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Aer Lingus

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Re: Consultation on Arts 19 & 22 Consumer Rights Directive 2011/83/EU

Dear Ms Cosgrave,

I refer to your letter to our Executive Counsel of 06 September, who has asked me to reply to you on his behalf.

General

At the outset, Aer Lingus welcomes any measure at European or national level which augments customer rights and protections and seeks to harmonise and improve practices across the passenger transport sector in the EU.

The Department's present Consultation however is very restrictive in terms of the time it permits interested stakeholders to fully consider its views and to contribute to the Department's deliberations. Further, the Minister's suggested implementation date of the end of 2012 is certainly far more ambitious than the practicalities of on-the-ground implementation by airlines for instance will permit and, other than in the UK, seems to be divergent from other Member States' implementation timetables.

Furthermore, no draft Regulations or guidance have been included with the Consultation, and so it is difficult to provide a full and considered view as to the proposed early implementation. This guidance is of significant importance to stakeholders, particularly in light of the Department's stated view that despite this Directive constituting a maximum harmonisation measure, Member States are free to apply its provisions to exempted sectors in national legislation (paragraph 14, page 7 of the Consultation document).

Proposed Timeline

As stated above, the timelines proposed in the Consultation are very restrictive in terms of the period allowed to both receive and consider stakeholder

contributions and to comply with the Minister's suggested implementation deadline of only ten weeks from now.

Compliance with the Directive will drive a great many technical, financial and administrative changes for traders, a good number of which will necessarily require consultation with business partners such as card services providers and may involve third parties such as regulatory authorities in other EU jurisdictions. The time limits proposed in this Consultation do not allow for all of these to be fully considered and addressed in time, much less implemented in practice. As you are aware, as part of the OFT's recent payment surcharges investigation Aer Lingus has committed to business changes which are in the process of being fully implemented. It cannot be reasonably anticipated that, in tandem with processes underway to meet our undertakings to the OFT, additional changes (which must be compatible with those undertakings) to meet the Minister's implementing Regulations will be completed in ten weeks time. Very considerable resources are currently committed to this OFT work as well as to other major changes in Aer Lingus's IT and business infrastructure currently underway, and further technical adaptations required on foot of the Directive, earlier than is necessary, will most likely delay and inhibit all projects.

Aer Lingus must also establish definitively and in advance of any changes, what precisely the implementing measures require. This will necessitate preparation of detailed financial costings, consultation with all affected card and merchant services providers and the input of all affected business areas. This of course is not an exercise which can be conducted in the absence of the implementing Regulations themselves and necessary guidance from enforcement authorities - not solely in the Irish jurisdiction, but in all those markets in the EU into which Aer Lingus operates.

The Minister's proposed implementation date greatly precedes the date set out in the Directive and, other than with respect to the United Kingdom, is divergent from other Member States' implementation timetables. Whereas this may be less of a concern in sectors addressed which do not generally compete internationally (such as entertainment ticketing service providers), it has particular implications for Irish companies which operate on an EU and worldwide basis because of the risk that inconsistent national regulations could harm their competitive position with respect to European competitors. Inconsistent implementing legislation across Europe also presents an entity such as Aer Lingus with difficulties in practical and operational terms, as well from a competitive perspective. It is presumably not the Minister's intention that Irish companies are not availed of the same facilities to comply with EU law as their European counterparts or are subject to harmonisation rules which are more onerous. We would therefore urge in the first instance that both the consultation deadline and the implementation timetable be reconsidered and brought more into line with that envisaged by the Directive itself.

We note that the first EU Commission meeting aimed at guiding Member States in the transposition of the Directive took place only last week. The Directive provides for transposition by 13 December 2013 and full implementation by no later than 13 June 2014 and these time limits should be fully availed of, particularly in light of the very late introduction into the Directive's legislative process of Article 19 itself. In setting these deadlines, the Commission clearly

had in mind the provision of adequate and reasonable time for both Member States and affected companies to comply with the Directive, given the complexities involved in compliance.

