



Department
for Business
Innovation & Skills

**THE EUROPEAN COMMISSION'S
PROPOSAL FOR A NEW DIRECTIVE
ON PACKAGE TRAVEL AND
ASSISTED TRAVEL
ARRANGEMENTS**

Government Response to the
Call for Evidence

SEPTEMBER 2014

THE EUROPEAN COMMISSION’S PROPOSAL FOR A NEW DIRECTIVE ON PACKAGE TRAVEL AND ASSISTED TRAVEL ARRANGEMENTS: The Government’s Response to the Call for Evidence

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THE EUROPEAN COMMISSION'S PROPOSAL FOR A NEW DIRECTIVE ON PACKAGE TRAVEL AND ASSISTED TRAVEL ARRANGEMENTS: The Government's Response to the Call for Evidence

INTRODUCTION

This is the Government's response to the Call for Evidence on the European Commission's Proposal for a New Directive on Package Travel and Assisted Travel Arrangements¹ which was issued on 20 September 2013 by the Department for Business Innovation and Skills (BIS). The Call for Evidence closed on 29 November 2013.

The Call for Evidence invited submissions and evidence to help inform the Government's understanding of the expected impact of the Commission's Proposal (the Proposal) and to inform the UK's negotiating position as it engages with the other Member States and the Commission in the European Council Working Group, and with the European Parliament.

The Department is extremely grateful to the 42 respondents for their written responses to the 43 questions posed in the Call for Evidence and thanks them for their engagement. 27 responses were from industry and tourism organisations including the main trade representative bodies in the UK and those representing the broader European trade. Two respondents represented consumers' views; six responses were from enforcement authorities and regulators in the sector; and seven respondents were other organisations including legal firms, insurers and card payment organisations. Annex A lists the respondents.

BIS officials have continued to engage directly with a range of stakeholders as the negotiations in the European Council and the consideration of the Proposal by the European Parliament has progressed.

The responses included a broad range of views and information. This, together with our ongoing contact with stakeholders, has been of great assistance in enabling us to present well informed provisional positions on the various elements of the Proposal, and to engage fully in the negotiation process.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239934/bis-13-1153-european-directive-on-package-and-assisted-travel.pdf

EXECUTIVE SUMMARY

The European Commission published a Proposal for a new Directive on Package Travel and Assisted Travel Arrangements in July 2013². It is intended that the new Directive will replace the current regime under Directive 90/314/EEC as implemented in the UK by the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288 as amended) (the Package Travel Regulations) and the Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012 (the ATOL Regulations). Holding a licence under the ATOL Regulations is recognised as evidence that a business meets the insolvency protection requirement in the Package Travel Regulations³.

The Proposal retains the essential shape of the current regime, covering the provision of information and the consequences of contractual failure, making the organiser liable for the performance of the package, including by third parties, and providing for consumer protection in the event of organiser insolvency.

The Proposal is a consumer protection measure and is also directly relevant to the further development of the single market for leisure travel services. Consumer protection is not a devolved matter in Scotland or Wales, but is a devolved matter in Northern Ireland. The UK regulations which implement the current Directive apply throughout the UK, including in Northern Ireland. It is envisaged that, with the consent of the Northern Ireland Assembly, any new implementing Regulations will in due course apply throughout the UK. The UK Government conducts EU negotiations on behalf of the whole UK.

Our response to this Call for Evidence considers the views and arguments put forward by respondents and our current understanding of the views of other Member States and provides our conclusions.

Our response also takes into account the Department for Transport's current review of the Air Travel Organisers' Licensing (ATOL) as part of its domestic reform programme. (See below.)

About the Call for Evidence

The Call for Evidence was particularly relevant to consumer groups, the travel trade including package travel organisers, retailers, travel agents, other travel organisers and facilitators (for example those currently covered by the ATOL flight-plus licensing requirements and online agents) and providers of leisure travel components; passenger transport providers; hoteliers and other holiday accommodation providers; car rental firms; and other providers of tourist services.

The Call for Evidence was also relevant to those who are currently engaged in providing financial services to the leisure travel industry in respect of the requirement that it protects consumer prepayments and provides for consumer repatriation in the event of insolvency.

² http://ec.europa.eu/justice/consumer-marketing/files/com_2013_512_en.pdf

³ In respect of non-flight packages the Package Travel Regulations provide for three means of meeting this requirement: obtaining a bond via a body approved for the purposes of the Regulations; acquiring suitable insurance cover; or placing consumer money in trust to be released on completion of the package.

We distributed the Call for Evidence to some 154 organisations and businesses across the sector representing the various interests, including trade representatives and individual firms, consumer bodies, legal firms, insurance firms and promoters of tourism.

Our questions sought views on the general approach adopted by the Commission and on specific issues which it appeared were likely to have an impact on the sector and the practicalities of regulating the sector.

We received views on the elements we had identified as the most important or as having potentially the biggest impact.

The scope of the Proposal:

- increasing the coverage by broadening the definition of a “package” to take account of technological developments which have enabled innovation and growth in the sector, including the “dynamic packaging” model⁴;
- introducing a lesser level of protection (insolvency protection only) in respect of “Assisted Travel Arrangements” (ATAs), where the relationship between suppliers is looser but where there is an entity encouraging combinations of services as the result of business relationships with other businesses);
- application to business travel;
- application to domestic packages not incorporating travel;
- application of the Proposal to amateur or not for profit arrangements;
- the need to avoid circumvention by the adoption of an “agent for the consumer” position where an agent purports to buy services on behalf of a consumer rather than selling or offering to sell services.

Insolvency protection:

- the effects of a new approach proposed by the Commission requiring coverage of all of the sales activities conducted by businesses established in a Member State (rather than requiring coverage only in respect of sales or offers for sale within the Member State or business directed at the Member State’s consumers, as is the case now);
- the effects of the above approach in combination with clarification of the need for mutual recognition of member States’ systems of insolvency protection;

⁴ Essentially the model where the organiser, often on a web-site, provides the consumer with a range of options (flights, accommodation, car hire etc.), from which the consumer constructs their own “package” and makes payment to the organiser for all of the travel elements and which may or may not involve separate contracts with the service providers.

- The need to establish clarity about the limit of Member State liability for insolvency protection systems in respect of insolvencies resulting from extraordinary circumstances.
- The need for the Proposal to establish effective and proportionate insolvency protection obligations on business which do not impede growth, or create adverse competition impacts.

Organiser responsibilities:

- Establishing limits on organiser responsibilities in the event of failure to provide, or a delay in services, in the event of unavoidable and extraordinary circumstances;
- Clarifying the relationship between the Proposal and passenger rights regulations where the latter already place obligations on passenger transport providers in the same or similar circumstances.
- Clarifying pre-contractual information and contractual obligations;
- Covering the consequences of changes to services contracted for before departure;
- Covering the consequences of changes to or failure to deliver services post departure.

Summary of the Responses to the Call for Evidence

We received responses representing a wide range of interests, providing views and observations directly related to the questions and also offering wider perspectives. Most acknowledged the need for change to the regime and supported the Commission's general response to the significant developments in the market since the formulation of the current Directive 24 years ago. However, respondents also generally supported our view that the Proposal should be improved by further clarification in a number of respects and that the approach adopted by the Commission might have serious consequences in terms of costs and practicability.

Those representing the package travel industry support the extension of the definition to include "dynamic packaging models" and agreed with our assumption that, as drafted, the Proposal would bring within the full coverage of the Proposal all those currently selling packages as defined and most of the those currently considered to be "flight-plus" organisers (and therefore subject to the flight-plus ATOL in the UK). This, they observed, would level the competitive playing field whereby, currently, dynamic packagers were not held responsible for the delivery of the services comprising the "package". Others felt that the definition would be too wide and that some agency based models would struggle to

cover the liability provisions (making the organiser the chief source for recompense for consumers when things go wrong or are not delivered).

There was general support for the objective of seeking to overcome possible routes to circumvention, especially with respect to the “agent for the consumer” model.

In respect of the Proposal to include ATAs, some in the trade argued that they too should be considered to be packages. Conversely, others observed that, as drafted, the concept was indistinct and amounted to little more than facilitating purchases of individual travel components by consumers.

There was general support among the trade for B2B sales being, for the most part, excluded and that in this respect the Proposal should be extended to exclude more than just the larger corporate business travel providers. Respondents thought that the concept of the overarching “framework contract” for business to business arrangements should be extended to include all overarching B2B arrangements, but that those who booked their business travel through consumer facing outlets should continue to be covered. This would provide SMEs and smaller businesses that choose not to enter into specific B2B arrangements the means to benefit from the protection of the regime.

There was some divided opinion on the need to cover not for profit or amateur arrangements, for example by special interest groups or charities. These are, for the most part, not covered currently because of the exemption for those who organise trips only occasionally.

Areas identified for clarification centred particularly on the scope and definitions of the business models to be covered, especially the need to achieve more certainty as to the differences between the various elements of the definition of a “package”, and the definition of the ATA model where it is proposed only the insolvency protection provisions should apply.

Other areas for clarification identified by respondents concerned the consequences of unavoidable and extraordinary circumstances and the extent of organiser responsibilities where difficulties occur which are not due to the fault of the organiser or service providers. There was a general desire to better establish the relationship between the Proposal and the obligations on transport providers under passenger rights regulations so as to avoid double-banking of protections.

Those representing and promoting domestic tourism strongly supported our position, established in the course of the Red Tape Challenge, that the application of the current regime to domestic packages consisting of, for example, a hotel booking and some other non-transport tourist service, was unnecessary and had a stifling effect on innovation. Some argued that packages should only be covered if they include a transport element but acknowledged that such a wide adjustment would be difficult for other Member States to accept. They supported our arguing for the option of allowing Member States the option not to apply the Directive to packages which do not include a transport element and which are provided entirely domestically.

In respect of the approach proposed by the Commission to the provision of insolvency protection, most respondents, including those especially concerned with the UK’s ATOL

system, shared our concerns. Moving from protecting sales in the UK substantially to UK consumers to protecting all of the sales by businesses “established in” the UK, irrespective of where the sales are made or targeted, gives cause for significant concern that the additional risks posed by this approach would lead to increased costs and practical difficulties. These would include repatriation to other countries and the ability to properly assess the risk represented by businesses that might be trading substantially outside of the UK.

The Air Travel Organisers’ Licensing (ATOL) System

The final form of a new Directive will have a direct impact on work by the Department for Transport to review the role and funding of Air Travel Organisers’ Licensing (ATOL). Holding a licence currently provides the chief means by which those organising packages including a flight are able to meet their obligations to provide evidence of consumer protection against their insolvency.

The ATOL scheme is managed by the Civil Aviation Authority. In 2012 the Government introduced a modification to the ATOL scheme which had the effect of extending the insolvency protection elements to what are known as “Flight-Plus” arrangements. This measure was taken after a decision in the UK courts provided some clarity on the definition of a package; to the effect that many businesses which it had been assumed were covered by the scope of the current Directive, and therefore ATOL (which applies the same definition of a “package”), fell outside of the regime.

Reform of the ATOL scheme was the subject of a Call for Evidence conducted by the Department for Transport⁵. The Department for Transport will publish the Government’s response. The Government is keen to ensure that future arrangements the UK has in place in respect of insolvency protection in this sector minimise the exposure of the tax payer and provides business with a cost effective and efficient system adequate for its needs and those of consumers. The responses to that Call for Evidence are relevant to particular elements of this Proposal and inform consideration of our negotiating position.

The Government’s Response

We have received and continue to receive views and observations from a wide range of key stakeholders in the course of this exercise and the ongoing negotiation. In general, the responses received tended to confirm the provisional positions we have promoted as this dossier has progressed through the European Parliament and in the course of negotiations in the European Council. We are confident, therefore, that in arriving at our conclusions we have been able to consider a representative and wide range of views, drawing on a very considerable collective depth of knowledge of the sector and reflecting the various consumer and business interests which the Proposal will affect.

The Proposal is far from perfect but, while in some respects we believe a change of approach is necessary if significant unintended consequences are to be avoided, it does present a regime which should lead to significant improvements in consumer protection,

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203522/consultation-document.pdf

while facilitating the further development of the single market in this sector; and a levelling of the competitive playing field. We believe this is a view shared by the majority of the leading interests in the sector.

Key Elements of the Government's Response:

Scope

We support the extension of the concept of a “package” to include the dynamic packaging models. The growth of dynamic packaging was identified in the Commission's research as being the most significant in terms of consumer detriment and consumer confusion about the application of the protections in the current regime. We agree that, at present, businesses providing substantially the same services to consumers, albeit via different mechanisms, are not subject to the same level of regulation. We also agree that it is necessary to ensure all participants in the market provide, as far as necessary, the same level of protection. This reflects our desire to maintain specific additional protections for consumers of arranged holidays because of the unique nature of the product and the risks associated with it. This should also serve to overcome consumer and trade confusion as to regulatory requirements. Nevertheless, there is a need for more clarity in the Proposal as to coverage by to ensure that the definitions properly reflect the business models intended to be covered and are capable of covering possible routes to circumvention.

In respect of ATAs, we currently support the lesser coverage of this model as proposed by the Commission. On our current understanding, we are not convinced that the nature of the business relationships between the businesses whose services form an ATA are such that the application of all of the protections of the Proposal would be proportionate or necessarily practical. Nevertheless, we do believe there is a case for providing consumers with protection against the insolvency.

We believe that applying all of the obligations of the Proposal to the ATA model would be likely to stifle this as a business option, reducing competition and consumer choice. The travel market will continue to be dynamic and we think, if defined appropriately, the ATA model could provide a guard against avoidance and potentially support innovation. Facilitating these cross-promotional arrangements is to the financial benefit of all of the travel service providers involved, and is likely to impact on the packaging market. The process of buying an ATA may not look or feel a great deal different to buying a dynamic package to the consumer who is likely, therefore, to expect to be covered at least in the event of insolvency of the service providers. While the proposed application to ATAs does not entirely level the competitive playing field, we believe it probably represents a proportionate and justifiable approach in respect of the risks presented by the various business models to be covered more widely, and is likely to result in more rigour in the selection of services offered to consumers by retailers.

We believe that informed consumer choice should be a key driver for further developments in this sector. The Proposal seeks to ensure that consumers are informed of the level and nature of protection provided with a package and with an ATA. Given this knowledge, consumers should be free to choose their preferred level of protection and how they book their travel arrangements. Where they choose not to buy a product with added protection under the Directive, by booking their travel services entirely independently, it is for them to

assess the risk and to cover it by other means if they wish, for example through buying travel insurance.

It is important that the Proposal should not be easily circumvented simply by changing the contractual relationships or mechanism behind what the consumer is being offered. We therefore believe that the Proposal should be drafted so as to prevent circumvention, including by using the “agent for the consumer” model.

We do not believe that the risks posed to consumers in the UK of domestic packages are of the same level as those which involve travel to other countries and will continue to argue that Member States should be free not to apply the Directive to purely domestic, non-transport, packages. This option should be available where the Member State is satisfied that other consumer protection legislation is adequate in the circumstances. It should be noted, however, that there appears to be little support for this position from other Member States at present.

We support the exclusion from the Proposal of business travel which is clearly arranged as such under separate B2B arrangements. This would be in line with the bulk of other European consumer protection measures. However, all travellers who book via consumer facing outlets, irrespective of the purpose of the trip, should continue to benefit from the protections in the Directive. This would simplify the regime and provide for protection of sole-traders and SMEs who choose to book as consumers.

We believe the Proposal should be concerned essentially with business to consumer transactions, in line with the rest of consumer protection measures at EU level. That is, that it should apply to businesses and traders who aim to profit from selling the products to be covered, that is those who are “traders” as defined. We do not, therefore, support calls for the Proposal to apply to amateur or not for profit arrangements and would like to see more clarity on this point. Of course, voluntary or not for profit customers can still benefit from the Directive if they choose to buy protected products.

Insolvency protection

As mentioned above we have some serious concerns as to the possible effects of the Commission’s change of approach to Member States’ obligations in respect of the application of the insolvency protection provisions.

There is currently some ambiguity as to the ultimate level of insolvency protection a scheme is expected to provide. We believe the expectation should be that a scheme should provide for adequate coverage in all likely circumstances but that this liability should not be open-ended. The Commission’s Proposal underlines that the protection should reflect the level of financial risk represented by the trader’s activities. This is an important consideration because an expectation that the insolvency protection must cover all risks in all circumstances would likely have serious cost implications for businesses and for any insolvency protection scheme, whether it relies on the involvement of the insurance market or is based on a collective fund (the most common models).

We therefore need more clarity that an insolvency protection scheme’s liability should extend only to circumstances which reflect the normal assessment of risk. In the event of

extraordinary circumstances there is no justification for expecting schemes to cover levels of liability which do not exist in any other sectors; for example, personal banking protection includes a limit on liability. Achieving clarity on this point should make arranging for risk-based insolvency cover for the expanded scope of the Proposal, and costs, more manageable for regulators and business.

In respect of the Commission proposal that schemes should provide for protection for all of the sales of a business established in the Member State, it is important that the Proposal should contain a clear definition of “established in” for these purposes so as to provide clarity for businesses and enforcers. We believe that there would be serious and potentially costly consequences for schemes and, in turn, business, of such an approach. In our view, the requirement to provide for insolvency protection should apply in respect of sales made in or directed to consumers in the Member State, as is the case under the current regime. Further analysis is contained in our detailed response under Article 15 below (at page 102).

In the event that the Commission retains its approach, there should be a clearer exposition of the level and the nature of the protection to be provided, and there should be a firmer and efficient regime for ensuring compliance by Member States so as to minimise the potential adverse effects on consumer protection and costs; and, before purchase, consumers should be made aware of which entity is providing the insolvency protection.

Organiser Responsibilities

We agree that there should be a limit placed on the organiser’s liabilities where circumstances arise which are unavoidable and extraordinary. It seems reasonable that in those rare circumstances which are beyond the control of the organiser and the organiser is not at fault, that the business should initially make sensible provision for the care of the consumer, but that after a reasonable period they should not be liable for those costs. This limit should be commensurate with limits which have been agreed in respect of passenger rights.

We do not agree with the Commission’s approach of leaving it to the consumer to decide whether they should claim against the transport provider or the package organiser, where they have rights against both. We believe this opportunity should be taken to remove any doubling of protections under the Proposal and passenger rights regulations. Where passenger rights apply, the Proposal should not. Organisers should carry some limited responsibility where unavoidable and extraordinary circumstances cause problems for consumers which are not covered by the passenger rights regulations, for example, problems with accommodation or which cause difficulties for a consumer reaching a place of departure. However, where the issues affect only the transport element of a package and it is covered by passenger rights, the matter should be dealt with by the transport provider under its legal obligations.

Information Provisions

We believe that in large part the Proposal clarifies and to a degree simplifies the pre-contractual information obligations. There are some points of detail which should be clarified but in general the Proposal reflects the current position. It is important to acknowledge, however, that, given the extended scope of the Proposal, including covering the ATA model, pre-contractual information on the level of protection is an important

addition. This should enable consumers to make properly informed decisions about what they prefer to buy, and to compare fully protected arrangements with those which carry protection only in respect of insolvency. Consumers choosing the latter or who choose to make their arrangements entirely independently can then choose whether to cover other risks by, for example, buying suitable travel insurance.

There were no significant difficulties identified with the provisions covering the consequences for consumer and traders in the event of changes to arrangements before and during travel. Again the Proposal reflects in the main the current obligations, although there are points of clarification which we will pursue.

In the course of its deliberations, the European Parliament considered whether consumers should have a right to withdraw from contracts agreed at a distance or during excursions away from business premises. We do not support such an approach. Package travel along with transport services were excluded from similar provisions in the Consumer Rights Directive for practical and contractual reasons. The nature of many package arrangements, especially many of the new ways of arranging packages, mean that organisers enter into binding contractual arrangements with service providers, such as airlines, often resulting in cheaper prices for consumers. In these circumstances it does not seem reasonable that a withdrawal right exercised by a consumer, where the contractual arrangements have not changed, should result in losses for the organiser.

We support the application of certain elements of the Consumer Rights Directive to packages as included in the Proposal. See the comments under Question 40 (page 132).

NEXT STEPS

This Document outlines the Government's views on the Commission's proposals. The negotiations will continue under Italian Presidency in September 2014. In the meantime, we will be seeking to influence other Member States with a view to achieving support, especially in those areas of greatest concern and where it is important to achieve greater clarity.

It is the nature of negotiations that individual Member States do not necessarily achieve all they set out to accomplish. Where this is the case we shall seek to minimise any potential effects which would result in either significant decreases in consumer protection, or which might result in unnecessary or unjustified additional burdens on business.

As mentioned previously, the outcome of the negotiations will have a significant impact on the Government's conclusions on the future of the provision of insolvency protection for the sector. Those conclusions will necessarily need to take into account the revised scope of this Proposal and the obligations it will place on Member States in respect of ensuring consistent and effective protections.

We will continue to engage with key interested parties in the course of these negotiations.

RESPONSES TO QUESTIONS

This section includes brief summaries of the responses we received to each question, some representative extracts from those responses, and the Department's comments including our conclusions.

Chapter 1 - Scope

Article 2.1

Question 1

Do you agree that the “agent for the consumer” model should be covered by the Proposal? Please explain why, providing any evidence to support your views.

If the model should be covered should it be subject to an information provision to make it clear to consumers what the role of the agent is and that the resulting contracts will not benefit from the protections in the Proposal; or should the agent be considered to be an organiser and/or an assisted travel arranger and therefore subject to the relevant parts of the Proposal?

Summary of responses

Eighteen respondents expressed views in response to this question. Sixteen respondents agree that the agent for the consumer model should be covered by the Directive either as an organiser or as a retailer of an ATA. The respondents included a wide selection of trade representatives, consumer representatives and enforcement authorities

Those who went on to address the second part of the question expressed the view that if the Directive failed to ensure or be explicit about coverage of the model then a clear information provision would be necessary to avoid consumer confusion and to discourage avoidance.

Two respondents opposed the inclusion of the model, one trade body and one trader specialising in B2B transactions. One objected on the grounds that the agent for the consumer model might catch internet search engines. The other appeared to comment simply on the dangers of including agents generally as if they were organisers.

The following extracts illustrate the rationales expressed in favour of coverage:

“It is our view that the vast majority of consumers take no notice whatsoever in the booking conditions that they are asked to agree to prior to the sale and even if they did, would have no concept whatsoever of the very different position that they might find themselves in as a result of a term in the contract...ultimately the whole concept is grossly unfair to the consumer and those that seek to comply with existing law.”

“A consumers’ experience of buying a holiday under A4C contractual arrangements is virtually indistinguishable from their experience of buying one under other agency

arrangements. Therefore to be effective as a consumer protection measure the Directive should include A4C transactions within it. Explicitly including A4C transactions within the new Directive would enable the use of this business model, but not as an avoidance measure.”

“The consumer is unlikely to be able to appreciate the difference between buying travel services through traders and they will not appreciate the distinction between an intermediary acting as their agent and an intermediary acting as the agent of the travel service provider.”

The Government’s Response

The response has confirmed our initial view, informed by earlier discussions with stakeholder organisations and in the light of experience in relation to the ATOL flight-plus coverage, that the agent for the consumer model does potentially provide a technical route to avoidance which consumers may not appreciate, or which might mislead them. Those claiming to be agents for the consumer are acting in substantially the same way as other organisers or dynamic packagers, offering to arrange the same combinations of travel services. **We remain of the view, therefore, that the Directive should be drafted in such a way as to ensure and clarify that this model is covered.**

In respect of those that opposed coverage, there is no question that where “agents” in general actually make and sell packages or facilitate ATAs then they are intended to be covered as an organiser, or a retailer of an ATA. There is no intention in the Proposal that true agency is to be covered. The agent for the consumer model is perceived by respondents to be a technical means by which it may be possible for an organiser to avoid compliance by claiming that the nature of the relationship with the consumer or the service providers is different.

We do not believe that ensuring coverage of the agent for the consumer model will affect the position of search engines. In general, a search engine will provide a list of results in response to a request and the enquirer will then choose from that list and will be contracting with the service provider direct, not via the search engine as agent. There would appear to be no agency or organiser role for the search engine. Should search engine services develop to the extent that they do take on a more proactive and direct role in transactions in this sector, then there appears to be no reason why, if they participate in the market by packaging or facilitating ATAs, they should not be considered to be covered by the Proposal. Coverage is dictated by the nature of the activity undertaken by a business, not necessarily how it presents itself or its services, or the contractual relationships underlying that activity. (See also our comments in relation to the Tour Operator’s Margin Scheme (TOMS) at page 35).

Article 2.2

Question 2

Do you agree that those who organise ad hoc packages on behalf of, for example, a group of friends or club members or faith groups etc. should continue to be exempt?

If so, are you content that, assuming the effect of the Proposal is as we have described, the deciding factor should be whether in making arrangements the person doing so is a “trader” under the Proposal

Summary of Responses

There were eighteen responses to this question. A small majority favoured retaining the exemption for “occasional” organisers. Several of those that advocated that such organisers should be included were concerned about those that are traders but who argued that they only traded as organisers occasionally. In this context organisers of trips to the annual Hajj in Saudi Arabia and organisers specialising in other occasional events were cited. While some felt that anyone assisting or facilitating others to book combinations of travel arrangements should be covered including, for example, amateurs helping club members to organise special interest or sports trips, others were more focussed on whether a “trader” was involved.

There were general concerns about the meaning of “occasional” in the Proposal (which reflects a similar exemption in the current Directive) and a desire for more clarity to ensure that this did not provide a route to avoidance for businesses in the sector. Those representing or reflecting views from the charity sector argued strongly that charities should be specifically exempt on the basis that they were not for profit organisations. On the other hand most of the business representatives argued that consumers should enjoy the coverage of the regime irrespective of the nature of the organiser or organising body.

No-one provided any substantial evidence to demonstrate that the current exemption gave any significant cause for concern.

The following extracts illustrate comments for and against supporting the Commission’s Proposal:

“This will give this section of travellers an opportunity for protection and hopefully will also limit the amount of fraud that is often found in this sector.”

“While we believe that a group of friends, club members, or faith groups may act together to coordinate travel arrangements, should any person or body act as ‘organiser’ in combining travel services and in respect of monies taken, that group should be afforded protections under the Directive.”

“We are concerned that this phrase “ad hoc” could cause confusion for consumers. There has long been concern that school trips and those going on a trip as part of a “club” do not always enjoy financial protection as businesses attempt to argue that the package is not caught by the PTRs.”

“In principle, if an individual or company is holding money belonging to others, whether that activity is undertaken regularly or occasionally, we believe it is appropriate for that money to be protected against the possibility of the person holding the money not honouring their commitments. As such, we believe that there is no logic in imposing lesser obligations on occasional travel arrangers.”

“It is important to ensure that genuine friend-and-family transactions are excluded from the Directive. In doing so however, the Commission must ensure that a loophole is not created that would allow some organisers to avoid their obligations. For example, those travelling on school trips or as part of a club must have access to financial protection.”

“This is a very unusual opportunity to amend the current Directive to ensure that the burden on charities is lifted. Not for profits could simply be exempted from the financial elements, if not all of the Directive.”

“...inadvertently to impact the not for profit sector and burden it with expensive requirements such as these would fly in the face of the Government's express intention to support and utilise the sector in delivering community goals.”

“This sector has proven not to be of concern in this regard in the past and is not the prime target of the measures.”

“We agree with the general principle that organisers of ad hoc packages should be exempt. The main difficulty with exempting 'occasional' organisers is that some may operate very occasionally but at a large scale; for example, travel related to seasonal pilgrimages or to large events and festivals.”

“Using the definition of trader in this way works as the Directive currently stands.”

“We believe that this exemption should continue provided it is not carried out “by way of business”, which is a similar exemption available to companies on the periphery of the financial services sector.”

The Government's Response

The chief concern of those who support broader coverage in this context appears to be that traders who organise on an occasional basis should be covered. Those who support an exemption along the lines we have currently are mainly concerned that amateurs arranging trips or holidays for friends or organisers who do so in the course of charitable activities should continue to be exempt.

We recognise the need to continue to cover those who are in the business of organising packages infrequently, such as those organising trips the Hajj. It is our firm view that such organisers are covered by the current regime and should continue to be. We also consider it appropriate that the deciding factor should be, as the Commission has proposed, whether the organiser is a trader, irrespective of how often or how regular they sell or offer to sell packages and arrange Assisted Travel Arrangements, as opposed to someone who is not acting in course of business.

We therefore support the removal of the reliance on “occasionally” to identify exempt activities and the introduction of applying the Directive only to organisers and retailers who do so in the course of their trade or business, craft or profession, that is, as “traders”. Recital (19) to the Proposal should be amended to remove the reference to “occasionally organised packages). We believe this is clearer and

consistent with the rest of the EU consumer “acquis” of consumer protection legislation and in line with our support for applying this regime essentially to trader to consumer activity. See questions 3, 4 and 5 on B2B coverage.

Question 3

Do you agree that the proposed exemption is acceptable because the arranger of the business travel covers any necessary protection for business within the overarching contract? If not, please explain and provide any supporting evidence.

Summary of Responses

There were fifteen responses to this question. All but two supported the removal of business travel from coverage. Some were caveated with a desire to allow coverage for individuals who may be travelling for business purposes but who were otherwise booking as consumers. Others questioned whether the Commission’s proposed approach, by relying on the existence of an over-arching or framework business contract, was the correct one, some observing that the exemption should not apply only to employees as proposed.

Some observed that the UK’s ATOL flight-plus provisions already exempt B2B transactions and include workable provisions relying on the nature of the contracting or invoicing entity to be able to identify B2B arrangements.

The following extracts illustrate comments for and against supporting the Commission’s Proposal:

“...totally agrees with the proposed exemption for business travellers from the Directive on the basis that business arrangements are contracted in a totally different format, often within individually designed and agreed travel policies, and these do not carry the same potential risks to the travellers.

Business travellers’ transactions generally involve invoicing after tickets have been issued, and/or reservations transacted with virtually no exposure to funds being held by the travel management companies in advance of travel which is contrary to the situation with holidays.

There is virtually no risk with airline tickets, hotel bookings or car hire where the traveller has often completed his journey before payment is made...”

“...business travel should be excluded from the proposed Directive. This appears to be the intention behind the Proposal and that intention is based on the fact that business travellers are able to conclude contracts on terms freely negotiated between the parties.

In the UK, this distinction between holidaymakers and business travellers is dealt with very effectively under the ATOL regime by way of the Corporate Sales Exemption (05/2012)...believes that there is merit in exploring whether the continuation of an exclusion from the Proposal on that basis might be a clearer and more suitable approach than that proposed under the Directive, which will leave room

for significant differences of interpretation while ensuring that holidaymakers and businesses alike remain unclear about which protections apply to which travellers.

Should the Commission decide to persist with the definition of a framework contract, it will be necessary for clarity to be provided as to what constitutes a framework contract...A clear benefit of the corporate sales exemptions, referenced above, is that the requirement for a corporate entity (limited company) to be invoiced is a very transparent and effective definition, leaving little opportunity for disputes to arise.”

“Teachers and school support staff accompanying a school party should be covered by the full provisions of the Directive and not exempted by Article 2 c

This exemption is acceptable as long as the necessary protection is communicated to all parties. Complaints continue to be received by schools being sold packages for overseas trips without any financial protection in cases of insolvency.”

“...agrees that some business travel should benefit from the insolvency protections provided by the Directive, specifically sole traders and SMEs operating as partnerships; they should be treated the same as other consumers.

The current ATOL corporate sales exemption works well for the UK market. This lists types of institutions that a firm may sell to without the need to hold an ATOL (currently except when selling a package) and includes for example a body corporate, executive agency, non-departmental public body and various other professional persons such as employees of charities and higher education institutions.”

“It is important that the framework agreement is not limited to Employees as implied by Article 2.2 (c) as much business transacted under such contracts relates to individuals not employed by the purchaser of the travel arrangements (such as qualifiers on an incentive).

However, to maintain protection for individuals and small businesses, such derogation would not apply to:

- a) business travel booked directly by the individual business traveller not under a framework agreement or contract and
- b) business customers with an annual turnover below £1,000,000.”

“...the existence of a business to business framework contract should include any protections that businesses wish to pay for.”

“It is apparently the case that there is a prevailing view that business can afford to insure themselves against failure and this is clearly what the Consultation document is alluding to. However, irrespective of whether a business can afford insurance, they still suffer the same detriment within their travel contracts as do ordinary Consumers.”

“We agree with the government’s view that the unnecessary red tape embodied in the Directive should be removed. Within our sector, there is general good practice in the handling of pre-receipts and formal regulations to cover this is not necessary.”

The Government's Response

See under Question 5 for our comments on Questions 3, 4, & 5.

Question 4

Do you agree that all other business travel, i.e. that which is generally booked on an ad hoc basis from consumer or business facing outlets should be subject to the protections in the Proposal? If not, please explain and provide any supporting evidence.

Summary of responses

We received twelve responses to this question, some of which are reflected in the summary to question 3 above. Most acknowledged by the tone of their comments that where a business traveller is essentially travelling as a consumer it is unlikely to be practical for the organiser to be able to identify the business nature of the trip unless, the traveller reveals their purpose. There is clearly also some sympathy for the position of the sole trader or SME that, for whatever reason, might not choose to opt for a business travel specialist for their arrangements.

The following extracts illustrate comments for and against supporting the Commission's Proposal:

"Under the current ATOL Corporate Sales Exemption, smaller businesses such as sole traders and partnerships receive the full protection offered by the ATOL scheme. Equally, travellers who might be travelling for business purposes but who also make arrangements for their personal leisure travel (which will not be billed to the corporate body) receive that protection for their leisure travel...this is a sensible and proportionate way of ensuring that businesses are free to conclude their own commercial arrangements when booking travel services whilst continuing to protect those smaller business travellers and holidaymakers."

