

[2016] TLQ 4 THE NEW PACKAGE TRAVEL DIRECTIVE: THE DEFINITION OF PACKAGE AND ASSISTED TRAVEL ARRANGEMENT

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This article is the first in a series which examines the new Package Travel Directive¹. It looks at the six different definitions of 'Package' in the Directive as well as the definition of 'Linked Travel Arrangement' and discusses how the new definitions differ from the old one and how businesses will have to adapt to the new regime. It concludes that the definitions, in keeping with the philosophy of the Directive, significantly extend the protection offered to consumers and may require some businesses to change their business models and procedures.

In 2013 the 'original' version of this article was published. It began with a fairly well known proposition – that the new Directive was in equal measures both a landscape-changing whirlwind of modernised regulation, and yet also a rather benign update which didn't really mean an awful lot.

Nearly three years later it would be rather nice to say that the answers have popped up like the finest Dutch tulips, giving us the colour and depth we would all have expected from a quarter of a decade of debate, analysis and discussion from not only academics, but the ever-sharpened minds of the travel industry itself. After all, the original directive was seven pages, whereas the new Directive is contained in no less than seventy four, a lot of which is pre-amble from the Council acting as guidance as to exactly what is meant.

So, why then, after a quarter of a decade are there still so many questions? Let us take stock.

What is a package now?

Under the existing Directive/Regulations, in force since 1992, there is one definition of 'package':

¹ Directive (EU) 2015/2302 of the European Parliament and of the Council, of 25 November 2015 on Package Travel and Linked Travel Arrangements

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‘the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

- (a) transport;
- (b) accommodation;
- (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package,’

So, in simple terms there must be at least two out of three elements, namely transport, accommodation or other significant tourist services, sold as a ‘pre-arranged combination’ at ‘an inclusive price’.

The last part, the inclusive price element, is important, at least in the UK. It has been the requirement for an ‘inclusive price’ which has enabled ABTA and then Travel Republic² to win their cases against the CAA (and so bring us clarity on the current position), enabled the development of our dynamic packaging OTAs and arguably resulted in the introduction of Flight-Plus to bring financial protection (though nothing else) to these arrangements.

What is a package, under the new proposals?

Things are going to be different now, however. Let's start with something easy. Under the proposals the choice of elements (now called ‘travel services’) has increased from three to four, as car hire has been added as a distinct category of its own. So the old conundrum ‘can Fly-Drive be a package?’ is resoundingly answered ‘yes’.

There is a suggestion in the preamble that ‘other tourist services’ must equate in value to at least 20% of the package price, which would actually take many existing ‘packages’ out of regulation; for example a hotel ‘murder mystery weekend’; it is very unlikely that the price of hiring a few actors to perform the mystery, when divided amongst all the guests, will equate to 20% of the price. But (a) the preamble suggests as an alternative to 20% that the service could

² *ABTA v CAA* [2006] EWCA Civ 1299, *CAA v Travel Republic* [2010] EWHC 1151 (Admin)

be 'an essential feature of the trip', which would bring the mystery weekend back within the definition and (b) the 20% idea does not appear in the text of the Directive itself.

Another relatively simple change is that business travel is taken out of the definition of package, but only if the travel is booked by the *traveller's employer* and a *business travel specialist* under a *framework contract*. We can see all the words emphasised giving rise to issues of interpretation, but business travel providers are already preparing for a world where more likely than not they are not offering regulated packages.

From here onwards things start to become a bit more complicated. Under Art. 3 of the new Directive there are no less than six ways in which what a trader sells will be a package (and thus become an organiser) if at least two travel services are combined.

According to Art. 3(2):

'(2) 'package' means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if:'

'(a) those services are put together by one trader, including at the request or according to the selection of the traveller, before a contract on all services is concluded;

(b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:

(i) purchased from a single point of sale and those services have been selected before the traveller agrees to pay,

(ii) offered, sold or charged at an inclusive or total price,

(iii) advertised or sold under the term 'package' or under a similar term,

(iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or

(v) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with

whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.

Definition One. Art. 3(2)(a). Services put together by one trader

This is effectively the definition of a traditional package under the current legislation with the gloss added by the *Club Tour* case (Case C- C-400/00).

Definition Two. Art. 3(2)(b)(i). Where the services are purchased from a single point of sale within the same booking process.

This definition, as with the others that follow, applies regardless of whether the traveller has separate contracts with individual service providers e.g. hotels or airlines. Point of sale means a shop, website or telephone sales facility.

This is what happens when the traveller goes on to the website of many OTAs and when they visit a travel agency? Such transactions become 'packages'. More on this below, but as a 'sneak preview' the writers see this particular definition as being both strongest and that with the longest reach.

Definition Three. Art. 3(2)(b)(ii). Where the services are offered at an inclusive or total price.

It won't make any difference in future if services are shown with broken down prices, but then the total price is asked for – that is a package. And with that one move, both the *ABTA* and *Travel Republic* CAA cases are consigned to history!

Definition Four: 3(2)(b)(iii). Where the travel arrangements are called a package or similar term.

Is 'holiday' a similar term, we wonder? We have come across UK Trading Standards Authorities which have thought that way.

Definition Five: 3(2)(b)(iv). Where the contract entitles the consumer to choose among a selection of types of travel service and the trader combines them later.

In the UK this concept is not well known, but in other EU states a 'gift box' holiday is a more common phenomenon – the scheme usually being that the recipient is bought a 'Trip to London', and can then select flight, hotel, transfer etc from a pre-defined set of choices at a later date.

