

**Indecon Report on Directive
(2015/2302/EU) and Options to
Reform Irish Legislation on the
Travel Trade Industry to Comply
with the Directive**

**Report submitted to the Commission
for Aviation Regulation by Indecon
International Research Economists**

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Executive Summary

Indecon International Research Economists were appointed by the Commission for Aviation Regulation (CAR) to develop proposals in consultation with industry stakeholders on matters arising from the introduction of the new Directive on package travel and linked travel arrangements (2015/2302/EU).

The new Directive applies in Ireland from 1 July 2018. Prior to that Ireland is required to adopt and publish the laws, regulations and administrative measures necessary to comply with the Directive by 1 January 2018. Irish legislation has assigned authority to the Commission for Aviation Regulation for the licensing of travel agents and tour operators. Agents/operators must be bonded in order to qualify for a license; it has been CAR's responsibility to administer these bonds and the Travellers' Protection Fund in the event of agent/operator insolvency. The CAR assesses claims and processes refunds and/or repatriation for those consumers affected by the insolvency.¹

CAR has five main roles concerning travel trade licensing as follows:

1. Licencing travel agents and tour operators buying and selling overseas travel.
2. Administering a bonding scheme for travel agents and tour operators.
3. Administering the Travellers' Protection Fund (which was built up with a levy on passengers of tour operators between 1983 and 1987).
4. Processing claims for refunds and repatriation in the event of a licenced travel agent or tour operator going out of business.
5. Investigating instances of alleged illegal trade and, when necessary, prosecuting illegal traders.

In addition to the primary role of CAR in the licensing of travel agents and tour operators, the CCPC (combining the former the National Consumer Agency and Competition Authority) is responsible for the oversight and enforcement of Irish law pertaining to package holidays in cases of breach of terms such as pre-contractual information and advertising requirements. Terms and conditions as well as complaints procedures must comply with legislative requirements. If a customer follows these procedures and is still not satisfied, they may initiate court proceedings. It is not, however, within the remit of the CCPC to bring court claims on behalf of consumers. The CCPC has the power to prosecute organisers and retailers in relation to failure to comply with provisions of the Package Holidays and Travel Trade Act 1995 in relation to: brochure content, information to be provided before the conclusion of a contract, information to be provided before the start of a package and the form of the contract.²

This report presents a high-level overview of the requirements of the Directive as they relate to Ireland and the discretionary options available to the Irish Government. These include areas which may be outside of the Commission for Aviation Regulation's functions and duties but it is useful to identify all changes needed to comply with the Directive. We also consider any requirements of the Directive as they relate to CAR's functions.

The mandatory elements of the Directive also require a small number of changes to the operation of the functions of CAR such as: ways to manage requirements for mutual recognition and cooperation among Member States where insolvency protection is concerned.

¹ See, Package Holidays and Travel Trade Act, 1995, Sections 22-25

² See, Package Holidays and Travel Trade Act, 1995, Sections 10-21

Article 18, which deals with insolvency protection in requiring mutual recognition and cooperation among Member States where insolvency protection is concerned, has implications for CAR's existing supervisory functions. This Article indicates that:

“Member States shall designate central contact points to facilitate the administrative cooperation and supervision of organisers operating in different Member States. They shall notify the contact details of those contact points to all other Member States and the Commission. The central contact points shall make available to each other all necessary information on their national insolvency protection requirements and the identity of the entity or entities in charge of the insolvency protection for specific organisers established in their territory. Those contact points shall grant each other access to any available inventory listing organisers which are in compliance with their insolvency protection obligations. Any such inventory shall be publicly accessible, including online.”

Member States are further required to cooperate in seeking/providing each other with insolvency information upon request, with responses required within 15 days.

Indecon believes there are three main options which could be considered for this as follows:

- Department of Justice.
- Commission for Aviation Regulation.
- Department of Transport, Tourism and Sport.

At present under the 1982 Transport (Tour Operators and Travel Agents) Act, the Commission for Aviation Regulation is the state organisation which deals with licensing, claims by passengers in the case of insolvency, repatriation and the monitoring of appropriate bonding by entities that trade in Ireland. Therefore, it would be appropriate to designate that body as Central Point of Contact for contacts from other Member States as the information to be provided by the Central Contact Point is information that the Commission already provides to the public or relates to its statutory mandate.

It will also be necessary for the relevant legislation to adjust definitions in line with the Directive.

The changes that have occurred in the travel sector suggest (as was noted in one submission) that “the majority of sales are now done outside of the regulatory regime”. This raises the issue of whether, in the context of any required legislative changes, the existing protections schemes insofar as they cover travel services, which are not already required by the new Directive, should be maintained or removed. However, it is necessary for sufficient protections to be in place to provide the protections for services for packaged travel and the linked travel arrangements as foreseen in the new Directive.

Background to the Package Travel and Linked Travel Arrangements Directive

The new Package Travel and Linked Travel Arrangements Directive (Council Directive 2015/2302/EU) was published in the Official Journal of the European Union on 11 December 2015. One of the reasons for the new Directive is to provide consumer protection taking account of the reality in Ireland and in other EU countries that there is an increasing likelihood that consumers put together their own holiday components from different organisers (so-called dynamic packaging) instead of packages pre-arranged by an organiser or retailer. As a result of these market developments, and in the absence of updated legislation, different levels of consumer protection have applied to travel arrangements that are sold differently, but this may be unclear to consumers to whom the various arrangements may be indistinguishable.

As part of Indecon’s consultation with stakeholders, different views were expressed on aspects of the Directive and a number of stakeholders expressed concerns over the interpretation and implementation of the new Directive. Many of these stakeholders in the travel sector, however, also recognised the need for an updated Directive to reflect market and technological developments. For example, one leading company indicated to Indecon that they were “supportive of improved consumer protection measures and indeed would agree that the provisions of the 1990 legislation have been overtaken somewhat by the many changes which have come about in our business and markets since the original Directive came into force”.

Indecon believes any options for implementation of the Directive should be guided by the need for regulation and the costs involved. The existence of a significant market trend towards dynamic travel packages does not in itself imply the need for regulation and Indecon believes it is important to evaluate the extent of any consumer problems which exist. This is relevant in deciding the options for the Irish Government in relation to the Directive.

Indecon’s analysis has been guided by the need to ensure adequate consumer protection. The new Directive introduces welcome measures to enhance consumer interests. A key consideration, however, is the merit of imposing additional consumer protection regulation over those required by the Directive. Indecon believes any additional regulatory burden has potential costs and so needs to be considered in the context of what problems any additional measures are addressing and how significant are these problems.

The background to the Directive shows that the rationale is to provide travellers with adequate consumer protection. This is highlighted in Article 1 which states that the objective is to contribute “to the achievement of a high....level of consumer protection”. Indecon has taken account of this objective in formulating our advice on complying with the Directive. We are therefore supportive of the aspects of the Directive which introduce stronger consumer protection. However, we caution against imposing additional discretionary provisions of the Directive unless there is evidence of a market failure which would justify such additional regulations. The areas where there are choices for the Irish Government are discussed in the report and we understand that further consultation by CAR on these will be undertaken to provide the industry with a further opportunity to directly input to government policy in this area. It is hoped that the analysis in the report will help inform policymakers, travellers and industry of the options available to the Irish Government.

Maximum Harmonisation Nature of Directive

In considering the options for consultation on the Directive, it is important to recognise that as the Directive is a maximum harmonisation Directive, Member States do not have any flexibility on how they implement most of the provisions of the Directive. The Directive as a maximum harmonisation measure (see Article 4) indicates that Ireland and other Member States cannot deviate from the specific requirements of the Directive except in a limited number of areas where the Directive explicitly permits flexibility. The transposition of the Directive must therefore mirror the wording of the Directive itself in most areas. Unless otherwise provided for by the Directive, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in the Directive, including more or less stringent provisions which would ensure a different level of traveller protection.

The maximum harmonisation nature of EU Directive 2015/2302 on Package Travel and Linked Travel Arrangements is due to the intention of the Directive to contribute “....to the achievement of **as uniform as possible** level of consumer protection....” (Art. 1). Thus, its implementation must reflect this.

The maximum harmonisation nature of the Directive limits the ability of the Irish Government to adapt the Directive to suit the Irish market or Irish business or consumer practices should it wish to do so. Notwithstanding the maximum harmonisation nature of the Directive, there are a number of enabling clauses in the Directive which afford various choices for Ireland and other Member States. This presents a challenge to policymakers. It also raises issues for the travel trade, some of whom operate across European jurisdictions and markets. Any additional regulatory requirements by the Irish Government compared to other countries could give rise to difficulties with compliance and also have implications for the competitive position of the Irish sector.

It is necessary for Ireland to evaluate the options in the Directive. One means of evaluation could be to consider other Member States' implementations. However, as we understand, only Germany has implemented legislation to date. Indecon's analysis has therefore identified a number of important areas where a degree of discretion is permitted to Member States. These include:

- The manner in which the insolvency requirements are implemented.
- Whether Member States wish to extend their national legislation beyond the scope of the Directive to regulate areas of the travel trade not required by the Directive.
- Cooling-off periods and rights to cancellation.
- Whether the requirement for insolvency protection should be extended to retailers.

Insolvency Arrangements

A critical issue for complying with the Directive, as well as for consumer protection, is the need to ensure that organisers of packages provide security for the organiser's insolvency. Irish legislation currently provides consumer protection against insolvency of package travel providers and the new Directive also contains these requirements. Article 17 requires Member States to ensure that organisers established therein:

“...provide security for the refund of all payments made by or on behalf of travellers insofar as the relevant services are not performed as a consequence of the organizer's insolvency. If the carriage of passengers is included in the package travel contract, organizers shall also provide security for the travellers' repatriation. Continuation of the package may be offered. Organizers not established in a Member State which sell or offer for sale packages in a Member State, or which by any means direct such activities to a Member State, shall be obliged to provide the security in accordance with the law of that Member State.”

Indecon notes that a separate study and consultation process on insolvency arrangements and the bonding of the Irish travel has been published by CAR.

Of note is that the current insolvency protection scheme in Ireland and the Directive foresee the insolvency cover being used to finance accommodation of travellers prior to repatriation. Therefore, the desired outcome of both the current insolvency protection scheme and the scheme in the new Directive is essentially the same. The current Package Travel Directive, however, only applies to packages as defined in that 1990 Directive. This was transposed by the Package Holidays and Travel Trade Act, 1995. Licenced travel agents and tour operators in Ireland have in place insolvency protection of the type set out in section 22(2)(b) of the Package Holidays and Travel Trade Act, 1995 and consequently rely on bonds put in place as licence holders under the 1982 Transport (Tour Operators and Travel Agents) Act, as either travel agents or tour operators. At present the insolvency protection in place for tour operators and travel agents in Ireland is calculated by reference to projected licensable turnover, i.e., the total of receipts estimated by a licence applicant in respect of overseas travel contracts departing from Ireland for the relevant future period. That method of calculation is by way of secondary legislation and may be changed in the same manner. The insolvency protection under current legislation is also to provide refunds and repatriation in the case of insolvency. However, the method of calculation of insolvency protection under the 2015 Directive, as described above, is slightly different and is to be by reference to both payments received from customers and also an estimate for costs of repatriation.

There is also no geographic restriction in relation to travel contracts taken into account for the estimate of turnover.

A key conclusion from our assessment is that the current bonding arrangements are not inconsistent with the Directive, although as discussed below they do not cover the position of carriers facilitating linked travel arrangements. (There is also a need to apply the insolvency protection to sales by businesses established in Ireland and to modify the definition of package and that the application of insolvency protection for Business to Business Sales is removed.)

One new aspect of the Directive involves the need to provide security for consumers in the case of linked travel arrangements. Article 19 requires that traders facilitating linked travel arrangements shall provide security for the refund of all payments they receive from travellers insofar as a travel service which is part of a linked travel arrangement is not performed as a consequence of their insolvency. If such traders are the party responsible for the carriage of passengers, the security shall also cover the traveller's repatriation.

Air carriers may now also be regarded as traders facilitating linked travel arrangements. This is a new concept that is not part of the existing Irish legislative framework. This raises the requirement that such air carriers need to put in place additional insolvency protection. Under current Irish legislation, air carriers engaged in selling tickets for transport on their own airplanes are not regarded as either tour operators or travel agents. Potentially, if amendments were made to the Package Holidays and Travel Trade Act, 1995, then such air carriers could be covered by the current insolvency protection regulations in place under the 1995 Act that apply to undertakings that are not travel agents or tour operators. These provisions set out a 10% or 15% bond, depending on how the insolvency protections is structured.

While including air carriers who facilitate linked travel arrangements in the existing bonding schemes may have some perceived administrative advantages, there is a danger that it could lead consumers to mistakenly believe that there is the same level of consumer protection for both LTAs and packages. LTAs will not, under the Directive, provide travellers with the same level of protection that is offered when purchasing a package and therefore will place fewer obligations on traders who provide them.

It should be noted that any default not covered by the existing bonding arrangements are covered by the Travellers Protection Fund and this was not designed to deal with potential involvement by air carriers. An alternative option is to have a separate approach to insolvency arrangements for linked travel arrangements if there are differences in the risk profile of the underlying traders. While it is clear that insolvency arrangements for LTAs are required, an issue is whether facilitators should be part of the existing bonding schemes or have the option to utilise market based solutions such as bonding, insurance, trust accounts or other mechanisms to ensure that security shall be effective and still cover reasonably foreseeable costs.

