

IRISH TRAVEL AGENTS ASSOCIATION
RESPONSE TO
CONSULTATION ON THE TRANSPOSITION OF DIRECTIVE (EU) 2015/2302 ON
PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENTS
Commission Paper 10/2017
JANUARY 2018

1. The Irish Travel Agents Association:

The Irish Travel Agents Association is a member organiser, founded in 1971, which has, for the past 46 years, represented Ireland's Travel Agents and Tour Operators. The Association brings together approximately 100-member companies covering 140 branches in different towns and cities throughout the Republic of Ireland. All ITAA members are licensed and bonded with the Commission for Aviation Regulation.

ITAA member businesses range from small businesses with an annual turnover of €155,000 to businesses with an annual turnover of €117,000,000.

ITAA members carry on their businesses through mixed and varied mediums, including online, telesales and brick and mortar premises.

Moreover, ITAA members have made and continue to make a valuable contribution to the Irish economy, providing employment for approximately 1,400 employees.

ITAA members operate as, retail travel agents, tour operators, package organisers, corporate travel management companies and niche travel businesses.

Every year, since 2011, the ITAA has worked, with a travel bond provider, which arranges individual bonds for members ("Member Bond(s)"). Thereby, enabling ITAA members meet their obligations pursuant to Section 11 of the Transport (Tour Operators and Travel Agents) Act, 1982 (the "1982 Act") and those arising from Part III of the Package Holidays and Travel Trade Act, 1995 (the "1995 Act").

Prior to 2011, the ITAA arranged a collective bond, in which members could participate.

The ITAA Trust Fund, was established by the ITAA in 1986 (the "Trust Fund"). One of the purposes of the Trust Fund, is to improve the financial protection offered by members of the ITAA. Since its establishment, the Trust Fund has, put up collateral each year, to which the travel bond provider has first recourse, in the event of a call on a Member Bond.

The ITAA has been a CAR 'Approved Body' for the purposes of Part III of the 1995 Act since 1995.

One of the principal aims of the ITAA is to promote the interests of its members in running viable and successful businesses in which consumers and suppliers can have confidence.

ITAA members provide an important and valued service to customers and play a key role in the independent distribution of travel services. In a time of increasing globalisation, ITAA members are also valued by suppliers, who rely on independent travel agents to bring their offerings to market.

ITAA members offer consumers an alternative distribution system, to the direct sales option.

ITAA members afford consumers the opportunity to make informed choices about the various options available to them in terms of suppliers, service, pricing, routing and itineraries.

Consumers can have confidence, when an ITAA member arranges travel services on their behalf, that they are dealing with regulated travel businesses, committed to enabling their customers make informed choices; providing support and assistance to their customers, from the time of booking and right through-out their trip; and being accountable to their customers, should things not go as planned.

2. Background to the Consultation

EU Directive 90/314 on Package Travel, Package Holidays and Package Tours, (the “1990 Directive”) was the first initiative on the part of the EU to achieve a harmonised consumer protection regime for holidaymakers throughout the European Union.

The 1990 Directive had a profound impact and far reaching influence on the package holiday industry.

Since its implementation, some 28 years ago, consumer purchasing patterns have changed, and new distribution channels have emerged, most notably, the internet.

“Today, the European Consumer has access to multiple distribution channels from the classical paper brochure to mobile applications.”¹

Having regard to these market changes, the European Commission proceeded with a revision of the 1990 Directive, culminating in the publication in the Official Journal of the European Union on the 11th December, 2015, of EU Directive 2302/2015 on Package Travel and Linked Travel Arrangements (the “2015 Directive”).

Member States were required to transpose the requirements of the Directive into domestic law by 1st January, 2018 and have been afforded a further 6 months until the 1st July, 2018 for the Directive to come into force.

The ITAA welcomed the revision of the 1990 Directive, all the while urging *“the maintenance of a high level of consumer protection while ensuring a level-playing field among all actors in the travel market”²*

The scope of the 2015 Directive has been expanded to capture travel arrangements such as ‘dynamic packages’ and ‘click-throughs’ and ‘linked travel arrangements’.

Underpinning the expanded scope of the 2015 Directive are information requirements for consumers.

The 2015 Directive promotes cross-border trading, in requiring Member States to afford mutual recognition to insolvency arrangements which meet the requirements of a trader’s Member State of establishment

Insolvency arrangements must afford protection to travellers regardless of their place of residence, the place of departure or where the package is sold.

The ITAA recognises that as a maximum harmonisation directive, Ireland has limited discretion in the implementation of the 2015 Directive and a copy out approach is very much envisaged.

