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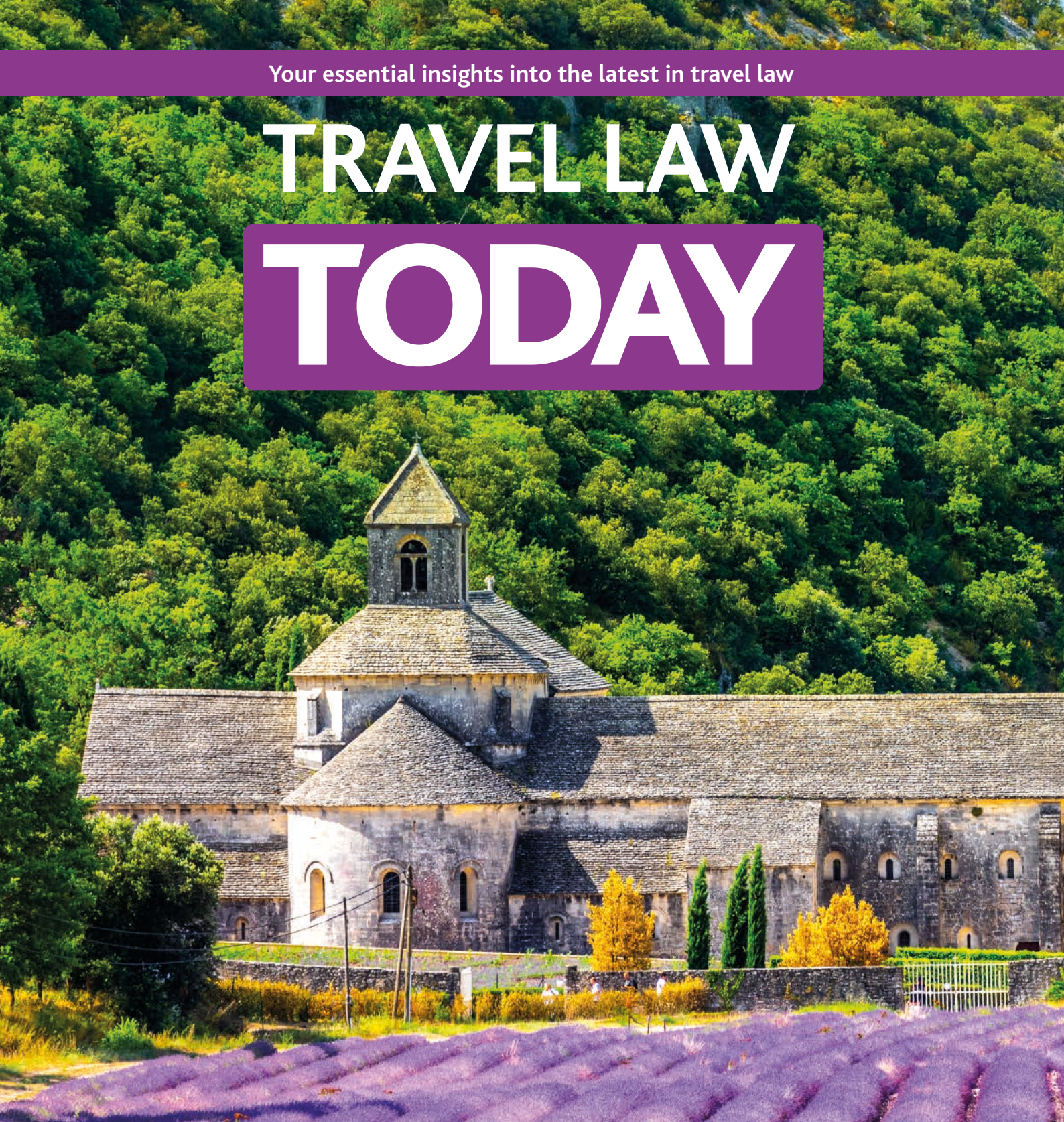
TRAVEL LAW TODAY



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ABTA
The Travel Association

Welcome

Simon Bunce, Director of Legal Affairs, ABTA

Simon's team is responsible for the provision of legal and regulatory guidance to Members; the advice and alternative dispute resolution services to customers of ABTA Members; and for the operation of ABTA's Code of Conduct.

In this edition of Travel Law Today, ABTA Partners address the big issues facing travel companies right now.

At long last we are seeing the world open up and people again able to travel for holidays and for business. This is the time then when travel companies must ensure that they take action to get their businesses fit for the future and whatever new challenges will present themselves.

At the same time, we are seeing the UK government and the regulators take stock of the rules that protect travel customers and push for more powers over those businesses.

It is clear that changes to regulations will come and I am very grateful to the ABTA Partners that support our Members by providing clear guidance, through these pages and through ABTA's programme of Seminars and Events, to give ABTA Members the best possible chance to thrive in an ever-changing business environment.

Simon Bunce
Director of Legal Affairs, ABTA

Contents

Managing your package organiser risk

Rhys Griffiths, Fox Williams LLP – Partner and Head of Travel
Rhys advises clients on compliance with the laws and regulations which apply to the sale of travel services in Europe. As a sector specialist, Rhys brings with him a great deal of industry insight and knowledge which helps ensure that his advice is always commercial, practical and pragmatic. Rhys typically undertakes this work for online booking platforms, travel agents and tour operators.

There are significant commercial advantages in operating as a package organiser; it's an attractive business model for travel companies looking to expand and increase their margins. However, with enhanced rewards come significant additional risks. Here are five top tips for how package organisers can best manage these risks.

Understand your obligations

The legal obligations of package organisers are set out in the Package Travel and Linked Travel Arrangements Regulations 2018 (PTR). The PTR are not particularly user-friendly but there is plenty of helpful guidance available, such as the summary published by the Department for Business, Energy & Industrial Strategy and here in Travel Law Today.

It might seem obvious, but it is critical that package organisers have a good understanding of their obligations under the PTR. This will help ensure that they are compliant, which lowers the risk of customer claims, regulatory enforcement and adverse publicity. Moreover, it enables package organisers to identify where risks lie, to plan how best to manage these risks and to implement strategies to reduce potential exposures, some of which I cover in this article.

Have a broad-based approach to compliance

Some aspects of the PTR are red lines that should not be crossed. For instance, package organisers must ensure that they have insolvency protection in place for the packages they sell. Non-compliance with this requirement is serious and likely to bring enforcement action by a regulator and personal consequences for the directors in the event of a failure.

Other aspects are open to interpretation. How exactly does the mandatory pre-contract information form have to be provided to the customer? Does a particular set of circumstances constitute "unavoidable and extraordinary circumstances" and thus trigger the customer's full refund rights? Can a package organiser insist that a customer take a substitute hotel?

In these grey areas, it is wise not to simply look for the legal answer and then stick rigidly to that. Rather, a broader assessment should be taken of the risks that might flow from a particular decision, the legal risk being just one. The package organiser may have good legal grounds for adopting a particular course of action, such as to deny a full refund, but that has to be balanced against the commercial and reputational risks associated with the particular situation.

If the financial consequences of agreeing to pay refunds is low, but the commercial and reputational risks of denying a refund are high, this may militate in favour of overriding strict adherence to the PTR.

In short, package organisers need to have a decision-making process that enables them to identify and balance the legal, commercial and reputational risks associated with PTR compliance.

Carefully drafted terms and conditions

The PTR set out the minimum legal rights for customers, which cannot be overridden by the package organiser's terms and conditions. However, these minimum rights can be supplemented and enhanced by the package organisers' terms and conditions. This is often done inadvertently, for instance where package organisers seek to explain in their own words the rights of the customer under the PTR, or where illustrations are used to explain the customer's rights.

Unless the customer terms and conditions are drafted very carefully, the explanations and illustrations given may (and often do) extend the rights of the customer beyond what is set out in the PTR. That is, of course, a choice for the package organiser. However, if package organisers wish to put themselves in the strongest legal position, then they should ensure that their terms and conditions are strictly aligned with the PTR.

Manage the risks of supplier refunds and insolvency

The COVID-19 pandemic led to the widescale cancellation of flights, which in turn meant that package organisers had to cancel and refund holidays within 14 days. For most, this proved impossible in circumstances where the airline refused or delayed the refund to the package organiser, thus bringing significant adverse publicity and regulatory scrutiny from the Competition and Markets Authority.