In deciding on both the approach and the levels of any security required for any Irish regulated entities facilitating linked travel arrangements account should be taken of how significant or otherwise LTAs are likely to be in the Irish market.

In considering insolvency arrangements for linked travel arrangements ("LTA") it is also important that Irish providers are not placed at any competitive disadvantage in relation to their counterpart providers established in other Member States. This has implications for both the security required for providers of such services in the context of insolvency of traders but also requires consistency in a definition of a Linked Travel Arrangement.

These issues need to be addressed in the context of the transposition of the Directive.

Scope of the Directive

The Directive has widened the scope of consumer protection in a number of important ways. These include extending the definition of packages and introducing the concept of linked travel arrangements. The scope has also been broadened to include some categories of business travellers and as a result the term traveller rather than consumer is used in the Directive.

The Directive contains a Minimum Harmonisation clause which allows Member States to apply requirements to travel services falling outside the scope of the Directive. The result of the application of the Minimum Harmonisation clause to expand the scope to other travel services would be to increase consumer protection; however, the corresponding administrative and/or financial burden on businesses in the travel industry and the impact on consumers may cause Irish policymakers to reject these optional provisions despite enhanced consumer protection.

Cooling-off Periods and Rights to Cancellation

The Directive provides significant mandatory consumer protection via cooling-off periods and rights to cancellation. Article 12(5) of the Directive indicates that Member States have an option to require travel contracts to provide the traveller with the right to cancel the contract within 14 days for no reason with respect to *off-premises* contracts.³ (This is in addition to the requirement that “Member States shall ensure that the traveller may terminate the package travel contract at any time before the start of the package. Where the traveller terminates the package travel contract under this paragraph, the traveller may be required to pay an appropriate and justifiable termination fee to the organiser. The package travel contract may specify reasonable standardised termination fees based on the time of the termination of the contract before the start of the package and the expected cost savings and income from alternative deployment of the travel services.”)⁴

Indecon notes that there is no similar cooling-off period currently provided in Irish law in relation to travel services, a point which was highlighted as part of our consultations. This could have potential impact on the industry. For example, it was suggested to Indecon that, “Introducing such a provision would introduce a fundamental new provision into these types of contracts to the detriment of Irish providers of these contracts, requiring them to revise the structure of these contracts. The discretionary provision could also have a severe impact on travel services providers’ income, which would ultimately be passed on to consumers.”

Indecon’s assessment is that the implementation of a cooling-off period as per Article 12(5) would likely result in higher costs, albeit for a small portion of the industry. Our judgment is the added requirement would not be justified in terms of the balance of costs and benefits. We have not seen any evidence of there being an appreciable level of consumer detriment in this area. We further reckon that any additional potential consumer benefits from this provision (beyond those already contained in the required elements of the Directive, obtained by reducing consumer detriment) would be small. Therefore, because we do not believe this provision would be in the consumer interest as it could restrict supply and potentially increase costs without commensurate benefits, we do not recommend any changes in this area.

Concurrent Liability of Retailers for Performance

Directive (2015/2302/EU) allocates liability for the performance of the package to the organiser. Article 13(1), however, permits Member States to provide for the concurrent liability of the retailer of a package, in addition to the liability of the organiser.

³ EU 2015/2302 Art 12 (5)

⁴ EU 2015/2302 Art 12 (1)

The Directive’s minimum harmonisation clause would allow Ireland and Member States to make the retailer as well as the organiser responsible for the performance of the package. If implemented, the retailer would also have to comply with the Directive in terms of insolvency protection.

The fact that Irish legislation suggests that policymakers have previously decided to allocate responsibility for the performance of such contracts to the organiser and not to the retailer was highlighted to Indecon as part of our consultations. One submission to Indecon indicated that:

“The Irish Government saw fit to fix the organiser with liability to the consumer for the proper performance of the contract (see Section 20 of the Package Holidays and Travel Trade Act, 1995).”

Indecon’s assessment is that on balance, taking into account of existing Irish legislation and our evaluation of consumer detriment, not requiring retailers to be concurrently responsible for the performance of the contract would be the appropriate option. While we accept that there are potential benefits of allocating liability to retailers, we are concerned that to do so would place Irish traders at a competitive disadvantage and could increase costs to customers. We therefore recommend that the option to make the retailer as well as the organiser responsible for the performance of the contract should not be exercised.

The Directive makes certain exemptions for business travel and short trips which are dependent on how the travel services have been retailed. Specifically, the Directive states that Business travel agencies are exempt from the Directive. However, business travellers who make arrangements through online or high street travel retailers should be given same the same protections as leisure/holiday travellers.⁵ There is also the issue of whether the existing legislative consumer protections in bonding and licencing for travel services, such as single travel services or by short trips, which are not covered by the Directive, should remain in Irish legislation.

Excluded from the Directive are trips lasting under 24 hours not including overnight accommodation and trips occasionally operated on a non-profit basis and to a limited group of travellers (e.g., school trip).⁶ As part of our consultations it was suggested to Indecon by representatives of the travel agents that consumers should be offered effective protection irrespective of the type of organisers and that this should include travel arrangements facilitated occasionally and on a not-for-profit basis and only to a limited group of travellers. This could be achieved by extending the Directive or by amending the provisions of the Statutory Instrument 271 of the 1995 Act. Indecon believes this latter option has potential merit if such groups are to be included. There is however a case for not extending coverage to these groups.

The Directive also provides an option to extend the scope of the Directive to cover contracts for single travel service elements, i.e., services not currently defined as packages within the Directive. An issue for the Irish Government is whether the scope and coverage of the Directive should be extended to additional areas such as stand-alone contracts.

Transposing the Directive

One issue relevant to the transposing of the Directive is that the wording of the Directive is clear, and given the maximum harmonisation nature of the Directive, the main provisions must precisely mirror those of the Directive and this lends itself to direct transposition. There are, however, different options which may be feasible for transposing the Directive. While these are subject to legal advice, in deciding on the legal methods for transposing the Directive the Irish Government might consider the following principles:

- Ensure the transposition complies with the requirement of the Directive within the timescale specified.
- Ensure sufficient levels of consumer protection.
- Provide clarity for consumers and for the sector.
- Minimise administrative costs to the state and to businesses.

⁵ EU 2015/2302 (7)

⁶ EU 2015/2302 (19)

The Directive could be transposed by way of primary legislation or by amending the current regime or by introducing secondary legislation. (Indecon understands that the German transposition has involved Amendments to the Civil Code as well as Amendment to the Injunctive Relief Law, Amendment to Trade Regulation, Amendment to Price Regulation and Amendment to the German investment Code).

In deciding how to transpose the Directive it is useful to consider some illustrative changes which would be required to Irish legislation to align with the Directive.

Illustrative Changes Required to Transport Regulation		
Irish Law	EU Directive	Notes
(1995) Part I (2), (3) Interpretation (includes definitions)	Art 3 Definitions	Add definitions from Directive: (1) Travel Service; (3) Package travel contract ;(4) Start of the package; (5) Linked travel arrangement; (7) Trader; (12) Unavoidable and extraordinary circumstances; (13) Lack of conformity; (14) Minor; (15) Point of sale Amend Irish law definitions to comply with Directive: (2) Package; (6) Traveller (term replaces Consumer throughout this entire legislation); (8) Organiser; (9) Retailer; (10) Establishment; (replaces Premises); (11) Durable medium (replaces Record); (16) Repatriation (reference to Traveller, delete ref to consumer)
(1995) Part I (2)(1)(3) ...packages offered for sale or sold in the State.	Ch V Insolvency Protection	Amend Irish law to reflect mutual recognition re Insolvency Protection as required by Directive. Member States are required to cooperate.
(1995) Part II (10), (12), (13), (14), (15) Regulation of Travel Contract	Arts 5 – 8 Annexes I and II (contractual requirements)	Replace Irish law with text of Directive Articles 5-8 to indicate required pre-contractual information; binding character of pre-contractual information and conclusion of package travel contract; content of package travel contract; documents to be supplied before the start of the package; and burden of proof. Add Annexes I and II of Directive which require certain forms of information depending on mode of booking package or linked travel arrangement.
(1995) Part II (16) Transfer of booking	Art 9:(transfer of booking)	Replace Irish law with text of Directive Art 9 for Transfer of package travel contract to another traveller. (Reasonable notice replaced with at least 7-day notice for transfer.)
(1995) Part II (17) Contract price revision	Art 10: Alteration of the price	Replace Irish law with text of Directive Art 10 for Alteration of the price.*
(1995) Part II (18), (19), (20) (alterations, failure of performance, liability)	Art 11: Alteration of other package travel contract terms	Replace Irish law with text of Directive Art 11 for Alteration of other package travel contract terms such as quality, substitution, etc. NB “implied” terms of contract not referenced in Directive.
(1995) Following Part II (21) Authorised officers	Arts 12 – 16:(rights and responsibilities)	Add text of Directive for Termination of package travel contract and right of withdrawal (by Traveller) before the start of package; responsibility for performance of package**; price reduction and compensation for damages; possibility to contact organizer via retailer; and obligation to provide assistance.
(1995) Part III Security (re insolvency)	Arts 17 – 23: (obligations re insolvency, rights, liability, redress)	Add/amend Irish law with text of Directive for Insolvency Protection, Linked Travel Arrangements, Specific Obligations of retailer where organizer is outside EEA, Liability for booking errors, right of redress, imperative nature of directive, enforcement and penalties.
(1995) Part I (6), (7) Offences, Proceedings (1982) Part V	Arts 24, 25: Enforcement and Penalties	Amend Irish law sections on Offences and Proceedings to correspond to new rules under Directive. Amend penalties to reflect €.
(1982) Part II		Irish law requires tour operators and travel agents to be licenced by the state; application required prior to commencing business; and compliance with regulations required to maintain licence.
(1982) Parts III - IV	Art 17, 18	Irish law requires operators selling package travel services in Ireland must be bonded for protection of consumer against failure of service provider to fulfil contract and/or insolvency. Travellers’ Protection Fund established to facilitate refund/reimbursement/damages in circumstances of supplier failure. Mutual recognition of Insolvency protection between MS required.
(1982) Part V		Irish law establishes provisions for offences and penalties under the Act.

n/a	Art 28: Transposition	Laws, regulations and administrative provisions necessary must be adopted and published by 1 Jan 2018. Effective date from 1 July 2018. Notice to be given to Commission.
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The appropriate way to transpose the Directive is a matter for the Attorney General and the Chief State Solicitor's Office. Considerations on the option include the need for policymakers to take account of the timing of the requirement for Ireland to implement the Directive. Ireland is required to transpose the requirements of the new Directive into Irish law by 1 January 2018 and Ireland then has a six-month period in which to apply these measures. Given the need to consult on the details of the Directive and the legislative requirements, there may be merits in considering amendments to the existing legislation.

Indecon believes that the decision on how to transpose the Directive should be guided by the easiest and most effective manner to meet the timescale required.

An issue which needs to be decided in the drafting of the Irish legislation or other arrangements to transpose the Directive is the basis for compliance and penalties.

Article 24 of the Directive requires that Member States must ensure that adequate and effective means exist to ensure compliance with the Directive. In addition, Article 25 specifies the need for Member States to lay down rules on penalties which must be effective, proportionate and dissuasive. As there are no details specified in the Directive on the levels of penalties which are appropriate Ireland has to make a judgement on what level penalties would be deemed in an Irish context to be effective, proportionate and dissuasive.

One option for the Irish Government would be to replicate the rules on compliance and penalties which are already in place under the 1982 and 1995 Acts.

An important issue for the Irish Government is that subject to certain qualifications, limits may be applied to compensation to be paid. Article 14(4) of the Directive States that:

“Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is to be paid by a provider carrying out a travel service which is part of a package, the same limitations shall apply to the organiser. Insofar as international conventions not binding the Union limit compensation to be paid by a service provider, Member States **may limit** compensation to be paid by the organiser accordingly. In other cases, the package travel contract **may limit** compensation to be paid by the organiser so long as that limitation does not apply to personal injury or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package.”⁷

One option would be to follow the position of the German transposition. In this context Indecon understands that the German transposition permits certain limitation of liability for selected delays to three times the travel costs. Other options could include more details re the cost and cost per day, such as three times the average cost per day for a maximum number of days.

Another aspect which should be considered in transposing the Directive is that given the short time available before transposition, care is required in introducing any of the discretionary provisions. This was highlighted by one company to Indecon where they noted that “With reference to areas within the Directive where Member States retain competence to introduce legislation on a discretionary basis, we would suggest initially that there is only a very short period of preparation time available to businesses between the publication of Irish implementing legislation and the coming into force of such provisions of the Directive as are already expected; accordingly, we feel that constraints of time and resource would preclude the implementation of discretionary measures which businesses are not fully apprised of, at this stage.”

Consultation Question

A list of proposed consultation questions is outlined overleaf.

