

ABTA response to the Department for Transport and Civil Aviation Authority consultations on ATOL

March 2018

About ABTA

ABTA – The Travel Association – is the UK’s largest travel trade association representing nearly 1,200 separate businesses.

ABTA Members range from FTSE100/250 companies through to a large number of SMEs and Microbusinesses.

ABTA represents the full range of businesses affected by these proposed changes: travel organisers, selling as principals and as retail agents; travel agents who are likely to be most affected by the concept of Linked Travel Arrangements; including ‘high street’, online travel agents and call centre agents. ABTA also represents all major cruise operators and the major domestic coach and rail travel organisers. 38 of the UK’s top 50 business orientated travel management companies are also ABTA Members.

ABTA is the UK’s leading and largest BEIS ‘Approved Body’ under the 1992 Package Travel Regulations, providing financial protection to consumers.

ABTA has 1,157 separate legal entities in Membership, with a significantly larger number (more than 5,000) of operating brands. Members operate from 4,280 physical locations, with an additional number of associated homeworkers and outside sales representatives.

ABTA therefore uniquely represents the full spectrum of the industry providing organised travel arrangements for consumers and business travel agents.

In relation to financial protection, ABTA represents:

- 659 ATOL holders
- 496 businesses providing financial consumer protection through ABTA as their ‘Approved Body’
- 359 businesses participate in both sets of arrangements

ABTA holds more than 1,240 individual performance Bonds with a total of value of more than £600 million in relation to our Members’ travel activities. A much smaller number of Members utilise financial failure insurance products and the arrangements of the two other BEIS Approved Bodies (CPT BCH and ABTOT) to comply with ABTA’s requirements and / or those under the Regulations.

ABTA also operates an insurance based reserve fund through ABTA Insurance PCC Limited.

Member Consultation

ABTA has consulted widely with its Members since the Consultations were launched on 26 February 2018, in order to inform this submission.

Key elements of the process included:

- 28 February ABTA meets with BEIS
- 5 March ABTA attends the Air Travel Insolvency Protection Advisory Committee (ATIPAC) working group on the Consultations
- 6 March ABTA Launches combined online Member Consultation with links to all documents
- 6 March ABTA Policy Advisory Group meeting
- 6 March Regional Meeting Programme commences with Bristol meeting (Regional meetings continued through to May, with Newcastle, Edinburgh and Cardiff also within the short Consultation window)
- 8 March ABTA meets with DfT
- 9 March Membership Committee reviews consultations
- 13 March ABTA Conference Call briefing for Members
- 15 March FTO Policy Group meeting
- 16 March ABTA Consultation closes – analysis commences
- 23 March ABTA submits response - DfT and CAA Consultations close

Introduction

ABTA believes implementation of the Package Travel Directive 2015 must be the overriding, immediate, priority for both regulators and the travel industry, especially given the lack of available time for businesses to adjust to regulatory changes before implementation deadline of 1 July. Member States were required to have put in place the required implementing laws for the 2015 PTD by 1 January 2018.

Any broader changes to the basic operation of the ATOL scheme, which are not necessary for the implementation of PTD, should be subject to a thorough consultation process with the industry and appropriate implementation lead times.

There are several implementation issues where ABTA believes practical improvements could be made to drafting of regulations. However, we recognise that the Government has left itself very little time to consider alternative proposals. We would urge further consideration of these matters, where the opportunity exists.

It is extremely difficult for consultees to fully address these issues as the new BEIS Package Travel and Linked Travel Arrangements Regulations, implementing the 2015 Directive, have also not been implemented by 1 January 2015 or to date. Furthermore, they have not been consulted on and have not been provided in draft form. We have also raised our drafting comments with BEIS. Coordination between BEIS and DfT in relation to these matters is essential.

Section 1 - Definitions and scope

DfT ATOL Question 1: *We are updating the ATOL regulations to adopt the new definition of a 'package' from Package Travel Directive 2015(PTD). Do you think the way the new definitions are drafted will cause any issues?*

ABTA response:

ABTA acknowledges that the Government is required to adopt these definitions, and other definitions in the PTD, as part of its implementation process. However, some of those definitions might be clearer with some minor drafting changes. Any drafting changes will need to be reflected in the wording used in the new Package Travel Regulations (PTR).

This question asks whether there are any issues that will be caused by adopting the definition in this way. ABTA has previously proposed some minor drafting changes which it is thought would provide more clarity to the definitions without changing the policy intention of the PTD.