What saved many package organisers was the fact that they had paid for the flight using a corporate payment card (known as a virtual card). This enabled the package organiser to initiate chargebacks if the airline did not pay the refund voluntarily. In turn, this ensured that refunds were able to flow back down the payment chain to the customer, albeit in some instances the chargeback was contested by the airline and had to be determined in a Visa or Mastercard arbitration.

This exact scenario had previously played out following the failures of Monarch Airlines and Thomas Cook Airlines, where travel companies had to refund the entire booking or substitute a new flight. The fact these airlines were paid using a virtual payment card meant that the travel companies were able to recover the price of the flight through chargebacks even though the airlines were insolvent.

Any travel company would be well advised to take advantage of this important feature of virtual payment cards to manage the risks of suppliers refusing to pay refunds or entering insolvency.

Manage the risks of personal injury claims

Package organisers are liable for the proper performance of the holiday. If customers suffer an injury or illness because of a supplier's negligence, then the customer may bring a damage claim against the package organiser. It is also possible, albeit very rare, for criminal proceedings to be brought against the package organiser for its own negligence.

These risks mean that all package organisers should have insurance in place to cover the costs and expenses that may flow from such risks. In addition, package organisers need to have a safety management system in place to manage the risks of customers suffering an injury or illness as a result of a supplier's negligence. This will help ensure that under-performing suppliers are either removed from sale or are required to address identified risks. It will also help the package organiser to demonstrate that they are taking their safety obligations seriously if they are required to demonstrate the steps they took to ensure the safety of the holiday.

> These risks mean that all package organisers should have insurance in place to cover the costs and expenses that may flow from such risks.

Business travel: Who's responsible when things go wrong?

Alex Padfield, Hextalls Law – Director
Alex has worked with the travel industry for over 20 years on a wide range of legal issues. He specialises in dispute resolution and assists tour operators, travel agents and their insurers in handling all types of litigation and disputes. He also advises on regulatory issues such as ATOL compliance.

Business travel is big business. It is estimated that global business travel will be worth approximately $1.4 trillion by 2024. ABTA's business travel Members range from large travel management companies (TMC) to independent specialists. There are more than 127 ABTA Members whose principal activity is business travel.

Nowadays, companies are increasingly aware of their duty of care to corporate travellers; using a business travel specialist can be vital. But who is responsible if things go wrong?

Business travel is not automatically exempt from the Package Travel and Linked Travel Arrangements Regulations 2018 (PTR). Recital 7 to the Package Travel Directive envisaged that some, though not all, businesses may prefer to benefit from the PTR protections:

(7). …it is not always easy to distinguish between consumers and representatives of small businesses or professionals who book trips related to their business or profession through the same booking channels as consumers. Such travellers often require a similar level of protection. In contrast, there are companies or organisations that make travel arrangements on the basis of a general agreement, often concluded for numerous travel arrangements for a specified period, for instance with a travel agency. The latter type of travel arrangements does not require the level of protection designed for consumers…'

So, if a business wishes to buy a conventional package or LTA it can do so. But for larger businesses or more frequent travellers, a 'general agreement' with a TMC may be better. 'General agreement' is defined in Regulation 3(3) as 'an agreement which is concluded between a trader and another person acting for a trade, business, craft or profession, for the purpose of booking travel arrangements in connection with that trade, business, craft or profession.'

Anything bought under that agreement will fall outside the PTR, so who is responsible if things go wrong?

The starting point will always be the general agreement itself as this should set out the contractual relationship between the travel specialist and customer. It should cover the basis upon which the travel services are offered and the extent of the TMC's responsibility.

TMCs usually act as agents for the suppliers of any travel services. If there's a problem, a business will not have the same rights as a consumer under the PTR and the TMC will not have the extensive PTR obligations. Although a responsible TMC will no doubt do everything it can to help, because it will be acting only as agent, its liability is likely to be limited. For example, if a hotel overbooks and has no room for a business traveller upon arrival, unless the general agreement says so, the TMC will not be obliged to arrange alternative accommodation or pay compensation. The financial burden will be on the business customer rather than the TMC. Similarly, there will be no insolvency protection if a supplier goes bust and the traveller is left stranded abroad. The business is likely to have to bear the burden of finding replacement flights or accommodation.

While trading outside the PTR may mean the business customer bears a greater burden of financial risk, using a TMC can offer peace of mind and convenience, not only when booking but also when making alternative arrangements if things go wrong. Business travel specialists are exactly that: specialists, and so can be highly responsive and able to put alternative arrangements in place if needed.

If the TMC is negligent (for example, it forgets to book accommodation when

arranging a trip) it will have to sort out any mistakes and may have to pay compensation. But these situations will be limited and, hopefully, rare.

For individual travel services that would not normally fall under the PTR, there should be no difference as to who's responsible when things go wrong. They are almost always sold by agents, so the customer must seek redress with the principal, ie the service provider.

The decision to sign up to a general agreement may depend upon a business customer's appetite for a little more risk balanced against the convenience and pricing a specialist can offer. For smaller businesses with limited travel needs a general agreement may not prove attractive but for customers who have regular travel needs the trade-off between losing some financial protection but gaining convenience and expertise will probably be worth it.

What about when a business trip is extended and becomes a holiday? Each case will depend on its facts. For a TMC to argue it should not be caught by the PTR, the holiday would need to fall under the general agreement, but some judges might have a problem accepting that such a holiday is 'in connection with a trade, business, craft or profession', which is what a general agreement should be for. Care should also be taken to ensure that any travel insurance provides protection once the business trip becomes a holiday. Many business travel policies cover directors and their families for holidays but may not cover other employees in similar situations.

What about when a business trip is extended and becomes a holiday? Each case will depend on its facts.

In summary:

- Business travel is not automatically exempt from the PTR.
- For smaller companies with less frequent travel needs, the PTR protections may be attractive.
- For larger companies or more frequent travellers, a general agreement with a specialist could be better.
- ABTA Members offering a general agreement will still have to comply with the ABTA Code of Conduct.
- The general agreement will take travel outside the scope of the PTR and the TMC will usually act as agent.
- Businesses can further protect their risk by purchasing comprehensive travel insurance.

Thomas Cook and COVID-19 spur EU review of the Package Travel Directive

Luke Petherbridge, ABTA – Director of Public Affairs
Luke joined ABTA in 2011, originally working on European issues, and was appointed Director of Public Affairs in 2020. He leads the Public Affairs team's work with Governments and policymakers in Westminster, the Devolved Administrations, and in Europe. Luke works regularly with Members and industry stakeholders on government relations issues, and is also a Board Member of the Tourism Alliance and the Northern Ireland Tourism Alliance.

In November 2020, the European Commission signalled its intention to look again at travel-based consumer protection when outlining next steps on the New Consumer Agenda. This year's Commission Work Programme, published in October 2021, confirms that updated legislative proposals to revise the Package Travel Directive (PTD) are expected by early next year.

The Commission has acknowledged that the revised PTD, adopted in late 2015, significantly extended the level of consumer protection compared with its predecessor (Council Directive 90/314/EEC). However, in the wake of serious disruptions to the travel marketplace over the last few years, the Brussels-based institution has promised to examine '*whether the current regulatory framework for package travel, including as regards insolvency protection, is still fully up to the task of ensuring robust and comprehensive consumer protection at all times, taking into account also developments in the field of passenger rights*'.

The fact the directive is up for revision within just a few years is notable, given the previous one operated for a quarter of a century. The above statement indicates a starting position driven by a desire to improve consumer outcomes, which is perhaps little surprise given the commitment came just over a year on from the failure of Thomas Cook, and still relatively early in the COVID-19 pandemic, against the backdrop of many months during which consumers struggled to obtain refunds for cancelled travel arrangements.

The variety of different approaches taken by EU Member States, as they have sought to balance the competing demands of consumers seeking redress and businesses struggling for survival, makes clear the complexities involved and there are sure to be heated debates to come as policymakers get to work.

