading advertising through omission. We do not study all the information requirements or tutelage for the consumer that Spanish law sets out, but only those whose omission could constitute an act of deception in the sense of prohibiting deception by omission (Rights against unfair competition.)

1. GENERAL REQUIREMENTS THAT ADVERTISING MUST HAVE SO AS NOT TO BE DECEITFUL BY OMISSION ACCORDING TO THE DPCD

The DPCD[63] forbids misleading omissions. The Directive wants consumers, when they take decisions, to have the proper information they need to take a decision on a transaction (e.g. whether they buy a product or not) with due knowledge of the facts. Consequently, the Directive forbids businesses and professionals to omit substantial information that the average consumer needs to take these decisions (art.7.1). In a web page, the omission exists when the information simply does not appear,but also when it is hidden or is offered in a way that is not very clear, is unintelligible, ambiguous or in a moment that is not suitable (art. 7.2)[64].

The starting point, should therefore be that of providing substantial information that the consumers need to adopt their decisions with due knowledge of the facts. If this appears a little abstract, sect. 5 of art 7 the Directive offers certain concretion, when it states that what is considered substantial are the requirements established by the Community law in the matter of information related to commercial communications, in which annex II contains a non- exhaustive list[65]. Several regulations relevant to this annex are mentioned in the annex relating to this case; we list them below given that the information should be stated on the website.

A. Articles 4 and 5 of Directive 97/7/EC of the European Parliament and Council, of 20 May 1997, relating to protection of consumers in respect of distance contracts[66]

Article 4[67] states in its first section that the consumer shall be provided with the following information in good time prior to the conclusion of any distance contract:

61 This Act imposes some special obligations to societies that have more than one hundred workers or whose annual turnover, calculated according to that set out in the Tax Regulations on Added Value, exceeds 6,010,121.04 euros and that, in both cases, operate in certain economic sectors, amongst which we find travel agencies, transport services for travellers by road, train or sea or by air, and retail trade activities (art.2).

62 Directive 2005/29/CE from the European Parliament and Council, of 11 May 2005

63 Implemented by Act 29/2009, of 30 December, that amends the legal regime of unfair competition and advertising for improving protection of consumers and users.

64 See also art. 7 of Act 3/1991, 10 January, on Unfair Competition.

65 That section 5 should provide what it considers as substantial the requirements established by Community law, but this does not mean that other information is not also substantial, but that that information is of course, and without prejudice to others, substantial.

66 The terms and conditions. 11 of the Directive of electronic commerce states that: This Directive is without prejudice regarding the level of protection, particularly for, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; Art 94 of the legislative Royal Decree 1/2007, of 16th November (approving the revised text of the General Law for the Protection of Consumers and Users and other complementary laws) states that "In commercial communications through email or other electronic means of communication and in the hiring at a distance of goods or services through electronic means, shall be applied as well as that stated in this title, the specific regulations on services of the information and electronic commerce./ When that stated in that title [III "Contracts carried out at a distance] contradicts with the contents of the specific guidelines of the information society and electronic commerce, this shall be applied preferentially."

67 This precept refers to art. 97 of TRLCU, nnot completely identical, and at the same time remits to the obligations of information of art. 60 of the same Revised Text.

(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;

(b) the main characteristics of the goods or services;

(c) the price of the goods or services including all taxes;

(d) delivery costs, where appropriate;

(e) the arrangements for payment, delivery or performance;

(f) the existence of a right of withdrawal, except in the cases referred to in section 3 of Article 6;

(g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;

(h) the period for which the offer or the price remains valid;

(i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

Section 2 of the article states the information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.

The second of the articles referring to the Directive (art. 5[68]) states that the consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4 (1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him. In any event the following must be provided:

- written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Article 6, including the cases referred to in the first indent of Article 6 (3),

- the geographical address of the place of business of the supplier to which the consumer may address any complaints,

- information on after-sales services and guarantees which exist,

- the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

B.Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

Article 3 of this Directive opens up with a general disposition that indicates any descriptive matter concerning a package and supplied by the organizer or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information. Furthermore, when a brochure[69] is made available to the consumer, it shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning:

