

## ON THE RELEVANCE OF *BIG DATA* FOR THE FORMATION OF CONTRACTS REGARDING *PACKAGE TOURS* OR *LINKED TRAVEL* *ARRANGEMENTS*, ACCORDING TO THE NEW PACKAGE TRAVEL DIRECTIVE

### SOBRE A RELEVÂNCIA DO *BIG DATA* PARA A FORMAÇÃO DE CONTRATOS RELATIVOS A PACOTES TURÍSTICOS OU LIGADOS A ARRANJOS DE VIAGEM, DE ACORDO COM A NOVA DIRETIVA DOS PACOTES DE VIAGEM

*Professor Adjunto do Instituto Politécnico de Beja, Portugal. Pesquisador sênior do Laboratório UbiNET - Segurança Informática e Cibercrime.*

#### SUMÁRIO

INTRODUCTION; 1 MEANWHILE, THE BIG DATA WAVE SWEEPED THE TRAVEL AND TOURISM INDUSTRIES; 2 PROTECTING TRAVELLERS FROM *BIG DATA* EMPOWERED TRADERS; CONCLUSION; REFERENCES.

#### INTRODUCTION<sup>12</sup>

As stated by Recital 2 of the 2015 Directive<sup>3</sup>, “In addition to traditional distribution chains, the internet has become an increasingly important medium through which travel services are offered or sold. Travel services are not only combined in the form of traditional pre-arranged packages, but are often combined in a customised way. Many of those combinations of travel services are either in a legal ‘grey zone’ or are clearly not covered by Directive 90/314/EEC. This Directive aims to adapt the scope of protection to take account of those

<sup>1</sup> Or “When the Internet became the main distribution channel for Travel Services”.

<sup>2</sup> This article corresponds to the Communication presented at *Conference on ESHTE/INATEL, About the Directive (EU) 2015/2302, on Package Travel and Linked Travel Arrangements*, In Lisbon, on October 11, 2016, and is part of the I+D DER2015-63595-R (2016-2018) “*BIG DATA, CLOUD COMPUTING Y OTROS NUEVOS RETOS JURIDICOS PLANTEADOS POR LAS TECNOLOGIAS EMERGENTES; EN PARTICULAR, SU INCIDENCIA EN EL SECTOR TURISTICO*”, Coordinated by the Professor Apollonia Martínez Nadal, *Catedrática de Dret Mercantil* da Universitat de les Illes Balears, Espanha.

<sup>3</sup> In full, Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

developments, to enhance transparency, and to increase legal certainty for travellers and traders”.

In fact, from the start of the legislative procedure that led to the adoption of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, intending to cope with the digital challenges was one of the main objectives declared by the European Commission<sup>4</sup>.

These policy challenges were further, and briefly, analysed and addressed at an accompanying Communication<sup>5</sup>. Namely, the focus was placed on the material scope of the Directive, defining “packages” and “assisted travel arrangements”, both tending to be increasingly performed online, with a special attention to “dynamic packaging” and its impact on consumers<sup>6</sup>.

However, the effects resulting from the technological platforms supporting both were not taken into consideration, not even those concerning the Artificial Intelligence applications that made possible “dynamic packaging”<sup>7</sup>. No qual o autor analisa desde o início do processo

---

<sup>4</sup> Explicitly at the Explanatory Memorandum of the Proposal (COM(2013) 512 final, of 9.7.2013). On the contents and objectives of the Proposal, in general, K. Tonner, “Modernising package travel: towards a new Directive”. In *IFTTA Law Review*, 1-2011, S. Keiler, “Proposal for a new Directive on package travel and assisted travel arrangements”. In *Journal of European Consumer and Market Law*, 3, 2013, J. M. Bech Serrat, “An overview of the proposal for a new Package Travel Directive”, In *IFTTA Law Review*, 1-2014. For a better understanding of the context of the Proposal, Z. Yaqub, “The Package Travel Directive”. In Z. Yaqub & B. Bedford, *European Travel Law*. Chichester: John Wiley & Sons, 1997, *maxime* pp. 47-52, S. Storm & M. McDonald, “Consumer Protection in the Tourism Industry”, In M. McDonald, *et al.*, *European Community Tourism Law and Policy*. Dublin: Blackhall Publishing, 2003, *maxime* pp. 278-292, D. Grant & S. Mason. *Holiday Law*. London: Sweet & Maxwell, 2003, pp. 31-60, H. Schulte-Nölke, Ch. Twigg-Flesner & M. Ebert, Ed., “Comparative Analysis of the Package Travel Directive (90/314). In *EC Consumer Law Compendium*. Brussel: European Commission, 2008, as well as J. Estol & X. Font, “European Tourism Policy: Its Evolution and Structure”. In *Tourism Management*, Vol. 52, 2016.