One area that will come under scrutiny is the extent and consistency of insolvency protection schemes across the EU. The Thomas Cook failure affected millions of consumers across Europe and unveiled a patchwork of different approaches to protection as well as uncovering some serious shortcomings in existing schemes. For example, the German scheme of insolvency protection applied caps on the financial liability of the insurers backing the scheme, which would have left German consumers out of pocket were it not for the decision of the federal government to step in to bridge this gap.

The COVID-19 crisis also shone a light on the disparities between insolvency protections in the package travel space and those elsewhere across the travel supply chain. The concurrent revision of EU Air Passenger Rights Regulation (261/2004) will provide opportunities for legislators to look again at airline insolvency, as well as wider rights and obligations and how these interact.

The need for consistency and better co-ordination across different areas of consumer law was a theme of the European Court of Auditors Report, which was published on 29 June 2021 and examined air passenger rights during the COVID-19 crisis. The Commission was asked to consider the introduction of: airline insolvency protection for stand-alone tickets; restrictions on pre-payments for air tickets and packages; insolvency protection for vouchers; and the creation of a guarantee fund for reimbursements in relation to cancelled flights and packages in times of crisis.

Meanwhile, throughout the pandemic, consumer groups such as the European consumer organisation BEUC have argued loudly for better enforcement of existing consumer rights, especially regarding refund timelines with the PTD specifying that refunds should be made within 14 days (seven days under the Air Passenger Rights Regulation). Industry figures such as ECTAA, the European trade body of which ABTA is a Member, have pointed out the impossibility of meeting those timelines when the industry is closed globally and industry suppliers delay returning monies that have been paid to secure travel services for consumers.

The European Commission recommendation, issued in May 2020 in response to the growing tensions between the needs of business and consumer rights, sought to reinforce the obligation for refunds but also gave backing to voucher schemes as a means of deferring refunds where the customer explicitly agreed to accept those.

This approach bought time and offered consumers reassurance, but the Commission will now want to bring forward clearer proposals to ensure the legislation is on firmer footing for potential future pandemics.

The fallout of the refunds crisis means that not just the timelines but also connected matters such as the definitions of unavoidable and extraordinary circumstances, as well as the role of national travel advisories, will come under the spotlight as the Commission and then the co-decision makers, the European Parliament and Council, seek to reach a durable solution. Given that global health bodies, including the World Health Organisation, have said they expect the next global pandemic to occur within a matter of decades, doing so will be vitally important.

While responding to the twin crises of the Thomas Cook failure and COVID-19 has doubtlessly acted as the major spur to put the PTD back in the in-tray of policymakers, once the directive is re-opened there are several parts of the legislation that will require attention. There is widespread agreement among both consumer bodies and industry representatives that the area of Linked Travel Arrangements (LTA) requires a rethink and clearer definitions.

The 2015 PTD also sought to create a functioning single market in insolvency protection, with mutual recognition of insolvency schemes and closer cooperation between national consumer bodies, but there remain many barriers that prevent companies from operating effectively across the EU from a single place of establishment. Meanwhile, the effectiveness of consumer information provision and the concept of click-through packages have also come under scrutiny.

Although a review of the Package Travel Directive will not affect UK law directly, the scope for change is broad and UK companies selling holidays to customers in the EU will be affected by new rules. The UK Government will also be watching carefully with the outcome of recent consultation on the UK's retained Air Passenger Rights legislation outstanding, the next phase of ATOL reform due, and tentative steps being taken to review the UK Package Travel Regulations too. Watch this space.

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Managing unavoidable and extraordinary circumstances

Claire Mulligan, Kennedys – Partner
Claire has been advising the travel and tourism industry for over 20 years on all manner of issues and litigation, including the Tunisian terrorist attack inquests, hotel accidents, overseas accidents and injuries whilst on holiday, drownings and catastrophic injuries sustained in pools or from balcony falls, hurricanes, mountaineering and climbing accidents, and sickness outbreaks.

Gareth Thomas, Kennedys – Partner
Gareth trained at an insurance practice and has completed a secondment with a global cruise company. He represents tour operators, cruise liners, charities, insurers and other travel companies in a variety of fast track, multi-track and catastrophic injury claims. Claims usually involve the Package Travel Regulations, Athens and Montreal Conventions, and also cases involving complex jurisdictional issues.

In the wake of COVID-19, what is considered unavoidable and extraordinary circumstances (UEC) has become simultaneously more relevant and less clear. On the one hand, UEC have become more relevant as customers and travel companies alike have sought to rely on them to get out of their package holiday contract without consequence, but on the other, what counts as unavoidable and extraordinary is harder to determine in these unprecedented times.

When are unavoidable and extraordinary circumstances?

Regulation 2 of the Package Travel and Linked Travel Arrangements Regulations 2018 (PTR), define UEC as: 'a situation which is beyond the control of the party seeking to rely on it for the purposes of the regulation... the consequences of which could not have been avoided even if all reasonable measures had been taken.'

When the European Commission was drafting the Package Travel Directive, it considered that official advice, from bodies such as the FCDO in the UK, should not automatically trigger customers' free cancellation rights. Instead, its advice to Member States was 'different sources of information, including official travel advice, may be relevant when establishing whether there were unavoidable and extraordinary circumstances and might be taken into account by judges when deciding on such matters'.

In other words, there is no definitive threshold by design. Whether or not there are UEC depends on context and how a situation is subjectively interpreted by multiple sources. This interpretation is endorsed by the most relevant threshold test set out in *Lambert v Travelsphere Limited* [2005]. Here, relating to the SARS pandemic, the judge found that while a travel company cannot shut its eyes to obvious danger, it can confirm that the holiday can go ahead as intended until there is not a 'flicker of hope' that the holiday can be performed.

Customers should be made aware that they cannot expect travel warnings issued by the FCDO to equate to free cancellation rights. Arguably, the UK Government's quasi-legal framing of all their advice at present has not been helpful in assisting customers in understanding their rights. Consider this statement from the CMA:

'If contracts cannot go ahead because of lockdown laws then, for most consumer contracts, the CMA would expect a consumer to be offered a full refund'.

The phrase 'lockdown laws' is vague, sure to be interpreted widely, and ultimately misleading to customers.

What are customers' rights in these situations?

A second reason why the statement from the CMA is misleading is because it over-simplifies what a customer's rights will be, even if UEC are deemed to have arisen. The situations considered below tease out the complexity of a refund/compensation claim relating to a package travel contract, a complexity that a customer may not have anticipated.

> 'If contracts cannot go ahead because of lockdown laws then, for most consumer contracts, the CMA would expect a consumer to be offered a full refund'.

1. Cancellation prior to holiday
If a package is cancelled due to UEC, a customer may be entitled to a refund of 'any payments made'. However, for this right to arise, it is also necessary that the UEC are in the place of destination, or its vicinity, and that the UEC prevent either (a) carriage to the destination or (b) performance of the package.

In Dennison v Loveholidays, unreported, Lincoln County Court [2021] the customer cancelled her holiday because the Government had imposed a requirement for travellers to quarantine upon their return. The court ruled against the customer, stating that there was no reason why the quarantine rule would affect either carriage to the destination or performance of the package.

This ruling indicates that it is important for the UEC to have a clear impact on the performance of the package holiday for refund rights to arise.

2. Cancellation due to changes to the package
If a package is changed due to UEC and the customer decides to cancel the package, they may be entitled to the same refund rights set out above. However, the change to the package must be considered significant.

In Kirk v We Love Holidays, unreported, Wrexham County Court [2022] the hotel the customers were meant to be staying at was closed due to circumstances relating to COVID-19. The tour operator offered a like-for-like substitute, but the customers decided to cancel their trip. On appeal, the court found that the substitution of the hotel did not constitute a significant change. This interpretation was supported by the fact that the specific point, regarding the permissibility of like-for-like hotel substitution, was dealt with in their contract. Therefore, the customers were not entitled to a refund.

3. Curtailed holidays
Finally, what are a customer's rights if a holiday is cut short due to UEC? In these situations, the customer has not received full benefit from the contract, yet the burden has often already been borne by the suppliers and their expenses are not recoverable.