¹ The Revision of the Package Travel Directive: ECTAA’s Position Paper

² ECTAA Press Release, dated 9th July, 2013

In those limited areas where the Irish government has a degree of discretion in the implementation of certain provisions, the ITAA would urge that an equitable balance between the rights and obligations of both traders and consumers is achieved.

3. Executive Summary

The ITAA recognises that as a maximum harmonisation directive, Ireland has limited discretion in the implementation of the 2015 Directive.

It is vital that the Irish government, in exercising its discretion, is *'guided by the need for regulation and the costs involved'*.

The implementation of the 2015 Directive has been long awaited. Clear and consistent legislation should be the outcome of the transposition and this aim should not be compromised for the sake of expediency.

The transposition must be informed by the finding in the Commission Paper 1/2018, that the current Travel Trade Consumer Protection Scheme is no longer effective.

Any insolvency mechanisms in force currently for the 1990 Directive, should only be maintained on the basis that they will ensure compliance with the additional requirements of the 2015 Directive.

At a minimum, the provisions of S.I. of 271 of 1995 Package Holidays and Travel Trade Act, 1995 (Occasional Organisers) Regulations, should be amended so as to apply with similar effect to Packages and Linked Travel Arrangements as defined in the 2015 Directive.

The ITAA would urge that consideration be given to the maintenance of a register of entities offering packages or facilitating linked travel arrangements on a non-for-profit basis.

The ITAA would not be supportive of the extension of the scope of the 2015 Directive beyond the mandatory requirements.

The ITAA is of the view that the introduction of a cooling off period for off-premises sales, would result in the imposition of a disproportionate burden on retailers, in the absence of any evidence of there being an appreciable level of consumer detriment in this regard.

The ITAA contends that there is no evidence of consumer detriment under current regime that warrants making the retailer liable in addition to the organiser.

The ITAA would strongly support the introduction of the limitations on compensation as provided for in the 2015 Directive.

4. ITAA Responses

1. Maximum harmonization Nature of the Directive

1.

1.1 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?

The ITAA's response to this question is in the affirmative, were the definition of an 'overseas travel contract', as set out in Section 2(1) of the 1982 Act to remain unchanged.

Section 2(1) of the 1982 Act defines an 'overseas travel contract' as "a contract for the carriage of a party to the contract (with or without any other person), by air, sea or land transport commencing in the State to a place outside the State or Northern Ireland, whether the provision of the carriage is the sole subject matter of the contract or is associated with the provision thereunder of any accommodation, facility or service."

As a consequence of the above definition, traders would, subsequent to the implementation of the 2015 Directive, be required to include in their licensable turnover, '... packages purchased on the basis of a general agreement for the arrangement of business travel between a trader and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession ("Business Travel Packages")'.³

Article 1 of the 2015 Directive sets out the stated purpose of the Directive: -

"The purpose of this Directive is to contribute to the proper functioning of the internal market and to the achievement of a high and as uniform as possible level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States in respect of contracts between travellers and traders relating to package travel and linked travel arrangements."

To require traders to bond Business Travel Packages, would seem at odds with the maximum harmonisation nature of the 2015 Directive. Irish corporate travel businesses would be placed at a competitive disadvantage, in what is increasingly a global business.

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?

Having regard, in the first instance, to the foregoing, it would seem that it is not open to the Irish Government to retain the requirement for travel agents and tour operators to have a licence to sell or offer for sale packages, as set out in the 1982 Act, in the absence of the

³ Article 2.1 (c) EU Directive 2302/2015

definition of "overseas travel contract" being changed. This issue is further expanded on in the response to question 5.

2. 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?

As regards, the ITAA's position in relation to the ability of Ireland to rely on the definition of "overseas travel contract", please refer to the responses to questions 1 and 5.

Concerning the proposition of Ireland relying on interpreting the definitions of "tour operator" and "travel agent" in the 1982 Act, the ITAA would not be supportive of such an approach being taken to the transposition of the Directive.

3. 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?

As in the case of question 2, the ITAA would not be supportive of such an approach being taken to transpose the Directive.

Whatever approach is taken must result in clear, consistent legislation and these objectives should not be compromised for the sake of expediency.

2. Insolvency Arrangements

4. Should Ireland maintain the specific insolvency mechanisms in force for the 1990 Package Travel Directive to ensure compliance with the additional requirements of the 2015 Directive?

Any insolvency mechanisms in force currently for the 1990 Directive, should only be maintained on the basis that they will ensure compliance with the additional requirements of the 2015 Directive.

