Review of Travel Trade Legislation

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Current Legislation

Travel Agents and Tour Operators in Ireland are required by law to hold licences. These are issued by the Commission for Aviation Regulation (CAR). They are required only by Travel Agents and Tour Operators and not by airlines, ferry companies, hotel booking agencies or any other travel provider. Licensees (travel agents and Tour operators) must meet financial, staffing, experience, bonding and premises minimum standards, to obtain a licence in order to have the right to sell travel products. This does not apply to the others mentioned above. CAR is undertaking a review of the current regulatory regime, with a view to making recommendations to the Minister, for possible appropriate changes to existing legislation, introducing new legislation or abandoning the regulatory regime altogether. This submission is made as part of the review process.

The current legislation was written in 1982 – twenty-six years ago. Before mobile 'phones, common internet usage and Ryanair. At the time, virtually all travel was purchased from Tour Operators, Travel Agents, Ferry companies or state owned Airlines. It was designed by the Government to incorporate into law a regulatory dimension to the travel business and offer protection to the travelling public. It should be noted that Irish travel agents and tour operators had already created a voluntary consumer protection scheme and this was in existence when the current legislation came into being and was replaced by it.

Legislative Review

One major flaw in the current legislation is that it was enacted and left intact regardless of developments in the industry it was designed to regulate. With the exception of enabling legislation (to give effect to an EU Directive) in 1995, which had very little effect on the workings of the existing regime, there has never been a review until now – 26 years later. The fact that a review has not been undertaken before now is a very bad reflection on the priority given by politicians and regulators to consumer protection. The legislation now protects only 22% of travellers and this highlights the result of this neglect. It blows the myth that the current legislation is a consumer protection devise. If almost 80% of travellers leave Ireland without any consumer protection, because they have chosen to do so, the current law can only be described as "an ass". The contention that the government has been looking after the interests of travelling consumers, while only 20% of travellers were covered, is at best misleading.

The Effects of the Current Legislation

Anti-Competitive

The effect of the current legislation is that a large number of small companies (small travel agents make up most of the companies covered) and a few larger companies (a small number of large tour operators and travel agents) bear the brunt of an onerous regulatory regime, while very large companies (airlines, accommodation booking agencies, ferry companies, event management companies etc.) are permitted to sell the exact same products without any concern for the legislation nor it's onerous requirements. Indeed, most of these large companies could not meet the criterion laid down in the legislation and would fail to get a licence were they obliged to apply for one, in the same way as travel agents. This gives rise to one of the most skewed competitive situations in existence in Ireland today.

Unrealistic and Unnecessary Bonding Requirements

If you own a Mom-and-Pop travel agency, you must have a minimum paid up share capital, minimum staffing levels, minimum experience requirements, and provide a bond in the amount of 4% of your turnover. For an average Mom and Pop shop this bond would amount to almost €200,000. The official policy of the ITAA Collective Bond Providers, who cover most travel agents, is that members covered by the bond must have a net worth equal to or greater than the amount of the bond. An analysis of the small travel agents within this scheme (who comprise by far the bulk of those covered by this legislation) shows that these Mom and Pop shops, are small (4 – 6 staff), are marginally profitable, tend to underpay their directors (average remuneration is €60,000) and yet have enormous net worth (of almost €200,000). Given that travel agents do not have stock, much in the way of fixed assets or work-in-progress, this net worth is made up primarily of cash. Therefore the effect of the legislation is to target small companies, oblige them to be profitable every year and demands that all earnings be retained within the company. At the same time, enormous companies who compete directly with these same small travel agencies are permitted to trade without any such obligations. This legislation effectively provides one very onerous rule for the small business and another "do-as-you-wish" rule for large companies.

Bad Use of Capital

Any business advisor, looking at the travel agency business would tell the proprietors that hoarding cash in the company bank account is a very bad way of using capital. It would be construed as running ones business very badly. However the legislation has the effect of achieving just this form of bad financial management throughout the entire industry. Moreover, solid, viable companies have been forced out of the industry because they could not meet these ridiculous bonding requirements. If one were to analyse the travel industry over the period covered by this legislation, one would see that the number of smaller travel agents is dwindling. In a nutshell, anyone who had other interests and could make a living outside this over-regulated environment, chose to do so. Anyone nearing retirement age expedited their departure from the business and the upshot of it all is that there has been a substantial "brain-drain" from the business. The new entrants, with few exceptions are more low-cost, low-service and web based providers. If this trend continues, travel agents, as we know them will cease to exist and consumers will have web sites to consult for their special trips. This has meant diminishing consumer choice, lack of competitiveness and an overall diminution of the range of suppliers available to the travelling public. Any law that has this effect is not offering consumer protection but is doing exactly the opposite.