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘Bringing the EU Package Travel Rules Into the Digital Age’, COM (2013) 513 final.

<sup>6</sup> London Economics, *on Consumer Detriment in the Area of Dynamic Packages - Final Report to the European Commission - Health and Consumers DG*, November 2009.

<sup>7</sup> On these, J. Cardoso. “Developing Dynamic Packaging Systems using Semantic Web Technologies”, In *Transactions on Information Science and Applications*. Vol. 3-4, 2006, and F. Zach, U. Gretzel & D.R. Fesenmaier, “Tourist Activated Networks: Implications for Dynamic Packaging Systems in Tourism”. In P. O'Connor, W. Höpken & U. Gretzel, Eds. *Information and Communication Technologies in Tourism 2008*. Proceedings of the International Conference in Innsbruck, Austria, 2008. Berlin-Heidelberg: Springer, analysed by R.A. Ayazlar, “Dynamic Packaging Applications in Travel Agencies”. In *Procedia - Social and Behavioral Sciences*, Vol. 131, 2014.

---

legislative que conduziu a adoção da Diretiva da UE relative as viagens organizaas e aos meios de viagem conexos

As a consequence, the Directive relies entirely on an, intended to be, clear, distinction between “packages”, pre-arranged or built in interaction with the purchaser,<sup>8</sup> and “linked travel arrangements”<sup>9</sup>, also with an interaction of the latter, but without any explicit attention to the underlying technologies.

So, “For the sake of transparency, packages should be distinguished from linked travel arrangements, where online or high street traders facilitate the procurement of travel services

---

<sup>8</sup> “It should be clarified that travel services combined after the conclusion of a contract by which a trader entitles a traveller to choose among a selection of different types of travel services, such as in the case of a package travel gift box, constitute a package. Moreover, a combination of travel services should be considered to be a package where the traveller's name, payment details and e-mail address are transmitted between the traders and where another contract is concluded at the latest 24 hours after the booking of the first travel service is confirmed.” (Recital 11), and, “Since travel services may be combined in many different ways, it is appropriate to consider as packages all combinations of travel services that display features which travellers typically associate with packages, in particular where separate travel services are combined into a single travel product for which the organiser assumes responsibility for proper performance. In accordance with the case-law of the Court of Justice of the European Union, it should make no difference whether travel services are combined before any contact with the traveller or at the request of or in accordance with the selection made by the traveller. The same principles should apply irrespective of whether the booking is made through a high street trader or online.” (Recital 8).

<sup>9</sup> “At the same time, linked travel arrangements should be distinguished from travel services which travellers book independently, often at different times, even for the purpose of the same trip or holiday. Online linked travel arrangements should also be distinguished from linked websites which do not have the objective of concluding a contract with the traveller and from links through which travellers are simply informed about further travel services in a general way, for instance where a hotel or an organiser of an event includes on its website a list of all operators offering transport services to its location independently of any booking or if ‘cookies’ or meta data are used to place advertisements on websites.” (Recital 12),<sup>9</sup> besides “Specific rules should be laid down for both high street and online traders which assist travellers, on the occasion of a single visit or contact with their point of sale, in concluding separate contracts with individual service providers and for online traders which, for instance, through linked online booking processes, facilitate in a targeted manner the procurement of at least one additional travel service from another trader, where a contract is concluded at the latest 24 hours after the confirmation of the booking of the first travel service. Such facilitation will often be based on a commercial link involving remuneration between the trader who facilitates the procurement of additional travel services and the other trader, regardless of the calculation method of such remuneration which might, for instance, be based on the number of clicks or on the turnover. Those rules would apply, for example, where, along with the confirmation of the booking of a first travel service such as a flight or a train journey, a traveller receives an invitation to book an additional travel service available at the chosen travel destination, for instance, hotel accommodation, with a link to the booking website of another service provider or intermediary. While those arrangements should not constitute packages within the meaning of this Directive, under which one organiser is liable for the proper performance of all travel services, such linked travel arrangements constitute an alternative business model that often competes closely with packages.” (Recital 13).

by travellers leading the traveller to conclude contracts with different travel services providers, including through linked booking processes, which do not contain the features of a package and in relation to which it would not be appropriate to apply all of the obligations applicable to packages" (Recital 9).

