

Proposal for a Directive on Package Travel and Assisted Travel Arrangements - Insolvency Implementers' Views

CAP 1147



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**Report on the outcome of a workshop held by implementers and enforcers
of the Package Travel Directive**

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Introduction

1. European holidaymakers have benefited from the protections provided by Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (Package Travel Directive (PTD)) for over 20 years. Changes in the travel industry and a need to address certain systemic issues led the Commission to propose a new Directive in July 2013. While other generic consumer protection legislation also exists, the continuing need for sector specific legislation for package holidays demonstrates how unique the holiday market is, and how specific the solutions devised to provide statutory protection have needed to be.
2. The insolvency protection requirements contained in the existing PTD have led to a range of insolvency protection solutions being implemented across Europe, which tend to reflect the specific needs of each Member State's holiday market. The revision of the PTD is long overdue, but the need for insolvency protection has remained constant.
3. This means that insolvency protection is provided in various ways, from mutual funds to bank guarantees and insurance products, and is managed by a variety of different organisations from government agencies to commercial entities.
4. In order to give focus to the views of this subset of stakeholders the UK CAA arranged an event, held in London, where representatives of these organisations from across Europe could discuss the areas of the proposed Directive relevant to their interests and their views and opinions on them.
5. These views are captured in this report and have been submitted to the Commission to help with the development of proposals for a new Directive. The views represent the outcome of the workshop, and are not intended to represent the views of the Member States where the implementers operate.
6. Full details of organisations represented at the event can be found at Annex A.

Content of Report

7. This report contains the key messages that insolvency protection implementers believe are important in developing the Directive proposal.

8. They are limited to the areas of the proposals that have an impact on the delivery of insolvency protection, and are based on the opinions where there was a broad consensus amongst participants or where the views expressed merit inclusion for consideration but where consensus was not reached. "Broad agreement" does not mean that every implementer held the view. Where only one or a few held the view, the text indicates this.
9. The main areas of interest were:
 - Definitions and Scope of Protection
 - Cross Border Issues
 - Practical Implementation Issues

Scope of Protection

Definition of a Package and Assisted Travel Arrangement

- **Implementers' view:** The definition of a package is comprehensive and should be effective but the inclusion of Assisted Travel Arrangement could create confusion for consumers and reduce consumer protection.
10. The definition of a package in the proposed Directive is a significant improvement on the existing one and the implementers support the Commission's attempts to capture the wide range of techniques used by businesses to sell combinations of travel services to their customers.
 11. The implementers also understood the aims of the Commission in introducing a new category of business - the Assisted Travel Arrangement (ATA) - that is not a package but where the involvement of an intermediary is such that the consumer should be protected in the event of insolvency. It was beneficial to consumers that more holidays would be covered with at least some form of protection.
 12. In creating an additional category, however, implementers expressed concern that firms are being offered an alternative that provides less protection despite the arrangements being almost identical to some types of package. Not only could this lead to less protection in terms of wider package travel protections, it could create confusion amongst consumers who do not understand the distinction between a financially protected holiday and a fully protected package. This could be made worse if travel businesses, especially internet-based ones, adapted

their sales methods to use this as a means of avoiding the full range of package protections.

13. Some of those attending felt that this confusion could be mitigated by mandating further information provision during booking processes and post-sale.

Definition of a Retailer

- **Implementers' view:** The definition of a retailer does not recognise the various activities that a retailer may undertake, and the subsequent requirements placed on retailers do not accurately reflect the role of the retailer or the risk that they pose to consumers.
14. Retailers operate differently in different markets and the view was expressed that the definition in the proposed Directive was too simplistic and does not accurately reflect the role that they play in all Member States. As allowed under the current Directive, some Member States make insolvency protection requirements on retailers to reflect the role they play in their particular market, or impose restrictions on when and how much money a retailer can collect from the consumer. There was no consensus on whether these measures should be adopted more widely, but there was general agreement that such measures should be allowed to remain, potentially by allowing Member States greater freedom in implementing some areas of the Directive.

Exclusion of Business Travel

- **Implementers' view:** Business travel should be excluded but there must be recognition that some business travellers are also consumers.
15. Implementers supported the principle of excluding business travel and agreed that the proposed Directive's main aim should be consumer protection. Basing the exclusion on a framework agreement still has the potential to place consumers at risk as the distinction between business and leisure travel can become blurred where, for example, a corporation arranges travel for employees' families or where employees choose to extend a business trip for leisure purposes.
 16. Some implementers said that this proposal could only be workable if "framework agreements" were adequately defined and suggested that a definition be introduced to the Directive text. Others shared their experience of businesses making travel arrangements on an ad hoc

basis, using corporate credit cards for example, rather than through specialist business retailers.

