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Delegations will find attached document SWD(2023) 905 final.

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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

**Proposal for a Directive of the European Parliament and of the Council
amending Directive (EU) 2015/2302 to make the protection of travellers more effective
and to simplify and clarify certain aspects of the Directive**

{COM(2023) 905 final} - {SEC(2023) 540 final} - {SWD(2023) 906 final} -
{SWD(2023) 907 final} - {SWD(2023) 908 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
The legal basis for EU action is Article 114 of the Treaty on the Functioning of the EU ('TFEU'),¹ which allows the European Parliament and the Council to adopt measures to establish and ensure the well-functioning of the internal market. In addition, Article 169(1) and Article 169(2) (a) TFEU provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of consumer protection/internal market legal basis, the Union's competence is shared. <i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU². It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU³ sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU⁴ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁵:
- Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
As part of an evaluation of the Package Travel Directive (PTD) and an impact assessment for its revision, the Commission conducted numerous consultation activities, including public and targeted stakeholder consultations. The consultations were carried out as widely as possible to receive relevant input, evidence and explanations of the needs of different categories of stakeholders, (e.g., travellers/consumers, tour operators, physical and online travel agencies, carriers, national authorities, insolvency protection funds, consumers and business associations, academia and non-governmental organisations). During the consultation process, which started with the publication of a call for evidence in August 2021 and continued up to May 2023, the Commission applied a variety of methods and forms of consultation. They included: · The consultation on the inception impact assessment and a 13-week open public consultation, which sought views from all interested parties.⁶

¹ EUR-Lex - 12016E114 - EN - EUR-Lex (europa.eu)

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

⁴ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

- Online workshops, including meetings of the Stakeholder expert group to support the application of the PTD.⁷ Dedicated questionnaires and discussion papers were sent out in advance to prepare for the meetings hosted by the Commission.
- Online workshops organised by a consultant preparing a study for the Commission with the aim of updating participants (business associations and individual companies both including travel sector specific ones, consumer organisations as well as European Consumer Centres) on the progress of the study and gathering information and other input in an interactive format.
- Workshops organised by stakeholders (e.g., the European Guarantee Funds' Association for Travel and Tourism, the European Association of Travel Agents and Tour Operators) offered the opportunity to further gather data from stakeholders on insolvency protection in the travel sector and prepayments.
- Targeted surveys conducted by the external consultant, aimed to collect information on stakeholders' views and experiences regarding the current market trends in package travel including cancellation rights, voucher use and reimbursements. It also sought to establish the main challenges of the current legislation as well as its primary costs and benefits.
- Targeted consultations of different stakeholders (public authorities, consumer organisations, business associations), mostly as follow-up of various workshops and meetings.
- Interviews conducted by the external consultant at two stages, comprising a set of scoping interviews and later full-scale stakeholder interviews.
- Meetings at technical or political level. The review of the PTD was raised also at political level, in particular, at informal ministerial meetings during different Council Presidencies.
- Bilateral online and in-person meetings with a wide range of stakeholders, including Member States.
- Position papers from consumer associations, business associations and national authorities.
- The Fit for Future Platform's (F4F) opinion of 22 March 2022.⁸ In its opinion on the PTD, the F4F Platform identified five problems and made five related suggestions. References to and explanations on all recommendations from the 'Fit for Future' Platform opinion are included in different parts of the Impact Assessment, with a reference to all suggestions in Section 2 and in relation to relevant topics or measures (e.g., Section 6 and Annex 2). Furthermore, while four out of five F4F recommendations are taken up, it is clarified why one recommendation is not taken up (Section 2.1.3.3. and Annex 2).

The explanatory memorandum of the proposal and the impact assessment (chapter 3) for the revision of the PTD contain a section on the principle of subsidiarity and refer to question 2.2 below.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Directive (EU) 2015/2302 is a full harmonisation instrument and problems in its application can be solved only at EU level. This includes areas where Member States took different

⁶ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13117-Package-travel-review-of-EU-rules_en

⁷ <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupId=3617&fromMeetings=true&meetingId=45600>

⁸ https://commission.europa.eu/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f/adopted-opinions_en#adoptedopinions2022

approaches in terms of legislation or interpretation. Ensuring that all EU citizens enjoy the rights provided by the Directive, including in a crisis, cannot be achieved by Member States acting alone.

Moreover, package travel is cross-border, not only in the sense of travellers going abroad, but also in terms of packages offered to travellers by organisers from other countries. The revision of the PTD aims to modernise the current rules and fix the problems flagged by the evaluation. The two overarching objectives of the PTD, namely, to ensure that all travellers in the EU enjoy a high and uniform level of protection and to contribute to the proper functioning of the internal market, remain relevant. Therefore, by acting at EU level, and removing the identified problems, closing gaps, as well as clarifying and simplifying the current Directive, the confidence of travellers and traders in purchasing and selling packages, including across borders, will improve the smooth functioning of the internal market. For instance, laying down binding rules on vouchers and common rules on prepayments will ensure more uniformity in the application of the Directive. If Member States addressed such issues in an uncoordinated manner, this would increase fragmentation in the Internal Market.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

The objectives of the proposed action cannot be achieved sufficiently by the Member States acting alone.