Definition Six: 3(2)(b)(v). Click-through arrangements.

A 'click-through' arrangement' is a package if the traveller's name and other details needed to make a booking are transferred to a second site when the first booking is made

The \$64,000 question here then is in practice whether the customer's details are passed through or whether the onward booking is a 'fresh' one that requires all data being inputted again.

So it can be seen that many more bookings, or combinations of services, will become packages, which makes sense as Paragraph 2 of the Pre-amble makes it clear that the aim of the Directive is to expand the overall protection for consumers and increasing the scope of what is a package goes to the heart of that aim.

Some have tried to argue there are in fact only two definitions of package and that for the second definition every one of points two to six above must apply. However, we think it is pretty clear that this is simply not what the new proposals say and a moment's reflection shows that it

would be a nonsense if all you had to do was avoid calling a holiday a package or similar and you could avoid the entire regime.

The proposals also make clear that there can be more than one organiser responsible for the same package if they have each fulfilled the criteria above. Any trader who combines and sells packages either directly or through or with another trader is an organiser. Art. 3(8) provides:

'(8) 'organiser' means a trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader; where more than one trader meets any of the criteria referred to in point (b) of paragraph 2, all of those traders are considered as organisers, unless one of them is designated as organiser and the traveller is informed accordingly;'

What that means in practice is that the industry is going to have to be very clear about liabilities when working together to sell holidays to consumers. Formal agreements containing indemnities will become even more common than they are now and perhaps even more detailed in terms of how the relationships of partner traders will work.

Linked Travel Arrangement (LTA)

It is still our suspicion that the Commission saw the UK's Flight-Plus regime (i.e. the scheme which gives to consumers financial protection but the trader does not take responsibility for the quality or safety of the trip), liked it and used it to give life to a whole new concept - the LTA (originally Assisted Travel Arrangement). Indeed, Article 17 does suggest that the main thrust of an LTA is with regard to financial protection. However, whatever the intention was, it seems to us that the new definition of package is so wide it doesn't leave much room for LTAs at all – in fact practically all Flight-Plus arrangements are now likely to be defined as packages.

Let's look at the definition of an LTA under Article 3:

(5) 'linked travel arrangement' means at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package,

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resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates:

- (a) on the occasion of a single visit or contact with his point of sale, the separate selection and separate payment of each travel service by travellers; or
- (b) in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.

So, an LTA can be any combination of the four 'travel services' (e.g. rail plus car hire, hotel plus tourist services etc) so it is much wider than Flight-Plus, which (obviously) must include a flight. The '24 hour rule' (i.e. that add-ons to the flight made up to 24 hours either side of the flight booking are taken into account), so critical in Flight-Plus, has not been included. It is clear from the wording that only retailers can sell an LTA. For this purpose, a retailer is a trader who is not an organiser, who assists the consumer in making separate contracts for travel services with separate providers. Also, an LTA requires two separate bookings to be made on a single visit or contact at the point of sale, or where there is a targeted click-through but the consumer's name and details are not transferred across.

So far so good, but note, a sale can only be an LTA if it is not already caught as a package. And there, it seems to us, is the problem. Anyone who currently thinks of themselves as mere agents can be classified as organisers in three easy steps when looking at the definitions of what is a package under Article 3. Here is the quick, easy and clear path that gets one to that destination:

- (b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:*
 - (i) purchased from a single point of sale within the same booking process,*
 - (ii) offered or charged at an inclusive or total price,*

This is of course number two in our list of six definitions of a package discussed above.

That is exactly the kind of business model that many agents currently use and which has under current rules been said not to be a package. (See again *ABTA v CAA & CAA v Travel Republic*).

The difference is largely the inclusion of 'total price' in b(ii). Talk of cows and horses (a nod here to District Judge Nicholas Evans in *CAA v Travel Republic*) will not matter anymore, nor will the famous 'supermarket analogy' used in *ABTA v CAA* to demonstrate the (then) essential difference between an inclusive and a total price; and the judgments that have been the leading cases on what is a package in the UK will soon start to gather dust.

So what is an LTA? In truth we have yet to see a reasoned argument for its use. The closest we can come is where a high street agent books, as a retailer, an organiser's package for a customer, who is then encouraged to go and enjoy a coffee & Danish, come back and then a taxi transfer from their home to their departure airport is booked as an additional feature. That would escape the various definitions of package but is somewhat contrary to the idea of being able to serve consumers efficiently and meet a retailer's objective of upselling and closing an additional sale.

After all, is a consumer in shop, or on the telephone, really going to be happy to book a flight, without any guarantee that they will also have a desirable hotel available at an acceptable price, or vice versa?

Conclusions

In the UK, the usual enthusiasm for consultation and implementation has been stalled as a result of largely unrelated political reasons but there is no reason to believe that a Regulation transposing the Directive will not be launched in time for the 2018 deadline.

The answer to the 'Is it a game changer?' question posed at the start of this article is entirely dependent upon where a business sits. An organiser maintaining its business model may not really see much change, whereas a traditional OTA may consider their world really is changing around them.

LTAs continue to shape up to be the model that never was, although perhaps individual member states will find a way to use them in ways hitherto unforeseen.

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In the meantime if nothing else, businesses have now had literally years to prepare for the implementation. The choices as to how to operate holiday businesses are now much more limited in our view – it is not quite as stark as being either an organiser or retailer, but those are the obvious options. Realistically Europe will have a much larger number of organisers (as defined) in a couple of years time with all the obligations (but also opportunities) that come with it.

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