There are several steps a travel company must take including arranging transport for the customer's return home. However, the customer does not have a right to recover compensation for damages. This is clearly stated in Regulation 16 of the PTR, and is also a basic tenet of contract law: where a contract is frustrated due to unforeseen events, the contract terminates and the parties are released from their obligations. Both points were made in the case of Tanner v TUI [2005], relating to the similarly worded 1992 Regulations. The court found that passengers on a cruise curtailed due to gale force winds were not entitled to a refund as the travel company had already incurred the expense and it was through no fault of theirs that the cruise had been cut short.

How can travel companies help their customers?

Head of the CMA's COVID-19 task force, Will Haytor, has said:

'If complying with government guidance adversely impacts consumers, our message to businesses is that they should treat their customers fairly and responsibly – including trying to find a mutually acceptable solution'.

Travel companies should be flexible and offer reasonable alternatives rather than cancellations where possible. Care should also be taken when reiterating insurance requirements.

More case law from the higher courts considering what this means for the travel industry would be useful. However, as it stands, the message emerging from the county courts is the need for clarity. Package holidays are contracts and, as per Lord Steyn, 'A thread runs through our contract law that effect must be given to the reasonable expectations of honest men'.

Ultimately, travel companies can best manage UEC by being proactive in managing the expectations of their customers.

Regulatory reform in 2022 – new powers for CAA and CMA

Neil Baylis, Mishcon de Reya LLP – Partner, Competition and Regulatory Group
With over 20 years' experience in EU and UK competition law and ranked as a Leading Individual in Travel by Legal 500 2019, Neil's travel clients include global tour operators such as APT, ICE and TTC, airlines such as Transat, destinations such as Mustique, and travel trade associations. He has spoken widely at travel industry events in the UK and overseas.

With the demise of Thomas Cook and Monarch Airlines, followed by the COVID-19 pandemic, the travel industry has received considerable attention in relation to consumer protection.

Between 31 January 2022 and 27 March 2022, the Department for Transport (DfT) ran a consultation entitled *Reforming aviation consumer policy: protecting air passenger rights* in which it proposed reforms to the Civil Aviation Authority (CAA) consumer protection regime.

The consultation addressed four main areas:

Regulatory enforcement powers

One of the major themes emerging from the COVID-19 pandemic was whether the CAA had sufficient powers to enforce airlines' compliance with consumer protection measures such as Regulation 261. Currently, the CAA is required to take a company to court to seek a remedy for non-compliance. This has been seen as inadequate in terms of ensuring prompt compliance, particularly in times of difficulty such as the pandemic when numerous refunds are required.

Both the CAA and the Competition and Markets Authority (CMA) have jurisdiction to enforce consumer protection in the aviation industry under the Enterprise Act 2002. The consultation therefore needs to be assessed in the context of the wider-ranging Department for Business, Energy and Industrial Strategy (BEIS) consultation on *Reforming competition and consumer policy,* which has proposed increased consumer enforcement powers for the CMA.

BEIS announced on 20 April 2022 that the following reforms would be introduced:

- A specific new offence of commissioning, hosting or offering fake reviews
- New prohibitions on unfair subscription contracts
- Powers for the CMA to impose fines of up to 10% of turnover on businesses infringing consumer laws (rather than the CMA having to seek an order in the courts)
- Increased penalties for failure to comply with CMA competition law investigations
- No merger control for deals involving companies with turnover less than £10m

The DfT consultation sought views on a wider range of enforcement powers, specific to aviation, than those currently available across other consumer sectors generally.

Some argue that the DfT consultation provides mixed messages. On one hand, it acknowledges that the vast majority of airline passengers do not experience problems. On the other, this appears to be at odds with the scenario portrayed by the quoted consumer groups. The answer appears to lie within the 'severity of detriment'. In other words, how significant the impact on the passengers themselves is when something goes wrong.

In contrast to other issues addressed in the DfT consultation, such as delayed or cancelled domestic flights or mandatory alternative dispute resolution (ADR), no specific proposals have been made in relation to regulatory enforcement powers. The consultation merely seeks views on the ability of the CAA to determine breaches of law to ensure businesses comply promptly, and to order them to pay compensation or financial penalties. The reform, if carried out, would effectively see a dramatic shift in the burden of proof from the CAA and CMA having to state their case in the courts to one where the recipient of the fine has to prove their innocence in court should they wish to challenge the ruling.

The consultation is vague on the possibility of turnover-based fines, as used by the CMA. The current indication is that CAA powers of this nature are likely to be addressed in the BEIS consultation.

Compensation for delays and cancellations to domestic flights

The consultation includes a proposal to change the basis of compensation for domestic flight delays and cancellations. Rather than a single compensation level for late cancellation or a delay of more than three hours, it will now be based on a sliding scale:

- Delay between 1 and 2 hours: 25% of ticket price
- Delay between 2 and 3 hours: 50% of ticket price
- Delay of more than 3 hours: 100% of ticket price

The logic behind this proposal is that under the current system delays to short-haul flights are undercompensated, whereas delays to longer-haul flights are overcompensated.

Mandatory Alternative Dispute Resolution

Currently, while aviation businesses may join ADR schemes, ADR is not mandatory. The consultation proposes to change this for all aviation businesses operating to, from, or within the UK.

The proposal is that if a passenger accepts the outcome of ADR, the airline is bound by the determination. On the other hand, if the passenger is dissatisfied with the outcome, they are entitled to take their claim to court.

If this process is to become mandatory, it raises the question as to whether airlines should have the right to appeal the determination as well as passengers.

Accessibility

No specific proposal for change has been put forward in relation to accessibility issues. However, the consultation invites views on matters such as (i) increasing limit of liability for damage, and (ii) the practicalities of special declarations of value in relation to passengers travelling with specialist mobility equipment. The consultation also asked for aviation businesses to submit reviews on more general terms about other possible reforms that may improve facilities for passengers with accessibility needs.

There is also a related request for views on:

- Whether, and if so how, individuals with protected characteristics, such as race, sexual orientation or age, would be affected by changes in this area; and
- How these reforms might achieve the objectives of eliminating discrimination and advancing equality.

Next steps

The aviation consumer protection measures address issues ranging from isolated failures such as a flight delay, through to major industry-wide issues such as airline insolvency, Consumer Credit Act rights, and accessibility for those at a disadvantage.

Overall, the consultation appears to propose only two specific changes, with several more open-ended reforms for consideration. Perhaps this stems from a recognition that the system is already complicated and any changes risk causing further fragmentation of the EU and UK aviation sectors as the UK moves away from the Regulation 261 regime.

Further, at a time when the aviation industry is attempting to 'build back better' after the pandemic, this consultation has come in parallel with: (i) the European Commission's review of the Package Travel Directive, (ii) the airline insolvency review and (iii) the BEIS consultation (now completed). This suggests that there are likely to be several interrelated, and potentially competing or contradictory, changes to an industry facing what is already a challenging and complex future.

The DfT is continuing to review the feedback it has received to the consultation. However, there is no indication of when an update report will be published.

