



A response by the Association of Personal Injury Lawyers

May 2022

Linked Travel Arrangements

1. We suspect that there has not been significant litigation on this issue yet due to the effects of the COVID 19 pandemic on international travel for the past two years. As such, the impact of the introduction of Linked Travel Arrangements (LTAs) and the broader definition of a package is still yet to be felt.
2. We remain concerned, however, that the definitions of “package” and “linked travel arrangements” will lead to uncertainty amongst consumers. LTAs do not offer the same protection as packages in terms of improper performance of the contract. APIL remains concerned that the introduction of LTAs may be used by tour operators and holiday providers as a way to circumvent the definition of a package and avoid liability for improper performance.
3. This review of the Package Travel Directive is an opportunity for this potential confusion around the different definitions and products on offer to be addressed. It is essential that guarantees are in place that consumers will be clearly informed by providers as to whether they are purchasing a package holiday which offers the gold standard in consumer protection or a LTA. If it is a package, the consumer should be informed clearly of the rights that do not apply to a LTA, but which would apply if they booked the same holiday as a regulated package holiday. The legal position should be set out in layman’s terms before the conclusion of the contract. While Annex A of the Package Holiday Directive 2015 sets out the wording that tour operators are required to provide to consumers when they book a holiday, we suggest that this should go further and explain clearly, in the case that a consumer has purchased a package, that should anything go wrong, the consumer will have the right to sue X tour operator. In the event that an LTA is purchased, there should be a requirement within the directive that the consumer is informed clearly that they would need to sue the individual travel service provider directly, should they wish to bring a claim, and that this may require the consumer to bring proceedings overseas and not in the courts of their home country. There should be a requirement that this information is provided in such a way and at such a time that the consumer has a genuine choice whether to proceed with booking a holiday that falls outside the Directive’s scope and the protections it provides for improper performance. From our members’ experience, people with these claims are often slow to contact a specialist lawyer about their potential claim, either because they didn’t realise that they could sue anybody or were not sure who they should sue.
4. Further, we remain concerned about the Directive’s focus on insolvency protection, which is reflected in the new concept of the LTA, over ensuring that consumers have a right of redress should something go wrong on their holiday. LTAs provide tour operators with an attractive means of offering holidays with some insolvency protection, but which do not fall within the scope of a regulated package holiday and

so allow the tour operator to escape liability for improper performance of the contract. The definition of LTAs should not be allowed to become too broad so that providers begin to offer only LTAs in place of a package due to the diminished consumer protection that they provide. Any change to the current Directive should ensure that businesses are not encouraged to take advantage of the new concept of a LTA as a means of introducing a reduction in consumer rights and avoiding contractual liability to consumers should things go wrong. As set out above, if the concept of a LTA is to remain part of the Directive's regime then there must be a focus on informing consumers about their rights associated with each type of product on offer, so that they can make a fully informed decision.

Liability regime generally

5. Uncertainties around the liability regime under the Package Travel Directive were helpfully clarified by the CJEU in the case of *X v Kuoni*¹. Although this decision related to the application of the 1992 Directive, we would expect, and it is important that, the 2015 Directive is interpreted in the same way so as to ensure the high degree of consumer protection envisaged under the liability regime for package holidays falling within the Directive's scope. The 2015 Directive establishes clear rules on liability, providing that the organiser of the package is liable if something goes wrong, no matter who performs the travel services. It is important that a broad view is taken of the obligations owed by tour operators to include a range of necessary services for the provision of a holiday of a reasonable standard.
6. The CJEU in *Kuoni* considered that, in order to ensure a high level of consumer protection (and in light of the objective of consumer protection pursued by the 1992 Directive) the obligations arising from a package travel contract could not be interpreted restrictively. These obligations include all the obligations associated with the provision of transport, accommodation and tourism services arising from the purpose of the package travel contract, irrespective of whether those obligations were to be performed by the organiser itself or by suppliers of services.
7. Furthermore, the CJEU clarified that the performance or failure to perform such actions by a supplier of services' employee(s) may constitute non-performance or improper performance of the obligations arising from the package travel contract. Thus, a tour operator is liable for the deliberate acts and omissions of the employees of its supplier of services within that wide scope in accordance with the objectives set out at article 5(1) of the 1992 Directive.
8. We consider that the current wording at Article 13 of the 2015 Directive is such that the reasoning of the CJEU in *X v Kuoni* can be extended and applied when considering the liability of the organiser of travel services for a package falling within the scope of the 2015 Directive. The liability of the organiser should continue to extend to the acts or omissions, criminal or otherwise, of the employees of the organiser's travel service provider, as well as to any other individual or entity the travel service provider may enlist in discharging its obligations to the organiser.