Implementation of the Directive

Whereas it is appreciated that the Directive is a harmonisation measure and that absolute uniformity across the EU is not required, given that many subject Irish companies trade on an EU-wide basis, implementing legislation here should be no more onerous than that in other EU jurisdictions. The Directive is for the most part a maximum harmonisation measure and Article 4 is clear that Member States must not introduce national laws which diverge from those contained in the Directive. However, the Consultation document (at paragraph 14, page 7) states that "*Member states are free, however, to apply the Directive's provisions to exempted sectors in national legislation.*" Aer Lingus does not accept that this is the case and the mechanism by which this is proposed to operate is not set out in the document. Indeed, later in the Consultation paper a conflicting view appears, in that "*Member States cannot go beyond, or add to, the Directive's maximum harmonisation provisions in national legislation*" (paragraph 2, page 10).

It is critical that the Irish implementing Regulations do not put indigenous companies trading in Europe at a competitive disadvantage by applying to them provisions of the Directive from which they are exempted. In common with their European competitors, Irish companies are entitled in law to those exemptions set out in the Directive and any divergence from this would be to the commercial and competitive detriment of Irish business.

Additional measures

It is submitted that in tandem with implementing Regulations in this case, legislation akin to the United Kingdom Credit Cards (Price Discrimination) Order 1990 is a prerequisite. That legislation makes it unlawful to carry out any agreement relating to credit cards to the extent that it imposes or requires the imposition of a "no discrimination rule". A "no discrimination rule" prohibits merchants from charging different prices to customers who pay by credit card rather than by another means of payment. Currently, Irish traders are restricted in how payment surcharges are made as a result "no discrimination rules" in contracts with card providers, but their United Kingdom competitors are not and indeed are at a greater freedom to meet the terms of Article 19 of the Directive. As you are aware, no such equivalent Irish legislation exists.

Article 22 of the Directive

As is set out in the Consultation document, the substantive requirements of Article 22 of the Directive are already applicable to airlines by virtue of Article 23(1) of Regulation (EC) No 1008/2008, and this has in fact been the practice of Aer Lingus for some time. In this respect, consideration should be given to adopting provisions similar to Article 23(1) of the Regulation for sea carriers, rail transport providers and other sectors which are subject to the Directive.

Assumptions in the Consultation document

Although Aer Lingus reserves its position in relation to the contents of the Consultation document, given the Department's very restrictive deadline for

replies we would initially address a number of the more important assertions it makes, viz.:

Costs borne by traders

In relation to the costs to traders of processing payments and the requirement generally of Article 19 that payment charges reflect such costs, it is not clear from the Consultation document how these costs will be interpreted by the Regulations or indeed by Irish enforcement authorities. The Directive does not define or elaborate on the establishment of such costs, and the Department considers that the matter would be more appropriately dealt with by means of guidance to traders than by a statutory provision. However, no guidance has been provided, and traders cannot therefore be reasonably expected to properly implement, by December of this year, far-reaching Regulations of which they have not had sight.


The cost to a trader of processing various payment methods is a complex calculation and, as is acknowledged in the Consultation document, the calculation differs by card type, transaction and value - as well as by other factors relating to turnover, and other characteristics of the trader.


It causes traders serious difficulties now for the Department to take the position in its Consultation that it is a matter for enforcement authorities and the courts to investigate and decide whether charges imposed exceed the cost of the payment method to the trader. This is because traders must immediately implement changes to financial, IT and sales infrastructure to meet the Minister's proposed deadline in ten weeks time, without visibility or guidance as to how the Regulations will impose the obligation and how it will be interpreted by enforcement authorities. For example, in advance of making major changes to financial, administrative and IT systems traders should be made aware of how the Regulations will provide for the fact that different card services providers charge different rates per transaction. Traders will also need to prepare to make systems changes in the event that the Regulations require that in advertisements and website booking processes, card surcharges are broken down by card provider.

In our view these issues will need to be resolved before the Directive is implemented into national law so as to ensure fairness across our business sector in Europe and to allow sufficient time to establish new systems to comply with the Regulations. It is submitted that this cannot reasonably be achieved by the end of 2012, a fact presumably in contemplation by the Commission when it set out the transposition and implementation deadlines of 2013 and 2014 respectively.

