

businesscompanion

trading standards law explained

Section 1. Packages

In this section

As the collapse of Thomas Cook in 2019 illustrated, package holidays are required to have insolvency protection to protect consumers' money.

The law states that a traveller's holiday must be protected if it is a package holiday or linked travel arrangement. ATOL is a UK financial protection scheme that protects flight-inclusive package holidays sold by travel businesses based in the UK. The scheme also applies to some flight bookings, usually those where consumers book flights (including UK domestic flights) but do not receive tickets immediately.

ATOL was introduced in 1973, as the popularity of overseas holidays grew. After a number of high-profile travel business failures left people stranded overseas, the UK Government realised consumers required protection when their travel providers fell into difficulties. ATOL currently protects around 20 million holidaymakers and travellers each year. Should an organiser, agent or airline go out of business then the following information may apply to you depending on your business model relationship:

1. Flight-based ATOL package holidays

If travellers have booked an ATOL-protected package and the provider subsequently ceased to trade, then the traveller should receive a refund if they haven't travelled and be repatriated if they are on the package holiday. For more information the traveller should be referred to the Civil Aviation Authority website: wwwcaa.co.uk

2. ATOL-protected flight only

If travellers have booked an ATOL protected flight with an airline that ceases to operate then the traveller should also visit the CAA website for details of refunds and repatriation: wwwcaa.co.uk

3. High street / retail sales

Where you are the contracted organiser / principal for bookings taken by a travel agent that goes out of business, it is your responsibility to continue to provide the holiday you booked.

4. Non-flight packages and LTAs

Where you have booked non-flight packages with an organiser / principal that ceases to operate then

these sales should be protected. Travellers will need to submit a claim for a refund to whoever provided the protection (which must be by a bond, insurance or trust account). If the traveller is already on holiday, in most cases, the package holiday should continue as normal (LTAs are covered later in the guidance).

5. Single element sales (such as flight-only or accommodation-only)

Where single element sales have been booked, such as accommodation-only with an organiser / principal/travel agent or online travel agent that ceases to operate, then these sales are unlikely to be protected.

Flight-inclusive package holidays and ATOL protection

If a travel business with an ATOL ceases trading, the ATOL scheme protects consumers who had booked flight-inclusive holidays with the company. It will support consumers currently abroad and provide financial reimbursement for the cost of replacing parts of an ATOL protected package.

The scheme is designed to reassure consumers that their money is safe and will provide assistance in the event of a travel business failure. For more information, visit: www.caa.co.uk/atol-protection

There are three insolvency protection options which the 2018 PTRs permit organisers to use for non-flight package holidays and LTAs:

Bonding:

To use the bonding option a trader must be a member of an approved body (approved by the Department for Business, Energy and Industrial Strategy), which oversees the bonding process to ensure that the bond is at an adequate level to meet insolvency requirements.

The bonds must not exceed a period of 18 months and must be a sum that covers whichever is the smaller of the following:

- the maximum amount of payments the organiser expects to hold at one time for travel packages still to be performed
- not less than 25% of all payments the organiser expects for travel packages in the 12-month period from the start of the bond

Alternatively, if the approved body has a reserve fund or insurance to cover any shortfall in bond cover the sum must cover whichever is the smaller of the following:

- no less than 10% of such payments
- the maximum amount of payments the organiser expects to hold at one time for travel packages still to be performed

In the case of packages which might involve repatriation costs, the bond must also incorporate such additional sum as the organiser may reasonably be expected to cover and, if necessary, accommodation for the traveller prior to repatriation.

Approved bodies are: ABTA - The Travel Association; and the Association of Bonded Travel Organisers Trust with Bonded Coach Holidays BCH/ABTOT.

Insurance: The organiser can take out one or more insurance policies which recognise travellers as the

insured persons and therefore pay direct to the travellers in the event of insolvency. Organisers should ensure that any insurance policy that they secure is not voided due to negligence or a breach of condition on their part. For instance, we are aware that ABTA - The Travel Association makes it a condition for any underwriters on their approved list not to reject any claim made by consumers or withhold payment under the policy to any consumers (who can prove a loss) due to any breach of the terms, conditions or covenants of the policy by the relevant package organiser or facilitator of an LTA. We consider this to be good practice.