"...feels that businesses should be free to work with their chosen travel supplier and agree their individually agreed contracts. If the business traveller is booking his own personal travel, then this will fall under the general holiday Directive but this is totally apart from his Company."

"No...trips bought on corporate credit cards should also be excluded."

"Where the booking is not made within a supporting 'framework contract' the business traveller does not have any protection and this may devalue the 'Travel Protection' brand since they have booked the 'package'."

"...if a solution like the ATOL Corporate Sales exemption can be implemented, any business travel which does not qualify for that exemption should be regulated in the same fashion as other travel arrangements."

The Government's Response

See under Question 5 for our comments on Questions 3, 4, & 5.

Question 5

If you believe all business travel should be exempt, how would you propose that business travel booked through consumer facing outlets could be identified in order that the organiser and the enforcement authorities can identify it as an exempt arrangement?

Summary of responses

This question attracted eleven responses. Almost all recognised that it would be extremely difficult to identify travellers on business using consumer facing outlets unless there was a clear mechanism by which this could be achieved, whether by identifying the payment details as from a corporate or other business source or by some other means. Aside from the example set by the Civil Aviation Authority in respect of the ATOL flight-plus B2B exemption no other means were suggested.

The following extracts illustrate comments for and against supporting the Commission's Proposal:

"The introduction of the Flight-Plus ATOL scheme in the UK has captured a proportion of these transactions but it is still very difficult to track and identify these."

"As the Directive is a "targeted harmonisation" Directive...the business travel exemption is an example of where member States should be allowed to determine their own national rules on how to best implement aspects of the Directive in distinct national markets."

"It would be virtually impossible for Enforcement Authorities to differentiate between consumer parties and business parties."

"...an exemption based on the purpose of a visit will be virtually unenforceable except through determination on a case by case basis, which is highly inefficient) but, as suggested above, payment with a corporate card could be an identifying factor for a greater range of exemption."

"We agree with the current Proposal as it would be difficult and costly to identify business travellers that use consumer-facing platforms. The commission's rationale – only business travel organised under the umbrella of an overarching service contract or "framework contract" should be excluded because business travellers are generally protected under those contracts and arrangements that relate to business to business contracts – is sound. Any Proposal to the contrary is unlikely to be practical..."

The Government's Response – Questions 3, 4, & 5

The responses have confirmed a desire amongst the trade, including broad appeal and specialist business providers, that B2B arrangements should largely be exempt. However, there is sympathy for the position of the sole trader or SME owner/employee who travels on business, and an appreciation that the protections of the Directive are of real potential value to those travellers.

We understand that the mechanism applied in the UK in relation to a similar exemption from the ATOL flight-plus regime works by removing those who identify themselves as business contractors via their business invoicing mechanisms, and covering those who do not.

The Commission's Proposal reflects another approach to identifying business travel and is more limited than the exemption preferred by most of the respondents. The meaning of "framework contract" is not clear but the Commission appears to have in mind exempting only the corporate travel specialists. There is wide support in the responses for a more general exemption. If the Commission Proposal remains, there is a desire to see it clarified and broadened.

We agree that the new regime should be directed first and foremost at protecting consumers and that in this respect it should be aligned with the rest of the EU consumer "acquis" of consumer protection measures. We also agree that, not least for practical reasons, business travellers that choose to book as consumers should be covered by the Directive. We believe the Commission's Proposal does not go far enough in removing B2B coverage and that the exemption should be broadened.

We would like to see a wider exemption for business travel. Where we have the opportunity we will promote the alternative approach of exempting business travel which is identified as such via invoicing and payment details; reflecting the ATOL flight-plus exemption currently in place in the UK.

If the Commission's "framework contract" approach remains it should be defined broadly so as to enable any business to choose to book outside of the coverage of the Directive either with specialist or non-specialist organisers and retailers where there is a clear B2B contractual relationship.

Question 6

Do you agree that it would meet our general domestic objective if the Government could argue that the only qualifier for "other tourist services" to be relevant should be that it accounts for not less than 20% of the total cost of the arrangement?

Does such an approach give rise to further ambiguity as to precisely what the 20% relates and how it should be calculated?

Summary of responses

There were twenty-one responses to this question. All but two identified significant problems with applying a percentage formula as the qualifying criterion for when including

“other tourist services” with one other travel service to form a package. Those opposed to the idea ranged from business and tourism representatives to enforcement interests. Some argued that there was a need for more clarity and perhaps tightening the criteria along the lines of the other tourist service being an essential element of the trip, or the advertised reason for a trip. Others preferred to retain the current situation which relies on interpreting the meaning of “significant proportion” on a case by case basis.

The following extracts illustrate comments and arguments for and against supporting the Commission’s suggested approach:

“The constituents making up the package could vary quite dramatically based on the customers’ choice on the standard and resulting cost of their accommodation and the same could apply to their tickets etc. This would have the effect of distorting packages where some would fall under the Directive and others would not but for the same events.

It would be better for the qualification to be maintained as a significant proportion of the package without a blanket percentage level being introduced.”

“One of the main problems with this approach is that it would disproportionately benefit more expensive accommodation providers over accommodation businesses focused on the mainstream market. For example, at the 20% level, a four star hotel country hotel could provide a 3 night short break for £600 to customers together with “other tourism services” to the value of £120 and quite possibly not have to comply with the PTD. However, we might provide a 3 night short break in a holiday park in the same area for £180, meaning the extra services we could “package” could be no more than £36.”

“No. For some arrangements, such as hotel and theatre or sports tickets, or a fishing trip, the express purpose of the whole trip is likely to have been to go to the theatre, the sports event or the fishing trip. The cost of the other services has nothing to do with the initial purpose of the trip, should the more expensive component fail.”

“We don’t believe that the Directive, nor its national implementation, ought to tie down in too narrow terms what ought to fall within its scope. To do so would, we suggest, be contrary to the purpose of raising consumer protection in this area. Retaining the current qualification of “a significant proportion” ought to be sufficient to form the necessary guiding principle.”

“...as prices fluctuate according to market conditions, some consumers may have paid a price which means that the tourist service was over 20% of the total, and others not, whilst on the same trip. It cannot be right that if, for example, serious injury was caused to some consumers, some would have a remedy under the Proposal, and others not, based on a completely random criterion.”

“...there is scope for ambiguity and confusion in the approach taken by the current draft of the Directive. ‘Significant proportion’ is undefined and there is scope for dispute over what this means. The recital provides some guidance, but this is of course not binding. Even the recital is ambiguous. For instance, we also think that there is scope for confusion regarding what constitutes an ‘essential feature’. If the figure of 20% remains, greater clarity will be needed over what this includes.”

“ 20% is a measure used in defining whether a company is an associate of another company under company law, so in a sense this figure is one already in use in making legal distinctions, so we would support this in place of the present ambiguity.”

“There should be no change and the alternative of "an essential feature of the trip" should be adopted.”

“...it is difficult for the consumer to determine whether the 20% limit has been reached and therefore whether or not the product that they are purchasing is protected under the PTD.”

The Government's Response

We agree that applying a percentage criterion as a qualifying condition for other tourist services to be an element of a package does not appear to be appropriate or practical. We are persuaded that it is likely to lead to too much ambiguity for consumers and to inconsistency in the application of the regime.

We are not persuaded by those that argued in this context that other tourist services should not be considered a formative part of a package but should only be covered where they are included in a package which include also both transport and accommodation. The rationale behind the regime suggests that consumers who book hotel accommodation and, say, a theatre ticket or a ticket to a sporting event in another country should be entitled to the same basic protections as other package travellers, particularly the right to look to the organiser in their home State to put matters right where there is a failure to provide the contracted elements.

In the context of our desire to see domestic packages consisting of just accommodation and other tourist services removed from coverage, the responses have confirmed our view that setting a percentage level as proposed would not help.

We do not support the percentage approach but there should be some additional clarification to ensure that other tourist services qualify where they are significant or an essential feature of a package, possibly based in part on the marketing of the product or the nature of the service in the context of the overall trip. For example, an excursion to a local market town on one day in 14 of a general family beach-based stay in a hotel might not qualify, but an excursion to an archaeological site as a part of trip promoted as a special interest experience would; cancellation of the excursion in this case would clearly significantly affect the consumer's expected experience and might even render the trip pointless.

We also considered the suggestion by some that a package should only be formed if transport was an element of the arrangement. We are not convinced that the rationale for the additional protections provided by the current regime and under the Proposal does not apply to such packages. This is particularly so where those packages are to be delivered abroad. As mentioned above, a key element of the current regime and the Proposal is that in the event of failure to deliver services, or failure to otherwise comply with the contract by third party service providers, consumers are able to pursue complaints with and look to an

entity (the organiser or facilitator) generally in their home state; thus overcoming the significant obstacle of having to pursue cases across borders.

As detailed below (Question 7), our view is different in relation to packages sold and delivered solely within the UK where that key benefit makes no difference, but in respect of packages delivered abroad the removal of all non-transport inclusive packages would likely lead to a significant decrease in consumer protection and consumer confidence.

While this may seem inconsistent with our desire to see freedom for Member States not to apply the regime to domestic non-transport packages, we would expect Member States to exercise that choice only where they have established that these products were not the cause of any significant levels of consumer detriment; whether purchased domestically or across border. In other words, it should be satisfactory where general consumer protection measures are adequate to deal with, for example, contractual failures and misrepresentation; just as they are in respect of other purchases made either in the Home State or where consumers buy products across borders or while in another Member State.

We must also take into account the fact that the Proposal is being negotiated at European level where other States share land borders and where transport more often does not form a part of a cross-border package. It seems very unlikely therefore that there would be sufficient support for such a position from other participants in the negotiation.

Question 7

Alternatively, do you agree that the Government should argue for an exemption or for a Member State option to exempt domestic packages which consist just of accommodation and other tourist services?

Summary of responses

We received twenty-eight responses to this question. Thirteen represented the domestic tourism sector, including some individual businesses. Others represented small businesses in general, and the package travel and travel agent sector. The remainder represented consumer views and the enforcement interest.

All of those representing the domestic tourism industry and small businesses supported the Government's position (established in the course of the wider Red Tape Challenge); that we should argue for some relief from the application of the Directive to the domestic sector. In particular, while many preferred an approach which would define a package as having to include a transport element (discussed under Question 6 above), they all agreed that in any case the Government should argue for Member States' choice as to whether to apply the Directive to domestic packages which consist only of accommodation and other tourist services.

In support of this position respondents presented the argument that the Commission had not justified, or assessed, the continued application of the regime to domestic products. They argued that the real value of the Directive is realised in respect of the foreign holiday market and that experience of the current regime proves this to be the case. They also presented analysis which suggests that the application of the current Directive has an inhibiting effect on the ability of domestic accommodation providers to innovate and

construct attractive combinations of accommodation and other services, thus constricting potential growth for the sector. They asserted that the core rationales for the Directive (in particular the ability of consumers to pursue cases for contractual failures against entities in their home State and the need to provide for repatriation in the event of organiser insolvency) do not apply in this area.

Those representing package organisers and travel agents more widely were less convinced, citing that an exemption might be difficult to define and that it might damage competition with the foreign package market. Others argued that removing these products from the Proposal would diminish a consumer's ability to seek recompense simply because they chose to holiday in the UK. Some expressed concern for the position of the visitor to the UK who might buy a domestic package either while in the UK or via the internet.

The enforcement representatives supported the Government's approach. One of the consumer representative organisations did not object to the Government's position, although they too expressed concern for the position of the traveller from abroad. The other consumer representative was concerned that domestic consumers would lose protections against types of detriment which had been reported to them; they cited coach tours, round Britain cruises and travel to domestic holiday destinations.

The following extracts illustrate comments and arguments for and against maintaining our approach to seeking a domestic exemption:

"...due to the burden of red tape associated with complying with the current Package Travel Directive, this has discouraged many small and micro businesses from working with other local tourism activity providers and has severely restricted the potential growth of this market. As almost 80% of domestic trips are undertaken using private transport, there is a significant opportunity for small and micro business to work with local tourism providers to offer a more attractive product and boost the local tourism economy if they were exempt..."

"A small hotel cannot sell a show, or an airport transfer, or a dinner at the same time as selling the accommodation. It can sell any of those things once the guests have arrived. This is irrational."

"...believes that a domestic exception would not be practicable. A suitable and effective definition which exempts such packages would be very complex without altering the general principles of the regulation."

"The Package Travel Directive was introduced to resolve two main issues — the repatriation of customers from a destination should an operator become insolvent and to provide the customer with a single easily identifiable organisation in the country in which the package was purchased that is responsible for all aspects of the package's performance.

In our view, the impact of removing value-added products that consist of just accommodation and other tourism services would be to significantly increase domestic tourism. Research conducted by VisitEngland shows that just 4% of holidays undertaken in the UK at the moment are packages. This is because over 80% of UK tourism businesses are micro businesses which are unable to comply

with the requirements of the PTD and therefore do not work with each other to provide the value-added products that customers are increasingly looking for.”

“Although supportive of the Government’s intentions to encourage increased sales of domestic packages...believes that a domestic exemption is not practicable.”

“It is also arguable that providing a domestic exemption damages competition, and could be counter-productive in that it is not likely to be beneficial to domestic tourism if it becomes clear that travellers who opt for a domestic package receive significantly lesser protection when compared to international packages.”

“The potential for increased business from such a change is considerable. We have had examples throughout the currency of the existing Directive of hotel members concerned to discover that accommodation plus, say, a theatre trip came within the Directive, with the resulting bureaucracy and cash flow implications for the handling of deposits. As a result, such ‘packages’ have largely ceased to be offered: reversing the existing position would encourage hoteliers to offer such ‘packages’ again. We are firmly of the view that no consumer detriment would arise from this change.”

“Our customers are increasing looking to purchase value-added products. Removing the barriers that currently prevent small businesses such as mine from providing these products to our customers would significantly enhance the domestic tourism offering available in our destination and boost both revenue and employment in our local economy.”

“We disagree. First, the current PTR’s have not caused any problems at all in the last 20 years in this area, as far as we are aware. Secondly, removing domestic packages – even some of them – from the definition suggests an over-concentration on the financial security/repatriation aspects of the current PTD; why should an injured consumer (or even a consumer who receives a substandard service) lose his rights to compensation just because he chose a package holiday in the UK?”

“...domestic packages which consist of, accommodation and another tourist service, for example, access to local amenities such as a golf course or attraction tickets, are not a significant cause for consumer complaint or detriment and do not carry the same risks for consumers as arrangements which include a transport element or which are delivered abroad. We do not believe that the Commission has established the case for maintaining coverage of these types of package delivered domestically.”

“We do not understand why it would be in consumers' interests for the Government to argue that domestic packages only were exempt. What if a UK consumer wished to buy such a package from a supplier in another member state? We are very sympathetic to the government's wish to encourage domestic tourism and feel this will be best accomplished (assuming we must keep sector specific provision in this area) through an across-the-board relaxation of what counts as a package. That said, if the only way of introducing an exemption is to make it "domestic", then it is better than nothing.”

“...the Impact Assessment associated with the European Commission’s Proposals to revise the Package Travel Directive provides valid reasons to maintain and revise the

Package Travel Directive so that it can continue to provide these protections for people undertaking travel overseas.

However, it is noticeable that the European Commission's Impact Assessment only considers the situation where the provision of transport is part of a package. There is no assessment of whether there is a significant consumer protection problem associated with the sale of products that do not include transport but are simply a combination of accommodation and "other tourism services".

Moreover, as there is no assessment as to whether there is a need for products consisting of just "accommodation" and "other tourism services" to be included in the Package Travel Directive, the Impact Assessment contains no analysis on either the impact the Proposal will have on businesses that wish to provide these products or whether requiring these businesses to comply with the PTD is a proportionate response to the perceived problem.

It is therefore our view that, unless the European Commission can identify and quantify [quantify] a significant problem associated with the sale of products that do not include transport, and demonstrate that the requirements of the PTD are a valid and proportionate response to such a problem, then these products should be removed from the bounds of the current Proposal."

"An additional benefit in amending the Package Travel Regulations is that it would help Destination Management Organisations (DMOs) in England. These organisations have been established to provide economic growth and employment through tourism development at the local or regional level and have previously been funded through a mixture of Governmental, council and membership funding. Enabling businesses to develop value-added products for customers would provide an incentive for them to join their local DMO in order to work together to find ways to enhance the attractiveness of local tourism products and services.

We feel that the changes as suggested will not put visitors at any significant financial risk but will offer an opportunity to generate additional growth and jobs, especially for smaller businesses."

"We are mindful of maintaining existing EU consumer standards, and particularly protecting consumer confidence, but we believe domestic, UK packages which do not include a transport element could be made exempt from the PTD without any detrimental effects.

Members quoted the perceived complexity of regulations, concern over legal liability and particularly around establishing a bond or trust account as the most difficult aspects of the PTD. Given the difficulty small businesses are currently facing in accessing finance, this should not be under-estimated."

"We completely reject the question and argument that could be made by the UK government.

We have long witnessed via our helpline the detriment suffered by UK holidaymakers embarking on Domestic Package Travel. We do not agree with the proposition

created within the Consultative document that detriment is not suffered on a domestic level – we would cite – coach tours where major quality problems exist or serious illness arises – round Britain cruise tours, often involving coach travel to port attract similar detriments – travel to holiday camps which include train/coach travel also attract similar detriment.”

“We do not object to the Government arguing for an exemption for domestic packages that do not have a travel element and so consist only of accommodation and other tourist services. This is because consumers’ vulnerability is increased by travel. ...However, consideration should be given to how overseas tourists who bought a domestic package while in the UK would readily get any redress appropriate should they not be covered by the protection of the package travel Directive.”

“We are concerned at the principle of a domestic exemption. Whilst we see the merits of requiring the definition of a package to include transport, we do not believe domestic holidays should be exempted *per se*.

Firstly, we do not believe that it is appropriate for member states to adopt different policies in relation to exemptions, and if the UK government were to promote a domestic exemption, it would need to argue the case for all countries to implement such an exemption.

Secondly, we believe that there are significant practical issues in other EU member states regarding such an approach. As an example, this may render a Spanish holidaymaker travelling to the Canary Islands not being protected.”

The Government’s Response

Clearly this is a significant issue for the domestic tourism sector and the bulk of the responses have served to confirm our perception that this is an area where the application of the Directive has not been shown to add significantly to consumer protection. Furthermore, we believe that disapplication of the regime to these products is unlikely to undermine consumer confidence in the UK domestic market given that the basic rationales for the added protections in the Directive do not apply. Consumers who experience a contractual failure or other loss are in the position to pursue their complaints through the usual channels within the UK under general consumer protection and contract law. As the products which would be subject to the exemption do not include a travel element the issue of the need to get home or to arrange alternative transport in the event of organiser failure does not apply.

Responses have underlined that the application of the current regime is discouraging growth and innovation in the domestic sector and that this is particularly acute in relation to SMEs’ desire to offer attractive combinations and deals packaged with accommodation.

We will continue to promote our policy that Member States should be provided with the choice to not apply the regime to these products, in their domestic markets where this can be justified. We take this approach in the belief that it is more likely to gain the

support of other Member States for whom, for whatever reason, a blanket exemption would not be palatable or justifiable because of the nature of their domestic markets.

Achieving a choice to exempt along these lines in the Directive would be a first step. We envisage that when implementing the Proposal we would consider further the impact in terms of the balance of business burdens and value added for consumers. At present we believe the current application of the Directive does not reflect a reasonable balance, inhibiting innovation and growth in the sector, and consumer choice.

It should be noted that in negotiations so far there has been little response our suggestions on this from other Member States, and the Commission has expressed scepticism. The European Parliament did not adopt amendments to this effect in its First Reading agreement. While we will continue to argue our position and seek to persuade the other Member States and the Commission, it seems unlikely at present that we will achieve our objective in this respect. Although we believe our position represents a more balanced and evidence-based approach, in the event that it is not adopted this is not an issue on which we feel the UK should withdraw its general support for the Proposal as a whole. It may be that there are ways in which the industry could present similarly attractive offers without falling within the Proposal, albeit that they would not be as convenient.

In response to concerns about the position of visitors to the UK who buy internal domestic packages, or who buy such a package by accessing a UK facing website making available domestic products from abroad, we believe, given the justification for disapplication, consumers will be at no greater risk than when they make any other purchase across borders, or where they buy services as independent travellers, or when they buy other services or goods while in the UK; the general consumer protections apply. As with the purchase of such a package by a domestic consumer the essential benefits of the Directive (repatriation in the event of insolvency and the ability to seek recompense from an entity in the home State of the consumer) do not apply. The consumer from another Member State would have bought a package which does not include a transport element and which was not being sold in their Home State by an entity in their Home State. The same would apply where a UK consumer chose to buy such a package while in, or from, another Member State which had exercised the exemption. The expectation would be that the exemption was only exercised where the Member State was satisfied that it provided no substantial additional protection.

In respect of problems with arrangements including domestic transport of the type mentioned in the extracts, if the package includes a transport element then it would not be exempt. If a package does not include the transport element then problems with transport providers would need to be addressed to the transport provider in the usual way. There is nothing in exempting contracts from the coverage of the Directive which inhibits consumers from seeking recompense for contractual failure in the usual way in the UK.

Article 3 – Definitions

Article 3(1)

Question 8

Is this likely to have any significant impact? If so, please explain and provide any supporting evidence.

Summary of responses

We received thirteen responses to this question comprising travel trade representatives, a legal firm and enforcement representatives.

This question relates to the Proposal to specify car hire as a separate element which in combination with either transport, accommodation or other tourist services can form a package. No respondents foresaw any difficulties with this, which is designed to clarify that car hire is always a significant element of a package. However, one respondent felt that in some circumstances the combination of a hotel and car hire should not be considered a package.

This is a selection of extracts from the comments received:

“No. Car hire has always been considered as part of a package as the largest component within the ‘other tourist services’ category. We believe it is important that holiday arrangements featuring car hire are protected within the proposed Directive and we support the breaking out of this element within the Directive’s definitions. It is important to note that car hire has already been broken out of the definition as prescribed under the 2012 Department for Transport regulatory reforms to the ATOL scheme.”

“We approve of this change. In particular, it clarifies that a ‘fly-drive’ holiday is indeed a package. Most commentators have thought it probably was under the PTD and PTR’s, but there was some doubt. Now the Proposal clarifies it.”

“We see no benefit or risk in separating out ‘car hire’ from ‘other tourist services’ as previously defined... We are concerned however that where a combination of services is being sold, the current Proposals would reduce protection from that which exists currently in the UK. A Flight Plus transaction can take place either at the same time or before close of business the following day and this period is reduced under the current Proposals.”

“We think businesses such as hotels ought to be able to add value by offering additional services. So, for example, if a hotel in a remote location offered a good deal on local car hire that would be available from a station or airport we do not think this should be caught by the PTD.”

“We believe that there are very few situations where a package is created by the combination of Car hire and other tourist services. As such, the theoretical possibility of adding new regulatory burdens appear to be, at best, small.”

The Government’s Response

It is accepted that car hire currently qualifies as “other tourist services” and that it is generally considered a significant qualifying element capable of forming a part of a package as covered by the regime.

In the light of the responses, we believe car hire should be considered a separate element which, in combination with any other travel services as listed in the Proposal, can form a package as covered by the regime.

Our concern that this approach might be too broad was alleviated by the fact that respondents foresaw no added burdens and felt there was value in the clarification it provided.

Article 3(2)

Question 9

Do you agree that the extension of the definition of a package is justifiable? Please provide evidence if you are able to counter the Commission’s view that the business models now intended to be covered are the main source of consumer detriment in the sector.

Summary of responses

There were twenty responses to this question covering travel trade representatives, the enforcement authorities and consumer representatives. All but one supported extending the definition of a package to ensure that the dynamic packaging model is covered, although some expressed strong reservations about including the “linked online booking process” model (Article 3(2)(b)(v) in the Proposal) arguing that unless a consumer appreciated that they were buying a combination of products in the course of essentially a single transaction they were unlikely to expect the arrangements to be a package.

Others expressed concern for greater clarity, particularly in distinguishing between the proposed package coverage and the coverage of ATAs.

Several underlined the need for clear consumer information on what arrangements are protected, and the level of protection.

No respondents provided any evidence to counter the Commission’s view that the arrangements intended to be added by the extension of the definition (“dynamic packaging”) are the main source of consumer detriment in the sector.

The respondents who opposed the extension did so on the grounds that in respect of some of the models covered it might not be possible for the individual suppliers to appreciate that in some circumstances a package had been created in the absence of a “central organiser”.

Some argued that the ATA model should be included as packages.

The following extracts illustrate the comments received:

“...totally agrees with the revision of the definition of a package in the light of the many changes in technology and processes of booking holidays. It is true to say that, with the march of technology and new booking websites, there has been an increasing reduction in the number of traditional packages booked under the current definition.

This has left a gap in the number of passengers being protected (often without their knowledge) and when subsequent failures of Travel Companies have occurred, this has been highlighted.”

“The inclusion of facilitated click through to another principles website cannot be justified as a package under the Proposals for Assisted Travel Arrangements. Consumers themselves do not consider this purchase option as a package.”

“Yes...welcomes the extension of a definition of what is a package. For many years we have argued that the current Directive is protecting an ever smaller part of the holiday market and that the Directive should be extended to ensure that more holidays are protected.

...significant consumer detriment has been caused by the failure of airlines over the years, and therefore, we strongly welcome the Commission’s Proposal to broaden the scope of the Directive to include online click-through sales, including those sales by airlines. The airline-led unprotected flight holiday market segment is substantial. It is worth emphasising that airlines can, and do, fail financially – comprehensive evidence of this is available.”

“The changes that the leisure travel market, in terms of product profile and consumer demand, has seen over the past few years have resulted in a significantly smaller proportion of travellers receiving adequate protection. Therefore the extension to the definition of a package is not only justifiable, but is essential in order to provide traveller protection where it is most needed.“

“...supports the developments to package definitions and believes that they could allow for regulatory simplification. The combined definitions of package and ATAs provide a more rational scope for holiday protection than exists under the current Directive and broadly capture the current scope of Flight-Plus and package protection of air holidays in the UK. The extended definitions will mean that, in future, more people across Europe have a correct awareness of whether their holiday is protected against insolvency or not.”

“In our view the development of increasingly dynamic and innovative ‘packages’ which fall outside the current definition in the PTD has resulted in piecemeal

protection for consumers, and a pronounced lack of clarity for consumers about which types of offering in this sector do, or do not, benefit from protection under the current Directive (as well as the extent to which certain protections may be available in respect of different offerings). We therefore believe that the widening of the definition, as proposed, is entirely justified in order to ensure that the fundamental principles of consumer protection are adhered to...”

“We would not support this extension of the definition.

It could be argued that where the consumer does not use a central organiser to build their ‘package’ and creates their own ‘package travel contract’ that the underlying suppliers would not be aware that they are a constituent part of a wider ‘package travel contract’. We would argue that this ‘package’ should be excluded and the suppliers are not held liable for the others parts of the consumer’s designed ‘package travel contract’ that they are not delivering.

This aspect of what constitutes a package and which providers are brought within this definition is likely to present an implementation challenge where a contracting supplier is not aware of other suppliers that are connected by association with a consumer’s travel arrangements.”

“...we welcome the refinements to the definition of a package and the fact that the combined definitions of package and assisted travel arrangements provide a more robust description of when holidays are subject to insolvency protection requirements.”

“We do agree that the extension of the definition of a package is justifiable. The existing Package Travel Regulations and Directive were of course defined before the internet. Consequently their coverage of the market was far greater than it has now become, due to the advent of consumers’ ability to self-combine travel elements that have many of the features of a package, but few of the protections.

Our research has consistently found high levels of consumer confusion about their rights when buying travel products, including findings that consumers are effectively over-estimating their protections because they assume they have package travel Directive or other protections when they do not. We believe a major risk to consumers comes from a lack of understanding of how the different protections work, as well as of the scope of industry schemes.”

The Government’s Response

The responses confirmed our initial analysis of the proposed coverage of the extended definition; that it was essentially in line with what the Commission’s research had identified as the sources of consumer detriment that had emerged in the leisure travel market since the original Directive and definition had been designed. It also accorded with the views of stakeholders that offers and business models had developed which were outside of the current coverage, but were essentially offering the same or similar products as packages, creating a mismatch with consumer protection obligations in the market.

Few respondents felt that the extension intended by the Commission was not justified. We were presented with no evidence to contradict the Commission's conclusions that the newer ways of offering combinations of leisure travel services were now an additional significant source of detriment which existing general consumer protection provisions do not cover adequately. In other words, the essential rationale behind the need for additional consumer protections in this sector apply to the newer business models as they do to the traditional package model.

We understand that some of the concerns expressed by those opposed to extending the full Proposal to dynamic packagers who operate an agency model is that being defined as "organisers" in this regime will change their status in respect of the Tour Operator Margin Scheme (TOMS) for VAT accounting. We further understand that the HMRC rules rely on the nature of the agreements between agents or operators and their suppliers. If the nature of those agreements does not change, then their being subject to the package travel regime should not affect their status in respect of TOMS. There is nothing in the package travel Proposal which requires changes to the contractual relationships between agents and suppliers or organisers and suppliers.

In general we agree with the Commission's overall approach to coverage; that, irrespective of the underlying business arrangements between sellers or agents and suppliers, the nature of the end product, and consumers' perception of the combination of services they have bought, should be the defining element as to whether they should benefit from the protection of the Proposal. There seems little doubt, from the Commission's research, that the dynamic packaging methods are in direct competition with the traditional package model; that there is consumer confusion over the level of protection they expect in relation to the newer methods facilitating their purchase of combinations of services; and that the basic rationales for the extra protections provided by the regime apply to the products resulting from these newer methods.

We therefore agree with the Commission's intention to extend the definition of a package along the lines proposed, but will continue to press for further necessary clarification and a satisfactory resolution of the questions of practicality raised in respect of the model described in Article 3(2)(b)(v) (the online linked model of dynamic packaging).

In particular the online linked and shopping basket models of dynamic packaging must be clearly delineated from the similarly defined looser ATA model.

Question 10

Do you agree that the proposed definition is clear?

How do you think the definition could be improved, and yet retain the extent of coverage intended?

Summary of responses

Twenty respondents commented on this question including travel trade representatives, the enforcement authorities and consumer representatives. Most found the bulk of the definition clear but there were serious concerns expressed about the lack of clarity of Article 3(2)(b)(v) (the online linked model).

Particular concerns were around the finite timing of the point at which the traveller's name or particulars needed to conclude a booking transaction are transferred, and the nature of those particulars. Some observed that guidance was provided in Recital 18. Several commented that the relationship, or difference between the Article 3(2)(b)(v) model and the similar ATA definition was not clear and that this could lead to confusion for both consumers and the trade.

This is a selection of the comments received:

"The idea that parties will designate between themselves who is the organiser in the case where various service providers are involved in the sale of the package, and that in the absence of such an agreement any may be liable for the whole package seems unworkable and unreasonable. It seems certain to lead to complex litigation."

"Despite our best efforts, we find it exceedingly difficult to identify the major difference between an ATS [ATA] and at least one possible definition of a package. If our members are uncertain, it can be guaranteed that the consumer will have little or no ability to ascertain which is which."

"...consider that any new definition of "package" should be crafted so as to avoid consumer uncertainty. There is a real concern that the new definition of "package" and Assisted Travel Arrangement will confuse consumers and has only been included to embrace "click-throughs"."

"We have serious concerns about the current draft of Article 3(2). The scope of a package, as set out in the Proposal, does not accord with consumer expectations of a package and will increase consumer confusion."

Extending the current Directive to clearly include Dynamic Packages would not only bring significant additional transactions within the scope of protection, but also aligns with consumer expectation. Consumers understand that if they bundle together certain products for an all-inclusive price that they are forming a package and that the advantage of doing this is that they are able to book the same hotel, flight etc. for, typically less than the total sum of the individual parts. Bundling components for an inclusive price is at the very heart of what a 'package' means."

“In most respects, the definition is clear. This is particularly true when the definition is read in conjunction with the recitals. The sub-paragraph 3(2)(b)(v) however is unclear in its use of the terms ‘particulars needed to conclude a booking’ and ‘at the latest when the booking of the first service is confirmed’.

When read in conjunction with sub-paragraph 3(5)(b), it is difficult to understand what processes will be involved to distinguish between a package and an assisted travel arrangement.

In order to avoid any confusion in the future, as the market changes, we believe that the definition could benefit from greater clarity in respect of a number of points. Firstly, we believe that there needs to be more clarity as to what it means by the timing of the confirmation of the booking under 3(2)(b)(v). Secondly, additional clarity is required as to when an arrangement is ‘purchased from a single point of sale’. Finally, ‘advertised under a similar term’ could benefit from greater clarification in order to avoid any trade or consumer confusion about the remit of the Directive.”

“In fact, the definition needs to be improved to extend the coverage intended in order to provide an equivalent level of protection for all travellers who perceive that they have booked a holiday. In order to minimise confusion among travellers, all holiday arrangements should be either fully protected or not protected at all. We favour the definition being expanded to bring as many types of arrangements within the scope of full protection as possible.”

“From the lawyer’s standpoint, the 6 definitions of ‘package’ are, with one exception, probably as clear as the imprecise tool of language can achieve. The danger of being *too* precise/prescriptive is that it facilitates avoidance. Where there may be a small room for doubt, but the *likely* meaning is clear, Traders are unlikely to take the risk of avoidance, however. The one exception we mentioned is the wording ‘at the latest when’ in Article 3(2)(b)(v). Is that intended to refer to the precise timing of events, such that a data transfer (in a click-through) even a split second after pressing the button – almost simultaneous but strictly not quite - avoids being a ‘package? Or do the words refer to process? We suggest that the test should be whether there is a need for consumers to re-input their personal data (not a package) or whether it is transferred automatically (a package); rather than any issue of timing.”