⁷ EU 2015/2302 (14) (4)

Proposed Consultation Questions

1. In addition to the questions proposed in the separate consultation process undertaken by CAR are there other aspects of insolvency arrangements which require adjustments?
2. Should the Irish Government specify or not the specific insolvency mechanisms required to ensure compliance with the additional requirements of the Directive?
3. Should the Irish Government maintain existing legislation which provides bonding and other protection for single travel services and for trips lasting under 24 hours which are not covered by the new Directive?
4. Which of the following should be nominated as Central Contact Point?
 - a. Department of Justice.
 - b. Commission for Aviation Regulation.
 - c. Department of Transport, Tourism and Sport.
 - d. Other
5. Does the Government have the option of adapting the security arrangements in the event of insolvency as set out in the Package Holidays and Travel Trade Act, 1995 to the requirements of the new Directive?
6. Should a separate approach be introduced concerning insolvency arrangements for linked travel assignments and should facilitators have the options of a market based solution or should they be required to be part of a bonding scheme?
7. Given that the desired outcome of the new insolvency protection provisions is the same as previously was the case, can Ireland continue to rely on the current bonding regulations to apply the new Directive? Put another way, does the Government have the option to maintain in force the current bonding arrangement set out in Section 22 of the Package Holidays Act, 1995 and Section 13 of the Transport (Tour Operators and Travel Agents) Act, 1982? Is this approach consistent with the provisions of the new Directive?
8. If that is the case, should the current bonding regulations, introduced by secondary legislation, be amended to expressly provide for a new method of calculation of the bond by reference to the text of article 17 and 19 of the new Directive?
9. Should the provision of S.I. of 271 of the 1995 Act Package Holidays and Travel Trade Act should be amended to apply to occasional and not for profit organisers with similar effect to packages and Linked Travel Arrangements?
10. Are there provisions in existing Irish travel trade legislation which are more or less stringent than those laid down by the Directive?
11. Does the Government have the option to continue to make the protection of overseas travel contracts alone, to destinations outside the island of Ireland, the subject of regulation? Is this consistent with Article 4 of the new Directive?
12. Is the requirement for travel agents or tour operators to have a licence to sell or offer for sale packages a more stringent provision in relation to the sale of packages than provided for in the Directive? Does the Irish Government have an option to retain this element of the current system as set out in the Transport (Tour Operators and Travel Agents) Act, 1982?
13. Is it an option for Ireland to rely on the definitions of "overseas travel contract", "tour operator" and "travel agent" as set out in the Transport (Tour Operators and Travel Agents) Act, 1982, to use that 1982 Act to transpose the new Directive? In essence, is there then an option for Ireland to rely on interpreting those pre-existing definitions to include organisers and retailers of packages or traders facilitating linked travel arrangements? If that is so, can Ireland then provide for the necessary insolvency arrangements by way of secondary legislation as provide for in Section 14 of the 1982 Act?
14. Alternatively, does Ireland have the option of relying on Article 29 of the new Directive and the text of the 1995 Package Holidays and Travel Trade Act to apply the new Directive? If that is so, can Ireland then provide for insolvency and other arrangements by way of secondary legislation as provided for by Sections 23 and 24 of the 1995 Act?
15. Is there agreement that the additional right to withdraw from a contract, entered into off-premises, within 14 days for no reason, should not be introduced given the other protections for termination permitted under the Directive?
16. Is there agreement that the discretionary option for the Irish Government to impose concurrent liability on retailers along with organisers should not be implemented?
17. Is there agreement or not that the scope of the Directive should not be extended beyond the mandatory requirements?
18. Is there agreement or not that the compliance and penalties should be aligned with those in place in the 1982 - 1995 Acts?
19. Is there support for the introduction of limitations on liability aligned with the German model?
20. Should the Government use this as an opportunity to update Irish legislation in this area to reflect market and technological developments and thus replace both relevant existing pieces of primary legislation with a new Act that transposes the Directive and make provision to retain the elements of the previous legislation that are consistent with the provisions of the new Directive?
21. Given the fact that the new Directive repeals the 1990 Directive, does this mean that the Government does not have the option to retain the 1995 Package Holidays and Travel Trade Act in force?
22. Is there agreement or not that the key criteria which should apply in any decisions on the transposition of the Directive should include:
 - a. Ensure the transposition complies with the requirements of the Directive within the timescale specified.
 - b. Ensure sufficient levels of consumer protection.
 - c. Provide clarity for consumers and for the sector.
 - d. Minimise administrative cost to the state and to businesses.
22. Are there any other aspects of the discretionary aspects of the Directive which should be considered for implementation by the Irish Government?

Source: *Indecon*

1 Introduction and Scope of Study

Following a competitive tender Indecon International Research Economists were appointed by the Commission for Aviation Regulation (CAR) to develop proposals in consultation with industry stakeholders on matters arising from the introduction of the new Directive on package travel and linked travel arrangements (2015/2302/EU).

The new Directive applies in Ireland from 1 July 2018. Prior to that Ireland is required to adopt and publish the laws, regulations and administrative measures necessary to comply with the Directive by 1 January 2018. Having regard to the Commission for Aviation Regulation's role as economic regulator in the sector, Indecon has developed proposals for consideration on the matters arising from the introduction of the new Directive. The aim of this report is to inform advice which CAR will subsequently provide to the Department of Transport, Tourism and Sport, after further consultations with the sector.

This report presents a high-level overview of the requirements of the Directive as they relate to Ireland and the discretionary options available to the Irish Government. These include areas which may be outside of the Commission for Aviation Regulations functions and duties but it is useful to identify all changes needed to comply with the Directive. We also consider any requirements of the Directive as they relate to CAR's functions.

The mandatory elements of the Directive require a small number of changes to the operation of the functions of CAR as follows:

- Ensuring that existing bonding arrangements are adequate to meet the requirements of the Directive; and
- Ways to manage requirements for mutual recognition and co-operation among Member States where insolvency protection is concerned.

It will also be necessary for the relevant legislation to adjust definitions in line with the Directive.

As part of our review we obtained detailed inputs from tour operators, travel agents, airlines and other stakeholders, however, in all cases our conclusions are based on Indecon's independent analysis of the issues. Indecon understands that CAR will develop proposals for circulation and comment to the industry prior to the finalisation of their advice to the Irish Government.⁸

Irish legislation has assigned authority to the Commission for Aviation Regulation for the licensing of travel agents and tour operators. Agents/operators must be bonded in order to qualify for a license; it has been CAR's responsibility to administer these bonds and the Travellers' Protection Fund in the event of agent/operator insolvency. The CAR assesses claims and processes refunds and/or repatriation for those consumers affected by the insolvency.⁹

⁸ CAR has separately examined the existing Bonding and Travel Protection Fund arrangements and the merits of options for these Arrangements.

⁹ See s.13 of the Transport (Tour Operators and Travel Agents) Act, 1982 and the Transport (Tour Operators and Travel Agents) Act, 1982 (Claims by Customers) Regulations, 1983, S.I. 104 of 1983.

The role of CAR in this area is based on its responsibility for licencing travel agents and tour operators. CAR also administers a scheme of protection for consumers of travel services. In 2015, the Commission licenced 273 companies which had a projected licensable turnover of €1.2bn. All tour operators and travel agents trading in the State are required by law to be licensed and bonded to buy or sell overseas travel originating in the State to destinations outside the State or Northern Ireland unless they qualify for exemption being a retailer or organiser established in another Member State who has provided the Commission with sufficient evidence of security for the protection of consumers. All licensees are required to provide a bond. The current bond required from travel agents and tour operators is a percentage of projected annual licensable turnover, 4% and 10% respectively.

CAR has five main roles concerning travel trade licencing as follows:

1. Licencing travel agents and tour operators buying and selling overseas travel.
2. Administering a bonding scheme for travel agents and tour operators.
3. Administering the Travellers' Protection Fund (which was built up with a levy on passengers of tour operators between 1983 and 1987).
4. Processing claims for refunds and repatriation in the event of a licenced travel agent or tour operator going out of business.
5. Investigating instances of alleged illegal trade and, when necessary, prosecuting illegal traders.

In addition to the primary role of CAR in the licencing of travel agents and tour operators, the CCPC (combining the former the National Consumer Agency and Competition Authority) is responsible for the oversight and enforcement of Irish law pertaining to package holidays in case of breach of terms such as pre-contractual information and advertising requirements. Terms and conditions as well as complaints procedures must comply with legislative requirements. If a customer follows these procedures and is still not satisfied, they may initiate court proceedings. It is not, however, within the remit of the CCPC to bring court claims on behalf of consumers. The CCPC has the power to prosecute organisers and retailers in relation to failure to comply with provisions of the Package Holidays and Travel Trade Act 1995 in relation to brochure content, information to be provided before the conclusion of a contract, information to be provided before the start of a package and the form of the contract.¹⁰

This report presents a high-level overview of all of the requirements of the Directive as they relate to Ireland and the discretionary options available to the Irish Government. These include areas outside of the Commission for Aviation Regulations functions and duties but it is useful to identify all changes needed to comply with the Directive. We also consider any requirements of the Directive as they relate to CAR's functions.

This report is structured as follows. Section 2 analyses the background to the Directive. In Section 3, the maximum harmonisation nature of the Directive is discussed. Section 4 reviews aspects of insolvency arrangements arising from the Directive and the following section (5) discusses the scope of the Directive. Section 6 examines the issue of a cooling-off period and rights to cancellation. In Section 7 the merits or otherwise of implementing concurrent liability on the retailer is considered. In Section 8, issues re transposing the Directive are examined.

¹⁰ See, Package Holidays and Travel Trade Act, 1995, Sections 10-21

Acknowledgements and Disclaimer

Indecon would like to acknowledge the valuable inputs from officials in CAR. Thanks are also due to officials from the Department of Transport, Tourism and Sport.

We are also very grateful to a wide range of stakeholders for providing advice on the practical aspects of the implementation of the Directive. Particular thanks are due to the Irish Travel Agents Association who organised a round table discussion with Indecon including representatives from their sector. We also appreciate the detailed insights provided by airlines including Aer Lingus, Ryanair, Cityjet and Aer Arann. We wish to also thank a range of other contributors for their interest in this review including Travel Centres, Sunway Travel, Club Travel, Topaz Travel, Joe Walsh Tours and from Travel Savers and agency managers.

Finally, we are grateful to David Grant for advice on international and other aspects.

The usual disclaimer applies and the views and analysis in this report are the sole responsibility of Indecon.

2 Background to the Package Travel and Linked Travel Arrangements Directive

The new Package Travel and Linked Travel Arrangements Directive (Council Directive 2015/2302/EU) was published in the Official Journal of the European Union on 11 December 2015. The Irish Government is required to transpose this Directive into Irish legislation by 1 January 2018. One of the reasons for the new Directive is to provide consumer protection taking account of the reality in Ireland and in other EU countries that there is an increasing likelihood that consumers put together their own holiday components from different organisers (so-called dynamic packaging) instead of packages pre-arranged by an organiser or retailer. As a result of these market developments, and in the absence of updated legislation, different levels of consumer protection have applied to travel arrangements that are sold differently, but this may be unclear to consumers to whom the various arrangements may be indistinguishable.

As part of Indecon’s consultation with stakeholders, different views were expressed on aspects of the Directive and a number of stakeholders expressed concerns over the interpretation and implementation of the Directive. Many of these stakeholders in the travel sector, however, also recognised the need for an updated Directive to reflect market and technological developments. For example, one leading company indicated to Indecon that they were “supportive of improved consumer protection measures and indeed would agree that the provisions of the 1990 legislation have been overtaken somewhat by the many changes which have come about in our business and markets since the original Directive came into force.”

Indecon believes that in deciding any options which may exist for the Irish Government in implementing the Directive, it is important to consider what problem the Directive is attempting to address, in other words, what is the rationale for the Directive. The rationale for the new Directive is based on the belief that consumer detriment¹¹ would result in the absence of enhanced consumer protection. This was highlighted by the European Commission in 2007 when it noted that:

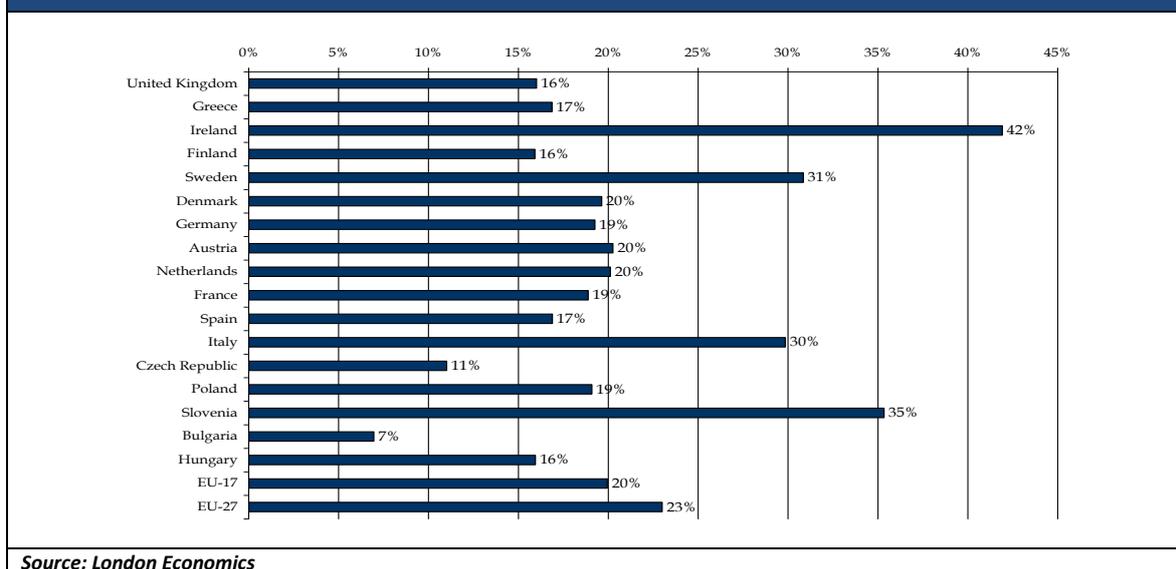
“The Commission has been made aware of an increasing trend, in some Member States, for consumers to put together their own holiday components from different organisers (so called dynamic packaging), instead of opting for packages pre-arranged by an organiser or a retailer. The regulation of these dynamic packages seems to be an issue in a number of Member States. It may not always be clear which travel arrangements are covered by the Directive. For instance, after booking a flight on a website of a low-cost airline, the consumer may be prompted to book a hotel and/or car rental and is then directed to separate websites. If the bookings of the different services are subject to separate contracts made with distinct companies and with separate payments, the package may not be covered by the Directive. Often it is not made clear to the consumer that different protection applies for more or less identical travel packages, which are sold differently. This uncertainty and possibly divergent interpretations of the Directive by the Member States may affect competition and consumer protection.”¹²

¹¹ Consumer detriment is a lost economic value to consumers, or lost consumer surplus.