The Red-Tape Syndrome

Travel agents are obliged to apply to renew their licences every year. Twice a year if we hold a tour operators licence as well. This additional tour operator licence is required, even if the company only operates one or two small ad-hoc trips (which are defined as "tours") a year. As mentioned above, travel agents are small businesses with only a few people in them. Proprietors do everything. They are usually the primary sales people and time devoted to filling out forms and complying with all the other requirements to get a licence, is time taken away from being a travel agent. In small businesses, proprietors are responsible for everything. Sales, marketing, administration, accounting, banking, even delivering tickets. Travel agents run on very tight staffing and never have spare capacity. They tend to work much longer hours than most businesses and usually have less to show for it at the end of the year. However, these people are required by law to spend man days filling out forms, negotiating bonds, liaising with accountants and dealing with queries raised by the Commission regarding their applications. They do so in an environment where it is made clear to them that they must comply to a time scale defined by the Commission or face huge penalties for late filing or loss of livelihood if the licence is not issued in time. Bear in mind that those very large companies, who are competing head-on with these small travel agents, to sell the exact same products to the exact same people, do not have to put up with any of this. There is a stated government objective to reduce "red-tape" on small business in Ireland. This does not apply to the small businesses within the travel trade. It might apply to the very large competitors but definitely not the smaller businesses. One rule for small agencies and another for everyone else.

Protection of Licensees

It would be reasonable to expect that the legislation would offer a form of protection to those licensees who reach the required standards. The implication is that those who do not meet the required standards, or who attempt to trade without a licence will be obliged to desist forthwith. The compliant licensee has the right to assume a high degree of protection from the Commission against illegal competition in such a situation. Unfortunately, this is not the case. The record of the regulatory bodies since the introduction of this legislation has been abysmal. The record speaks for itself. Whether it is too difficult, too much trouble, too much to be able to undertake because of lack of available resources, or just downright negligence, those responsible for enforcing the legislation to those who operate without licensing, has been dreadful by any measurements. The former Commissioner, Bill Prafiska, said it was because of lack of resources. Small travel agents are unable to plead "lack of resources" when they are being told of the dire consequences that will befall them if they miss a deadline, so the "lack of resources" argument does not impress this group. Moreover, the "lack of resources" evident when a potential illegal trader is brought to the attention of the Commission, is markedly at variance to the availability of resources deployed when the forms for renewals have to be filled out. It is the policy of the Commission to refuse to comment on any complaints made to them about illegal trading. In this way, it is possible to fail to act in an efficient manner on complaints, and by dint of refusing to comment on individual complaints, there is no visibility and thus no accountability for action or inaction. In short, if the Commission does nothing about a complaint, nobody will ever know. It is a fact that a number of companies operating without a licence, in competition with existing licensed travel agents, continue to do so regardless of complaints made to the Commission. This has given rise to the belief that complaints to the Commission about potential illegal traders will be dealt with in a tardy manner and unless the offending company is blatantly operating in a manner that the Commission just couldn't ignore, it will be left largely to carry on regardless. Established travel agents, who are put to the pin of their collar to comply with the legislation and obtain licences, are justifiably angry at the complete lack of protection from illegal competition that the current enforcement regime affords them. So we have legislation that discriminates in favour of big business and against small companies that is being enforced in a selective manner largely to the detriment of the same small businesses.

What if an airline goes bust?

Michael O'Leary is confidently predicting that dozens of airlines will go bust in the coming months and years. It is not so long ago that Ryanair themselves were on the brink of extinction. In an era when the world's most powerful banks have collapsed, who is going to guarantee that even the strongest airline may not face insurmountable turbulence? In that event, none of those consumers will be protected. The view may be that the credit card companies will pick up the tab but that is naive. In the event that Ryanair or some similar sized airline went bust, the credit card providers would default on any payout scheme and the "consumer protection legislation" would be exposed for what it is – a micro scheme for the small minority who book with small agencies.

Does the Current legislation need to be revised?

Without question the legislation, as it currently stands, is so out of date that the business it was designed to regulate, no longer exists. It has ended up penalising small companies hugely, so that a paltry 20% of travellers can have their funds protected. It ignores the other 80% of travellers and the array of non-licensed travel companies that serve them, all of whom are happily unaware of the tribulations of their smaller competitors endure. It is inequitable, anti-competitive and fails in it's primary objective of protecting consumer funds.