“The requirement in Art.3(2)(b)(v) that the traveller's details are "transferred between the traders at the latest when the booking of the first service is confirmed" places a great deal of reliance on an enforcement agency's ability to conduct forensic research into complex interlinked online transactions, and a requirement that inter-company I.T. protocols always function as intended. One does not need much experience to doubt the merits of such reliance.”

“The definition appears to capture all elements that may form part of a ‘package travel contract’ yet may present considerable challenges in suppliers’ ability to meet their obligations as described. We would suggest that where a consumer has built their own ‘package travel contract’ and there are different underlying contracts providing the package that the consumer has to use the services of an organiser to

draw these together or inform a supplier that they are nominating them as the organiser and advise what are the other components of the 'package'."

"These are particularly problematic in the lack of clarity in the definitions of: purchases from separate traders which do constitute a package (2 b (v) in Article 3 of the draft Directive); the procurement of additional travel services from another trader in a targeted manner through linked online booking processes (5 b in Article 3) which will not constitute a package, but an assisted travel arrangement. As well as a lack of clear definition of these two parts of these two categories, there is the potential for confusion between them. There is also the question of a package needing to be booked through the same booking process (2 b (i) in Article 3). This contradicts the aim of the Directive to ensure a more transparent market for consumers."

"We are concerned as to the extent to which "click through" arrangements between two websites will fall within the scope of protection."

The Government's Response

The responses confirmed that for the most part the proposed definition is clear and is an improvement on the current formulation. Inevitably, given the intention to capture different modes of packaging, there is considerable room for improvement to properly clarify the intended meaning and scope. The issues raised in the responses reflect most of the issues we had already identified in the course of analysing the Proposal and during discussions with stakeholders.

Of particular concern is the necessity to clarify the online linked dynamic packaging model described in Article 3(2)(b)(v) so that not only the mechanics of the model are properly captured but also that there is clear delineation between this model and the definition of an Assisted Travel Arrangement. This needs to be workable for business and for the enforcement authorities and should as far as possible be couched in terms designed to minimised circumvention.

We intend to propose clearer wording designed to ensure that businesses are left in no doubt when their products are or are not covered by the Directive as packages, and to ensure that business practice is properly reflected in the models as described in the definition.

This includes the need to ensure that a time limit is set for the online linked model, and that the timing of the transfer of data is not as finite as proposed because it appears to allow for easy circumvention.

Question 11

Assuming many current Flight-Plus arrangers and some other businesses which operate a similar model but which do not incorporate flights or are otherwise not in scope of the ATOL Regulations are brought within the definition, to what extent can the added liabilities (for the delivery of the whole contract) be managed by insurance or other (contractual) arrangements between the parties?

Summary of responses

There were eleven responses to this question from the travel industry and one other which made a separate point about the availability of travel insurance for consumers to cover supplier failure.

Views differed but on balance it seems likely that there is access to products to cover an organiser's liability for failure to deliver the contracted services, for those who would fall within the definition for the first time; or that the liability can be managed via the contractual arrangements between the organiser and the supplier.

The additional point about the availability of travel insurance for consumers highlighted that at present supplier failure insurance is far from universal and could not be relied on to cover this eventuality if that was being considered.

Here is a selection of the comments received:

"There are a range of insurance products in the market which could conceivably manage any potential liabilities for Flight-Plus arrangers."

"A retailer/facilitator can only have contractual obligations to its own customer but can have no obligations arising from a separate contract concluded by the same customer with other service providers. In the assisted travel arrangement context, the EC's proposed recital 36 confirms that individual service providers are responsible for their own contractual performance and not the contractual performance of other service providers. It is therefore not acceptable as a matter of logic or law that they should now be responsible for insuring against the insolvency of these other providers."

"...believes that insurance as described is likely available in the market."

"Is this question about security for pre-payments, or about liability? If the former, there is a poor market for insurance (including SAFI), and Trust Accounts may be the preferred method of security for SME's, as they tend to be at present. In truth, there is no difference between the Flight-Plus arrangers you refer to, and existing 'package' organisers under the PTR's, as far as the burden or availability of security is concerned. If the question is about liability, there is a thriving market in Public Liability insurance for tour operators."

"We asked our members whether they had ever experienced difficulty in obtaining public liability insurance and were surprised at the results of our survey. 25% of those responding admitted to having difficulty, whether linked to cost or availability, in

obtaining adequate insurance. In some cases this may be related to the type of travel, such as adventure travel or travel to ‘dangerous’ destinations. We would hope that all suppliers whether acting as an organiser or not would take all reasonable steps to ensure the suppliers they use are of a reasonable quality and have their own effective health and safety procedures but in some remote areas, there may be no choice of supplier and this may be reflected in the responses we received.”

“We believe that the vast majority of additional liabilities for proper performance (or conformity) can be dealt with by way of appropriate indemnity provisions within a contract without any disproportionate cost implication.

There are a range of specific liabilities for which insurance can or ought to be able to be obtained on the market; the associated cost of that will depend on the risk profile of the individual business.”

Supplier failure in the B2B market can be managed by contracts...”

“An insurance market already exists to address larger scale failures, and tour operators are able to obtain public liability cover to protect against claims which may arise from product or service failure. We suspect that the providers of this type of insurance will be inclined to extend the scope of cover to include the “new” packages. In principle, there may also be contractual arrangements between the sellers of services and the supplier of the original services – hoteliers etc. However, this will not always be the case.”

The Government’s Response

The responses give us no serious cause for concern that those businesses in the UK which would for the first time be subject to the liability provisions of the Directive will not be able to manage that risk as others already do, either via insurance or through their contractual arrangements with their suppliers.

Question 12

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| Do you agree with the Commission’s contention that the broader coverage of the definition should result in organisers being incentivised to choose service providers carefully in order to minimise their risk? |
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Summary of responses

Thirteen respondents commented on this question. Eight represented the different trade interests, two the enforcement authorities, one commented on behalf of consumers, one was a legal firm and one was a charitable supplier.

All recognised the Commission’s contention as being sound. Most of the trade representatives, particularly those reflecting the views of package organisers strongly agreed; as did the enforcement and consumer commentators. Some trade comments were more qualified in respect of the proposed extension of coverage, citing the nature of the

business arrangements underlying their sales methods as not being adapted to taking on the liability of failure by others.

Respondents underlined the importance of ensuring that an agent, for example, which carried this liability in respect of the consumer should have a declared right to seek recompense from those supplying failed or non-compliant services.

Selection of comments received:

“Recent changes in the ATOL scheme have resulted in holiday patterns changing with travel arrangements being sold to the consumer to ensure that the products sold and the quality and stability and safety of the supplier is scrutinised and the ... feels that the same will be true when the broader definition of the package becomes is introduced.”

“Airlines that offer click-through options are very careful in checking the reliability, performance and credit rating of the service providers they choose to work since their own commercial reputation is at stake. Airlines do not oblige a passenger to use this click-through – it is just an offer that may be cost effective for the passenger because of the inherent economies of scale and the obvious synergies between car hire, hotels etc. and the air transport industry.”

“It appears that this contention would be correct. ...has long argued that an extension of the Directive to cover arrangements that sit outside of its scope would ensure that consumers receive greater protection, not only in relation to consumer financial protection and repatriation, but potentially also in terms of the type of accommodation, excursions and transfers provided where the organiser has a liability for the proper performance of these elements.

...has always argued that holiday companies should take steps to ensure that their suppliers provide safe, secure and sustainable products for sale. Indeed... it would seem to make sense that sellers would seek to reduce their risk, as a proper function of the market, by being careful about what they sell.”

“Yes we agree. The PTD/PTR’s regime has led to widespread health and safety auditing of foreign hotels (and other services) by tour operators, for example, to the great benefit of consumer safety and raised standards; and that can only be extended (a good thing) if ‘packages’ become a much wider concept.”

“Yes. We see this as a key benefit of the Proposal. This will be more so the case if the definition is expanded to bring all those arrangements that would otherwise be “Assisted Travel Arrangements” into the scope of full package protection.

Sellers will take greater care in selecting suppliers in terms of financial stability or security, ability to deliver upon the contract, their approach and ability to provide assistance to travellers and the way in which they deal with health and safety.”

“We absolutely agree with the Commission’s contention. As can be seen from our Consumer stories, there is an element of the Travel Industry who ‘enjoy’ the benefits of a trade body’s membership, yet offer products from ‘non-members’ that will often

produce difficulties for Consumers. If the Travel Industry were incentivised to choose product suppliers carefully, this would in our view have a major impact on improving quality standards.”

“The current regime places liability for performance on the organiser who in most cases will have no operational control over the performance of the travel services supplied by for example airlines and hotel accommodation suppliers. That very construct is unfair and acts as a disincentive for suppliers to be accountable for their services, at least where offered as part of a package. Suppliers know that the organiser is liable and acts as a backstop in the event of non-performance, and this does not encourage active risk management by suppliers. Carrying out due diligence on suppliers may provide some mitigation however this is not sufficient to ensure the services will be delivered where due to the regulations, the buck stops with the organizer. Nor can contractual measures be relied on to ensure suppliers are incentivised to perform and that there is a fair apportionment of risk under the contract. Very often the supplier (for example an airline or large hotel chain) will have greater bargaining power to avoid contractual sanctions leaving the organizer carrying the full weight of the liability imposed by the regulation.

Any widening of the definition of package obviously exacerbates this disparity. Whilst we accept there is some benefit to consumers to deal with a single accountable party (i.e. the organiser) for all elements this makes it essential to ensure a clear regulatory right of redress for organizers against suppliers for their failure to perform.”

“We do agree with the Commission’s contention in this regard, and support this objective. Prior to the implementation of the 1990 Directive, UK case law imposed an obligation on tour operators to use reasonable care and skill in the selection of their suppliers. We are concerned that currently, in the absence of any such obligation, the sellers of holiday services are frequently carrying out no assessment whatsoever of the suitability of the products they are selling, but conversely are suggesting that it would be unreasonable to impose such an obligation on them.”

The Government’s Response

The logic of the Commission’s assumption appears to be well founded and supported by respondents. Most commented that the likely effect of making the organiser responsible for the products they are selling or facilitating, whether they are of the traditional packaging type or operating an agency model, would be of benefit to the consumer in the event that things go wrong. Respondents also agreed, that carrying this liability would apply pressure on the trade to seek to make arrangements with reliable suppliers.

While acknowledging the concerns of some as to the practicality and cost of extending the liability provisions, we remain of the view that such an extension would likely result in improved services for consumers and promote consumer confidence in the products on offer.

We remain to be convinced that it is necessary or appropriate for the Proposal to be any more explicit in respect of the right of a business to seek recompense from their suppliers where the business is required to put matters right for consumers as the result of a supplier failing to deliver the contracted services. Article 20 of the Proposal provides clarification

that there is nothing in the Proposal or in national law which should be interpreted as restricting the right to seek redress from third parties which contributed to the event triggering compensation, or price reduction. This is a B2B issue, not a consumer law matter, and it is for the businesses to negotiate when entering in to contracts with their suppliers in the usual way.

Article 3(5)

Question 13

Is the definition of an assisted travel arrangement clear?
Given the intention, do you think the definition could be improved? If so, how?

Summary of responses

We received nineteen responses to this question. Ten were from trade representatives, four from enforcement bodies, two representing consumer interests and four from others. Many of the responses to this question were clearly concerned with the need to include a model which involves a looser arrangement between businesses than is intended to be covered by the definition of a “package”.

Most of those who were in favour of providing for insolvency protection for the ATA model were chiefly concerned that there should be a clear difference between this and packages and that consumers should be clear when the lesser protection applies.

Trade respondents were divided. There were those who believe that if there is a model for which insolvency protection was considered appropriate, that model should also be subject to the whole Proposal. There were also those who believe that as far as can be judged at present, the ATA model was so far removed from the packaging concept that it should not be included because the purchasing process, essentially a series of separate transactions with different travel service providers, was such that consumers would be under no illusion that they were buying a package. Others observed that the proposed definition of a package was broad enough to include all current business models which involved active organising or combining of travel services, and that identifying ATAs as a separate model was likely to be difficult. Respondents generally accepted our contention that just about all of the models currently covered either as packages or as ATOL flight-plus would be likely to be considered packages under the Proposal.

All respondents expressed concern that the definition of an ATA was not clear, or that the difference between the definition of an ATA and the range of business models apparently intended to be included in the definition of a package was not clear.

In terms of the clarity of the definition, the responses confirmed issues which we had identified, in particular the need for a time limit to be set to provide businesses with clarity that beyond a given time the use of a link between businesses would not establish an ATA.

A further issue raised by some trader respondents relates to online search providers and whether, for example, comparison sites would be captured.

Concern was also expressed that the proposed term “ATA” was misleading as it might be taken to imply some service which offered assistance to holiday makers in case of problems while travelling, not in making their arrangements.

An Illustrative selection of comments received:

“There is also concern amongst our members in relation to online transactions and we would appreciate further clarity in relation to

a) With regard to online transactions where a search engine is used to source travel services linked through to sites where additional elements can be bought, or where there is a transfer of travelling data (including data held on past behaviour)

b) With regard to online transactions where a meta-search facility such as Skyscanner provides multiple options and offers the consumer a chance to buy linked elements

... wonders if most of these growing bookings would be captured under the Directive/or ATA?”

“We do not agree that the definition is clear in relation to Assisted Travel Arrangements. This can only cause consumer confusion by creating a new category that differs from consumer perceptions of a package.”

“- No. ...in some situations it is difficult to understand what processes will be involved in distinguishing between a package and an Assisted Travel Arrangement.

The name ‘Assisted Travel Arrangement’ is misleading, and potentially problematic. Consumers do not receive any assistance in respect of an Assisted Travel Arrangement. Assistance, however, would be provided in the event of problems for the consumer for those who have purchased a package. We suggest the UK Government seriously considers supporting efforts to rename Assisted Travel Arrangements as ‘Linked Travel Arrangements’ that better reflects how they are formed and avoids any potential confusion for consumers as to what type of assistance they can be afforded if purchasing such an arrangement.”

“No. It is difficult to understand the processes involved in distinguishing between a package and an Assisted Travel Arrangement. That difficulty will be amplified when the process of distinguishing is being undertaken by the traveller when choosing between types of travel arrangement.

...we believe there is no clear rationale for “Assisted Travel Arrangements” existing as a separate type of activity. Arrangements should either have full protection or no protection at all. We believe that all arrangements falling within this category would be considered by customers to be holidays and therefore give rise to a legitimate expectation that they will be covered as a package.”

“As well as the lack of clear distinction between the Package and the ATA, ...concerned that some holidays that benefit from protection in the UK as Flight-Plus arrangements are not captured either as Packages or as ATAs. The definition of Flight-Plus includes scenarios where the customer returns the next day to complete their booking. Not only does this allow the customer to consider their options (with choice being one of the major advantages of these ‘dynamic packages’) it also prevents firms from avoiding their legal obligation by delaying the booking of travel services so that the sale falls outside of the definition. ...strongly recommends that a similar time delay be written into the ATA definition.

...believes that financial protection requirements must be the same for packages and ATAs. The extent to which the existence of two categories provides consumers with more choice is unclear, mainly because the drafting of the Directive is unclear. Some arrangements that are considered packages under the new definitions are virtually indistinguishable from ATAs. Unless the definitions are improved and distinctions made clear, any gains for consumers will be lost in the inevitable confusion that the definitions create.”

“Referring to example 9-11 in Annex B, it seems arbitrary to us that the scenario in 11 counts as an ATA whereas the same products bought together would constitute a package; there is no difference whatsoever in risk to consumer, so why should a different regime apply? In general, it seems an onerous burden to impose on travel agents for a fairly modest service on which they could only hope to make a commission. These definitions are difficult to follow for informed people within the industry yet they are supposed to be clear to consumers.”

“It is not clear what the intention of defining ATAs in this way is. The creation of ATAs as a separate category of holiday with a different set of rights attached has the potential to confuse the picture for consumers. In our view this could only be justified if consumers buying packages and ATAs faced distinctly different risks of consumer detriment or the distinction allowed businesses to offer buying choices to consumers that would not exist if they had to comply with the full set of package requirements. The way that the categories have been drawn currently, with the ATA definition more or less confined to a subset of click-through sales means that neither of these things is true.

We observe that any sale involving multiple contracts but where a total price is charged will be a package, with all that entails. It seems unlikely, therefore, that ATA as defined will enable the continuation of Flight-Plus arrangements as they stand. ...it is important that, however ATAs are eventually defined, the scope of the definition is able to absorb all future ways of selling what appear to the consumer to be holidays.”

“...financial protection requirements must be the same for packages and ATAs.”

“If it is clear to a customer when they click through to another website, that they are booking with a separate entity, then ...does not feel this should fall under ‘ATAs’.”

“We are not certain that these definitions offer clarity or enough distinction so that one cannot be confused with the other;

If for example, it were the intention of the drafter's to include those transactions that begin with a choice of a flight, followed by a hotel and paid for with one payment under Article 3 (2) (b) (v), then we would suggest that this is made clearer;

If it is the intention of the drafter's to create a category of travel sales (Assisted Travel Arrangements), whereby a Consumer will 'hop' from one travel provider to another, paying separately each time for that travel product, then that also needs to be more clearly stated and demonstrated to the Consumer that this is the transaction that they are engaged in;"

The Government's Response

Please see under Question 14.

Question 14

Do you agree with the Commission's contention that providing lesser coverage for this model provides choice for those businesses whose trade would otherwise fall within the definition of a package?

Do you agree with the Commission's contention that providing this choice, and ensuring that consumers will be aware whether they are buying a fully protected package or an assisted travel arrangement covered for insolvency only will eventually lead to a market which better reflects consumer preference?

If so, do you believe that this would be a positive outcome, even though it is possible that the market could adjust to one where there is less consumer protection overall? Please explain.

Summary of responses

We received twelve responses to this question; seven from the trade, one from a consumer representative, two from enforcers and two from others. It will be appreciated, however, that many of the comments received in response to Question 13 were also pertinent to the points raised in this Question.

Few respondents firmly agreed with the Commission's contentions as outlined in Question 14 given the difficulty with the proposed definition of an ATA and uncertainty about the differences between that and some of the models intended to be covered by the proposed definition of a "package". Most of the comments were therefore more concerned with establishing clarity as to coverage. Some particularly consumer representatives, added that assuming clarity for the ATA model could be achieved, providing a degree of protection at least to cover insolvency, for this model is to be welcomed, provided the situation was clear to consumers before purchase.

As reflected by the comments under Question 13, there is a division in the views of different sectors represented by the industry. There are those that believe where a trader facilitates

a consumer in their choice that should constitute a package. Conversely, there are those that argue the definition of a package should be limited to the scenario where a trader presents the consumer with a prearranged combination of services; whereas where a trader merely facilitates choice, essentially acting as agents for suppliers, it should be considered an ATA and provide only insolvency protection (most of these already fall within the ATOL flight-plus coverage in the UK). Some expressed concern that the creation of the ATA level of protection would result in a migration to that model, resulting in less consumer protection overall, while others doubted this.

A selection of comments:

“Many consumers prefer to organise their own personalised combinations of travel services from a wide selection of pre-chosen options, accept suggestions on services facilitated at advantageous prices or to assemble totally independent services.

It is therefore not beneficial to the consumer to remove the range of recommendations, special offers and links that increase choice in the online travel environment and that the consumer widely understands not to constitute a packaged travel arrangement. The consumer will also expect that the travel industry is allowed to market information and relationships in the same way as any other sector.”

“...we believe that the category of “Assisted Travel Arrangements” does not form a useful, nor justifiable set of discrete activities to fall outwith the definition of a package. We favour an approach where the maximum level of traveller protection is extended widely so as to encompass all of those arrangements where the traveller believes that they are purchasing a “holiday”. This secondary category can only create confusion among travellers.”

“Our members have never sought to seek ways of avoiding regulation or to make use of loopholes, so the business model covered by Assisted Travel Arrangements does not apply to ...members and we do not understand why such a distinction between Packages and Assisted Travel Arrangements needs to be made, It would make matters much simpler for consumers if all arrangements which, in theory, would be covered by Assisted Travel Arrangements were simply classed as packages. Airlines and other organisations offering ‘click-through’ facilities in order to avoid responsibility for what they put together should be brought within the system and asked to take full responsibility for the actions of their suppliers and to provide financial security to protect their customers.”

“It is accepted that companies should be able to provide some holiday arrangements which are not a “package”. However, the transparency of the arrangements is key in allowing the consumer to understand what they are purchasing and therefore, what rights they have.”

“The extent to which the existence of two categories provides consumers with more choice is unclear, mainly because the drafting of the Directive is unclear. Some arrangements that are considered packages under the new definitions are virtually indistinguishable from ATAs. Unless the definitions are improved and distinctions made clear, any gains for consumers will be lost in the inevitable confusion that the definitions create.”

“We are supportive of the aim of ensuring that consumers have this minimum level of protection from those who are facilitating the provision of arrangements that are not packages, provided that there is sufficient clarity in the definitions to ensure that arrangements that are understood by consumers as being packages are treated as packages, and afforded the full range of protections.”

“We believe that ‘assisted travel arrangements’ should be removed from the scope of the Directive on the grounds that the definition of such arrangements is arbitrary lacks sufficient clarity to be enforceable and is seemingly without substance or merit in terms of addressing any real consumer risk. ...the Commission should focus on a clear and enforceable definition of ‘package’ in order to provide protection to package holiday customers that expect to have protection included, not those shopping around and using multiple platforms to find the best deal.

We also call on the Commission to ensure there is clarity for consumers in the package travel protection market; this initiative undermines that objective because it adds to the complexity of the regime and has the potential to confuse consumers.”

“We believe that there is an important policy consideration to be decided before looking to improve the definition: namely, should there be a secondary level of protection, and if so, exactly what should fall into that second level. We believe that businesses should not have the choice or means of structuring their business model simply to move from one protection model to another, and as such, it should be abundantly clear to consumers that they are purchasing a product with more limited protection.

As it may be difficult to create such clarity, the better answer may be to abolish the concept of Assisted Travel Arrangements in their entirety, and ensure that all linked online transactions amount to protected package arrangements.”

“We do not agree that ATA’s allow businesses a choice of model, in the real world (except in the world of click-throughs without the requisite data transfer).

Firstly, the requirement to make the consumer ‘start again’ with a second booking is counter-intuitive to the business’ desire to sell services to a captive consumer.

Secondly, this vision contradicts what ...the Commission told the meeting ... namely that ATA’s are not really intended to create an ATA Industry; instead, the intention is to capture everything as ‘packages’ but in case that does not succeed, ATA’s exist as a ‘safety net’. ATA’s make a lot more sense seen in that light.”

“Having a discrete category where lesser protection is afforded to the traveller does not serve the overall aim of the Directive even if consumers were fully aware of the nature of the protection that their specific type of arrangement provided. In fact, consumers will frequently have no mind to protection until such time as it is required and, in the event of a significant failure the net effect on travellers who have an ATA but who have no protection over the arrangements as a whole could have a significantly damaging effect on confidence in the industry as a whole.”

“This is likely to lead to a two-tier market where unscrupulous (and cheaper) operators seek to avoid the obligations of the Directive and to undercut the honest market. Those operators create the most difficulties in terms of access to justice by creating business models which make it extremely difficult to pursue claims against the proper entity where there is a lack of transparency as to who the relevant contracting party is, what are the terms of the contractual bargain, and the basis on which any judgment can be enforced.

Permitting assisted travel arrangements to fall outside the scope of European regulation will drive a coach and horses through the protection of consumers, particularly those who book over the internet.”

“Yes to both. We think the market reflects consumer preference now: the growth has been in the online market place. The clarity of information proposed and, above all, the choice of what cover to buy, seems to us a good idea. If a consumer is told, online or in person, that their product selection does not include payment protection and/or repatriation they can choose what to do about it. They might already have insurance; they may be using a credit card; they may be prepared to take their chances. The key thing to assure is informed choice, and prove that choice has been exercised, thereby minimising risk that travellers unknowingly travel unprotected.”

“We would prefer if it were the case that all such arrangements were Packages and therefore fully obligated to the Consumer. However, we do consider that for the present, the system of ATA as proposed (subject to our views in Question 13 above), provides a ‘de minimus’ protection for Consumers and offers in part the prospect that Consumers will recognise the ‘greater’ product and the full protection it offers. At this stage we do not detect that the market will shift toward an ATA model for the simple reason that Consumers are more aware and want the simplicity attached to the purchase of the Package model.”

“...if businesses are able to choose between two models of protection, one of which results in lower costs of operation, but less regulation, it is inevitable that demand for lower cost solutions will encourage a move into the model which has lower costs of operation, and thus lower selling prices to consumers, which at the same time providing less protection to those consumers.”

The Government’s Response, Questions 13 &14

The comments received from the industry highlight this area as being one of the most contentious. While they can appreciate the Commission’s rationale for proposing a separate category of arrangement to be subject only to insolvency protection, it is clear that its worth depends crucially on clarity being achieved as to the differences between what are proposed to be packages and ATAs. There have already been some attempts by the European Parliament in its First Reading Report to reach agreement on establishing a difference. The spread of concerns expressed in the responses have also been echoed in comments from other Member States in the European Council Working Groups. The position, however, remains insufficiently clear at present.

As such, it is difficult to decide on the merits of providing for the lesser level of protection for ATAs, or for providing for any protection at all under the Proposal in respect of these arrangements. It may be that the prime objectives of the Proposal can be achieved without attempting to introduce the ATA concept, and that that will be clearer for consumers and for the industry. However, if there is a danger of providing a route to circumventing important protections through surreptitious adjustments to business arrangements or by superficial adjustments to presentation in the future then that should be avoided. It is important to try to ensure that valuable protections are not undermined on a wide scale by providing for competitive pressures which lead ultimately to a significant removal of consumer protection in this sector.

We need more clarity in the definition of the ATA model so as to establish more precisely the distinction between ATAs and packages and the extent of the coverage of the Proposal in respect of packages. In general we support the expansion of the package definition to include dynamic packaging. Once a clear difference between a package and an ATA can be established, we will be in a better position to decide the merits of covering the ATA model for insolvency. On our current reading, the ATA model should be capable of providing options for businesses within which to innovate; providing consumers with clear choices as to the type of products and level of protection they prefer. It is important, therefore, that the ATA definition is not so limited as to exclude possible future developments in marketing and arranging for combinations of travel services, or to allow for circumvention at the expense of businesses which are subject to the regime. On the other hand it may emerge in the negotiations the ATA model as intended may be so far removed from the package model that it is perceived as being, in effect, no different from consumers simply making their own independent bookings of separate components for their holidays, for which they may make their own insurance arrangements.

For now, assuming our understanding of the Commission's intended target is correct, we believe there is value in including the ATA model to provide protection for consumers against the insolvency of ATA facilitators and service providers, and to provide business with a choice of protected models within which to innovate. The likely costs of providing for that would, it seems to us, be counterbalanced by the financial value to the respective service providers of benefitting from targeted referrals to their services. However, we also consider that the relationships between the different travel service providers in the ATA model are likely to be comparatively loose, to the extent that it is difficult to justify applying the full range of protections and obligations in the Proposal.

We agree with Proposals to change the term "Assisted travel Arrangement" (ATA) to "Linked Travel Arrangement" (LTA) as this better describes the role of those facilitating this purchase method.

In respect of offers from service providers being made available via search engines or comparison websites, it seems clear at present that these functions are in essence merely methods of advertising; and that the consumer is aware that when they click on one of the offers they are directed to the website of a single service provider. However, if these services are developed to the point that they fall within either the definitions of an ATA or a package then they would be subject to the regime irrespective of how the trader characterises the service.

Article 3(8) & (9)

Question 15

Are the different roles of organiser and retailer sufficiently well defined?

Summary of responses

We received fifteen responses: nine from the trade; one from a consumer representative; two from enforcers and three from others, including one law firm.

Five felt that the definitions were sufficiently clear. However, several were concerned about the definition of retailer, which is most pertinent to the definition of an ATA, and argued that clarity was needed to ensure that where a travel service provider (not just an agent for a service provider) creates and sells such an arrangement that service provider should be considered a “retailer”, and therefore responsible for meeting the requirements of the Proposal.

Others commented that the definitions of organiser and retailer should cover those who act as agents for the consumer, in order to avoid circumvention. They also raised the possibility of difficulties for the enforcement authorities where there is more than one organiser under the Proposal’s definitions and none has elected to take responsibility for the arrangement.

Some extracts from responses:

“The definition of a retailer is not totally clear as the organiser will not always be trading as an agent for other travel services. It is possible, and very likely, that the sales of Assisted Travel Arrangements will be made on the basis of the traveller concluding a contract direct with one trader acting as a Principal (i.e. an airline may facilitate the purchase of other travel services from another travel service provider).”

“A retailer/facilitator can only have contractual obligations to its own customers but has no obligations linked to any separate contract concluded by the same customer with other service providers. “

“Consumers are likely to remain unclear about role of online discount companies and the role they play in advertising the package, making the necessary arrangement and providing any financial protection.”

“The proposal that all parties would be considered organisers unless otherwise established could lead to this line being blurred even further and would cause serious problems for enforcers when trying to decide who is responsible for the arrangement. The definition of organiser also appears to exclude those acting as Agent for Consumer.”

“We do not think that the assignment of organiser status should be left to contractual arrangements because it is very likely the commercial parties will try to push the ‘organiser liability’ onto the other wherever possible. In practice, either the parties will fail to reach any clear agreement or the party with the least scale and bargaining power is likely to end up carrying that risk under the relevant contract.”

The Government's Response

As mentioned above, we take the point that the “agent for the consumer” model should be covered by the Proposal, whether that can be accounted for by amendments to these definitions or otherwise.

We also agree that the definition of a retailer could be read as excluding the service provider of the first element of an ATA where the service provider (for example an airline) is selling an element of an ATA direct. We do not believe this is the Commission's intention because the ATA model is designed to cover the looser click-through model where commonly the click-through is from one service provider to another. **We believe the definition of a retailer should be clarified to cover this.**

Question 16

Do you agree that businesses will be able to agree among themselves, presumably through contractual arrangements, which should be designated the organiser where a package consists two or more separate contracts with suppliers?

Please provide any other comments or views on the scope of the Proposal or the definitions not covered above.

Summary of responses

We received thirteen responses to the first part of this question: seven from the trade; one from a consumer representative; three from enforcement authorities; and two from law firms.

In general, the trade felt that contractual arrangements could be made to ensure that agreements would result in one responsible organiser. However, there were also serious concerns as to the practicability of this approach. Concern was expressed that some of the technical means of creating a package might not facilitate the immediate recognition or nomination of a single organiser.

A cross section of respondents commented that arrangements should be in place such that the consumer must be informed which trader would be the nominated “organiser” before agreeing any contracts.

Extracts from responses:

“It would seem that an agreement should be able to be reached quite easily on this in many circumstances but we also recognise that there could be uncertainty at times and we believe this proposal should be revisited.”

“It seems sensible that contractual arrangements between parties should be able to provide for a clear lead in most circumstances. ...members have expressed a

concern in relation to whether this is practicable in reality, and that there will be a level of uncertainty that is not addressed in these proposals.”

“In reality we suspect there will be a lot of confusion here for consumers and traders alike, with multiple chains of would-be agents/sub-agents/retailers, leaving a Court to decide who is/are the organiser(s). But a few robust Judgments, one way or the other, will help clarify for all.”

“No, as online discount companies will often only accept a limited role in advertising a late availability holiday.”

“We do have concerns that some the proposals would result in the possibility of there being more than one organiser in the sale of a package holiday. We believe this could be fraught with problems where both deny responsibility when things go wrong. We believe it must be clear before the package is sold exactly who is taking the role and responsibility of acting as the organiser and as a result, taking responsibility for failures that may occur.”

“While businesses would be able to enter into such agreements, the question is surely what happens if they do not, or resile from them, or dispute proper performance, and whether that might prejudice consumers' chance of a prompt resolution to a complaint. The consumer needs to know to whom to address their complaint: either the provider of the service they have bought directly e.g. a hotel, or an organiser. If a supplier denies being an organiser and (therefore) denies liability for a fellow supplier's services, in practice the consumer will only have recourse to the supplier whose services were at fault.”

“This should be possible through contractual arrangements. Of more importance will be making this clear to consumers and obvious to all the parties involved when consumers claim their protection.”

“Whilst in theory, this may happen, our experience is that in practice, many arrangements of the type which will fall into the scope of protection, may be created by the use of XML feeds or other technology, where the level of human interaction between the supplying parties may be very limited. As such, we doubt whether contractual arrangements can address areas of responsibility like this.”

“We would suggest that where businesses are agreeing amongst themselves to supply elements of a ‘package’ that there is a requirement that there should be a contract in place that specifies which business is to be determined as the organiser rather than leaving businesses to decide this themselves on a case by case basis.”

The Government’s Response

There are clearly concerns that relying on traders to agree amongst themselves who in each case should take on the responsibilities of complying with the new regime might lead to difficulties. This is particularly so where a package is created through the purchase of elements under separate contracts and where the suppliers do not agree or may not be necessarily be aware under their current arrangements.

It seems to us that requiring service providers to identify a single “organiser” to the consumer before the sale or creation of a package would encourage the parties to make suitable arrangements among themselves. This would suggest that the scenario of two organisers carrying the responsibilities of the Proposal, which would cause confusion for consumers and the trade, could be avoided.

Indeed, simply placing joint liability on the service providers does not necessarily help the consumer in practical terms. Where neither trader has acknowledged the responsibility, they are unlikely to have taken steps to provide for the protections required, so the consumer would be unlikely to benefit without going through a potentially protracted process, possibly involving the courts and possibly across borders. The essential intent of the regime would therefore not have been met. **Irrespective of the methods used which result in a package, there should be a single entity clearly identified to the consumer as the organiser for the purposes of the Proposal, before the contract or contracts are agreed. Responsibility for ensuring clarity on this point would rest with all the service providers involved if necessary.** It will be for business to ensure that their arrangements with others take account of the fact that their services might form part of a package and to facilitate the provision of this information.