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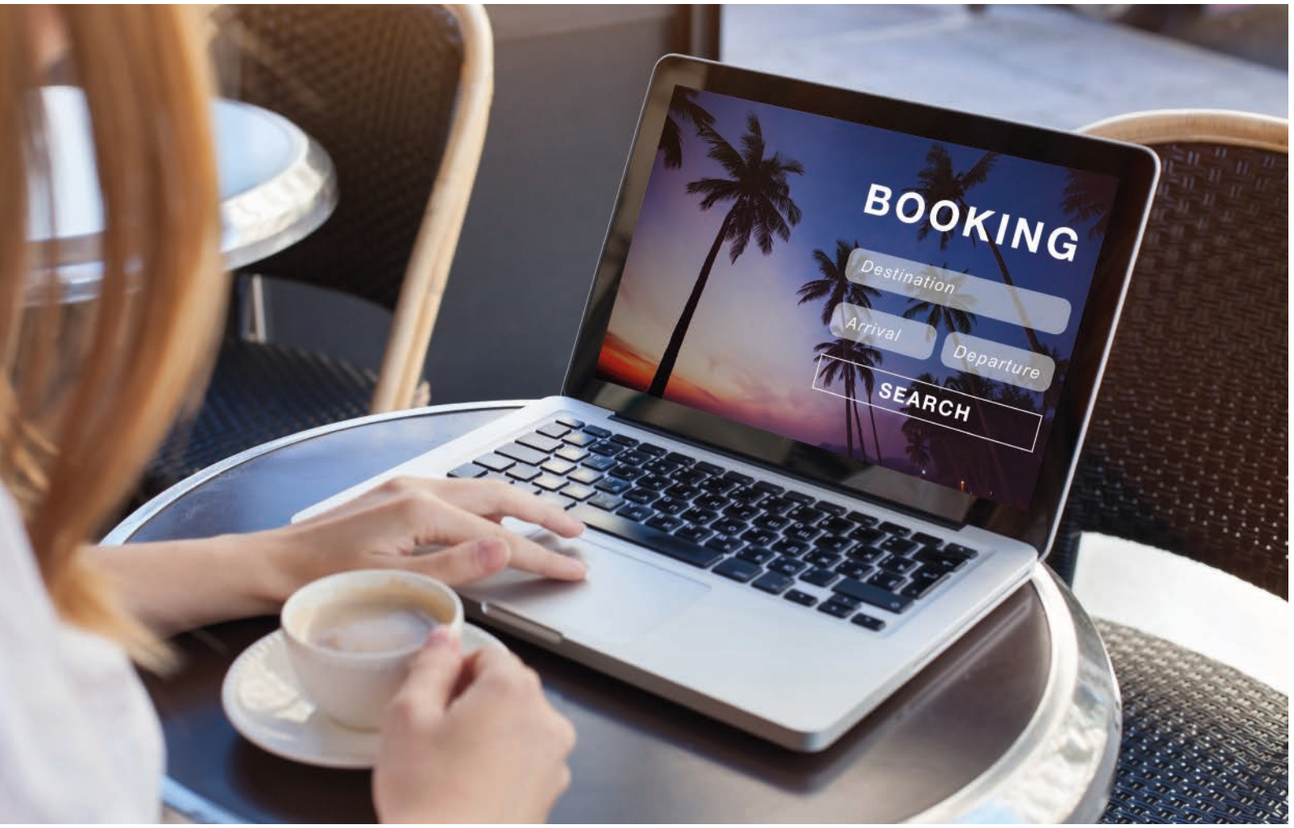


Managing change in an uncertain world

Joanna Kolatsis, Themis Advisory – Director
Joanna Kolatsis is the founding director of Themis Advisory, a business consultancy and strategic advisory firm. Jo has over 20 years of providing legal services to the travel and aviation industries. Her expertise includes aviation and travel law, commercial and regulatory matters including the Package Travel Directive and ATOL compliance, risk/crisis management and criminalisation in air and travel incidents.

No sooner were we looking forward to a relaxation of COVID-19 travel restrictions in the UK than we were faced with the prospect, and reality, of war in Ukraine. It is a reminder that we face continuing uncertainty when it comes to travel.

Customers are more savvy and better informed as a result of events of the last two years, and we must be ready to face further uncertainty. Our starting point when looking at managing change is Part 3 of the Package Travel Regulations 2018 (PTR) and the legislative framework:

Regulation 11(2) provides that changes should not be made before the start of a package (other than for price as per Regulation 10) unless the contract allows the organiser to make such changes and the change is insignificant.

Regulation 11(3) confirms that where significant changes to the package are proposed, or the organiser cannot meet any special requirements agreed with the traveller, or an increase in price of more than 8% is proposed, the organiser must adhere to the requirements in Regulation 11(4) to (11).

This includes setting out the proposed changes and any alternative arrangements offered of similar or higher quality (and price). The traveller has a reasonable period to either accept the changes or terminate the contract without incurring any cancellation fees. If the traveller opts to terminate the contract, a refund should be provided within 14 days of termination. The traveller may also terminate the contract and accept a substitute package and where this results in arrangements of a lower quality or cost, the traveller is entitled to an appropriate price reduction.

A disinclination to travel does not entitle a customer to obtain a full refund if they opt to terminate their arrangements because they have simply changed their mind or feel nervous about travel. Regulation 12 makes it clear that while a traveller may terminate the contract prior to the start of the package, they may be required to pay an appropriate and justifiable termination fee to the organiser.

Regulation 13 provides for termination by the organiser where minimum numbers required for travel are not reached or in the event of unavoidable and extraordinary circumstances. In these scenarios a full refund is due to the traveller but no compensation is payable.

The PTR is fairly clear on the issues regarding changes to packages and we are now well accustomed to dealing with them. But as well as the specific regulatory requirements governing how we treat customers, we need to consider how we work with suppliers to overcome or minimise the costs and disruption when changes are necessary.

Supplier agreements have been under scrutiny since the pandemic, primarily due to suppliers' reluctance to provide refunds when organisers were compelled to refund by law. As a result, supplier terms and conditions are now being strengthened on both sides. Wherever possible, the organiser should outline the supplier's specific obligations as regards refunds and cancellation terms under the PTR to mirror their own responsibilities to customers. There should also be specific indemnities in place to protect against claims by customers if the supplier does not fulfil its obligations. Supplier contracts should have enough flexibility for the organiser to provide efficient solutions for customers in the event of disruption.

In reality, no one wants to resort to expensive legal processes to resolve simple customer issues that could be avoided if the parties entered into a sensible discussion at an early stage. This should underpin all supplier negotiations to ensure that if changes are required either by the customer or the organiser, they should be accommodated with minimal fuss (and cost). Regulators have been calling on the industry to be as flexible as possible with customers; the only way to achieve this is to have suppliers on board where possible. Experience dictates that when customers are given the flexibility they desire, they are more likely to amend their booking or re-book in future – this is surely the best outcome for all.

Customer perception and understanding is another key factor when dealing with changes to package arrangements. Booking terms and conditions must provide clarity as to the customer's options if changes are inevitable. The PTR obligations should be outlined in unambiguous terms and any details as to flexible options should be provided prior to booking. If you provide free changes or extended cancellation terms, make these clear to customers and outline specifically how this benefits them.

The first point of reference for customers when things go wrong are the booking terms and conditions: they should act as your roadmap when dealing with changes or disruption. Your sales and customer support teams should know these terms well so they can guide customers through their options and avoid a laborious change process, which could escalate.

Not every travel plan will go without a hitch and there will be instances where compensation should be offered. Many businesses opt to include a sliding scale of compensation within their booking terms and conditions as a further measure of clarity to customers for ease of reference and commensurate with PTR requirements.

Regulation 16 outlines the obligations where an appropriate price reduction should be offered to travellers for any period where there is a lack of conformity unless this can be attributed to the traveller (Regulation 16(2)). In addition, the organiser should offer appropriate compensation for any damage sustained by the traveller due to the lack of conformity (Regulation 16(3)).

Customer perception and understanding is another key factor when dealing with changes to package arrangements. Booking terms and conditions must provide clarity as to the customer's options if changes are inevitable.

Compensation is not payable if the organiser can prove that any lack of conformity is (a) attributable to the traveller; (b) attributable to a third party unconnected with the travel services and is unforeseeable or unavoidable; or (c) due to unavoidable and extraordinary circumstances (Regulation 16(4)).

The CMA and the pandemic

Stephen Mason, Travlaw LLP – Senior Counsel
Stephen is one of the top two travel industry lawyers in the field of Package Travel and Holiday Law in Britain and is recognized as such in Chambers Directory of the Legal Profession 2022 and for many years previously. He has played a leading role in advising the industry through the COVID-19 Pandemic and all the legal issues arising.

The Competition and Markets Authority (CMA) has played a key role in attempting to regulate the travel industry during the COVID-19 pandemic. Here are some of the steps they have taken and lessons learned.

First, some context:

- The CMA has powers and responsibilities much wider than those discussed here; the points in this article are relevant to the issues under discussion only.
- The CMA took over the responsibilities of the Office of Fair Trading (OFT) in 2014. The OFT no longer exists.
- For our purposes, the powers and responsibilities of the CMA stem from the Enterprise Act 2002 (EA).

