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Passenger protection in the event of airline insolvency

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

PASSENGER PROTECTION IN THE EVENT OF AIRLINE INSOLVENCY

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PASSENGER PROTECTION IN THE EVENT OF AIRLINE INSOLVENCY

1. INTRODUCTION

1. The Single Market for air transport has brought significant benefits to consumers. These include a wider variety of air services (such as the development of "low cost" carriers and the introduction of new routes) and a greater choice of fares due to increased competition. However, competition places increased pressure on inefficiently run airlines or those which inadequately respond to customer demand; stress points being highlighted when demand declines and costs rise. Increased competition has paralleled a rise in the number of airline failures, with 105 European scheduled air carriers becoming insolvent between 2000 and the first six months of 2012¹. The scale of such insolvencies varied with small airlines, offering relatively few seats having little impact, to larger airlines, such as Spanair, Malév and Windjet, causing major disruption for individuals. Passengers who had departed, or were about to do so, when a carrier became insolvent ran the risk of being left without assistance. Such failures have a greater impact on passengers stranded away from home, particularly at points where there were either no or limited alternative services. This issue has therefore raised both public and political attention.
2. Unlike other services or transport modes, air tickets are often bought months before the flight departs. To ensure seats are filled as early as possible air carriers encourage passengers to purchase by offering lower fares the earlier a booking is made. Passengers can therefore be more vulnerable to air service provider insolvency.
3. The position of passengers when an air carrier is declared insolvent will vary depending upon how their ticket was purchased. The most significant difference being between standalone (flight-only) tickets and those purchased as part of a package. Passengers who purchase a package covered by the Package Travel Directive² (PTD) are already protected. This Directive requires organisers to either refund the consumer or make alternative flight arrangements and provide interim assistance (e.g. hotels/refreshments) if a contracted air carrier becomes insolvent.
4. Regulation (EC) N°1008/2008³, which governs the licensing of European air carriers, requires Member States to take action should they not be satisfied with the capital adequacy of an air carrier they licence. However, the current EU legal framework does not establish any direct insolvency protection requirement for flight-only ticket holders - such passengers usually having to ensure their own protection.

¹ This figure includes managed "wind downs", takeovers and consolidations, which may have little or no passenger impact – such as BMI in 2012.

² Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours OJ L 158, 23.6.1990, p. 59.

³ Regulation (EC) No 1008/2008 of the European Parliament and Council of 24 September 2008 on the common rules for the operation of air services in the Community (Recast).

5. Regulation (EC) N° 1346/2000, governing cross-border insolvency proceedings, entitles passengers resident in another Member State to the insolvent airline to lodge claims for refunds or damages in foreign insolvency proceedings. However, even if a passenger is successful in his/her claim, which is not certain, there would inevitably be a delay in receiving payment with the affected passenger having to meet their own costs in the interim.
6. There is evidence that the awareness of passengers of the protection they may have is generally poor, even for those covered by PTD. In a survey conducted for the Directorate General for Justice of the Commission⁴ to support potential revisions to that Directive, 66% of respondents did not know whether they were protected if the airline they were booked on became insolvent. There is therefore a situation of market failure, as passengers are inadequately informed about the risks they incur and may not take action to protect themselves against them.
7. In this context, especially for flight-only ticket holders, it is important that passenger protection be enhanced. Addressing this issue quickly could be achieved without new legislation by more effective use of existing law. With this aim, this document assesses the current state of play and considers what measures could effectively be implemented by the Commission, vis-à-vis the competent national authorities and stakeholders.

2. STATE OF PLAY

2.1. Airlines insolvencies in the EU

8. Between 2000 and 2010 ninety six scheduled service⁵ air carriers became insolvent. The frequency of airlines ceasing operations fluctuated in this period with no distinct pattern. Peaks of fourteen air carrier insolvencies were observed in 2004 and 2008, but only three failures in 2000 and 2007. In contrast by 2011 this had fallen to one⁶, but rose to eight⁷ major scheduled air carriers ceasing operations in 2012. There is some relationship between the distribution of insolvencies and the size of Member States aviation markets, the largest number of insolvencies being of carriers registered in the UK and Spain (the first and third largest markets in the EU, measured in terms of passenger numbers). However, this may only demonstrate an active intervention policy in those Member States.