Since the original legislation was enacted, consumers have changed. Their buying patterns have changed, their views have changed and their values have changed. As a travel agent who offers financial protection for client's funds, I have absolutely no doubt that the consumer places no value whatsoever on this financial guarantee. Client after client has proven that if they can buy a product cheaper on the internet, they will do so regardless. Entreaties to deal with licensed travel agents on the grounds of financial security are treated with disdain. The consumer has moved on and will not pay extra for financial protection. They are currently (temporarily) a bit more aware of financial protection after the high profile failures in the recent past. This will quickly fade and they will revert to type by January and seek out the cheapest option again. This is born out by the fact that more and more consumers are choosing to buy their travel on the internet with unregulated providers. In short, the consumer will not choose to pay extra for financial protection and places no value on the enormous burden placed on travel agents to provide it. It may cost travel agents a fortune to provide financial security but the client doesn't want it. Travel agents bear the cost of providing security while the huge competitors who are getting the business, do not have such overheads.

What would replace it?

Either –

(a) Scrap the legislative regime altogether and let the buyer beware. This brings travel agents into line with low-cost carriers, bed banks, web based vendors etc. and closer to normal commercial practice. In this case commercial insurance would be made available for consumers who wished to purchase cover for financial security. The small businesses within the travel industry would not be hammered by bureaucracy, draconian financial requirements and would be competing on a level playing field with those large companies who currently enjoy a state sponsored advantage. Small businesses would be able to release some of the equity currently tied up by dint of the legislation and reinvest it in improving or expanding their businesses, or start new ones. If 200 travel agents were each allowed to use €150,000 of the equity currently tied up, for productive purposes, that would release € 30,000,000 into the economy at a time when it is badly needed.

Or –

(b) Introduce a flat fee for every person who leaves the country by whatever means i.e. by airplane or ferry. A mechanism could be found to incorporate bed banks, ground handlers abroad etc. This fee could go towards a central fund and augment the millions that already exist in the possession of the Commission, for this purpose. In this case the state would underwrite the consumers funds – limited to a full refund of what the consumer paid and not covering the cost of repatriation expenses. In doing, so the state is providing the service of consumer protection. The fund would quickly build up to an amount adequate to cover any potential claim. At that point, as the government continues to offer this consumer protection, it would continue to collect the levy and this would in effect become another source of revenue for the government, while at the same time offering value for money in the form of consumer protection.

Built-in Reviews

If it were deemed appropriate to continue some from of legislative process, it is imperative that a regular review is built into it. This would ensure that it is relevant to the business it would seek to regulate. We can see how irrelevant the current legislation has become and to avoid this happening in the future a thorough review should be undertaken every three years. The travel business completely changes itself every 18 months and any legislation, which attempts to govern such an industry, should be guaranteed to stay relevant to its purpose. This can only be achieved by building in regular reviews that will have the ability to change the effect of the law to the changed environment.

Protection of Licensees

If the concept of legislation is retained, the resources required to police it must be reviewed. There is no point in revising the legislation and leaving the infrastructure in a way that will see nothing is done to police it. Unless compliant licensees are rewarded and delinquents punished efficiently, there is no point in having any legislation at all. There is no need to rely on lengthy and hugely costly and time wasting, legal procedures to deal with illegal traders. Efficient and enthusiastic enforcement of the legislation by those charged with the task would cut out a lot of time wasting and expense to the taxpayer. In the meantime, those who comply should not be troubled by unnecessary bureaucracy or over attention.

What if nothing is done?

The existing regime is not working. It is heavily penalising compliant small businesses while rewarding big companies and illegal traders. Left untouched it will continue to force viable small travel agents out of business and leave us with a marketplace full of web sites and low-cost carriers. This review is long overdue and has put a sharp on focus on just how irrelevant the current legislation has become. It runs counter to the governments own objectives of providing financial protection to travelling consumers. It places an unfair and unnecessary burden on the weakest sector of the travel business while ignoring big business. It applies enormous red tape on small business, which is diametrically opposed to the governments stated objective of reducing red tape on small business. Its effectiveness is now down to 20% of potential consumers. 80% of travellers ignore it completely. There can be no rational case made for retaining the existing scheme or making it even more onerous on the small trader. This review is a timely catalyst and makes it clear to everybody that this outmoded regime is long past its "best by" date. It cannot be allowed to remain in its current state. It is an unjust and unfair burden applied unevenly against the smallest people in the business. In default of radical change to affect a much fairer regime, those most unfairly affected by this inequity will be obliged into radical action themselves. By whatever means, the small traders of the travel business must unyoke themselves from this discrimination or face going out of business.

