Package Travel and Assisted Travel Arrangements Directive Proposed by the European Commission

Department of Transport, Tourism and Sport
Consultation Paper, January 2014

Aer Lingus response

Aer Lingus is a member of the International Air Transport Association (IATA), the trade association of airlines who comprise 84% of total air traffic. Of those airlines, more than 60 are based in the EU and more than 180 have operations to or from the EU and could potentially be affected by the proposed directive.

Aer Lingus is also a member of the International Air Carrier Association (IACA) representing 28 airlines that operate various business models to cater for different demands in the travel market, including low-cost, seat-only and tour operator traffic. The common feature of IACA member airlines is efficiency in terms of fleet utilisation and load factor.

Aer Lingus is in general agreement with and would support and reiterate both the IATA and IACA positions in relation to the proposed Directive, to the extent set out below.

General

The revision of the 1990 Package Travel Directive is to be welcomed in as much as it recognises that the development of online sales in the airline sector has changed the way in which consumers organise their holidays.

By using the possibilities of the internet, many consumers have moved away from buying traditional ready-made packages and instead prefer to organise personalised combinations of travel services themselves.

Consumers can either (i) select from a pre-chosen range of services, or (ii) accept the suggestions - and advantageous prices - that some retailers offer by facilitating the procurement of additional travel services, or (iii) assemble totally independent services themselves.

However, certain features of the proposed Directive will not only create confusion but will have very negative impacts on consumers, businesses and enforcement bodies alike. Those features are: (i) the inclusion in the definition of ‘package’ transactions that are not offered or charged at an inclusive price (Article 3.2 (b) (v)); and (ii) the creation of the new concept of ‘assisted travel arrangements’.

Assisted Travel Arrangements
The proposal recognises that an assisted travel arrangement is a combination merely “facilitated” by a retailer. 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.

Contractual legal obligations linked to click-through processes should not be different in the tourism and travel sector than in any other commercial sector, but the concept of the assisted travel arrangement ignores this. For example, the contractual obligation of the vendor of a television set is limited to the sale of the set and does not extend to protection of the consumer against the bankruptcy of any distributor of television programmes that the consumer subscribed to when he bought the set. In an example from another sector, a retailer cross-selling a credit card would not be liable if the credit card entity went bankrupt.

Furthermore, the insolvency protection obligation arising from assisted travel arrangements is an impossible burden which could lead to the end of click-through facilities. Take the example of a situation where the airline is not the retailer facilitating the access to another service provider (such as a hotel) and the hotel in fact is the retailer facilitating access to the airline: it would then be for the hotel, as “facilitator” of the assisted travel arrangement, to obtain a security against the insolvency of the airline - a security that would guarantee the reimbursement of the airline ticket and potentially the repatriation of the passengers.

In the assisted travel arrangement context, the proposed Directive’s 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.

**Insolvency protection**

Any additional protection of the consumer provided through the concept of assisted travel arrangements goes far beyond consumers’ reasonable expectations. Consumers who choose customised combinations instead of a package are attracted by the convenience of the click-through reservation and in most cases also by a lower price (negotiated between the retailer and the service provider). However, they do not expect more protection than when booking separately: because they conclude several contracts paid separately, they know that they are not covered automatically against the insolvency of the retailer. Additionally, any consumer buying only a seat on a flight can get specific protection through an individual travel insurance product.

It is likely also that insolvency protection will not be generally or easily available, or if available - only to a few major operators or commercial entities at a prohibitive price. Mandatory security instruments (such bank guarantees, letters of credit, bonds, etc.) may not be viable for less financially secure airlines or service providers. This obligation is likely then to push all but the strongest operators out of the market, thereby reducing competition and consumer choice. In any event, airlines which offer click-through operations are very careful in checking the credit rating of the service providers with whom they work and whose services they offer to their customers.
because their own commercial reputation is at stake. Airlines do not oblige a passenger to use click-through options – these are merely options 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.

Therefore, obliging airlines which act as retailers to provide security against the insolvency of other service providers would be problematic for the following reasons:

a) Irrespective of how the security is provided, there would be a need for thorough assessment and evaluation of the risk.

- for a global car hire company or hotel chain, this would mean extensively checking the individual arrangements in each country of operation. This investigation may be impossible to perform (e.g. because of commercial sensitivities). In any event it would be costly and take time, and require significant international financial expertise.
- an additional difficulty is that in most cases, the risk is not quantifiable and therefore not insurable: how could a retailer (an airline in our case) know in advance the number of click-through events that will lead to a contract with a separate service provider?
- any security could have limitations, exclusions, conditions etc. attaching to the scope of coverage and may differ from country to country. And, given the uncertain risks, the overall price is likely to be very high.

b) In cases where the assessment is feasible and quantifiable and the cost of the security against the insolvency of another service provider is established, this cost will be included in the price to be paid by the consumer, potentially rendering the assisted travel arrangement more expensive than any independent combination of the same services. In other words, the obligation to obtain the security could vitiate the value of the product by eliminating potential cost savings to the consumer.

Indeed, the insolvency protection may not be enforceable, because:

a) Member States will be forced to identify each service provider engaged in assisted travel arrangements and check and monitor the securities for each. This will be a costly and complex exercise as service providers can be established world-wide; and

b) In most cases, service providers have no knowledge of the identity of the consumers who make use of the click-through facility and who contract with other service providers. How will an airline know if a passenger who claims to have booked a hotel that went bankrupt actually booked the hotel after a click-through from the airline’s website?

European Parliament Committee on Internal Market and Consumer Protection (IMCO) and the right to cancel
With reference to the recent vote at the European Parliament’s IMCO in relation to the right to cancel a travel contract, IACA member airlines are concerned at the Committee’s proposal to grant a right to cancel a travel contract in the circumstances proposed at that Committee, viz:

a) in the event that the time of departure and return deviates by more than 3 hours. IMCO members propose that a traveller may withdraw from a package contract without penalty (i) should the time of departure and return provided for in pre-contractual information diverge by more than three hours from the actual time of departure or return, or (ii) if it is not within the part of the day indicated in the pre-contractual information (compromise amendment 9, relating to Article 9 paragraph 1a, new).

Tour operators assemble their packages well in advance of the travel season and at a point in time when hotels are ready to sell their accommodation, but whilst airline schedules may not yet be definitively planned. Some airlines indeed cannot finalise their schedules until later in the year after travelling group consolidation and when they are certain of slots as well as availability of aircraft, crew, ground handling services at the destination, etc. It is IACA’s view that tour operators should continue to be able to sell holiday packages with the best available information on planned flight schedules. This process is in the best interests of both the travel industry and the travelling public, allowing holidays to be planned a long time ahead at the best possible price.

Therefore, allowing the traveller to withdraw from the contract on foot of a deviation of 3 hours is disproportionate. For a typical long holiday (e.g. an annual family 2-week holiday), a deviation of 3 hours (actual compared to pre-contractual) cannot be considered as an essential part of the package. This constraint would fundamentally jeopardise the nature of leisure flights and would challenge the availability of affordable holiday travel;

b) in the event of the traveller being subject to extraordinary circumstances. This is the IMCO Committee’s endorsement of an amendment proposed by the Parliament’s Transport Committee (amendment TRAN 71), which would give the right to a traveller to terminate the contract - before the start of the package and without compensation - in the event of unavoidable and extraordinary circumstances occurring to the traveller. In general, risks such as these are usually covered by travel insurance policies, to which any traveller is free to subscribe. Such incidents to the extent that they occur in a traveller’s personal circumstances are clearly outside the control of a travel service provider and accordingly IACA does not accept that the travel industry should assume that risk for all package travellers.

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