Case study: First 2018 PTR Prosecution

On 3 December 2021, Anthony Taylor (57) of TT Tours, a Wolverhampton Coach Operator, who tricked hundreds of pensioners out of their holidays and pocketed their money, was jailed for four years at Wolverhampton Crown Court - the first such prosecution under the Package Travel and Linked Travel Arrangements Regulations 2018. Taylor took £65,000 from elderly customers to fund a lavish lifestyle including trips to five-star hotels in London, gambling, restaurants and payments to a girlfriend. He pleaded guilty to fraudulent trading and breaches of the 2018 PTRs and the Consumer Protection from Unfair Trading Regulations 2008.

Taylor, who operated from a stall at Bilston Indoor Market, had targeted senior citizens' clubs to promote a five-day coach holiday to Torquay which included travel, hotel, five-course evening meal, free evening bar and excursions for £99. The hotels in Torquay which had allegedly been booked by Taylor had never received such bookings and had never heard of him or TT Tours.

300 customers had booked on to the trip that was due to depart on 17 February 2020 and the unwitting victims only discovered they had been duped when they turned up with their suitcases and no coaches ever arrived to collect them.

TT Tours had never filed any accounts and had no business bank account. All of the customers' money, paid mainly via cash, cheque or transfer, went straight into Taylor's personal bank account.

"The trustee can pass the money to the organiser only when they provide evidence that the contract has been fulfilled"

Mrs D, a pensioner, booked a trip to London, travelled on a coach with 39 others, saw a show and stayed at a hotel overnight and the package cost £279. The following morning she was having a shower when the glass shattered. The hotel didn't contact the operator and called an ambulance, but she wasn't taken to hospital. She was very shaken but returned home on the coach. She was offered £250 by the hotel. She could have a case for personal injury damages and may have had a case against the hotel for negligence as they owed Mrs D a duty of care; when a person is injured by the negligence of another, the injured party is legally entitled to damages. The types of damages recoverable in a personal injury case are intended to place the injured party into a position they would have been in had the injury never occurred. So, the 'injured' person can claim for their pain and suffering. If there is any suggestion of personal injury then the operator should refer the matter to their tour operator liability insurers. Under regulation 15(2) of the 2018 PTRs the operator has an obligation to provide assistance to deal with the claim.

It is not advisable for the operator to make any offer and the injured party should be referred to the operator's insurers.

The injured party has three years to make a claim and if the claim is not reported then your companies insurance premium would take a hit.

Trust account: This option requires all money paid by the traveller to be held by an independent trustee

until the contract has been performed. The independent trustee can pass the money to the organiser only when they provide evidence that the contract has been fulfilled or if evidence is provided that the organiser has repaid a portion of the money to the traveller or the money has been forfeited on cancellation by the traveller.

The costs of administering the trust account must be paid for by the organiser. If the organiser is providing a package that includes the carriage of passengers then they must have insurance in place to cover repatriation and, if necessary, accommodation for the traveller prior to repatriation.

For more detailed information on trust accounts please visit:

www.businesscompanion.info/en/quick-guides/services/package-travel-and-holidays#Moniesintrust

Organisers not established in the UK that sell or offer package holidays for sale in the UK must comply with the UK insolvency protection requirements as stated above. In addition, UK established travel agents (retailers) that sell package holidays combined by organisers outside of the UK and EU (Third Country Traders) are required to take responsibility for the performance of the package and provide insolvency cover, unless they can show the trader already complies with these parts of the 2018 PTRs.

