The New Package Travel Directive: An Overview
Michael Coley

The new Package Travel Directive (EU Directive 2015/2302) ("The 2015 Directive") was signed on 15th November 2015. It repeals and replaces the current Package Travel Directive (Council Directive 90/314/EEC) ("The 1990 Directive"), which is transposed into UK law by the Package Travel, Package Holiday, and Package Tours Regulations 1992 ("The 1992 Regulations"). Member states have until 1st January 2018 to transpose the 2015 Directive into national law, which means that although the timetable for the UK's secession from the EU is still unclear, the 2015 Directive will still fall to be implemented before secession takes effect.

The aim of the 2015 Directive is to update the regulatory position to better cater for the way in which package travel sales have evolved since the 1990 Directive was implemented. Here, we look at some of the key changes.

Packages
In the 26 years since the original Package Travel Directive was signed the way in which travel and related services has changed significantly. The 2015 Directive seeks to account for this by broadening the scope of products covered. Recital 2 of the 2015 Directive recognises that in addition to the traditional pre-arranged package, consumers now increasingly have the option to customise the elements of their packages in a bespoke product. In the past, it was unclear whether products of this type were covered by the 1990 Directive; the 2015 Directive now brings them firmly within the ambit of the legislation.

The definition of a "package" under the 2015 Directive has become somewhat longer in an attempt to cover the various means by which travel services may now be bought and sold. The definition (at Article 3 (2)) addresses packages where separate contacts are concluded with different travel service providers, and arrangements under which the choice of travel services is made after the contract is concluded.

The 2015 Directive also recognises "linked travel arrangements", in which a single trader facilitates the making of separate contracts for travel services with different providers. These are distinct from packages, but often compete closely with them. As such, information and insolvency protection requirements apply under the directive. Linked travel arrangements are covered by Chapter VI of the directive.

Organisers
The principle that the organiser is responsible for compliance with the package contract is reinforced in the 2015 Directive. "Organiser" is now more broadly defined: a person will be an organiser if he is a trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader. The words "other than occasionally", which appear in the definition under the 1990 Directive, are absent from the new definition. It is anticipated that the revised definition will bring more people and entities within its ambit. For example, those selling Flight-Plus products which were previously not considered package holidays are likely to now be considered organisers and fall within the 2015 Directive and any regulations made under it.

Price Increases
Price increases which take place after the conclusion of the package contract will now be capped at 8% of the total value of the package. If the increase exceeds this limit, the consumer will be entitled to terminate the contract without paying a termination fee.

Performance
Responsibility for conformity with the contract lies with the organiser. Article 13 (3) provides that if any of the travel services are performed otherwise that in accordance with the contract, the organiser shall remedy that non-conformity unless to do so is impossible or entails disproportionate costs taking account of the extent of the non-conformity and the value of the travel services in question.

If a lack of conformity is not remedied, Article 14 provides that the consumer shall be entitled to a price reduction for the period of non-conformity. In addition, the consumer shall be entitled to compensation for any loss sustained as a result of the non conformity unless the lack of conformity is attributable to the traveller; attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or due to unavoidable and extraordinary circumstances.

Article 13 (5) provides that if a significant proportion of the travel services cannot be provided in accordance with the contract, the organiser shall offer alternative arrangements of equal or higher quality at no extra cost. If the alternative offered is of lower quality, an appropriate price reduction shall be granted. The consumer may reject the alternative offered only if it is not comparable to what was originally contracted for or the price reduction is inadequate.

Article 13 (6) provides that where a lack of conformity substantially affects the performance of the package and the organiser has failed to remedy it within a reasonable period set by the traveller, the traveller may terminate the package travel contract without paying a termination fee and, where appropriate, request a price reduction and/or compensation for damages.

In cases involving carriage of passengers, where alternative arrangements are impossible or have been validly rejected, or the consumer has terminated the contract, the organiser will be obliged to provide repatriation at no extra cost.

Article 13 also makes provision for circumstances in which the traveller's return is impossible to ensure in accordance with the package by reason of unavoidable and extraordinary circumstances. By virtue of Article 13 (7), in such circumstances, the organiser is responsible for the cost of accommodation, if possible to the equivalent standard of that included in the package, for a maximum of there nights per traveller. However, if the organiser is informed at least 48 hours in advance that the traveller has reduced mobility (or is accompanying such a person), is pregnant, is an unaccompanied minor, or requires specific medical assistance, the three-night limit on accommodation does not apply.

Mutual Recognition of Insolvency Protection

Insolvency protection was an important feature of the 1990 Directive and the 1992 Regulations. It remains an important feature of the 2015 Directive, but has now been overhauled to provide for mutual recognition of insolvency protection regimes between member states.

Since the implementation of the 1990 Directive, insolvency protection has been something of a vexed question for package holiday providers and regulators. The 1990 Directive required only that member states have an insolvency protection scheme. As a result, implementation across Europe was inconsistent, with different member states having their own insolvency protection schemes and providers having to comply individually with the insolvency protection scheme in force in each country in which products were sold.

The UK made moves towards mutual recognition in the 1992 Regulations: Regulation 16 (2) released operators from compliance with the UK insolvency protection scheme as long as they complied with the scheme in operation in the member state in which they were established. Famously, this led to some organisers relocating within the EU and concerns being raised by the Civil Aviation Authority (CAA) about so-called "regulation shopping".

Under the 2015 Directive, regulation shopping is perfectly legitimate. Article 17 provides that member states will now be required to recognise each other's insolvency protection schemes, and will be prohibited from imposing additional requirements on foreign organisers. Organisers will be required only to comply with the insolvency protection scheme in the member state in which they are established, and in doing so, will be deemed to be compliant across the EU.

The effect that mutual recognition will have on regulatory behaviour is still unclear and has been the topic of much debate. Fears have been raised that member states will engage in a "deregulation

arms-race" in order to attract business, to the detriment of consumers. However, others argue that the opposite will in fact be the case: the publicity which attaches itself to stranded holiday-makers and the burden on the member state in question to assist in rectifying matters will operate as a brake on any tendency towards under-regulation. On the contrary, the element of competition will act as an incentive for member states to offer a regulatory regime which is competitive for business, provides the best protection for consumers, and is efficient for both.

For organisers, the benefits of mutual recognition are clear: the administration required in complying with multiple insolvency protection schemes will be greatly reduced, as will the attendant costs to those businesses. The EU estimates that compliance costs will be reduced from around €11 to €8 per package sold.

Overall, many of the rights and protections afforded to consumers under the 1990 Directive remain unchanged by the 2015 Directive. Certain aspects, such as the cap on price increases and the provisions concerning accommodation in the event of unavoidable and extraordinary circumstances are new. However, the real changes are those which seek to update the Directive to reflect the modern way of doing and regulating business in the travel industry. Re-defining the terms "packages" and "organisers" updates and increases the scope of those concepts and should bring greater certainty for consumers about whether they are protected; while mutual recognition of insolvency protection was an inevitable response to the regulatory landscape. While it remains to be seen how the 2015 Directive is to be implemented, the recognition of the need for clarity and efficiency in the regulatory regime so far looks to be a step in the right direction for traders and consumers.

Michael Coley is a barrister at the 36 Group specialising in aviation and consumer law.