Additional Comments on Definitions (Article 3).

One respondent had further comments on the definitions section of the Proposal.

‘assisted travel arrangement’ — the present definition needs to be redefined and elaborated in order for the traveller booking travel services which fall under the definition of ‘assisted travel arrangement’ to be clear that all the components of the travellers booking will not have the full protection under the Directive given to packages.

The Government’s Response - This is covered in the Proposal under Article 17

‘framework contract’ - this concept needs to be clearly defined so that there is a common understanding throughout the EU as to what type of business travel arrangements come under this head and therefore are outside the Directive.

The Government’s Response - We agree, see comments under Questions 3, 4, & 5.

‘trader - means any person who is acting for purposes relating to his trade, business, craft or profession. The word ‘craft’ either needs to be replaced or deleted altogether as it’s synonymous with trade and therefore confusing in the context of travel arrangements.

The Government’s Response - The Commission is using a definition which is common to other EU consumer protection legislation. If the word “craft” does not apply in this sector then its inclusion should not give rise to problems.

‘durable medium’ - this needs to perhaps be redefined since its covering the

transmission of information which for example might be transmitted by other means such as telecommunication.

The Government's Response – Again, this is a common definition used in other consumer protection legislation. In our view it covers the nature of the medium on which the information is transmitted, irrespective of the means of transmission.

'lack of conformity'- these words are not as clear and a little confusing. We will submit that the EC should use 'improper performance' which was previously used in Directive 90/314/1990. Perhaps 'improper performance' could be defined as meaning, 'failure to perform or not performing the travel services in accordance with the contract'. These are the words used in the 1990 Directive and there is a lot of jurisprudence in existence in the member states as to their meaning and effect.

The Government's Response – We do not agree that it is necessary to change the Commission's approach here. Lack of conformity is defined in the Proposal and seems sufficiently clear. The contract(s) is for travel services, so reference is made to travel services in the definition.

'contract' means the agreement linking the consumer to the organiser and/or the retailer. This was the definition of 'contract' in Directive 90/314/1990. It has been omitted from the present draft; however, a definition of 'contract' is important for clarity in the Directive. Perhaps wording such as 'contract' means the agreement linking the traveller to the organiser and/ or the trader.'

The Government's Response – The Commission is proposing a definition of "package travel contract" to make it clear, given the wider range of packaging models intended to be covered, that there will not necessarily be a single contract covering all of the services in a package. **Given the proposed definition of 'package travel contract', and the references to 'a contract on all services' and 'separate contracts concluded with individual travel service providers', we do not believe that a further definition of 'contract' is necessary.**

The present Directive speaks of 'extraordinary circumstances' but does not define these words. Similar wording as defined in Regulation 1177/2010 might be of assistance 'extraordinary circumstances' is defined to include, but not be limited to, natural disasters such as fires and earthquakes, terrorist attacks, wars and military or civil armed conflicts, uprisings, military or illegal confiscations, labour conflicts, landing any sick, injured or dead person, search and rescue operations at sea or inland waterways, measures necessary to protect the environment, decisions taken by traffic management bodies or port authorities, or decisions by the competent authorities with regard to public order and safety as well as to cover urgent transport needs.'

'unavoidable circumstances' needs to be defined as to whether it is covering a 'force majeure' type of situation. If so than perhaps the definition should mean unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded,

the consequences of which could not have been avoided even if all due care had been exercised.

The Government's Response – Article 3(11) contains a definition of “unavoidable and extraordinary circumstances” which is the phrase used in the Proposal. Recital (26) provides some further guidance to supplement the definition. Clarity as to the meaning of this phrase is a concern shared by several Member States at present. However, we believe the proposed formulation, or perhaps reverting to the current formulation is likely to be adequate. We are not convinced by arguments that official advice should be a prerequisite for these circumstances being invoked. Official advice should not become the only indicator for business as to when they might be able to rely on exemptions and conditions in these circumstances, nor when consumers are entitled to additional help. Such reliance could diminish consumer protection in certain circumstances. Official advice will not be issued to cover all of these circumstances and ultimately it is the businesses responsibility to consider all of the circumstances before invoking these circumstances, and it should remain to be for the courts to decide ultimately in any particular case whether it was right that these circumstances were invoked in the context of the Directive. Official advice often differs between Member States depending on different interpretations and perspectives of events. **It is inevitable that, particularly in respect of safety, organisers will be guided by official advice, but it should not in our view form a formal part of any definition.**

‘special medical assistance’ - this needs to be defined with reference to Chapter IV 6.

The Government's Response – the phrase used in Article 11.6 is “*specific* medical assistance” and occurs in relation to circumstances where the organiser has to be notified of the particular needs of a consumer. We do not, therefore, believe there is a need for a definition because the organiser will be informed by the consumers concerned about the required assistance.

Chapter 2 – Information obligations and content of the package travel contract

Article 4 - Pre-contractual information

Article 4.1 & 4.2

Question 17

Do you agree that the bulk of the pre-contractual information is likely to be provided by a responsible business in advance of a consumer agreeing a contract irrespective of a legal requirement to do so?

Do you agree that providing such a list in the Proposal assists business by providing certainty as to the minimum level of information they should supply.

Are there elements of the pre-contractual requirements which might cause difficulty, taking in to account that we believe the intention is that all of this information forms a part of the contract if agreed?

Are there improvements or clarifications from which the list would benefit? If so please specify?

Is there anything missing from the list?

Summary of responses

We received sixteen responses to these questions: nine from the trade; two from consumer representatives; three representing enforcement authorities and two others, including one law firm.

All of those that responded agreed that for the most part the information listed was either required under the current regime already or by other legislation. Similarly those who responded agreed that it would help business to have a list setting out a minimum level of information required for the sector, including five of the trade respondents.

Common concerns were expressed in relation to some of the items listed, in particular, those requiring information about the language in which services will be delivered, and the broad requirement for information about access to persons of reduced mobility. However a consumer representative felt there was scope to expand this element of the requirement. Some concern was also expressed about the fact that some of the information becomes a contractual obligation in relation to which any change may have consequences in relation to the liability provision; change could come about as a result of matters beyond the control of the organiser, for example the impact of traffic or delays to flights etc.

Others expressed concern about the detail required, particularly in respect of the dynamic packaging model where the organiser may not have access to the information in relation to all of the choices they make available.

Requiring an indication of the “tourist category” of the accommodation was observed by one respondent as being potentially meaningless because of the variety of categorising systems adopted world-wide.

Two respondents proposed adding information about the insolvency protection provided with the package, one of which also suggested that, based on the proposed Article 15, information about the language used to deal with claims should be included.

Some extracts from comments:

“We feel that the provisions concerning the support for Persons with Reduced Mobility is not liable to give the desired results and feel that it would be more practical for traders to give details on availability of access rather than guaranteeing the access.

- We would also suggest the removal of the passenger having to be told in which language the services will be offered.”

“...has concerns that as drafted, information provisions concerning support for Persons with Reduced Mobility (PRMs) could in fact have the adverse impact of the original intention. The required information for travellers is "whether access for persons with reduced mobility is guaranteed throughout the trip or holiday". The only realistic information that the trader can give in respect of this is that access is not guaranteed. A more practical and helpful requirement will be for traders to have to give information on the availability of access.

We are also concerned that the proposed Directive makes provision for the customer to be told in what language the services will be offered. Although we see the logic of the sentiment, this is a very difficult task to achieve and is overly-burdensome to comply with. We recommend that this provision is removed from the text.”

“The requirement for Insolvency Protection should be included in Article 4.”

“...believes that in view of the practical issues arising where consumers’ protection is provided by the protection arrangers in a different country, then the relevant information should also be made available (for example, the availability of facilities in the consumer’s native language).”

“ Article 4

1. (a) (vii) ‘whether access for persons with reduced mobility is guaranteed throughout the trip or holiday.’ These requirements need to be clarified and defined since access for persons with reduced mobility where passengers travelling by ships and ferries is covered adequately in Regulation 1177/2010. Hence the Directive should not apply to cruises where Regulation 1177/2010 is in force. For consistency the same wording should be used in these Directive otherwise the test will be different for the land based part of a cruise booking.”

“...ii. A minimum list of information to be provided is useful; the detail required is impractical.

iii. Art.4(1)(a)(ii) is too strict. Many aspects of programmes are traffic dependent. An intended 2 or 3 hours stop in the middle of a day may be curtailed if traffic conditions dictate. Similarly, conditions at certain key sights might cause delay or even a last-minute decision to offer an alternative; extreme over-crowding, for example...

Art.4(1)(a)(iii) may be problematic. An operator may wish to change accommodation providers - for example if the group size is smaller than anticipated and a hotel better suited to the itinerary thereby becomes an option (e.g. a smaller centrally-located property)...Using "tourist category" as the one criteria by which you judge a hotel is both crude and obsolete; few people choose hotels on this basis alone. There are also important problems with the classification system. For example, a hotel in Spain may not be classed as 4* unless a certain proportion of its rooms have central heating. The right 3* may be a much better (and possibly more expensive) option on a particular tour, group-size permitting...

Art.4(1)(f) seems to place an unreasonably high burden of knowledge on the operator. It is reasonable to require them to remind travelers of the countries (including transit countries) visited and general visa requirements, but they cannot be expected to remain up-to-date as to the exact requirements of all countries of all nationalities, nor the processing speed... the adult traveler should be in no doubt as to their own responsibility for ensuring they have adequate paperwork to travel. It is unclear what 'general information on health formalities' might be..."

"The list may also include information as to what type of protection is offered for that particular product or package and any limitation of liabilities under recognised treaties and conventions."

"The recital [24] expressly states that the list of information to be provided is exhaustive. However, information may still be required to be supplied as a result of the UCPD/CPRs in particular cases. We would suggest that the recital is amended to clarify that. We consider that the specificity is helpful concerning the requirements for information on the language(s) in which any activities which form part of the contract(s) will be carried out, and whether access for persons with reduced mobility is guaranteed throughout the trip or holiday."

"We would suggest that the name of the entity that is ultimately taking payment from the consumer is added. In the case of payment by card, the consumer would see this name on their statement and there is less likelihood of consumer confusion where a name they were not expecting was to be shown."

"On the 3rd sub-question, we are concerned that a 'bland' approach to the application of information under Article 4 (1) (a) (vii) will be applied...The question of 'guarantee' is perhaps difficult for Travel Companies on this issue, because they will argue the nature of holiday properties creates some difficulty for them. We would argue that the growth of disabled travel imports a moral obligation (whatever of travel trade bodies Code of Conduct), to ensure that the product is fit for the use of those with reduced mobility... we wonder whether Article 4 should import the ability for the Member State to include an additional sanction on those who fail to provide such a 'guarantee' over and above that which currently applies. The provision could be improved by stating that the:

1. The hotel, resort, cruise ship or aircraft is free from defect;
2. Consumers should physically receive this information;
3. The form in which it should be provided to the Consumer, and
4. The moment or period when they will receive that information.”

“The following information should be added:

the period of stay should include the number of nights;
information on the method of calculating costs which cannot be given in advance including the eventual price increase after the conclusion of the contract;
information on the means and timescale for redress (complaints handling, alternative dispute resolution) in case of problems;
information regarding risks arising from natural disasters, public health, public order and other interruptive sources;
meaningful information on the category of the accommodation;
for trips in foreign countries the specific hotel should be named; accurate descriptions of the services available at the place of destination;
information on the insolvency protection and liability insurance of the tour operator.”

“Whilst in general, we are content with these provisions, we are a little concerned with the potential impacts of clause 4(1)(a)(vii). Compliance will be relatively straight forward for a tour operator selling a simple point to point flight + accommodation package...we anticipate that there will be more challenges for Organisers putting together dynamic packages, who may not have the same level of knowledge regarding all the facilities and services available on the itinerary, including identifying any factors which may impact on the ability to “guarantee” delivery to PRMs [persons of reduced mobility].

We question the purpose and benefit of the information requirement for organisers to state the “languages in which the activities will be carried out”.

“activities” could presumably mean anything that forms part of the package

It places additional/unnecessary burden on checking languages of local staff.

When many people working in the travel industry are multi-lingual is this really an issue?

Most travellers would assume activities run by local suppliers will be carried out with an emphasis on the local language (depending on the nature of the accommodation or service offered).

Article 4.1(e) regarding the minimum number persons required for a package to take place and that a package can't be cancelled less than 20 days before the start of the package. We note that in a number of instances, holidays may only be put together less than 20 days before departure.”

The Government's Response

In general we are content that, in order for consumers to be able to make a properly informed decision in this sector, there is a need to specify with some precision the

information required to be supplied to a consumer pre-contract. We believe that on the whole the Commission has adequately identified the nature and level of information necessary for these purposes.

In respect of suggestions that elements of these requirements should be tightened further, we are not convinced that this would result in any significant additional protection for consumers, and there is a risk that these requirements would become over burdensome. For example, we believe a requirement to provide the location of accommodation, as proposed, would include the name and address of a hotel, and that an itinerary would necessarily need to specify the number of nights of a stay. Other information, such as the availability of complaints handling systems and the means of seeking redress would, in our view, be better placed in the context of the contract and is not necessarily important information at the marketing stage.

In response to a point raised about the interaction of these requirements with other law, the Proposal is clear that it is without prejudice to information requirements in other EU legislation such as the Unfair Commercial Practices Directive.

We have noted that a minority of the proposed information requirements are likely to be either too burdensome or not practical to provide, especially for the new range of organisers which will be covered; also that some of the requirements appear to be too wide or not flexible enough. However, we believe that a change to the accommodation provider, as mentioned by one respondent, should continue to be a significant change which triggers the significant change rights in Article 9. The possibility of such a change is accounted for, subject to the conditions in Article 5 (requiring notification to the consumer of such a possibility before any contracts are agreed).

“(vii) whether access for persons with reduced mobility is guaranteed throughout the trip or holiday;” seems likely to have the effect of discouraging information about access to people of reduced mobility. It is not practical for an organiser to be aware of reduced mobility access *throughout the holiday*, particularly in relation to elements which do not form a part of the contract or contracts. Organisers will be left with little choice but to say that they cannot provide such a guarantee, even though the arrangements might be perfectly acceptable in terms of access to transport and access to the accommodation which are the subject of the contract(s). **We therefore favour an approach which requires the provision of information covering access to the contracted for services, and that organisers should respond where they are able to any further enquiries which consumers with specific mobility concerns raise with them.**

We agree that a general requirement to provide information on which language the activities will be carried out is too burdensome, especially in relation to the dynamic packaging model where organisers are not necessarily organising or supplying additional services but are simply providing the option to buy additional activities provided by third parties. Clearly, where it is a selling point, businesses will voluntarily provide information that activities will be conducted in English, or that the service includes interpretation. In other circumstances, it is likely to be obvious that there is the possibility that activities will be conducted in the language of the country being visited.

It is worth noting that where being informed about the language of an activity is important information which the average consumer would need in order to make an informed decision

about the purchase of a particular service, for example a lecture or special interest activity, then the omission of that information might be an offence under the Consumer Protection from Unfair Trading Regulations 2008 as a misleading omission. **There is no need for a requirement relating to the provision information about language except where other tourist services comprise a part of a package and the consumer's enjoyment of those services depends on effective oral communication. Otherwise, compliance would be too burdensome, especially in view of the fact that we are not aware that lack of this information is the cause of any significant levels of complaint or consumer detriment.**

We agree with the Commission that information on the tourism category of accommodation can be a useful indicator of quality and available facilities. However, we are aware that categorisation systems and standards vary considerably across Member States. Some have formal government based schemes, others have voluntary schemes which may or may not be independently verified, indicating a range of varying qualifying criteria for the different levels of categorisation. **We believe, therefore, that any requirement should be qualified as being "where applicable".**

We are persuaded that, in some circumstances, where the minimum number of travellers required for a package to proceed is not achieved, requiring a minimum period of 20 days notice prior to travel is likely to have an unnecessarily restrictive effect on the market for these particular arrangements. The industry observes that some such arrangements only make their "quota" up to two weeks prior to departure and that consumers would in general prefer the arrangements to go ahead, rather than have to make alternative arrangements because of cancellation. For the vast majority of sales of packages there is no minimum limit.

Those that do apply such a condition are likely to be specialist and relatively small scale activity programmes, or may be dependent on circumstances where the arrangements are only put together at short notice, for example where a sports team progresses through the stages of an international tournament, or where an unexpected natural phenomenon occurs. In such circumstances it is important that consumers are informed of the conditions under which the arrangements will proceed, and of the minimum period which will apply to cancellation notice for the particular arrangement.

This is important information which must, as proposed, be provided in a clear and comprehensible manner prior to agreeing any contracts, but in our view consumers of such arrangements are capable of making a decision as to whether such conditions are acceptable to them. In general, we believe that, where consumers are provided with adequate information on which to make an informed decision, business will design products and make available services designed for consumers' needs under conditions acceptable to consumers. **We are therefore of the view that pre-contractual information about minimum numbers and the applicable notice period for cancellation should be provided, but that the notice period should be for the trader to decide.**

We agree that information about the insolvency protection applied to packages and ATAs is important for consumers before they buy. This may inform their choice between a package, ATA or independent travel options. This is particularly so where, if, as the Commission proposes in Article 15, the insolvency protection is more likely to be provided under schemes operated in other Member States.

Article 4.1(g)

Question 18

Is this Proposal clear enough?

Would this Proposal cause any significant difficulties in practice? If so, please explain.

Summary of responses

Thirteen respondents commented on these questions: six from the trade; two from consumer representatives; three from enforcement interests and two from others. Five of the trade respondents agreed that consumers should be informed whenever a package has been or is about to be created and this view was shared by the other respondents. Three trade respondents felt that the provision of this information would not be straightforward in respect of the dynamic packaging model where the creation of the package is in the hands of the consumer, although two did not pick up on this point. A consumer representative and an enforcement interest also observed that it would not necessarily be clear in respect of the dynamic packaging model.

Two of the enforcement interests, one consumer interest and one of the “others”, a legal firm, felt the Proposal should go further, particularly in respect of the online dynamic package model; by requiring information at each stage of the process on whether proceeding would result in a package or whether it would not. Some of the trade respondents argued that providing information that a package would not be created would be difficult in respect of the online model.

Extracts from responses:

“There are significant practical issues potentially created by this. In the majority of cases, the seller will likely deduce that protected arrangements are not being created; therefore, they will not communicate this to the consumer. It is unrealistic to expect businesses to provide consumers with ‘if this happens’ information.”

“Prominence of this information is all important.”

“Our view, bearing in mind experiences shared with us by consumers, is that there is some poor practice and avoidance of this issue by organisers. We feel that a better and more fully prescribed solution within the Directive would provide significant benefit to the consumer.”

“No. It seems burdensome to include extensive information with every product on the chance it may be included in a package.”

“The Proposal is clear enough and though it may be difficult to do, it is necessary. It should extend to the nature of the protections offered and how those protections can be accessed.

We believe that the PTD should go further. In view of the inevitable continued existence of unprotected sales (single travel components, for example, as well as (possibly) future new ways of selling package-like arrangements that are not covered by the Directive) the protected / unprotected status of travel components should be clear to consumers at each stage of the selection process. Consumers' ability to exercise effective choice would be impaired if it were only immediately prior to contract (or after contract) that they learned that the sales were or were not protected, because by then they will inevitably have put considerable effort into choosing."

"...while the Directive includes a number of proposals to improve the provision of information to consumers, they need to go further. We believe that the proposal should contain specific requirements for organisers and agents to make it clear throughout the buying process and at the point of sale the type of product the consumer is buying, and the consequence of that on their protections and rights. Where a seller sells a combination of protected and unprotected sales, they should be required to disclose to the consumer where sales are not protected as well as where they are protected."

"We can see the difficulty between:

1. Article 3 (2) (b) (v) and Article 5 (b). The issue relates to the wording 'linked online booking processes'. Perhaps the distinction can be found in Article 3 (2) (b) (i) which refers to that part of the definition of what constitutes a Package as arising from it being:

"purchased from a single point of sale within the same booking process"

Whereas,

2. Article 3 (5) (b) refers to 'procurement' through the said processes
For Consumers, the difficulty will be how do they recognise an Article 3 (2) (b) (v) and Article 3 (5) (b) purchase?

It suggests that there will have to be very clear notices being given to Consumers during the purchasing journey; this would then remove the fear behind the proposition within this question!"

"In general, we believe that the proposal is clear. However, we agree with the point highlighted in the Call for Evidence, and believe that this may cause practical problems. We would however suggest that a bigger issue is the corollary to the situation described. If a travel provider is selling something which does not amount to a package or to Assisted Travel Arrangements, then there is no specific obligation on them to make that point clear. We would suggest that it should be necessary to do so."

The Government's Response

The need to minimise the consumer confusion and misunderstanding as to when the protections of the current Directive apply to products, as evidenced by the Commission's research, is one of the prime objectives of the Proposal.

We support the basic proposition that before buying a combination of products consumers should be informed that what they are buying is covered by the protections in the Directive. However, requiring warnings when consumers are not buying protected products would be to apply the Directive to products which are not currently in scope (the purchase of single travel or accommodation elements for example). This is a requirement which was proposed in the course of the European Parliament's consideration of the Proposal.

We take the view that this is not a practical or justifiable proposal. Given the many ways in which travel services, including packages, can be booked by consumers such a requirement suggests that each time a consumer buys a potential component of a package the seller would need to inform them that they were not buying a package. Travel services which are capable of comprising a part of a package range from all consumer transport services, hotel and other types of accommodation, car hire, to admission to theatre and other attractions. It would not be justifiable or proportionate in terms of consumer protection to impose a negative information provision of this type to all sales of these services.

We agree with a requirement that package organisers, including those enabling dynamic packaging, and those arranging ATAs, inform consumers before they complete a purchase that they are buying a protected product. This will provide clarity when buying a protected product. For those that choose not to buy protected products, guidance and advice to consumers to the effect that unless they are informed that the protections apply they should assume that they do not is an important element of how the new regime should be presented.

If business offers both protected and unprotected products, and elements of their presentation might mislead a consumer into thinking that unprotected products are protected, this would be covered by the Consumer Protection from Unfair Trading Regulations 2008 (implementing the Unfair Commercial Practices Directive) as misleading practices.

Article 5 – Binding character of the pre-contractual information and conclusion of the contract.

Question 19

Please provide any comments on the effects of Article 5.

Summary of responses

Six responses were received to this question: four from the trade and two from enforcement interests. Two trade respondents considered that the provisions of Article 5 would have an impact on the market. They expressed concern that the provisions did not provide enough

allowance for the imposition of hotel taxes between the time of the conclusion of the contract and the time of delivery. One enforcement interest was content with the provisions while the other expressed concern that any allowance in respect of elements for which the price, at the time of the sale, could not be calculated in advance should be tightened up.

Extracts from responses:

“Art.5(2), with reference to Art.4(1)(c), might be interpreted in such a way as to leave an operator exposed to the cost of an overnight tax that is imposed between the conclusion of the contract and the stay in question. We have seen many examples in recent years, particularly in Italy, of overnight taxes being introduced at relatively (or very) short notice. It is not that such costs "cannot reasonably be calculated"; it may be that they are simply unknown. Such costs should not become the liability of the operator, so there should be a specific exclusion for liability for such local taxes. ...we would suggest that any tax that comes into force after the contract is concluded should be excluded from the information requirements unless the organiser has been made aware by its suppliers or otherwise.”

“The provision of article 5 should only be applicable where the trader has demonstrated that the costs could not have been calculated at the time of the contract or that there was no reasonable means of giving the consumer an indication of these. It should also be suggested that the terms of the contract covering the provisions of article 5 should be bold, precise and compelling in order that the consumer can make an informed decision.”

“We are not convinced the drafting of Article 5 gives an organiser sufficient protection to pass on taxes that may have been introduced after the booking is made. There are recent examples in Italy of ‘City Taxes’ which were introduced at relatively short notice and payable by customers on check-in at the hotel. If these taxes were not contemplated by the organiser and outside the control of the organiser to pay, then the traveller should still bear these fees, even if the organiser has not highlighted their possibility in their marketing material prior to the contract being agreed.”

The Government’s Response

We believe that the late imposition of local taxes is adequately accounted for in Article 8 of the Proposal. This allows for alteration of the price where the contract expressly provides for the possibility of price increases and decreases in relation to the level of taxes included in the cost of travel services imposed by third parties not directly involved in the provision of the travel services.

Under the Proposal such changes in price must be brought to the attention of the consumer at least 20 days before the start of the package and consumers must also be provided with a justification of the price change. The current time limit in the UK is 30 days. None of the trade respondents to the questions relating to Article 8, in particular Question 23, argued that 20 days is too short to enable them to account for the imposition of taxes.

We believe there is adequate allowance in the Proposal to account for price changes which are outside of the organiser’s control and which occur, either as the result of

not being able to calculate them in advance of the conclusion of the contract, or which are imposed after the conclusion of the contract.

Although not commented on in the responses, we believe there is room for more clarity in Article 5, in particular that **the traveller should always be supplied with a copy of the contract on a durable medium, irrespective of whether they also receive a “confirmation of the contract” (Article 5.3).**

We are not convinced that there is a need for tightening the pre-contractual requirements in respect of charges which cannot be reasonably calculated in advance. In our view, where there is doubt that such a charge cannot be reasonably calculated in advance, the courts are capable of applying the test of reasonableness. Under the Proposal, the consumer must be told they may have to pay such charges before the conclusion of the contract, so the consumer can choose not to buy the product if at that stage they are not happy.

In practice, the pre-contractual information will be provided in the course of marketing or advertising products by the organiser. Increasingly this information is being provided online as the consumer shops for their holiday or break; the time between being presented with the pre-contractual information and agreeing the contract is likely in those circumstances to be short. Provided consumers know that they are paying for all the services comprising the package (subject to the allowance for price increases in limited circumstances in Article 8) we believe it is unlikely that the price of those services will differ significantly for the reasons set out in Article 4.1(c) from the price presented pre-contract. Further restrictions in this area might unnecessarily limit the type of offer available, particularly where additional services are being offered but where the price is not available from a third party such as car hire where a firm quote is sought just before the contracts are agreed.

Article 6 - contents of a package contract and documents to be provided before travel.

Article 6.2, Article 6.2(e), Article 6.4

Question 20

Are there any elements of Article 6 which are unclear?
Are there any elements of Article 6 which cause particular difficulties or undue expense? If so, please explain and provide any supporting evidence.

Summary of responses

We received seven responses to this question: five from the trade; one from a consumer representative and one from an enforcement interest. No respondents expressed concerns about the nature of the information required to be included in the contract. Some respondents made particular comments with a view to clarifying the drafting, in particular in relation to the coverage of unaccompanied minors and the need to reflect the obligation on the consumer in Article 12.3 to inform the organiser of any lack of conformity with the contract without undue delay. The apparent option of including this information in the “confirmation of the contract” or the contract also caused some confusion.

Extracts from comments received:

“...would like clarification on the confirmation of the contract (Article 6 (2) which we feel is not clear

- Article 12.3 places the onus on the traveller to inform the organiser without undue delay of a lack of conformity and Article 6.2(c) should be consistent with that. Therefore not only should it state that the contract must give details of a contact point for complaints, but should also state that the contract must include an instruction to the traveller that they must complain at the earliest opportunity. (See current PTR 15 (9))

- According to the wording of the proposed text (Article 6.2 (f)), parents or legal guardians of minors would need to be provided with details of their own children going on holiday with them. We believe this should be when they are travelling without their parent or legal guardian and it should be noted that the contact information should only be available to parents or legal guardians which protects minors whilst providing clarity to parents and legal guardians about the minor’s travel arrangements.”

“This information should be in a prescribed format so this important legal information is clearly differentiated from other documents provided.”

“We would suggest that within the wording of Article 6 (2) (g) the following wording should be added:

“Before embarking on these mechanisms you should consider seeking independent advices”.

We suggest this simply because of the large number of holidaymakers who currently receive similar guidance from Travel Industry sources.

Consumers are often disadvantaged because no matter what we think of these mechanisms, they are still legalistic in nature (particularly when a travel company introduces their own legal representatives into the equation).

With regards to Article 6 (4), we would suggest the introduction of a timeframe – at least 14 days before travel. Even where travel is booked at the last minute, it should be perfectly possible to deliver these items via electronic mechanisms prior to departure or at least have the agreement to collect them from a named source at the departure airport; this measure alone would reduce the number of ‘no document’ complaints!”

“We question the drafting of Article 6(2)(b)(iii). Taking a situation where an Organiser has either bonds or insurance in place, the clause suggests that the Organiser needs to provide details of the bond obligor. In practice, that would never happen, and the details will be given of the body holding the financial protection – such as the CAA, ABTA etc. Whilst this appears minor, we believe that this should be corrected.”

The Government's Response

We agree that the reference to providing this information in the contract or the confirmation of the contract in Article 6.2 is potentially confusing and does not meet the objective. In our view **the information must be included in the contract irrespective of whether another form of notification or confirmation of the contract is used.**

On Article 6.2(f), we agree that the coverage of special requirements in respect of minors is in need of clarification; in that it should refer to minors who are unaccompanied by their parents or legal guardians and that the contact points should be with the person or persons responsible for the minor's well-being while on the trip. It is also necessary in our view that "minor" should be defined for the purposes of the Proposal (person below the age of 18).

We agree that it would be helpful to reflect the obligation on the consumer to bring any non-conformity with the contract to the attention of the organiser without undue delay and that it should be included in Article 6.2(c).

It is not necessary, in our view, to prescribe the form in which the information listed in Article 6.2 should take, beyond the requirement that it forms a part of the contract and must be provided in a clear and prominent manner as proposed.

We do not agree that information on the availability of alternative dispute mechanisms needs to include advice that the consumer should seek independent advice before pursuing a complaint. Such advice is not in our view a matter for inclusion in the contract, which is the subject of Article 6.

We are not convinced that placing a firm time limit on providing the documents listed in article 6.4 before travel is necessary. The current regime contains a similar requirement; that this information is provided "in good time". We are not aware that this approach has caused significant problems and it appears to provide a degree of flexibility which seems necessary, especially in respect of arrangements which are agreed shortly before travel.

Chapter 3 – Changes to the contract before the start of a package.

Article 7 – transfer of the contract to another traveller.

Question 21

Does this differ from the current position or practice?

Summary of responses

Nine responses to this question were received: six from the trade; one from a consumer representative, one from enforcement; and one from a legal firm. The trade respondents expressed concern that the Proposal appears to change the situation in relation to the transfer of a booking to another person by the requirement that the trader can only charge an amount reflecting the actual costs it incurs in facilitating the transfer.

Some trade representatives also mentioned that in some circumstances, particularly where packages include a flight, that it may not be possible to transfer the arrangement because of restrictions on the airline ticket booked.

Extracts from responses:

“-This is a new and significant obligation on organisers, as currently, the charge to the consumer is that the costs associated with the transfer are charged and they add a fixed administration charge

- ...believes that the organisers should continue with this practice with the administration costs at a flat rate and the status quo be observed as it is not to the detriment of the client.”

“Yes, this implies a new and significant obligation on organisers. Current practice is often that package organisers charge the consumer the costs associated with the transfer levied by their suppliers, and make a fixed charge for their own administration costs.

...believes that organisers should continue to be able to recover their reasonable administration costs. This administration cost should be able to be expressed as a flat rate. It's unreasonable to expect organisers to calculate the exact amount of administration involved in each case. In any event the flat rate, if set at a reasonable level, wouldn't be unreasonable for any particular client.”

“Yes charges are often not proportionate and can be the full cost of the package. Non compliance with Unfair Terms in Consumer Contract Regulations is common with regards excessively high fees for amendments to contracts/cancellation of contracts charges.”

“Our members, on the whole, sell packages involving scheduled, as opposed to charter flights. The last ten years have seen a substantial reduction in flexibility shown by airlines to make amendments to existing bookings. Of those that responded, roughly 50% said they would allow changes for the charges imposed by the airline whilst almost 40% said that the airlines they sold would not allow name changes at all. In these cases, booking conditions make it clear that the cost of a transfer of a booking will be the full cost of a new flight ticket. It is vital for BIS to emphasise in its discussions with the Commission that the cost and ability to change is very different for packages and ATS based on scheduled as opposed to charter flights. In many cases scheduled airline contracts insist on an organiser ticketing almost immediately after the booking has been confirmed whereas for charter flights, tickets are frequently not issued until 14-21 days before departure.”

“There are some inclusions whose operation is dependent on demographics. For example, some sites provide reservations for people within a certain age ranges at different prices. It is imaginable that, were a young adult to transfer the contract to an older adult who did not meet the requirement for the original group reservation. In such circumstances it may be impossible to accommodate the transferee in all arrangements. It would be reasonable to allow operator to make clear any practical or potential difficulties so the transferee can make an informed decision.”

“This does not alter the current position, however, there are clear cases where transfer is requested between close family and friends and this has been refused, in some cases up to 4 weeks before departure. We would suggest the inclusion of the wording:

“and such reasonable request by the traveller shall not be unreasonably refused”.

The Government’s Response

In our view the possible consequences of a consumer transferring a booking to another should be included in the contract, including where, for example, the nature of a ticket contains restrictions, either in the event of cancellation or transfer, and any costs associated with that.

The Proposal allows for the possibility that some arrangements carry restrictions, for example in relation to the group a package is aimed at, by being clear that the person to whom an arrangement is to be transferred should meet any qualifying criteria.

The Proposal also allows for the charging of additional fees, charges or other costs arising from the transfer. This would include, in our view, any costs arising from the transfer of a flight ticket, or, where necessary, of the cancellation of a ticket and purchase of a new one in the name of the transferee. These consequential costs should not exceed the costs incurred by the organiser, although, of course, the organiser is likely to incur internal expenses in administering changes to arrangements and it is reasonable that these too should be recoverable in the circumstances.