The EA gives the CMA power to deal with domestic infringements, which include breaches of any enactment that provides for a criminal penalty as well as breaches of contract (and even torts) that harm the collective interest of consumers (Section 211 EA). It doesn't matter whether any previous criminal or civil proceedings have been taken. The list in Schedule 13 EA of enactments includes the Package Travel and Linked Travel Arrangements Regulations 2018 (PTR), the Consumer Rights Act 2015, and the Consumer Protection from Unfair Trading Regulations 2008.

Enforcement is carried out via Enforcement Orders, which are, in effect, injunctions to stop companies breaching their legal obligations. These can also include orders to pay compensation to consumers, and to take other steps to stop the consumer detriment.

However, before applying for an Enforcement Order, the CMA is required (except in an emergency) to consult with the business concerned with a view to reaching an agreement whereby the business gives 'voluntary' undertakings to comply with its legal obligations (ss 214 and 219 EA). A business that gives and then breaches an undertaking will find that taken into account by a court in subsequent proceedings. It is important for a business not to give an undertaking that is impossible to comply with just to get the CMA off its back.

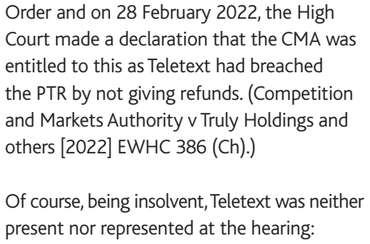
The pandemic

The CMA has taken the following steps regarding the pandemic:

- It sent two letters (10 July 2020 and 13 May 2021) to many travel companies warning them that it was monitoring concerns over:

1. Refunds to consumers, especially those payable within 14 days of cancellation under Regs 11, 12 and 13 of the PTR (cancellation by the organiser, the consumer or following a significant change to a holiday).
2. Misinformation given to consumers about their rights, eg telling customers they must claim on their insurance or must accept a Refund Credit Note etc.
3. Barriers to reclaims, eg requiring calls to a telephone line that is rarely answered.
4. Attempts to argue that FCDO advice against all but essential travel did not trigger refund rights – exceptionally strong grounds were needed by any company seeking to argue that, said the CMA.

- The CMA obtained undertakings from a number of travel companies, many well known and respected, including Virgin Holidays, Tui UK Ltd, Lastminute.com, We Love Holidays. As a generalisation (varying in each case), the undertakings made promises about future conduct over the issues listed above.
- It widened its investigation to include the obtaining of similar undertakings from 'accommodation only' companies such as Sykes Cottages and Vacation Rentals.
- It aborted an investigation into the refund policies of Ryanair and British Airways. It is well known that the single biggest reason for the travel industry struggling to meet its refund obligations was non-receipt of refunds from suppliers, notably some airlines. However, the CMA stated that, unlike the PTR, there was no clear law that required airlines to issue a refund where the flight operated but the consumer could not, for pandemic linked reasons, join the flight.



It was notable that the undertakings (which the CMA is entitled to and does publicise) did not set out the precise circumstances under which refunds were payable. The normal approach was to undertake to make refunds 'where the PTR so require', or words to that effect. That left it open to organisers to argue that refunds were not due in some cases, for example, fraudulent claims, consumers accepting vouchers direct from suppliers, or the famous 'flicker of hope' cases where consumer cancellation has been premature.

The CMA also obtained undertakings from Truly Travel (Teletext Holidays). That company was badly affected by the pandemic and an inability to recover refunds from suppliers. Although it gave undertakings, under pressure from the CMA, it was unable to comply with them. On 29 October 2021 it went bust. Despite the liquidation, the CMA pressed on by applying for an Enforcement Order and on 28 February 2022, the High Court made a declaration that the CMA was entitled to this as Teletext had breached the PTR by not giving refunds. (Competition and Markets Authority v Truly Holdings and others [2022] EWHC 386 (Ch).)

Of course, being insolvent, Teletext was neither present nor represented at the hearing: I have no doubt that the judge tried his best to consider what arguments Teletext might have put forward, but it is not the same as having a skilled advocate arguing persuasively that an Enforcement Order was inappropriate. I hope that this case will not set a firm precedent.

Conclusions

1. The CMA was under pressure from consumer lobbies and pressure groups to do something, although some argue that the CMA has achieved little during the pandemic. It secured undertakings to pay refunds from companies that were always going to pay them. It obtained a court order against a company that was no longer trading and irrefutably unable to pay. It did nothing to clarify the law as to when refunds were payable. It hit hard at the travel industry but did not use the same vigour against a major cause of the problem: airlines. It forced companies to use precious resources to dispute with the CMA, which inevitably involves the cost of lawyers, accountants etc.
2. The problem is not just the above. Once the CMA starts a well publicised action, it can and sometimes does, especially for SMEs, start a spiral in which the CAA, credit card companies, banks etc. start to panic and turn the screws on the same company.
3. The regulator should engage with the industry and its issues in a constructive and helpful way. However, the current legislative proposal being considered (Reforming Competition and Consumer Policy) is to give the CMA more power to enforce, and make it harder for businesses to resist and, on 20 April 2022, the Government confirmed that it planned to legislate to empower the CMA to take enforcement action itself, issuing fines and Orders to businesses relating to their behaviour towards consumers. It will be for the trader to initiate an appeal to a court if it felt that the CMA action was unjustified.

> On 20 April 2022, the Government confirmed that it planned to legislate to empower the CMA to take enforcement action itself.

The Tour Operators Margin Scheme – a time of change

Tom Walsh, Deloitte LLP UK – Partner
Tom leads the Travel Industry team for Tax at Deloitte LLP UK and advises travel businesses on matters including agent versus principal and international supply chains. He has recently provided evidence before a Parliamentary Select Committee on the future of tax on transport in the context of devolution.

Since its withdrawal from the European Union (EU) on 31 December 2020, the UK has implemented changes to the Tour Operators Margin Scheme (TOMS). These changes have taken effect during a time when the ability of non-EU established entities to apply TOMS in some EU Member States has begun to curtail, with further action expected from the European Commission. The impact for UK members using TOMS is that the UK margin scheme may no longer be relied upon to account for all VAT due on the sale of EU products.

What is TOMS?

TOMS was introduced by the EU in 1977 as a way for businesses to simplify VAT accounting on the onward supply of bought-in travel services.

A primary objective of TOMS was to reduce the complexity of VAT accounting for tour operators by allowing onward supply to be taxed in the tour operator's place of establishment, thereby removing the obligation for businesses to register for VAT in every EU destination where packages are supplied. The EU TOMS simplification derives from European VAT law and has been implemented in each EU Member State (including the UK up until 2021) through local legislation.

Under TOMS, a business is required to account for VAT on designated margin scheme supplies in the country it is established, even if the services are provided elsewhere (eg a French-established business selling holidays in Spain would account for VAT in France, rather than Spain). Travel businesses without any presence in the EU have historically applied the same principle, meaning that supplies made under TOMS fall outside the scope of EU VAT when supplied by a non-EU tour operator.

Following the UK's secession from the EU, the concept of TOMS remains under UK VAT law but with changes so that UK tour operators no longer account for UK VAT at a positive rate when selling EU products.

Ongoing review

In recent years, the application of TOMS across the EU has been considered by the European Commission and debated at various VAT working groups but without any legislative changes to its operation.

In February 2020, the European Commission launched a formal evaluation of how TOMS is applied across the EU. The findings were published a year later and highlighted a number of key issues for the Commission, including that 'the current application of the TOMS does not ensure a level playing field for all travel agents operating within the EU market, including those not established within the EU'.[1]

While the EU Commission has separately identified the taxation of non-EU established tour operators as an issue, some individual EU Member States have proactively announced or implemented changes to their local application of TOMS ahead of any potential changes to EU VAT law.

Croatia and Germany have already taken steps to restrict non-EU established businesses from applying TOMS

Against the backdrop of ongoing activity at European Commission level, both Croatia and Germany have taken unilateral action to change the way in which TOMS can apply to non-EU established tour operators.

In January 2021, the German Ministry of Finance announced that it would be changing its interpretation of existing TOMS legislation such that non-EU established businesses can no longer rely upon TOMS for supplies made in Germany. Although announced in January 2021, the implementation has been delayed and is now scheduled to take effect from 1 January 2023.

