



# **ADR in the Aviation Sector and the Sector of Tour Operators**



# **Selected Pitfalls and Hard Cases on Air Passenger Rights and Traveller Rights**

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# Summary

1. Lack of coherence between APRights and (Package) Travel Rights
2. Legal statute of the service provider
3. Lack of transparency on prices, availability, ...
4. Unfair contract terms
5. Insolvency protection
6. Lack of effective enforcement and redress
7. Conclusions and proposals.

# I. Lack of coherence between APR and PTD(1)

- Air Passenger rights > Reg. 261/04
- APR (operating carrier) < PTD (Package Travel Directive concerns contractual and operating carrier)
- APR (all flights + airl.) > PTD (only « classic » packages)
- current PTD protects < 50% of travellers
- Dynamic PT boost > 33% (Sanco MEMO/09/523-24)
- **Case 1**: ECJ Emirates C173/07 (flight vs journey)

# I. Lack of coherence APR-PTD (2)

- **Case 2**: BE Constitutional Court 3/2/11 (ticket transferability vs. transferability of air package travel : NO discrimination ☹ );
- **Case 3**: ECJ Club Tour C400/00 30/4/02 (pre-arranged combined travel services; classic TA vs. OnlineTA...)
- **Case 4**: NE Hoge Raad 11/6/10 ( SGR/ANVR; tailor-made package, sold « in his name » by a travel agency=PTD)
- **Case 5**: Volcanic ash crisis, APR (assistance and rerouting by operating airl.) and PTD ( stronger rules, different concepts, liability for selected airline, vertically integrated touroperators, online packages or « seat only », ... ) .

## II. Legal statute of travel seller

- Airlines sell “own” transport service, + and + combined with services from 3rd companies ( “click through packages”);
- Most travel agencies and touroperators sell mainly services from 3rd companies ;
- New sellers ( OTA, brokers, and other intermediaries): everyone offers or sells combined travel services actually...
- Hence : concepts, contract rules and liability rules of PTD are outdated...

## II. Legal statute (2)

- **Case 1**: vredeg.Oostende 1/3/05 (holiday by car offered by means of travel prospectus by TO , and sold by TA; 2 "intermediaries", but TO condemned as "organizer"; "culpa in eligendo" and selling in own name);
- **Case 2**: commercial court Namur 10/3/10 ( injunction against SN airlines conc. UCT ; airline selling own tickets is not a "retailer" or TA under the PTD);
- **Case 3**: comm. court Namur 29/9/10 ( injunction against easyJet conc. UCT; airline selling ancillary travel services like hotel stay is "organizer" under PTD);
- **Case 4**: NE Hoge Raad 11/6/10 ( SGR: TA's selling services from 3rd companies are acting in own name as TO; so, turnover should be covered as TO; >< ANVR : TA's are NOT acting as TO ...

# III. Lack of transparency of tariffs and prices

- « Unbundling » of ticket prices, and endless creativity concerning « ancillary services »: transaction fee, payment fee, check-in fee, fee for priority boarding, seat reservation fee, guaranteed flight schedules, cancellation fee, toilet use,...
- Ancillary revenues of airlines in 2008-2009: +43% ( ca 3,3 mia €; e.g. Ryanair: 22,2% of revenues ).



# III. Transparency of prices(2)

- EU Reg. 1008/2008: step forward, but:
  - unclear : « final price » = upfront all-in ?
  - ambiguous : why are fuel surcharges still allowed ?
  - legal uncertainty concerning unfair price terms
  - lack of enforcement ( NEB? DGCM of Min.Econ. ? ), and lack of individual and collective redress mechanisms (exception: easy crossborder small claims procedure);

# III. Transparency of prices(3)

- 2 « sweeps » by DG Sanco( 2007 and 2009) confirmed the lack of implementation and enforcement:
  - No name and shame...( still 22% of airlines were not complying in 2009 )
  - Also sales problems and unfair commercial practises ( availability, unfair or unclear contract terms, pre-ticked boxes, lack of contact details, ...).

# III. Transparency of prices(4)

- CPC report 2009 on airline taxes, fees,...
  - confirm lack of clear info on optional and non-optional price elements;
  - lack of info on possible refund of taxes, fees and charges in case of cancellation...
  - recommendations i.a. on terminology, price structure, info duties, transparent transactions, better administrative cooperation ( CPC-Net).

# III. Transparency of prices(5)

- Report in 2008 by S.D.Gleave on contract terms and tariff schemes : confirms lack of transparency on taxes and charges; attacks fuel supplements, UCT, and misleading info;
- Study by Test-Achats and 4 other EU consumer associations on passenger satisfaction rates in 2009-2010: website price transparency is not sufficient (best EU ones: BA, LH and Swiss).