17. It was suggested that a distinction between business sales and consumer sales could be made by looking at when payment was required. In general terms, consumers pay in advance and businesses pay in arrears, although some implementers commented that this was no longer the case in their market. Alternatively, an exclusion could be based on who the sale is made to i.e. all sales to a registered company would be excluded. This would still result in a small number of consumers (spouses etc) being at risk and may result in some small businesses gaining protection when this was not the intention, but it was seen by some as a simpler and more comprehensive option compared to the proposed exclusion based on framework agreements. Whatever final definition is settle on, it was agreed that the need for clarity around what is in scope applies equally to what is not.

Insolvency Protection Requirement

- **Implementers' view:** Basing a Member State's responsibility for implementation on firms established in their territory instead of sales to consumers in their territory will create a gap in protection.
18. Under the current Directive, Member States require firms based outside of the EEA selling to consumers in their territory to comply with their insolvency protection requirements. The implementers all had experience of at least one high profile travel company that would be excluded under the proposals for a new Directive as drafted.
 19. The implementers acknowledged that the proposed new Directive requires retailers to take responsibility for packages sold by them for organisers based outside the EEA, but expressed concern that this would not address the gap, as these organisers mostly sell directly to consumers over the internet.
 20. The exclusion of non-EEA organisers also creates an uneven competitive environment where those required to comply with the proposed new Directive would be competing for the same business as those outside of the scope of the proposed Directive, and a risk that internet based firms will move their operations outside of the EEA to avoid these obligations.

21. Suggested solutions were permitting Member States to impose requirements equivalent to Directive protections on businesses outside the EEA who sell or offer for sale into their markets.
22. Other cross border issues are covered below.

General comments on Scope

- **Implementers' view:** The continued exclusion of airlines from statutory protection arrangements makes the insolvency provisions unfair on organisers.
23. Organisers are liable for all the services that make up the package. This means that as well as making provisions for its own insolvency, it has to be prepared for the impact of the insolvency of a supplier. Implementers shared their concerns over the impact that airline insolvency has on organisers, and the inequity of requiring insolvency protection for packages when the harm to consumers of airline insolvency is just as great. No consensus was reached, though attendees recognised that competitive distortions created by the new Directive should be minimised.

Cross border protection

Inconsistency in Insolvency Provision

- **Implementers' view:** It is a mistake to expect mutual recognition of other Member States' protection regimes without first establishing that all schemes provide sufficient protection.
24. Implementers expressed serious concerns over the options given to travel firms to establish themselves in the Member State with the most favourable regime, irrespective of where they target their business. As the proposed Directive requires Member States to recognise the protection provisions made in the Member State of establishment, regardless of the effectiveness of those provisions, this could have severe consequences for consumers.
 25. The proposed Directive must be clear on the consequences that a Member State would face if it failed to ensure that an organiser established in its territory had appropriate insolvency protection arrangements in place. There must also be consequences for Member States who fail to respond to a query from another Member State about the arrangements made by an organiser - many of the representatives

present had experienced great difficulty engaging with colleagues across Europe on similar issues and saw this as an obstacle to mutual recognition.

26. Some representatives suggested that the Commission could take on more of an oversight role and provide assurance that consumers were protected equally and firms treated consistently. As a minimum, implementers suggested that more needed to be done to give comfort that other regimes provide adequate protection. Also, it was clear that greater clarity is needed on how to interpret the phrase 'established in its territory' to ensure consistent application.
27. Given the importance of different Member State schemes providing at least a reasonable level of insolvency protection from day one, attendees felt that more thought needed to be given to implementation/transitional arrangements for the new Directive.

Consumer Experience of Insolvency

- **Implementers' view:** Consumers' experience of insolvency protection will be adversely affected by the need to seek assistance from protection mechanisms based in a different Member State.
28. As well as concerns over adequacy of provisions, it is important to consider how consumers' experience of insolvency protection will be affected by the proposed Directive. Implementers raised the prospects of consumers having to seek assistance in another language from an organisation that they are unfamiliar with, and potentially having to seek redress through the legal system of a country other than their country of residence. In addition, if the provisions are expected to include the arrangement of repatriation, careful consideration must be given to who is best placed to make such arrangements.
 29. Each scheme will have to make provisions for consumers from different Member States, adding to the complexity and cost of insolvency protection.
 30. Member States with a well established protection regime have generally achieved a reasonable level of consumer awareness within their own countries, which helps the protection arrangements to function effectively. If the proposed Directive leads to protection being provided by multiple countries with differing effectiveness, consumer understanding is likely to be reduced.

