

European Insolvency Protection Implementers' Views on Package Holiday Directive Progress

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Introduction

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 (PTD) for over twenty years. A key part of this protection is against the insolvency of holiday sellers and holiday providers, and different Member States have developed a range of different systems to allow businesses to provide the protection required. 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.

In order to ensure that the experience of these different stakeholders ('the implementers') in the provision of insolvency protection informs the ongoing development of the new Directive, two workshops have been held: the first, in November 2013 produced a report¹ of recommendations based on the original proposal. The second workshop, in October 2014, considered the progress that had been made through the co-decision process and potential solutions to current concerns. The outcome of the second workshop is captured in this report, which contains a number of messages on which there was broad agreement between attendees and a number of recommendations and conclusions, highlighted in the text, where there was a firmer consensus of opinion. 'Broad agreement' does not mean that every implementer held the view. Where only one or a few held the view, the text indicates this. The views represent the outcome of the workshop, and are not intended to represent the views of individual organisations or Member States. Full details of organisations represented at the event can be found at Annex A.

Our hope is that these messages and recommendations will inform the further development of the Directive towards agreement and the implementation process that will follow.

¹ <http://www.caa.co.uk/application.aspx?catid=33&pagetype=65&appid=11&mode=detail&id=6023>

Context

The existing and proposed Directives are justified by the protection they give to consumers and the assistance they give to the creation of an effective internal market. The proposed Directive is best judged by assessing how far it sustains and builds upon the current legislation's effectiveness in these areas.

As part of the workshop, attendees reviewed the extent to which changes in the Directive proposed in EU Parliament and Council Working Groups had begun addressing some of the concerns the implementers identified in their first workshop. All attendees recognised that there has been considerable progress with some of these issues; in particular proposals to ensure that businesses selling directly into Member States from non-EEA countries are subject to the Directive, and requirements for the provision of information about insolvency protection at the time of booking.

Where it was felt more work was needed, the workshop focussed on what the implementers could suggest to legislators, and how we might work together as a group to address these concerns. The following broad themes emerged:

- Scope;
- Standards of insolvency protection;
- Mutual recognition and trans-border sales; and
- Information requirements.

In each of these areas, attendees identified a number of common concerns and potential ways of addressing them.

Scope

Discussions on scope focused on the definition, scope and requirements attached to Assisted Travel Arrangements, the business travel arrangement exemption, sales made directly by businesses outside of the EEA and a perceived continued distortion caused by Directive requirements to protect against airline insolvency when airlines are not required to do so themselves.

Assisted Travel Arrangements

On Assisted Travel Arrangements, the workshop reflected on the conclusions of the first implementers' workshop and some of the proposals under discussion in relation to this new category. The first workshop concluded that the new category could provide additional consumer protection and make the whole system more resilient to future technological change and deliberate avoidance, but that there were risks that its introduction could result in confusion and difficulties in implementation and enforcement. The implementers noted that, since then, revised proposals for Assisted Travel Arrangements had more limited consumer protection requirements attached to them.

Participants recommended that the full refund of money paid over should be the principle and that if it proves impossible to develop a definition for the category that delivers enough benefit to consumers, then legislators should consider whether the regulatory burden to industry arising from the new category would be justified.

However, this did not amount to a strong view that assisted travel arrangements should be abandoned. Discussions noted that the distinction between retailers and organisers in the Directive was becoming increasingly unclear and there was some support for a category of holiday sales, accommodating a broader range of retail business models, with only insolvency protection requirements attached to them.

Business travel

On the business travel exclusion, the workshop noted that amendments proposed by Parliament had increased clarity over when it would apply but some participants expressed concern that the continued restriction of the exclusion to sales made under framework contracts would unfairly discriminate against smaller businesses.

Here, the implementers recommended that a looser definition for the exclusion be defined, perhaps based on whether the sale is made to registered businesses. To allow for national differences, some implementers recommended that Member States should be permitted to extend Directive requirements to excluded areas.

Sales from non-EEA countries

Participants noted with approval Parliamentary amendments to clarify that Member States should be able to make requirements on any business from non-EEA countries selling directly to their consumers.

Airline insolvency

The implementers reiterated their view that the continued exclusion of matching insolvency protection arrangements for air carriers was illogical and unfair.

Standards of insolvency protection

The first implementers' workshop recognised that under the existing Package Travel Directive there are unequal standards of insolvency protection in different Member States and that, in some cases, the requirements put on businesses and levels of compliance are insufficient to meet their insolvency protection obligations. It also recognised that differences between Member States in terms of legal definitions and industry roles had shaped the arrangements that they had put in place in their different countries.