Then, the legal texts are coherent with these options<sup>10</sup>, including the scope and the contents of the pre-contractual information to be provided<sup>11</sup>, as "This Directive applies to

---

<sup>10</sup> So, "[2] 'package' means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if: (a) those services are combined by one trader, including at the request of or in accordance with the selection of the traveller, before a single contract on all services is concluded; or (b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are: [...] (iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or (v) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service." as "[5] 'linked travel arrangement' [that] means at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates: (a) on the occasion of a single visit or contact with his point of sale, the separate selection and separate payment of each travel service by travellers; or (b) in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service." (Art. 3). On these concepts, S. Mason & M. Gatenby, "The New Package Travel Directive: The Definition of Package and Assisted Travel Arrangement". In *Travel Law Quarterly*, November 2016 <<http://www.travellawquarterly.co.uk/resources/misc-other-resources/new-package-travel-directive-definition-package-assisted-travel-arrangement/>>.

<sup>11</sup> "1. Member States shall ensure that, before the traveller is bound by any package travel contract or any corresponding offer, the organiser and, where the package is sold through a retailer, also the retailer shall provide the traveller with the standard information by means of the relevant form as set out in Part A or Part B of Annex I, and, where applicable to the package, with the following information: (a) the main characteristics of the travel services [...]; (b) the trading name and geographical address of the organiser and, where applicable, of the retailer, as well as their telephone number and, where applicable, e-mail address; (c) the total price of the package inclusive of taxes and, where applicable, of all additional fees, charges and other costs or, where those costs cannot reasonably be calculated in advance of the conclusion of the contract, an indication of the type of additional costs which the traveller may still have to bear; (d) the arrangements for payment, including any amount or percentage of the price which is to be paid as a down payment and the timetable for payment of the balance, or financial guarantees to be paid or provided by the traveller; (e) the minimum number of persons required for the package to take place and the time-limit, referred to in point (a) of Article 12(3), before the start of the package for the possible termination of the contract if that number is not reached; (f) general information on passport and visa requirements, including approximate periods for obtaining visas and information on health formalities, of the country of destination; (g) information that the traveller may terminate the contract at any time before the start of the package in return for payment of an appropriate termination fee, or, where applicable, the standardised termination fees requested by the organiser, in accordance with Article 12(1); (h) information on optional or compulsory insurance to cover the cost of termination of the

packages offered for sale or sold by traders to travellers and to linked travel arrangements facilitated by traders for travellers." (Art. 2 (1). Continuing this information to be binding, as previously, along with the applicability of Directive 2005/29/EC, of the European Parliament and of the Council, of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market [...] ('Unfair Commercial Practices Directive')<sup>12</sup>.

Regarding online contracting of "packages" or "linked travel arrangements", we should also have in mind that, whereas Directive 2011/83/EU of the European Parliament and of the Council, of 25 October 2011, on consumer rights, is not applicable (Art. 3(3) g), both are "information society services"<sup>13</sup>, falling within the scope of Directive 2000/31/EC, of the

---

contract by the traveller or the cost of assistance, including repatriation, in the event of accident, illness or death. [...]. 2. With reference to packages as defined in point (b)(v) of point 2 of Article 3 the organiser and the trader to whom the data are transmitted shall ensure that each of them provides, before the traveller is bound by a contract or any corresponding offer, the information set out in points (a) to (h) of the first subparagraph of paragraph 1 of this Article in so far as it is relevant for the respective travel services they offer. The organiser shall also provide, at the same time, the standard information by means of the form set out in Part C of Annex I. 3. The information referred to in paragraphs 1 and 2 shall be provided in a clear, comprehensible and prominent manner. Where such information is provided in writing, it shall be legible." (Art. 5). On the basis for these enhanced information duties regarding travellers, J.A. Luzak, "Vulnerable Travellers in the Digital Age". In *EuCML - Journal of European Consumer and Market Law*, 2016-3.