¹² Working Document on the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Brussels, 26.07.2007.

The extent and relevance of any changes in the market environment in the package travel sector was examined in a report¹³ by Indecon's associate practice, London Economics, for the European Commission. This showed that around one-fifth of respondent households purchased dynamic travel packages in the prior two years. Interestingly, the evidence suggests that the use of dynamic travel packages in Ireland was the highest of any of the countries surveyed highlighting the relevance of this Directive in an Irish context.

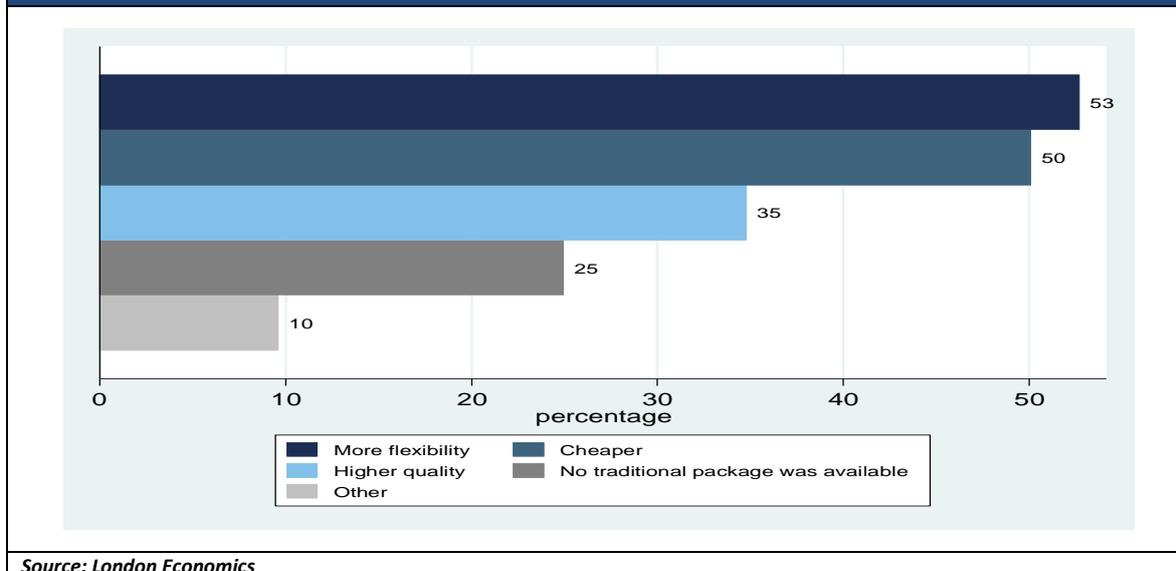
Figure 2.1: Incidence of purchase of dynamic packages in households within the last 2 years



The potential role of Directive 2015/2302/EU was also evident from the research which suggested that some consumers suggested that they bought a dynamic package and not a traditional package because they thought it would be of higher quality. The main reasons, which appear to be guiding decisions on purchasing dynamic packages, were the perceived greater flexibility and lower costs. (See Figure 2.2 overleaf.)

¹³ See London Economics, Study on Consumer Detriment in the area of Dynamic Packages, Nov. 2009. Data from this study is included in subsequent figures in this section.

Figure 2.2: Reasons for purchasing dynamic packages – weighted average for EU-17



Source: London Economics

Indecon believes any options for implementation of the Directive should be guided by the need for regulation. The existence of a significant market trend towards dynamic travel packages does not, however, in itself imply the need for regulation and Indecon believes it is important to evaluate the extent of any consumer problems which exist. This is relevant in deciding on the options for the Irish Government in relation to the Directive.

Indecon's analysis has been guided by the need to ensure adequate consumer protection. The new Directive introduces welcome measures to enhance consumer interests. A key consideration, however, is the merits of imposing additional consumer protection regulation over those required by the Directive. Indecon believes any additional regulatory burden has potential costs and so needs to be considered in the context of what problem any additional measures are addressing and how significant are these problems.

The background to the Directive shows that the rationale is to provide travellers with adequate consumer protection. This is highlighted in Article 1 which states that the objective is to contribute "to the achievement of a high....level of consumer protection". Indecon has taken account of this objective in formulating our advice on complying with the Directive. We are therefore supportive of the aspects of the Directive which introduce stronger consumer protection. However, we caution against imposing additional discretionary provisions of the Directive unless there is evidence of a market failure which would justify such additional regulations. The areas where there are choices for the Irish Government are discussed in the report and we understand that consultation by CAR on these will be undertaken to provide the industry with a further opportunity to directly input to government policy in this area. It is hoped that the analysis in the report will help inform policymakers, travellers and industry of the options available to the Irish Government.

3 Maximum Harmonisation Nature of Directive

In considering the options for consultation on the Directive, it is important to recognise that as the Directive is a maximum harmonisation Directive, Member States do not have any flexibility on how they implement most of the provisions of the Directive. The Directive as a maximum harmonisation measure (see Article 4) indicates that Ireland and other Member States cannot deviate from the specific requirements of the Directive except in a limited number of areas where the Directive explicitly permits flexibility. The transposition of the Directive must therefore mirror the wording of the Directive itself: “Unless otherwise provided for by the Directive, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in the Directive, including more or less stringent provisions which would ensure a different level of traveller protection.”¹⁴

The maximum harmonisation nature of EU Directive 2015/2302 on Package Travel and Linked Travel Arrangements is due to the intention of the Directive to contribute “....to the achievement of **as uniform as possible** level of consumer protection....” (Art. 1). Thus, its implementation must reflect this.

The maximum harmonisation nature of the Directive limits the ability of the Irish Government to adapt the Directive to suit the Irish market or Irish business or consumer practices should it wish to do so. Notwithstanding the aim of maximum harmonisation, there are a number of enabling clauses in the Directive which afford various choices for Ireland and other Member States. This presents a challenge to policymakers. It also raises issues for the travel trade, some of whom operate across European jurisdictions and markets. Any additional regulatory requirements by the Irish Government compared to other countries could give rise to difficulties with compliance and also have implications for the competitive position of the Irish sector.

It is necessary for Ireland to evaluate the options in the Directive. Indecon’s analysis has therefore identified number of important areas where a degree of discretion is permitted to Member States. These include:

- The manner in which the insolvency requirements are implemented.
- Whether Member States wish to extend the scope of the Directive to regulate areas of travel not required by the Directive.
- Cooling-off periods and Rights to Cancellation.
- Whether the requirement for insolvency protection should be extended to retailers.

These issues are discussed in subsequent sections.

¹⁴ Art 4 Directive 2015/2302/EU

4 Insolvency Arrangements

A critical issue for both consumers and for the travel sector is the need to ensure that organisers of packages provide security for the organiser's insolvency.

A notable development in the Directive outlined in Section 5 is the provision concerning insolvency protection. Irish legislation currently provides consumer protection against insolvency of package travel providers. However, Article 17 requires Member States to ensure that organisers established therein:

“...provide security for the refund of all payments made by or on behalf of travellers insofar as the relevant services are not performed as a consequence of the organizer's insolvency. If the carriage of passengers is included in the package travel contract, organizers shall also provide security for the travellers' repatriation. Continuation of the package may be offered. Organizers not established in a Member State which sell or offer for sale packages in a Member State, or which by any means direct such activities to a Member State, shall be obliged to provide the security in accordance with the law of that Member State.”

Article 17 also requires that the security shall be effective and shall cover reasonably foreseeable costs. It shall cover the amounts of payments made by or on behalf of travellers in respect of packages, taking into account the length of the period between down payments and final payments and the completion of the packages, as well as the estimated cost for repatriations in the event of the organiser's insolvency.

The insolvency and repatriation provisions have to be read in conjunction with Recitals 39 and 40 of the Preamble. Recital 40 indicates that:

“For the insolvency protection to be effective, it should cover the foreseeable amounts of payments affected by the organiser's insolvency and, where applicable, the foreseeable cost for repatriations. This means that the protection should be sufficient to cover all foreseeable payments made by or on behalf of travellers in respect of packages in peak season, taking into account the period between receiving such payments and the completion of the trip or holiday, as well as, where applicable, the foreseeable cost for repatriations. That will generally mean that the security has to cover a sufficiently high percentage of the organiser's turnover in respect of packages, and may depend on factors such as the type of packages sold, including the mode of transport, the travel destination, and any legal restrictions or the organiser's commitments regarding the amounts of pre-payments he may accept and their timing before the start of the package. Whereas the necessary cover may be calculated on the basis of the most recent business data, for instance the turnover achieved in the last business year, organisers should be obliged to adapt the insolvency protection in the event of increased risks, including a significant increase in the sale of packages. However, effective insolvency protection should not have to take into account highly remote risks, for instance the simultaneous insolvency of several of the largest organisers, where to do so would disproportionately affect the cost of the protection, thus hampering its effectiveness. In such cases the guarantee for refunds may be limited.”

This requires:

- Member States to ensure that there is security in place to cover refunds for packages not performed by reason of insolvency as well as providing for repatriation.
- These obligations are to be “effective”.
- Only “reasonably foreseeable costs” are covered.

Nothing is said about how the security and repatriation are to be implemented, leaving it to the Member States to choose for themselves. Given that the arrangements are to be “effective” and that decisions of the European Court of Justice (“ECJ”) imposed liability on Member States themselves in the event that the security provisions in the previous Directive were not properly implemented and were inadequate to cover refunds or repatriation,¹⁵ an issue for Ireland and other Member States is whether in addition to imposing a duty on organisers to provide security it is necessary to mandate the *methods* of doing this. The mechanisms Member States have chosen under the previous Directive (and the new Directive in the case of Germany) include bonding, insurance, trust accounts, travel protection funds or a combination of these. Licensing of organisers and retailers is often coupled with the security requirements.

The current Package Travel Directive only applies to packages as defined in that 1990 Directive. This was transposed by the Package Holidays and Travel Trade Act, 1995. Licenced travel agents and tour operators in Ireland have in place insolvency protection of the type set out in section 22(2)(b) of the Package Holidays and Travel Trade Act, 1995 and consequently rely on bonds put in place as licence holders under the 1982 Transport (Tour Operators and Travel Agents) Act, as either travel agents or tour operators. At present the insolvency protection in place for tour operators and travel agents in Ireland is calculated by reference to projected licensable turnover, i.e., the total of receipts estimated by a licence applicant in respect of overseas travel contracts departing from Ireland for the relevant future period. That method of calculation is by way of secondary legislation and may be changed in the same manner. The insolvency protection under current legislation is also to provide refunds and repatriation in the case of insolvency. However, the method of calculation of insolvency protection under the 2015 Directive, as described above, is slightly different and is to be by reference to both payments received from customers and also an estimate for costs of repatriation. There is also no geographic restriction in relation to travel contracts taken into account for the estimate of turnover.

The calculation of the appropriate level of insolvency protection in Ireland at present is by reference to estimated payments received from customers departing overseas from within the State. The bond level of 4% of projected licensable turnover for travel agents and 10% of projected licensable turnover for tour operators provides insolvency protection for customers that allows for refunds of payments made, repatriation and reimbursement of related expenses occasioned by the relevant collapse. The travel services covered by the bond are travel alone, travel plus accommodation, travel plus other ancillary services and packages as defined in the 1990 Package Travel Directive. Under the new definition of organiser, travel agents may be regarded as an organiser engaged in selling packages. Previously, it was mainly tour operators who were regarded as organisers as they pre-arranged the various combinations of travel services (transport/accommodation etc.) for sale directly by themselves or through a retailer.

¹⁵ Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others*, Case C- 140/97 *Rechberger and Others* and Case C-430/13 *Baradics and Others*.

A key conclusion from our assessment is that the current bonding arrangements are not inconsistent with the Directive, although as discussed below they do not cover the position of carriers facilitating linked travel arrangements. (There is also a need to apply the insolvency protection to sales by businesses established in Ireland and to modify the definition of package and that the application of insolvency protection for Business to Business Sales is removed.) Both the current insolvency protection scheme in Ireland and that provided by the Directive foresee the insolvency cover being used to finance accommodation of travellers prior to repatriation. Therefore, the desired outcome of both the current insolvency protection scheme and the scheme in the new Directive is essentially the same.

As stated above, Article 17 of the new Directive requires organisers to put in place insolvency protection. Article 17(2) then requires that the insolvency protection be calculated by reference to the amounts of payments made by or on behalf of travellers in respect of packages, taking into account the length of the period between down payments and final payments and the completion of the packages, as well as the estimated cost for repatriations in the event of the organiser's insolvency.