68 See art. 98 of TRLCU.

69 Article 152 of Royal Legislative Decree 1 / 2007 of November 16 (approved by the revised text of the General Law for the Defence of Consumers and users and other complementary laws) obliges to make available to consumers and users this informative leaflet or programme, that should have in writing the corresponding offer on the package holiday and should have clear, comprehensive and precise information on the following points: a) Destinations and means of transport, mentioning their characteristics and class. b) Duration, itinerary and calendar of the trip. c) Relationship of the accommodations, indicating their type, position, category and level of comfort and their main characteristics, as well as their standardization and tourist classification in those countries where there is an official classification. d) The number of meals that shall be served, and if applicable if the drinks or some of them are not included in the scheduled board.
e) Information of a general kind on the conditions applicable to nationals of the European Union States members with regards to passports and visas, and the health formalities necessary for the trip and stay. f) Total final price of the package trip, including the taxes, and estimated cost of the medical costs. In the case of additional corresponding costs to those included in the package trip that the consumer has to take on and that are not paid to the organiser or retailer information about them and if known their amount. g) The amount or the percentage of the price that should be paid as a deposit based on the total price and the time schedule for paying the rest of the cost not covered by the deposit and the conditions for financing that, if applicable, are offered.

(a) the destination and the means, characteristics and categories of transport used;

(b) the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;

(c) the meal plan;

(d) the itinerary;

(e) general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;

(f) either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;

(g) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation

C. Articles 5 and 6 on the Directive on electronic commerce[70]:

This case the demands overlap to a certain extent those demanded by the arts. 10 and 20 of LSSI we have already set out in another section of this report.

Article 5 states shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:
(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

- any professional body or similar institution with which the service provider is registered

- the professional title and the Member State where it has been granted,

- a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.

70 See arts. 10 and 20 of LSSI.

In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Art. 6 provides other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Information requirements set out in the different Directives can be overwhelming, although fortunately many are repeated. Experience states that many websites do not comply but good sense advises being strict with their compliance.

2. REQUIREMENTS IN THE CASE THERE IS AN INVITATION TO PURCHASE.

The UCPD establishes that when there is an invitation to purchase, this should include certain essential data. If there is a lack of this data, then the invitation to buy is unfair[71]. The Directive understands as an "invitation to purchase" as that commercial communication that indicates the characteristics of the product and its price in a suitable manner to the means of commercial communication used and thus allows the consumer to make a purchase[72]. According to the ECJ there is an invitation to purchase from the moment the information relating to the commercialised product and the price is sufficient for the consumer to be able to take a decision on the transaction, without it being necessary that the commercial communication includes a specific means for the acquisition of the product or that it appears in connection with such a means or with the occasion of it[73]..

The information that should be includes are listed in section 4 of art. 7, and in Spain in art.20 of the Revised Text of the Consumer and User Law[74]. We will list it below, as in a website that markets tourist services there will be without a doubt some invitations to purchase in the sense of the Directive, which is why this information must also be recorded:

a) The main characteristics of the product, to an extent appropriate to the medium and the product

b) geographical address and identity of the trader, such as his commercial name, and if applicable the geographical address and the identity of the trader he is acting on behalf of

c) the price inclusive of taxes or, where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

d) payment methods, delivery and operating and the system to deal with claims, if they are different to the demands of professional diligence;

71 Sentence of TJUE 12 May 2011, C-122/10, Ving Sverige, ap. 24.
72 Art. 2, letter i) of the Directive
73 Sentence of TJUE 12 May 2011, C-122/10, Ving Sverige, ap. 33.
74 Royal Legislative Decree 1 / 2007 of November 16th

e) in the case of products and transactions that have entailed a right to revoke or cancel, the existence of such a right.

V. THE FIGURE OF THE COORDINATING BODY

1. JUSTIFICATION OF THE FIGURE OF THE "COORDINATING BODY"

"Viajando por Besanas" is a project of public interest, where beyond the commercialisation of tourist products, the priority is local development. Its final aim clearly defines the aims of the project:

"...the fixation of the population in a rural medium by generating social and economic activity in the primary sector, exploring its opportunities from the tourism point of view and activities related to leisure and free time."

There has been various efforts from Public Administrations, at different territorial levels in Spain and Portugal, and the Paideia Foundation so as to pursue this development. Once the Project's objectives have been achieved its tack is also concluded. But it would be desirable to find a legal way that would allow some, several or all entities that have set up this action to follow closely the tools created and act, from their experience in the management and the availibility of the means and resources, of a coordinating body in the future.