The guidance document so far has covered the requirement in the 2018 PTRs which states that package holidays must be protected. The requirements are for flight-inclusive package holidays and non-flight package holidays or LTAs. There are, however, three situations stated in the Regulations which do not require any protection from business. These are:

- 1.** Package holidays and LTAs that last less than 24 hours unless overnight accommodation was included.
- 2.** Package holidays and LTAs which are organised occasionally and on a not-for-profit basis and for a limited group of travellers, such as a one-off trip arranged by a church for its members. The BEIS guidance helpfully adds: "occasionally means no more than a few times a year". This would apply to the not-for-profit organisation itself and not to an organiser serving that group or market on a commercial basis.
- 3.** Business travel packages and LTAs will be exempted, unless they are purchased from 'consumer-based' providers (for example, high street travel agencies).

Trading standards services have recently been advising business on the various forms of advertising their package holidays.

In one advertisement for a package holiday a trader stated that "verbal communication falls outside the scope of the 2018 PTRs". This was incorrect. Verbal communication can be misleading and could be a breach of the Consumer Protection from Unfair Trading Regulations 2008.

The law states that if the description could mislead an "average consumer" then action could be taken.

The trader also claimed that "social media descriptions fall outside the 2018 PTRs". Again, this is incorrect and certain package holiday claims are being investigated.

A very recent issue has been the sale by high street and online travel agents of a 'super package' (or 'package plus') and whether the agent would have to provide protection. A super package is where a travel agent sells a package holiday as a retail agent but at the same time sells an additional travel service.

For example, a traveller may well ask for airport accommodation to be booked alongside the package holiday, perhaps because of an early flight. Similarly, the traveller might ask for transport to be arranged

from their home to the point of departure of a package (cruise).

Our view is that the travel agent will sell the package and the additional travel service as a retail agent and the organiser of the package will be a third-party tour operator and the principal of the additional travel service will be the airline or hotelier. However, we don't consider these transactions give rise to a new package, for which the retail agent is the organiser.

If the travel agent was to be the organiser of this super package, then the consequences for the travel agent will become unrealistic and add to the confusion for travellers. The travel agent will need to provide insolvency protection for the entire super package, which will mean applying for an ATOL if the super package includes a flight.

More importantly from our point of view, the travel agent will also become liable for the proper performance of all travel services included, even though the travel agent is unlikely to be in any position to exert legal or commercial pressure on a supplier to rectify a problem. The reality is that it would be far better for the tour operator of the original package to be responsible for fixing problems with their part of the booking and the traveller will not be even more confused.

There are clearly four travel services defined in the 2018 PTRs and 'package' is not stated as a travel service.

In addition, the 2018 PTRs contain extensive pre-booking information requirements on both the organiser and the retailer. The traveller should therefore be in no doubt as to what the package does and does not contain.

Our advice is that agents will need to demonstrate that the traveller was informed about which components were included in the package, which were not, and the status of the various parties in the sale (for example, the identity of the tour operator, the single component supplier and the status of the agent).

The 2018 PTRs contain a "legal right of redress" for package holiday organisers under regulation 29, which allows them to bring a claim against a third party who has done something that triggers a liability for the organiser to the traveller. For example, cancelled flights that lead to a refund of a flight-inclusive package.

"The 2018 PTRs contain a 'legal right of redress' for package holiday organisers"

One online travel agent fraudulently obtained more than £42,000 from a group of UK holidaymakers who paid for flights via their website. However, the airline received no booking request. The agent admitted fraud and received a jail sentence. They were also ordered to refund the consumers.

Case study: Social media

This case study concerns the growing trend of package holidays being sold on major social network sites by 'homeworkers' who do not always understand the significance of the sales of package holidays.

One travel post by a seller we'll call 'X' on a social networking site ends, "Flights sold separately but showing from £37".

Is the offer for the seller to make the booking or for the traveller? It really isn't clear, and it should be clearer at the beginning that the flight is extra. If X makes the booking, was it at the same time as

the hotel booking? If so, then an LTA (separate selection and payment) or package (if paid as a total fee) would be created.

The post could be misleading and we would have to consider whether the average consumer would be misled (thinking it an LTA or package), potentially leading to a CPRs offence.