One new aspect of the Directive is the need to provide security for consumers in the case of linked travel arrangements.

Article 19 requires that traders facilitating linked travel arrangements shall provide security for the refund of all payments they receive from travellers insofar as a travel service which is part of a linked travel arrangement is not performed as a consequence of their insolvency. If such traders are the party responsible for the carriage of passengers, the security shall also cover the traveller's repatriation.

The sort of insolvency protection foreseen is similar for both organisers and traders facilitating linked travel arrangements, i.e., security for refund of all payments received from travellers and also the cost of traveller's repatriation in the event of insolvency.

An issue was raised by stakeholders to the consultation process that not all of the sector is currently covered by insolvency arrangements, for example, bed banks. In addition, it was pointed out that "any consideration of consumer protection must recognise the protection offered by credit card companies." More specifically in evaluating the mechanisms the key issue is that they should be adequate to meet the requirements of the Directive, i.e., there should be enough money to cover the refunds and the repatriations. However, the Preamble of the new Directive applies a caveat. It is clear that the mechanisms should be sufficient to cover "normal" insolvencies but not extreme situations and the example is given of the simultaneous insolvency of several large operators. The Preamble also indicates that the level of security should vary with the risk of insolvency and the costs that would ensue. For instance, ski tour operators concentrate their business into a few months and are more at risk of insolvency than operators who spread their business over the calendar year; new entrants are more at risk than established businesses; and, larger organisers pose larger risks if indeed they do become insolvent.

In examining insolvency arrangements an issue concerns any arrangements for airline insolvencies. Airlines are subject to a separate licensing regime and they have to undergo stringent financial tests but airline insolvencies have arisen.

As part of the stakeholder consultations one major company suggested to Indecon that:

"Recitals are interpretive tools which explain the reasons for specific provisions of the instrument and cannot displace or vary the effective of the operative provisions. The CJEU has held that "the

preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question” (Nilsson [1998] ECR I-7477, para. 54). Further, in a case concerning two recitals which were not repeated in the body of a directive, Advocate General Leger stated that “although the preamble to a directive in principle may give the Court information as to the legislature’s intention and the meaning to be given to the measure’s provisions, the fact remains that, where a concept set out in a recital is not given concrete expression in the actual body of the directive, it is the terms of the latter that must predominate”. (Commission v Italy [2009] ECR I-519). In a case concerning a recital in the preamble of a Regulation which did not correspond to any operative provision of a directive, the CJEU held that “a recital cannot be relied upon to interpret [the Regulation] in a manner clearly contrary to its wording.” (Manfredi [1998] ECR I-785, para. 30.)

It was therefore suggested that any discretion which is suggested by Recitals 30 and 40 of the Directive cannot be transposed because no such discretion is provided in the body of the Directive. Another issue raised concerning the insolvency protection was the suggestion that any new requirements should be as broad and flexible as possible in order to comply with the terms of the Directive.

In evaluating the implications of linked travel arrangements it is of note that air carriers may now also be regarded as traders facilitating linked travel arrangements. This is a new concept that is not part of the existing Irish legislative framework. This raises the requirement that such air carriers need to put in place additional insolvency protection. Under current Irish legislation, air carriers engaged in selling tickets for transport on their own airplanes are not regarded as either tour operators or travel agents. Potentially, if amendments were made to the Package Holidays and Travel Trade Act, 1995, then such air carriers could be covered by the current insolvency protection regulations in place under the 1995 Act that apply to undertakings that are not travel agents or tour operators. These provisions set out a 10% or 15% bond, depending on how the insolvency protections is structured. It should be noted that any default not covered by the existing bonding arrangements are covered by the Travellers Protection Fund and this was not designed to deal with potential involvement by air carriers. An alternative option is to have a separate approach to insolvency arrangements for linked travel arrangements if there are differences in the risk profile of the underlying traders. We also note that LTAs will not, under the Directive, provide travellers with the same level of protection that is offered when purchasing a package and therefore will place fewer obligations on traders who provide them. While it is clear that insolvency arrangements for LTAs are required, an issue is whether facilitators should be part of the existing bonding schemes or have the option to utilise market based solutions such as bonding, insurance, trust accounts or other mechanisms to ensure that security shall be effective and still cover reasonably foreseeable costs.

In the German legislation we understand facilitators of LTAs have the same insolvency requirements as tour operators but that fulfilling the obligations for insolvency arrangements under the Directive can be met by a market based solution by insurance company or by a payment promise of a credit institution but with a limit on liability in a financial year to €110 million.

While including air carriers who facilitate linked travel arrangements in the existing bonding schemes may have some perceived administrative advantages, there is a danger that it could lead consumers to mistakenly believe that there is the same level of consumer protection for both LTAs and packages. LTAs will not, under the Directive, provide travellers with the same level of protection that is offered when purchasing a package and therefore will place fewer obligations on traders who provide them.

It should be noted that any default not covered by the existing bonding arrangements are covered by the Travellers Protection Fund and this was not designed to deal with potential involvement by air carriers. An alternative option is to have a separate approach to insolvency arrangements for linked travel arrangements if there are differences in the risk profile of the underlying traders. While it is clear that insolvency arrangements for LTAs are required, an issue is whether facilitators should be part of the existing bonding schemes or have the option to utilise market based solutions such as bonding, insurance, trust accounts or other mechanisms to ensure that security shall be effective and still cover reasonably foreseeable costs.

In deciding on both the approach and the levels of any security required for any Irish regulated entities facilitating linked travel arrangements account should be taken of how significant or otherwise LTAs are likely to be in the Irish market.

In considering insolvency arrangements for linked travel arrangements (“LTA”) it is also important that Irish providers are not placed at any competitive disadvantage in relation to their counterpart providers established in other Member States. This has implications for both the security required for providers of such services in the context of insolvency of traders but also requires consistency in a definition of a Linked Travel Arrangement.

The only Member State who has to date transposed the Directive is Germany. As part of the consultation process it has been suggested to Indecon that the key features of the definition in the German transportation of a LTA is that:

- Two or more different travel services are purchased for the purpose of the same trip or holiday.
- Resulting in the conclusion of separate contracts with the traveller
- And where the relevant trader facilitates, on a single visit or contact with his point of sale, the separate selection of each travel service.
- Which may be paid for via a single/ combined payment
- As long as (in relation to the payment obligations in respect of the separate travel services) these payments can be evidenced by separate invoices regardless of the fact that those invoices are paid for by the consumer using a single payment.

The Directive also has implications for co-operation between Member States. Article 18 deals with insolvency protection in requiring mutual recognition and cooperation among Member States where insolvency protection is concerned and indicates:

“Member States shall designate central contact points to facilitate the administrative cooperation and supervision of organisers operating in different Member States. They shall notify the contact details of those contact points to all other Member States and the Commission. The central contact points shall make available to each other all necessary information on their national insolvency protection requirements and the identity of the entity or entities in charge of the insolvency protection for specific organisers established in their territory. Those contact points shall grant each other access to any available inventory listing organisers which are in compliance with their insolvency protection obligations. Any such inventory shall be publicly accessible, including online.”

Member States are further required to cooperate in seeking/providing each other with insolvency information upon request, with responses required within 15 days.

A requirement of the Directive is to nominate a central contact point in accordance with Article 18 (2) to (4) of the Directive in order to facilitate co-operation and supervision of organisers between Member States. Article 18(2) does not explicitly designate member contact points so it is left to Ireland and other countries to do so. The consultation with stakeholders did not indicate any clear view on what organisation should represent such a central contact point. For example, one

stakeholder indicated they did not adopt any position on this issue and would be happy for the state to designate the central contact point.

Indecon believes there are three main options which could be considered for this as follows:

- Department of Justice.
- Commission for Aviation Regulation.
- Department of Transport, Tourism and Sport.

At present under the 1982 Transport (Tour Operators and Travel Agents) Act, the Commission for Aviation Regulation is the state organisation which deals with licensing, claims by passengers in the case of insolvency, repatriation and the monitoring of appropriate bonding by entities that trade in Ireland. Therefore, it would be appropriate to designate that body as Central Point of Contact for contacts from other Member States as the information to be provided by the Central Contact Point is information that the Commission already provides to the public or relates to its statutory mandate.

The changes that have occurred in the travel sector suggest (as was noted in one submission) that “the majority of sales are now done outside of the regulatory regime”. This raises the issue of whether, in the context of any required legislative changes, the existing protections schemes insofar as they cover travel services, which are not already required by the new Directive, should be maintained or removed. However, it is necessary for sufficient protections to be in place to provide the protections for services for packaged travel and the linked travel arrangements as foreseen in the new Directive.

Current bonding arrangements

Indecon notes that a separate study and consultation process on insolvency arrangements and the bonding of the Irish travel has been published by CAR. (This separate work concerns the existing legislation and the Traveller Protection Fund.) In this context it is useful to summarise the current bonding arrangements which are in place.

The current travel and tour licensing regime originates from the 1982 Act (Tour Operators and Travel Agents 1982). The Act was updated in 1995 the Package Holidays and Travel Trade Act 1995, which took into account the previous European Directive.

The goal of the legislation is to provide consumer protection for refund and, if necessary, repatriation. The current Irish scheme covers such foreign travel (travel only) or travel packages (e.g., travel and accommodation), but does not cover non-travel-only purchases. The current legislation covers travel agents and tour operators, but direct purchases from airlines and other providers are not covered by the Act.

These Acts require that all travel agents and tour operators organising travel which originates in Ireland to destinations outside of the Republic of Ireland and Northern Ireland must be licensed and bonded annually by the CAR.

The license requires posting or securing a bond annually. The CAR administers the licensing and bonding, as well as the administrative aspects of any refunds and claims.

The bond can be in a variety of forms, including a bank or appropriate financial institution guarantee, insurance, deposits with the CAR or other collective agreements. The legislation stipulates the bond must be equivalent to 4% of projected annual turnover for travel agents and 10% of turnover for Tour Operators.

In the case of insolvencies and required refunds in excess of the bond of any given company, a further Travellers' Protection Fund (TFP) is maintained as a collective insurance fund. This fund was previously built up via a levy, but the levy was eliminated in 1987 when the fund was deemed to hold sufficient funds for its purposes. However, several recent large collapses during the recession have depleted the fund, raising the question of whether a new levy and replenishment or other sources of stop-gap insurance should be considered.

The current Package Travel Directive only applies to packages as defined in that 1990 Directive.

Licensed travel agents and tour operators in Ireland in fact do not have in place insolvency protection of the type set out in the 1995 Act but rather rely on an exemption set out in section 22(2)(b) of the Package Holidays and Travel Trade Act, 1995 and consequently rely on bonds put in place as licence holders under the 1982 Transport (Tour Operators and Travel Agents) Act as either travel agents or tour operators.

Proposed issues for consultation

Indecon's suggestion on proposed consultation questions concerning insolvency arrangements are outlined below.

Figure 4.1: Consultation Question on Insolvency Arrangements

- In addition to the questions proposed in the separate consultation process undertaken by CAR are there other aspects of insolvency arrangements which require adjustments?
- Should the Irish Government specify or not the specific insolvency mechanisms required to ensure compliance with the additional requirements of the Directive?
- Should the Irish Government maintain existing legislation which provides bonding and other protection for single travel services and for trips lasting under 24 hours which are not covered by the existing Directive?
- Which of the following should be nominated as Central Contact Point:
 - Department of Justice.
 - Commission for Aviation Regulation.
 - Department of Transport, Tourism and Sport.
 - Other
- Does the Government have the option of adapting the security arrangements in the event of insolvency as set out in the Package Holidays and Travel Trade Act, 1995 to the requirements of the new Directive?
- Given that the desired outcome of the new insolvency protection provisions is the same as previously was the case, can Ireland continue to rely on the current bonding regulations to apply the new Directive? Put another way, does the Government have the option to maintain in force the current bonding arrangement set out in section 22 of the Package Holidays Act, 1995 and section 13 of the Transport (Tour Operators and Travel Agents) Act, 1982? Is this approach consistent with the provisions of the new Directive?
- If that is the case, then should the current bonding regulations, introduced by secondary legislation, be amended to expressly provide for a new method of calculation of the bond by reference to the text of articles 17 and 19 of the new Directive?
- Should a separate approach be introduced concerning insolvency arrangements for linked travel assignments and should facilitators have the option of a market based solution or should they be required to be part of a bonding scheme?