We agree that it should remain possible for a business to apply a reasonable administration fee for the internal costs of transferring a booking (so long as it represents a genuine pre-estimate of those costs) in addition to any external costs incurred as the result of making the

changes (rebooking non-refundable flights etc.). **We would therefore like to see more clarity that these provisions do not exclude the possibility that organisers' internal administration charges (as opposed to extra charges imposed by third parties and resulting from changes to arrangements third parties) can be expressed as a standard rate on the basis that the fee is a genuine pre-estimate of internal administration costs incurred by the organisation for arranging transfers.**

Article 8 – Alteration of the price

Question 22

Do you have any evidence that currently permitted price increases exceed 10% of the total price of the package?

Summary of responses

Nine responses were received: five from the trade; one from consumer representatives; two from enforcement interests and one from a legal firm.

No respondent objected to the Proposal, which reflects substantially current requirements; that limited price increases should be permitted for reasons beyond the organiser's control.

Similarly it was observed, particularly by trader respondents, that a cap of 10% of the total cost of the package was not unreasonable and reflects voluntary rules under ABTA code of practice. However, some commented that the consequences of exceeding the 10% cap were not clear. None of the respondents who commented identified any significant experience of price increases of more than 10% under the current regime.

One enforcement organisation commented that they felt that setting a cap might have the effect of being perceived as a sort of allowance or default level which traders would take advantage of.

Extracts from responses:

"...We have no knowledge of any organisers exceeding this level or any comments ...and it would seem sensible that this is maintained as it is accepted by consumers and the trade alike."

"No. ...Members are bound by our Code of Conduct which requires companies to allow a customer to cancel if any surcharge exceeds 10% of the holiday price. It is then a decision for the customer whether to pay the surcharge and take their holiday or to receive a full refund. In practice currently, therefore, surcharges are unlikely to exceed 10% of the holiday price."

"Surcharges of over 10% are unheard of because (a) ...enforces a 10% rule for most of the industry and (b) it would be terrible PR for any company seeking such a swingeing increase. What is surprising is that there is no reference to the abolition (in the Proposal) of the 'absorb first 2%' rule. This is a good change for traders, as the

Current rules are fiddly to operate and risk creating a higher base price to allow for any 2% increase being absorbed, in times of uncertainty. The new rule will prevent this temptation.

“We note the proposal to introduce a cap of 10% on in-contract price revisions. Where caps are introduced there is, in our view, a real risk that the level of the cap will in practice become the 'default level' i.e. all rises will be at the level of the cap. To prevent this, the provision should say that increases will reflect the actual increases in costs experienced, but not be more than 10%. In addition, in line with unfair terms provisions on price variation, the consumer experiencing an increase in price should be able to cancel without experiencing any penalties for doing so.”

“You should refer to our Consumer stories on holiday price changes (some have different factors at play) as they demonstrate a +10% scenario in some cases. We would argue, as we currently do within the present PTD/PTR, that where price changes arise, Consumers will be able to rely on Article 9 rights.

By measuring it against the current +2% increase which appears to be unlimited thereafter, it could be argued that capping it at a level of 10% (we would have preferred a lower percentage) provides certainty to Consumers. ”

“It is a common feature among online travel agents that once a transaction is concluded, there is no change to the price a consumer pays. Customers' money is passed almost directly onto the service provider, whether that is an airline or hotel. For example, under IATA's BSP system OTAs will not hold on to customer monies for longer than 7 days. This is a key difference between OTAs and tour operators and thus affects the risk profile of these different travel arrangers.

We note that the only likely changes in the original price that might occur arise from fees outwith the control of the agent or supplier, such as airport fees. However, where these charges are contained within the original package price the changes are unlikely to be passed to the consumer.”

“We are not aware of any instances where cost increases would otherwise result in an increased cost in excess of 10%, so do not in general regard this as a problem. However, we note that the proposal contains no indication as to what should happen in the event that the Organiser does face cost increases which would require a price increase of more than 10%. We believe that the current UK provision that effectively provides a right to consumers to cancel the contract in those circumstances appears to be a sensible and appropriate addition to the text.”

The Government's Response

We believe there are sufficient safeguards in the Proposal against a 10% cap being used as an acceptable allowance, in particular the new requirement that when passing on an increase the organiser must provide a justification and a calculation. The conditions for allowing increases are limited only to those listed in Article 8.1 and there is no allowance for any additional cost increases to be included.

We agree that it would be helpful to clarify that any price increase, for permitted reasons, which exceeds 10%, should trigger the right to withdrawal as a significant change to the contract(s) in Article 9. While it would reflect the Proposal as it stands because a price increase of more than 10% is likely to be considered by the courts to be significant we believe it would be helpful to make this explicit.

Question 23

Will either element of this Proposal cause particular difficulties? If so, please explain and provide any supporting evidence.

Summary of responses

Nine responses were received: four from the trade; one from a consumer representative; two from enforcement interests; and one from a law firm.

The trade interests do not foresee any problems with a 20 day notice limit after which any increase could not be passed on. The enforcement commentators were split on the 20 day limit. One argued for retaining the current 30 day limit which applies in the UK, the other expressed the view that 20 days notice was sufficient.

The consumer representative expressed a preference for retaining a 30 day limit

Extracts from comments received:

“We would argue for a requirement for consumers to be notified of changes a minimum of 30 days prior to the start of the package, in line with the existing UK requirement, and would oppose the introduction of the more restrictive 20 day limit currently suggested which we do not consider provides enough protection for consumers.”

“The current UK time limit in which to notify the consumer of price increases is 30 days. The Directive proposes 20 days – this should be sufficient enough to enable the consumer to find alternative packages or to raise the funds to meet the increase.”

“We are uncomfortable with the 20 day limit and would prefer the 30 day period, simply because Consumers do not receive notices of price changes in good time; we argue that Consumers have to bear the brunt of a 10% increase (we acknowledge, however unlikely, the possibility of a decrease) then the latest period under Article 7 should be set at 30 days.”

“We do not regard either aspect as creating any particular difficulties.”

The Government’s Response

The current 30 day minimum notice of increases in the UK gold-plates the 20 days notice required in the current Directive. Given that respondents report that price increases of 10% of the cost of the whole package are rare, the majority of increases will be less than 10%. The proposed regime is such that price increases of less than 10% are permitted for limited reasons provided they are covered in the contract, so the consumer will be contractually obliged to pay these increases where they are justified and the consumer is in receipt of a relevant calculation to illustrate the justification. The notice period in the vast majority of cases is therefore to give consumers time to pay the increase (not to decide whether or not to continue with the arrangement).

As mentioned above, we will argue that increases of more than 10% should trigger the consumer’s right to cancel the package at no cost. Given that these cases are likely be relatively rare we believe a 20 day notice period is proportionate and will generally provide sufficient time for a consumer to make alternative arrangements where they choose to exercise their right to withdraw.

Article 9 – Alteration of other contract terms

Article 9.2

Question 24

Is there anything on the Article 4(a) list which you consider not to be a main characteristic of the travel service to the extent that significant alteration should entitle the consumer to withdraw from the contract and receive a full refund, and possibly additional compensation? Please explain your reasoning.

Summary of responses

Seven responses were received: five from the trade; one for a consumer representative; and one from the enforcement interest.

The trade representative expressed concern that changes to some of the items defined as main characteristics of a package (i.e. those listed in Article 4.1(a)) would not in themselves necessarily amount to a significant change to the package as a whole and should not therefore give rise to an automatic right to cancel.

The responses from the consumer and enforcement interests felt all items constitute main characteristics of a package.

Extracts from comments received:

“We totally agree that travellers have the right to be notified of any changes to their package but feel that they should only be given the option to cancel and receive a full refund if any changes are significant changes to the whole package. (such as days of departure, hotels, major flight time changes)

We do not feel that changes to items such as meals/excursions and similar changes are sufficiently significant to merit the cancellation and refund of the holiday and we therefore submit that Article 9.2 should be amended to reflect this. “

“...the right for the traveller to cancel the package as a result of such a change should only arise where the change results in a significant change to the package as a whole.

So, whilst we believe that such features are main characteristics of the package, we do not believe that significant changes to the individual characteristics will necessarily create a significant change to the package that should allow the consumer to withdraw from the contract. We believe that Article 9 2. should therefore be amended accordingly.”

“There are a number of reasons why changes need to be made to one “characteristic” but where the overall purpose, character and design of the package remain unchanged.”

“In Art.4(1)(a)(ii) the term 'intermediate stops' is used; in (v) 'visits, excursions or other services'. If circumstances dictate, a substitution or re-routing might make for a better day; they may indeed be constrained in the case of a short-notice site closure or traffic accident, or even adverse weather. Discretion to make such changes should remain; it would be reasonable to require this right of variation to be explicit in the information provided.”

“In relation to the final item, we note that in many countries, the tourist category of the accommodation may only reflect the tax bracket in which accommodation is allocated. Many tour operators attempt to provide a more objective classification of quality and standard by giving properties their own rating, and customers will normally pay more attention to these ratings (or indeed to general feedback sites, such as TripAdvisor) than to officially allocated ratings. We therefore question whether a change to the official rating should give rise to a right to cancel.”

The Government’s Response

We agree that Article 9.2 is tightly drafted and that there may be circumstances where a change to one of the items defined as essential might not necessarily have a significant impact on a package as a whole. However, there are circumstances when alteration of any of those items would be considered significant by the consumer, depending on the nature of the package. We do not therefore believe that any of the items should be removed, subject to our comments in relation to Question 17 on information on language.

Article 9.2 relates to significant changes in essential terms which become known in advance of the start of the package and is without prejudice to Article 9.1 which permits insignificant

changes to contractual terms. Alterations to itineraries which are needed because of circumstances which occur during a trip are covered under Article 11.

Given that insignificant changes are permitted and that the right to withdraw is only triggered by significant changes to a main characteristic of a package, which we believe can be interpreted as being significant in the context of the package, we do not believe these provisions as proposed would necessarily lead to significant additional burdens on business. It seems unlikely, for example, that where changes to individual items do become apparent before departure the consumer will choose to cancel the holiday if those changes are not significant in the context of the package as a whole.

Article 9.2 must also be read in conjunction with Article 9.3 which provides that in the event of significant changes to main characteristics the consumer is entitled to an adjustment in price where the changes accepted by the consumer result in arrangements of a lower quality or cost. It seems right that this should apply irrespective of whether the changes are significant in the context of the whole package, because they are services which the consumer has paid for in the expectation of a given level of quality.

We do not believe that Article 9 represents a significant change from the situation under the current regime.

Article 10 - Termination of the contract before the start of the package.

Article 10.2

Question 25

Is this provision clear enough?

Is this provision needed in practice when the organiser has the right to terminate the contract under the same circumstances with the same result for the consumer, given that the organiser is liable in any case for damage to the consumer as the result of negligence?

Summary of responses

Eleven responses to this question were received: seven from the trade, one from consumer representatives; one from enforcement interests; and two from legal firms.

Opinions between the trade representatives and the consumer and enforcement representatives were divided on how or whether consumers should have the right to terminate the contract in unavoidable and extraordinary circumstances, but all advocated more clarity on the circumstances in which the right might apply. The trade generally supported incorporating the wording of Recital 26 into the provision, arguing that the main indicating factor should be whether the FCO had issued travel warnings and advice. The consumer representative felt that such an approach is not reliable and cited the differences in advice from the FCO in the UK and authorities in other Member States, particularly in relation to the Red Sea resorts in Egypt.

The trade were concerned that consumers would seek to take advantage of such a right when, in fact, the destination resorts were safe or unaffected by issues occurring in a wider region which might gain extensive media coverage. In general, the trade confirmed that they did not think this new right for consumers was necessary given that the trade invariably abided by FCO advice in these circumstances.

One legal firm respondent observed the possibility of confusion as to the use of the term compensation in different contexts in Article 10, when in some cases what is meant is a fee for termination.

Extracts from responses:

“Not really. We feel that the Recital 26 clearly provides an outline of when unavoidable and extraordinary circumstances might be deemed to apply. This provides clarity and we would recommend that it is incorporated into the article to increase clarity.”

“No. ...believes this provision is not needed.”

“As currently drafted in the Proposal, this is fraught with difficulty and the risk of unnecessary litigation. This is because the clear idea, that this should link to Government Advice about where not to travel, is contained only in the Recitals and not in the Article itself. English Judges are notorious for just reading the words of a Regulation, and construing it – what does it actually mean? Not ‘what is the intention?’. So the nervous (or cynical) consumer may seek to cancel all sorts of holidays where there is trouble/illness/ a hurricane/whatever in a nearby country, whilst in reality there is no danger at their actual destination. This is very unfair, and burdensome to traders (who will have litigation to defend if they don’t return consumer moneys). The simple answer is to specify that the criterion is Government Travel Advice.”

“A number of our members expressed concerns at the definition of extraordinary events which may occur at the destination or in the vicinity. Naturally all members offer cancellation, re booking or a full refund when the UK’s FCO advises against travel but as currently drafted, it does seem quite possible, for example, that customers booked to the Red Sea resorts in Egypt, or to the beach resorts of Kenya in 2013 could have been faced with demands for cancellation despite there being no specific FCO advice against travel to the actual holiday destinations, but to other parts of the country. We believe the right to cancel should apply only where government advice is against travel to the destination booked.”

“We can envisage a case where the traveller considers the circumstances to meet Art.10(2) but an operator does not. For example, in the event of a terrorist attack on a public transport system some relatively short time before the traveller is due to leave. In the event that the operator considers on good local advice that the programme will, subject to some alteration be able to run as before (perhaps substituting a city sightseeing with a visit to an out-of-town location), and in the absence of a formal travel warning issued by a national authority, can the operator refuse to refund to an anxious traveller who prefers to stay at home? The criteria as to what constitutes

'significantly affecting' the package and the conditions precedent seem open to dispute."

"Article 10 does not reflect the restrictive position of Recital 26. We do not accept your proposition that the Consumer can gain redress in these circumstances for negligence (very few have succeeded!)

As we have seen this year with Egypt, the British Government is very much alone in maintaining travel advices to that country. The UK stands in isolation against many EU Member States and this delivers a serious detriment to UK holidaymakers.

...We would suggest that extreme care needs to be had with this provision and the EU Commission MUST recognise the extreme detriment suffered by UK Consumers.

If the provisions stand as they are, Travel Companies will continue to hide behind the PTD and the FCO; Consumers will argue "the right to terminate the contract without paying compensation where unavoidable and extraordinary circumstances like warfare or a natural disaster will significantly affect the package. Unavoidable and extraordinary circumstances should in particular be deemed to exist where reliable and publicly available reports, such as..."(this will take the form of other Member of Foreign States, News Channels, Social Networks etc).

Of all the provisions of the proposed PTD, this is one where the status quo is not tenable and it is therefore recommended that the UK Government and the EU Commission urgently look at this provision again!"

The Government's Response

It is important that a reasonable balance is achieved between the rights of consumers and the burdens on business in contractual relationships. Where a business is at fault it is not unreasonable that consumers should be entitled to recompense, or that the business carries the cost of, for example, cancellation or putting matters right. However, where there is no fault on the part of the trader, but the nature of the services on offer carry inherent risks that events beyond the control of either the trader or the consumer will affect delivery, then there appears to be no justification for expecting that the trader should carry the cost of additional compensation.

There is an inherent danger that products involving travel to other parts of the world will be subject to circumstances entirely beyond the control of the trader and we believe that, in general, consumers would acknowledge that this is a risk they too must be aware of and which may have consequences for them.

We are not convinced that the addition of this right necessarily adds much to the current situation where the consumer is entitled to a refund (but not compensation) where a trader is forced to cancel arrangements because of extraordinary circumstances. If the right is to be included, we are of the view that there is a need to clarify the circumstances in which it might be applied.

In the course of consideration by the European Parliament of this provision, amendments were proposed to extend the meaning of unforeseeable and extraordinary circumstances to the personal circumstances of the consumer, for example, consumer illness before travel, or unexpected bereavement. We do not agree that such circumstances should be the subject of a right to withdraw without paying a cancellation fee in accordance with the contract. These are issues which can be covered by travel insurance, and there is no reason why the trader should carry the cost of the consumer's personal circumstances which are entirely beyond the trader's control.

Perhaps reverting to the current formulation covering the unavoidable and extraordinary circumstances might provide some more clarity, but we are not convinced that there is an ideal formulation which will not inadvertently either limit the concept too much, or make it so broad as to be unworkable. We believe that there is a general understanding of what constitutes unavoidable and extraordinary circumstances and that it is sufficiently clear given a particular situation. Where there is disagreement, we believe the courts are able to decide these issues in relation to each case.

We do not support, as others do, the idea that there should be mention of official advice as a trigger for being able to invoke these circumstances. Official advice will not be issued to cover all of these circumstances and ultimately it should be for the courts to decide in any particular case whether it was right that these circumstances were invoked in the context of the Directive. Official advice often differs between Member States depending on different interpretations of events and different perspectives. **It is inevitable that, particularly in respect of safety, organisers will be guided by official advice, but it should not in our view form a formal part of any definition and we shall argue that it should not appear in recital 26.** Official advice is only one of several factors which businesses must take into account in these circumstances, and providing a list, albeit a non-exhaustive list, of factors inevitably gives rise to questions as to whether factors not listed may or may not be relevant. We are not aware that the current approach to the application of unforeseen and extraordinary circumstances has given rise to difficulties.

We agree with comments which highlight that the use of the word “compensation” in various parts the Proposal to cover different circumstances is confusing. The drafting should be clarified to refer to, for example, cancellation fees, refunds and compensation, as appropriate.

Article 10.3(a)

Question 26

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| Will this cause particular difficulties? If so, please explain and provide any supporting evidence. |
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Summary of responses

Ten respondents commented on this question; seven from the trade; one from consumer representatives; and two from enforcement interests.

Responses to Question 17 on pre-contractual information also comment on the information requirement attached to this provision.

The trade respondents were divided with a significant number believing that the imposition of a 20 day time limit before cancellation would not cause problems. However, others felt that it might lead to a constriction in the market observing that many arrangements which rely on a minimum number are arranged at short notice and in relation to particular events such as progression of a sports team through a tournament.

Although they did not comment on the 20 days Proposal directly the enforcement respondents were concerned that the notice of cancellation should be adequate to enable the purchase of alternative products.

Extracts from responses:

“Whilst potentially inconvenient, we do not believe that this provision will cause particular difficulties.”

“Establishing an arbitrary 20-day cut off robs travellers who have already booked of the chance of a departure that, in the event, would only run through last minute bookings. This should remain a discretionary part of the contract.”

“This matter is a contractual matter, albeit the Directive prescribes for it and the period within which the consumer should be informed. However, the period should be sufficient enough to allow the consumer to seek an alternative product.”

“It is hoped that the Organiser would have maintained regular contact with the traveller particularly for packages booked well in advance. The cancellation of a cruise by the organiser twenty days before the cruise date for a package booked a year ago would not be justified.”

The Government’s Response

See our comments in relation to Question 17.

We are persuaded that in some circumstances requiring a minimum period of 20 days notice prior to travel in the event that the minimum number of travellers required for a package is not achieved is likely to have an unnecessarily restrictive effect on the market for these particular arrangements.

Pre-contractual information about conditions on minimum numbers and the applicable notice period for cancellation should be provided, but that the notice period should be for the trader to decide and indicate to the consumer.

Chapter 4 – Performance of the package

Article 11 – Liability for the performance of the package.

Article 11.2

Question 27

Do you agree that this is a reasonable addition to the current provision?

Would the term “disproportionate” benefit from some further explanation, perhaps in a recital, or is it clear enough?

Summary of responses

We received thirteen responses: seven from trade representatives; two from consumer representatives; two from enforcement bodies; and two from legal representatives.

Generally respondents believed that the term “disproportionate” would benefit from some further explanation, some questioning whether it was a reference to the cost the package or to the effort required by the organiser irrespective of cost.

Other comments related to the wording and intent of Article 11.1, generally seeking clarification or advocating limits on liability.

Extracts from respondents:

“- More clarity is required before we are able to provide a view.

- Greater clarity as to what this term means is needed before we can offer a view as to what it means.”

“Disproportionate requires definition”

“Our overriding concern is that the liability for performance of a package is held solely by the organiser and not shared with the suppliers where they have control over the performance of one or more elements of the package.

...would like to see the regime operate in way that entitles organisers to:

i. exclusions and caps related to third party fault and extraordinary circumstances;

ii. caps on total liability; and,

iii. a clear regulatory right of redress against the supplier to make itself good.

We also believe that there is no reason why organisers should be primarily liable in cases of failure or delay by an airline. Consumers have a direct claim against the airline under the Air Passenger Rights Regulation but the current regime duplicates protections and leaves organisers liable for the riskiest element of a package holiday, the flight.

In light of these comments, we suggest the following amendments to articles 11 and 12.

Article 11, paragraph 2 should be clarified so that organisers are not liable to remedy the lack of conformity if 1) either that lack of conformity is contributable to the traveller, a third party or due to unavoidable or extraordinary circumstances, 2) or the traveller fails to inform the organiser without undue delay of any lack of conformity. This would bring the liability for performance in line with the requirement for price reduction and compensation as stipulated under article 12.

We therefore suggest the following amendment: “...*the organiser shall remedy the lack of conformity, unless this is disproportionate or in cases where the criteria of Article 12 paragraph 3 point a or, point b apply*”.

“We suggest that when considering what is ‘disproportionate’, then any discussion/recital should reference that to the description initially given to a Consumer about the content of the product; reference should also be made to the actual contract and what was promised to be delivered. It therefore follows that it would not be disproportionate to correct the contract if it were in line with the ‘promise’?”

“Article 11(1): definition of “*Members States shall ensure that the organiser is responsible for the performance of the travel services included in the contract*”: is this provision meant to contain the same obligation as under the former Article 5 of Directive 90/314, or a different obligation? Is this an obligation capable of enforcement by an injured consumer against the tour organiser, if so, how?”

Article 11(2): what does “*remedy the lack of conformity*” signify or mean? Does this refer to or incorporate a claim in damages? If not, why not? Is this left to the Member States’ discretion, if so, why? Against what bench-mark is something to be considered “*disproportionate*”: the cost of the holiday, the cost of the remedy, the profitability of the tour operator, the severity of the loss or injury, something else? Who decides what is “*disproportionate*”? 5

Why is “*lack of conformity*” (see Article 3(12)) used as a statutory definition when what is referred to is a breach of duty under the contract? If it is intended to replicate the pre-existing regime under Directive 90/314 why has the legislator used a new vocabulary of terms? If there is a difference in intent, what is it?”

“Part a, yes. Part b, wherever in legislation the word ‘proportionality’ or its offshoots appear, there is room for plenty of argument...But in reality, in the vast majority of cases, it *will* be proportionate to remedy a lack of conformity, eg by providing an alternative hotel. Only in the most minor of cases, or where the non-conformity happens, say, within 2 hours of the end of the holiday/the flight home, would it possibly be disproportionate. That is how judges in county courts have been deciding issues such as this for many years, anyway.”

The Government’s Response

We support the Commission's approach here. Article 11.2 reflects current good practice and a degree of clarification on this point is welcomed.

We agree that the term "disproportionate" is open to interpretation and its application will depend on the particular circumstances and the scale of any lack of conformity with the contract. However, we are not convinced that there is a better word or phrase which is flexible enough to account for the very wide variety of circumstances which might lead an organiser to consider whether a remedy is proportionate. The alternative would be a list of situations where remedies were not required, but this clearly would not be flexible enough and could be unduly limiting.

We therefore tend to agree with one of the legal respondents who implied that a successful argument of disproportionality in the courts is likely to show that in the circumstances the cost of a remedy would be excessive and not equate with the likely resulting benefit to the consumer; the more significant the failure, the less likely it will be that a remedy would be considered disproportionate. We do not believe that the UK courts would struggle to decide on whether a lack of remedy was proportionate in any given set of circumstances.

In response to some of the wider points raised in relation to Article 11.1 it is worth noting that the application of liability for the performance of the contract(s) should be read in conjunction with the provisions on compensation (Article 12). There it will be observed that there is no liability for price reduction or compensation where the lack of conformity is attributable to the traveller; attributable to a third party not connected with the delivery of the services and is unforeseeable or unavoidable; or, is due to unavoidable and extraordinary circumstances.

However, we agree that there does appear to be a disconnect between the restrictions on the right to price reduction and compensation and the requirement that a remedy must be provided under Article 11. We do not think an organiser should be obliged to remedy a lack of conformity with the contract where the same conditions apply (i.e. that the contract cannot be conformed with because the failure is attributable to the consumer etc.) Similarly, in our view, organisers must be given the opportunity to remedy non-conformity with the contract so the requirement that a consumer should bring issues to the attention of the organiser without undue delay (where this requirement forms a part of the contract and it is reasonable in the circumstances)(see Article 12.3(b)) is not unreasonable. **We believe, therefore that restrictions similar to those on the liability to compensate should apply to the obligation to remedy.**

We believe that allowing organisers to limit their liability by simply referring the matter to third party suppliers would undermine one of the key benefits of the regime - that consumers can, in general, look to an entity in their Home State (the organiser) to put matters right in the event of contractual failure. We note, however, that Article 20 confirms that there is nothing in the Proposal which limits an organiser's right to seek recompense in turn from travel service providers where they contribute to the event which triggered the compensation to the consumer or the price reduction or other obligations.

Articles 11.3, 11.4, 11.5 & 11.6

Question 28

Do you agree that the new financial limit to this obligation is reasonable in the circumstances?

Is the extent of the liability sufficiently clear? In particular, is it sufficiently clear which categories of travellers the limit will not apply to?

On Article 11 generally, are we correct in our assumption that organisers can insure against the risks which the Article is designed to address, in respect of all of the business models which are intended to be covered by the new definition of “package”?

Summary of responses

We received eight responses from the trade, one from a consumer representative, one from an enforcement body and two from law firms, making a total of twelve.

The trade respondents were keen to ensure that their liabilities in unavoidable and extraordinary circumstances were no more than apply to transport providers under EU passenger rights regulations. Most agreed that including provisions which are more detailed than under the current regime is helpful. Some argued that there should be no overlap with passenger rights, so that organiser liability would only come into effect when passenger rights against transport providers do not apply.

There were a range of views on the issue of whether insurance was available to the trade to cover liabilities in unavoidable and extraordinary circumstances. The trade respondents doubted that cover was available, or observed that the cost of cover would likely be as much as the cost of the liability. On the other hand, a legal firm felt that such insurance was available on the market.

There was general concern about the apparent breadth of the exemption from the liability limit for persons of reduced mobility, in particular that it is proposed to cover any person accompanying persons of reduced mobility. It was suggested that this should be limited to a nominated person so that, for example, others in an accompanying group or family would benefit only from the limited liability. Again, it was argued that there should be consistency with passenger rights legislation as it applies to different forms of transport.

A business travel representative observed that this element of the Proposal would not necessarily add protection in respect of business travel to commercial events for which, in general, the customer organising the commercial event carried the contractual liability for the cost of the event if unavoidable or extraordinary circumstances cause cancellation, and that this is something these business customers habitually insure against.

The consumer organisation did not argue against the proposed level of protection but suggested it could be clarified.

Extracts from respondents:

“...would suggest that the mode of transport should be taken in to account when drafting this section, as differing levels of transport would merit a review of the limitations of that particular mode of transport. The Air Passenger Rights proposal is at a much higher level than these other forms of transport and this should be taken in to consideration

...feels that further clarity is required but totally agrees that particular attention must be given to disabled or reduced mobility passengers.

This is a complex subject as there are so many differing reasons which could cause a passenger to be delayed which are totally unrelated to the airline involved and this should be taken into account.

Although it could be deemed that it is the passenger's responsibility to get themselves to an airport on time for their return journey, there are a number of reasons, which could be regarded as force majeure, which could happen which would prevent this from happening...would therefore suggest that there should be an amendment to allow the organisers the flexibility not to be tied to the airline's operational status relating to extraordinary circumstances.”

“This financial limit reflects the Air Passenger Rights proposal; however it is considerably higher than in relation to other modes of transport. ...would recommend that the drafting should reflect that the organiser is entitled to rely on the same conditions and limitations that the transport provider would rely on in relation to the relevant mode of transport.

...does not believe that there is insurance available for force majeure events.

There may be a number of reasons that prevent an organiser from ensuring a traveller's timely return and those reasons may be unrelated to the actual transport service. The organiser should be able to rely on the fact of unavoidable and extraordinary circumstances even if they do not affect the relevant transport provider. For example, in the event of a natural disaster where road access to an airport has been disrupted but the airport remains operational, a flight would operate as normal. While the flight would be operational, it would be impossible for an organiser to ensure the timely arrival of a passenger at that airport to travel on that flight. This amendment would allow organisers the flexibility to not be tied to the airline's operational status if the passenger is unable to reach the airport due to extraordinary circumstances.”

“We would like to be reassured that, as the question anticipates, organisers can indeed insure against such risks. It seems to us that it would be better to offer consumers the chance to opt in to appropriate insurance so that the cost to them is as transparent as possible, and the chance of duplicating cover is minimised. We think there is likely to be consumer detriment through various insurance (household, travel, other) seeking to recover from the other and/or suggesting that the operator is liable, thus rendering the insurance redundant in practice. It would also be welcome to ensure that the provisions on the EC261/20043 together with provisions of PTD do not provide further regulatory overlap.”

“It is not reasonable to expect the organiser to cover the costs for all people accompanying a person with reduced mobility and the business believes that this should be limited to ‘a designated person’ and also be treated on a case-by-case basis.”

“We have some concerns in relation to Article 11(6), but it should be noted that these partly relate to our understanding of how the Commission interpret the definition of PRMs. We understand from meetings that we have attended that the Commission believe that families travelling with young children are potentially PRMs. Whilst that interpretation is generally not accepted by any industry stakeholder, including those representing the interests of PRMs, we would be very concerned if the Commission interpretation was correct, as this would mean that a very high proportion of our customers could be treated as PRMs, and thus escape the limitations in article 11.”

“We consider the financial limit reflects what is happening within other Directive/Regulation proposals. We would suggest that the limit is clarified to state clearly that it is €100 per night per person to a maximum of 3 nights per person. “

“Yes the new financial limit is reasonable, given the parallel Air Passenger Rights proposal, and given the ‘steep learning curve’ that everyone had after the Icelandic ash cloud event (and similar but lesser events eg snow at Heathrow). As to the last part of your question, there is, as stated above at Question 11, a thriving market in tour operator liability insurance.”

“This stipulates EUR 100 per night, whereas in Regulation 1177/2010 the costs are EUR 60 per passenger per night and there is no special provision for removing the limits for accommodation for Disabled persons. In this respect there should be clarity in that where in such circumstance regulation 1177/2010 is applicable than Article 11 5 shall not be applicable in those instances, or that Article 11 does not apply to cruises or Passenger Services. Again in order to have consistency there should be the same levels in the proposed Directive as EU1177/2010. We appreciate that EUR 100 per person per night is the bench mark at present for airlines. Indeed there is argument that it should be the same for airlines. The EC has made it clear that consistency is important.”

“When a traveller’s journey is interrupted due to the failure of the transport provider to fulfil its obligations, it should be stipulated that the traveller can claim appropriate assistance directly from the transport provider in line with the relevant Passenger Rights legislation. In cases of flight or train disruption this would clarify that transport providers have the obligation to assist travellers regardless of whether they have booked a stand alone ticket or a package. This would be the most efficient arrangement to ensure that travellers are accommodated on the next available flight or train out.”

The Government’s Response

We are keen to avoid “double banking” of rights and obligations. In many situations which are affected by unavoidable and extraordinary circumstances, or otherwise, the failure will affect the transport element of a package. Where this is the case there is a range of EU

passenger rights regulations which are directly applicable in Member States and which have been agreed at EU level. These place minimum liabilities on passenger transport providers to provide help and, where appropriate, compensation to travellers. We do not believe that in the same circumstances it is necessary to impose the same or similar obligations on package organisers as well.

Where circumstances give rise to a route to assistance and/or compensation from passenger transport providers under existing passenger rights regulations the package organiser should not be liable under the Proposal. Where passenger rights regulations do not apply, for example, the consumer misses a flight because circumstances prevent them getting to the airport, then the liability should fall on the organiser as set out in Article 11. Article 14 places an obligation on the organiser to provide assistance to travellers in difficulty. This would, in our view, include that the organiser should be prepared to provide the traveller with information about their passenger rights when circumstances apply. We believe that this will be clearer for the respective traders, and for consumers. It will also prevent the reported tendency of the respective businesses to pass liability from one to the other, causing delay and confusion for consumers.

We agree that Article 11.6 is in need of clarification in relation to its application to persons accompanying disabled persons or persons of reduced mobility. **We agree that this liability should be limited to a nominated person rather than, as seems possible under the current wording, entire parties of people who might be accompanying a person with reduced mobility.**

We agree that placing a limit on the level of liability in unavoidable and extraordinary circumstances is reasonable. Furthermore, in the course of the European Parliament's consideration of the Proposal it has been proposed that the standard of accommodation should be the same as was contracted for originally. We do not agree with this approach. The organiser is clearly obliged to provide the level of accommodation contracted and paid for, for the period covered by the contract, but not where the organiser is required to provide for extra accommodation at its expense, for reasons beyond their or the consumer's control. **There should be no expectation that the standard of "emergency accommodation" for the period beyond that contracted for should be the same as originally contracted for.**

It remains unclear whether an organiser is able to obtain insurance in respect of its liabilities in unavoidable and extraordinary circumstances. However, achieving clarity that liabilities covered by passenger rights regulations continue to be covered by transport providers only should, in our view, limit this liability to the extent that insurance companies might be more attracted to offering cover in these circumstances, or that the organiser is able to account for the risk in its operational costs.

