

**THE EU COMMISSION REPORT ON THE APPLICATION OF DIRECTIVE (EU) 2015/2302:
THE NEW PACKAGE TRAVEL DIRECTIVE**

Sarah Prager

On 26th February this year the Commission published its review of how the new Package Travel Directive is being implemented by Member States. The report is not merely an interesting overview of the implementation of the Directive, however; it is an aid to the understanding and interpretation of the various provisions of domestic law intended to give effect to the Directive. It is not, of course, binding on the English courts (or, for that matter, on the courts of the other Member States); but it is of assistance in determining the intentions of the Commission as to how the Directive is designed to operate.

Refunds

The report makes the point that one of the defining features of the new, as opposed to the original, Directive is the provision of stronger cancellation rights and more assistance to travellers when something goes wrong during a holiday; these new, improved, protections will be in the spotlight in the coming months and years as the Great Refund Saga rumbles ever-closer to litigated resolution. In particular, because the provisions of the new Directive are more consumer-focused than those of the Directive which gave rise to the Package Travel, Package Holidays and Package Tours Regulations 1992, it is doubtful that the 'flicker of hope' line of authorities originating in the decision in *Lambert v Travelsphere* [2005] CLY 1977 will survive the passage of the Package Travel and Linked Travel Arrangements Regulations 2018. The Commission considers the effects of the pandemic and in particular the fact that a large number of would-be tourists still have not received refunds, and reiterates that the pandemic did trigger the right to a refund or, at the consumer's selection, vouchers. There is concern over the interplay between the traveller's right to obtain a refund from an airline, a tour operator and any relevant insurer, but the Commission concludes that this 'requires further analysis', and warns the industry,

“The upcoming in-depth analysis planned for 2022 will not aim to lower consumer protection. On the contrary, the Commission will assess how the high level of consumer protection provided by the PTD can be ensured, how the rights of consumers can be effectively enforced at all times and how a fairer sharing of the burden among economic operators along the value chain could contribute to this objective.”

Insolvency

The Commission devotes an entire section of the report to the collapse of Thomas Cook in September 2019, which it says ‘sent shock-waves through the whole tourism sector’. The depressing statistics are repeated once more: 21,000 employees, 600,000 holidaymakers, 140,000 repatriations, £350million of UK ATOL settlements alone, and so on. The Commission concludes that ‘the insolvency protection systems appear to have functioned well’, in particular the repatriation arrangements, although a significant number of holidaymakers are still reportedly awaiting refunds for trips untaken, which appears to this author to be a serious failing, given that they ought to have been refunded ‘without undue delay’ over a year ago. The plight of those litigants (and lawyers) owed money by the tour operator is outwith the scope of the report, of course, and other commentators have considered [elsewhere](#) the question of whether a tour operator ought to hold insurance to cover these risks, failing which a very large number of litigants have been left with no meaningful recourse.

But the Commission identifies another concern; it appears that insurers are pulling out of the insolvency protection market, so that in future it may become increasingly difficult for entities affected by the operation of the Directive and the implementing Regulations to obtain cover even for repatriation and refunding. The Commission proposes an EU-wide Guarantee Fund as one possible solution; it remains to be seen whether the UK could take advantage of this scheme, but the approach of the Commission to the UK’s proposed accession to the Lugano Convention is not promising in this regard. The report also repeats the call for compulsory insolvency protection for air carriers, which seems to this author to be increasingly irresistible, particularly in the light of the Great Refund Saga.

Conclusion

The report provides interesting reading for those concerned with how the courts are likely to balance the rights of consumers, airlines, tour operators and insurers. Although the Commission does not offer any solutions, it has identified the problems faced by all of these groups as a result of the pandemic and of insolvency, which regrettably is surely likely to trouble us further in this context as governments' furlough and state aid schemes come to an end. At present the indications are that the Commission will not tolerate any reduction in consumer protection, taking the view that governments can underwrite the cost to tour operators and others via state aid; but this analysis is only as strong as the state aid provided, which to date has been woefully inadequate to the task, or so the tour operators maintain. But if we have learnt one thing from the Thomas Cook experience, it is this: pushing tour operators into insolvency benefits nobody and results in far greater unfairness than might be caused by the provision of state aid or a *slight* reduction in consumer protection legislation.

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