5. 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?

The ITAA believes that the current travel trade consumer protection measures, have been integral to the manner in which the EU Directive 90/314 on Package Holidays, Package Travel and Package Tours (the “Current Directive”) is implemented in Ireland.⁴

Article 17.3 of the 2015 Directive, provides that

.... ‘an organiser’s insolvency protection shall benefit travellers regardless of their place of residence, the place of departure or where the package is sold and irrespective of the Member State where the entity in charge of the insolvency protection is located’.

Section 2(1) of the 1982 Act defines an ‘overseas travel contract’ as “a contract for the carriage of a party to the contract (with or without any other person), by air, sea or land transport commencing in the State to a place outside the State or Northern Ireland, whether the provision of the carriage is the sole subject matter of the contract or is associated with the provision thereunder of any accommodation, facility or service.”

The geographical delineations, which are contained within the definition of an ‘overseas travel contract’ are not compatible with the provisions of the 2015 Directive.

It is difficult to see how the current bonding arrangements set out in Section 22 of the 1995 Act and Section 13 of the 1982 Act could be maintained without adjustments being made so that the arrangements respond to the requirements of Article 17(3), whereby the organiser’s insolvency protection should benefit travellers regardless of a traveller’s place of residence, the place of departure or the where the package is sold.

6. 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?

The ITAA would submit, that in its view, the amendment of the definition of an ‘overseas travel contract’, would be a pre-requisite to such an approach.

⁴ Response of the Irish Travel Agents Association to The Department of Transport, Tourism and Sport’s Consultation paper on Package Travel and Assisted Travel Arrangements Directive, Proposed by the European Commission [2013/0246], March 2014

3. Scope of the Directive

7. 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?

The existing legislation provides bonding for single travel services, which involve a contract for carriage and where the contract for carriage is associated with the provision thereunder of any accommodation, facility or service.

At paragraph 1.5 of the Commission Paper 1/2018, the Commission advises that it has concluded the current scheme is no longer effective.

The ITAA Response to the Commission Paper 8/2017 - Travel Trade Consumer Protection Measures, sets out the position of the ITAA and its members in relation to the shortcomings of the existing arrangements and the changes which should be made to same.

As underlined at page iii of the Executive Summary contained in the Commission Paper 1/2018, any decision to maintain existing arrangements should be 'guided by the need for regulation and the costs involved', resulting in fair and equitable trading conditions for all traders in the travel sector competing with each other.

8. Should the provisions of S.I. of 271 of the 1995 Act Package Holidays and Travel Trade Act be amended to apply to occasional and not for profit organisers with similar effect to packages and Linked Travel Arrangements?

Article 2(b) of the Directive excludes from its scope packages offered, and linked travel arrangements facilitated, occasionally and on a not-for profit basis and only to a limited group of travellers.

The ITAA was very disappointed at the inclusion of Article 2(b) in the 2015 Directive and firmly subscribes to the view that consumers should be offered effective protection, irrespective of the type of organiser.

Having regard to Recital 21, it is the position of the ITAA, that the Irish government should apply the provisions of the Directive to packages and linked travel arrangements that are offered or facilitated on a not-for-profit basis.

Failing the above, it is submitted 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.

With reference to the text contained in Recital 19, consideration should be given to the maintenance of a register of entities offering packages or facilitating linked travel arrangements on a non-for-profit basis.

Any person, association, society, firm or organisation or charity offering packages or facilitating linked travel arrangements should be required to register with the appropriate regulatory body with the register being easily accessible by the public.

This would ensure that both traders and travellers are properly informed that such packages and linked travel arrangements are outside of the scope of the 2015 Directive.

9. 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?

Please refer to responses to questions 1, 5 & 6 above.

Is this consistent with Article 4 of the new Directive?

Without the revision of the definition of an “overseas travel contract”, the ITAA would have concerns that such an option may not be compatible with Article 4 of the 2015 Directive.

10. Is there agreement or not that the scope of the Directive should not be extended beyond the mandatory requirements?

The ITAA would not be supportive of the extension of the scope of the 2015 Directive beyond the mandatory requirements.

4. Cooling off Periods and Rights to cancellation Consultation on package travel and linked travel arrangements

11. 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?

Article 12(5) provides: -

‘With respect to off-premises contracts, Member States may provide in their national law that the traveller has the right to withdraw from the package travel contract within a period of 14 days without giving any reason.’

Travel services, particularly airline seats, are sold on a real - time availability basis, with payment requirements being immediate and cancellation charges applicable, usually from the time of booking.