General Issues with Cross Border Sales

- **Implementers' view:** Different interpretations will create an obstacle to cross-border trading.
31. Elements of the current Directive have been interpreted differently by Courts in different Member States. Various phrases included in the definition of a package for example have been given different meanings by Judges that make it difficult to accept that the same product will receive the same treatment in different Member States.
 32. There is also currently a different interpretation of the requirement for assistance with repatriation. Implementers identified that some regimes reimburse consumers for the expense of making their own arrangements, and others arrange repatriation by sourcing alternative flights and paying accommodation providers on behalf of the consumer. Common interpretation will be essential before Member States can gain comfort that adequate provisions are in place under a different regime.
 33. It was suggested that a set of minimum standards could be devised for the arrangements that Member States would require businesses to comply with, which set out an agreed interpretation of the requirements and establish an accepted framework for the payment of claims and management of repatriation. This would raise standards and ensure that consumers' expectations were both managed and met (see paragraph 25 above).

Competitive advantage moves towards large protection providers

- **Implementers' view:** If the full pan-European scope of a large package seller's business must be protected by the arrangements made by one Member State, then the complexity that requires will mean that only the largest providers will be able to cope, leading to greater concentration in the protection market.
34. For example, take a large package organiser based in one Member State which sold to four others. At present the protection can be provided by relatively small and straightforward businesses local to those four markets. If the requirement then changes so that one provider must protect all four markets, only the largest and best resourced protection providers will in practice be able to do this.

Implementation Issues

Consistency in Insolvency Provisions

- **Implementers' view:** Insolvency protection requirements for packages and ATAs must be consistent.
35. The proposed Directive is clear in its requirement for consumers to be protected against the insolvency of the package organiser or the arranger of the ATA. It was felt however that, as drafted, consumers would not be equally protected in the event of the insolvency of a travel service provider. If an element of an ATA is lost as the result of insolvency, implementers felt it was important that the consumer was not left with the expense of having to replace that service, or the expense of having to pay for related services that they would not be able to use (i.e. hotel accommodation that could not be accessed as their flight provider had ceased trading).

Information Requirements

- **Implementers' view:** Greater use of information requirements may go some way to addressing some of the concerns around potential consumer detriment.
36. To enable consumers to make an informed choice when booking a holiday, it is essential that they understand the consequences of their decisions in the event of insolvency. If a consumer purchases a package from an organiser established in another Member State, implementers believe that they should have access to information about the protection provisions that would apply.
37. Some attendees felt it was important that consumers were made aware at various key points in the booking process of the consequences of the decision they were making on their protection status. The proposed Directive does place specific information requirements on both the organisers and arrangers of ATAs, but this should not be limited to post-contract.
38. It was also suggested that a Europe wide awareness campaign, similar to that run for air passenger rights, should be undertaken by the Commission to promote the benefits of booking a package, such as the insolvency protection available.

Future Proofing the Directive

- **Implementers view:** Technology will continue to develop and lead the travel market.
39. Developments in the travel market have been led by developments in the technology used by consumers to research and book their holidays. The implementers were realistic about the ability of the proposed Directive to cover new sales techniques that may emerge in the future, but suggested that the Directive include clear concepts that could be interpreted as covering new methods that may emerge as the most effective way of future-proofing the legislation.

Conclusions

40. From the experience gained and shared by the implementers across the different markets in which they operate, a number of key themes emerged.
41. There was universal agreement that the proposed Directive would create a gap in protection for sales made direct by businesses established outside the territory of the EEA, creating potentially serious consequences for competition and consumer protection.
42. There are significant practical considerations that would mean that cross border protection would potentially fail to deliver the insolvency provisions envisaged by the Commission. Of particular concern was the ability to make appropriate repatriation arrangements into another Member State, and the language barriers that would make claiming a refund extremely difficult. Those attending suggested a number of practical mitigations to these potential difficulties.
43. Information requirements must be effective if consumers are to receive the protections intended under the Directive and to ensure that they do not lose out in circumstances outside the Directive scope.
44. The implementers hope that the advice contained in this report is useful to the Commission and would like to offer any further assistance in developing an effective Directive that will last another 20 years.

Annex A

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