Also in January 2021, Croatia changed its approach to the taxation of non-EU established businesses. Unlike Germany, however, the change in Croatia was effected quickly and provides insight into how the removal of access to the TOMS rules in the EU could impact non-EU established businesses.

Since January 2021, UK travel businesses have been required to register and account for VAT in Croatia in respect of supplies made in Croatia (ie account for Croatian output tax and recover local input tax on individual supplies made or received via a local VAT registration, rather than applying a margin scheme calculation).

If the ability to rely on TOMS is removed across the EU, UK tour operators would be required to undertake the same process in every EU Member State where bought-in travel products are sold in the tour operator's own name.

In addition to the changes in Croatia and Germany, there have been two recent cases in the Spanish court system that have ruled in favour of TOMS not being applicable for non-EU established businesses.

After a number of years of discussion and debate, it is clear that changes to the application of TOMS are afoot and Member States are exploring (and implementing) options to address the perceived unlevel playing field between EU and non-EU operators, while awaiting any broader legislative changes that will invariably take time when routed through the EU Institutions.

What next?

The European Commission is due to undertake a study on the future of TOMS later in the year and is expected to propose changes to the European VAT Directive in 2023, which could set out changes to the scope and mechanisms of TOMS.

> Although any EU legislative changes will take time to implement, recent developments in Croatia and Germany point to a problematic trend for ABTA Members

Although any EU legislative changes will take time to implement, recent developments in Croatia and Germany point to a problematic trend for ABTA Members. Should more EU Member States take unilateral action to impose local VAT on supplies made by UK-established operators it would serve to increase the cost and uncertainty of selling EU travel products. Our view is that there is a greater need than ever for UK travel businesses to keep abreast of EU VAT law developments and the local tax rules applicable in destination territories.

1. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11883-VAT-scheme-for-travel-agents-evaluation-_en

The new Information Commissioner – what this means for UK data

Mark Smith, Purdy Smith - Founder and CEO
Purdy Smith is a boutique commercial law practice based in London. Mark's specialisms include advertising, consumer, data privacy and travel law. Mark has enjoyed advising a variety of travel businesses throughout his career from smaller companies to leading international brands.

On 4 January 2022, John Edwards took up post as head of the UK's Information Commissioner's Office (ICO), the UK's independent regulator for data protection and information rights law. Taking over from his well-regarded predecessor, Elizabeth Denham, he has started a five-year term leading the organisation.

Edwards hails from New Zealand and has a background as a solicitor and barrister, including time as a policy adviser to the New Zealand government on freedom of information issues, as well as eight years as New Zealand Privacy Commissioner, during which time he chaired the International Conference on Data Protection and Privacy Commissioners. His perspective is, "Privacy is a right, not a privilege" and he has stated, "In a world where our personal data can drive everything from the healthcare we receive to the job opportunities we see, we all deserve to have our data treated with respect."

Edwards oversaw a major overhaul of New Zealand's data privacy laws with the introduction of the Privacy Act 2020. However, that legislation only gave him the power to levy NZ$10k penalties when he had been pushing for penalties of up to NZ$1m. The UK's Information Commissioner can, by contrast, issue fines of up to £17.5m or four percent of global turnover, whichever is the higher. Whilst it may have taken a change of jurisdiction, it appears Edwards now has access to the significant fining powers he was hoping for.

Edwards has spent the majority of his first 100 days in office on a listening tour, engaging with organisations, businesses and individuals throughout the UK about their interactions and experiences with the ICO. He gave his first major public speech as the UK Information Commissioner at the IAPP Data Protection Intensive in London on 23 March 2022, in which he spoke about his perspective on data protection issues.

He stated that he had been "buoyed by the positive feedback" regarding trust in the ICO and appreciation for its willingness to engage, and for the expertise of its staff. He wants to see an ICO that is quick to act, agile, curious and capable of bringing "certainty to an uncertain world."

New reforms and data adequacy

Edwards is jumping in at the deep end of information rights in the UK, as the ICO will be active in engaging with the UK Government on proposed reforms to the Data Protection Act 2018 now that Brexit has taken place and the UK is no longer strictly tied to the EU's current data protection regime (GDPR) even if it is currently mirroring it. Amongst many other issues, he will also be dealing with criticism resulting from the introduction of the ICO's Age Appropriate Design Code, a statutory code of practice setting out standards for products and services accessible to minors, developed by his predecessor.

> Edwards has spent the majority of his first 100 days in office on a listening tour, engaging with organisations, businesses and individuals throughout the UK about their interactions and experiences with the ICO

The UK Government ran a consultation last autumn titled "Data: A new direction" that discussed various proposals for reform. These included introducing a cost limit for data subject access requests, a modified approach to accountability obligations to allow greater flexibility, raising the threshold for data breach reporting to the ICO, and reforms to the requirements for international data transfers.

In addition, the consultation paper considered reforms to e-privacy law including a partial relaxation of the rules around cookie consents, such as the introduction of an exception for analytics cookies, which would no doubt be welcomed by many. However, the proposed introduction of increased fines for breaches of the Privacy and Electronic Communications Regulations 2003, which set out the rules on cookies and marketing via e-mail, telephone and SMS, amongst other requirements, would clearly be a source of apprehension for a lot of businesses. This would increase the ICO's fining powers from a maximum of £500k to match the much higher maximum fines available under the GDPR mentioned earlier in this article (£17.5m or four percent of global turnover, whichever is the higher).

Responses are currently being analysed and the outcome of the consultation should be announced later in 2022.

Edwards urges that the proposed reforms not be seen as radical, and has suggested that they will not place any burdens, besides the costs naturally associated with change, on UK businesses. In fact, he frames the reforms as holding a "clear intention to reduce regulatory burdens, in order to create a streamlined law that more effectively protects people's rights". He has said that once Parliament has decided on the appropriate regulation, the ICO will devote itself to ensuring that the transition to any new laws is seamless and as painless as possible.

But UK businesses aren't the only audience Edwards needs to satisfy. In June last year, the EU formally recognised the UK's data protection standards as being adequate enough to permit the flow of personal data from the EU to the UK without further protections being needed. A crucial, though not unexpected, decision, given the UK's current mirroring of the EU's approach via adoption of the "UK GDPR" following Brexit. Concerns have arisen, however, over whether that adequacy decision could be at risk in future in light of the proposed data protection reforms, which would be introduced during Edwards' tenure as Commissioner.

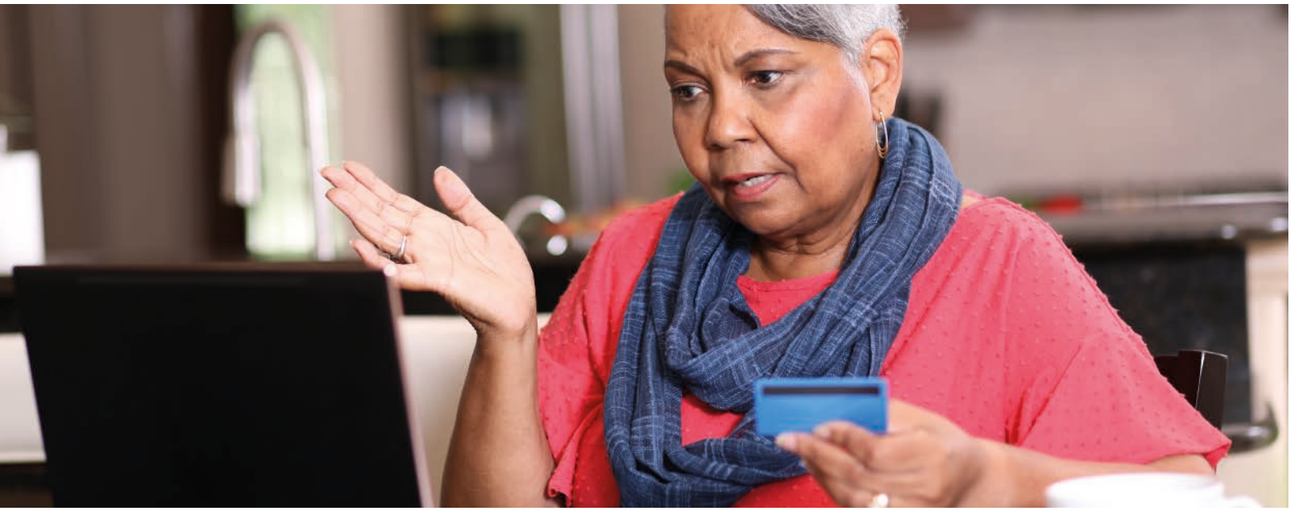
Clearly, Edwards will need to work to balance the UK's potential divergence from the EU GDPR in some respects with ensuring that the UK's data laws are sufficiently robust for EU countries and others around the world to trust a free flow of data across borders. No doubt this will be one of numerous challenges he will face over the next five years at the head of one of the UK's most topical regulators.