Article 12 – Price reduction and compensation for damages

Article 12.4

Question 29

Do you agree that setting a maximum for compensation at three times the cost of the package where an organiser chooses to apply limits in the contract is reasonable?

Summary of responses

Eleven respondents addressed this question directly: five from the trade: two from enforcement bodies; and three from legal firms.

Four of the trade representatives supported capping the level of compensation at the level proposed, some observing that it reflects the practice established by ABTA members. One argued that setting a limit encourages consumers to seek the maximum in each case with some members suggesting that the limit was too high. One of these organisations opined, however, that this view was not in line with legal precedents in the UK.

On the other hand, the consumer representatives were concerned about setting any limit on compensation, observing that packages can be very expensive and that setting a limit might not reflect the true detriment experienced by some consumers. They suggested that the limit should be reviewed annually.

The law firms were divided, one supported the Proposal, and the others argued that setting any limit would be to the detriment of the consumer because they had experienced cases where compensation exceeded three times the cost of the holiday. It was clear, however, that some of these cases involved personal injury claims which could not be limited under the Proposal.

One of the enforcement bodies supported the limit insofar as it provides a good guide for business in settling claims. However it also felt that in some circumstances consumers should have leave to apply to the courts for greater amounts. The other argued for more clarity that in the event of personal injury not only the organiser should be held accountable.

Extracts from respondents:

“Clarification over who may have caused personal injury, intentional damage or gross negligence. If this only applies to the Organiser this will be somewhat limited.”

“... it is clear that in the intervening years the figure has gradually reduced in many package organisers booking conditions. The majority of our members, having worked with minimum figures for 20 years expressed the view that there should be no mention of limitations as it encourages customers to ask for the amount stated, whether justified or not. Just over 10% felt that the figure was too high and the limitation should be the original cost paid in the first place. We do however recognise that legal precedent in the UK together with explicit introduction of compensation for ‘non material damage’ makes such a wish unrealistic.”

“There are cases that we have dealt with in the past where compensation has been awarded or agreed in excess of three times the total price of a holiday package. We do not understand the rationale behind a unilateral limit on the compensation payable under any contract. This seems to be to the detriment of the traveller/consumer.”

“Setting a compensation figure which businesses can work to is a good start to allow businesses a guide for settling claims and disputes in most cases. However, in exceptional circumstances, where consumers feel that the level of compensation is not adequate for the loss incurred, there should be a leave to apply to the courts to assess the level of compensation sufficient enough to meet their losses.”

“We are concerned by any attempt at limiting compensation (noting that personal injury etc is excluded). Our concern rests on the point that as holidays are becoming more sophisticated and more expensive (we recently heard from one person who spent £17k on their holiday and have heard from Consumers who have spent in excess of £20k), a limit or an attempt to codify limits on damages may not actually reflect the true damage suffered by a Consumer.

We are also concerned that this would create a precedent whereby future lobbying by the Travel Industry would seek to have this limit lowered. We would suggest that either the provision is removed or that the ‘cap’ is subject to an annual review to allow for this ‘cap’ to be increased.”

“...these changes have come about without any consultation. The reference to a cap at three times the cost of the package is arbitrary. ...members handle thousands of cases each year comfortably in excess of such a limit. This would lead to gross under-compensation of injured consumers in many, many cases, and would constitute a significant denial of justice.”

The Government’s Response

We believe enabling organisers to limit compensation for contractual failures is a helpful measure. The proposed limit reflects contractual limitations generally in place in the UK and probably represents a reasonable approach. It should also provide consistency for those businesses seeking to trade across borders.

Including the option to set a limit of not less than three times the cost of the package is helpful for business as it enables business and its insurers, where used, to better assess and account for their exposure, keeping overall costs down. While it is possible that, in future, business could present arguments that the limit should be decreased, and the Government would consider such a case, that would need to be in the context of adjusting the Directive at EU level; it would need to be justified by a strong evidential case if Member States were to agree. The advantage of allowing for a minimum level of compensation based on a ratio of the cost of a package is that the minimum level increases with the cost of the package and should therefore generally be proportionate to the likely damage sustained, at least in financial terms, by the consumer.

Responding to the suggestion that there should be more clarity that claims for personal injury are not limited to the organiser, we do not believe that the Commission intends to

include negligence claims for personal injury within the scope of the Proposal, as Article 12 (for example) expressly relates to remedies for lack of conformity to contract (that is, breach of contract). Nevertheless, **clarification on this point from the Commission would be helpful as would clarification as to whether it is their intention that personal injury claims resulting from lack of conformity are within scope. It is our view that they should remain in scope, and unfettered, as is the case currently, but that it should be made clear that the Directive has no effect on personal injury claims resulting from negligence.**

Other Comments Received on Article 12

Three legal firms and a trade representative had additional comments and suggestions on Article 12, mostly concerned with claims for personal injury. For example:

“This burden of proving improper performance in relation to low-value personal injury claims (say under €50,000) may in itself lead to a denial of justice, unless the burden of proof is shifted to the tour organiser to demonstrate that there was no improper performance of the obligations under the contract. We consider that there should be a harmonised provision as to burden of proof, which should be placed on the person best able to deal with the issue of applicable local standards, namely the organiser.”

The Government’s Response: We understand that claims for personal injury generally require the claimant to establish negligence or breach of contract. We do not believe that the circumstances in which such claims might arise in this market are sufficiently different from others, for example in relation to claims where direct contractual relationships exist, for example, between consumers and hotels abroad, or with transport providers based in the UK or abroad, to justify changing the burden of proof. The current Directive, by making the organiser liable for the improper performance of contracts performed by third parties abroad assists consumers considerably in that they can generally pursue such claims within the UK because mostly the organisers are based in the UK. The Proposal is not clear about a Member State’s obligation to apply the provisions in respect of sales or offers for sale in the Member State so that on the whole this position would remain. We will be pressing for more clarity on this point because it is one of the important protections currently provided for consumers.

“Does Article 12(2) contain a general right to damages for an injured victim who has suffered injury as a result of a breach of contract? Or, is it some other entitlement to compensation, taking into account the regime for price reduction?”

The Government’s Response: We understand that Article 12.2 sets out a right to compensation which is in addition to a reduction in the price of the contract because the original agreement cannot be complied with and the replacement arrangements do not meet the quality, standards or facilities originally contracted for. Price reduction is simply a reflection of the downgrading of the original contract.

“Article 12(3): can Member States restrict the right to damages for personal injury where an injured victim fails to notify the organiser “*on the spot*”? What is “*reasonable*” for these purposes? ... considers that were such a possibility to exist, in

respect of a potential claim for personal injury, it would constitute an unfair contract term.”

The Government’s Response: Article 12(3) is concerned with lack of conformity with the contract, that is, breach of contract. We do not think it is the Commission’s intention to include negligence claims for personal injury within the scope of the Proposal. As such, Article 12(3) should not apply to such claims. We will also seek clarification as to whether it is the Commission’s intention to include personal injury caused by lack of conformity. There is a similar notification requirement in the current Directive and we are not aware that it has been relied on to avoid claims for personal injury. **Nevertheless this is a point on which we will seek clarification from the Commission and if necessary clarification in the text that the notification requirement, where included in a contract, does not apply to claims for personal injury.**

“Article 12(6): prescription for “*introducing claims*”: what does introducing a claim mean? How is it done? Does this refer to a claim for personal injury? Why is the period of such a claim so short, bearing in mind the provisions for personal injury in the Proposal for a Common European Sales law? ...considers that any such limitation period should be no less favourable than any other claim for personal injury with a minimum primary limitation period of four years.”

The Government’s Response: As mentioned above, Article 12 appears to be concerned with claims for non-conformity, not with claims for personal injury as the result of negligence. We understand that what is intended by “introducing claims” is making a claim against the organiser for non-conformity with the contract. The period for making such a claim is not limited by the provision; it says that it shall not be shorter than one year. We envisage that in the UK we shall maintain the current position on time limits for action.

“...disagrees with the use of the terminology by reference to lack of conformity: is this a reference to a breach of contract: if it is, it should say so, and be consistent with other European instruments dealing with breaches of contract. If it is not, a clear explanation should be stated as to what it refers to: the language is confusing as to scope and remedy, particularly given that such measures need to be implemented. Since Member States have discretion as to implementation, there is every possibility for different States to take a different view as to how to implement the provisions into national law thus defeating the object of uniform harmonisation.”

The Government’s Response: 'lack of conformity' is defined in the Proposal as being “*lack of and improper performance of the travel services included in a package.*” The Commission has acknowledged in negotiations that the “and” should be an “or” and we agree.

Our understanding is that the Commission has taken the approach of referring to the *services included in the package* because it is the organiser of the package who is liable when the services are not provided as set out in the overall arrangement and there might not necessarily be a direct contractual link to the organiser. A package is essentially a combination of services which may be directly contracted for with service providers with the organiser as intermediary, or combined in a package contract direct with the organiser. Use

of “breach of contract” might not, therefore, be adequate in relation to the new models of organising packages intended to be covered by the Proposal because there might not be a contract for the provision of the actual travel services between a consumer and the organiser.

“The proposal should make explicit what provisions shall be implemented into civil law so as to provide an effective remedy. Presently, Article 22 regulates effective enforcement: which Article 23 amplifies as referring to penalties to be applied by enforcement bodies. There is no provision providing consumers with effective civil remedies, if the Member States choose to implement the Directive by reference to criminal and/or administrative remedies. Article 12 should provide an express right to damages at civil law where a consumer has suffered personal injury, which right should permit a full and effective remedy.*

The Government’s Response: We believe it is clear that the Proposal sets out contractual rights for consumers irrespective of how Member States implement it in relation to creating criminal offences and enforcement provisions. It is for Member States to decide how to ensure compliance in their domestic legislation. As mentioned above, we do not believe the Proposal addresses directly the issue of negligence claims for personal injury (nor, in our view, does the current Directive), consequently there is nothing in the Proposal which inhibits the freedom of consumers to pursue negligence claims for personal injury.

“The words ‘non-material damage needs to be removed as it is not clear what this is to cover? As compensation is to be assessed in the relevant jurisdiction it is for those courts to assess the recoverable heads of damages. If it is to stay it should be defined to make clear what it covers and that the Directive is not creating a new head of claim.”

The Government’s Response: This is an issue which has been discussed in negotiations. We understand that the concept of “non-material damages” encompasses, for example, consumer inconvenience and disappointment, apart from any financial damage they may have suffered. This is an attempt to reflect ECJ rulings on the issue of compensation and to clarify that such damages are not excluded from the coverage of the Proposal. However, further clarification on this point would be helpful.

“On Article 12: paragraph 6 we suggest the following wording to better clarify the prescription period: “*The prescription period for introducing claims under this Article shall not be shorter than one year from the first day of the improper performance*”

The Government’s Response: Clarification of the point at which this period should commence has been a subject discussed in negotiations. **We would like more clarity on this point, or will seek to maintain the current position in the UK.**

Article 13 – Possibility to contact the organiser via the retailer.

Question 30

Do you agree that it is reasonable that a consumer should be able to use the retailer who arranged the sale of a package as a contact point? If not, please explain.

Summary of responses

We received nine responses to this question; five from trade interests, one from a consumer representative, two from enforcement interests and one from a legal firm.

All but one of the trade interests supported the Proposal with the caveat that clarification should be achieved in order to ensure that the serving of documents relating to court proceedings should not be included. This view was shared by the legal firm respondent. The consumer representative observed that the Proposal essentially reflected the likely assumption of consumers at present and argued that failure on the part of a retailer to comply with this provision should be subject to sanctions.

The trade representative which opposed this provision had concerns that an obligation to insure message forwarding might be too onerous on smaller retailers, but did observe that good customer service is important to customer loyalty.

Extracts from comments received:

“Yes, however, there are limitation and service issues worthy of consideration. ...is concerned that the provision might interfere in the orderly functioning of legal proceedings. ...believes that this technical jurisprudence point should be given consideration by BIS’ legal team.”

“We do not represent retailers so do not have detailed knowledge, but it would seem to require sometimes very small businesses to assure continuity of message forwarding service, which seems impractical. As the time when contact is made with retailer may be material, this seems potentially unreasonable to the operator who might have been able to address a complaint promptly and satisfactorily had they known about it sooner. These reservations do not suggest that consumers avoid communicating with their retailer; high levels of post-sale service is one of the ways in which customer loyalty can be secured.”

“This is what happens in day-to-day practice; Consumers return to the retailer and regrettably suffer poor handling of their complaint whilst it is being directed to an Organiser. We would suggest that retailers are encouraged through a ‘sanction’ to handle complaints correctly and efficiently, thereby reducing the time spent on the handling of such complaints and Consumer frustration!”

“This Proposal is reasonable, subject to one clarification. The word ‘claims’ is used in Article 13. That is the same word as used for what happens when you start proceedings in the County Court; you issue a Claim. If such Claims could be served on the Retailer, that would be unfair on the Organiser who might find there is a default judgment against him, because the Retailer ignored the Claim (the Retailer is

not the named Defendant, after all!); ...the last sentence of Article 13 would probably mean that the Organiser's time for Defending the Claim was severely eaten into."

The Government's Response

We do not think it unreasonable that a retailer should be obliged to pass complaints and concerns about service delivery or other matters to an organiser where the retailer has been the point of contact with the consumer; the Proposal does not prevent the consumer from addressing their complaints to an organiser direct.

We agree that the wording of the Proposal could be wide enough to include the serving of documents relating to court proceedings, and that, for the reasons provided in the comments received, where the organiser is subject to those proceedings it is not desirable that the consumer should have the option of serving them via the retailer. **We would like to the provision to be clarified so that this obligation does not include serving documents relating to court proceedings which should always be delivered direct to the parties concerned.**

Making the failure to comply with this provision subject to sanctions, and the nature of those sanctions, is a matter for the Member States to consider in the context of implementing the Directive in national law; we shall do so at that stage.

Article 14 – Obligation to provide assistance

Question 31

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| Is the extent of the Article 14 obligation clear enough? |
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Summary of responses

Ten respondents commented on this question: six from the industry, one from consumer representatives, two from enforcement interests and one legal firm.

Generally it was agreed that as drafted the Proposal is fairly clear, so far as it goes. It was observed by trade representatives that this obligation to provide general assistance to consumer goes wider than the similar requirement in the current regime in that it is not apparently related to difficulty caused by issues with the services contracted for, but could be for any reason. That being the case, although generally it was acknowledged that at present most organisers would attempt to offer assistance to their customers in difficulty, for whatever reason, there was concern that this might be read as implying that organisers were obliged to provide assistance, or alternative travel at their own expense.

Concern was also expressed at the practicality of the wide obligation, particularly in relation to those organisers that have no physical presence at the destination.

The consumer representative was concerned that the organiser would be able to charge a reasonable fee for the assistance provided under this Proposal, also that the organiser should be prepared to act as an "advocate support" on behalf of the consumer, particularly where they may be the victims of crime.

Extracts from responses:

“The current Directive requires that organisers must provide prompt assistance to any consumer in difficulty where the contracted services have fallen apart due to unconnected third parties or force majeure but there is no requirement to provide financial assistance.

The proposed Directive extends the obligation to all travellers whether or not the difficulty is related to the performance of the contracted services. ...would recommend that Member States should give prompt assistance to the traveller by providing appropriate information on local health provision and consular services as well as helping them to source alternative travel arrangements. We further feel that the organiser should be allowed to charge the traveller for this if the situation is caused by the traveller’s negligence or intent.”

“No. The current Directive and PTRs provide that organisers must provide prompt assistance to a consumer in difficulty where the contracted services are not performed properly due to unconnected third parties or force majeure. There is no requirement to provide financial assistance in such circumstances.

The proposed Directive extends this obligation to all travellers in difficulty whether or not the difficulty is related to the performance of the contracted services. As the Proposal is somewhat ambiguous regarding the funding of any assistance we propose the below amendment:

Member States shall ensure that the organiser gives prompt assistance to the traveller in difficulty, in particular by:

- a) providing appropriate information on health services, local authorities and consular assistance, and
- b) assisting the traveller in making distance communications and assisting in sourcing alternative travel arrangements.

The organiser shall be able to charge a reasonable fee for such assistance if the situation is caused by the traveller's negligence or intent.

There might be a case for seeking further restrictions on the obligation to provide assistance to those travellers who are in difficulty as a result of failures in the contracted services.”

“This obligation seems very open-ended, and particularly onerous on smaller operators who may not have an extended network in the field or a large staff to provide such assistance. It is very hard to see how an operator based exclusively in one country could, for example, provide open-ended and prompt travel and communication assistance to a traveller in difficulty in a remote time zone. Similarly, expecting small companies to be sufficiently expert on health services, local authorities and consular assistance seems to set the level of expertise unrelated to the business of packaging and delivering tours quite high. We suggest that 24/7

emergency assistance is best provided by the insurance industry that is specialist in precisely this service...”

“This will obviously be an advantage to consumers and as long as the details are made clear consumers will benefit from this clarity.”

“The provision is clear but again we have some reservations, particularly where crime is a factor within a holiday. Since 2010, we have witnessed a marked increase in crime complaints from holidays, often emanating from the chosen hotel.

We are concerned about the ‘blanket’ assumption of drugs, drink, youth and so on, as being a factor in deciding on whether to charge, when the real assistance to be given should be to act as an advocate support where difficult issues arise.

This is a poorly thought out provision and we suggest that the ‘enablement’ of charging be removed and that it is re-worded to encourage ‘advocate support’. This is not an unreasonable position to take; we accept that some people are the authors of their own misfortune, but many find themselves in an extraordinary situation and do not need the arbitrary and subjective decision that you must pay before we help you further!”

“This will add cost, and may be practically difficult if the Organiser is say an ‘Online Travel Agent’ who does not have any real connection to the resort or hotel. Such traders may need to employ agency services in resorts to meet such needs, at extra expense.”

The Government’s Response

It is our understanding that this Article is intended to place a new obligation on organisers to provide assistance irrespective of whether a traveller’s difficulties are the result of contractual failure. The Proposal deals elsewhere with the consequences of and obligations in respect of contractual failure. Nevertheless, this article probably reflects existing good practice. While we do not believe that an organiser should carry the costs of difficulties experienced by travellers which are not the result of problems with the contracted services it is not unreasonable to suppose a degree of responsibility to provide appropriate assistance where the organiser is in a position to do so.

We agree, therefore, that there is a need to clarify this Article to the extent that its application is not necessarily connected to the contracted for services, and that there is no presumption, in that case, that the organiser should bear the costs of providing assistance in the circumstances. There is a need also to recognise that under the proposed expanded coverage of the Directive there will be far more arrangements sold where there is no local representative of the organiser to hand and that, therefore, the degree of assistance envisaged by the Proposal must be within the realms of practicability.

We would like clarification of the relationship between this Article and the provisions covering the consequences of contractual failings and other circumstances covered in the Proposal. It should also be clearer that there is no expectation that the organiser should bear the costs of assisting the traveller beyond providing

information and advice, assisting or facilitating communications and assistance in arranging for, but not, for example, paying for, alternative travel arrangements, beyond their obligations elsewhere in the Proposal; and, that, given the wide range of arrangements proposed to be covered by the new regime, a test of proportionality and practicality be applied to these obligations.

Chapter 5 – Insolvency Protection

Article 15 – Effectiveness and scope of insolvency protection

Question 32

We welcome views on this analysis. While a system which based charges more on individual risk might be fairer in that the less risky businesses would be likely to pay less per sale, the more bespoke approach might add significant costs to all because of the greater complexity in administration of such a regime.

Summary of responses

We received fourteen responses which directly addressed this question: seven from the trade; one from a consumer representative; two from enforcement bodies; and four from others including those who provide insurance for the current ATOL scheme in the UK.

There was a general appreciation that ideally any system of protection should reflect as far as possible the risk presented by particular businesses but opinion was divided as to whether in the current market a fully individual risk based approach was practical. Comments on this issue were made against the background of the Department for Transport’s consultation on reform of financial protection provision, in particular the ATOL scheme which protects packages which incorporate a flight. Several comments as to the nature of protection therefore referred to responses to that consultation.

On costs, the general view was that a system which required closer monitoring of sales activity and risk than is the case at present in the UK would be more expensive. Representatives of smaller businesses argued for risk based charges. However, larger businesses generally supported a flat rate scheme, perhaps incorporating added protections for businesses perceived to be more at risk of failure, and observed that the level of their contribution, based on sales, in effect subsidised the protection of riskier smaller businesses.

The consumer representative favoured a pan-Europe system of insolvency protection, arguing that this would provide clarity and consistency for consumers and might be more robust than the current situation where Member States implement the current requirement in a number of ways.

Extracts from responses:

“There are many discussions which include the premise that there should be a single charge for all passengers travelling which would keep the cost to a minimum and

offer full protection and security but there is also an argument, from the larger stronger retailers, that their passengers should not be supporting the more vulnerable companies.

A single APC type charge or levy would be welcomed by ... to cover all elements and we would recommend further work and investigation in this area with consideration being given to the volume and risk profile of arrangements being considered in relation to the sustainability of a mutualised APC-style fund.”

“The respondents believe that risk rating and insurance pricing by “actuarial” means or any other model is possible but can be divisive and subject to challenge.”

“... Members have indicated that it may not only be those representing a higher than average risk who might have difficulty in electing to utilise alternative arrangements to an Air Passenger Charge (APC) style contribution solution. It also affects those whose scale, either in the UK or internationally, is such that the availability of sufficient capacity in the financial markets (insurance, bonding, etc.) might make a move out of an ATT scheme difficult or impossible.

In any event, as part of the further work recommended, the consequences of substantial changes in the volume and risk profile of arrangements protected must be considered in relation to the sustainability of a mutualised APC-style fund.”

“Though we understand that it is much simpler for a Regulatory Authority to have a fixed contribution to a fund in order to cover financial failure, our members feel that it is quite correct that any system should take into account the actual financial risk represented by an individual trader’s activities.”

“A risk-based approach

It is self-evident that in a bonding or insurance based scheme each participant will bear their own costs and that these are naturally risk priced by the market.

In a mutual fund, there is, on the other hand, a choice to be made between flat rate pricing and risk pricing. Within a risk pricing model, there are further choices to be made as to the criteria to be used in order to evaluate the risk and then as to how those criteria should be weighted.

With regards the universe of potentially relevant criteria, we believe that in any risk pricing scheme significant weight should be given to covenant strength. It is a truism that no company that has not failed has ever cost the Scheme anything. If the risk of a company failing is very small, therefore, the question of what the exposure would be if they were to fail is barely relevant.

As today, we also believe that it would remain essential to provide that those businesses that represent the greatest risk to the Scheme, either because they are relatively new businesses, or because they are on a weaker financial footing provide additional security whether in the shape of bonding or other acceptable security.

We acknowledge that due consideration might also be given to the size of the relevant exposure in the event of a failure, being largely, but not only, a function of

the extent to which customer monies are received in advance, but we believe, for the reason mentioned above, that this should represent a secondary consideration. Equally, this consideration would not be a relevant factor in relation to the costs of repatriation.

We do not believe that the costs of looking into a licensee's selling prices would justify the incremental gains in perceived fairness.

To put the point in a more general way, we believe that the evaluation of risk should seek to emulate the view that an independent third party financial institution would form if faced with the same set of factors.

Finally, within a mutual fund, or indeed any licensing scheme, there should be some element of universally applied fee that will cover the costs of administering the Scheme." [Extract from a response to DfT's consultation on ATOL Implementation and Funding Arrangements.]

"We recognise that if the ATOL scheme remains as it is, creating a common fund from APC payments, it is likely that because of the increase in sales protected as packages or AST [ATA], claims against the Air Travel Trust may increase and with it, the need to increase funding to the ATT. We asked our members whether they would support varying rates of APC but our survey did not provide us with an easy answer. Almost evenly, members commented that weaker ATOL holders should pay more, whilst others saw a change as potentially dangerous, making it more difficult to identify APC costs in consumer documentation and making the cost of administration substantially higher, thus leading to a potential further increase for all organisers and agents holding a licence."

"...takes the view that there should be a level playing field for insolvency protection. The insolvency risk profile of online travel agents (or others providing so-called "dynamic packages") is considerably different from tour operators or traditional travel agents that pre-arrange tours because OTAs do not hold on the airline ticket payment for longer than a several days due to IATA's BSP system. In some cases, particularly with many accommodation bookings, our members do not even process the payments as the consumer pays the supplier directly on arrival or at the end of their stay.

Therefore in a large number of cases OTAs [Online Travel Agents] either never hold the customer funds for the booking or only hold onto them for a relatively short period of time leaving little or no risk of the OTA organizer becoming insolvent in the meantime. Further, from the moment the supplier (airline, hotel etc.) receives the funds, it is bound to provide the services purchased. As such, the customer bears no or little risk of the services not being delivered even in the unlikely event of the OTA's insolvency in the interim. By comparison, traditional tour operators take deposits and do not transfer payments until later in the process and therefore pose more risk to customers of sinking into insolvency whilst holding the customers' money. The actual requirement for protection against insolvency should reflect this fact."

“The Directive proposes that the means of financial protection should take into account the actual financial risk of a trader’s activities. It is not clear whether this means the chance of a trader becoming insolvent, or the cost caused by such an insolvency, or both. Either might be useful as part of the systems by which the Directive is implemented, though there is a danger that if the clause is interpreted as materially restricting the freedom of implementers in the systems that they can provide, then such systems are unlikely to be optimal. It would be preferable to make a more general requirement to the effect that the implementation systems should follow the principles of better regulation.”

“A system based on individual risk would be fairer, but regrettably the introduction of the flat rated APC caused serious damage to the insurance market for financial protection in the travel industry. It was the insurance industry which had the expertise to underwrite these financial risks and rate businesses accordingly. What will not work is a system which asks the insurance industry to accept “adverse selection” which is where the industry is at the moment. Any reform in this area would need to give the insurance market back the opportunity to write business across the whole market.”

“A fixed rate contribution in absolute isolation might be inconsistent with this proposed requirement, but the characteristics of the national implementing schemes would need to be taken as a whole – other elements such as bonding requirements, or other national protection schemes which also apply, will make a difference.”

“We would support charges that are based on an individual business’s risk as this would be fairer too all. However, where the costs of complexity outweigh the advantages of individual risk assessment, discussion maybe required to identify an equitable equilibrium position. However, any additional ‘complexity’ costs could be offset from a consumer’s perspective where the ‘home’ regime’s insolvency protection was superior to that available from that of their own home Member State.

Although the nature of ‘insolvency protection’ for payments has not been specified, where the home state is able to interpret this to fit its own travel market, the use of trust funds to hold payments may be of assistance to reduce the costs of protection.”

“...notes that Article 15(2) states that, “The insolvency protection referred to in paragraph 1 shall take into account the actual financial risk of the relevant trader's activities.”interprets that phrase as relating to the way in which the insolvency protection is funded. The main requirement here is that the means by which funding (whatever form it takes) is gathered is effective, timely, auditable, and enforceable. One aspect of enforceability will be the perceived fairness of the burden that the arrangements place on the package sellers.”

“First, under Article 15(2), does the very clear right to balance the cost of financial protection against what is generally deemed to be the risks posed by the operations of the company, pose a further risk to consumers? I am mindful of the issue of enforcement and in particular the case of *Rechburger v Austria* case (C-140/97). Here insurance was based on 5% of turnover over 3 months; the Member State was

refused the defence that the losses only happened because they were unexpected and that there was poor trading.

Are the new provisions simply a statement that it is business as usual – would a financial risk assessment and looser arrangement on the basis of reducing a business overhead prove to offer sufficient financial protection? Are the financial institutions robust enough to deal with such risk assessments following the banking crisis? Does the consumer not deserve the right to have enshrined into law a robust enforcement process and a clear requirement that a company or someone operating a travel company is ‘fit to trade’?”

The Government’s Response

It is still not entirely clear precisely what the Commission envisages when it refers to the actual financial risks of the relevant trader’s activities, nor the expected extent of the protection. For example, it is not clear whether protection schemes are expected to provide for insolvency protection in all circumstances, including the most extreme. The latter point is crucial to the consideration of how Member States will implement the insolvency protection requirement and in our view must be clarified in order to shed light on the necessary assessment of risk.

If it is intended that the protection will cover all circumstances, the risk would appear to be incalculable, and that would be likely to severely restrict Member States’ options, irrespective of their preferred method of providing for this protection, where there would possibly be shortfalls of coverage in extremis. In those Member States which believe the industry should account for the risks it presents without financial support from the State (including the UK), insurance based schemes might not be attractive, or become far more expensive to cover an unknown and potentially very costly risk. These considerations are compounded in our view by the Commission’s approach to requiring Member States to have in place provisions which will provide businesses established in their State with the means to cover all of their sales rather than sales or offers for sale to consumers in their State, as is the case at present. Please see our further comments on this under Question 33 below.

It seems clear that any system of insolvency protection must be designed in a way which is proportionate, in which the costs to business, and ultimately to consumers, reflect the nature and extent of the risk of insolvency in normal circumstances and reflecting past experience. It is important, therefore, that requirements are based on assumptions according to which consumers are protected in all reasonable circumstances, but not necessarily fully protected in all circumstances; even banking regulation does not provide a 100% guarantee on consumer savings, there is a cap.

In the course of discussions in the Council Working Groups, the Commission has indicated that in their view Member States would be required to ensure that an effective system is in place, including amounts and risk assessment; so that in the great majority of cases there is sufficient protection. We believe this clarification is helpful because it suggests that there are circumstances at the extremes where it is accepted that it would be disproportionate to ensure protection.

We would therefore like clarification reflecting the Commission’s comments in the Directive to enable Member States to put in place systems which are proportionate

to, and which reflect, usual and expected levels of risk in this market; but which should not necessarily apply in exceptional circumstances. For example, we believe it would not be proportionate that an insolvency protection scheme should be required to take into account the risk of a catastrophic and unexpected failure of a very large company or a number of companies, possibly for reasons entirely beyond their control or the control of the Member States. Limiting risk in this fashion should provide Member States with more options to ensure that there are adequate levels of insolvency protection at reasonable cost.

A body representing online travel agents (OTAs) whose activities under the Proposal seem likely to be covered mostly as organisers, but also possibly as retailers of ATAs (many are already covered in the UK by the ATOL flight-plus extension), observed that their business model often means that consumers' payments are not held by OTAs for any significant period. Payments are passed on to the travel service providers and contracts concluded with them rapidly so that in the event of the insolvency of the OTA the actual arrangement in place might be unaffected; consumers will be able to use the services agreed. This suggests that the risk of consumer loss represented by OTAs is in some cases significantly less than that carried by the organiser model. In our view an insolvency protection system designed to reflect more closely the assessment of individual risk would likely need to reflect the nature of the wider range of business models brought within the system.

The pan-Europe approach supported by the consumer representative was the subject of discussion as the Commission formulated its Proposal. It was clear during these discussions that there was very little support for this approach among Member States. Arguments against this idea included that it would likely be very bureaucratic and slow to react to changes in a very dynamic market and that, consequently, it was likely to be more expensive. Several Member States also feared that it would lead to a lessening of the level of protection already in place in their States. In our view there is no prospect that, even if we were to support such an approach, it would achieve any appreciable level of overall support.

Question 33

Do you agree with the Commission's contention that this Proposal will help to achieve its objective of promoting more cross-border trade?

To what extent do you believe the costs of insolvency protection might be affected by the requirement that it covers consumers based in another Member State or elsewhere who would need to be repatriated to their place (airport usually) of departure in the event of insolvency?

Summary of responses

Nineteen respondents commented on this question: nine were trade representatives, one was a consumer representative, six were enforcement bodies; two from law firms and one from an insurance company.

Six of the trade representatives felt that the Commission's approach would make cross-border trading easier, but there was an acknowledgment that there must be more consistency in the level of protection across Member States. Several welcomed the idea

that they would be able to cover all of their insolvency protection, irrespective of the location of their customers under a single system. Two trade respondents were less convinced that, as drafted, what the Commission is proposing, would better enable cross-border trading, and feared that costs would rise significantly because the extent of the risk posed by businesses trading substantially out of the State where they are established is less easy to assess.

One trade representative body also envisaged significant problems for consumers who could be faced with up to 28 different systems when shopping for their holidays, and where, in the event of insolvency, claims would need to be made across borders giving rise to issues such as language, the requirement that the system would need to make refunds across border, and provide for repatriation potentially to any airport or Member State (possibly to other countries as well).

The consumer representative expressed similar reservations relating to the different levels of protection currently in place in Member States.

Most of the enforcement respondents had detailed knowledge of the current ATOL system. They too foresaw significant difficulties with the “established in” approach and felt that, even assuming an equal level of protection across Member States, costs would inevitably rise by having to cover the international activities of cross border sellers. They expressed concern that this might lead to costs for businesses that did not trade across borders but served the domestic market for holidays at home and abroad.

It was observed that if the level of insolvency protection was not the same across Member States, or for local market reasons was notably cheaper in some Member States, this could lead to the migration of businesses to the cheapest provider. The possible consequence would be that UK consumers would be covered by a system which would struggle to meet requirements in the event of a large insolvency, and that they would need to claim across borders. Two respondents submitted that one relatively large online travel agency had already relocated to the Balearic Islands where insolvency protection is cheaper than the cost of their Flight-plus ATOL, but where there are concerns that the local arrangements would not be capable of providing the level of protection required in respect of the level of business of the company.

Respondents also mentioned practical difficulties, in particular in relation to repatriation where doubt was expressed as to the ability of systems less developed than the UK’s to contact and provide for the repatriation of consumers from other Member States who could be holidaying anywhere in the world.

Others made similar comments in relation to likely cost increases, but generally agreed that cross border trade would be encouraged.

See also the responses to Question 38.

Extracts from comments received:

“We would like to think that this would help achieve better trading between Member States and it would be really positive if the financial protection offered within one

Member State is recognised as complying with the regulatory requirements of the other Member States.