Compulsory insurance for travel organisers²

9. Currently, there is no requirement for travel organisers to have a minimum level of liability insurance in place to cover claims made by customers who are seriously injured

¹ [2021] UKSC 34

² This section is adapted from a 2021 article by Chris Deacon, which appeared in *PI Focus and Travel Law Quarterly*: <https://www.travellawquarterly.co.uk/wp-content/uploads/2021/04/2021-deacon-final-on-why-tour-operators-should-have-public-liability-insurance-wpn-79-84.pdf>

or impacted by a fatal accident on a package holiday. This lack of regulation is concerning to APIL, as it can leave many injured people uncompensated and with no effective means of redress. In September 2019, when Thomas Cook collapsed, many holidaymakers who had suffered an injury while on a package holiday learned that the tour operator did not have public liability insurance to cover their claims. Thomas Cook only held liability insurance for severe cases, where damages could be millions of pounds. Therefore, the vast majority of claimants at the time/after the collapse were left without compensation, including financial losses that can endure on a lifetime basis as a result of the injury suffered on holiday.

10. Despite the 2015 Directive providing a wider definition of “package” and therefore providing a wider scope for travel agents and tour operators to be held liable to a consumer when things go wrong, there is currently no provision for travel organisers to have compulsory liability insurance. This undermines the protections offered by the Directive if the tour operator runs into financial difficulty and is under-insured or completely uninsured for its liability in a claim for serious injury.

11. The concerning nature of this situation was recognised by the UK Government in 2019. Andrea Leadsom, then-Secretary of State for Business, Energy and Industrial Strategy said that it was unacceptable that Thomas Cook customers were left uncompensated and that this type of situation should never have arisen in the first place. Leadsom promised that the UK Government would arrange a statutory compensation scheme for the victims most seriously impacted by Thomas Cook’s insolvency and made a commitment that the government would take steps to ensure it would not be repeated.

12. Paragraph 6I of the ABTA Code of Conduct provides that ABTA members shall:

If they are Principals or Organisers, ensure that they obtain liability insurance to cover claims made by clients. They shall ensure that evidence that liability insurance has been obtained is supplied to ABTA within 28 days of the commencement of such insurance policy by either completing the Liability Insurance Notification form or by confirmation from their insurance broker. Acceptance by ABTA of such evidence is not an acceptance by ABTA of the adequacy of such insurance.

13. Within the UK, despite tour operators being encouraged to obtain comprehensive liability insurance voluntarily, via in their Code of Conduct, they are failing to do so - with potentially life changing consequences for consumers.

14. We believe that there should be EU-wide rules on minimum requirements for public liability insurance for package organisers, to cover, amongst other things, the cost of compensation claims. We recommend that tour operators should be legally compelled to have a minimum level of liability insurance to cover claims from consumers who have been seriously injured, suffer illness, or have suffered a fatal accident as part of a package travel contract. There should also be a requirement that such policies do not carry prohibitive self-insured excess levels. The protections provided to consumers by the Package Travel Directive are illusory if a tour operator runs into financial difficulty and is under-insured or completely uninsured for its liability in a claim for serious injury. Under normal circumstances, the lack of a mandatory insurance requirement for tour operators to meet serious injury and fatal accident claims during a package holiday would be worrying. The effect of the Covid-19 pandemic means that

further insolvencies in the travel industry are highly likely and even inevitable, and protections must be put in place.

15. Compulsory insurance will help to create and maintain customer confidence in the package travel industry and ensure that consumers have a viable route to redress if the worst happens, giving meaningful effect to the provisions at Article 13 on organiser's responsibility for the performance of the package.

Refunds for packages that cannot go ahead

16. The 2015 Directive provides cancellation rights to consumers. Article 12(2)) gives the traveller the right to terminate (without paying a fee) in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affects the transport of passengers to the destination. There will be a full refund but no additional compensation.
17. From our members' experience, there have been disputes since the pandemic on the application and interpretation of these rights. There needs to be clarity about the circumstances in which a consumer can cancel and get a full refund, and the circumstances where a travel operator can deny the full refund. Travel operators have argued for a restrictive interpretation. For example, in the Welsh case of *Brynmawr Foundation School v Holiday World International Travel Limited (t/a Leisure World Schools)*³ a school's ski-trip to the USA in April 2020 was cancelled. It was argued by the defendant travel organiser here that the cancellation was more to do with the situation in the UK and not the USA, relating to the first lockdown and its restriction on non-essential journeys and activities, i.e. school trips. As such, the cause of the cancellation was not exceptional circumstances at the place of destination. The judge, in this case, held that there did not need to be a correlation between the extraordinary circumstances at the destination, and the traveller's decision to cancel – the fact that there were extraordinary circumstances at the destination was sufficient. This case highlights, however, the tactics used by tour operators/travel organisers to attempt to avoid providing a refund.
18. The pandemic has highlighted that the Directive's provisions surrounding cancellation have not worked as well as would have been hoped, and there must be clarity and certainty around this issue.

- Ends -

Any questions relating to this response should be addressed in the first instance to:

Alice Taylor

³ *Brynmawr Foundation School v Holiday World International Travel Limited (t/a Leisure World Schools)* (Cardiff County Court: Trial 7 December 2021, Judgment handed down 2 February 2022) <https://www.clydeco.com/en/insights/2022/2/covid-19-educational-travel-refunds-regs-12-7-and>

Legal Policy Manager

APIL

Alice.taylor@apil.org.uk

0115 9435417