2.2. Passenger Impact

9. An estimated total 1.4-2.2 million passengers were affected between 2000 and 2010⁸, of which some 12% were stranded away from home. The proportion of passengers stranded is low in comparison to the total number booked to travel but could not do so, although again this figure fluctuated and was higher in specific cases (e.g. Air Madrid). Despite this the number of passengers impacted never exceeded more than

⁴ RPA, LE and Yougov, 2010. DG Justice Impact Assessment Annex 2 – Enhanced insolvency protection for consumers purchasing airline tickets – a survey.

⁵ Steer Davies Gleave, Passenger protection in the event of airline insolvency - final report – March 2011.

⁶ Viking Hellas

⁷ BMI, Cirrus Airlines, Spanair, Malév, Cimber Sterling, Skyways, Air Finland and Windjet

⁸ Central case scenario: 1.8 million, equivalent to 0.07% of all return standalone trips.

500,000 per annum⁹. The highest number of failures, in terms of passengers, occurred in 2004, but even then this only represented 0.17% of EU passengers travelling that year¹⁰.

10. It is estimated that between 2011 and 2020 some 0.07% of all flight-only passengers will be affected by air carrier insolvency¹¹. The number will vary annually, but this percentage is likely to increase due to traffic growth and as there are now fewer, larger carriers – the loss of any therefore having a greater impact. The average number of passengers affected is estimated to increase from 325,000 in 2011 to 480,000 by 2020. Of which, based on past statistics, some 12% are projected to be stranded.
11. Whilst the overall proportion of passengers affected is low, the impact of insolvency on individuals can be significant. Apart from the inconvenience of the disruption itself, passengers may incur a number of unrecoverable costs:
 - Where operations cease before initial departure, passengers must choose between rearranging the trip or forgoing their journey. If they rearrange, they must meet the cost of alternative travel which, booked at short notice, will probably be more expensive. If it is not possible to organise alternative travel, or the passenger does not choose to do so, then they may forfeit any non-refundable components of the trip (such as accommodation or car hire).
 - Where operations cease and a passenger becomes stranded, they will usually have to arrange their own alternative travel. Again this will usually be at short notice and likely to be much more expensive than the cost of the original ticket. Capacity constraints may also lead to delay, with affected passengers having to meet assistance costs and compete with others for such services. Lack of available information may compound a passenger's ability to economically make such arrangements.
12. Between 2000 and 2012, stranded passengers incurred the highest immediate costs from airline insolvency, on average over €796.¹² These costs varied depending on distance and the carrier concerned - stranded passengers due to travel on short-haul "low cost" carriers incurring an average cost of €335.¹³

2.3. Existing passenger protection provided under EU law

13. Historically the problem of passenger protection has been:
 - Neither the air carriers nor the competent authorities have been able to sufficiently ensure in advance that necessary appropriate arrangements are in place to re-route flight only passengers and assist them in the interim to provide ensure that their other rights are respected (e.g. information, assistance, and reimbursement).

⁹ Almost 777 million passengers were carried by air in 2011 in the EU-27. Source: Eurostat.

¹⁰ Steer Davies Gleave report, pp. 41 to 44.

¹¹ Steer Davies Gleave report, p. 41.

¹² These costs are an average estimated to have been incurred by stranded and booked passengers. Note this average is significantly increased by the high costs incurred by the large number of passengers stranded in Latin America following the failure of Air Madrid.

¹³ Steer Davies Gleave report, pp. 46 to 52. See table in paragraph 14 for cost composition.

- Passengers' rights under Regulation (EC) No 261/2004 have not been fulfilled by the failing carrier - in particular rerouting stranded passengers and in providing assistance (such as accommodation). This has meant affected passengers have therefore had to be self-reliant