Source: Indecon

5 Scope of the Directive

The Directive has widened the scope of consumer protection in a number of important ways. These include extending the definition of packages and introducing the concept of linked travel arrangements. The scope has also been broadened to include some categories of business travellers and as a result the term traveller rather than consumer is used in the Directive. The Directive contains a Minimum Harmonisation clause which allows Member States to apply requirements to travel services falling outside the scope of the Directive. The result of this application would be to increase consumer protection; however, the corresponding administrative and/or financial burden on businesses in the travel industry and the impact on consumers may cause Irish policymakers to reject these optional provisions despite the enhanced consumer protection. In this section, we consider other aspects of the scope of the Directive. The following aspects are found in the recitals and are not binding in law unless clearly provided for in the Directive itself:

The Directive makes certain exemptions for business travel and short trips which are dependent on how the travel services have been retailed. Specifically, the Directive states that Business travel agencies are exempt from the Directive; however, business travellers who make arrangements through online or high street travel retailers should be given the same protections as leisure/holiday travellers.¹⁶

Excluded from the Directive are trips lasting under 24 hours not including overnight accommodation, and trips occasionally operated on a non-profit basis and to a limited group of travellers (e.g., school trip).¹⁷ However, Member States may apply the Directive to such trips as noted in EU 2015/2302 (21). Text in bold font below is known as the minimum harmonization clause:

“Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. **Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive.** For instance, Member States may maintain or introduce corresponding provisions for certain stand-alone contracts regarding single travel services (such as the rental of holiday homes) or for packages and linked travel arrangements that are offered or facilitated, on a not-for-profit basis to a limited group of travellers and only occasionally, or to packages and linked travel arrangements covering a period of less than 24 hours and which do not include accommodation.”¹⁸

Note: The EC Communication of 18 March 2013 entitled ‘Passenger protection in the event of airline insolvency’ regards traveller protection against insolvency of airlines. This applies only to the purchase of air travel services (individually) and “does not therefore address insolvency protection for packages and for linked travel arrangements.”¹⁹

¹⁶ EU 2015/2302 (7)

¹⁷ EU 2015/2302 (19)

¹⁸ EU 2015/2302 (21); Art 4 “...Unless provided for in this Directive, Member States shall not maintain or introduce, in their national law, provisions divergent from those laid down in this Directive...”

¹⁹ EU 2015/2302 (38)

As noted above the Directive provides an option to extend the scope of the Directive to occasional organisers and to stand-alone contracts for single elements.

The Directive under (Article 3(2)) expands the scope of what is meant by ‘package’ travel to include a variety of services combined through online purchasing. The scope of the Directive has therefore been widened to include packages as defined below:

“... ‘package’ means a combination of at least two different types of travel services for the purpose of the same trip or holiday if:

- (a) Those services are combined by one trader, including at the request of or in accordance with the selection of the traveller, before a single contract on all services is concluded; or
- (b) Irrespective of whether separate contracts are concluded with individual travel service providers, those services are:
 - (i) Purchased from a single point of sale and those services have been selected before the traveller agrees to pay;
 - (ii) Offered, sold or charged at an inclusive or total price;
 - (iii) Advertised or sold under the term ‘package’ or under a similar term;
 - (iv) Combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services;
 - (v) Purchased from separate traders through linked online booking processes where the traveller’s name, payment details and email 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...”.

Offering “packages” for sale as defined under the 1990 Directive fits with the definition of the activity of “tour operator” under the 1982 Act. The scheme of the 1990 Directive was that an organiser was a person engaged in prearranging a package and offering it for sale. That continues to be the case, with an additional change in the 2015 Directive that the term “organiser” now also means a trader who combines and sells or offers to sell packages not prearranged but instead combined in accordance with the selection of the traveller before a single contract on all services is concluded. Thus, the definition of offering “packages” as defined under the 2015 Directive continues to fit with the definition of “tour operator” under the 1982 Act. Tour Operators remain organisers. In addition, the new definitions of “packages” and “organiser” under the 2015 now capture the activity of travel agents when engaged in dynamic packaging. Thus, travel agents may now be regarded as organisers of packages in addition to tour operators. Article 17 of the Directive requires all organisers to have the same level of insolvency protection in place.

In addition, the scope of the directive has been extended to include the concept of linked travel arrangements as outlined the Directive (Art 3 (5)) as follows:

“... ‘linked travel arrangement’ means at least two different types of travel services purchased for the same holiday or trip, 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 contract 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 trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service...”

The Directive also contains significant additions and changes to definitions concerning service providers and consumers. Notably, the term “consumer” has been replaced by the term “traveller” under Article 3(6) of the Directive:

“... ‘Traveller’ means any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded, within the scope of this Directive...”

Providers of package travel services and linked travel arrangements have been defined under Article 3 of the Directive as follows:

“... ‘trader’ means any natural person of any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organizer, retailer, trader facilitating a linked travel arrangement or as a travel service provider...”

“... ‘organizer’ means a trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader, or the trader who transmits the traveller’s data to another trader in accordance with point (b)(v) of point (2)...”

“... ‘retailer’ means a trader other than the organiser who sells or offers for sale packages combined by an organiser...”

An issue for the Irish Government is whether the scope and coverage of the Directive should be extended to additional areas such as stand-alone contracts. As part of our consultations it was suggested to Indecon by representatives of the travel agents that consumers should be offered effective protection irrespective of the type of organisers and that this should include travel arrangements facilitated occasionally and on a not-for-profit basis and only to a limited group of travellers. It was also argued that the provision of the Directive should be widened to apply to these groups, such that:

“that the provisions of S.I. of 271 of 1995 Package Holidays and Travel Trade Act, 1995, (Occasional Organisers) Regulations, 1995, should be amended so as to apply with similar effect to Packages and Linked Travel Arrangements as defined in the Directive”.

Indecon believes this latter option has potential merit if such groups are to be included. There is however a case for not extending coverage to these groups.

In considering extending the scope to not-for-profit entities Indecon believes that only a very small number of such entities are likely to be operating in Ireland and many occasional organisers of travel will utilise the services of a bonded travel agent. Occasional organisers from non-profit organisations may not have experience of the risks in the sector. If risks are not understood by the purchasers or organisers this could lead to consumer detriment; for example, if travellers did not realise that there was a difference in their insurance coverage between different types of organisers.

However, given their limited involvement in the market there may be a case for excluding these operators or else extending the provisions of S.I. of 271 of the 1995 Act. However, this is a matter of judgement and Indecon notes that in the Consultation Paper issued by the UK Department of Business Energy and Industrial Strategy they suggested that:

“Extending coverage to additional areas would not address any considerable consumer detriment that we are aware of.”²⁰

Another issue raised in the consultations was the treatment of very small operators. Indecon accepts that complying with the Directive would add costs and workload to entities and that this may represent a particular challenge for small firms. However, we are uncertain of how any exception could be introduced for such firms while maintaining the protections required by the Directive.

As set out above, the new Directive changes the scope of the definition of package. It dispenses with the requirement for prearrangement. Consequently, travel agents may now fall within the definition of organiser as well as tour operators. Potentially, therefore, the activity currently defined as tour operator in the 1982 Act, may in fact have within its scope the notions of organiser and trader facilitating linked travel arrangements. If that were the case, then related insolvency arrangement may be made by reference to the provisions of that 1982 Act.

Alternatively, Article 29 of the new Directive states that references to the repealed Directive shall be construed as references to the new Directive and shall be read in accordance with the correlation table set out in Annex III of the new Directive. The 1995 Package Travel Act explicitly refers to the repealed Directive - Directive 90/314/EEC. Therefore, potentially Ireland may consider relying on the 1995 Package Holidays and Travel Trade Act, 1995 and Article 29 of the new Directive to read and apply the pre-existing 1995 Act in the manner prescribed by Article 29. In that scenario, insolvency arrangements might be provided for by reference to the relevant provisions of the 1995 Act.

A separate issue which has implications for the CAR functions is the requirement in Article 18 of mutual recognition of insolvency protection and administrative co-operation. Specifically:

“Member States shall recognise as meeting the requirements of their national measures transposing Article 17 any insolvency protection an organiser provides under such measures of the Member State of his establishment.”

This change means that while CAR previously had to ensure that all specified travel services sold in Ireland met its requirements, CAR will now have to ensure that packages sold across EEA by Irish established enterprise are covered by the Irish bonding regime. Similarly, if a trader established in another Member State sells a package in Ireland they will be covered by the insolvency protection of that Member State.

Indecon suggestions on proposed consultation questions covering the scope of the Directive are outlined overleaf.

²⁰ Updating Consumer Protection in the Package Travel Sector, Consultation, Department of Business, Energy and Industrial Strategy, August 2017.

Figure 5.1: Consultation Questions re Scope of the Directive

- Is there agreement or not that the scope of the Directive should not be extended beyond the mandatory requirements except in the case of occasional and not for profit organisers?
- Is there agreement or not that the provision of S.I. of 271 of the 1995 Act Package Holidays and Travel Trade Act should be amended to apply to occasional and not for profit organisers with similar effect to packages and Linked Travel Arrangements?
- Are there provisions in existing Irish travel trade legislation which are more or less stringent than those laid down by the Directive? Are they provided for in the Directive?
- Does the Government have the option to continue to make the protection of overseas travel contracts alone, to destinations outside the island of Ireland, the subject of regulation? Is this consistent with Article 4 of the new Directive?
- Is the requirement for travel agents or tour operators to have a licence to sell or offer for sale packages a more stringent provision in relation to the sale of packages than provided for in the Directive? Does the Irish Government have an option to retain this element of the current system as set out in the Transport (Tour Operators and Travel Agents) Act, 1982?
- Is it an option for Ireland to rely on the definitions of “overseas travel contract”, “tour operator” and “travel agent” as set out in the Transport (Tour Operators and Travel Agents) Act, 1982, to use that 1982 Act to transpose the new Directive? In essence, is there then an option for Ireland to rely on interpreting those pre-existing definitions to include organisers and retailers of packages or traders facilitating linked travel arrangements? If that is so, can Ireland then provide for the necessary insolvency arrangements by way of secondary legislation as provide for in section 14 of the 1982 Act?
- Alternatively, does Ireland have the option of relying on Article 29 of the new Directive and the text of the 1995 Package Holidays and Travel Trade Act to apply the new Directive? If that is so, can Ireland then provide for insolvency and other arrangements by way of secondary legislation as provided for by sections 23 and 24 of the 1995 Act?

Source: Indecon

6 Cooling-off Periods and Rights to Cancellation

The Directive provides options for the Irish Government to impose additional measures concerning cooling-off periods and rights to cancellation for no explicit reason in specific types of transactions. These should be considered against the existing consumer protections as well as the new mandatory protections which will be implemented as part of the Directive.

Rights with regard to changes and cancellations are in place in the new Directive. These include the requirement that a cancellation by travellers must be allowed in the contract as well as reasonable termination fees under certain circumstances. The new Directive, in line with the previous Directive, permits travellers to transfer a package travel contract to another traveller if they give the organiser reasonable notice. The new Directive specifies at least seven days before the package is due to start should be considered reasonable. The transferor and transferee are still liable for covering the costs of any necessary changes; however, these costs must not exceed the actual costs incurred by the organiser, and the organiser must provide the transferor with evidence of such costs.

Consistent with the requirements of the existing Directive, the new Directive makes allowances for price changes for specified reasons (fuel costs, taxes or fees on the travel services, exchange rates), and provided that the possibility is reserved in the contract. The contract must also allow for a price reduction up to a specified level. The Directive requires that price increases cannot apply unless a specified length of notice is given and justification for changes provided. In the event of a price increase >8% of the total value of the contract, the traveller must be given the option to cancel the contract and obtain a full refund without termination fees. The Directive states that organisers must inform the consumer of price increases without undue delay.

If an organiser needs to significantly change a package other than the changes explicitly permitted in the Directive, then the traveller must be given the option to terminate the contract without a termination fee. If a traveller is properly informed of any changes but does not respond, there is an issue for the Irish Government of how to treat this in the Irish legislation. Indecon believes it would be reasonable for the Irish legislation to permit the organiser to assume that lack of response means the contract is not terminated.

Our analysis indicates that significant mandatory consumer protection re cooling-off periods and rights to cancellation are provided for within the Directive. The Directive also in Article 12(5) indicates that Member States have an option to require travel contracts to provide the traveller with the right to cancel the contract within 14 days for no reason with respect to off-premises contracts.²¹ This is in addition to the requirement that “Member States shall ensure that the traveller may terminate the package travel contract at any time before the start of the package. Where the traveller terminates the package travel contract under this paragraph, the traveller may be required to pay an appropriate and justifiable termination fee to the organiser. The package travel contract may specify reasonable standardised termination fees based on the time of the termination of the contract before the start of the package and the expected cost savings and income from alternative deployment of the travel services.”²²

²¹ EU 2015/2302 Art 12 (5)

²² EU 2015/2302 Art 12 (1)

Indecon notes that there is no similar cooling-off period currently provided in Irish law in relation to travel services, a point which was highlighted as part of our consultations. For example, it was suggested to Indecon that “Introducing such a provision would introduce a fundamental new provision into these types of contracts to the detriment of Irish providers of these contracts, requiring them to revise the structure of these contracts. The discretionary provision could also have a severe impact on travel services providers’ income, which would ultimately be passed on to consumers.”

Indecon has not seen any evidence that there is a particular problem with off-premises purchases, which would not be met by the mandatory provision of the Directive as highlighted earlier in this section. If a cooling-off period is implemented for such purchases, organisers would experience financial losses in cases where they have passed on money to suppliers if they were not able to resell the travel services to a different traveller (if the consumer subsequently cancels during the cooling period). This would be further complicated by supplier restrictions. For example, one stakeholder noted that “supplier restrictions can make it very difficult for organisers to unbundle the travel services and attempt to resell same. This is particularly the case where the booking is made close to the date of departure.”

During the consultation programme, it was also suggested to Indecon that the volume of off-premises contracts concluded in the Irish market is very small but that the implementation of this provision could result in traders not concluding such contracts, thereby reducing the opportunities for consumers to make such bookings.

Indecon’s assessment is that the implementation of Article 12(5) would likely result in higher costs, and would not be justified in terms of the balance of costs and benefits, as we have not seen any evidence of there being an appreciable level of consumer detriment in this area. Because we do not believe this provision would be in consumer interest as it would restrict supply and potentially increase costs, we do not recommend any changes in this area.