Raising standards

There was general agreement among attendees that work would be needed to ensure that all countries are able to meet the new Directive's requirements and the workshop noted the proposals under discussion in Council to define standards of insolvency protection and ways of meeting them within the Directive text. Participants felt that while increased clarity here was desirable, there were dangers to over-prescription. Where insolvency protection systems are working as required under the existing PTD they do so in a range of ways that reflect the requirements of the businesses they serve.

The implementers recommended that legislators should avoid attempting to define ways of meeting standards (as opposed to defining the standards) as to do so would put unjustifiable constraints on implementers' and Member States' ability to balance different interests, and would increase the burden of regulation.

Participants in the workshop proposed a number of ways in which standards of compliance might be raised, including the following:

- Better enforcement by the European Commission;
- Clarity over Member States' liabilities if their systems were non-compliant;
- A European-level guarantee fund that stands behind national systems to ensure that Member States are able to implement fully compliant schemes; and
- Improved and consistent information requirements enabling consumers to avoid non-compliant systems.

Timeliness of refunds

Although the importance of offering timely refunds was fully accepted, protection providers need to distinguish between valid and invalid claims and this takes time.

The implementers concluded that a requirement that refunds be made 'immediately' was impossible.

Mutual recognition and trans-European sales

Current barriers

Discussions on mutual recognition centred on how this could be made to work most effectively under the new Directive and how to ensure that it does so in a way that sustains and increases consumer protection. The workshop considered areas where insolvency protection provision and the freedom to sell holidays across borders had been made to work under the existing PTD and what could be learnt from this. Participants identified a number of potential barriers to consumers receiving the protection they are entitled to in a more open market, the first two echoing concerns identified at the first workshop:

- Greater trans-European selling will pose new challenges around communication and in ensuring consumers have equality of access to their rights. Access can be impaired where there are language difficulties, travel or communications costs, and especially if consumers need to pursue their rights through court action in another Member State;
- If standards continue to fall short of Directive requirements in some Member States, enabling businesses to cut costs by avoiding compliance, then they will tend to move to jurisdictions where this is true, and this will exacerbate the problem of consumer access to effective protection over time;
- The differences between Member States in terms of definitions, requirements put on businesses and the risks that those businesses pose and proposed freedoms over where different responsibilities sit under the new Directive mean that some degree of mediation between systems is needed to make things work effectively; and
- The current systems for information exchange among organisations involved in insolvency protection provision have not proven effective as a basis for Member State oversight and enforcement. Where information exchange is currently working this is on a bilateral basis and facilitated by relationships between individuals and, in some cases, agreements.

Making mutual recognition work for consumers

The implementers made a number of recommendations to address these issues in ways that will give consumers confidence to buy in a more open and dynamic holiday market by ensuring that they have access to effective protection:

- Member States should be explicitly permitted to protect their countries consumers from businesses selling from non-compliant countries by requiring additional security from such businesses;
- The development of bilateral arrangements between Member States and/or implementers to mediate sales across borders should be encouraged;
- Effective consumer access to insolvency protection in a more open market would be improved by defining accessibility standards protection providers would need to meet, and requiring travel sellers to provide pre- and post-booking information about how their consumers can access protection; and
- The legislators should be aware that Member States with more limited insurance markets may find it difficult to maintain compliant systems and consider ways to address this.

Participants also recommended that the Commission should ensure that co-ordination systems are introduced or strengthened to support this more open market. Suggestions included a platform for communication among all Member States and those involved in insolvency protection, and an information database and exchange on how different Member States ensure Directive requirements and developments within their industries.

Information requirements

The implementers were supportive of the development in the proposals under discussion in Council by which travel sellers must provide consumers with standardised information on insolvency protection before they book travel products. These proposals would improve consumers' confidence in buying travel, both by enhancing their ability to make informed choices and especially where trans-European sales might otherwise reduce consumers' confidence about their protection.

These and other developments improving the information available to consumers would also mitigate risks arising from technological or other market changes which might otherwise reduce the Directive's effectiveness.

As a result, the implementers felt that further gains could be made by providing better information and recommended that requirements are made on businesses to display prominent information about insolvency protection on all sales material, and to provide their customers with information about what is protected and how to access their protection post-booking.

Conclusions

The implementers hope that this report and its recommendations are useful to the Commission, officials and Members of the European Parliament as they continue the development of an effective holiday Directive.

Annex A

The workshop was hosted by the UK Civil Aviation Authority who have responsibility for overseeing insolvency protection for air packages in the UK.

Participants

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