<sup>12</sup> "1. Member States shall ensure that the information provided to the traveller pursuant to points (a), (c), (d), (e) and (g) of the first subparagraph of Article 5(1) shall form an integral part of the package travel contract and shall not be altered unless the contracting parties expressly agree otherwise. The organiser and, where applicable, the retailer shall communicate all changes to the pre-contractual information to the traveller in a clear, comprehensible and prominent manner before the conclusion of the package travel contract. 2. If the organiser and, where applicable, the retailer has not complied with the information requirements on additional fees, charges or other costs as referred to in point (c) of the first subparagraph of Article 5(1) before the conclusion of the package travel contract, the traveller shall not bear those fees, charges or other costs. (Art. 6). On this subject, specifically, F. Sebastio, "Protection of consumer's dream holidays: UCPs in the travel package services". In *Italian Antitrust Review*, 2014-1(2), on 1990 PTD, and M.B.M. Loos, "Precontractual information obligations for package travel contracts". In *EuCML - Journal of European Consumer and Market Law*, 2016-3, on the 2015 Directive.

<sup>13</sup> That is "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition: - "at a distance" means that the service is provided without the parties being simultaneously present, - "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, - "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request." (Art. 1(2) of Directive 98/34/EC, of the European Parliament and the Council, of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC, of the European Parliament and the Council, of 20 July 1998)



European Parliament and of the Council, of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')<sup>1415</sup>

## 1. MEANWHILE, THE BIG DATA WAVE SWEEPED THE TRAVEL AND TOURISM INDUSTRIES

For a pre-understanding, based on EU sources, "Big data refers to the exponential growth both in the availability and in the automated use of information: it refers to gigantic digital datasets held by corporations, governments and other large organisations, which are then extensively analysed (hence the name: analytics) using computer algorithms"<sup>16</sup> or, likewise, "The term 'big data' refers to large amounts of different types of data produced with high velocity from a high number of various types of sources. Handling today's highly variable and real-time datasets requires new tools and methods, such as powerful processors, software and algorithm. Going beyond traditional 'data mining' tools designed to handle mainly low-variety, small scale and static datasets, often manually"<sup>17</sup>

---

<sup>14</sup> On this subject, M. Lonnfors, "The Relationship between the Legal Regulation of Communications Technology (CT) and Travel and Tourism in the EU". In *16th BILETA Annual Conference*, 2011, Edinburgh <[http://www.bileta.ac.uk/content/files/conference%20papers/2001/The%20Relationship%20between%20the%20Legal%20Regulation%20of%20Communications%20Technology%20\(CT\)%20and%20Travel%20and%20Tourism%20in%20the%20EU.pdf](http://www.bileta.ac.uk/content/files/conference%20papers/2001/The%20Relationship%20between%20the%20Legal%20Regulation%20of%20Communications%20Technology%20(CT)%20and%20Travel%20and%20Tourism%20in%20the%20EU.pdf)>, J.B. Bech Serrat, "Why is there a Separation between Distance Selling in EU Law and the Tourism Industry?". In *Journal of Consumer Policy*, Vol. 33-1, 2010, Idem. *Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis*. Berlin-Heidelberg: Springer, 2012, and N. Fernández Pérez, "The Essential Review of the European Legal Framework for Distance Selling of Tourist Services". In *Papers de Turisme*, 54, 2013, as well as the recent general review of G. Straetmans, "Misleading practices, the consumer information model and consumer protection". In *EuCML - Journal of European Consumer and Market Law*, Vol. Issue 5-5, 2016.

<sup>15</sup> Since we are dealing with services, the Proposals, presented by the Commission the 9.12.2015, for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM/2015/0635 final) and for a Directive on certain aspects concerning contracts for the supply of digital content (COM/2015/0634 final), will not be taken into consideration.

<sup>16</sup> According to the Article 29 Data Protection Working Party Opinion 3/2013, on purpose limitation, of 2.4.2013.

<sup>17</sup> As stated at the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a thriving data-driven economy' (COM(2014) 442 final, of 2.7.2014).

---

To sum things up, *Big Data Analytics*, or just *Big Data*, is the recent result of the availability of huge data storing facilities through *Cloud Computing*, interconnected by very wideband cables and massive processing power, now accessible even to small and medium-sized enterprises. But, beyond this sort of *brute force*, that made possible a cheap access to massive amounts of data, in real-time, the effective breakthrough are Artificial Intelligence algorithms that are able to take notice of minor changes in patterns and identify non-obvious correlations, and adapt themselves as this is a form of “machine learning”.

These algorithms reach beyond usual analytics as they are not intended to find answers to predetermined questions, for instance related to the causes of certain behaviour, but lead to the finding of connections and relationships between data that are unexpected and were previously unknown. Based on these correlations predictions will be made, and a new algorithm can be created and applied to particular cases, in the future<sup>18</sup>.