The function of a coordinating body would be directed at watching over the continuity of the Project, with actions directed at its consolidation, diffusion and expansion:

CONSOLIDATION

* promote actions and projects that could favour the continuity of the Project and its expansion

* offer advice to organisations that participate in the Project

* verify the quality of the tourist products offered

DIFFUSION

* receive and distribute information relating to the Project and make it arrive at other public Administrations and the representative bodies of the tourist interests in the different territories where the project is being implemented

* encourage among the participants the exchange of experiences and good practices

* promote the celebration of forums and meetings that allow the Project to be made known and the incorporation of new organisations

* divulge the actions carried out by the organisations involved to favour the setting up of similar actions in other geographical points

EXPANSION

* favour the incorporation of new "areas" and new organisations

Below we show an example of the main organisational formulae that exist in the Spanish legal system to constitute a coordinating body as the one proposed.

2. PROPOSED FORMULAE TO CONSTITUTE A "COORDINATING BODY"

A. Inter-administrative agreements

The participating territorial Administrations can subscribe to an agreement to create a monitoring platform and promote the "Viajando por Besamas" Project, where they will promise to develop the aforementioned activities oriented at their continuity, diffusion and expansion.

The presence of numerous local entities involved in the Project will favour the formalization of an inter-administrative agreement under the protection of local government legislation (Rules of Law of Local Government and the corresponding autonomic local government laws.)

There would be no objection to the agreement being signed between local organisations of different Autonomous Communities. In fact, there are precedents in our legal system (for example, the Agreement signed on November 2001 between the Town Councils in the area of Treviño - belonging to Castilla and Leon - and the provincial Council of Alava.).

As well as territorial organisations, agreements can be signed with local organisations by corporate and institutional Administrations. In these cases it is important to take into account that the field of action of the non-territorial Administrations can exceed the local territory, which is why we should clearly determine in the clauses the area of application of the Agreement.

With regards to formal demands, and although there is no doctrinal unanimity, the most specialised doctrine defends the need to publish these agreements to give efficiency against third parties to these instruments. In any case it is a very recommendable measure and necessary in honour of legal security.

We should assess the possibility of encouraging a trans-frontier agreement, in this case, obviously with Portugal, for groups to participate in this Project. In this case, we should take into account the European Framework Convention on trans-frontier cooperation between territorial entities - created in Madrid on 21 May, signed by Spain on 1 October 1986 and ratified on 10 July 1990-. In the ratification declaration of the Framework Convention, Spain declared the subordination of its effective application on hosting interstate Agreements with the other contracting party, and whilst they are not hosted, the efficacy of collaboration agreements that the territorial organisations sign will require the express agreement from the Government of the Nation.

There is in fact a Treaty between the Kingdom of Spain and the Portuguese Republic on Transfrontier Cooperation between Organisations and Territorial Entities (Treaty of Valencia of 3 October 2002.) The Treaty's aim is to "promote and legally regulate transfrontier cooperation between Portuguese territorial entities and Spanish territorial entities in the area of their respective competencies" (article 1). Its contents are very detailed and vast and collect diverse formulae for cooperation to attend to the common interests of the transfrontier entities.

All of these are preceded by a cooperation agreement (article 4.) An example of a transfrontier cooperation agreement is that hosted in the constitution of the Working Community of the Central-Euroregion Alentejo- Extremadura (EUROACE), of 21 September 2009. EUROACE's aim is to encourage transfrontier and inter regional cooperation between the three regions, promote the integral development of its territories and improve the conditions of living for its citizens. The most prominent objectives amongst which figure "heritage, culture and tourism" (article 3). Amongst its aims (article 4) we cite explicitly the following:

- Conceive cross border strategies of territorial development, coordinate and guarantee their follow-up (letter b);;

Promote and approve initiatives that bring together the three regions' agents, whose ultimate goal is to create and reinforce networks of cross border cooperation (letter d);

- Encourage second generation cooperation, oriented towards the elimination of border-related expenses and improve the living conditions of citizens in the three regions, mainly through the optimisation of resources and the shared use of infrastructure, equipment and services (letter f).