LOOK OUT for ABTA's Data Protection and Management in Travel training, taking place in September 2022.

Details will be announced soon.

You might be interested in ABTA's **free Cyber Security Helpline** for ABTA Members run by ABTA Partners DMH Stallard and Grant Thornton.

Visit: www.abta.com/partnerhelplines



Section 75 claims and chargebacks through the pandemic and beyond

Sara-Jane Eaton – Partner, Head of European Group, International Claims and Travel Group, DWF Law LLP
Sara-Jane is an international insurance lawyer with particular interest and expertise in cross-border and travel claims, especially those pursued under the Package Travel Regulations. Sara-Jane is recognised in the travel sections of Chambers and Partners and Legal 500 as having "a good eye for the winning points in a case".

With lockdowns and other COVID-19 restrictions coming to an end across Europe, many UK holidaymakers will be planning their next break. UK travel businesses will breathe a long-awaited sigh of relief after two years of a pandemic that threw many into a severe liquidity crisis.

Even so, it is likely that travel businesses will still face a large number of Section 75 claims and chargebacks from customers who change or cancel their plans, especially now that travellers are more aware of the remedies they can seek. Sara-Jane Eaton and Rishab Reitz, DWF's International Claims Handler outline the key legal points of Section 75 and chargeback claims, and explore steps that ABTA Members can take to protect themselves.

Section 75 claims

Section 75 of the Consumer Credit Act affords protection to consumers using a credit card to buy goods or services that cost over £100 and not more than £30,000. Section 75 holds the credit card company jointly and severally liable for any breach of contract or misrepresentation by the retailer or trader. Customers who want their money back after holiday cancellations frequently use this legal mechanism.

Chargebacks

Chargebacks enable customers to get their money back from participating banks if there is an issue with their purchase. There is no limit on the amount a customer can claim. Chargebacks are mainly used by those paying with a debit card.

Challenges for travel businesses

Customers have used both methods to get their money back if their holiday plans were cancelled or changed due to the pandemic.

Many travel businesses were hit with Section 75 claims or chargebacks even though they offered refunds or were only acting as intermediaries between customers and tour operators and had no contractual liability towards the customer.

Other travel businesses ended up issuing refunds twice as chargebacks or Section 75 claims were successful when a refund had already been issued. In some cases, customers were not even entitled to a refund (eg because they chose to cancel their holiday due to FCDO advice although travel would have been possible) but still made a successful chargeback request or Section 75 claim.

Although travel restrictions have been lifted in many countries, customers will probably continue to make Section 75 claims and chargeback requests where travel plans are changed or cancelled.

Measures travel businesses can take

Travel agents

If you are acting as a travel agent, explain this to your customers (who will often not be aware that their contract is not with you) while assuring them that you are trying to get their money back from the tour operator or airline. If customers are aware of your efforts to recover their money, they are less likely to make a Section 75 claim or chargeback request.

Ensure that your terms and conditions clearly state that you are acting solely as an agent. You can use this as evidence when disputing any Section 75 claim or chargeback request. If an airline or tour operator cancels, you can then redirect any claim to them as the customer's contract is with them.

Check your supplier agreement and ensure that you can seek an indemnity from the supplier if there is a chargeback. You must, however, keep your supplier and tour operator well informed of customer complaints and steps taken to resolve these. Your supplier is much more likely to agree to an indemnity clause if this is the case.

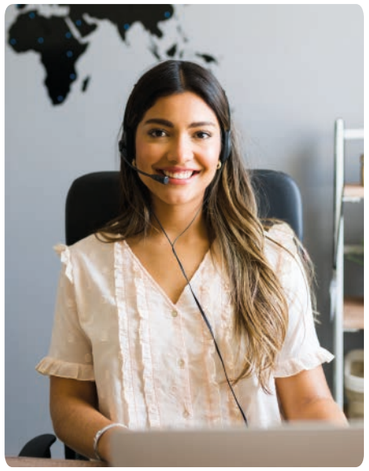
If you still receive a Section 75 claim from a customer, you may be able to make a Section 75 claim yourself against the supplier

if you used a credit card for payment (for example a virtual credit card) and you are a sole trader, small partnership or unincorporated business. Such businesses are covered by the Consumer Credit Act when acting as a consumer. The same should apply to chargeback requests under the relevant scheme rules.

Package holidays

If your customer has booked a package holiday and it is cancelled, tour operators are generally obliged to issue a full refund within 14 days. You should, however, offer the customer alternatives such as a change of date or a voucher as the claim will settle if the customer accepts such an alternative. If customers still want a refund and you refuse to grant it, they will probably succeed if they make a Section 75 or chargeback request.

Do review the reasons for any cancellation. If the package holiday was cancelled by the customer because of Government-imposed travel restrictions, there may not be any breach of contract. A chargeback may also fail as, for example, VISA has issued guidance stating that chargeback requests will not be successful where a customer cancels a booking due to government prohibition or regulation.



If the FCDO has advised against travel (but there are no prohibitions) and the customer chooses to cancel their package holiday on this basis, the customer is unlikely to succeed in making a Section 75 claim or chargeback request unless they have cancelled in line with the provider's terms and conditions and you have still failed to issue a refund.

Where it is the customer's fault that they cannot travel (eg because they contracted COVID-19), Section 75 claims or chargeback requests generally will not succeed (except for accommodation cancellations made in line with the terms and conditions of the accommodation provider).

Multi-seat bookings

If you receive a Section 75 claim for a multi-seat booking (eg for a family) and each individual seat is below £100, no refund is due if individual tickets were purchased. If, however, the Section 75 claim is for a "family ticket" of more than £100 you must issue a refund (provided the other Section 75 requirements are met).

Part-payments

Customers are entitled to make a Section 75 claim even if they have only made a part-payment. Businesses should note that recovery is not limited to the deposit – if the customer paid the rest in cash, you would still be obliged to issue a full refund.

Customers can also make chargeback requests for part-payments. However, recovery is limited to the amount paid by card.

Section 75 claims or chargeback requests on refunded bookings

In some cases, travel businesses issued a refund but customers still succeeded in making a Section 75 claim or a chargeback request. This may arise where customers approach the travel business for a refund but subsequently decide to pursue a Section 75 claim or chargeback request as they do not know if and when a refund will be issued by the travel business.

It is important to keep customers informed as to whether a refund will be made and what the processing times are. You should also ensure that any refunds are processed back to the same card that was used for the booking. This helps avoid Section 75 claims or chargeback requests.

If you still end up making two refunds, be aware that customers are not entitled to double recovery. Most customers will return any overpayment if you explain the problem to them. If the Section 75 claim or chargeback request has not yet been approved, you should dispute it, showing evidence that an agreement has been reached with the customer and that a refund is being issued.

You might be interested in ABTA's **free Chargebacks Helpline** for ABTA Members run by ABTA Partner Travelaw.

Visit: www.abta.com/partnerhelplines

ABTA has been a trusted travel brand for over 70 years. Our purpose is to help our Members to grow their businesses successfully and sustainably, and to help their customers travel with confidence.

The ABTA brand stands for support, protection and expertise. This means consumers have confidence in ABTA and a strong trust in ABTA Members. These qualities are core to us as they ensure that holidaymakers remain confident in the holiday products that they buy from our Members.

We help our Members and their customers navigate through today's changing travel landscape by raising standards in the industry; offering schemes of financial protection; providing an independent complaints resolution service should something go wrong; giving guidance on issues from sustainability to health and safety and by presenting a united voice to government to ensure the industry and the public get a fair deal.

For more details about what we do, visit **abta.com**

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