For example, the definition of an 'organiser' includes the words 'a trader who combines and sells, or offers for sale packages' without any clarity about what 'combines' means. ABTA believes that this lack of clarity could cause problems in future as traders seek ways to avoid their liabilities under both the ATOL Regulations and the PTR. Any change to the definition of organiser would require a further amendment to the definition of Retailer.

Further, although it is not proposed to regulate LTAs within the ATOL Regulations, should that situation change, clarity is required about the definition of LTAs. BEIS have previously explored clarifying the definition and we believe that there is merit in continuing that process so that there is complete clarity about how an LTA can be created.

DfT ATOL Question 3: *Do you foresee any issues arising from implementing flight-LTAs under the Package Travel Regulation mechanisms through bonding, insurance or trusts?*

ABTA response:

The development of LTAs has not been met with enthusiasm by the travel industry at large as, although the holidays purchased by travellers under this model will be regulated, the level of protection offered by that regulation is significantly lower, if it exists at all, than would reasonably be expected by those travellers. However, it is recognised that the Government must implement the concept, as required by PTD.

The decision to protect the monies held by companies facilitating a flight-inclusive LTA outside of the ATOL scheme is inevitably going to increase confusion, both within the trade and for consumers, around financial protection in the travel industry. This confusion will only be exacerbated by the inclusion within the ATOL scheme, in some circumstances, of the flight element of these sales as a Flight-Only sale.

Whilst options exist within the current PTR mechanisms (subject to any changes in the forthcoming PTR) for the protection of the monies held that do not relate to the flight element of the LTA, it is unclear whether there is sufficient capacity in the bonding and insurance markets should this type of

sales model prove popular amongst businesses and travellers.

The DfT recognises that the result of its 2016 consultation was that there was overall industry support for keeping LTAs that included a flight within the ATOL scheme, and ABTA believes it is likely that this view remains prevalent. Whilst it is clear that the CAA's preference is to not be seen to be responsible for the protection of monies under LTAs, seemingly in order to preserve the existing ATOL brand, it is not clear why that should be the determining factor in this process.

There is already a significant lack of understanding about how and whether travellers' monies are protected when buying a holiday. Regulating flight-based holidays outside of the ATOL scheme will only increase that lack of understanding and ABTA believes that the government preference for Option 3 should be reviewed.

We would also highlight the need for the DfT to monitor closely the European level review of LTAs, which is due to be undertaken from summer 2019. While this is beyond the date of the UK's departure from the EU, and it is unclear whether timelines will require automatic updating of UK regulation, if the opportunity exists to create additional clarity in this area it is important this is considered.

DfT ATOL Question 4: *We are updating the ATOL scheme so that the requirement to hold an ATOL will apply to UK businesses when they sell packages to consumers in Europe. Do you foresee any issues from the changes in who needs to hold an ATOL?*

ABTA response:

ABTA believes that this proposal represents an opportunity for many travel companies and will be welcomed by many.

There are questions to be answered, though, about the operation of such a system when the UK leaves the EU, and some certainty about that situation should be given as soon as possible. ABTA would urge the government to seek continued alignment and cooperation on consumer protection measures, including the PTD.

DfT ATOL Question 5: *We are updating the ATOL Regulations to require Agents acting for the Consumer to hold an ATOL? Do you expect any issues from the new regulation?*

ABTA response:

ABTA recognises that bringing the Agent for the Consumer model into the scope of the ATOL Regulations is in line with the requirements of the PTD, and we believe this will bring further clarity to what has been an uncertain area of travel company regulation in recent years.

The further extension of scope, bringing into the the ATOL scheme traders who facilitate the making available of flight accommodation, is currently unclear and would benefit from some explanatory text. Whilst there is support for bringing within the scope of regulation those traders who are acting in the market for the sale of flight accommodation, and for seeking to future-proof this regulation, there is uncertainty about how this proposal will affect existing arrangements between ATOL holders

and their marketing partners.

DfT ATOL Question 6: *We are updating the ATOL regulations to exempt business-to-business sales from the ATOL scheme (regulation 10). Do you expect any issues from the new regulation?*

ABTA response:

The PTD includes an exemption for travel companies that sell packages and LTAs on the basis of a 'general agreement' for the provision of business travel. The Government should reflect this exemption in the ATOL scheme, recongising that many corporate sales are already exempted.

The Government's proposal, however, includes provision for the CAA to lay down requirements for the contents of those agreements, although the CAA is not obliged to do so.