The advantages of the collaboration agreements are the following:

* Flexibility: The agreement clauses allow them to adapt to the needs of those involved with no other limits than those imposed by the legal system

* Simplicity: there are no ulterior motives, except those in respect with their publication, nor does it require a creation of a body with a legal personality

* Open composition: allows the participation of any public body and does not impede the participation of private organisations

B. General protocols

Act 30/1992 of 26 November, of the Legal System of the Public Administrations and the Common Administrative Procedure regulates a form of agreement in which the note of the connection is somewhat diluted or watered down

It deals with "general protocols", instruments of a marked programmatic or declarative character that do not involve commitment to cost or execution.

Article 6.4 of the Act states, within the general regulation of the Agreements, that:

"when the agreements are limited to establishing guidelines of political orientation on the acts of each Administration in a question of common interest or fixing a general framework and the methodology for the development of cooperation in an area of inter-jurisdiction or in a matter of mutual interest they shall be called General Protocols."

This formula shall allow the start to a route to collaboration as soon as the Project concludes, without prejudice to its ulterior development through the formulazation of some of the remaining formulas pointed out.

The advantages of this formula are the following:

* The same as the inter-administrative agreements: simplicity, flexibility and open composition

* Low level of enforcement: its programmatic character can be very useful at the onset of collaboration actions, when the interested parties have still not defined their roles or the degree or level of commitment that they willing to assume. This advantage could constitute, at the same time, their main disadvantage if we hope to make up an efficient and executive body.

C. The associations of local organisations

European Charter of Local Self-Government recognises the The entitlement of local authorities to belong to an association to undertake their common interests (article 10).

The Fifth Additional Provision of Law regulating the basic precepts of Local Regime allows local entities to constitute associations on a state or autonomous basis, to protect and promote their common interests, and shall apply their own specific regulations, and failing that, by the State legislation regarding associations.

These associations are regulated by statutes, approved by the representatives of the associated entities, which should guarantee the participation of their members in associative tasks and the representation of their governing bodies.

74 Real Decreto Legislativo 1/2007, de 16 de noviembre.

These associations, according to their functions, could hold agreements with the different Public Administrations and accept private organisations among their members, as established by their statutes.

The Galician experience, known about first hand by those that subscribe to this Report, allows us to verify the suitability of this formula to undertake actions of local development, among those promoted by "Viajando por Besanas."

As an example, we can point out the role that the Association for Local Development DELOA has played; constituted as a Local Action Group (2001) and currently a Rural Development Group, constituted with the aim of promoting local development in the municipalities of the area of Barbanza (Riveira, Pobra do Caramiñal, Boiro y Rianxo), the area of Sar (Padrón, Rois y Dodro) and more recently those of the Ría Muros-Noia (Muros, Lousame, Noia, Outes and Porto do Son). As can be read in the Constitution Act of the DELOA Association this will have as its aim " to combine efforts and be a *centre of integration and representation of the different territorial, institutional, social, economic agents and any others that can provide actions that favour local development, not only public but private*, interested in promoting development" of this area. They form part of DELOA" a balanced and representative group of speakers of the different socio-economic sectors not only public but also private, with support in the area of association actions (article 6.1 of their Statutes.) Amongst them, as well as the aforementioned Town Councils, some private entities, such as the Paideia Foundation.

It would be interesting that together with local development those entities that have participated in the Project "Viajando por Besanas" could be used in transferring the Project. In the case of Galicia, for example, the Association DELOAREDE, a non-profit making organisation could be integrated. Its aims are generically local development, and would centre on rural tourism. There are a group of private entities linked to the tourist sector that form part of this Association. Among their aims we find those to expressly "encourage innovative projects in rural and active tourism at an autonomous, national and international level, and with special interest, to participate in the project "Viajando por Besanas" (SOF1/P3/E148)" (article 4 of the statutes of DELOAREDE.) Its character of association as non-profit making and aimed at local development meet with the provisions contained in article 6 of the DELOA Statutes. At the centre of the reconstructed DELOA Association and through its decision making organisms they could reach an agreement for the coordination of the Project. This function would fit in with the aims of the DELOA Association collected in article 5 of its Statutes and in particular in letter c), which points out:

"To be a receptor centre and distributor of all the information relating to the socio-economic development of the rural environment not only nationally but internationally, focusing this work mainly on the knowledge of resources and *the promotion of projects and initiatives of interest to achieve a harmonic, balanced, endogenous sustainable and integral development.*".