More than in other industries, *Big Data* has been a reality in Travel and Tourism. Commercial communication and reservations made by transportation companies, starting with airlines, but also hotel and rental car have always left data trails. The same, with travel agencies, since a long time relying on Global Distribution Systems<sup>19</sup>.

Now, the sources of the available data have multiplied, from general and travel social media, to comments written at online magazines or apposite boxes at various providers' webpages. To this, we should add all the data coming from location sensors, interaction with mobile devices, of paramount relevance in this field. Notwithstanding other sources, as weather forecasts or political, or economical, or public health, news and analyses, now available in real time and immediately combined with all other data.

---

<sup>18</sup> For a basis, the following reports, by J. Manyika *et al.*, *Big data: The next frontier for innovation, competition, and productivity*. McKinsey Global Institute, 2011, the NESSI - Networked European Software and Services Initiative White Paper, *Big Data - A New World of Opportunities*, December 2012, as R. Souza *et al.* *How to get started with big data. BCG perspectives*. The Boston Consulting Group, May 2013, and Ph. Russom. *Managing big data*. The Data Warehousing Institute, 2013.

<sup>19</sup> For a general approach on the actual relevance of Big Data for Travel and Tourism industries, with the analysis of cases, Th.H. Davenport, *At the Big Data Crossroads: turning towards a smarter travel experience*. Amadeus IT Group, 2013; a more critical perspective is the one provided by Ch. Jouan, Org. *Big Data - The Impact on Travel & Tourism*. Future Foundation, for the 14th WTTC - the *World Travel and Tourism Council Global Summit*, Hainan / China, 2014. <[http://www.wttc.org/-/media/files/reports/special-and-periodic-reports/wttc\\_big\\_data\\_report\\_final.pdf](http://www.wttc.org/-/media/files/reports/special-and-periodic-reports/wttc_big_data_report_final.pdf)>.

But, what is the specific relevance of *Big Data* for the Travel Industry, besides a much better decision support, making possible faster adjustments to even micro trends in local markets demands and internal decisions in order to improve efficiency?

For a proper answer, the keyword is personalisation, as *Big Data Analytics* allows the creation of new packages customised in order to fulfil the requests, and also the implied desires, of each client. Namely, it may refer to the past experience with that traveller, repeating offers as seasonal trends are identified, not mechanically but taking into consideration not only the explicit feedback received from that given person but also all the available data. Another line has to do with the personal, or institutional, relationships from information on family, or sports, events, being the behaviour of social networks “friends” a major source of relevant data. One more, mostly related to linked travel services, has to do with secondary offers, based on the profile of each prospective purchaser, even without a previous business record with the trader. In all these offers, a quite relevant role is performed by location data, with an utmost relevance regarding additional services, or alternative arrangements in case of non-performance of given travel services, in real time and reducing the basis for conflicts<sup>20</sup>.

## 2. PROTECTING TRAVELLERS FROM *BIG DATA* EMPOWERED TRADERS

Now, *Big Data* is a pervasive reality, necessary for the competitiveness of European companies, as well as for the general efficiency of our Societies. Therefore, the European Commission designed strategies in order to take full advantages from the inherent challenges<sup>21</sup>.

---

<sup>20</sup> “Where a significant proportion of the travel services cannot be provided as agreed in the package travel contract, the organiser shall offer, at no extra cost to the traveller, suitable alternative arrangements of, where possible, equivalent or higher quality than those specified in the contract, for the continuation of the package, including where the traveller's return to the place of departure is not provided as agreed. // Where the proposed alternative arrangements result in a package of lower quality than that specified in the package travel contract, the organiser shall grant the traveller an appropriate price reduction. // The traveller may reject the proposed alternative arrangements only if they are not comparable to what was agreed in the package travel contract or the price reduction granted is inadequate.” (Art. 13(5))

<sup>21</sup> Starting with the, referred, Communication from Commission, 'Towards a thriving data-driven economy' (COM(2014) 442 final, of 2.7.2014), along with the Commission Staff Working Document - Report on the Implementation of the Communication 'Unleashing the Potential of Cloud Computing in Europe' (SWD(2014) 214 final, also of 2.7.2014), reinforced by Communication 'A Digital Single Market Strategy for Europe'



---

One of the basis of these strategies is the compliance with Fundamental Rights of European Citizens, especially regarding the overlapping of consumer protection with personal data protection, both reaching a new importance after the *Treaty of Lisbon*.<sup>22</sup>

As a matter of fact, business models based on *Big Data* might lead to a permanent control of costumers' behaviour, with data collected in real time and retained for undisclosed terms, in order to obtain information even for originally unforeseen objectives, leading to a quite impressive and enhanced information asymmetry.

