

## Travel agent guidance

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### Travel Law: What you need to know

The Chartered Trading Standards Institute is aware that a high proportion of travel agents have been closed during the COVID-19 pandemic, with agents working from home during points of the Government's unlocking of restrictions on the public. With a better outlook for the remainder of the year, this guidance is to help travel agents understand just some of the important issues for both themselves and their customers.

The details of the Global Travel Taskforce report, published by the Government in April 2021, has a number of recommendations.

Three of the prominent ones are:

- the Government will use a traffic light system of green, amber, and red denoting low, moderate, and high-risk countries linked to Covid-19.
- a green watchlist will be used to identify countries at risk of moving from green to amber.
- three review checkpoints of measures, no later than June 28th, July 31st and October 1st, 2021.

This traffic light system is the first step on the road back to normality. However, the Government has stipulated certain controls, linked to this "traffic light system":

- even if you are fully vaccinated and have proof of the vaccinations, if you travel to a "green" destination you will be required, on your return, to undergo a PCR test (a polymerase chain reaction

test). The test detects the presence of a virus if you are infected at the time of the test. The test could also detect fragments of virus even after you are no longer infected. The test is not free and will require travellers to pay for the test on top of the holiday costs already paid.

- for those travelling to, "amber" countries, there will be a need to quarantine for 10 days at home and be tested at least twice during this quarantine period.

It has come as a relief to see the Government are intending to extend the provision for ATOL protected Refund Credit Notes (RCNs) (for flight-inclusive package holidays) beyond the end of April 2021 and is now considering extending the ATOL, RCN expiry date to 30th September 2022. As regards to non-flight packages, ABTA intend extending the issuing of RCNs beyond April 30th 2021 and extending the RCNs expiry date.

## REFUND CREDIT NOTES EXPLAINED

A refund credit note for a package holiday:

- Lets you REBOOK your holiday for a later date
- IS financially protected
- Gives you the right to a cash REFUND up to the date it expires
- IS NOT a holiday voucher –holiday vouchers do not have financial protection

## **The introduction of the Package Travel and Linked Travel Arrangements Regulations 2018 (2018 PTRs) presented major challenges for Travel**

### **Agents.**

Package holidays and Linked Travel Arrangements (LTAs) can be complex combinations of travel services which include transport and accommodation, but may also include other services such as car hire and significant 'other tourist services' such as excursions. Where travel agents contract for the consumer with different service providers, for example airlines and hotels, a problem with the delivery of one service may affect the delivery of the others and under the new rules the travel agent has an important role to help resolve any issues that may arise.

The 2018 PTRs do not cover;

- day trips (under 24 hours and not including overnight accommodation);
- packages and LTAs which are organised occasionally and on a 'not for profit basis' for a limited group of travellers,
- are situations in which businesses make bookings through contracts with business travel agencies (a business-to-business contract).

Travel agents will now be aware that separate selection and purchase of travel services will come under the new rules. An agent could become a "facilitator", of a linked travel arrangement in the following scenario.

A traveller visits your branch and pays for a flight and without leaving the branch, decides to book and pay separately for a hotel to 'link' with the flight.

Many of the requirements of the 2018 PTRs will be familiar to those used to organising package holidays. However, the definitions and scope of the requirements mean that it is likely that many more travel agents will have to ensure that their business systems and practices take account of the 2018 PTRs.

Travel agents will need to be aware of the following points:

1. when making sales in their travel agencies, on the telephone or on their website, the relevant information provisions for pre- and post-contract information requirements are met. The 2018 PTRs provide criminal offences if these information provisions are not followed (see later notes regarding what information needs to be provided at what stage).
2. when travel services are combined into a package or linked travel arrangement, insolvency protection shall either be; a. by holding an ATOL for flight-inclusive packages and b. for non-flight packages and LTAs, by providing a bond or insurance policy, or by holding the traveller's money in a trust account.
3. UK-based travel agents who deal with non-UK organisers will be liable for the proper performance of the package and for insolvency protection or must provide evidence that the non-UK organiser complies with these.