The *advantages* of this formula are:

* Pre-existing association: The existence of an association of local entities such as DELOA makes it easier to set up coordination actions and would benefit from previous experience that this Association has had up till now in the framework of local development.

D. Consortia

Consortia are organisational figures with certain support in our legislation. In a general way, we confirm that consortia are *cooperation instruments* that enjoy their own legal personality. In everything else, there is a large margin of action, because it is their Statutes that determine their aims and peculiarities regarding their organic, operating and financial regime.

Traditionally consortia are constituted in the local area admitting the participation, together with local entities, of other public administrations and private entities that are non-ptofit making (articles 57 and 87 of the Basic Law on Local Government, 61, 64, 69 and 110 of the Revised Text of the Local law and 149.1 of the Local Administration Law of Galicia.)

There is therefore the possibility of constituting a consortia between the town councils involved in the Project "Viajando por Besanas" and the Junta de Extremadura, together with the possibility of other non-profit-making entities, whether public or private that can be incorporated among them DELOAREDE.

Article 6.5 of Law 30/1992 of the Legal Regime of Public Administrations and the Common Administrative Procedure contains a regulation regarding the minimum requirements for a consortium:

"5. When the management of the agreement makes it necessary to create a common organisation, this could adopt the form of *consortium with a legal personality* or that of a mercantile company.

The statues of the consortium shall determine its aims, as well as the peculiarities of the organic, functional and financial regime.

The decision-making bodies shall be integrated by representatives of all the consorted entities, in the ratio set out in their respective statues. We can use any of the forms anticipated in the legislation applicable to the Consorted Administrations for the management of the services that are entrusted".

In the Autonomous Community of Galicia, the figure of a local consortium has its own development in the Local Administration Law (articles 149 and followed by, 196 and 297.) The main notes of its legal system are the following:

1st) Constitution

The constitution of a consortium should be carried out by signing an agreement with the entities wishing to form part of the consortium:

Artícle 150.

1. The initiative for the constitution of a local consortium could start from one or several of the local entities that are interested.

2. The expedients for the constitution of local consortia, as well as for the creation and subsequent approval of their statutes, shall begin with *agreements by the local promoting entities that should be adopted by an absolute majority of the legal number of the corporation members.*

3. Through these agreements each local entity will designate a representative of the Corporation who will go on to be part of the *Management Committee, and* will have the representation of the group of entities until the constitution of the bodies to govern the consortium is defined, which shall be made up by representatives of all the consorted entities, in the ratio that is set out in their respective statues, and which shall be in charge of processing the corresponding expedient and creation of the statutes.

2nd) Operational Regime

The operation of the consortium shall be determined in its Statutes. In this there is great flexibility in its organic, operating and financial regime.

With respect to its organic regime, there are very different formulas. From the most complex consortia, where there are three bodies that are responsible for managing the body created (assemby, management board and president), to consortia managed by a sole governing body, accompanied by the figure of a president.

With regards to the operating regime, freedom of pacts allows Statutes to be those that establish the operation of the organisation created. It is not possible here to put forward general criteria, because it would be the wish of the consorted bodies that would determine the operating of the consortium.

On the other hand, the consortium can subject itself to private law or to Public law. Currently there is a large number of consortia whose statutes remit to the rules of Private law with the exception of those regarding public hiring guidelines when public participation is the majority.

3rd) Members

Of a voluntary character by the consortium and it associated base, it allows the possibility for its members to leave and incorporate other new ones, according to its statutes.
The advantages of this formula are the following:

***Flexibility:** the wish of the consorted entities, manifested in their Statutes, allows the entity to adapt to the specific needs of continuity and sustainability of the Project "Viajando por Besanas," without prejudice of attending to ulterior needs of local development.

*** Open composition:** allows the participation of any public body and does not impede the participation of private organisations

***Legal security:** the consolidated trajectory of the consortium in the local environment makes it a recognised formula for future participants and other public and private organisations, which guarantees their operation and efficacy.

*** Efficacy and viability:** giving the created entity a legal personality opens some very interesting action routes, such as for example, being able to take part in requesting aid and grants or to participate independently with its consorted entities in legal businesses related with the consortium's aim as determined in its statutes.