Charge-free payment options

Throughout the Consultation document the Department makes reference to the VISA Electron payment method and its availability within Ireland. It must be appreciated that this method is commonly used by Aer Lingus customers across Europe and that Irish banks have widely introduced a similar product this year to Irish customers (VISA Debit).





Administration charges

Throughout the Consultation and in particular in paragraph 36 of page 28, the Department proposes to provide in the Regulations that any charge to consumers that is avoidable where a specified payment instrument is used will be regarded as a fee for the use of a means of payment for the purposes of Article 19. This does not take account of the nature of administration charges, or the practice of airlines across the industry in processing payments.

Administration charges encompass the cost of various elements which contribute to the support of a sale - not merely the card or merchant service provider's charges. These elements include card authorisation costs, merchant fees and bank commissions, website support helpdesk staff and I.T. infrastructure, language supports, email and measurement tools, General Sales Agency support throughout Europe and software/hardware support and license fees for our reservations system.

Aer Lingus seeks to incentivise the use of more efficient payment methods such as VISA Electron and as part of that incentive, offers an exemption from our administration fee for users of that card. The inclusion of administration fees within the scope of Article 19 solely within Irish Regulations will remove that incentive and unless a similar provision appears in all implementing legislation across the EU, expose Irish airlines to competitive disadvantage with other EU carriers. Administration or booking fees are a legitimate facet of many European airlines' pricing structures and in Aer Lingus's case, will shortly be included and displayed within the headline price. They cannot be regarded as fees solely for the use of a given means of payment and are not rightly within the scope of Article 19.

Criminal proceedings

At paragraph 19 on page 9 of the Consultation, the Department proposes to provide in the Regulations that, if in criminal proceedings the truth of a factual representation is an issue, and the trader who made the representation does not establish its truth on the balance of probabilities, that representation will be presumed to be untrue. It is submitted that it would sufficient in such circumstances to provide for such a statement not to be accepted by the Court, rather than to automatically characterise it as a deliberate misrepresentation. This is particularly important in the context of proposed criminal implications of failure to comply with the Regulations.

Payment by Direct Debit

At paragraph 9 on page 5 of the Consultation, the Department notes that some businesses offer price reductions to customers who make payments by direct debit. There can be no basis to regard such price rebates as amounting to anything other than a charge for the use of other means of payment. The referenced Commission clarification that such rebates are not a fee *'in respect of the use of a given means of payment'* within the meaning of Article 19 has not

been included in the Consultation document and so the basis for this view is unclear. It is important for stakeholders to have a full understanding of this position, particularly as at least one major European airline currently facilitates payment for flights by direct debit.

Questions set out in the Consultation

Question 1: yes, within the passenger transport sector by European and United States carriers; similar charges also apply in other business sectors such as events held by sporting organisations.

Question 3: no, see above.

Question 4: yes, there is no reason why all sectors should not be subject to such a provision and all forms of transport with the passenger travel sector should be subject to similar rules.

Question 7: we cannot comment on these figures as in large part they do not apply to this company's business model. Further, contrary to the statement in paragraph 58 on page 38 of the Consultation, it is not the case *"that card transactions in the airline sector in particular are predominantly 'card not present' transactions"*, particularly in the case of Aer Lingus which conducts sales not only online, but through travel agencies and ticket offices and desks. On-board/inflight sales transactions are also completed by means of cash or a present payment card.

Question 8: no, see above.

Question 11: it is unclear why the financial services sector is not proposed to be included and see above in relation to our view as to whether sectors excluded from the Directive's scope can be included by national legislation;

Question 13: civil enforcement is the more appropriate remedy, particularly in light of the Department's proposal at paragraph 19, page 9 of the Consultation.

We are available to the Department at any time and would welcome the opportunity to discuss the Consultation further.

Yours sincerely,

**DERMOT KILBANE
AER LINGUS GROUP PLC**