2.4. Partial solutions and existing remedies

14. Member States have used different financial tools (e.g. reserve funds, insurance schemes and bank guarantees) to implement their PTD obligations. Some have individually sought to address the flight-only issue by extending the cover offered under their PTD arrangements to flight-only ticket holders. In Denmark, the Rejsegarantifonden, a fund which provides protection under this Directive was extended on 1 January 2010 to offer passengers the option of protection on all flights from Denmark on carriers established in Denmark.
15. Scheduled Airline Failure Insurance (SAFI) permits flight-only passengers in some States (such as the UK and Ireland¹⁴) to insure against some of the costs of air carrier insolvency. This commercial scheme is available on an individual basis and is also occasionally included in general travel insurance. SAFI covers the cost of rerouting if a passenger is stranded or a refund of the original ticket cost where a passenger cannot recover it. SAFI does not usually cover the cost of purchasing another ticket on an alternative carrier if a passenger has yet to start their journey, or any additional costs incurred as a result of delay or other non-refundable losses such as car hire. Cover is usually not available to any carrier known to be in financial difficulty and can be withdrawn from the market with little notice. Despite this the insurance sector considers there is room for increased use of insurance products like SAFI¹⁵.
16. Payment for tickets purchased via IATA-accredited travel agents are held within a central payment mechanism, known as the Billing Settlement Plan (BSP), before being passed to the airline (this is usually monthly, but this period can be shorter). If a member airline becomes insolvent, IATA may voluntarily refund passengers whose payments have not yet been passed to the airline. Such protection is limited - only applying to those passengers who booked within the payment period i.e. at most up to 30 days before the flight. Passengers booking via an IATA travel agent further in advance of travel would not obtain a refund as the money is no longer in the BSP system.¹⁶
17. In some Member States purchases made by a credit card (and some debit cards) allow consumers to claim a refund from the card provider in the event of the service provider's insolvency. However, this refund is usually limited to the cost of the original ticket and in some cases subject to a minimum amount¹⁷.
18. Finally, assistance has in some cases been provided by other airlines who agree to offer "rescue fares" at a nominal charge.

¹⁴ Whilst the UK and Ireland are the largest markets, SAFI has significant market share in Germany, Holland, Sweden, and the Czech Republic. In 2000-2010, SAFI cost between €3-5 per ticket, covering 2% of passengers impacted by insolvencies.

¹⁵ External study - Stakeholder workshop - 30 March 2011 - Brussels - http://ec.europa.eu/transport/passengers/studies/doc/2011_30_03_minutes.pdf

¹⁶ Debates on BSP's qualities and shortcomings can be found on DG MOVE's website: http://ec.europa.eu/transport/themes/passengers/studies/doc/2011_30_03_minutes.pdf

¹⁷ In the UK purchases in excess of €125 (£100).

2.5. Protection of passengers has so far been limited

19. Of passengers purchasing flight-only tickets affected by insolvency between 2000 and 2010, some 76% had no form of protection other than Regulation (EC) No. 261/2004. This legislation only came into effect in 2005 and in practice has until recently rarely been applied in insolvency situations.
20. The majority of passengers have had to seek a refund of their original ticket as a creditor of the failed air carrier through national insolvency procedures with varying degrees of success. Of the remainder, 14% were able to claim a refund via their credit card provider, with a further 8%, who purchased their ticket from an IATA travel agent, also able to obtain a refund. Only 2% of passengers held additional protection such as SAFI.
21. As to other costs all but those who purchased SAFI are limited to the recovery of the cost of their original tickets. However, even those passengers able to obtain a full ticket refund are estimated to be only able to recover 60-70% of their eventual flight costs if they decide to rebook, as the incremental cost of new flights is not covered. Stranded passengers recovered more of their costs if they held SAFI, but not under other schemes. Direct assistance to passengers was only provided by national authorities in a very limited number of cases.

3. THE WAY FORWARD

22. The proactive approach taken at a national level in early 2012 by Spain and Hungary following the suspension of operations by Spanair and Malév¹⁸ ensured that those insolvencies were better managed in comparison to similar failures. Whilst inevitably passenger experience varied, on average it would seem passengers were better informed, re-routed more quickly and provided with more immediate levels of care/assistance.
23. To identify what specific measures might mitigate the impact of airline insolvency the Commission wrote to Member States on 17 April 2012 requesting information on the approach they each took. The conclusions of that exercise are outlined below.