It would seem appropriate for any terms that the CAA wishes to impose to be the subject of consultation in due course and for the implementation of any such terms to be subject to a reasonable period of notice to allow business to prepare for any new requirements. It should be recognised that, should the CAA dictate terms that restrict the ability of traders to operate within the exemption intended by the PTD, that might be seen as an attempt to gold plate the PTD in breach of the principle of maximum harmonization. It may also place UK businesses at a disadvantage compared to their non-UK competitors. These competitors may well be complying fully with the requirements of the PTD and other consumer protection law, but would not be subject to a more onerous regime that might be imposed by the CAA.

DfT ATOL Question 7: *We are updating the ATOL regulations to qualify the exemption for Agent for ATOL Holders when they are organising packages (regulation 15)? Do you agree with this approach, and do you foresee any issues with the proposed changes?*

ABTA response:

This proposal is to update the current restriction on qualifying for the 'agent for ATOL holder' exemption when selling flights that are part of a package. We understand that the proposal is not intended to restrict the sale by travel agents of packages organised by other companies for whom they act as agent. The intention seems to be that organisers of packages, whether trading as an agent or not, should have their own ATOL which will protect the whole package. If this is indeed the proposal, we support it.

However, as drafted, the proposal would appear to require all the services under the package sold through an agent for the ATOL holder to be supplied under a single contract between the ATOL holder and the consumer. This would appear to prevent organisers who wish to sell packages under a multiple contract model (a model which is allowed under the PTD and specifically provided for under the proposed ATOL Standard Terms) from selling those packages through their appointed agents. We do not believe that this is the policy intention and the drafting should therefore be reviewed.

It is important to note that there is no consumer detriment being addressed by the current drafting. Currently, in the case where an ATOL holder sells a multi-contract package on behalf of another

organiser, the principal organiser will be protecting the arrangement under his or her own ATOL. We understand that the confusion here is likely to have been created in the migration from flight-plus (where there will not have been an alternative ATOL holding organiser sitting behind the arrangement).

DfT ATOL Question 8: *We are updating the regulations to exempt Agents that are selling packages organised by EEA traders from the ATOL scheme. Do you agree with this approach, and do you foresee any issues with the proposed changes?*

ABTA response:

Currently any travel agent that wishes to sell packages that include flights as the agent of an organiser that is established outside the UK is required to hold an ATOL in its own right. This is a significant disincentive and can result in the duplication of protection, where the organiser is established in the EEA and is also providing protection under the scheme of its own Member State. The Government is proposing to exclude agents from the need to hold an ATOL where they are acting as the agent of an organiser established in the EEA, on the basis that those packages should be protected under the scheme of the Member State of the organiser's establishment. Avoiding duplication of protection would appear to be a sensible proposal.

The proposal does not set out what the terms of such an exclusion might be but states that certain conditions will need to be met.

It would seem appropriate for any such terms and conditions, and the necessary monitoring and enforcement processes, to be the subject of consultation in due course and for their implementation to be subject to a reasonable period of notice to allow business to prepare for any new requirements.

In the meantime, it would seem appropriate to allow the exclusion where a contractual agency situation can be proved to exist. This would align with the proper implementation of the PTD. Any restriction on that implementation would risk being an unlawful breach of the principle of maximum harmonisation.

In addition, the proposal does not set out how agents will be treated when acting as the agent of organisers based outside of the EEA. Such organisers are required to provide protection under PTR, but it should be clarified whether, and on what basis, they are required to hold an ATOL. It has been queried whether the current formulation of the ATOL Regulations, whereby they apply to persons 'in the UK who make available etc...' is sufficient to allow the CAA to enforce the Regulations against companies that are outside the UK.

DfT ATOL Question 9: *We propose to remove Part 3 of the ATOL regulations, to revoke ATOL 'Flight Plus'. Do you foresee any issues with this approach?*

ABTA response:

We recognise the removal of Flight-Plus will be a necessary part of the Government's implementation of the PTD.

CAA Question 4: Exemptions from the ATOL Regulations: What are your views on the changes proposed to each of these four exemptions?

ABTA response:

ABTA supports the proposed amendment to the exemption for travel companies operating small aircraft, sporting event, carriage of animals, replacement transport and balloon/airship.

ABTA supports the proposed amendment to the exemption for Flight-Only sales using the consumer's credit or debit card.

ABTA supports the proposed amendment to the exemption in relation to Flight-Only sales with a non-UK departure.

With regard to the proposed amendment to the exemption in relation to corporate sales, the PTD includes an exemption for travel companies that sell packages and LTAs for business travel, as long as a 'general agreement' exists for the provision of business travel services. The Government and the CAA should reflect this exemption in the ATOL scheme. Many corporate sales are currently excluded from the ATOL Scheme.