## **Trust Accounts**

Trust account protection has changed since the UK's exit from the EU. The main points to be aware of are:

1. funds in trust accounts must be held in the UK and not in another Member State.
2. an agent, selling a package or facilitating an LTA using a trust account must obtain insurance to ensure that if they collapse when the consumer is on holiday, repatriation will be covered.
3. it is an offence if the agent informs their independent trustee that the travellers have returned from their holiday, when they have not yet returned in an attempt to release the money early into the agents trading account.

## **Package holidays and travel agents**

To help travel agents who may be concerned with the scope of the Regulations, we will revisit what constitutes a package holiday;

- traditional package holidays sold by tour operators, travel agents or online traders combined by one trader and sold under a single contract.
- travel services sold in a single booking process (a shoppingbasket style of selection) where the consumer can select a range of travel services, offered by the agent, related to a single trip to create a package. The point of sale could be at the travel agent, their website or over the telephone.
- travel services are sold at an inclusive or total price. So, for example, an Agent puts together a selection of travel services for the same trip and sells it to the consumer for a total price.
- combination is sold as a package (or under a similar term). For instance, 'combined-deal', 'all inclusive' or 'all-in arrangement'.
- gift-box style packages where an agent sells a package that allows a traveller choice in selecting one of the varieties of travel services in the package. For example, a 'Tastes of the Region' package that allows the recipient to choose from a selection of accommodation and meals in the particular region, to be selected from options, after the package has been purchased.
- package sold through a linked online booking process. For example, a consumer visits an online travel agent and purchases a flight. The travel agents website provides a link to an accommodation website. If the consumer clicks on this link and finds their name, payment details and email address appear on this second, "targeted" website and they continue, purchasing a hotel to go with the flight, all within 24 hours, it becomes a package, and the travel agent must provide insolvency protection.

## **Should agents be concerned about Linked Travel Arrangements (LTAs)?**

The LTA, has only two scenarios to consider. Its either;

- the separate selection and separate payment of travel services made during a single visit to a travel agent where the consumer selects and pays for e.g. a hotel and then, without leaving the agent, they select and then pay the agent separately for a flight.
- visiting an online travel agent's website and after the consumer has purchased one travel service, they are 'targeted' with a cross-sell to another trader's website, where the traveller buys from the third party within 24 hours. This may seem a very similar scenario to the "package" definition above BUT, in an LTA situation, the consumer's name, payment details and email address do not automatically appear on the second website.

It is important for agents to understand whether the combination of travel services they arrange for consumers are packages or LTAs. The legal obligations will differ, including the requirement for insolvency protection. There is statutory information that must be provided in a clear, comprehensible, and prominent manner in any materials presented to, or discussions carried out with consumers prior to them purchasing a package holiday or LTA.

THREE PRACTICAL EXAMPLES OF THE SALE OF A PACKAGE, LTA AND AN ONLINE TRANSACTION ARE BELOW.

1) "I visited a travel agent with my wife to book a hotel as we wanted to travel to Paris. The agent offered several different hotels and we selected one. My wife then suggested we could also book a flight and to ensure we could get around we added car hire. The agent sold us the choices we had made at a total price".

The first example is a package.

2) "I visited a travel agent on 5th February and booked a flight to Barcelona. I paid for the flights just as the shop was closing. I then returned to the Agent first thing the following morning (6th Feb) and bought a room in a lovely hotel in Amsterdam. Obviously, my booking was within 24 hours, so I am sure it's an LTA as I paid separately, is that right?"

The second shows the purchase of two separate travel services where the traveller left the Agent, revisiting the following day (so no package or LTA).

3) "A traveller visits an airline's website and buys a flight. On this website is a link to an accommodation provider. The traveller clicks on the link, and his name, payment details and email address appear on the third party website. The traveller purchases a hotel within 24 hours".

The last example is a package bought online.

## **Information requirements under the Package Travel and Linked Travel Arrangements Regulations 2018**

This element of 'best practice' concerns the statutory information that must be provided in a clear, comprehensible, and prominent manner to consumers before making a package holiday booking. The relevant Schedules in the 2018 PTRs are listed below with a brief overview of their meaning:

**Schedule 1** states information requirements in the Regulations should be covered in any brochure description and ideally the information should be discussed during the sales process, complementing the brochure description.

