



Exemptions for low-cost packages and extenuating circumstances?



James Hawkins, Nicholas Leah & Rory Turnbull, 3 Hare Court Chambers – Barristers

James specialises in personal injury claims, particularly those arising from accidents abroad, illness claims, claims against foreign insurers and recovery claims. He is regularly instructed by UK tour operators. James is recognised in the legal directories Chambers and Partners and The Legal 500 for his work in travel law.



Nicholas and Rory successfully completed their pupillage at 3 Hare Court in October 2023 and are busy developing a broad civil and commercial practice. They are regularly instructed in travel and aviation law matters.

Thoughts on two aspects of the Department for Business and Trade’s Call for Evidence. A central objective of the legislation regulating package travel contracts is to ensure a high level of consumer protection (as, for instance, stated by the Court of Justice of the European Union in *X v. Kuoni Travel Ltd* [2021] 1 WLR 3879).

In the recently published Call for Evidence by the Department for Business and Trade (DBT), giving consumers appropriate protections and enabling them to have confidence in booking package holidays are listed as some of the Government’s objectives. So too, however, are the objectives of supporting the travel sector to grow and innovate, and enabling some flexibility for business in deciding how to secure consumer protection. There is a recognition that in certain cases, as the

regulations currently stand, ‘the balance between consumer protections and burdens on businesses may not be right’.

The Call for Evidence, if implemented, would provide key exceptions from the provisions of the current version of the Package Travel and Linked Travel Arrangements Regulations 2018.

One area in which the Government is seeking views is whether packages sold for

a price below a minimum threshold should be exempt from the regulations. The Call for Evidence states that establishing a threshold would create a greater range of affordable package holidays as organisers would not have to bear the same regulatory burden as for a more expensive holiday. It also points out that the need for the protection afforded by the regulations in respect of insolvency and refunds may be less relevant ‘when the consumer has relatively less to lose through a lower value booking’.

Such a proposal is open to the criticism that it would create a two-tier system. Those consumers who only have the means to purchase cheaper holidays would not have the same protection as those who are able, and choose, to make more expensive bookings. Equally, even if the less wealthy consumer has less to lose, it does not mean that it is an amount that they could afford to lose. There could also be an incentive for organisers to be creative to ensure that the cost of a package falls below the threshold. Of course, much depends on how the minimum threshold is measured – be it by the price of the overall package, the average cost per person or some other measure.

A key consideration is how claims for injuries occurring during a low-cost package would be affected. If the proposal is – as it seems to be – for packages priced below the threshold to fall outside the scope of the regulations, could an injured traveller bring a claim against the English tour operator in the English courts? It might need to be argued that a tour operator’s contractual obligations (as a matter of English contract law, irrespective of the regulations) extended to the way in which a service was performed, rather than being an obligation simply to arrange for another to perform a service, as in pre-regulations cases like *Wong Mee Wan v. Kwan Kin Travel Services Ltd* [1996] 1 WLR 38. A solution could be that only certain regulatory requirements are disapplied for low-cost packages. Whatever the final proposal, this seems set to be a controversial area.

Another area of the Call for Evidence, with the disruptions caused by COVID-19 in mind, is whether the regulations should better cater for ‘extenuating circumstances’. The DBT is calling for views on how well the regulations operated during the pandemic. A specific example is the requirement to refund customers within 14 days of the termination of the holiday contract – described in the Call for Evidence as ‘very challenging in the context of the pandemic’, and an obligation held in *Competition and Markets Authority v. Truly Holdings Ltd* and others [2022] EWHC 386 (Ch) to have been an absolute one (seemingly applying even if bank details could not be obtained from a traveller).



The regulations provide for a defence to a claim for compensation for a lack of conformity with the contract – rather than for a refund of sums paid – in cases of unavoidable and extraordinary circumstances. Exceptions are therefore not unknown to the regulations. Indeed, it is when there are unavoidable and extraordinary circumstances that an organiser is permitted to terminate the contract, having the obligation instead to provide a refund within 14 days. Questions arise, however, as to what should constitute extenuating circumstances: how unusual does the situation need to be? Presumably it would need to be something more than the unavoidable and extraordinary circumstances that allowed the contract to be terminated in the first place. Will the focus be on the nature of the event giving rise to the termination, or the ability of the organiser to pay refunds swiftly? Perhaps the Government will even look to a price reduction model (perhaps akin to the CJEU’s recent guidance in *KT v FTI Touristik GmbH* [2023] 1 WLUK 39) rather than a refund one.

Consistent with the consumer protection aim of the regulations, there may continue to be a set period for a refund to be made even in an exceptional case like the pandemic. Even so, the fact that this question is being asked suggests there may be scope for some latitude in the future. This area, and the possibility of exemption from the regulations’ requirements for low-cost

Indeed, it is when there are unavoidable and extraordinary circumstances that an organiser is permitted to terminate the contract, having the obligation instead to provide a refund within 14 days.

packages, are two aspects of the Call for Evidence that indicate if not a weakening of the consumer protection aim, then at least an increased focus on the extent of the burden on organisers.

ABTA’s inaugural Financial Protection and Risk Management Conference will take place on 24 January 2024. Join us to receive valuable updates and guidance on tackling regulatory challenges facing businesses across the industry.

Find out more and register your place at: www.abta.com/events