The Government's proposal, however, includes provision for the CAA to lay down requirements for the contents of those agreements although the CAA is not obliged to do so.

It would seem appropriate for any terms that the CAA wishes to impose to be the subject of consultation in due course and for the implementation of any such terms to be subject to a reasonable period of notice to allow business to prepare for any new requirements. It should be recognised that, should the CAA dictate terms that restrict the ability of traders to operate within the exemption intended by the PTD, that might be seen as an attempt to gold plate the PTD in breach of the principle of maximum harmonization. It may also place UK companies at a disadvantage compared to their non-UK holding competitors who may well be complying fully with the requirements of the PTD and other consumer protection law but are not subject to a more onerous regime that might be imposed by the CAA.

CAA Question 8: What are your views on the CAA's proposal to stop granting ATOLs to businesses that are exempt from the need to hold an ATOL because they are established in an EEA country other than the UK?

ABTA response:

ABTA supports this proposal.

Section 2 – Information requirements

CAA Question 1: *Providing information to consumers before and after sale: What are your views on the proposed changes to ATOL standard terms 1 and 6?*

ABTA response:

Whilst the statement about the intention behind these proposals has merit, the lack of any precise wording of any new Term means that it is difficult to give support to the proposal.

ABTA urges the CAA to come back to the industry with a fully worked up proposal outlining what will be expected of ATOL holders in future. That proposal can then be subject to a full and proper consultation process, so that its merits and any deficiencies can be explored, and so that ATOL holders can ensure they are able to comply with any new requirements.

With the information available, we are concerned about the practicalities of, and difficulties in complying with, the proposal. It would seem sensible to allow travel businesses time to implement the changes necessary for the Government's compliance with the requirements of the PTD before expecting further changes to business processes that are not required under the PTD.

It should also be recognised that, should the CAA dictate terms that restrict the ability of traders to operate within the terms intended by the PTD, that might be seen as an attempt to gold plate the PTD in breach of the principle of maximum harmonisation. It may also place ATOL holders at a disadvantage compared to their non-ATOL-holding competitors, who may well be complying fully with the requirements of the PTD and other consumer protection law but are not subject to the more onerous regime imposed by the CAA.

Section 3 - Enforcement measures

DfT ATOL Question 10: *We are making minor amendments to the ATOL regulations so that the CAA's existing enforcement provisions are fully aligned with the changes we are making to the scope of ATOL (eg to include agent for the consumer sales).*

ABTA response:

ABTA recognises the need to make these changes to align with PTD 2015 and supports the proposal.

DfT ATOL Question 11: *Please set out your views on the proposal to introduce civil sanctions (e.g. those provided for in Regulatory Enforcement and Sanctions Act 2008 (RESA 2008)) to give the Civil Aviation Authority more effective and flexible enforcement powers for the ATOL scheme.*

ABTA response:

While ABTA supports the CAA being given more flexibility in enforcing the ATOL regime, we believe further detail is required on how these sanctions would be used in practice.

ABTA is certainly aware of dissatisfaction from agents for ATOL holders, where the ATOL Holders have not issued accurate agency agreements, and it would seem that anything that allows the CAA

to deliver a more flexible and effective response to such failings would be welcome.

CAA Question 7: *What are your views on the proposals to change ATOL Certificates as set out above?*

ABTA response:

the proposal for the change of Flight-Plus ATOL Certificates to Package sale – multiple contract ATOL certificates. We believe that this will assist organisers operating on such a basis to maintain their agency status.

The CAA must allow a reasonable period of time for ATOL holders to make the necessary changes to their documenting processes, and should not seek to penalise ATOL holders who are endeavouring to make the changes, or their agents, where the ATOL holder fails and the customer is not holding the correct ATOL certificate.

It is proposed that Flight-Only ATOL sales will offer full refund protection in the event that the ATOL holder becomes insolvent (although if the insolvent ATOL holder's Flight-Only was part of another ATOL holder's multi-contract package, the consumer will have no claim. The package organiser must look after the consumer and can make an ATT contribution claim towards the cost of doing so – as happens now with an ATOL Flight-Only claim, which forms part of another ATOL holder's Flight-Plus). We support this proposal.

It is currently unclear what protection the traveller receives when buying an ATOL Protected Flight-Only in the event that the airline fails. In such a scenario, there is nothing in the ATOL Regulations that would require the ATOL Holder to arrange alternative arrangements or provide a refund to the traveller. Neither is there any obligation, under the ATOL Standard Terms, for the ATOL Holder to deliver such a result.