For instance, the different uncoordinated measures that many Member States took during the COVID crisis confirm the necessity for EU action. For example, in its Recommendation 2020/648 of May 2020 ('the 2020 Recommendation'),⁹ the Commission set out principles on voluntary vouchers and on ways to make them more attractive for travellers, including by protecting them against the insolvency of the organiser. The uptake of the Recommendation varied across Member States. Several Member States even adopted temporary legislation deviating from Article 12(4) of the Directive, which gives travellers the right to a refund within 14 days of the termination of the contract. The relevant Member States gave package organisers the possibility to significantly extend the periods for reimbursements or made vouchers issued by organisers mandatory for travellers. In July 2020, the Commission opened infringement proceedings against 11 Member States.¹⁰ The infringement proceedings were closed after the relevant Member States repealed the legislation deviating from the PTD or after the relevant measures had expired. On 8 June 2023, the Court of Justice of the European Union (CJEU) confirmed in two rulings on the one remaining infringement case and in a preliminary ruling that such deviations infringed the PTD.

- (a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

⁹ Commission Recommendation 2020/648 of 13.5.2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125 (OJ L 151, 14.5.2020, p. 10).

¹⁰ 15 Member States adopted specific rules temporarily allowing organisers of packages to impose vouchers, instead of reimbursing payments in money, for cancelled trips, or to postpone reimbursement beyond the 14-day period, which is contrary the PTD. The Commission opened infringement proceedings against 11 Member States.

See Commission's press communications of 2 July and 30 October 2020 (under point 5 – Justice):

https://ec.europa.eu/commission/presscorner/detail/en/INF_20_1212 and
https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687

The identified problems have a cross-border dimension in two ways: packages can be offered cross-border to travellers by organisers from other Member States and/or package travellers often go abroad. The revised PTD is expected to simplify the existing rules and improve legal certainty as well as to lead to a level field for businesses. This will lead to the protection of package travellers in a way that is as uniform as possible and will facilitate the development of cross-border trade and/or services within the EU in the field of package travel. This could not be achieved through action at national level.
(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty¹¹ or significantly damage the interests of other Member States?
Absence of a common EU approach would result in legal discrepancies between Member States. This fragmentation would generate additional compliance costs for businesses trading cross-border as well as different levels of consumer protection across the EU.
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
The proposed amendments to the PTD clarify, inter alia, that Member States may set up rapid refund mechanisms/crisis funds for rapid reimbursement of prepayments. Member States have the competence to set up such mechanisms if they consider them appropriate. The proposal aims to strengthen the insolvency protection rules of the PTD. Member States will continue to decide themselves on the best way to implement an effective insolvency protection system, while the proposal includes additional criteria on how effective insolvency protection can be achieved. Furthermore, Member States have the possibility to set up a national insolvency back-up fund where appropriate.
(d) How does the problem and its causes (e.g., negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
Travellers from all Member States faced major difficulties in recovering prepayments within 14 days for cancelled packages during the COVID-19 pandemic. This was due to the lack of liquidity of organisers when faced with many concurrent refund requests. Since organisers use the prepayments received from travellers to prepay certain services included in a package, they depend on refunds from service providers in order to reimburse travellers if the package is cancelled. As experienced during the pandemic, many organisers did not receive (timely) refunds from service providers (e.g., airlines and hotels) and so were unable to reimburse travellers within the mandatory period. In addition, there are differences in the insolvency protection systems in the Member States which, according to most consumer organisations and public authorities, triggered a higher level of protection against the insolvency of organisers in some Member States, while those differences imply insufficient protection of travellers in other Member States. Furthermore, there is legal uncertainty and there are different interpretations in the Member States regarding certain provisions of the PTD, e.g., of the coverage of vouchers and refund rights against the insolvency of the organiser, concepts of 'click-through' packages and of linked travel arrangements, termination of the contract. Also, there is legal uncertainty about the use of vouchers and lack of clarity regarding travel warnings.