In The Meantime

Current Bonding Levels Too High

In the short term and before this review has been completed, it would be possible to reduce this huge burden on small business at the stroke of a pen. The Commissioner has presented figures, which show that the industry is hugely over bonded and as mentioned above, the cost to small business is grossly out of proportion to the normal costs associated with running a small enterprise. There is a sledgehammer being used to crack a nut here and it is in the form of the requirement to bond travel agents at 4% of turnover. This could be reduced to 1% immediately, as an interim measure, and this would transform the plight of the small man. It would reduce the amount of bonding cover required, reduce the costs and difficulties associated with obtaining such a bond and release locked up capital at a time when the business faces one of the toughest challenges ever. This change can be done instantly at the discretion of the Commissioner and he should do it without delay.

Crazy Bonding Requirements

The Commissioner has stated that in the period from 1982 to the end of 2007, claims totalling just over €2.5 million were made against bonds in respect of collapsed travel firms. In 2007 alone, Travel Agents and Tour Operators were obliged to provide bonding cover in the amount of €137,000,000. In the decade up to the end of 2007 Agents and Operators had to provide bonding cover of over €1,000,000,000 (one billion) to cover claims of €2.5 million. The small business adviser who would have told those Mom & Pops not to be hoarding hundreds of thousands of euros in their balance sheets to obtain bonds, would be screaming from the rooftops that those huge bonds are not required in the first place! Those looking at the travel business from outside may comment that this is absolute madness. Unfortunately, for those operating within the industry this is a fact of life and an obligation we have to meet, just so we can get on with our livelihoods. Again those, non-licensed competitors with whom we have to compete, have no such bonding issues.

Bond Level Reduction Not A Solution

This bond coverage cut is proposed as an interim measure only and not as a permanent solution to avoid the review discussed earlier. The principle of small business paying heavily for consumer's financial protection must be broken. If the consumer wants financial insurance they must fund it themselves, as they would with any other insurance cover. This shift of cost is imperative to the survival of a small but very important industry and one that is a very substantial employer with thousands of (long term) Irish jobs. But they can only be long-term Irish jobs as long as we remain in business. This regulation is doing everything it can to ensure we don't.

Conclusion

This legislation is ineffective, inefficient and failing to achieve its core objectives. It discriminates against a small sector of the travel business and bestows a considerable trading advantage to the majority of large providers. It is anti-competitive, draconian on those few who are subjected to its terms and has the potential to damage indigenous, small Irish businesses and jobs, beyond repair. It is being enforced selectively against small business and adding huge quantities of unnecessary red tape to the weakest sector while ignoring the stronger ones altogether. There can be no rational argument for retaining the existing legislation in its current form or for tinkering with it. It must be completely thrown out and replaced with a more equitable regime that covers all travellers or none. I recommend some form of very light handed legislation of all travel providers that is designed to ensure professional standards are maintained. An indefinite licence that is confined to minimum service standards could be revoked in the case of poor practices, would cut a lot of the red tape, but would have to apply to all providers, not just travel agents and tour operators. Financial cover should not be paid for by the provider but should be available to the consumer if they wish to pay for it. There should not be a protracted contemplation period on this review. It has already taken months to get to this point.

END

John Galligan Travel
The Travel Managers

Review of Travel Trade Legislation

Package Holidays and Travel Trade Act 1995 (The 1995 Act)

30th October 2008

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This act was passed to bring into effect in Irish Law the provisions of the Package Holiday Directive handed down from the EU. It was implemented at a time when the vast majority of people travelled on their holidays through large Tour Operators and booked those holidays in the traditional way. It did not envisage a time when the vast majority of travellers booked their own travel arrangements through web sites. Its main objective was to make it easier for consumers to settle disputes before, during or after a holiday by making the (big) Irish Tour Operator liable for the acts, deeds and omissions of their sub-contractors, wherever they were in the world. The theory was that an unhappy consumer could return home from holiday, take legal actions against the big Irish company and (potentially) win a case against them for anything whatsoever that happened while the client was away on holidays. The Irish company, in turn, would be obliged to take legal action against the foreign company to recoup it's losses. All this would apply even if there were no negligence, contribution to the problem or even knowledge of the problem by the Irish operator. The small consumer, who had been wronged while on holiday, could return and "hit" the local company who could well afford to pay out and then fund expensive and extensive foreign litigation to recover the losses incurred.