It would be helpful if the Government could clarify its intentions in this regard. If the Government intends that there should be an obligation on the ATOL Holder in such a situation, any such proposal should be the subject of consultation in due course, and the implementation of any such requirement should be subject to a reasonable period of notice to allow business to prepare. It should be recognised that, should the Government put forward such a proposal, this would seem to restrict the ability of traders to operate within the terms intended by the PTD, as it would be an extension of the liability of the ATOL Holder that had facilitated an LTA. That might be seen as an attempt to gold plate the PTD in breach of the principle of maximum harmonisation.

CAA Question 9: *What are your views on the CAA's proposed transitional arrangements? Are they helpful in adapting to the new arrangements? Should there be other transitional provisions?*

ABTA response:

We believe that transitional arrangements will be necessary to allow businesses and CAA to adapt to the new rules so we welcome the proposed transitional arrangements.

Section 4 - Agency agreements

CAA Question 5: *What are your views on the changes proposed to the schedule of agency terms, including the proposal to remove the content of AST1 from these?*

ABTA response:

We believe that the intention here is to remove the need to reproduce AST1 in the agency agreements, and to simply refer to AST1 in the schedule. We understand this to mean that any changes to AST1 will not require any amendment to the agency agreement itself.

On that basis, we support the intention behind this proposal.

However, the question, and the consultation reference a number of other changes, none of which are spelt out in a sufficient degree of detail. Any changes to the Agency Terms should be based on a consultation that specifies the new requirements in detail rather than simply putting forward proposals without the proposed wording of any new or amended Term.

Section 5 – Reporting

CAA Question 2: *Providing information to the CAA: What are your views on the proposed changes to ATOL standard term 3?*

ABTA response:

We support this proposal. However, it would seem sensible and reasonable to allow travel businesses to implement the changes necessary for the Government’s compliance with the requirements of the PTD before expecting further changes to business processes that are not required under the PTD.

CAA Question 3: *Reporting business and financial information to the CAA: What are your views on the proposed changes to ATOL standard term 4? What are your views on the CAA’s intention to issue guidance to ATOL holders in relation to any planned corporate activity?*

ABTA response:

Whilst the statement about the intention behind this proposal has merit, again, the lack of any precise wording of any new Term means that it is difficult to give wholehearted support to the proposal.

The CAA should come back to the industry with a fully worked up proposal outlining what will be expected of ATOL holders in future. That proposal can then be subject to a full and proper consultation process so that its merits and any deficiencies can be explored and so that ATOL holder can make arrangements to ensure that they are able to comply with any new requirement. In any event, it would seem sensible and reasonable to allow travel businesses to implement the changes necessary for the Government’s compliance with the requirements of the PTD before expecting further changes to business processes that are not required under the PTD.

CAA Question 11: *Do you have any comments on the proposal to share Accountants' Annual Reports (AAR) with the relevant accountancy body?*

ABTA response:

We have no objections to this proposal.

CAA Question 12: *Online ATOL Certificates - The CAA would welcome consultees' views on this proposal, while it is still in the early stages.*

ABTA response:

ABTA Members have raised a number of concerns about this proposal whilst not being entirely opposed in principle.

Before Members can wholeheartedly support the CAA's proposal, they are seeking answers to the following questions.

- How much will this system cost to implement and how will it be funded?
- How will any necessary changes to travel companies' systems be funded?
- Will the load capacity / bandwidth of the system/database be able to cope with the volume of information that is passed to it?
- How will the security of customers' information be guaranteed?
- Will the speed of the system and frequency of the data uploads mean that passengers no longer receive certificates at the time of booking? Booking processes are 24/7 365 days a year and supported on that basis by Members. The same would be required of CAA IT.
- We understand that the CAA is looking to the DVLA's MOT Certificate system as a model. Because travel bookings change and are amended however, the solution required for ATOL Certificates is significantly more complex. Has the CAA considered all of the changes which can take place (part cancellations, schedule changes) etc., which might result in an ATOL Certificate being amended or reissued? How that process is then reconciled to APC contributions is also an important factor.
- Will travel companies be able to override the normal rules when there are extenuating circumstances?

Members strongly believe that any proposal would require a very careful forward planning phase, with a long implementation timeline from the conclusion of the full requirement specification, so that the many standard and non-standard industry IT systems are able to be changed as required.

More information: for more information, please contact Simon Bunce, Director of Legal Affairs (T: 020 3117 05573; E: sbunce@abta.co.uk)

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