Proposed issues for consultation

Indecon’s suggestion for a proposed consultation question concerning cooling-off periods and rights of cancellation is presented below:

Figure 6.1: Proposed Consultation Question Re Scope of the Directive

- Is there agreement that the additional right to withdraw from a contract, entered into off-premises, within 14 days for no reason, should not be introduced given the other protections for termination permitted under the Directive?

Source: Indecon

7 Concurrent Liability of Retailers for Performance

Directive (2015/2302/EU) allocates liability for the performance of the package to the organiser. Article 13(1), however, permits Member States to provide for the concurrent liability of the retailer of a package, in addition to the liability of the organiser.

The Directive's minimum harmonisation clause allows Ireland and Member States to make the retailer as well as the organiser responsible for the performance of the package. If implemented, the retailer would also have to comply with the Directive in terms of insolvency protection.

In considering the merits of the option of a concurrent liability of the retailer for the performance of the package, it is useful to consider the definition of an organiser and of a retailer in the new Directive. These are defined as follows:

- Organiser: a trader who combines and sells packages. Traders who pass on the traveller's name, payment details and email address to another trader to create a package as was described in the final row of Table 1 will also be considered organisers.
- Retailer: a trader other than the organiser who sells or offers for sale packages combined by an organiser.

The starting point in considering whether retailers should have more extensive liability is in paragraph 23 of the Preamble to the Directive and Article 13(1) which provides an option for the Irish Government to impose liability on retailers for the proper performance of the package and paragraph 41 which would permit Ireland and other Member States to impose insolvency protection requirements on retailers. Article 20 is significant in that it provides that retailers who sell the packages of organisers established outside the EEA will be liable for their proper performance of the package and for their insolvency unless the retailer can provide evidence that organiser complies with those provisions.

Those who are in favour of additional liability on retailers argue that an extension of liability has potential benefits²³ as follows:

- It protects vulnerable consumers who may be more likely to use a retailer.
- It makes the ultimate seller accountable.
- It spreads the cost.
- It may place the cost on those best able to bear it.
- It brings disputes to courts within the consumer's home jurisdiction.
- It could enhance product quality.

Indecon accepts that there are valid reasons for considering extending liability to retailers but we note that there are a number of potential problems with duplication. If organisers and retailers and the suppliers of single travel services could be held liable and each makes provision for this liability then costs would increase, to the detriment of travellers who would ultimately bear the cost.

²³ For example, See Wohlmuth, P., *The Liability of Travel Agents: A study in the Selection of Appropriate Legal Principles* [1996], Temple Law, Quarterly 29.

Dual liability might also arise because suppliers might have liability under international conventions such as the Montreal²⁴ or Athens²⁵ Conventions, or under Reg. 261/2004,²⁶ or there might also be liability for credit card issuers. The priority of such claims would have to be established as well as rules to prevent double recovery of damages.

In terms of fairness retailers might justifiably argue that they should not be held liable for the faults of others who are perhaps on the other side of the world where quality standards might be different or difficult to monitor, or where judgements are difficult or impossible to enforce.

Likewise, if liability arises from insolvency of an organisation then the priority of claims vis-à-vis the retailer and organiser would have to be determined.

All this is complicated by Article 20 as follows:

2. "...where the organiser is established outside the European Economic Area, the retailer established in a Member State shall be subject to the obligations laid down for organisers in Chapters IV [proper performance of the package].... unless the retailer provides evidence that the organiser complies with [that Chapter]".

This should be read in conjunction with Article 7 as follows:

2. "The package travel contract or confirmation of the contract shall set out the full content of the agreement which shall include.....
3. (b) information that the organiser is:
 - (i) responsible for the proper performance of all travel services included in the contract in accordance with Article 13.

According to the European Commission it would be sufficient evidence of compliance with Articles 7 and 13 if the non-EEA organiser included such a liability term in its contract with the traveller. It would still leave the traveller with perhaps the difficulty of asserting their rights in a foreign jurisdiction. As part of our stakeholder consultations, Indecon obtained the views of the industry on the merits of requiring a concurrent liability of retailers for performance. In considering this discretionary option, a point made to Indecon as part of the consultations is that retailers are not currently liable under Irish legislation.²⁷ It was therefore suggested that by one of the consultees that:

"It would require large-scale and fundamental renegotiation of contractual relationships between retailers, organisers and other service providers, including for retailers to ensure that they have rights binding against other service providers to enable them to comply with their obligations, e.g. to empower them to provide alternative arrangements for travellers. It is not clear whether such renegotiation would even be possible."

²⁴ Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999.

²⁵ Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002.

²⁶ Regulation EC No 261/2004 of The European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

²⁷ This refers to situations where failure to perform under the contract is at issue. Ireland has not previously adopted legislation to hold retailers liable along with tour organisers/operators. See Sections 19-20 of Package Holidays and Travel Trade Act (1995) and Article 5 of Directive on Package Travel, Package Holidays and Package Tours (90/34/EEC).

The fact that Irish legislation suggests that policymakers have previously decided to allocate responsibility for the performance of such contracts to the organiser and not to the retailer was also highlighted to Indecon as part of our consultations. One submission to Indecon indicated that:

“The Irish Government saw fit to fix the organiser with liability to the consumer for the proper performance of the contract (see Section 20 of the Package Holidays and Travel Trade Act, 1995).

The Act in general ensures that the tour organiser rather than the retailer is responsible to the consumer for any breach of duty that occurs. This is supported by subcontractors (such as airlines, hotels etc.) which is dealt with in Section 20 of the Act. This is further supported by the fact that the tour operator/organiser is a professional entity, expert in dealing with the organisation and supervision of such travel packages and so the imposition of such apparently harsh liabilities is justified.”

[extract: Holiday law in Ireland, by Johnathan Buttimore – page 21]

It was also suggested that concurrent liability of retailers for performance would not be aligned with the intent of Recital 22 of the Directive which states that the main characteristic of a package is that there is one trader responsible as an organiser for the proper performance of the package as a whole.

In our judgement, as stated previously, additional regulation always carries potential cost and must be balanced against potential benefits to the consumer. Our judgement is that additional benefits for the consumer are likely to be very small, as the full liability in case of non-performance is allocated to the organiser. Consumer detriment should not be sought to be reduced beyond its initial total, and thus there would be potential added compliance costs of allocating portions of the liability, while the consumer would gain little, as they would already have full redress to one party, the organiser (which is bonded).

Indecon’s assessment is that on balance, taking into account of existing Irish legislation and our evaluation of consumer detriment, not requiring retailers to be concurrently responsible for the performance of the contract would be the appropriate option. While we accept that there are potential benefits of this, we are concerned that to do so would place Irish traders at a competitive disadvantage and could increase costs to customers. We therefore recommend that the option to make the retailer responsible for the performance as well as the organiser should not be exercised.

We would suggest that the CAR consultation paper should seek views on whether there is agreement that concurrent liability of retailers should not be implemented.

Proposed issues for consultation

Indecon’s suggestion on a proposed consultation question concerning concurrent liability of retailers is outlined below.

Figure 7.1: Proposed Consultation Query re Concurrent Liability of Retailers

- Is there agreement that the discretionary option for the Irish Government to impose concurrent liability on retailers along with organisers should not be implemented?

Source: Indecon

8 Transposing the Directive and Setting of Penalties for Non-Compliance

One issue relevant to the transposing of the Directive is that the wording of the Directive is clear and given the maximum harmonisation nature of the Directive the main provisions must precisely mirror those of the Directive and this lends itself to direct transposition. There are, however, different options which may be feasible for transposing the Directive. While these are subject to legal advice, in deciding on the legal methods for transposing the Directive the Irish Government might consider the following principles:

- Ensure the transposition complies with the requirement of the Directive within the timescale specified.
- Ensure sufficient levels of consumer protection.
- Provide clarity for consumers and for the sector.
- Minimise administrative costs to the state and to businesses.

The Directive could be transposed by way of primary legislation or by amending the current regime or by introducing secondary legislation. (Indecon understands that the German transposition has involved Amendments to the Civil Code as well as Amendment to the Injunctive Relief Law, Amendment to Trade Regulation, Amendment to Price Regulation and Amendment to the German investment Code).

In deciding on how to transpose the Directive it is useful to consider some illustrative changes which would be required to Irish legislation to align with the Directive. See Figure 8.1 overleaf. Further examples of changes needed in Irish legislation to comply with the Directive are included in Annex 1.

Figure 8.1: Illustrative Changes Required to Transport Regulation		
Irish Law ^{28,29}	EU Directive ³⁰	Notes ³¹
(1995) Part I (2), (3) Interpretation (includes definitions)	Art 3 Definitions	Add definitions from Directive: (1) Travel Service; (3) Package travel contract ;(4) Start of the package; (5) Linked travel arrangement; (7) Trader; (12) Unavoidable and extraordinary circumstances; (13) Lack of conformity; (14) Minor; (15) Point of sale Amend Irish law definitions to comply with Directive: (2) Package; (6) Traveller (term replaces Consumer throughout this entire legislation); (8) Organiser; (9) Retailer; (10) Establishment; (replaces Premises); (11) Durable medium (replaces Record); (16) Repatriation (reference to Traveller, delete ref to consumer)
(1995) Part I (2)(1)(3) ...packages offered for sale or sold in the State.	Ch V Insolvency Protection	Amend Irish law to reflect mutual recognition re Insolvency Protection as required by Directive. Member States are required to cooperate.
(1995) Part II (10), (12), (13), (14), (15) Regulation of Travel Contract	Arts 5 – 8 Annexes I and II (contractual requirements)	Replace Irish law with text of Directive Articles 5-8 to indicate required pre-contractual information; binding character of pre-contractual information and conclusion of package travel contract; content of package travel contract; documents to be supplied before the start of the package; and burden of proof. Add Annexes I and II of Directive which require certain forms of information depending on mode of booking package or linked travel arrangement.
(1995) Part II (16) Transfer of booking	Art 9:(transfer of booking)	Replace Irish law with text of Directive Art 9 for Transfer of package travel contract to another traveller. (Reasonable notice replaced with at least 7-day notice for transfer.)
(1995) Part II (17) Contract price revision	Art 10: Alteration of the price	Replace Irish law with text of Directive Art 10 for Alteration of the price.*
(1995) Part II (18), (19), (20) (alterations, failure of performance, liability)	Art 11: Alteration of other package travel contract terms	Replace Irish law with text of Directive Art 11 for Alteration of other package travel contract terms such as quality, substitution, etc. NB “implied” terms of contract not referenced in Directive.
(1995) Following Part II (21) Authorised officers	Arts 12 – 16:(rights and responsibilities)	Add text of Directive for Termination of package travel contract and right of withdrawal (by Traveller) before the start of package; responsibility for performance of package**; price reduction and compensation for damages; possibility to contact organizer via retailer; and obligation to provide assistance.
(1995) Part III Security (re insolvency)	Arts 17 – 23: (obligations re insolvency, rights, liability, redress)	Add/amend Irish law with text of Directive for Insolvency Protection, Linked Travel Arrangements, Specific Obligations of retailer where organizer is outside EEA, Liability for booking errors, right of redress, imperative nature of directive, enforcement and penalties.
(1995) Part I (6), (7) Offences, Proceedings (1982) Part V	Arts 24, 25: Enforcement and Penalties	Amend Irish law sections on Offences and Proceedings to correspond to new rules under Directive. Amend penalties to reflect €. 1982 Act Part V sets out provisions for criminal proceedings in case of breach by tour operator/travel agent.
(1982) Part II		Irish law requires tour operators and travel agents to be licenced by the state; application required prior to commencing business; and compliance with regulations required to maintain licence.
(1982) Parts III - IV	Art 17, 18	Irish law requires operators selling package travel services in Ireland must be bonded for protection of consumer against failure of service provider to fulfil contract and/or insolvency. Travellers’ Protection Fund established to facilitate refund/reimbursement/damages in circumstances of supplier failure. Mutual recognition of Insolvency protection between MS required.
(1982) Part V		Irish law establishes provisions for offences and penalties under the Act.
n/a	Art 28: Transposition	Laws, regulations and administrative provisions necessary must be adopted and published by 1 Jan 2018. Effective date from 1 July 2018. Notice to be given to Commission.
* Price increase must not exceed 8% of total and at least 20-day notice must be given. **Where Organiser cancels contract due number of persons enrolled for the package does not meet stated minimum, required minimum notice periods must be given in accordance to length of travel: 20-day notice if trip > 6 days; 7-day notice if trip between 2-6 days; 48-hour notice if trip <2 days.		

²⁸ Package Holidays and Travel Trade Act, 1995

²⁹ Transport (Tour Operators and Travel Agents) Act, 1982

³⁰ Directive (EU) 2015/2302

³¹ Information contained in the Notes column are included for convenience and do not constitute an exhaustive list of required changes to Irish package travel law.

However, as part of our stakeholder discussion one stakeholder suggested that it may be better to transpose the Directive by way of primary legislation to replace the current provisions. It was suggested that this option:

“...is preferable to transposing either by way of amending the current regime or by introducing secondary legislation.”

It was also suggested that:

“It would be needlessly complicated to identify the applicable existing legal provisions and amend each to reflect the requirements of the Directive. It would be far more efficient to repeal all existing legislation and to replace it with an Act which is specifically drafted to transpose the Directive.”

Another aspect concerning the timing of transposing the Directive is whether the date the measures come into force applies to sales made after that date or to holidays taken after that date. Given that often there is a significant lag between date of sales of a contract and the date of the holiday, Indecon believes it would be unfair to the seller to require compliance for holidays sold before the Directive comes into force.