We do not believe that such changes would significantly affect the costs of insolvency protection.”

“To avoid the extra-territorial application of the Directive, its scope should be confined to packages offered for sale or sold in the EU.”

“...supports this proposal and believes it will help to encourage more cross-border trade, if implemented effectively. Given the cost and status of the UK insolvency protection scheme, the business sees no reason why the cost per passenger would need to increase to allow for consumers from other member states to be covered. However agreement would need to be sought from all parties involved to ensure that this provision works in practice.”

“We are uncertain whether the proposal will genuinely result in more cross border trade. We would have a concern if businesses attempted to relocate to the market offering the lowest costs of protection, and sought to undertake all their activity from that market. We anticipate that it is unlikely that national regulators will feel entirely comfortable allowing sales to be regulated in a completely different market.

We believe that there will be impacts on the costs of protection in each market, but it is difficult to judge the extent of those impacts. Our own experience is that there are already significant variations in the cost of protection of holidays in different markets. This is partly driven by different mechanisms for financial protection existing in those different markets, but in some instances reflects how the financial protection regime has developed over time. As a specific example, our costs of obtaining protection in Belgium are relatively low, but that is partly as a result of the existence of a mutual scheme of protection, on which there have been relatively few claims. As a result, the cost of protection has been able to fall.”

“The potential to ‘forum shop’ to find the lowest cost of financial protection by registering a business elsewhere in the EU initially appealed to a number of [our members]. However the disadvantages, particularly to consumers and ultimately to the travel industry as a whole, we believe may outweigh any possible advantage.

One of our former members who held an ATOL licence for 250,000 passengers, announced with 24 hours’ notice that it was moving its business to Palma Majorca and returning its ATOL licence. Despite our best efforts as an organisation, we have been unable in the past two weeks since the move, to establish exactly how the protection scheme works although anecdotally the cost of protection was less than 10% of the cost of protection in the UK. Potentially UK consumers could be faced with nearly thirty different protection schemes, none of which other than the exiting ATOL scheme would be familiar to them. This will devalue the ATOL scheme and destroy the work the CAA has been involved in developing consumer knowledge over the past ten years.

Once a business fails where protection proves to be inadequate, or impossible to access due to language difficulties, the entire industry will suffer. We have grave

doubts that the majority of EU countries can possibly identify the risks and potential liability they would be accepting in allowing an ex UK business to register and operate in their jurisdiction. In practical terms we doubt the Bulgarian or Romanian civil service would be able to communicate with British tourists stranded in the Caribbean or India where for example charter flights would need to be arranged from an unknown destination to the UK to enable repatriation to take place.

In our survey only 12% said such an idea was a possibility but had many hurdles to overcome but almost 80% said the plan appears to be a total nightmare. We are of the firm belief that allowing such a plan would severely damage the reputation of the travel industry as a whole, leading to changes in consumer habits which would be damaging to the entire travel industry and strongly recommend that BIS reject the proposal.

We recognise the plan to have a central point of contact in each country but consumers are unlikely to have the vaguest idea about which country is providing protection and even if they do, the language issues appear to be insurmountable.”

“...believes that the benefits of enabling more cross border trade are likely to be limited initially, although there might be a move by travel firms to relocate their operations to benefit from another Member State’s more relaxed regulatory regime. As well as the cost of the protection regime, the Committee’s view is that considerations such as tax will play a major part in businesses’ decisions to move between jurisdictions.

...concerned that this has the potential for material consumer harm as some Member States do not presently have substantial outbound tourism operations, and their protection arrangements are suitable only for their limited local markets. This needs to be addressed if the protection envisaged in the Directive is to be effective and cross border trade is to thrive.”

“...believes that it is likely that the proposal will promote cross-border trade to some extent, through regulatory simplification. There are a number of reasons that we think any beneficial impact may be small.

Though... has no evidence to support the view, it seems reasonable to assume that consumers are more likely to buy holidays sold by foreign-established businesses if they are able to access protection services within their own country. This would mean that requiring them to access the protection services of a foreign country would tend to discourage cross-border trade rather than encourage it.

As we are starting from a point where Member States’ schemes are not set up to protect consumers from across Europe there would be significant transitional issues and likely teething problems. If this occurs (a poorly managed repatriation exercise for example) it may cause consumers to lose confidence in holiday protection and buy fewer packages and ATAs.

A key benefit of the existing arrangements is that consumers are able to claim what is due to them within their own country. This would be lost under

the new Directive, which makes it a less effective consumer protection measure – accessing protection from the services provided by a different Member State creates consumer detriment, especially where language barriers are concerned.

The UK experience has been that cross-border trade can be achieved within national protection schemes, provided the schemes are non-discriminatory. There is widespread non-UK ownership and management of ATOL holders selling in the UK. It is also relevant that the UK market is already competitive, so additional gains may be small.

The aggregate costs of businesses providing insolvency protection are likely to increase under the new Directive even after adjusting for the increases in scope. There are two main reasons for this.

Maintaining a practical ability to provide repatriation and refund services to a range of different countries is likely to be more expensive than specialising in one. Assessing the risk posed by businesses will be more expensive, because of the need for risk assessment to capture the differences arising from the different markets in which they sell, so the task of understanding the business will be more complex.”

“...believes that the benefits of enabling more cross border trade are likely to be limited. The greater impact will be to enable travel firms to move their operations to benefit from another Member State’s more relaxed regulatory regime. This has already started in the case of LowCost Holidays which has moved its operations to Spain without making it very clear how changes will affect consumers. Considerations such as tax will also play a major part in businesses’ decisions to move between jurisdictions.

This has the potential for material consumer harm unless each Member State implements protection effectively. We are aware that some Member States do not presently have substantial outbound tourism operations, and their protection arrangements are suitable only for their limited local markets. This needs to be addressed if the protection envisaged in the Directive is to be effective.”

“...understands the purpose of this, in terms of pursuing the Single Market, but from its perspective as a provider of insolvency protection services it advises that this will inevitably increase the administrative complexity and hence expense of delivering refunds and repatriation. The complexity may also lead to delays in launching repatriation exercises, which leads to obvious consumer detriment.

It is our understanding that it is possible for the same business to be established in more than one Member State. In order for insolvency protection providers to understand where liabilities lie it will be important for the Directive to be clearer about how mutual recognition would work where this is the case.

...believes that the objective of promoting more cross-border trade can be best achieved if consumers can be assured that they will receive the same quality of protections regardless of the nationality of the business from which they are buying their holiday. This includes the extent of protection, access and timeliness. The

Commission has been quite clear about the standards of protections required, but ... is concerned that Member States' schemes offer varying degrees of protection. It will be important to ensure that the quality of consumer protection that exists under the existing Package Travel Directive is not undermined by mutual recognition requirements, in particular the ease of accessing protection.

...more work is needed to ensure that the introduction of the new Directive results in the holiday protections offered across Europe being more equivalent than they are now. ...Member States should be permitted to continue running non-discriminatory authorization schemes, or alternatively that Single Market freedoms were open only to businesses established in Member States which had implemented the protections adequately.

...has no direct experience of providing protection for consumers based in different countries across Europe, but it seems likely that language barriers and different market structures across the European markets will complicate the provision of providing effective protection, which will result either in a poorer standard offered to consumers or higher costs."

"The respondents do not believe that the "Commission's contention that this proposal will help to achieve its objective of promoting more cross-border trade" is achievable without consistent risk management and regulatory control.

...this "lighter touch" regulation could mean more under-capitalised companies in the sector, with a consequent high risk of failure. The inevitable consequence is that the cost of insolvency protection will rise, unless there is a consistent regulatory regime to ensure companies are financially sound.

The potential transfer of business to lowest regulated States without the matching ability to control risk and raise funds to cover repatriation and refunds could lead some States becoming exposed to disproportionately high costs of repatriation and refunds in respect of travellers based in other States."

"We have noted that some travel companies have already started their move to outside the UK and we fear that 'insurance' based systems will offer a less than advantageous benefit to Consumers; there is a need for a Pan-European Wide Financial Protection Scheme!

First, under Article 15(2), does the very clear right to balance the cost of financial protection against what is generally deemed to be the risks posed by the operations of the company, pose a further risk to consumers? I am mindful of the issue of enforcement and in particular the case of *Rechburger v Austria* case (C-140/97). Here insurance was based on 5% of turnover over 3 months; the Member State was refused the defence that the losses only happened because they were unexpected and that there was poor trading.

Are the new provisions simply a statement that it is business as usual – would a financial risk assessment and looser arrangement on the basis of reducing a business overhead prove to offer sufficient financial protection? Are the financial institutions robust enough to deal with such risk assessments following the banking

crisis? Does the consumer not deserve the right to have enshrined into law a robust enforcement process and a clear requirement that a company or someone operating a travel company is 'fit to trade'?

...what if the scheme in another Member State is less speedy or advantageous or seeks to impose only minimum assistance requirements (for example in repatriation), whilst maintaining the 'spirit' of the new PTD, by comparison to what a consumer could achieve in their own State? How will the EU Commission ensure uniformity and balance equality against what appears to be the construction of a 'light-touch' pan-European scheme? Will any 'inconsistencies' create an imbalance in the operation of the Single Market and therefore a detriment to consumers faced with any additional costs?"

"...consider that the Insurance market plays a vital role in the provision of financial failure insurance for the travel industry and is proven to be able to adapt to the changes in the way the travel industry has changed and how the consumer now books their holiday.

...welcome the mutual recognition of insolvency protection between Member States and the obligation of providing administrative cooperation.

[Recital 34] ...implies that organisers will now not only have to provide security for their own insolvency but that of all suppliers that they use rather than simply make the organiser responsible as before. ...there is a danger that an Insurer may not be able to cover ALL if any of the suppliers that the Organiser uses as well as they own insolvency. Therefore the suggested insistence of security for suppliers by the Organiser could immediately beyond their control put them in breach of the regulations from day one because no such security is available.

Insurance Providers

The regulations appear to suggest that each Member State is responsible for companies supplying insurance, but it does not make it a condition that the Insurance Provider is registered in a Member State. ...is aware of an insurance provider not registered in any member state that is providing such insurance and is not regulated, with no recognised financial rating, no available financials accounts.

Whilst the regulations rely on member states there is still no provision to protect the public from an Insurer issuing this type of insurance and being in a financial position to pay claims specifically on an aggregated basis i.e. a large organiser collapse with tens of thousands of passengers.

...also believes that Insurers should have a minimum financial rating with a recognised rating agency such as Standard & Poor's of at least A as another security for the public."

"This is an absolutely vital point. The current law defines what is regulated by reference to packages 'sold or offered for sale' in the EU (PTD) or in the UK (PTR's). The Proposal shifts Regulation to businesses 'established in a member state'. ...was strongly persuaded by Regulators at the Event we recently attended that (a) they have no real grasp/authority over packages sold by a business in their territory to consumers in another Member State (or indeed outside the EEA); (b) that

administering after a failure, both the financials and repatriation, would be a nightmare, with the language difficulty for consumers just being the start of the problems (c) businesses will move out of the EU (e.g. to the USA or Dubai, say) to avoid Regulation. We strongly recommend that the criterion remain the current one, the place where the packages are sold or offered for sale, i.e. normally the consumer's own Member State."

"The suggested extension to include 'assisted travel arrangements' brings in the concept of third party service providers. Insurance of any insolvency protection against the failure of such third parties would only be possible with similar levels of robust risk management and regulatory control as for the existing holiday arrangers.

We believe that the new proposals to include protection against insolvency for sales to travellers outside the State of establishment of the business could create a huge risk and regulatory problem. For example, in the UK, insolvency protection can be insured as a pool across the industry but is only possible because of the strong risk management controls combined with the levers employed by an effective licensing regulator.

The concept of a UK traveller holidaying in Thailand (for example), but booked with a non-UK tour operator, perhaps regulated and protected by a local (perhaps tax payer) funded scheme in a third country is difficult to accept in terms of the insurability of such a liability. In the event of insolvency of the holiday arranger, would the cost of repatriation then fall on the local scheme in the domicile of the holiday arranger? Would it be reasonable to expect the tax payer in that third country to repatriate UK travellers back to the UK? If not, then would the UK government have to repatriate these stranded travellers without the benefit of any levy, funding or ability to regulate or control the risk of insolvency?

The respondents believe that the concept of mutual acceptance of risk across borders is cannot be seen as sustainable or insurable without the same system of control and regulation of the holiday arrangers being applied to all companies. To open the cross border trade up without some common ground on how the risk of failure is to be managed and controlled would seem to be premature.

Therefore whilst it is appreciated that consumers expect the same level of protection irrespective of the Member State, in which the business is established, there does need to be a common system of regulation and control (as mentioned above). If such risk is to be insured on a pooled risk basis then insurance solutions are only possible on the back of good risk assessment processes as demonstrated in the UK aligned to risk sharing and control via regulator management. Licensing and regulation without proper risk management does not provide a financially sustainable Insured consumer protection."

The Government's Response

The Commission is proposing a change of approach so that a Member State will be required to ensure there is insolvency protection in respect of the sales activities of

businesses established in the Member State, irrespective of where the business is selling or to whom they are selling.

The Commission's justification for this approach is that it will allow businesses the convenience of protecting all of their activities under one scheme, and that this will promote more cross-border trade. The UK supports provisions which promote the single market and enable ease of establishment for businesses, but not at any cost. There is little indication that the Commission has considered the possible adverse effects of such an approach, particularly in respect of one of the key rationales for the Directive; that on the whole consumers can pursue claims for non-conformity with an organisation based in their Home State in respect of services which would otherwise necessitate cross-border action. In our view the proposed approach could undermine this key protection.

However, we believe it is crucial to establish what the Commission means by "established in". Without a clear indication in the text as to what this means it is not possible for Member States to properly consider their liabilities under this approach. For example, is it envisaged that the concept of establishment relies simply on a minimal physical presence in a Member State from which it directs sales at other Member States, or does it rely on a business actually undertaking and facilitating the majority of its sales activities within the Member State? **We will therefore continue to seek clarification on this point in the text, if the concept of "established in" remains the basis on which Member States must ensure there is protection.**

Notwithstanding the need to clarify the concept of establishment as used in the Proposal we have other concerns over the approach, several of which were alluded to in the responses we received and might best be illustrated by the following scenarios:

- 1) Member State A has a relatively small package travel market operated mostly by SMEs. The current insolvency protection scheme put in place by Member State A is relatively inexpensive because the risks presented by the sector can be easily assessed, not least because the system covers sales within Member State A, and levels of activity are relatively small.

A large online organiser, already trading across EU and in 3rd countries establishes its business in Member State A because it can make savings on its insolvency protection provision.

Member State A must ensure that its insolvency protection scheme can cover all the activities of the online organiser irrespective of where it sells packages, or to whom. The scheme in Member State A will need to expand if it is to properly assess the risk presented by the online organiser, even though very few of its sales are to Member State A consumers. The costs of the protection are likely to rise because of the costs of monitoring the risk presented by sales activity outside of Member State A, and to account for the possibility that in the event of insolvency the system should be capable of locating and repatriating consumers from all over the world potentially to destinations anywhere in the world, and must arrange for refunds to consumers anywhere in the world (Article 15 (2) does not limit the scope of the protection in Article 15 to sales within the EU).

- 2) In the situation described above the online organiser established in Member State A directs most of its sales activity to Member State B. In the event of insolvency, Member State A's protection scheme falls short and does not cover the cost of refunding thousands of consumers from Member State B nor repatriating the hundreds of stranded passengers. If Member State A is found not to have implemented Article 15 correctly, it will potentially be liable under the Directive, being the State of establishment.
- 3) Again, taking example 1, the online organiser which has established in Member State A is a well-known brand with a history in Member State B and continues to conduct most of its sales with consumers from Member State B. Consumers from Member State B experience failures in the performance of the contract while on holiday in Member State C. The matter is not corrected at the time (the employees in Member State A do not speak the language of the consumers from Member State B and fail to understand the problem). On returning home, the consumer in Member State B can no longer look to the protections implemented in their Home State but are forced to try to have their complaint dealt with across borders by the online organiser in Member State A. They have lost one of the fundamental benefits of the Directive because the business has established elsewhere for economic reasons; a result which has been better facilitated by the approach to insolvency protection adopted in the Directive.
- 4) The system of insolvency protection in Member State D has been established on the basis that it is able to monitor the sales activity in Member State D in order to assess the risk presented by package organisers (the current situation under the Directive). Under the Proposal, the system must now cover all of the sales activity of businesses established in Member State D. Any insurance provider is likely to become reluctant to provide cover, or that cover will become more costly because establishing the extent of the risk presented by the relevant businesses will be much less reliable. It is not easy to track the sales of a business when they are being made across the EU, or anywhere in the world. Assessing that risk therefore becomes much harder and more expensive. In addition, EU consumers will effectively be subsidising protection for consumers from elsewhere in the world because of the complications and added expense of providing for such wide ranging protection.

We consider that the consequences of the Proposal as presented tips the balance between consumer protection and business obligations too far in favour of business convenience at the expense of the consumer protection objectives of the Directive. We also believe that the proposed approach unnecessarily complicates Member States' options; will result in increases in the costs of protection; and, that it is possible that some current systems may prove to be inadequate and will fail to deal with the likely consequences, especially if there is an influx of businesses establishing in a Member State where there is relatively small sector at present.

It is also the case that, unlike at present, reliance on the "established in" approach means that those trading from 3rd countries direct into the EU may not consider themselves subject to the insolvency protection provisions. This provides a clear incentive, particularly for online traders to relocate offshore, for example to the Channel Islands. On the whole, our experience of off shore traders under the current regime is that they do comply with the UK

regime which applies to sales directed at the UK market by obtaining, for example, an ATOL licence.

We, therefore, favour retaining the current approach: that Member States are responsible for regulating sales and offers for sale in their territory, primarily with the objective of protecting consumers who buy travel services in their Member State. But we consider that the Proposal could be clearer that Member States are obliged to recognise the protections provided in the other Member States where consumers choose to buy travel services across borders which are regulated elsewhere in the EU, thus facilitating cross border purchases.

We believe there is nothing in this approach which inhibits the freedom of businesses to establish where they wish to. However, as now, they would continue to be obliged to abide by protections in place in the Member States to which they direct their sales activity.

One respondent observed that Recital 34 of the Proposal seeks to clarify the coverage of the insolvency protection requirement by specifying that protection provided by organisers and retailers of ATAs should cover the insolvency of any of the service providers supplying the services which go to form the arrangement. The Commission has acknowledged during the negotiations that this should apply only to ATAs because elsewhere in the Proposal organisers of packages are already liable for the delivery of all the services, and therefore must make good failings which are the result of the insolvency of a service provider.

Question 34

Do you agree that consumers should have the opportunity to complete their holidays (if appropriate) in the event of the insolvency of the package organiser or assisted travel arranger where the contracts for the travel services are valid and should be honoured by the travel service providers? Do you see any practical difficulties with this approach?

Summary of responses

We received sixteen responses to this question: seven from trade representatives, one from a consumer representative, six from enforcement interests and two from others, including 1 law firm.

All of the respondents but one agreed that where possible it would be good if consumers were able to take or complete their holidays, rather than simply be refunded or immediately repatriated. The one respondent from an enforcement authority who did not agree did not explain why.

The main issue identified was that it would be important that whatever entity took on the fulfilment of the arrangements, consumers should still benefit from the provisions of the Proposal, including coverage for the insolvency of the entity and that the entity carried the full liability for delivery where required.

It was also observed that this often reflects the current situation in the UK where the CAA in particular will look to find an organiser to take over the arrangements of a failed business wherever practicable and appropriate.

Extracts from responses:

“...it is generally preferable for customers to complete their holiday before being repatriated as per the normal current practice. With the introduction of Assisted Travel Arrangements, this could continue providing the contracts have been made with the service providers and not with the retailer of the arrangement. This would, in effect, fall apart where the failure is of one of the contracted principal providers. With a traditional package things could become more complicated, as if the organiser fails prior to departure, the traveller could find that they have had to change their arrangements and this could result in them not being restricted [protected?] as intended by the Directive.

If the organiser fails after departure then the traveller will not have the rights to protect them in the event of changes occurring to arrangements and they will not have the right to bring claims back in the UK (as intended by the Directive).”

“The UK already provides provision for completion of travel under ATOL in respect of a package and this should continue. We again state that this could not be enforced for separate transactions with principles on click through sales.”

“On the face of it, and in most cases, it will be preferable to provide repatriation at the completion of the customer’s holiday as planned.

Certainly, customers on many Assisted Travel Arrangements should normally continue to receive their holiday as planned as the contracts are made with the service providers and not with a retailer of the arrangement, so the failure of the retailer should not affect the delivery of the contracted services unless the retailer is one of the actual providers of one of the travel services.”

“We have a slight concern with this provision on the extent to which legislation should set a framework for managing solutions, or whether it should address all possible issues. We are concerned that this is attempting to micro manage the process which will follow the failure of any Organiser, and we question whether this is appropriate. Broadly speaking, we believe that a customer should normally have the opportunity of completing their holiday arrangements before being repatriated, but we believe that this may vary on a case by case basis, and as such, any framework should not be over prescriptive.

We would also be concerned as to some practical impacts of allowing this to happen. Who would be responsible for any product or service failure in the period between the financial failure of the Organiser and the customer return home? If a customer suffered a catastrophic injury, for example, would they have a right to claim, and if so, against who?”

“...agree that the fulfilment of holidays, where possible, is usually preferable to the option of repatriation or refund and that the ability to do so should not be prevented

by Directive requirements. However, in some cases, the ability to fulfil holidays is contingent on somebody being around to do it, which may not always be the case.”

“...would urge caution where insolvency leaves the consumer with no package organiser to take responsibility, however, and where these arrangements are subject to the terms and condition of the supplier, which may differ from the terms under which the booking was originally made and may not provide the protections granted under the Directive. This is of particular concern where the contracts are with overseas suppliers (as they invariably will be) where the consumer would need to seek redress from firms operating in different countries, in a different language and under different contract law.”

“Yes, this should be provided when it is appropriate to do so. In many cases, it has the potential to provide consumers with what they want at a lower cost than refunding their money. Two practical issues may arise. First, who facilitates the process? In the UK, the position of the Air Travel Trust provides a means of answering the question for air holidays, and financial security providers could play a role, but it may not be possible under all potential implementation scenarios. Second, if the failed business was a package organiser then consumers will in practice be unable to look to the organiser for wider aspects of product liability. An insolvency protection provider will not always be able to take on such liabilities. In the UK, the CAA and ATT have sometimes been able to achieve a similar result by agreeing terms on which customers’ protection is transferred to a different travel company, which has the necessary expertise and insurances.”

“For ATA’s, we note that under Flight-Plus there is a requirement under the ATOL Regulations 2012 for the Arranger to make suitable alternative arrangements following the failure of an element of the Flight-Plus. So if an airline fails, the F-P arranger must still enable the consumer to get to their (possible expensive) cruise or hotel. But under ATA’s, there seems to be only a requirement to refund the price of the failed element; leaving the consumer unable to use – or get a refund for – the hotel etc. We suggest that the Flight-Plus model be adopted for this purpose. It might have the effect, though, of making SAFI virtually compulsory for ATA retailers. As we said at Question 11 above, there is not much of a market of available SAFI at present.”

The Government’s Response

It seems preferable that consumers should be able to complete their holidays or travel arrangements where it is practicable and appropriate for the insolvency protection provider to arrange for this without any reduction in consumer protection. In respect of packages this is likely to mean either that another organiser agrees to take on the arrangements and the liabilities under the Directive, or the insolvency protection provider agrees to do so. For ATA’s this will not be possible where the “retailer” is one of the principle suppliers, and clarity on what happens to the remainder of the services contracted for under an ATA where one element is no longer available is an issue which needs addressing in the Proposal.

The Proposal should allow for fulfilment where appropriate and practicable, but should not require it.

Article 16 Mutual recognition of insolvency protection and administrative cooperation.

Article 16.1, 16.2, 16.3 & 16.4

Question 35

Do you think that having such a system will encourage cross-border trade by, for example, encouraging higher levels of consumer confidence in buying packages or assisted travel arrangements across borders?

Do you have any experience of other types of cross-border trade where similar consumer protection provisions apply? If so, please provide details of your experience and any lessons that may be learned for package travel?

Summary of responses

We received fourteen responses to this question: six from trade representatives, one from consumer representative, four from enforcement interests and three from others including two law firms.

Four of the six trade respondents felt that firmer mutual recognition requirements would have a beneficial effect on cross border trade, although two observed that they felt it would make little difference to the current position for them. The consumer and enforcement interests outlined similar concerns to those addressed under article 15, observing in particular that consumers generally do not look at the detail of the protection provided and assume that they will generally be covered by the rules of the State in which they purchased the arrangements. Similar issues in respect of protection being sought or enforced across borders were therefore relevant to this question, as were the points relating to the practicality of systems monitoring out of State activity.

In respect of the Commission's Proposal for a system designed to ensure compliance by Member States in respect of ensuring adequate protection under their respective systems, most of the comments doubted that such a system could be introduced without requiring considerable investment by Member States or adding significantly to costs. It was also observed that a system which acted in the event of a failure to deliver was not particularly helpful to the consumers immediately affected.

Extracts from responses:

“...has a number of non-UK companies in membership. We ensure that they have protection in place for their non-licensable packages, either by providing protection ... or providing evidence of satisfactory protection under the Package Travel Directive in another EU Member State. Indeed, we have a number of members who protect their package arrangements under the German scheme. This highlights, in our view, the importance of ensuring that there is mutual recognition of protection schemes across the EU.”

“This seems to us a small step in a welcome direction. While a central contact point who is able to provide independent verification of an organiser's insolvency protection arrangements is a useful back-stop, it would be very welcome if the consumer could, perhaps through the use of EU-wide symbols establish that an organiser is presenting itself publicly as having the desired cover. In the same way that a domestic consumer could contact ABTA or CAA/ATOL to verify that a retailer or operator publishing the relevant trade symbols, this could be extended such that domestic contact points could verify status through their counterparts of organisers in 3rd countries.”

“This sounds good in theory, but in practice we doubt if all member states will be able to create systems of protection which are sufficiently robust.

It works to an extent in financial services (Freedom of Services), although some member states still have local rules which restrict entry (language requirements in particular).”

“If mutual recognition of other countries' protection systems becomes standard, then protection arrangers will need such a system of central contact points. Moreover, It will be necessary to establish and maintain in real time accurate registers of travel organisers operating throughout the EU and the EEA, accessible to consumers as well as regulators, organisers and traders, and will have to be in the local language(s).

The creation and maintenance of such registers in each Member State is not a trivial undertaking. ...is very concerned about the practicability of this proposal, although it would be important that consumers and Regulators had access to reliable real time information.

...most consumers do not actively seek information about insolvency protection. This is primarily because they assume that protection is in place and will be available when they need it. When choosing a holiday, most consumers are driven by price and departure airport. When departing from the UK, they will therefore assume that they are protected by a UK scheme. A central contact point may have limited impact on consumer confidence in cross-border sales as only a small number would make use of it: nonetheless, if cross border trade is to become more widespread this will be necessary.”

“...has experience in ensuring robust mutual recognition arrangements under the existing Package Travel Directive. These allow businesses established in each country to sell into each other's markets under their state of establishment's protection arrangements and mean that consumers can make claims within the UK and are ensured the same level of protection as other UK consumers. We believe that such an approach is more in line with principles of subsidiarity than what is proposed and that a variant of it could be proposed as part of an alternative.”

“Consumers would be unlikely to have a high level of confidence as; in general, they would be unable to differentiate between different protection schemes. Lighter regulatory control could allow high risk companies to operate which inevitably will

have a higher risk of failure and thus 'burn' less well regulated and funded schemes. Such potential scenarios could leave national governments the (legal?) obligation to repatriate their own consumers but without the benefit of any funding and prior planning or control over the failed holiday arranger that had been regulated by another member state.

At present there is no publicity or explanation of the differing protection regimes nor clarity over whether travellers from another state or elsewhere are covered and for what- we are not aware of any equivalent of the "ATOL" mark, except where such national schemes are fully bonded by external sureties such as in Germany. Even there it must be doubted that surety providers have sufficient capacity or intention to protect high numbers of travellers from other states. Most respondents believe that the current UK model adopted to fund the ATOL protection supported by excess layer insurance protection, is the most efficient scheme providing the best protection for the consumer as it is closely allied to effective management of the insolvency risk.

The extent of any protection scheme's obligation to consumers based in another State must be matched by consistent risk management over financial performance and some control over entry into the sector, otherwise it will simply encourage poorly managed and funded businesses to operate from lightly regulated domiciles and with a consequent increase in business failures.

A (non-tax payer) and consumer or industry funded solution, on a wholly cross border basis or perhaps an EU funded scheme could be the only way forward to align the insurance and management of the risk of failure with the desire to open trade..."

"...most consumers do not actively seek information about insolvency protection. This is primarily because they assume that protection is in place and will be available when they need it. When choosing a holiday, most consumers are driven by price and departure airport. When departing from the UK, they will therefore assume that they are protected by a UK scheme. A central contact point would have limited impact on consumer confidence in cross-border sales as only a small number would make use of it."

"We are concerned about the 'temptation' for Travel Companies to base themselves within EU 'off-shore zones'. If this were a Regulation we would be more confident that the rules would be equally applied across the whole of the EU. The fact that this is a proposed Directive, recognising the 'possibilities' that arise from cross-border trade, raises the spectre that Consumers may be limited by a 'State's' interpretation or willingness to attract companies and the employment that travels with it. We fear that some companies will seek to distort the intentions of the PTD through a particular 'State's' implementation and create a greater Consumer detriment, particularly if they choose a jurisdiction outside the UK or an EU 'off-shore zone'. We fear that this will lead to a serious detriment for Consumers, not just within the UK but of all EU Member States!"

"Our Regulator (CAA) has made no secret of its unhappiness of the recent move (under the *current* legislation) of a major travel company to Spain. But at least they have room to argue (if such be the case) that the foreign regime does not adequately 'cover' the package (see wording of Regulation 16 (2)(a) of the PTR's). Under the

Proposal, there would be compulsory mutual recognition, and there are fears of a 'race to the bottom', as companies seek establishment in the regime perceived to be cheapest; of course this is a 'double whammy' because of the points made at Question 32, above. Regulators lose their current powers, eg Enforcement Orders under the Enterprise Act, and the like. If the mutual recognition point is to remain, it becomes vital for consumer protection that Regulation bites on where packages are sold, not the country of establishment."

"The present position is that bonds/security by Insurance companies and Financial institutions are recognised if in an EU Member State (EU Case 410/96). The submission made to the EU last year was that 'other schemes' in the EU should be recognised. Whilst we welcome the Mutual recognition objective, article 16 is not clear I what it is seeking to achieve. Surely, all 'Other Schemes' are already meeting the requirements of National rules e.g. ABTA, does this now mean that the ABTA bond will be automatically recognised in other Member States or does Article 16 require member states to set up new rules and requirements?"

It is important for the Directive to be absolutely clear in its wording on the scope of the insolvency protection and the mutual recognition of insolvency protection, in order to be consistent with each Member States insolvency protection schemes, Member States, therefore need to ensure that their insolvency protection schemes adequately protect travellers purchasing packages or assisted travel arrangements especially in circumstances where the traveller is not residing in the same Member State as that of the organiser or retailer Hence Article 15 and 16 of the present draft Directive needs to capture this aspect in more detailed and clear wording."

The Government's Response

We agree with the general intent of mutual recognition of Member States' provisions (in our view this is the position currently), but, as mentioned under Article 15 we believe the proposal is fundamentally flawed in applying the requirement for insolvency protection to all of the sales of a businesses established in a Member State irrespective of the country in which those sales are made.

We, therefore, support the current approach to mutual recognition, so, for example, a consumer who chooses to buy a package which is sold or offered for sale in another Member State would be covered by the protection in that Member State. Currently, in our view, Member States cannot insist that consumers based in their jurisdiction must be protected by the protection in the Home State where they have purchased a product already protected by the system as it applies to sales in another Member State. This is the level of mutual recognition we believe is already in place.

We believe Member States should primarily be concerned with protecting consumers in respect of sales activity in their Member State, irrespective of the location of the consumer (this is in line with the approach adopted in the wider EU consumer acquis); not that they provide protection for consumers in other Member States when they are shopping in their Home States.

We are not entirely clear about what the Commission has in mind as far as the monitoring elements of Article 16 are concerned, but it seems to be imposing a regime which is driven by the additional administration involved in the “established in” approach, demonstrating another complication and probably costly consequence.

In order to comply with the wider Proposal the trader should be providing consumers with details of the insolvency protection they have in place. It should be simple enough for interested parties to enquire direct to the protection provider as to whether a business is properly covered. We question the need, therefore for a central register.

The sharing of information about the provisions in place in each Member State is important and is reasonable enough, but we wonder whether it is necessary for contact points to maintain records of every trader if the contact points are different from the bodies actually providing the means of protection. This seems to be an unnecessary level of bureaucracy which, particularly in Member States which have a great many businesses selling packages and ATAs, will be costly to maintain.

There is already cross-border enforcement mechanisms designed to enable the pursuit of non-compliance with European requirements.

We will therefore seek clarification and underline that if the “established in” approach remains there is likely to be a need for a very robust system by which shortcomings in Member State implementation are identified and rectified quickly in order to ensure ongoing and adequate protection for consumers. We currently have doubts as to whether such a cross EU system is likely to be able to deliver such assurance, without considerable expense. **The Proposal must be more explicit on the minimum acceptable standard of insolvency protection.**

Chapter 6 – Assisted Travel Arrangements

Article 17 – Information requirements for assisted travel arrangements.

Question 36

Is this Proposal clear enough?
 Would it be preferable if the Proposal included a set form of words which all assisted travel arrangers were obliged to use?
 Would it cost less for business if required to use a set notice in a specified way, rather than formulating and using its own form of words?
 Is this a practical proposition given the nature of the business models covered as assisted travel arrangements? If not, please explain.