In order to achieve this control, companies have now the tools needed to create detailed profiles of each client, latter used to assess and discern his or her behaviour. Besides, *Big Data* makes anonymization reversible, albeit Privacy Enhancement Technologies are becoming mandatory.

Therefore, the European Institutions<sup>23</sup>, and other bodies<sup>24</sup>, did pay a close attention to this subject, even because this was one of the problems to be addressed by the comprehensive

---

(COM(2015) 192 final, of 6.5.2015) and developed with Communication 'Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society' (COM(2016) 587 final, of 14.9.2016)

<sup>22</sup> As stated by the systematic insertion at the *Treaty on the Functioning of the European Union*, Art. 12 for consumer protection and Art. 16 for the protection of personal data, as well as at the *Charter of Fundamental Rights*, Art. 8 for the protection of personal data and Art. 38 for consumer protection, now with an enhance role, as established by Art. 6 of the *Treaty of the European Union*. For a general perspective, for instance, I. Pernice, "The Treaty of Lisbon and Fundamental Rights". In S. Griller & J. Ziller, Eds, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*. Wien / New York: Springer, 2008, pp. 235-256, and S. Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon", In *Human Rights Law Review*, Vol. 11-4, 2011, specifically, W. Kerber, "Digital markets, data, and privacy: competition law, consumer law and data protection". In *Journal of Intellectual Property Law & Practice*, Vol. 11-10, 2016.

<sup>23</sup> The Commission at the, mentioned, Communications, 'Towards a thriving data-driven economy' (COM(2014) 442 final, of 2.7.2014, and 'A Digital Single Market Strategy for Europe' (COM(2015) 192 final, of 6.5.2015); being the European Data Protection Supervisor more assertive, from the Preliminary Opinion 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy', of March 2014, reinforced by Opinion 4/2015: 'Towards a new digital ethics. Data, dignity and technology', of 14.9.2015, closely followed by Opinion 7/2015, 'Meeting the challenges of big data - A call for transparency, user control, data protection by design and accountability', of 19.11.2015, and updated by Opinion 8/2016, 'EDPS Opinion on coherent enforcement of fundamental rights in the age of big data', of 23.9.2016.

<sup>24</sup> As the Article 29 Working Party, that had a first approach this subject with Opinion 2/2010, on 'online behavioural advertising', adopted the 22.6.2010, followed by Opinion 05/2012, on 'Cloud Computing', of 1.7.2012, and by Opinion 3/2013, on 'purpose limitation', of 2.4.2013, the same for Opinion 8/2014, on the 'Recent Developments on the Internet of Things', as well as the 'Statement on Statement of the WP29 on the impact of the development of big data on the protection of individuals with regard to the processing of their personal data in the EU', both of 16.9.2014.

reform of the European data protection rules that started at January 2012<sup>25</sup>. The same for Academia<sup>26</sup>, even regarding Travel Law<sup>27</sup>.

However, since the adoption of the General Data Protection Regulation was lagging, the Court of Justice of the EU made a stand towards Big Internet Companies, with its decision on the *Google Spain Case*<sup>28</sup>.

Very briefly, we should remember that, not following the demeaning Opinion of the Advocate General, the Court achieved an interpretation of the applying rules (Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data) based on the new relevance of informational self-determination after the *Treaty of Lisbon* and on a standard of technology neutrality<sup>29</sup>.

---

<sup>25</sup> The Proposal for a Regulation, of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012) 11 final) and the Proposal for a Directive of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (COM/2012/010 final), both of 25.1.2012.

