

businesscompanion

trading standards law explained

Section 1. Packages

In this section

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

The law states that a consumer's holiday must be protected if it is a package holiday. ATOL (Air Travel Organisers' Licence) is a UK financial protection scheme that protects most air package holidays sold by travel businesses based in the UK. The scheme also applies to some flight bookings, usually those where you book flights (including UK domestic flights) but do not receive your tickets immediately.

ATOL was first introduced in 1973, as the popularity of overseas holidays grew. After a number of high-profile travel business failures left people stranded overseas, the UK Government realised consumers required protection when their travel providers fell into difficulties. ATOL currently protects around 20 million holidaymakers and travellers each year.

It may help to highlight the responsibility of Organisers and Agents with the example of the collapse of Thomas Cook. Should an Organiser, Agent or Airline go out of business then the following information may apply to you depending on your business relationship:

i) Flight-based ATOL package holidays

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

ii) ATOL-protected flight only

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

iii) High street/retail sales

Where you are the contracted Organiser/Principal for bookings taken by a Travel Agent that goes out of business, it is your responsibility to continue to provide the holiday you booked.

iv) Non-flight packages

Where you have booked non-flight packages with an Organiser/Principal that ceases to operate then these sales should be protected. Travellers will need to submit a claim for a refund to whoever provided the protection (which must be by a Bond, Insurance or Trust Account). If the traveller is already on holiday, in most cases, the package holiday should continue as normal.

v) Single Element Sales (e.g. accommodation-only)

Where single element sales have been booked, such as accommodation-only with an Organiser/Principal/Travel Agent or OTA who ceases to operate then these sales are unlikely to be protected.

vi) Flight only with Thomas Cook Airlines Ltd (sale of flight only or Linked Travel Arrangements)

If travellers' flights were booked through an airline which ceased to operate, there is no financial protection in place for those sales, however, if those flights were used to form part of a package for travellers, then the trader may be responsible to make alternative arrangements for them. Agents are advised that where they took travellers' payments by debit or credit card there is a risk of chargeback if travellers make a claim with their credit card issuer or bank. In these circumstances, Agents are advised that if they had supplier failure insurance (SAFI) in place they should contact their insurer.

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

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

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

Bonding: To use the bonding option a trader must be a member of an approved body (approved by the Department for Business, Energy and Industrial Strategy) which oversees the bonding process to ensure that the bond is at an adequate level to meet insolvency requirements. The bonds must not exceed a period of 18 months, and must be a sum that: covers the maximum amount of payments the Organiser expects to hold at one time for travel packages still to be performed; or is not less than 25% of all payments the Organiser expects for travel packages in the 12-month period from the start of the bond, whichever sum is the smaller. Alternatively, if the approved body has a reserve fund or insurance to cover any shortfall in bond cover the sum must cover: no less than 10% of such payments; or the maximum amount of payments the Organiser expects to hold at one time for travel packages still to be performed, whichever is the smaller. In the case of packages which might involve repatriation costs, the bond must also incorporate such additional sum as the Organiser may reasonably be expected to cover and, if necessary, accommodation for the traveller prior to repatriation. Approved bodies are: ABTA - The Travel Association; Association of Bonded Travel Organisers Trust (ABTOT); Bonded Coach Holidays (BCH).

Insurance: The Organiser can take out one or more insurance policies which recognise the travellers as the insured persons and therefore pay direct to the travellers in the event of insolvency. Organisers should ensure that any insurance policy that they secure is not voided due to negligence or a breach of condition on their part. For instance, we are aware that ABTA - The Travel Association makes it a condition for any

underwriters on their approved list not to reject any claim made by customers or withhold payment under the policy to any customers (who can prove a loss) due to any breach of the terms, conditions or covenants of the policy by the relevant Package Organiser or facilitator of a Linked Travel Arrangement. We consider this to be good practice.

Trust account: This option requires all money paid by the traveller to be held by an independent trustee until the contract has been performed. The independent trustee can pass the money to the Organiser only when they provide evidence that the contract has been fulfilled or if evidence is provided that the Organiser has repaid a portion of the money to the traveller or the money has been forfeited on cancellation by the traveller.

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

For more detailed information on trust accounts please visit:

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

Organisers not established in the UK or any other European Member State (Third Country Traders) who sell or offer package holidays for sale in the UK must comply with the UK insolvency protection requirements as stated above. In addition, UK established Travel Agents (retailers) who sell package holidays combined by Organisers outside of the European Union are required to take responsibility for the performance of the package and provide insolvency cover, unless they can show the TCT already complies with these parts of the 2018 PTRs.

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

i) Package Holidays and Linked Travel Arrangements that last less than 24 hours unless there was overnight accommodation included.

ii) Package Holidays and Linked Travel Arrangements which are organised occasionally and on a not-for-profit basis and for a limited group of travellers, such as a one-off trip arranged by a church for its members. The BEIS guidance helpfully adds that, "occasionally means no more than a few times a year". This would apply to the not-for-profit organisation itself and not to an Organiser serving that group or market on a commercial basis.

iii) Packages and linked travel arrangements purchased on the basis of a general agreement.

Backed by the guidance given in the BEIS document we highlight to businesses that they should consider their operations as there would be some situations where packages could be created and protection required. The following scenario shows how a package can be created. A traveller books a golf break with a hotel that includes a pre-booking for round(s) of golf at a local major golf course, as well as the accommodation.