SUMMARY CHART FOR THE ADVANTAGES OF THE ORGANISATIONAL FORMULAE PROPOSED

COLLABORATION AGREEMENT	PROTOCOL	ASSOCIATION OF LOCAL ENTITIES	CONSORTIA
Flexibility	Flexibility	Preexisting Association	Flexibility
Open Composition	Open Composition		Open Composition
Simplicity	Simplicity		Legal Security
	Little degree of enforceability		Efficacy and viability

VI. CONCLUSION

The 21st century has burst into the political and social stage with different ideas-forces. Two of them are used nearly as a wild card and are present in any association linked to the management of public policies: *governing and sustainability*. In local environments both ideas come from the hand of processes of Agenda 21 (Conference of Río, 1992), which has become one of the most sound and ambitious proposals for sustainable development that the local world has known in developed countries and as a starting point in those that are developing (BLANCO and GOMÁ, 2002, 94).

The ideas pointed out, governing and sustainability, should govern the emancipation process of the "Viajando por Besanas" Project in a way that its efficient continuity can be guaranteed once its execution has been finalised by the entities that boosted and promoted it.

In the maturing process that starts next, we should take into account some considerations set out in depth in the previous pages and summarised in an Executive Document which is included as an ANNEX.

This is our opinion, without prejudice to any other better one based on the Law.

A Coruña, 30th September 2011

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Annex Executive Document

MANUAL FOR GOOD PRACTICES FOR THE TRANSFERABILITY AND SUSTAINABILITY OF THE TOURIST PROJECT ON THE WEB *"VIAJANDO POR BESANAS"*

The "Viajando por Besanas" Project is about to finish. As was expected through its aims, each participant region has created a catalogue of activities that are subject to serve as tourist resources, tourism packages have been created and their marketing has started. It deals right now, with putting this product in the hands of different tour operators and offering the necessary tools to manage new proposals.

So that the transfer of results is made with the greatest guarantees of continuity and sustainability, we set out in the following pages some legal clauses that should be taken into account in the future advances of "Viajando por Besanas", focusing on three main aspects dealt with in the Legal Report:

Package holidays

Competition and electronic commerce

The Coordinating body

PACKAGE TRAVELS

§ Although European rules do not restrict the organisation and sale of package holidays to travel agencies, Spanish Law and Portuguese Law demands that the organiser and the retailer of a package holiday should have the condition of a travel agency.

§ Organisers and retailers of a package holiday can be either physical or legal personalities; in the latter case, the adoption of a certain corporate form is not demanded.

§ As a previous requirement for carrying out a tourist activity, the organisers and retailers of a package holiday, with regards to a travel agency, should undertake a statement of responsibility or a prior communication, which should be followed by a registration in the relevant or equivalent Tourist Activities Register.

§ Organisers and retailers of a package holiday should give sufficient guarantees to protect consumers' interests:

* In the Spanish legal system, they are obliged to set up a deposit to ensure, specifically the restitution of funds deposited, as well as the reimbursement of repatriation costs in the case of insolvency or bankruptcy.

* In the Portuguese legal system, they are obliged to set up a guarantee fund to be able to meet jointly and severally the loans that come about due to the services contracted to the agencies not being complied with.

§ Organisers and retailers of a package holiday have to contract an insurance policy for civil liability to cover risks inherent from the development of their business activity.

§ Organisers and retailers of a package holiday can undertake their tourist activities, totally or partially through electronic means. However, if they contract premises or establishments that are open to the public, it is necessary they meet with the conditions set out in the specific regulations regarding a travel agency.

§ Organisers and retailers of a package holiday, with regards to tourist service suppliers, could establish themselves freely in any of the Autonomous Communities or member States of the European Union or the Economic European Space) without any more limitations than those derived from the compliance of the laws and regulations which are applicable.

COMPETITION AND ELECTRONIC COMMERCE

§ The marketing of tourist services through a website obliges the providers of the service to comply with three types of fundamental obligations:

* General information obligations: the service providers of the information society are obliged to have the means that permit it, not only for the consignees of the service but also the competent bodies, to have access, through electronic means, permanently, easily, directly and freely, to certain information that the Law specifies (name and social denomination, address, registered office, etc.)

* Information obligations relating to contracting when electronic contracting activities are undertaken, certain information requirements should be satisfied just before contracting as well as after contracting (arrangements that have to be followed to sign the contract, the language or languages that the contract can be formalised in.

* Obligations referring to advertising regarding marketing communications, promotional offers and competitions (commercial communications carried out electronically should always be clearly identifiable as such, spam is prohibited, etc.)