3.1. Applicability of passenger rights in cases of airline insolvency and financial monitoring

24. There was consensus the most desirable outcome for a passenger was an air carrier being able to continue operations without them having to care about any financial issues.
25. Passenger rights, such as care, re-routing and compensation, under Regulation (EC) No. 261/2004 are applicable from the sale of a ticket and are unaffected by an airline's financial position. There is an obligation on Member States regulatory authorities to make full use of their existing powers under EU law to ensure air carriers take the necessary measures in this regard. Regulation (EC) No 1008/2008 gives authorities powers in relation to the financial fitness of airlines to ensure that

¹⁸ Transit passengers immediately affected Spanair - 22,000 passengers - Source BBC news, Malév - some 7000 passengers- Source Malév press release 3 February 2012

the latter will be in a position to meet their obligations under the consumer acquis. A number of Member States, the UK and Spain, therefore use Regulation (EC) No 1008/2008 to ensure the obligations of Regulation (EC) No 261/2004 are incorporated in air carriers business practices.

26. Article 9(1) of Regulation (EC) 1008/2008 states that the licensing authorities of Member States must suspend or revoke the Operating Licence of a Community air carrier if they are no longer satisfied it can meet its actual and potential obligations for a 12-month period. Article 9(2) requires licensing authorities to make an in-depth assessment of the financial situation of a carrier and to review its licence when financial problems are identified, or insolvency or similar proceedings taken against it. Ideally national authorities should have an active on-going dialogue with such carriers to identify issues.
27. The monitoring practices of regulatory authorities vary from annual and biannual management account reviews, to monthly evaluations of all the airlines licensed. The visibility provided by monthly evaluation, balanced by increased examination when problems are identified, would seem to offer the most benefit. Certain Member States target resources where they consider there is the greatest risk to passengers based on objective criteria including size and type of operation, geographical coverage, past financial trading and provision of "life line" services.
28. Given the ability of an insolvent carrier to meet its obligations may be limited, improved monitoring would allow Member States authorities to intervene at an early stage. This would permit licensing authorities to anticipate and manage the suspension of operations and ensure passenger rights obligations are upheld while funds are still available. It is therefore essential to identify as early as possible carriers with potential financial difficulties prior to them becoming public – as beyond this point it is often too late to act – and engage with them. For example, where the UK licensing authority has identified financial concerns with an air carrier in some cases it has required contingency plans be put in place as a condition of retaining its Operating Licence. This plan would include how a "wind-down" of operations might be organised to protect passengers (particularly those outside the EU) if required.
29. There are a number of benefits to this approach. Disconnecting the decision on when operations should be suspended from the failure itself has allowed company staff to re-route passengers with the active help of other airlines before the carrier is declared insolvent. Such a solution efficiently ensures appropriate assistance, rerouting and information is provided to passengers. Such planning also allows an air carrier to concentrate its resources on repatriating passengers who may otherwise be stranded away from home (and to limit the number of passengers taken out).
30. A number of Member States drew the Commission's attention to the merits of increased collaboration. Their view being that subject to commercial confidentiality an authority holding information of concern could draw the attention of the Member State where that carrier is licensed to the possible need for closer monitoring. Similarly, a licensing authority concerned with the possible insolvency of a carrier it licenses could liaise with authorities in other Member States to allow them to make contingency preparations.

31. Some Member States stated that the consequences of a possible failure could be mitigated by promoting with the carrier a progressive phasing out of unprofitable and/or distant routes/destinations where passenger assistance could be more difficult to arrange. In critical cases national authorities have actively managed their licensing function to ensure that a business was wound down at the lowest point in the carrier's demand cycle. Although there is no optimum time for an airline to cease operations, clearly the failure in peak season (for example at Christmas or Easter) when there is a shortage of alternative capacity has a greater impact on passengers than otherwise.