This could be a package, as the round of golf would be an "essential feature" of the package. A very recent issue has been the sale by high street and online Travel Agents of a 'super package' (or 'package plus') and whether the Agent would have to provide protection. A super package is where a Travel Agent sells a package holiday as a retail Agent but at the same time sells an additional travel service. For example, a traveller may well ask for airport accommodation to be booked alongside the package holiday, perhaps because of an early flight. Similarly, the traveller might ask for transport to be arranged from their home to

the point of departure of a package (cruise).

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

If the travel Agent was to be the Organiser of this super package, then the consequences for the travel Agent will become unrealistic and add to the confusion for travellers. The travel Agent will need to provide insolvency protection for the entire super package, which will mean applying for an ATOL if the super package includes a flight. More importantly from our point of view, the travel Agent will also become liable for the proper performance of all travel services included, even though the travel Agent is unlikely to be in any position to exert legal or commercial pressure on a supplier to rectify a problem. The reality is that it would be far better for the tour operator of the original package to be responsible for fixing problems with their part of the booking and the traveller will not be even more confused!

There are clearly four travel services defined in the Regulations and 'package' is not stated as a travel service. In addition, the 2018 PTRs contain extensive pre-booking information on both the Organiser and the retailer. The traveller should therefore be in no doubt as to what the package does and doesn't contain.

Our advice is that Agents will need to demonstrate that the traveller was informed about which components were included in the package, which were not, and the status of the various parties in the sale (e.g. the identity of the tour operator, the single component supplier and the status of the Agent). Agents should also, we consider, take steps to assess their potential exposure to such claims and ensure that any assumed insurance cover will actually meet such liabilities.

Case study: Social media

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

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

Is the offer for the seller to make the booking or for the consumer? It really isn't clear, and it should be clearer at the beginning that the flight is extra. If X makes the booking, was it at the same time as the hotel booking? If so, then an LTA (separate selection and payment) or package (if paid as a total fee) would be created.

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

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

Let's also not forget the whole issue of X suggesting the flight and where to purchase. If that is what is being considered then this could be an LTA where there is targeted cross selling to a third party,

once the purchase of the accommodation is made.

Organisers/Principals and Travel Agents

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

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

There is always a need as a Principal/Organiser to ensure you provide accurate information to consumers. Organisers/Principals could offer package holidays, Linked Travel Arrangements, accommodation-only or flight-only facilities to the consumer. The requirement for accurate information is to enable consumers to make an informed choice. It is important with package holidays and travel services to understand what the responsibilities of the Organiser/Principal and Agent are in any transaction with the consumer. In general terms, the Organiser/Principal is the party that is contractually bound to the consumer to provide the travel services. You will be the Organiser/Principal if you place yourself in contract with the customer either directly or through someone you have appointed or allowed to act as your Agent.

Where an Agent has been appointed, it can contract on behalf of that Organiser/Principal and their acts are treated as those of the Organiser/Principal. In addition, monies paid to an Agent on behalf of the Organiser/Principal are deemed to be received by them.

Case study: Online holiday marketplace

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

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

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

The 2018 PTRs have added new definitions for Principal/Organiser, for example where a consumer purchases a flight on the airline's website (from the airline - the Organiser/Principal) and a link on the flight website takes the consumer to an accommodation website (e.g. Booking.com) where a booking is made within a 24-hour period. This 'Linked website transaction' (not Linked Travel Arrangement)

occurs when the payment details, name and email address of the consumer are passed from the initial Principal/Organiser to another trader in a targeted manner and would now be termed a package.

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

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

Consumers will not be entitled to compensation for damages if the Organiser/Principal can prove that lack of conformity is:

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

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

It is possible to act as the retailer (travel Agent) for other Organisers/principles when selling package holidays. If you, as a retailer, sell the packages as the properly disclosed travel Agent of the Organiser/Principal, you will not generally be responsible for the travel services to be provided under the package contract or for the financial protection. However, you will be required to provide specific information about the package, and you may have additional responsibilities.

When a consumer buys a holiday or trip, they will have to be given specific information where it is relevant to their holiday. The obligation to provide this information rests with the Organiser/Principal and, where the package is being sold by a retailer (travel Agent), also the retailer, and they must agree how this information is to be provided.

Case study: Building works

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

We have recently been in contact with the Advertising Standards Authority (ASA) regarding their Code of Advertising Practice, which is based upon the Consumer Protection from Unfair Trading Regulations, which we enforce.

We spoke to their executive about just what the ASA mean when they state that: “When advertising hotels abroad the Organiser/Principal should always put on the website (if this is how the package is sold) that there may be building works at the hotel.” They quote their Code of Advertising Practice. The three important points I made were:

i) Information on building work, if relevant to the traveller, can be provided during the booking process. The ABTA Code states that this should be provided before the holiday is booked. Trading standards will always refer to the 2018 PTRs which clearly want information about building works just before the booking is made, when more information would be available to make a much more reliable decision.

ii) This view, that not everything has to be provided at the start of the booking process, is backed up by the case of *Purely Creative and Others vs The Office of Fair Trading* (2011). The judge stated: “In my judgement the key to understanding this paragraph is the concept of, ‘need’. The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision”. Some information will be relevant, or helpful, but it isn’t needed to make that initial decision to select the holiday. It will be much more important to the consumer whether the price is affordable, or the dates match with when they want to go.

iii) We then said the issue about building work is what you can say on the front page that will help the traveller. ‘There is building work at this hotel’ would not be specific enough or of benefit to the traveller. They will need to know the impact of the work, which could range from visual untidiness through to noisy disruption of a holiday. Also, building work changes all the time, so it would be impossible to accurately describe it. In addition, it affects travellers in different ways. They might be put in a room away from it. They might spend very little time at the hotel, and not be bothered at all. Also, they might book for a future date when the work will have stopped.

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

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