Another major issue is giving an approximate price of flights as they would be subject to change and this could be construed as misleading if the price increased. Travel agents should have a system to check that the information is as up to date as possible, which would be their due diligence defence.

Previously brochure and website prices could be set where there were charter flights as flight prices rarely changed. Now, package holiday prices are based on scheduled flights and hotel rooms, and prices may well change right up to the point of departure.

Hotel and flight prices may also change depending on the popularity of the hotel or flight. Where prices are described as a "From" price, it is very difficult to gauge the actual cost until much closer to departure. For this reason our advice would be not to quote a set price unless you are able to show you have a "significant number" at this price.

Organisers / principals and travel agents

The 2018 PTRs explicitly place liability for the performance of the travel services included in the package on the organiser/principal, irrespective of whether the travel services are performed by third parties.

In some cases, the person with whom the consumer immediately deals in purchasing a package will be the organiser/principal. In other cases, the consumer will be dealing with a retailer (travel agent) selling on behalf of an organiser / principal. When considering whether a trader is an organiser/principal, it should make no difference whether that trader is acting on the supply side or presents themselves as a travel agent acting for the consumer. Any trader who ultimately combines a package will be the organiser/principal for the purposes of the 2018 PTRs.

A principal/organiser must always provide accurate information to consumers. Organisers / principals could offer package holidays, LTAs, accommodation-only or flight-only facilities to the consumer. Consumers need accurate information to make an informed choice. It is important with package holidays and travel services to understand what the responsibilities of the organiser / principal and agent are in any transaction with the consumer. In general terms, the organiser/principal is the party that is contractually bound to the consumer to provide the travel services. A business will be the organiser / principal if it places itself in contract with the consumer either directly or through someone it has appointed or allowed to act as its agent.

Where an agent has been appointed, it can contract on behalf of that organiser/principal and their acts are treated as those of the organiser/principal. It is vitally important for businesses to understand that where monies are paid to an agent on behalf of the organiser/principal, the monies are deemed to have been received by the organiser / principal.

"Any trader who ultimately combines a package will be the organiser / principal for the purposes of the 2018 PTRs"

Case study: Online holiday marketplace

The second case study concerns a well-known accommodation-only provider.

There is currently an investigation by one of our authorities regarding the issue that a prominent accommodation marketplace seems to be selling package holidays and not providing the level of financial protection needed. Normally there is no problem with obtaining a holiday property, but there are links suggesting that they are growing into package territory.

Typically, although not definitively, an organiser / principal will issue its own documentation to the consumer, have terms and conditions (which may include cancellation terms and provisions), set the price of the supply and be responsible for the actual supply of the services.

The 2018 PTRs have added new definitions for principal / organiser, for example where a consumer purchases a flight on the airline's website (from the airline - the organiser / principal) and a link on the flight website takes the consumer to an accommodation website where a booking is made within a 24-hour period. This 'linked website transaction' (not linked travel arrangement) occurs when the payment details, name and email address of the consumer are passed from the initial principal / organiser to another trader in a targeted manner and would now be termed a package.

When considering whether a trader is an organiser/principal, it should make no difference whether that trader is acting on the supply side or presents themselves as an agent acting for the traveller. Any trader that ultimately combines a package will be the organiser / principal for the purposes of the 2018 PTRs.

Consumers need to inform the organiser/principal without undue delay, considering the circumstances of the case, of any lack of conformity they perceive during the performance of a travel service included in the package travel contract. Failure to do so may be considered when determining the appropriate price reduction or compensation for damages where such notice would have avoided or reduced the damage.

Consumers will not be entitled to compensation for damages if the organiser / principal can prove that lack of conformity is one of the following:

- attributable to the consumer
- attributable to unforeseeable or unavoidable actions of a third party not connected to any of the travel included in the package
- due to unavoidable and extraordinary circumstances

If a consumer is in difficulty during the package holiday, the organiser/principal is obliged to give appropriate assistance without delay. Such assistance should consist mainly of providing, where appropriate, information on aspects such as health services, local authorities and consular assistance, as well as practical help, for instance about distance communications and finding alternative travel arrangements. They can charge a reasonable fee for such assistance if the difficulty is caused intentionally by the consumer or through the consumer's negligence. That fee must not in any event exceed the actual costs incurred by the organiser / principal.