3.2. Passenger related measures

32. Accurate and timely communication is key to minimising the impact of insolvency on passengers, particularly those stranded with limited access to communication. However, effective channels of communication between a carrier and its passengers should be the norm irrespective of the financial status of the carrier - established channels merely making managing its failure easier.
33. Some authorities have required carriers to accept certain restrictions to mitigate passenger loss, for example through the use of escrow accounts where ticket money (including airport passenger charges) is independently held until a passenger has flown, reducing the potential impact of a failure.
34. Recent experience has shown that passenger interests are better protected/managed, where the enforcement of Regulation (EC) No 261/2004 and Regulation (EC) No 1008/2008 is undertaken within the same national authority, or where such bodies proactively cooperate. This approach should be promoted in that:
- Good communication channels improve the handling of affected passengers - particularly where different national authorities enforce each Regulation.
 - The designated national enforcement body for Regulation (EC) No 261/2004 can identify where passengers might be stranded (obtaining data from airline), and establish a coordinated action plan involving relevant stakeholders (other carriers, airports, Member States' own government departments (e.g. foreign affairs). Airports have a particularly important role in this process: providing information to stranded passengers and ensuring facilities, such as toilets and catering, are available. This approach would ensure a more efficient use of resources and reduce unnecessary duplication. In this regard, the Commission's proposal for the revision of Regulation 261/2004 introduces an increased role for airports in the event of airline insolvency (Articles 5(5) and 14 of the revised Regulation).
 - When an air carrier fails the designated national enforcement bodies could provide relevant passenger information (e.g. on "rescue fares"), either directly (e.g. on its own website) or through information channels - media, airports, social media, airline associations or on a failed carrier's own systems.

3.3. Rescue fares

35. In July 2011, AEA, ELFAA, IATA, and ERAA¹⁹ advised the Commission that their members could assist in rerouting stranded passengers by making available existing spare (or possibly additional) capacity when insolvency occurs. In such situations member airlines charge affected passengers a nominal "rescue fare" sufficient to cover outgoings such as taxes and the marginal costs of carriage. In a number of recent airline insolvencies such rerouting has proven effective in assisting stranded passengers. However, such a solution is dependent upon the willingness of competitor airlines to offer such fares and the route concerned. Airline associations have suggested this process could be improved by Member States coordinating and even funding such rerouting. Airports, for example AENA²⁰ following the insolvency of Spanair, have also assisted by offering reduced or waiving passenger related charges.
36. To ensure maximum public awareness, Member States concerned have communicated the availability of such "rescue" offers via national government websites.

4. CONCLUSIONS

37. The Commission is conscious of the impact on passengers of airline failure and in particular on stranded holders of flight-only tickets.
38. The Commission would draw to the attention of Member States and stakeholders that Regulation (EC) No 261/2004 already provides an appropriate legal framework for passenger assistance in cases of insolvency. However, experience has shown that this Regulation can be difficult to enforce where an air carrier is closing down its activities unless, using Regulation (EC) No 1008/2008, a carrier has been required to plan ahead and put in place measures to protect passengers should it lose its Operating Licence.
39. The Commission has identified that proactive engagement by national regulatory authorities can significantly improve the situation for affected passengers. Therefore, before deciding to propose new legislation in this area, the Commission considers it essential to strengthen the licensing oversight of EU air carriers under Regulation (EC) No 1008/2008.
40. The Commission will therefore:
- Encourage the national authorities competent for the enforcement of Regulation (EC) No 1008/2008 and Regulation (EC) No 261/2004 to coordinate their actions to ensure appropriate monitoring of the financial position of air carriers and where necessary adopt a coordinated approach to the suspension of their operations to minimise the impact on passengers;

¹⁹ AEA (Association of European Airlines), ELFAA (European Low Fare Airline Association), IATA (International Air Transport Association) and ERAA (European Regional Airlines Association)

²⁰ Aeropuertos Españoles y Navegación Aérea

- Encourage greater cooperation and sharing of best practice and information between the regulatory authorities of Member States;
- Engage with EU air transport associations to formalise the existing voluntary agreements on the provision of rescue fares and their effective promotion;
- Engage with EU airport associations to develop voluntary arrangements to complement "rescue fares" for example offering reduced airport charges in such situations to minimise the costs to passengers;
- Engage with industry to encourage the wider and more systematic availability of SAFI or similar insurance products across the EU;
- Engage with IATA to encourage the adoption of a service level agreement to ensure that the Billing Settlement Plan (BSP) is used to ensure the largest possible number of passengers recover what they paid before an air carrier is declared insolvent;
- Encourage the wider and more systematic availability of information about credit card refund schemes or similar products in a Member State to allow passengers to protect themselves against the risk of insolvency under national law.

41. The Commission will closely monitor the application of these measures. Two years after the adoption of this text, the Commission will review their performance and effectiveness and assess whether a legislative initiative is needed to guarantee the protection of passengers in the case of airline insolvency.