The appropriate way to transpose the Directive is a matter for the Attorney General and the Chief State Solicitor’s Office. Considerations on the option include the need for policymakers to take account of the timing of the requirement for Ireland to implement the Directive. Ireland is required to transpose the requirements of the new Directive into Irish law by 1 January 2018 and Ireland then has a six-month period in which to apply these measures. Given the need to consult on the details of the Directive and the legislative requirements, there may be merits in considering amendments to the existing legislation.

Indecon believes that the decision on how to transpose the Directive should be guided by the easiest and most effective manner to meet the timescale required.

Issues re definition of linked travel arrangements and click-throughs

In transposing the Directive’s particular issues are likely to arise concerning the definition of linked travel arrangements and ‘click-throughs’. As part of our stakeholder consultations Indecon was informed of concerns over the Directive’s text in this area and the administrative, technical and financial costs potentially involved with compliance, as well as the practicality of implementation. Indecon understands the uncertainties on the interpretation of the definitions in the Directive but our opinion is that there is no option for Member States including Ireland other than to transpose the positions and definitions in a manner which precisely mirrors the Directive. Issues re interpretation of the definition of linked travel arrangements and other such aspects may subsequently be issues for the Courts to decide.

Options re compliance and penalties and limitation on liability

An issue which needs to be decided in the drafting of the Irish legislation or other arrangements to transpose the Directive is the basis for compliance and penalties.

Article 24 of the Directive requires that Member States must ensure that adequate and effective means exist to ensure compliance with the Directive. In addition, Article 25 specifies the need for Member States to lay down rules on penalties which must be effective, proportionate and dissuasive. As there are no details specified in the Directive on the levels of penalties which are appropriate Ireland has to make a judgement on what level penalties would be deemed in an Irish context to be effective, proportionate and dissuasive.

One option for the Irish Government would be to replicate the rules on compliance and penalties which are already in place under the 1982 and 1995 Acts.

Indecon understands that the European Commission is currently undertaking a Fitness Check of EC consumer protection and it was suggested as part of our stakeholder consultations that based on discussions at the Fourth Package Travel Transportation Workshop of 16 February 2017 that the adequacy of penalties will be considered as part of that process. It was therefore suggested that Ireland should continue to apply the current system of penalties as per the 1982 and 1995 Acts at least until the European Commission's Fitness Check on Consumer Law has been completed.

Limits on compensation

An important issue for the Irish Government is that subject to certain qualifications limits, may be applied to compensation to be paid. Article 14(4) of the Directive States that:

“Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is to be paid by a provider carrying out a travel service which is part of a package, the same limitations shall apply to the organiser. Insofar as international conventions not binding the Union limit compensation to be paid by a service provider, Member States **may limit** compensation to be paid by the organiser accordingly. In other cases, the package travel contract **may limit** compensation to be paid by the organiser so long as that limitation does not apply to personal injury or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package.”³²

One option would be to follow the position of the German transposition. In this context Indecon understands that the German transposition permits certain limitation of liability for selected types of delay to three times the travel costs. Other options could include more details of the cost and cost per day, such as three times the average cost per day for a maximum number of days.

Indecon believes that the best option for transposition would be one which would meet the requirements of the Directive in the timeliest manner. If it is possible to maintain the existing primary legislation and use the powers for secondary legislation set out therein to introduce updated regulations reflecting the detail of the new Directive, that might be the best initial approach. Subsequently in order to ensure clarity it may be appropriate to repeal all of the existing legislation and introduce a new piece of legislation. The final choices on this will depend on the view of the Attorney General as well as Government decisions on whether to introduce any measures which are discretionary within the new Directive.

³² EU 2015/2302 (14) (4)

Proposed issues for consultation

Indecon's suggestions on proposed consultation questions concerning transposition of the Directive are outlined below.

Figure 8.2: Consultation Questions re Transposition of the Directive

- Is there agreement or not that the key criteria which should apply in any decisions on the transposition of the Directive should:
 - Ensure the transposition complies with the requirements of the Directive within the timescale specified.
 - Ensure sufficient levels of consumer protection.
 - Provide clarity for consumers and for the sector.
 - Minimise administrative cost to the state and to businesses.
- Is there agreement or not that the compliance and penalties should be aligned with those in place in the 1982 – 1995 Acts?
- Is there support for the introduction of limitations on liability aligned with the German model?
- Are there any other aspects of the discretionary aspects of the Directive which should be considered for implementation by the Irish Government?
- Should the Government use this as an opportunity to update Irish legislation in this area to reflect market and technological developments and thus replace both relevant existing pieces of primary legislation with a new Act that transposes the Directive and make provision to retain the elements of the previous legislation that are consistent the provisions of the new Directive?
- Given the fact that the new Directive repeals the 1990 Directive, does this mean that the Government does not have the option to retain the 1995 Package Holidays and Travel Trade Act in force?

Source: Indecon

Annex 1 Examples of Areas of Changes Needed in Irish Legislation to Comply with The Directive

NOTES re DIRECTIVE (EU) 2015/2302 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2015 on package travel and linked travel arrangements

Corresponding References to Package Holidays and Travel Trade Act, 1995, in Red below

Directive applies to Organiser: “The main characteristic of a package is that there is one trader *responsible as an organiser for the proper performance of the package as a whole*. Only in cases where another trader is acting as the organiser of a package should a trader, typically a high street or online travel agent, be able to act as a mere retailer or intermediary and not be liable as an organiser. Whether a trader is acting as an organiser for a given package should depend on that trader's involvement in the creation of the package, and not on how the trader describes his business. When considering whether a trader is an organiser or retailer, it should make no difference whether that trader is acting on the supply side or presents himself as an agent acting for the traveller.” (Part 1, Para 3(1) amend definition of Organiser)

“...**organisers** are responsible for the performance of the travel services included in the package travel contract, unless national law provides that both the organiser and the retailer are liable.

Retailers also responsible together with the Organiser for: “provision of pre- contractual information. In order to facilitate communication, in particular in cross-border cases, travellers should be able to contact the organiser also via the retailer through which they purchased the package.” (add definition of Retailer)

All necessary information must be provided to consumer BEFORE point of purchase. Provider of information must take into account specific needs of travellers who are particularly vulnerable due to age/infirmary which trader could reasonably foresee. (Add in Part II – Regulation of Travel Contract)

Key information: main characteristics of travel and prices provided in ads on the website or brochures “as part of pre-contractual information should be binding unless the organiser reserves the right to make changes to those elements and unless such changes are clearly, comprehensibly and prominently communicated to the traveller before the conclusion of the package travel contract.” (add in Part II – Regulation of Travel Contract)

Visa requirements: of destination countries and approx. periods for obtaining visas should be provided by organiser (already in Part II, para 12 (1)(a))

Rights and Obligations: of both parties to contract must be laid down before and after start of package if contract not properly performed or if circumstances change.

Define travel “packages” to include “combined deal”, “all-inclusive”, or “all-in arrangement”

“Only the combination of different types of travel services, such as accommodation, carriage of passengers by bus, rail, water or air, as well as rental of motor vehicles or certain motorcycles, should be considered for the purposes of identifying a package or a linked travel arrangement.” (accommodation for residential purposes or intrinsic travel services e.g., baggage handling, transfers between stations, meals, travel insurance etc. are not included in the definition of packages or linked arrangements) (add to definition of package and linked travel arrangements)

Non-intrinsic services such as admissions to events, guided tours, ski passes, etc. are not themselves packages or linked arrangements but may become part of a package or linked arrangement if combined with one type of travel service e.g., air, rail, accommodation etc. If value of non-intrinsic services as part of package/linked arrangement >25% of total value, then these services are to be considered representing a “significant proportion” of the value of the package/linked arrangement. (add to definitions)

Clarify “that where other tourist services are added, for instance, to hotel accommodation, booked as a stand-alone service, after the traveller's arrival at the hotel, this should not constitute a package. This should not lead to circumvention of this Directive, with organisers or retailers offering the traveller the selection of additional tourist services in advance and then offering conclusion of the contract for those services only after the performance of the first travel service has started.”

Clarify “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.”

Distinguish linked travel arrangements from travel services booked independently even if for same trip.

Specific Rules should apply to both high street and online traders where linked online booking processes do not constitute “packages” within the meaning of the Directive but are an alternative competing product. (e.g., where booking flight online leads to pop-up window from another service provider for rental car or hotel, these are not contracted by same provider as a package but rather are linked)**NEW SECTION NEEDED**

“In order to ensure fair competition and to protect travellers, the obligation to provide sufficient **evidence of security for the refund of payments and the repatriation of travellers** in the event of insolvency *should also apply to linked travel arrangements.*”

Single travel service booked on standalone basis does not fall within the meaning of package or linked travel arrangement under this Directive.

Traders required to state clearly and prominently “whether they are offering a package or a linked travel arrangement, and provide information on the corresponding level of protection, before the traveller agrees to pay. A trader's declaration as to the legal nature of the travel product being marketed should correspond to the true legal nature of the product concerned. The relevant enforcement authorities should intervene where traders do not provide accurate information to travellers.”

Exclusion from Directive: trips lasting less than 24 hours which do not include accommodation, as well as packages or linked travel arrangements offered or facilitated occasionally and on a not-for-profit basis and only to a limited group of travellers. (exclusion should be added)

Unforeseen events: ... traveller should, under certain conditions, be entitled to transfer a package travel contract to another traveller. In such situations, the organiser should be able to recover his expenses, for instance if a sub-contractor requires a fee for changing the name of the traveller or for cancelling a transport ticket and issuing a new one.

Termination:

travellers allowed to cancel package travel any time before start of contract in return for payment of justifiable termination fee; also allowed without paying termination fee if unavoidable/extraordinary circumstances will significantly affect performance of package (e.g., warfare, terrorism, disease outbreak, natural disasters, etc.) (amend para 20(2))

organisers allowed to cancel package before start of contract if minimum number of participants not reached (must be reserved in package) (Add to para 16)

Unilateral changes:

Organisers allowed to change contract but traveller also allowed to terminate if changes alter significant characteristics of package (e.g., departure/arrival times, fuel market prices, fees imposed by third parties, etc.) If increase >8% in price, traveller entitled to terminate contract without termination fee. (amend para 17)

Specific Rules/Remedies:

Traveller entitled to problem resolution and/or offer of substitute alternative arrangements re lack of conformity in performance of travel package. (e.g. delay of bus organiser causes traveller to incur taxi expense in order to catch flight) (add to para 17)

Compliance with other International conventions regulating travel services

Traveller in difficulty during trip: Organiser obligated to provide appropriate assistance without undue delay. (e.g. information re local health services, consular assistance communications and alternative travel arrangements) (article 4(1)(b)(ii))

Traveller fully protected against Organisers Insolvency: MS in which Organiser is established provide refund on all payments by/on behalf of travellers and for traveller's repatriation (where package includes carriage of passengers) "Member States should ensure that the protection is effective. Effectiveness implies that the protection should become available as soon as, as a consequence of the organiser's liquidity problems, travel services are not being performed, will not be or will only partially be performed, or where service providers require travellers to pay for them. Member States should be able to require that organisers provide travellers with a certificate documenting a direct entitlement against the provider of the insolvency protection." ("foreseeable amounts") (Para 12(1)(6) and (article 5(2)) Part III - Security

Mutual recognition of insolvency protection and administrative cooperation (art. 18) (New Section Needed at para 22):

1. **Member States shall recognise** as meeting the requirements of their national measures transposing Article 17 any insolvency protection an organiser provides under such measures of the Member State of his establishment.
2. **Member States shall designate central contact points to facilitate the administrative cooperation** and supervision of organisers operating in different Member States. They shall notify the contact details of those contact points to all other Member States and the European Commission.
3. The **central contact points shall make available to each other all necessary information on their national insolvency protection requirements** and the identity of the entity or entities in charge of the insolvency protection for specific organisers established in their territory. Those contact points shall grant each other access to any available inventory listing

organisers which are in compliance with their insolvency protection obligations. Any such inventory shall be publicly accessible, including online.

4. If a Member State has doubts about an organiser's insolvency protection, it **shall seek clarification from the organiser's Member State of establishment**. Member States shall respond to requests from other Member States as quickly as possible taking into account the urgency and complexity of the matter. In any event a first response shall be issued at the latest within 15 working days from receiving the request.

Linked travel arrangements: Traders facilitating linked travel arrangements should be obliged to inform travellers that they are not buying a package and that **individual travel service providers are solely responsible for the proper performance of their contracts**. Traders facilitating linked travel arrangements should, in addition, be **obliged to provide insolvency protection for the refund of payments they receive and, insofar as they are responsible for the carriage of passengers, for the travellers' repatriation, and should inform travellers accordingly**. Traders responsible for the performance of the individual contracts forming part of a linked travel arrangement are subject to general Union consumer protection legislation and sector-specific Union legislation. **ADD definition of Linked travel arrangements at beginning; ADD protections under Part III - Security**

Smaller Companies: MS can take into account special circumstances of smaller companies in laying down insolvency protection schemes so long as same level of protection for travellers is ensured. **(add to protections under Part III)**

Errors in booking process: travellers protected in relation to errors made in booking process of package and linked arrangements. **(add at Para 20 – extent and financial limits of liability)**

Rights and obligations under the Directive may not be waived. (e.g., by provider claiming to be merely an intermediary or other) **(add at end)**