§ The websites for marketing tourist services should provide the substantial information that the consumers need to make their decisions with the knowledge of the facts.

* All omission of substantial information that the average consumer needs to take these decisions is forbidden.

* On a website, omission exists when the information simply does not appear, but also when it is hidden or it is not offered clearly, is unintelligible, ambiguous or at a time when it is not suitable.

* When the characteristics of the product and price are indicated in such a way that it allows the consumer to make a purchase, there is certain essential information that cannot be omitted (price, including taxes, payment methods, etc.)

§ The marketing of tourist services through a website used by several independent cheap operators could cause problems from the point of view of the Right to defend competition, especially when referring to prices between companies.

* Price agreements (pacts through which two or more companies decide to fix prices of their products or services) are forbidden by the Right to defend competition.

* Price agreements exist (and are forbidden) although they do not meet any special formality (it is not necessary that they even be written down.)

* The fact that they are fixed by an association made up by businesses, does not eliminate legal prohibition, as it is in the scope of agreements, decisions and recommendations (non-binding agreements) adopted by associations and within their ambit..

§ It is possible that various companies organise a marketing system of tourist services on a web that does not fall into the prohibition of price fixing. For this, the different businesses involved should act completely independently when determining their prices. With this in mind we recommend:

* that the price on the website should be the same as each business fixes independently for its activity when not on the website (the website price could be updated, for example, according to the price stated in the business' own website and that this is applied to customers that contract directly with him.)
* that web users could proceed with the individual identification of companies and that the selection system on offer should be completely clear.

* that, in the case of marketing package holidays, the consumer could chose between the different services individually, by being able to know previously the prices of these services (the web-users could configure their own tourist packages between the different options of accommodation, board, activities, etc., that are stated on the website with their respective prices.)

THE COORDINATING BODY

§ "Viajando por Besanas" is a project of public interest, in which beyond the commercialisation of tourist products, the priority is local development. Its final aim clearly defines the aims of the project: "... fixation of the population in the rural area through the generation of social and economic activities in the primary sector, exploring their opportunities from the tourist point of view and activities related to leisure and free time.".

§ So as to pursue this development there has been various efforts from Public Administrations, at different territorial levels in Spain and Portugal, and the Paideia Foundation. Once the Project's objectives have been achieved its task is also concluded. But it would be desirable to find a legal way that would allow some, several or all entities that have set up this action to follow closely the tools created and act, from their experience in the management and the availibility of the means and resources, in a coordinating body in the future.

§ The function of a coordinating body would be directed at watching over the continuity of the Project, with actions directed at its consolidation, diffusion and expansion:

CONSOLIDATION

* promote actions and projects that could favour the continuity of the Project and its expansion

* offer advice to organisations that participate in the Project

* verify the quality of the tourist products offered

DIFFUSION

* receive and distribute information relating to the Project and make it arrive at other public Administrations and the representative bodies of the tourist interests in the different territories where the project is being implemented

* encourage among the participants the exchange of experiences and good practices

* promote the celebration of forums and meetings that allow the Project to be made known and the incorporation of new entities

* divulge the actions carried out by the organisations involved to favour the setting up of similar actions on other geographic areas

EXPANSION

* favour the incorporation of new "areas" and new entities

§ The main organisational formulas that in exist in the Spanish legal system to constitute a coordinating body such as those proposed are:

* Inter-administrative agreement: The participating territorial Administrations could sign up to an agreement to create a platform for monitoring and encouraging the Project “Viajando por Besanas”, where they promise to develop the aforementioned actions oriented at its continuity, diffusion and expansion.