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.

Organisers would be exposed to losses, in cases where they have passed on money to suppliers with little likelihood of reselling the travel services to a different traveller.

Whilst the volume of off-premises contracts, concluded currently, is perceived as being very small, the implementation of this provision would most likely result in traders not concluding such contracts, thereby diminishing and possibly eliminating the opportunities for consumers to make such bookings.

The ITAA is of the view that the implementation of Article 12(5), would result in the imposition of a disproportionate burden on organisers, in the absence of any evidence of there being an appreciable level of consumer detriment in this regard.

Further, the ITAA notes “Indecon’s assessment 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. In their judgement the added requirement would not be justified in terms of the balance of costs and benefits. They state they have not seen any evidence of there being an appreciable level of consumer detriment in this area.”⁵

⁵ paragraph 3.16 Commission Paper 1/2018

5. Concurrent Liability of retailers for performance

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

The first paragraph of Article 13.1 of the 2015 Directive, clearly sets out that the organiser is responsible for the performance of the travel services included in the package travel contract.

However, the second paragraph of Article 13.1 goes on to provide that Member States may maintain or introduce in their national law provisions under which the retailer is also responsible for the performance of the package.

Directive 90/314 EEC gave discretion to Member States to determine whether retailers, organisers or both should be liable for the proper performance of a package.

The Irish government saw fit to fix the organiser with liability to the consumer for the proper performance of the contract.⁶

“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 is submitted that this clarity in terms of the party responsible for the proper performance of the contract has provided certainty for consumers and traders.

Recital 22 of the Directive 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.

It is the position of the ITAA that to also fix retailers with responsibility for the proper performance of the package seems at odds with the intent of Recital 22.

The terms organiser and retailer are clearly set out in the Directive and specifically fixes the retailer with certain obligations.

The ITAA contends that there is no evidence of consumer detriment under current regime that warrants making the retailer liable in addition to the organiser.

To do would result in retailers having to incur additional costs including insurance costs (resulting in both retailers and organisers insuring the same risk).

⁶ Section 20 of the Package Holidays and Travel Trade Act, 1995

It is noted that the Department of Business, Energy and Industrial Strategy had indicated in its consultation paper, published on the 14th August, 2017, that it will not be making retailers liable for the proper performance of the contract.⁷

A stated objective of the Directive, set out in Recital 4, is to enable traders to benefit fully from the internal market, with the removal of measures resulting in legal fragmentation which 'leads to higher costs for businesses and obstacles for those wishing to operate cross-border'

In so far as the United Kingdom would be an obvious market for exploitation for traders in Ireland, Irish traders would be placed at a competitive disadvantage in having to bear the costs of carrying liability for the proper performance of the contract.

Accordingly, the ITAA would endorse paragraph 3.18 of the Commission Paper 1/2018

"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. Their 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."

⁷ Paragraph 55, page 24 Department for Business, Energy & Industrial Strategy, Updating Consumer Protection in the Package Travel Sector – Consultation, August 2017

6. Central Contact Points

13. 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

The ITAA would be supportive of the Commission for Aviation Regulation being nominated as the Central Contact Point.

More generally, as regards appropriate administrative arrangements, the ITAA calls for a single regulator of all regulated businesses, in the travel trade sector. The current division between the Commission for Aviation Regulation and the Consumer and Competition Protection Commission is unsatisfactory. A single regulator for the travel trade is preferable in terms of responsibility, oversight and enforcement.

7. Transposing the Directive

14. Is there agreement or not that the compliance and penalties should be aligned with those in place in the 1982 - 1995 Acts?

The ITAA is of the view that it would seem to make sense that the compliance and penalties should be aligned with those in place in the 1982 – 1995 Acts.

15. Is there support for the introduction of limitations on liability aligned with the German model?

As far as the ITAA is aware, the German transposing legislation has not yet been published.

The ITAA's colleagues in the DRV⁸ have kindly provided an unofficial translation of the new § 651 para. 1 BGB (German Civil Code) as follows:

'The travel organiser may, by agreement with the traveller limit his liability for such damage to three times the package price

- 1. Which does not constitute bodily injuries and*
- 2. Which was caused without fault (intentional or negligent)'*

The ITAA would strongly support the introduction of limitations aligned to the German model and provided for in Article 14(4) of the 2015 Directive.

⁸ DRV – the German Travel Association

16. 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?

The ITAA would contend that the 2015 Directive presents a unique opportunity for a rationalisation, consolidation and updating of the existing legislation in the context of the transposition of the 2015 Directive and would strongly support the above proposition.