AIA on APR, 24 June 2011

# III. Transparency of price(6)

- **Case 1**: BGH Berlin 20/5/10 (vzbv/Ryanair; the supreme court forbids a credit card fee)
- **Case 2**: Agencia Catalana del Consumo 6/10/10 (administrative fines imposed on 5 lowcost airlines concerning UCT on payment fees, luggage, and pre-ticked boxes)
- **Case 3**: ECJ Ving Sverige 12/5/11 ( a reference only to an entry-level price in an invitation to purchase cannot be regarded, in itself, as constituting a misleading omission;the judge will have to ascertain, inter alia, whether the omission of the detailed rules for calculating the final price prevents the consumer from taking an informed transactional decision and, consequently, leads him to take a transactional decision which he would not otherwise have taken;possible reference into traders website).
- **Case 4**: Action by Test-Achats (May-June 2011; on air and holiday price supplements)

# IV. Unfair contract terms

- Key: Transparency, clarity, accessibility
- Transferability (no) vs. Codeshare (yes)
- Need for balanced Force Majeure rules
- Imposed coupon sequence and use
- Non guaranteed speedy or priority boarding or seat reservations
- Disproportionate right to refuse
- Flight schedules under reserve
- No liability for additional services; « acting as a mere intermediary »; applicable law; competent court, etc.

# IV. Unfair contract terms

- **Case 1**: Ryanair-case, commercial court

Namur 10/3/10 (website and optional supplements are more transparent since 10 Nov 2010; but new UCT's added ☹ )

- **Case 2**: easyJet-case, comm. Court

Namur 10/3/10 ( Belgian law declared applicable, and Belgian court is competent; cfr ECJ C204/08 Baltic Air, and C144/09 Hotel Alpenhof )

- **Case 3**: SN-case, ibidem ( needed informed consent on codeshare; other case of "Finnish dog" with price supplement at check-in of codeshare flight by Finnair )

# V. Insolvency protection

- 1. Package travel** : Belgian Travel Contract Law is OK, except concerning recovery of damages about liability cases, and concerning gift coupons (pending litigation)
- 2. Airlines**:
  - Growing risk of insolvency(see Booz report 2009 and impact assessment study 2010 by DG Move)
  - Prepayment by consumers longtime before the flight
  - Growing direct selling and marketing by airlines: need for level playing field between airlines, TO's, TA's and Online TA's



## 2. Airlines (2)

- Art.7 of the PTD 90/314 could already apply to airlines when selling a « travel package » : «*The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency* »
- **Cases**: Air Madrid, SkyEurope, MyAir, ...: financial losses, no repatriation (regulation 1008/08 is not sufficient ).
- Current Belgian law proposal Claes-Beke: airline financial coverage of insolvency risk by insurance lower than for package travel ? (anyway, option 8 of PTD-consultation in 2010 offers best possible solution : widened scope of PTD into « travel services directive »).

# VI. Lack of effective enforcement and redress

- Public enforcement by authorities (NEB) is insufficient and non coherent (few sanctions ; so-called APR-regulations Reg 261/04 and 1107/06 vs. other passenger rights under Reg 889/02,1008/08,...);
- Private enforcement by civil courts is disproportionate (no ADR in most EU countries, except partially in NE and Scandin.; only crossborder small claim proced.)
- **Case**: Volcanic ash crisis: useful lessons by EU Commission within « non-paper », but insufficient (only describing working paper with some vague guidelines and ... disclaimers; need for clarification of Reg 261/04 and more active role by NEB's )

# VII. Conclusions and proposals

## 1. In general :

- Transparency = key for competition and consumer satisfaction (e.g. Community Air Passenger Reporting System? New Internet opportunities; crisis management and communication,...)
- Same level playing field for airlines, TO's, TA's and OTA's (info, advertising, contract terms, liability, assistance, redress, insolvency,...): need to integrate ALL APR, and to realize option 8 aiming at widened scope of PTD vs. CRD "travel chapter"; otherwise ... 2 different sets of rules and lack of confidence and legal insecurity...
- All non-optional price elements should be included in upfront price !

# VII. Conclusions and proposals (2)

## 2. Air Passenger Rights:

- Principle of joint liability between operating and contractual carrier (e.g. Reg261)
- Exceptional ash crisis should not weaken the air passenger protection (Reg261 functioned well since 2005 ! Return flights by non-EU airlines should fall under the scope of Reg261 )
- EU should tackle the UCT's in (air) transport contracts (specific legislation? measures or initiatives under the current discussion on EU contract law and the possible « optional instrument »? Minimum-modelcontract with ADR-instrument ? )
- Need for ADR (cfr NE and Skandin.; BELMED; widening crossborder small claims regulation 861/07 into « national » claims )

# VII. Conclusions and proposals<sup>(3)</sup>

## 3. (Package) Travel Directive

- The scope of the PTD should be widened into all travel services (including « car holidays »);
- Introduction of principle of joint liability between all implied « travel traders » ( concepts of retailer, organiser, travel intermediary are outdated);
- Special attention should be paid to Internetsales and non-EU traders like Booking.com, Expedia, etc.

# Thanks for your attention !

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