A "package" is anything that includes (a) a flight and one or more other travel component or (b) combines two travel components. Any travel agent or tour operator who arranges this is automatically exposed to the extended liability contained in the 1995 Act. Put simply, a two-man travel agency that books a Ryanair flight to London and a hotel for the weekend there has created a "package". The total package might cost a few hundred euros and the small agent might only make €30-€40 on the transaction, but they are now exposed to almost unlimited liability as a consequence of selling these clients a "package". If one of those clients fell down the stairs in the hotel and broke his leg, the small travel agent may now be faced with a six-figure lawsuit for damages, negligence, loss off earnings, compensation, distress etc. Whatever about being able to pay out on such an award (which is most unlikely), the legal costs alone in such a case would be enough to put this agency out of business. So, while the agent only booked a weekend away for these clients and only received a paltry fee for that service, they are liable for almost any catastrophe that might befall these clients. With "dynamic packaging" now the order of the day and almost everything small agencies sell being packaged in this way, it follows that every time an Irish travel agent sells a holiday, that sale has the potential to put that agency out of business. This must be a unique business and legislative proposition.

This effect could not have been envisaged by the wise men of Europe who came up with the idea in the first place, nor the Irish Politicians who enshrined it in legislation. At the time of the Directive all holidays may have been booked and paid for through large tour operators, who could afford to take the "hits". In 2008, most travellers book themselves on the internet. The internet provider is not held liable in any way even though they are the new "big operators" and are acting as "virtual travel agents". In many cases they have replaced or overtaken the big operators that this legislation was written for. To survive, every small agency has to use dynamic packaging and this now accounts for a large percentage of products sold in small agencies.

The net effect is that very large airline and accommodation agencies work together to become "virtual travel agents" but the legislation, because of a technicality, does not trouble them. At the same time, small travel agents, who still use an amended version of the original business model, are doing the exact same thing as the "virtual travel agents" but take on a contingent liability so enormous as to expose them to financial ruin, every time they sell a holiday.

While consumers may book their flights on an airline website and then go on to book their hotel through the portal of the airlines web site, they are effectively completing two separate transactions – one with the airline for the flights and another with an affiliated hotel booking agency for the accommodation. This is not deemed to be a package under the 1995 Act as it involves the consumer making two separate arrangements with two separate suppliers despite the fact that it all appears to be done at one vendor's site. In the event that this client walked into a travel agency and the clerk there did the exact same thing i.e. book flights with an airline and click through to a bed bank to book accommodation, the travel agent automatically becomes liable for everything after that.

Imagine a law, which bestowed such a contingent liability that it had the potential to put small newsagents out of business every time they sold a Mars bar, while at the same time absolving Tesco from the same liability because they take sales over the internet. That is exactly what has happened in the travel business.

The current situation is that almost 80% of Irish travellers book their travel online. The 1995 Act ignores those 80% and the companies that serve them. Instead it focuses on the 20% that still book through travel agents and tour operators. It seeks to make the providers to that 20% liable to a fatal lawsuit every time they make a sale. There is unlikely to any parallel to this inequity anywhere in the world. As an example, this Act gives Ryanair a free hand to sell the exact same product to the exact same people as travel agents, without any of the liability that the smaller companies must endure.

While the Act was probably intended to get the big Tour Operators to fund refunds and/or compensation for clients, those big tour operators are no longer the force they once were and the really big players are the airlines and bed banks who are excluded from the terms of this act. Moreover, dynamic packaging by agents to stay alive has resulted in the smallest companies in the travel business taking on the onerous liability regime originally aimed at the very biggest companies.

It is ridiculous that a tiny travel agent in a small town in rural Ireland could be put out of business by an act that happened without any negligence on its own part. In the context of the current travel industry, this law is indeed an ass and should be scrapped immediately. It rewards the enormous on-line providers and places all the burden of liability on the smallest and weakest in the travel provider community.

This law is out of date and as part of the existing review by the Commission, it should recommend that it be revised to take this huge liability away from small Irish businesses. There can be no rational case made for making the weakest of travel providers take on such a bizarre amount of liability when there is no question of negligence on the part of the small Irish agent. This should be done as a matter of urgency as the ridiculous level of liability is present with every passing day and with every package sold. It would only take one such holiday to go wrong to put the agency out of business through no fault of their own, but through the fault of out of date and illogical legislation.