**Schedule 2** information will not be a problem as it relates to website sales where links can be used to provide consumers with their 'key rights' (this is contained in Part 1 of Schedule 2).

**Schedule 3 part 2** again talks about key rights information. This is where the problems occur as they relate to travel agents (shop sales) and telephone sales, where the consumer's 'key rights' must be explained BEFORE the booking is made. Part 1 relates to the insolvency protection and Part 3, the copy of the actual regulations

**Schedule 4** lists the consumer's key rights prior to concluding a contract with one online travel service provider, no later than 24 hours after receiving confirmation of a booking with another 'linked' online travel service provider. The first online travel service provider will be fully responsible for providing insolvency protection and the proper performance of the package.

**Schedule 5** highlights the information to be provided in the Package Travel Contract after the booking has been made (the Confirmation Invoice).

**Schedules 6 to 10** deal with the information provisions for LTAs.

## **What about agent sales through social media sites?**

Regardless of the sales channel, any sale of a holiday, be it in person or online is covered by the regulations, even holiday sales through social networking sites.

For example - a trader selling a holiday through a social media post is offering some "lovely hotels in different parts of the world". The post then states that "flights are from £37 from Doncaster airport".

The potential problem with this type of advertising is that the booking details may not be made clear to the traveller at the point of sale. Will this trader be in a position to book flights as well as accommodation or is this just an indication of the prices available?

If the trader was to make the booking for both elements for any potential traveller, then this would be a Linked Travel Arrangement. If the trader is suggesting relevant flights in the post and what websites to purchase these from at the advertised prices, then this could also be considered a Linked Travel Arrangement. The sales post could be misleading, and consideration would need to be given whether the average consumer would be misled (thinking it's an LTA or package), potentially leading to a CPR offence.

It is best practice for travel agents using social media to sell holidays to have a system to check that the information is as up to date as possible. This would be a due diligence defence for the trader.

## **The Consumer Protection from Unfair Trading Regulations (CPRs)**

Trading Standards enforce the 2018 PTRs and travel agents should be aware of the specific legislation that leads to investigations for inaccurate or misleading information to consumers.

The CPRs are legislation used extensively by regulators to pursue investigations where there have been misleading or deliberately false holiday and travel descriptions in brochures, online, in travel agencies or where sales are made over the telephone.

Here are two examples;

- Bait advertising (or 'bait and switch'). This is where an agent misleads a consumer into believing they can buy a package holiday or travel service at a low price when they are aware that they do not have reasonable stock available or are not able to supply at that price; this is also where the agent attempts to 'up-sell' to a higher priced product.
- Falsely stating that a product is only available for a very limited time to make the consumer make an immediate decision. An example of a breach of the law would be where an advertised sale of

package holidays stated a finishing date for the offer, but the sale was continued after the advertised finishing date as few sales had been made.

The CPRs prohibit misleading descriptions that cause, or are likely to cause, the average consumer to take a different transactional decision. This does not only relate to pre-shopping but includes after-sales.

**'Misleading actions'** happen when an agent provides false information about important matters, such as the main characteristics of the product (even if the information is factually correct) or presents the product in such a way as to be likely to deceive the consumer to these matters.

An example of a breach of the law would be where flight prices are advertised but they do not include Government taxes.

**'Misleading omissions'** happen when an agent gives insufficient information about a holiday or travel service. It is a breach of the CPRs to fail to give consumers the information they need to make an informed choice in relation to a holiday or travel service if this would cause the average consumer to take a different decision.

Some other banned practices are listed below:

- claiming to be a signatory to a code of conduct when the trader is not, e.g., claiming compliance with the ABTA Code of Conduct without being a member.
- displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation, e.g. using an ATOL (Air Travel Organisers Licence) logo.
- claiming a code of conduct as an endorsement from a public or other body which it does not have.

It is important for agents to understand whether the combination of travel services they arrange for consumers are packages or LTAs. The legal obligations will differ, including the requirement for insolvency protection. There is statutory information that must be provided in a clear, comprehensible and prominent manner in any materials presented to, or discussions carried out with, travellers prior to their purchase.