The pandemic did highlight some problems with action being taken under the Consumer Rights Act, such as this example of a couple who had booked their honeymoon prior to COVID-19.

They were forced to cancel their wedding owing to the pandemic and the owner of the accommodation was asked to provide a refund of the £1,190 they had paid. The owner refused, pointing out the clause which stated: "All deposit payments are non-refundable." Noticing the cottage had been re-let, they repeated their request citing that the owner had not lost out on income, but it was refused again.

The trading standards service received their complaint and it was found that the statement regarding deposit being non-refundable was a breach of the Consumer Rights Act. Court action was taken, with a positive result for the couple who got their refund.

"The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable an informed transactional decision"

Case study: Building works

The next case study concerns the issue of building works in a resort and when to notify the consumer.

CTSI has recently been in contact with the Advertising Standards Authority (ASA) regarding its Code of Advertising Practice, which is based upon the Consumer Protection from Unfair Trading Regulations (which is enforced by trading standards services).

CTSI spoke to its executive about just what the ASA means when it states that: "When advertising hotels abroad the organiser/principal should always put on the website (if this is how the package is sold) that there may be building works at the hotel." The Code of Advertising Practice is quoted. The three important points CTSI made were:

- 1.** Information on building work, if relevant to the traveller, can be provided during the booking process. The ABTA Code states that this should be provided before the holiday is booked. Trading standards will always refer to the 2018 PTRs, which clearly want information about building works just before the booking is made, when more information would be available to make a much more reliable decision.
- 2.** This view, that not everything has to be provided at the start of the booking process, is backed up by the case of *Purely Creative and Others vs The Office of Fair Trading* [2011]. The judge stated: "The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision".

Some information will be relevant, or helpful, but it isn't needed to make that initial decision to select the holiday. It will be much more important to the consumer whether the price is affordable, or the dates match with when they want to go.

- 3.** We then said the issue about building work is what you can say on the front page that will help the traveller. "There is building work at this hotel" would not be specific enough or of benefit to the traveller. They will need to know the impact of the work, which could range from visual untidiness through to noisy disruption of a holiday.

Also, building work changes all the time, so it would be impossible to accurately describe it. In addition, it affects travellers in different ways. They might be put in a room away from it. They might spend very little time at the hotel, and not be bothered at all. Also, they might book for a future date when the work will have stopped.

Trading standards and ABTA consider it misleading to put a general statement on building work at the start. That is why it works so much better coming up later in the process through errata, if it affects the client's dates of travel.

- 1.** When a package is sold through a travel agent/retailer, the organiser and the agent/retailer must ensure that the required information, both before and after a package is sold, is provided to the traveller.
- 2.** To avoid duplication, they may decide between themselves who will provide this information but must ensure that it is provided.
- 3.** Where a package is not sold through a retailer it is the organiser's responsibility to provide the information.

During COVID-19, the Foreign and Commonwealth and Development Office (FCDO) advice was to cancel all non-essential travel to a destination. It was assumed that a refund would be made to a traveller's package as stated in regulation 12(7) of the 2018 PTRs, but it was not clear if FCDO advice banning non-essential travel to destinations would guarantee a refund under that regulation. The Civil Aviation Authority stated that the FCDO advice not to travel to some destinations was not mandatory and it would be up to the airline how to deal with consumers booked to travel on future flights. However, a recent judgment in London civil court found that FCDO advice against all but essential travel entitles a package customer to a full refund. The judgment was against Loveholidays in September 2021. A traveller spent £2,065 on a holiday to Croatia and more than a year trying to obtain a refund from Loveholidays. He cancelled the holiday after FCDO advice.

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