Summary of responses

A total of thirteen responses addressed this question: seven from trade interests, one from a consumer organisation, four from enforcement interests and one from a legal firm.

All but one commented that where the information required by Proposal is to be provided, then, in general, setting out a standard form of words and the conditions under which it

should be provided would be helpful and save costs for business. Several cited the current UK ATOL certificate as a good example of a relatively simple system which was workable and appeared to deliver to consumers the information they needed to provide reassurance as to the ATOL cover. Some trade representatives felt it was important to ensure that consumers were made aware, irrespective of what they were buying, of the level of protection their particular arrangement attracted, including when the arrangements did not fall within the Directive at all (purchase of single elements from separate providers as entirely unrelated products).

One correspondent felt the form of any notice should be left to Member States and not prescribed in detail in the Directive, but nevertheless advocated a set format and content.

Notwithstanding comments from some in the trade doubting the necessity to include the ATA models in the Directive at all, they argued against a Proposal which required bespoke information for consumer, per booking, suggesting that such an approach would add considerably to costs; they favoured, therefore, a set form of words, or the freedom to provide generic notifications and information.

Despite general support for a set format approach, several respondents were still concerned that the precise coverage of the ATA models was not at all clear, and neither was the nature of the insolvency coverage in respect of the provider of the individual services which made up the ATA. Some therefore commented that it was not possible at this time to comment on the practicability of providing information at a stage where an ATA had not been created, but might be, depending on the consumer's decision to buy a second service which had been targeted at them as a result of agreeing the first.

Extracts from responses:

“We believe that there should be a set form of words but that these should be produced at Member State level. We do not believe it would be practical to specify this wording in the text of the Directive.”

“The requirement to clarify as described may be accompanied by an opportunity to sell insurance to cover the eventualities that are subject to mandatory cover (be it duplicated or not) under the terms of the PTD.”

“Further clarity is needed regarding the proposals for information requirements for ATAs. From an IT point of view this could be costly for companies to provide. ...view is that it would be preferable if the proposal included a set form of words which all assisted travel arrangers would be obliged to use, in order to ensure consistency for customers.”

“We believe that this point is inextricably linked with the fundamental question of the scope of Assisted Travel Arrangements, if they are able to continue to exist at all.

“Any form of words would need to vary by country, and we do not think that any provision, other than a broad description should appear in the Directive.

As stated earlier, subject to whether Assisted Travel Arrangements do constitute a legitimate product type, we believe that there should be standard wording describing the levels of protection that are offered for:

- Fully protected packages
- Assisted Travel Arrangements
- Unprotected travel arrangements

We believe that it is equally important that those selling holidays or other travel arrangements in which the consumer receives no protection should have obligations to make clear the lack of protection offered to consumers.

... We are not convinced that this is a practical proposition, depending upon the final version of scope of the various options.”

“...we do not believe ‘ATAs’ should be included within the scope of the Directive. Notwithstanding our views on the inclusion of ATAs in the proposal the UK industry’s experience of providing certificates for ATOL Flight-plus holidays shows the following issues should be taken into account:

- Information needs to be standardised and not require individual preparation on a per customer basis (for example, it should not require entry of specific customer details, itinerary numbers etc).
- Any requirement to create bespoke information documents (such as certificates) on a per customer basis would have a significant cost impact.
- There should be clarity on the contents of the standard information required well in advance of implementation (this did not happen with Flight-plus and created significant cost).”

“...we consider that the provision is clear subject to those points previously made. In answer to your further sub-questions, we have long advocated the use of standard terminology... We cannot see how standard wording and required notices would be a burden to business; it would be a marketing tool to demonstrate their ethic, openness in business!”

“The proposal for consumers to be made aware that by booking an Assisted Travel Arrangement (ATA) they are contracting separately with each travel service provider is sound but begs more questions about the nature of ATAs and what the Commission actually intends to legislate for. The information for the consumer should explain that insolvency protection applies to these sales, but the existence of separate contracts makes it difficult to establish whose insolvency is being protected against.

...believes that whatever requirement is made on ATAs it must be clear to the consumer what they are protected for and what form that protection will take. The Committee’s earlier responses relating to pre-contractual information to be made available to consumers are all relevant here; sellers of protected travel should be obliged to make the situation on protection clear from the start of the selection process (including where some sales are not protected), and to provide documentation after the event setting out what is protected and how it can be accessed.

In a UK context ...believes that the ATOL Certificate has had a beneficial impact and the Directive should not have the effect of requiring it or other useful changes regarding information to be rescinded.”

“...the information the consumer needs is that which should explain that insolvency protection applies to these sales - but the existence of separate contracts makes it difficult to establish whose insolvency is being protected against.

...it is important that consumers are told at an early stage exactly what they have purchased, whether it is protected, and, if not, what the alternative is.

Art.6 (b) (iii) requires package organisers to provide the name of the entity providing insolvency protection but there does not seem to be a similar requirement in respect of Assisted Travel Arrangers.”

The Government’s Response

Clearly, in order that one of the key objectives of the Proposal is to be achieved (that the current confusion among consumers and the sector as to what is covered and what is not should be alleviated) it is important that consumers in this market are properly informed of the different levels of protection proposed for the different selling models to be covered.

We, therefore, support the Proposal that before an ATA is concluded the consumer is informed that they will not be buying a “package” but that the insolvency of the retailer or any of the service providers is covered.

The extent of coverage in the event of the failure of one of the service providers should be clarified; we prefer that either a suitable replacement is arranged to enable the ATA to continue, or, where that is not possible or appropriate, that cancellation of other elements which are effectively rendered unwanted is permitted, and refunds provided for.

We will continue to consider and seek advice on the practicality of this Proposal, subject to achieving more clarity on sales processes which result in creating ATAs. For example it seems a relatively simple requirement where the consumer is in face to face or telephone contact with retailer, however, where the consumer is online and is presented with a targeted offer to take up a second service, at what point and how should the consumer be informed that if they take up the second service an ATA will be created?

We do not support extending the information provision to arrangements which do not form either a package or an ATA. We believe this would be too onerous on the providers of single travel services, which include hoteliers, airline, car hire firms, for example, who are in no position to know whether the consumer is in the process of making their own combinations of separate arrangement or not.

We believe it is enough that consumers should be made aware when they are considering buying a protected package or an ATA, and should be advised in guidance that if they do not receive such notification, then their self-booked arrangements do not benefit from the added protections included in the Proposal. The Unfair Commercial Practices Directive

(Consumer Protection from Unfair Trading regulations 2008 in the UK) already makes it an offence to mislead by omitting important information which the consumer is likely to need to make an informed decision. This, in our view, includes where it is possible that a consumer might be misled by the omission of information about the lack of coverage, for example, a web based seller offering a variety of packages, ATAs and bookings of single elements, the presentation of which might give the impression of added protection for all the arrangements on offer when that is not the case.

Question 37

Should there be a similar requirement for ATAs to ensure that travellers know who will be providing assistance in the event of the ATAs insolvency?

Summary of responses

Twelve respondents replied to this question: six from trade interests, one from a consumer organisation, three from enforcement interests and two from others including one law firm.

All agreed that this requirement should reflect a similar requirement on package organisers under Article 6 to provide details of the entity providing the insolvency protection as pre-contractual information. One trade representative qualified their comments by suggesting this was appropriate where the retailer held the consumer's funds. One reiterated their desire not to see ATAs covered as they did not equate to packages.

Extracts from response:

"...agrees that there should be a similar requirement."

"Yes. This should be available before any booking is made."

"If the ATA will be holding client funds, this seems reasonable. "

"...Subject to our response to the earlier question in relation to packages, we support a consistency of approach."

The Government's Response

We agree that the information obligation on the ATA facilitator should include details of the provider or providers of the required insolvency protection, including where claims should be directed in the event of a failure.

Chapter 7 - General provisions

Article 18 – Particular obligations of the retailer where the organiser is established outside of the EEA.

Question 38

What are the likely effects of this provision on any existing market for packages organised outside of the EU but which are sold through EU based entities?

Will the likely costs of complying with this Proposal outweigh any likely benefits retailers might accrue from selling for organisers from outside of the EEA?

To what extent might these costs be passed to the organiser as a condition for the retailer providing an EEA established sales platform?

Does the lack of application to sales targeted at EEA Member States from outside of the EEA direct by organisers create a gap which might be exploited? If so, please provide any ideas for practical solutions.

Summary of responses

We received fourteen responses to this question: eight from trade interests; one from a consumer representative; four from enforcement interests; and one from a legal firm.

Several trader representatives interpreted the Proposal as a whole, with the exception of Article 15, as applying to off-shore organisers so that they would be liable for the performance of the whole package and for providing the relevant information provisions. But they would not, because of the “established in” formula proposed by the Commission in relation to the Article 15 insolvency protection requirements, be required to provide insolvency protection. They then went on to observe that this was a clear incentive to establish in non-EU countries and trade direct into the EU.

Several trade representatives and enforcement interests also offered the view that it was likely that the costs to retailers of providing the protections Proposed in respect of sales and offers for sale of packages provided by businesses established in 3rd countries would act as a disincentive to carrying that business. This would result in those 3rd country businesses trading direct with consumers and providing less protection than is required of businesses established in the EU. They observed that this in turn was likely to result in economic inequalities which would act to encourage establishment outside of the EU.

Extracts from responses:

“...We believe that this is the effect of the existing Directive. If a retailer sells packages offered by organisers based outside of the EEA, those sales are covered by the existing Directive.

- Costs for any obligations on companies within the Directive would be passed on through higher costs for suppliers and ultimately to the consumer in higher prices.

- We do not necessarily agree with the premise of this question.

...As the Directive, with the exception of Article 15, is not restricted in its application, we believe that it will apply to all packages and assisted travel arrangements sold or offered for sale in the EU and that Member States will be required to ensure that travellers buying packages or assisted travel arrangement in their territory receive the rights intended under the Directive.

This reflects the current situation under the existing Directive and Package Travel and ATOL Regulations. ...has received confirmation from the CAA, the trading standards authorities, and BIS that, subject to all relevant considerations, enforcement action will be taken against any travel company which it believes to be acting in breach of the ATOL Regulations or the Package Travel Regulations, irrespective of whether the company is registered and where its trading address appears to be situated.

...On that basis, and with the exception of Article 15 on which we comment below, we believe that the Commission's intention is, quite rightly, that EU travellers should obtain the benefits of the Directive when they purchase packages and Assisted Travel Arrangements, the sale of which is directed at the EU.

That, of course, will pose a challenge for the enforcement authorities in the EU and we believe that is a challenge that the enforcement authorities must prepare for and respond to.

...If it is believed that the Directive does not apply to packages and Assisted Travel Arrangements that are sold in the EU by companies outside of the EEA, companies will seek to establish outside of the EEA. In reality, they do not need to go far, as is seen by the Isle of Man and Channel Island examples.

The regulatory authorities must set out now what approach they will take to ensure travellers in the EU will not lose the protections that this Directive seeks to give them by travel companies from outside the EEA selling from a cost-base that is lowered due to a lack of regulation.

If it appears that the enforcement authorities in the EU have no intention of protecting EU travellers, it will be very difficult to avoid mass avoidance of this Directive.

Article 15 imposes obligations on Member States but only in respect of organisers and retailers 'established in their territory'. We believe that this Article is misjudged. The intention of the Directive is to provide protections to consumers in the EU. The obligation on Member States throughout the Directive, with the exception of Article 15 is to ensure that travellers get that protection. The obligation on Member States under Article 15 is solely to ensure that organisers and retailers 'established in their territory' obtain financial security for their travellers. This formulation allows organisers and retailers who are not established in a Member States to sell to travellers in a Member State without having in place any financial security.

This cannot be the intention of the Directive. The intention must be that Member States must ensure that all packages and Assisted Travel Arrangements sold or offered for sale in their territory are covered by a financial security.”

“In general, this should make retailers in the EU reluctant to sell the products of non EU based entities, as they will not wish to pick up a responsibility of this type. That will presumably give more protection to European consumers.

Will the likely costs of complying with this proposal outweigh any likely benefits retailers might accrue from selling for organisers from outside of the EEA? We would anticipate that they would.

To what extent might these costs be passed to the organiser as a condition for the retailer providing an EEA established sales platform? We do not believe that retailers would have sufficient bargaining power to pass such costs back up to non EEA organisers. In practice, any additional costs will fall to consumers.

Does the lack of application to sales targeted at EEA Member States from outside of the EEA direct by organisers create a gap which might be exploited? If so, please provide any ideas for practical solutions. We commented in section 1 of this response that one of our key principles for the design of any scheme was that obligations should be proportionate. Ultimately, if Organisers believe that the burdens being created by the new regime are excessive, they will look to avoid those burdens if they are able to do so. This may lead to businesses relocating offshore if they believe that there are financial advantages to doing so. It should also be remembered that whilst the proposals do significantly extend the scope of protection, they do not generally impose burdens on the original sellers of services, such as airlines and hoteliers. As such, there will continue to be imbalances in the market, and there will no doubt be some other businesses who will seek other ways to avoid the burdens created by the Directive.”

“This could mean certain companies basing themselves within the EU but having a non EU HQ to escape the provisions of the Directive. There have been examples of non EU travel companies selling packages through co.uk websites but in reality the company is based outside the EU. The Timeshare and Holiday Club industry have traditionally based themselves outside the EU or in countries that have not adopted a particular Directive.”

“In theory this sounds a good idea, ensuring all package sales are protected but we suspect rather than sell them and take risks over a product which they have absolutely no control whatsoever, they will choose not to sell the product at all. 25% of our members indicated that they do currently sell products packaged outside the EU and that this change could be a potential disaster. On the other hand almost 40% thought this was a good idea as it would encourage true retailers to look for a UK based company, although clearly there may be times when no such product is available.

At present sales within the UK should have financial protection, this may well have the opposite effect to the desired one, namely that customers will be forced to book

direct as no UK business will wish to take the risk of sale. This cannot be good for the consumer or the travel industry.”

“...is concerned that this proposal will result in UK consumers purchasing directly (that is, not through an agent) from firms established outside of EEA not having access to financial protection. This is because Article 15 makes no such requirement for non-EEA established businesses. This would be a major backward step from the current Directive, where the requirement is based around packages sold or offered for sale within the territory of the EU.

Where businesses are genuinely established outside the territory of the EU, enforcing the requirements of the PTD (whether sales are direct or not) is a challenge. Despite this, many non-EEA established businesses sell packages and provide financial protection across Europe in accordance with the terms of the PTD. On the face of it, the proposal would remove those protections.

Exclusion of insolvency protection from non-EEA direct sales is entirely inconsistent with the purposes of the Directive and, given the ease with which an internet-enabled business can relocate, creates an easily exploited avoidance channel.

...This might be a simple matter in respect of travel companies based outside the EEA, such as Turkey, Isle of Man or one of the Channel Islands. There is no reason why similar principles should not apply wherever the company was based. ...we believe that the Commission’s intention is, quite rightly, that EU travellers should obtain the benefits of the Directive when they purchase packages and assisted travel arrangements, the sale of which is directed at the EU. This poses a significant practical challenge for regulators and enforcement authorities in the EU, the magnitude of which should not be underestimated.

... as it is presently drafted, it will be very difficult to avoid mass avoidance of this Directive.”

“...Our chief observation is that if BIS interpretation is correct, the proposal will provide further incentive to locate offshore and market to EU-based travellers online only. The scope for difficulty in enforcement if such offers are picked up and redistributed by online providers with a physical presence in the EU seems very wide. We have no knowledge of the likely cost to a retailer of providing PTD-level cover, but observe that they are already at a competitive disadvantage to the non-EU entity. If there were a scheme by which non-EU entities could show compliance with a EU system (see response to Q35 above) then there may be an incentive for non-EU entities to participate in order to appeal to EU consumers. This would be welcome, though we note that operators in EU remain at a competitive disadvantage as compared to those outside the EU due to the operation of the tour operators margin scheme, by which the gross margin of a package is subject to TOMS VAT in the operator's country of establishment. Much of the European industry is already located in Switzerland (EEA but not EU) so if a retailer could be based in Switzerland, for example, and successfully sell throughout the EU, they would have an advantage over their EU counterparts.”

“...it opens up an easy avoidance route. In an internet-enabled age it is relatively straightforward to sell direct to within the EEA, from outside its territory. On the face of it, some well established businesses now selling under ATOL would have no further requirement to do so, and businesses wanting to avoid providing protection could relocate.

Different requirements could apply to such sales, perhaps based on the state from which the consumer was to depart. There would be a degree of complexity if they also made agency sales, because those would presumably be protected by the EEA state in which the agency was established.”

“We ...are concerned that this proposal will result in UK consumers purchasing directly (that is, not through an agent) from firms established outside the European Union and thus not having access to financial protection. This is because Article 15 makes no such requirement for non-EU established businesses. This would be a major backward step from the current Directive, where the requirement is based around packages sold or offered for sale within the territory of the EU.”

“This provision may in affect lead to many companies refusing to work with companies outside of the EEA unless they agree to take on the liability, for example ...working with cruise companies. As a retailer ...would be unwilling to take on the liability of the organiser. It is our view that the likely costs of complying with this proposal would outweigh any likely benefits accrued from selling for organisers from outside of the EEA.”

“We are concerned by this point because of the potential lack of ability for Consumers to seek valuable redress against an Organiser or Retailer; providing a ‘guarantee’ for Chapters IV & V does not provide complete security for Consumers – clarity on liability and redress should be addressed under Article 18 for Consumers!

“In order to promote the cross-border provision of travel services, organisers established in other EU member states or outside of the EU should be able to comply with the consumer protection required by this Directive. Should the member state in which the consumer resides conclude that the national insolvency protection scheme of the country of establishment of the organiser is not adequate according to article 16, it should allow organisers not established in the consumer member state, to join the national insolvency protection scheme of that member state. Closing the scheme to national organisers only can hamper trade between member states and the development of the Single market.”

“...retailers may be surprised at the cost of public liability insurance, not to mention the cost of providing financial security (possibly via a Trust Account, although that would mean the money could not be passed on to the Organiser until after the holiday). And what of the seriously injured consumer who finds that the retailer, through wantonness or ignorance, does not have liability insurance? And Article 18 also leaves the big new hole of Organisers outside the EEA who sell direct to consumers, not through a retailer, (eg via their own website).”

The Government's Response

The comments received which provided views on the possible effects of the application of insolvency protection requirements only to businesses established in an EU Member State are directly relevant to our analysis and comments in relation to Article 15 under Question 33 above. They tended to support our view that the whole Proposal should apply to sale or offers for sale of packages and ATAs in Member States or directed to a Member State's consumers, irrespective of a business's place of establishment.

We therefore support the Proposal to the extent that organisers from 3rd countries might not be providing the required protections to EU consumers. But, as mentioned above, the wider Proposal contains unnecessary complications in our view in that those organisers established in 3rd countries would not be obliged to provide protection against their insolvency. Placing this liability on retailers only in respect of these sales seems likely to act as a significant discouragement for retailers to carry this business, in which case organisers established in 3rd countries will be left with little choice but to trade direct, without providing insolvency protection. **This could lead to significant reductions in consumer protection and the Commission should rethink its approach of applying insolvency protection only to businesses established in EU Member States.**

Article 19 – Liability for booking errors.

Question 39

Does this cause any particular difficulties? If so, please explain and provide any supporting evidence.

Summary of responses

Eight respondents commented on this question: four from trade interests; one consumer representative; two from enforcement interests; and one from a law firm.

All foresaw no problems with the Commission's Proposal to make it clear that retailers would be liable for any mistakes in the booking process unless attributable to the traveller or to unavoidable and extraordinary circumstances.

Extract from responses:

"Complaints continue to be received concerning retailers refusing to honour pricing mistakes."

"we asked our members whether retailers should accept responsibility for their own errors and not seek to the blame the Principal, which is frequently the case. Not surprisingly, 63% agreed this was a good idea but remain to be convinced that the agent will not still try to blame the Principal for their mistakes. We therefore support this proposed change."

"We completely agree and would refer to the 'name change' Consumer stories we offer in this report as support; this has been a long time coming!"

The Government's Response

We support this element of the Proposal as it provides clarity for the trade and for consumers, although possibly does not change the situation in practice in the UK. However, we believe liability on the retailer should be limited only to the retailer's mistakes.

Article 25 – Amendment of Regulation (EC) No 2006/2004 and Directive 2001/83/EU

Article 25(1)

Question 40

Is there a special case to be made against the application of these provisions to contracts covered by the Proposal? If so, please explain and provide any supporting evidence.

Summary of responses

Six responses were received: four from trade interests; one from a consumer representative; and one from an enforcement body.

None of the respondents thought that the relevant provisions of the Consumer Rights Directive (CRD), which currently excludes packages as defined under the current Directive from coverage, should not apply to packages as defined under the Proposal.

Two trade respondents argued that the CRD should not be gold plated, implying opposition to early application of the relevant provisions to packages than would be required under the Proposal. The remaining trade representatives found no arguments against application in due course, suggesting that they would not want to see additional regulations to those implementing the CRD.

Extracts from responses:

“We do not believe that there is a special case and do not wish to see any additional regulations.”

“...believes that the UK Government should not go beyond the wording of the Directive (i.e. should avoid gold plating the provisions) unless there is a clear consumer detriment or a requirement to make the provisions suit the UK market. This should be determined in conjunction with the trade; however, our established position is to avoid any additional regulation.”

The Government's Response

We support the extension of these general provisions in the CRD to packages as proposed by the Commission. It should be noted that those arranging ATAs and those arranging dynamic packages not covered by the current regime are already covered by all of the provisions in the CRD, subject to the exemption for passenger transport services to the right to withdraw.

Packages as defined in the Proposal will continue to be exempt from the remainder of the CRD (chiefly the withdrawal rights for distance sales and sales conducted away from business premises) as will contracts for transport services. We agree that the package business model and the contractual arrangements which must be committed to by traders in the sector (often irreversible because of the conditions of sale of the service providers, for example, airlines and other transport providers) make it impractical and potentially very expensive to allow for consumer withdrawal. The Proposal already provides for circumstances where it is reasonable that the consumer should either be able to withdraw from package contracts and receive appropriate compensation (for example, where the contracted for services cannot be provided or where unforeseen and extraordinary circumstances prevent the delivery of the services). **We should therefore resist any attempts by other Member States or the European Parliament to extend other elements of the CRD to packages.**

Impact Assessment

Question 41

Do you agree with the Commission's assessment? If not, please explain and provide any supporting evidence.
Are there other problems which the Commission has not identified?

Summary of responses

Nine responses to this question were received: five from trade interests; one from consumer representatives; two from enforcement bodies and one from representatives of credit card providers.

Four of the trade representatives agreed with the Commission's analysis of the key problems facing business which need to be addressed by the Proposal.

An enforcement interest did not agree that divergent insolvency protection provisions across Member States necessarily gave rise to problems and observed that the different approaches adopted in Member States often reflected differences in legal systems and the availability of their protections, for example, the additional protections for credit card purchases in the UK under section 75 of the Consumer Credit Act.

Representative of credit card companies argued that the Commission's observations in its Impact Assessment that there was a degree of doubling up of protection across different regimes (package travel and passenger rights protections) sometimes led to a tripling of

protection in the UK where additional credit card protections also apply. They argued for more agreement across the industry to share information with a view to ensuring consumers only made single claims where multiple claims might be possible in respect of the same incident.

The consumer representative also agreed with the Commission's assessment, but maintained its views that certain types of business travel should continue to be covered.

Extracts from responses

"... does not agree with all of the Commission's assessment. While recognising that legal discrepancies do exist between Member States, they do not necessarily follow from the different schemes that exist. Each national system has developed in the light of many other factors. For example, the UK has Section 75 of the Consumer Credit Act; in France, all retailers (including travel agents) are obliged to take responsibility for the sales they make. The insolvency protection systems developed in each country have developed around those different legal structures."

"In the assessment regarding unjustified costs for package organisers in section 2.3.2, reference is made to double compensation in the case of package organisers and transport carriers. To this we would add that there could be triple compensation whereby the traveller approaches the card company that was used to pay for their travel – this particularly applies in the UK for reasons set out below and may also affect other Member States in the case of chargebacks.

...We would welcome cross industry discussion to share information and avoid the potential for triple compensation being claimed. Given the challenges of sharing information, the Commission may wish to consider including measures in its Directive that makes the sharing of information in the case of travel claims less cumbersome than where local data protection rules may make this more of a challenge."

"It is difficult for ...to respond to the specific questions on the EC's impact assessment in great detail or with substantial evidence. There is considerable uncertainty about provisions within the proposal (for example, the extensions to the scope or the change to the status of car hire) that would significantly change the impact of the Directive. We also note that the impact assessment is out-of-date owing to the pace of change in the online travel agency sector. The EC should produce a new assessment of the final proposals so that ...and the wider industry have a chance to quantify the effects on our members' businesses."

The Government's Response

We believe the Commission's impact assessment was successful in identifying the main causes of business difficulties under the current regime. We received no substantial responses that argued to the contrary or which identified any other significant difficulties.

We continue to be concerned that the relationship between the Proposal and the passenger rights regime could be clarified still further and that a clear dividing line should be established to avoid doubling of protections; so that where consumers have rights to exert

under the passenger rights regime, they should not also have rights under the package travel regime. In other words, the package travel regime should only apply where other rights do not apply in the same circumstances.

We sympathise with the comment that it was difficult to properly assess the Commission's assessment of impact without a clearer understanding of the scope and application of the Directive.

We agree that where there is the possibility of multiple claims from consumers under different systems it is sensible for the industry and the enforcement authorities to work to ensure that such claimants are directed to one route to seek recompense where appropriate, and that where there are joint liabilities, acceptable agreements are reached as to how such claims are paid for and by whom. Ideally this should be behind the scenes so that the process for consumers is not complicated. We do not see this as an issue which could be addressed in the Proposal, but is something to be pursued domestically as a means of insuring efficient and cost effective application of the rules.

Question 42

Do you agree with the Commission's assessment? If not, please explain and provide any supporting evidence.

Do you agree that these issues are significant to the extent that they need to be addressed in the way proposed. Are there alternatives to adding to regulation which might provide acceptable levels of protection?

Are there other problems which the Commission has not identified?

Summary of responses

We received seven responses to this question: four from trade interests; one from a consumer representative and two from enforcement bodies.

All agreed that the Commission's assessment had identified the current issues for consumers.

The trade representatives supported the Commission's approach to extending the coverage of the Directive, in particular its attempt to include the airline click-through model; agreeing that the identified issues are significant enough to justify expanding the scope of the Directive.

The enforcement representatives underlined their concern that some elements of the Proposal might undermine consumer protection, particularly those relating to the provision of insolvency protection. They also identified an additional problem relating to consumers' lack of knowledge of the current protections.

No respondents identified any alternatives to regulation as a means of addressing the issues identified by the Commission

Extracts from comments:

“...has already expressed the need for the scope of the Directive to be expanded to capture the ever increasing number of unprotected holidays that are being taken each year.

...has been increasingly vocal with airlines and the UK Government regarding the need for inclusion of airline click-through arrangements to be included in ATOL arrangements and we very much welcome the proposed inclusion under the amended Directive. This allows a level playing field for businesses competing within the same market arenas.

...feels that it is essential that the Directive must include holiday sales by airlines by way of click-through arrangements and would go further to identify that the only way to get total protection would be to introduce a levy on all air based travel arrangements (as per the Dutch model) This would provide total protection for the consumer as well as total clarity.”

“For many years we have argued that the current Directive is protecting an ever smaller part of the holiday market and that the Directive should be extended to ensure that more holidays are protected. ...welcomes the progress made by the Commission in bringing airline click-through arrangements within the Directive’s scope.

...therefore believes that the issues are indeed significant enough and they do need to be addressed in the proposed way.”

“...broadly agrees with the Commission’s account of consumer detriment, although we have noted elsewhere our view that mutual recognition will lead to a lower standard of protection.

Although we also agree that the measures proposed are often effective and proportionate ways of addressing these – clarity of definitions, strong information provisions for example – we do not believe that changing from the current (national scheme) basis will help consumers at all and may hinder them. It will simplify compliance for businesses, but seems likely to introduce barriers to the practical ability of consumers to access the protection provided under the Directive.

A major problem that has not been identified is that consumers have little awareness of their rights under the existing Directive and assume that they have holiday protection when they do not. In the UK, the possibility of businesses operating as agents for the consumer to avoid regulation increases the potential for consumer confusion.”

“Yes; they need to be addressed by revision to this Directive as other Directives have failed to address key concerns in travel contracts (eg: The Unfair Trading Regulations (UCPD) – apart from one prosecution since 2008, we have experienced time and time again enforcement authorities failing to implement those legal protections). An amended Directive provides a clear advantage to Consumers.”

The Government’s Response

It seems clear that in the view of those who responded to this question, the Commission has identified the main areas of concern for consumers which the current regime has failed to keep pace with. Our previous and ongoing engagement with the industry and enforcement representatives suggests that the Commission's assessment of the issues to be addressed is correct.

Question 43

Do you agree with the Commission's overall assessment of the impact of policy option 6? If not, please set out those areas where you believe the assessment is not correct and provide any supporting evidence.

The Commission's assessment looks at the position across the EU. Are there any special elements of the UK market, or the UK regulatory environment, which are likely to either amplify or diminish the Commission's assessment as it might apply to the UK? If so, please explain.

Summary of responses

Eight responses addressed this question: four from trade interests; one consumer representative; two from enforcement bodies; and one from representatives of credit card providers.

There was no disagreement with the Commission's overall assessment of the impact of its "Option 6" which forms the basis of the overall Proposal; although the enforcement representative believed that the Commission had underestimated the likely costs of changes to the insolvency protection systems, particularly to public authorities.

The only special element in the UK situation which was identified was the potential overlap in protections which arise from the additional credit and payment cards protections in place in the UK. Concern was expressed that a UK implementation of the new regime which made allowance for this added protection, and which resulted in lower costs for participants, might distort the EU market where similar protections are not available.

Extracts from comments received:

"...believes that the impact assessment underestimates the implementation costs for Member States. The fact that the Directive would require rearrangements to almost all existing Member States' implementation arrangements mean that the costs to public authorities are likely to be substantially above "the usual cost which accompanies the implementation of EU legislation."

"...we also feel that the average costs of protection would rise as a result of what is proposed, but this is not reflected in estimations of costs to businesses."

"...The characteristics of the UK that would cause the greatest difference in assessing the relative impact of the proposal on UK against the average are the fact

that much of what is included in the new package definition is already subject to insolvency protection as Flight-Plus or under agent for the consumer agreements. The fact that UK is an island means that we have periodically been required to repatriate large numbers of UK consumers at the same time. The most efficient way of doing this has proved to be through central coordination and we may be more restricted in our ability to do this under the new proposal.

Finally, on harmonisation, ...believes that the proposal is not subject to maximum harmonisation and that this is a good thing. The fact that ATOL existed prior to the introduction of the original PTD, and recent experience in ensuring that UK consumers are protected while not exposing the taxpayer to uncontrollable risk suggests that, in order to achieve UK policy objectives, we require some flexibility over our regulatory approach. Any move to maximum harmonisation would cause changes that would not meet consumers' expectations, or industry needs."

"In the UK, credit cardholders have s75 protection when purchasing goods / services according to the Consumer Credit Act 1974 where the value of the transaction is within set parameters and where a debtor / creditor / supplier relationship exists. We would not expect the pricing of a trader's insolvency protection to include an allowance for this element of protection since this would not create a level playing field with other Member States that do not have available this consumer protection or its equivalent."

The Government's Responses

We have noted the comments on likely additional costs for public authorities. These are likely to be exacerbated by the Commission's approach to applying the insolvency protections on the "established-in" basis rather than to sale or offers for sale in Member States. We will continue to argue our preference for the latter as set out under Question 33 above.

The comments on the possible impact of savings accruing from credit and payment card protection in the UK are also noted. However, our understanding is that there is a cost to business attached to this protection in the form of the fees charged by card providers. It seems likely that any savings to the system for protection under the Directive in the UK are offset by business accounting for the card providers' liabilities under the Consumer Credit Act. It seems unlikely, therefore, that if the UK system makes allowance for the additional card protection, UK organisers or retailers would be operating to any significant cost advantage over operators in other Member States.

Annex A

LIST OF RESPONDENTS

Consumer Representatives

Holiday Travelwatch
Which?

Travel Trade

Association of ATOL Companies (AAC)
ABTA
AITO
BAR UK (Board of Airline Representatives)
British Airways
British Holiday and Home Parks Association
British Hospitality Association
British Marine Federation
CCI UK
Christian Consulting - Charity Management Consultant
Corris Caverns Ltd
Cossington Park
English Association of Self Catering Operators (EASCO)
ETOA (European Tour Operators Association)
ETTSA (The European Technology and Travel Services Association)
Eventia
Federation of Small Business (FSB)
Institute of Outside Learning, Employers Group
Resort Development Organisation
Scottish Passenger Agents Association (SPAA)
Scottish Tourism Alliance
Thomas Cook Group
Tourism Alliance
TUI Travel PLC
Visit England
Wyndham Vacation Rentals UK
Wales Tourism Alliance Limited

Regulators

Air Travel Trust – CAA
ATIPAC
Civil Aviation Authority (CAA)
Devon & Somerset Trading Standards Service
OFT
TSI – Trading Standards Institute

Others with Interests in the Travel Trade, e.g. Insurance Companies and Legal Firms

Colemans CTTS Solicitors

Hill Dickenson LLP

IPP Insurance

“Licence Holder Insurance” co- insurers of the Air Travel Trust (Willis Ltd etc.)

Pan European Organisation of Personal Injury Lawyers (PEOPIL)

Travlaw LLP - Stephen Mason

UK Cards Association

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