## Card surcharges?

Holiday and travel businesses (specifically travel agents) are not permitted to impose surcharges for taking payment by a consumer's debit or credit card, or an electronic payment service that is backed by a bank or an intermediary.

## Frustrated contracts

The pandemic has highlighted some circumstances where it is impossible for a contract to go ahead as agreed. This contract is therefore frustrated. As a result, the contract comes to an end and where consumers have paid money in advance for services or goods that they have yet to receive, they will be entitled to obtain a refund. As agents will be aware the Competition and Markets Authority are investigating a number of examples where this has not been the case and their investigations are highlighted in the article below.

<https://www.gov.uk/government/publications/cma-to-investigate-concerns-about-cancellation-policies-during-the-coronavirus-covid-19-pandemic>

The Trading Standards view, depending on the circumstances of each case investigated, is as follows:

A contract will be 'frustrated' as a matter of law if, due to no fault of the parties, something happens after

the contract was entered into which means it can no longer be performed at all or performance would be radically different to what was agreed. As a result, the contract comes to an end.

Other consequences of frustration, in particular, what happens to money already paid under the contract, will depend on which of the laws apply to the contract. Under English law, certain consequences of frustration are set out in the Law Reform (Frustrated Contracts) Act 1943. Under this legislation, parties to the contract are no longer liable to make any outstanding payments and they are entitled to get back anything they have already paid.

## **Cancellation relating to government guidance**

Where a service can legally be provided as agreed, but a business or consumer does not want to go ahead with the arrangement, e.g. because of Government advice, then the position is more legally complex. The circumstances of each case will have to be carefully considered. The Foreign, Commonwealth and Development Office (FCDO) provide advice for travellers going to destinations all over the world. If a package holiday could be cancelled considering FCDO advice against travel to the relevant country (due to unavoidable and extraordinary circumstances, as set out in The Package Travel and Linked Travel Arrangements Regulations 2018) then consumers should be entitled to a full refund. If a package holiday has been frustrated, then any applicable pre-existing terms and conditions on cancellation and refunds will not apply.

It is important to note that whether a contract has been frustrated will depend on the circumstances. Although frustration is less likely where there are no legal restrictions in place, it is not impossible. If advice or guidance means a consumer would be at serious risk if the contract went ahead as agreed, a court could find that the contract had been frustrated.

## **Current situation advice**

Many travellers will have booked packages through a travel agent. The agent may have "dynamically packaged" the booking with different travel service suppliers. If, because of the pandemic or FCDO advice, the package had to be cancelled, the agent would be responsible to refund, even if they could get no refund from the third party e.g. the airline, because the flight was still operating, despite FCDO advice. We are aware that until the late 1990's most packages were based on charter-flights. The Airlines were owned or linked to tour operators, so when operators cancelled flights (due to the FCO advice), a refund could be made with nobody losing out! Now lots of packages are based upon scheduled, low-cost carrier flights that must be paid for and tickets issued the day of the booking. Every low-cost carrier operates on the basis that if a flight is operating (despite FCDO advice) and customers refuse to travel, the fare is not refunded.

Agents can also set out their own terms on which they will do business, some offer lower fares with higher charges for changes or cancellation and many fares will have no value at all in the case of a cancellation. The airlines dictate the terms attaching to the fares, including the fact that the tickets may have to be issued immediately, so deposits cannot be accepted by agents who will need full payment immediately. If a flight is not able to be changed or there is no refund if the flight is cancelled, this should be made clear, prior to the sale taking place and any agent who failed to do so could breach the CPR's (omission).

The airlines have recognised that they cannot sell many tickets at full fares and, therefore, appoint a small number of "authorised agents", to sell lower fares on their behalf. These are what is called, the airlines, "net fares", allowing agents to sell the flights at a price which would be popular for customers. However, where a customer wants a full refund (e.g., during a global pandemic), where their flight is cancelled, the agent is required to refund the full cost which will include the agents profit margin as well. This is why agents will be looking at a cancellation charge or fee, to recoup their commission. The cancellation charge or fee should be made clear to the consumer at the time of purchase otherwise, the full cost the customer paid should be refunded.

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