¹¹ https://europa.eu/european-union/about-eu/eu-in-brief_en

(e) Is the problem widespread across the EU or limited to a few Member States?
The problems are widespread across the EU given the cross-border nature of package travel and given that the legal uncertainty and interpretation problems regarding the PTD affect all Member States.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
No. The proposal further harmonises and clarifies certain provisions. The higher degree of legal clarity and the simplified regulatory framework is expected to increase the level of compliance and would make enforcement more efficient across the EU. Moreover, certain proposed clarifications may reduce the need for interpretation by national courts and the CJEU, ultimately reducing the burden on the national and EU public administrations.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
Overall, Member States acknowledge the need for a revision of the PTD through targeted amendment that will clarify and further harmonise certain aspects. This includes the better protection of prepayments and more effective insolvency protection.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?
The objectives of the proposed action can be better achieved at Union level by reason of scale and effects of that action.
(a) Are there clear benefits from EU level action?
Directive (EU) 2015/2302 is a full harmonisation instrument and problems in its application can be solved only at EU level. This includes certain areas where Member States have taken different approaches in terms of legislation or interpretation. Ensuring that all EU citizens enjoy the rights provided by the Directive, including in a crisis, cannot be achieved by Member States acting alone.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
The revision of the Directive would entail certain costs for stakeholders, but is also expected to reduce burden on them, thanks to enhanced legal clarity and simplification. Moreover, several measures considered in the preferred option that could lead to moderate cost increases are already implemented in some Member States, so that businesses present there would not face additional costs. As regards reduced burden for public administrations, the higher degree of legal clarity and the simplified regulatory framework is expected to increase the level of compliance and would make enforcement procedures more efficient.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
See 2.3 (b) and (f) as well as 2.4 (b).
(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

The revised PTD proposal strengthens and improves an already existing legislative framework, without extending its scope. Overall, benefits of the initiative outweigh any possible loss of competence of Member States and local and regional authorities.
(e) Will there be improved legal clarity for those having to implement the legislation?
Yes. See 2.3 (f)
3. Proportionality: How the EU should act
3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?
The proposed revision of the PTD complies with the proportionality principle of Article 5(3) TFEU. As explained in Section 3.3 of the Impact Assessment Report, it does not exceed what is necessary to achieve the objectives of the Treaties, as it is limited to aspects of travel law for which EU action is necessary. It does not extend the scope of the PTD. In addition, as described in Section 5.3 of the Impact Assessment Report, three policy options assessed have been structured in light of the anticipated proportionality of the included measures with regard to addressing the problems defined based on the results of the evaluation. Finally, the proposed revision of the PTD is based on the preferred option under the Impact Assessment Report, which contains measures that are less interventionist than those contained in the other options and that are proportionate both with a view to crisis preparedness and outside of crisis situations (Section 6.1 of the Impact Assessment Report). Consequently, this initiative respects the balance between the objective and the means and methods used as well as the consequences of the action, and is, therefore, proportionate (Section 7.4 of the Impact Assessment Report).
3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?
The impact assessment that accompanies the proposal amending the PTD analyses the impacts of the policy option through a quantitative and qualitative assessment that proves that the proposed amendments are proportionate and do not exceed what is necessary to strengthen the level of consumer protection, at all times, including in the event of a major crisis, while improving the functioning of the Internal Market in the package travel sector.
(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?
Yes. Package travels can be cross-border and require the same legal provisions in all Member States to ensure a level playing field for business and the same level of protection for consumers/travellers. The main objective is to enhance the effectiveness of the existing, though targeted amendments, clarification and simplification.
(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g., choice between regulation, (framework) directive, recommendation, or

alternative regulatory methods such as co-legislation, etc.)?
The objectives of this proposal can be best pursued through a Directive, which is the most appropriate instrument to amend an existing Directive. The option of introducing exclusively non-legislative measures, such as a Commission guidance notice or a recommendation, instead of amending the PTD was discarded, as it corresponds largely to the baseline and cannot resolve the problems identified in the evaluation and the problem definition.
(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g., is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
The proposed amendments leave as much scope for national decision as possible (see reply to question (e) below) while achieving satisfactorily the objectives set.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
A one-off direct adjustment cost of c. EUR 60.5k is envisaged for national governments due to the transposition process. The increase in administrative burden is c. EUR 48.7 million for traders (one-off cost) to comply with new information obligations and of c. EUR 6.5 million for familiarisation with the new provisions. Nevertheless, due to proposals for simplification, there is envisaged a decrease in administrative burden of c. EUR 181.4 million per year as less forms have to be filled in by traders. For citizens/consumers, it is envisaged a recurrent cost of c. EUR 332.1 million due to 100% pass-through of cost increases for organisers to travellers through package price increases. At the same time, there is a decrease in costs for citizens/consumers of at least c. EUR 168.8 million per year due to reduction of consumer detriment in view of lower prepayments. Moreover, certain proposed clarifications may reduce the need for interpretation by national courts and the CJEU, ultimately reducing the burden on the national and EU public administrations.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
The proposal contains provisions allowing Member States to set up the national insolvency protection systems based on common criteria, while leaving the specific implementation to them. Furthermore, it allows Member States to decide whether to set up at national level rapid refund mechanisms/funds for the rapid reimbursement of prepayments or back-up insolvency protection funds for better protection of travellers' prepayments against the insolvency of organisers.