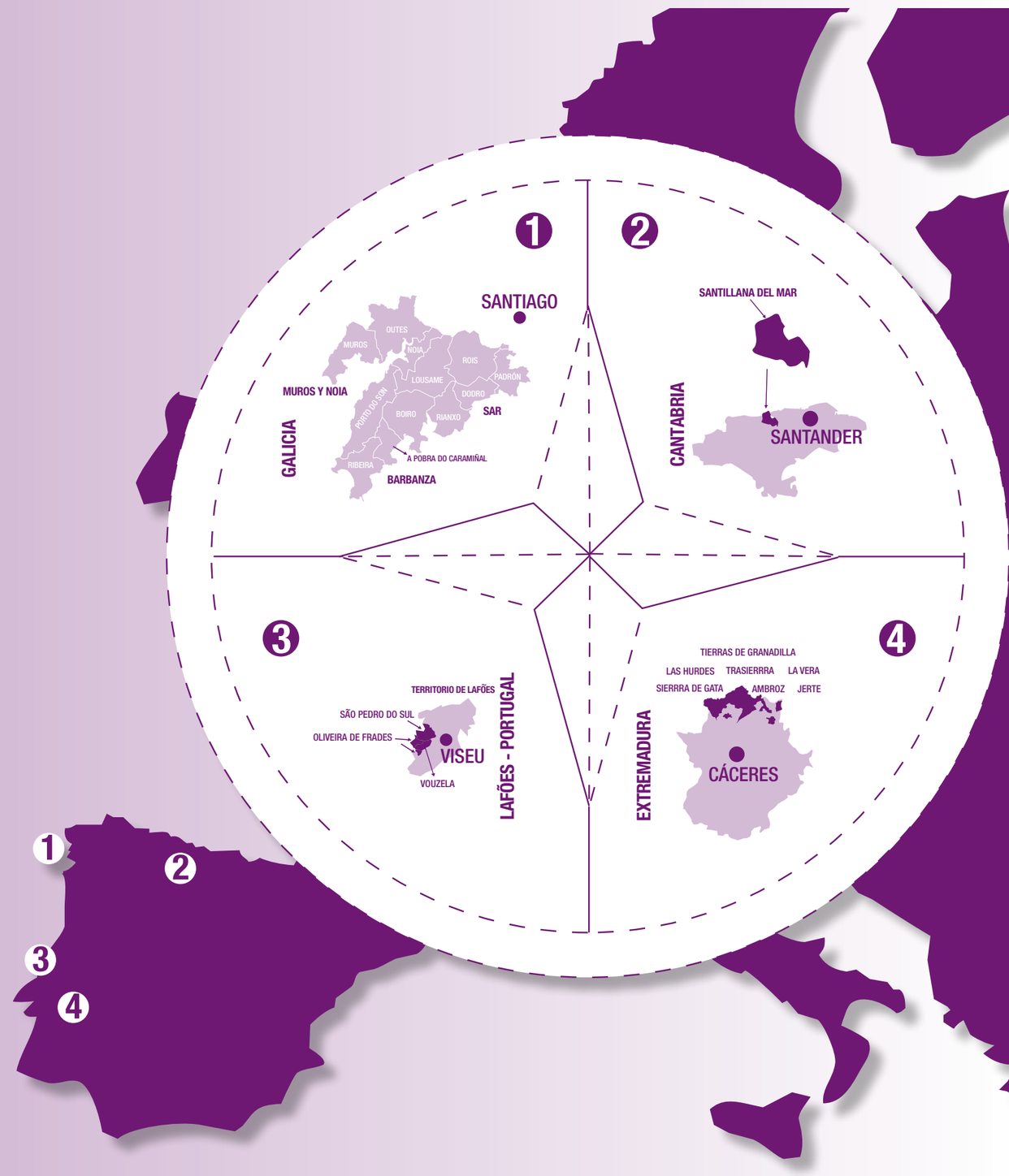
* General protocol: an agreement that is limited at establishing the methodology to develop the collaboration, without spending or operating commitment. This formula will allow the start to a route to collaboration as soon the Project ends, without prejudice of its ulterior development through the formalisation of some of the remaining formulas point out.

* Association of local entities: an entity based on an association at a state or autonomous basis, to protect and promote their common interests, regulated by statutes, approved by the representatives of the associated entities, which should guarantee the participation of their members in associative tasks and the representation of their governing bodies.

* Consortia: cooperation instruments that enjoy their own legal personality, governed by their Statutes, which determine their aims and peculiarities regarding their organic, operating and financial regime.

SUMMARY CHART FOR THE ADVANTAGES OF THE ORGANISATIONAL FORMULAS PROPOSED

COLLABORATION AGREEMENT	PROTOCOL	ASSOCIATION BETWEEN LOCAL ENTITIES	CONSORTIA
Flexibility	Flexibility	Preexisting Association	Flexibility
Open Composition	Open Composition		Open Composition
Simplicity	Simplicity		Legal Security
	Little degree of enforceability		Efficacy and viability



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