<sup>26</sup> I.S. Rubinstein, "Big Data: The End of Privacy or a New Beginning?". In *International Data Privacy Law*, Vol. 3-2, 2013, A. Mantelero & G. Vaciago, "The 'Dark Side' of Big Data: Private and Public Interaction in Social Surveillance. How data collections by private entities affect governmental social control and how the EU reform on data protection responds in Social Surveillance". In *Computer Law Review International*. 2013-6, P. Leonard, "Doing big data business: evolving business models and privacy regulation". In *International Data Privacy Law*, 2014-1, K. Krasnow Waterman & P.J. Bruening, "Big Data analytics: risks and responsibilities". In *International Data Privacy Law*, Vol. 4-2, 2014, R. Kemp, "Legal aspects of managing Big Data". In *Computer Law & Security Review*. Vol. 30-4, 2014, L. Moerel. *Big Data Protection. How to Make the Draft EU Regulation on Data Protection Future Proof*. Tilburg University, 2014, G. González Fuster & A. Scherrer, *Big Data and smart devices and their impact on privacy*. Study for the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, September 2015, B. van der Sloot & S. van Schendel, "Ten Questions for Future Regulation of Big Data: A Comparative and Empirical Legal Study". In *JIPITEC - Journal of Intellectual Property, Information Technology and E-Commerce Law*, Vol. 7-2, 2016 <<https://www.jipitec.eu/issues/jipitec-7-2-2016/4438>>, and also A. Mantelero, "Personal data for decisional purposes in the Age of Analytics: from an individual to a collective dimension". In *Computer Law & Security Review*, Vol. 32-2, 2016, this being an insight into an analysis of travellers as such.

<sup>27</sup> M. Colangelo & V. Zeno-Zencovich, "Online Platforms, Competition Rules and Consumer Protection in Travel Industry". In *EuCML - Journal of European Consumer and Market Law*, 2016-2.

<sup>28</sup> The Judgment of the Court (Grand Chamber) of 13 May 2014 (C-131/12). *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*.

<sup>29</sup> On this issue, the Article 29 Working Party, at 26.11.2014, adopted "Guidelines on the implementation of the Court of Justice of the European Union judgment on 'Google Spain and inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González' C-131/12, 26 November 2014, for further and

The Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) reinforced this approach, clearly.

Pointing out only some of the most pertinent issues respecting *Big Data* in the context of offer of “package travel contracts” or linked travel arrangements”, the first to be addressed is the territorial scope, as the Regulation “applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.” (namely by a trader, or through a processor, established outside the Territory of the EU Member States, with or without the use of *Cloud Computing*), as well as “to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.” (Art. 3(1)(2)<sup>30</sup>, hence, with a wider territorial scope than the Package Travel Directive<sup>31</sup>.

Besides, processing has to be done with due regard to the Principles of “lawfulness, fairness and transparency”, “purpose limitation”, “data minimisation”, and “storage limitation” (Art. 5(1) a), b) c) and e), greatly restraining the scope of *Big Data Analytics*<sup>32</sup>.

---

somewhat divergent analysis, I. Iglezakis, “The Right To Be Forgotten in the Google Spain Case (case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?”, July 26, 2014, available at SSRN: <<https://ssrn.com/abstract=2472323>>, H. Crowther, “Google v Spain: is there now a ‘right to be forgotten?’”. In *Journal of Intellectual Property Law & Practice*, Vol. 9–11, 2014, and B. Van Alsenoy & M. Koekkoek, “Internet and jurisdiction after Google Spain: the extraterritorial reach of the ‘right to be delisted’”. In *International Data Privacy Law*, Vol. 5-2, 2015.

<sup>30</sup> According to Art. 2(1) of Directive 2006/123/EC, of the European Parliament and of the Council of 12 December 2006, on services in the internal market, and Art. 1 and 3 of the Directive on electronic commerce.

<sup>31</sup> On the subject, P. de Hert & M. Czerniawski, “Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context”. In *International Data Privacy Law*, Vol. 6-3, 2016, as well as E.J. Kindt, “Why research may no longer be the same: About the territorial scope of the New Data Protection Regulation”. In *Computer Law & Security Review*, Vol. 32-4.

<sup>32</sup> As “Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’); (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the

---

Furthermore, to the data subject are granted rights to object his data processing (Art. 21)<sup>33</sup>, including “data portability” (Art. 20)<sup>34</sup>, as well the “right to erasure (‘right to be forgotten’)” (Art. 17)<sup>35</sup>, expressly in the context of direct marketing<sup>36</sup>.

There are also very strong limits to “Automated individual decision-making, including profiling”, as “The data subject shall have the right not to be subject to a decision based solely

---

initial purposes (‘purpose limitation’); (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’); [and] (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (‘storage limitation’);”, on the precise consequences of this rules, B. Custers & H. Uršič, “Big data and data reuse: a taxonomy of data reuse for balancing big data benefits and personal data protection”. In *International Data Privacy Law*, Vol. 6-1, 2016.

<sup>33</sup> “1. The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.”

<sup>34</sup> “1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided [...]”.

<sup>35</sup> “1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).”. On this, A. Mantelero, “The EU Proposal for a General Data Protection Regulation and the roots of the ‘right to be forgotten’”. In *Computer and Security Review*, Vol. 29-3, 2013, and C. Bartolini & L. Siry, “The right to be forgotten in the light of the consent of the data subject”. In *Computer Law and Security Review*, Vol. 32-2, 2016.

<sup>36</sup> “2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.” and “3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.” (Art. 21), E. Carolan, “The continuing problems with online consent under the EU’s emerging data protection principles”. In *Computer Law & Security Review*. Vol. 32-3, 2016.



on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.” (Art. 22(1), even if it “shall not apply if the decision: (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) is based on the data subject's explicit consent.” (Art. 22(2). Besides, in this context, “‘profiling’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;” (Art. 4(4)<sup>37</sup>.

Finally, we may not forget the relevance of these rules being is enforced through strict liability (Art. 82) and very high administrative fines (Art. 83), that may amount to “up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher”.

Also relevant, within this framework, as they deal with one of the most pervasive tool used on online behavioural advertising, are the rules on the use of ‘cookies’ (Art. 5.3. of Directive 2002/58/EC, of the European Parliament and of the Council of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009<sup>38</sup>.

---

<sup>37</sup> On this subject, F.J. Zuiderveen Borgesius, “Singling out people without knowing their names - Behavioural targeting, pseudonymous data, and the new Data Protection Regulation”. In *Computer Law & Security Review*, Vol. 32-2, 2016, and N.J. King & J. Forder, “Data analytics and consumer profiling: Finding appropriate privacy principles for discovered data”. In *Computer Law & Security Review*. Vol. 32-5, 2016, from a mostly technical perspective, B. Goodman & S. Flaxman. “European Union regulations on algorithmic decision-making and a ‘right to explanation’”. In *ICML Workshop on Human Interpretability in Machine Learning* (WHI 2016), New York <<https://arxiv.org/pdf/1606.08813.pdf>>.

<sup>38</sup> F. Debusseré, “The EU Privacy Directive: A Monstrous Attempt to Starve the Cookie Monster”. In *International Journal of Law and Information Technology*, Vol. 13-1, 2005, R. Bond. “The EU E-Privacy Directive and Consent to Cookies”. In *The Business Lawyer*, Vol. 68-1, 2012, E. Kosta, “Peeking into the cookie jar: the European approach towards the regulation of cookies”. In *International Journal of Law and Information Technology*, Vol. 21- 4, 2013, J.A. Luzak, “Much Ado about Cookies: The European Debate on the New Provisions of the ePrivacy Directive regarding Cookies”. In *European Review of Private Law*, 2013-1, Idem, “Privacy Notice for Dummies? Towards European Guidelines on How to Give ‘Clear and



## CONCLUSION<sup>39</sup>

So, despite the fact that New General Data Protection Regulation will not be applicable before the 25 May 2018, Professional Legal Operators related to the Travel Industry will need to maintain a permanent dialogue with this Regulation, along with the New Packaged Travel Directive, a *dialogue des sources* / *Quellendialog*, in order to achieve the best possible solution in coherence with the pertinent Principles and Fundamental Rights<sup>40</sup>.

Recebido em: 28-12-2016 / Aprovado em: 08-02-2017

---

Comprehensive Information' on the Cookies' Use in Order to Protect the Internet User's Right to Online Privacy" - Amsterdam Law School Research Paper N. 2013-65 <<https://ssrn.com/abstract=2350209>>, D. Clifford. "EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the crumbs of online user behaviour". In JIPITEC - *Journal of Intellectual Property, Information Technology and E-Commerce Law*, Vol. 5, 2014 <<http://www.jipitec.eu/issues/jipitec-5-3-2014/4095>>, F.J. Zuiderveen Borgesius. "Personal data processing for behavioural targeting: which legal basis?". In *International Data Privacy Law*, Vol. 5-3, 2015.

<sup>39</sup> Or "The need of an enhanced *Dialogue of the Sources*".

<sup>40</sup> Following the Method introduced by E. Jayme, "Identité culturelle et intégration: le droit international privé postmoderne". In *Recueil des cours de l'Académie de droit international*, T. 251, 1995, p. 60.