

# THE UNIVERSITIES' MUTUAL

Tailored Solution for Insurance Services

## THE PACKAGE TRAVEL REGULATIONS AND THEIR APPLICABILITY TO UNIVERSITIES AND COLLEGES

### 'Otherwise than occasionally'

The Package Travel, Package Holidays and Package Tours Regulations 1992 (the Regulations) will only apply if the organiser organises 'otherwise than occasionally' which unhelpfully is not defined in the Regulations. That said, the preamble to the new European Directive which is now expected to come into force late 2017/early 2018, indicates that 'occasionally' means not more than a few times a year.

There is no case law on this point. Commentators suggest that this is intended to be judged as a matter of fact or degree in the light of individual cases and that it is a matter of frequency rather than regularity. An example to this end given in one of the leading textbooks on Travel Law<sup>1</sup> suggests that a climbing association who frequently organises packages for its members is likely to be caught but a school which organises just one annual school trip might not. The point is that something can be done 'regularly' but still only occasionally. The situation might be different in the case of universities and colleges who are regularly AND frequently organising research trips for their students (although question here whether the definition of 'package' would be fulfilled – see further below).

A commercial element is evidentially important in determining whether or not something is occasional but is not definitive – otherwise the Regulations would be limited in scope to organisers acting in the course of their trade or business.

### 'Selling or offering for sale in the UK'

There is no requirement that the organiser makes a profit in order to be caught by the Regulations (see above re the commercial element). It is enough that the consumer or person on whose behalf the organiser is acting is based in the UK in order to fulfil this element of the definition.

### A 'package'

The Regulations define 'package' as:

*"the pre-arranged combination of not fewer than two of the following 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."

The Regulations do not define what is meant by a 'pre-arranged combination'. However, it is generally accepted that the two or more components of the package can be 'pre-arranged' and 'combined' at any point prior to conclusion of the contract with the consumer and still fulfil this element of the 'package' definition. In practice, this means that the definition of 'package' encompasses arrangements put together at the direction of the consumer as well as the more traditional 'package' type arrangements that are put together by the tour operator or travel agent prior to promotion in a brochure or on a website – the consumer typically being unable to select or de-select any particular component of the package (save for choosing dates and flight times for example).

What is 'accommodation' is more straightforward. There is no requirement that accommodation should account for a significant proportion of the package. The ECJ has held that *"the duration of the accommodation is of no importance in the scheme of the directive"*, save as expressly stated in the Regulations, that the package must be longer than 24 hours or include an overnight stay. Note for universities/colleges, limiting the type of accommodation falling under the Package Travel Directive (PTD), the ECJ has held that an extended stay with a host family does not fall within the intended meaning of accommodation within the EU Directive from which the Regulations derive.

What constitutes 'other tourist services' can be more difficult to determine. In order to qualify, the service must not be ancillary to the provision of accommodation or transport and must account for a significant proportion of the package. 'Significant' is again not defined in the PTD or the Regulations. However, commentators suggest that the 'other tourist service' will be a qualifying component if it is one which when taking the package as a whole and looked at from a quantitative (i.e. measure in time) and qualitative perspective, it is more than minimal, incidental or of casual importance to the consumer and their package experience.

In practice what this is likely to mean is that if the service is specifically identified and promoted in the brochure or through the tour operator's website, even if in terms of time it is of only limited duration in the context of the package as a whole, when looked at from a qualitative perspective, it is likely to be regarded as 'significant'.

<sup>1</sup>Saggerson on Travel Law and Litigation, Fifth Edition (2013), Wildly, Simmonds & Hill Publishing

On that basis, it is likely that a pre-booked excursion, a health club and spa, a lecturer or guide are all likely to be qualifying 'other tourist services'. The provision of refreshments, in-transit entertainment, laundry services, room service, swimming pools, the provision of an additional luggage allowance are likely to be considered as ancillary to either the transport or accommodation service and are unlikely to qualify as 'other tourist services'.

### 'Inclusive price'

In English law, the definition of what is or isn't an 'inclusive price' is highly fact sensitive and will very much depend on the individual facts of the case. Evidential pointers will include:

- How the arrangement is advertised?
- How many contracts are formed?
- How the price is calculated?
- How payment to the individual suppliers is facilitated?
- How is the consumer invoiced?

The Regulations explicitly state that the submission of separate accounts does not necessarily mean that the price is not 'inclusive' for the purposes of fulfilling the definition. In an attempt to clarify matters, the English courts have suggested that the overarching question should be "*whether the services are being sold or offered for sale as components of a combination or whether they are being sold or offered for sale separately but at the same time*" (CAA v ABTA [2006] EWCA Civ 1356).

It seems apparent in the example cited above and discussed in further detail below however, that it would not be open to the staff and students to select or de-select any part of the package and that the 'price' charged is an 'inclusive' one for all elements.

### The Regulations – Information Requirements

This summary does not go into all of the information requirements/liability provisions laid down in the Regulations, save to say that there are many.

You will probably find that you are already satisfying most of the information requirements set out in Regulations 5 and 7 – but note that you must give certain information in writing.

Please see the Regulations themselves for further detail:  
<http://www.legislation.gov.uk/uksi/1992/3288/contents/made>

### Regulation 15 – Liability for proper performance of obligations under the contract

The main Regulation to be aware of in terms of liability is Regulation 15.

If the Regulations apply (i.e. all of the above is satisfied) then primary civil liability for the performance of the contract, including the negligent acts of suppliers, will fall to the 'other party to the contract' with the consumer, which is usually the organiser, but can also be the retailer (i.e. a travel agent who sells on behalf of the organiser) (this is a question of fact), unless the loss/damage suffered by the consumer is due to the fault of the consumer, an unconnected third party or force majeure type event or circumstance.

It would then be for the organiser to either join or pursue separately later the supplier for any losses suffered as a result of a claim made in the first instance against the organiser by the consumer.

The standard to be applied is one of reasonable care and skill – judged on the local standards of where the contract was performed.

### Regulation 16 – Financial Protection

One of the more onerous requirements of the Regulations is that the organiser must obtain security for the entire value of the package and to repatriate the consumer to the place of departure in the event of the insolvency of one of the suppliers. Essentially, what this means in practice is that you would have to refund the students for any element of the package that does not take place due to supplier insolvency and have enough money to return them to the place of departure in the event for example that the transport provider becomes insolvent and is unable to carry out the service.

The Regulations suggest that there are three ways of doing this – 1) insurance, 2) trust account and 3) bonding. We appreciate that where the suppliers require payment or part-payment upfront, setting up a trust account is not practical therefore you may wish to obtain a bond or seek advice on obtaining suitable insurance cover in advance.

### The new Package Travel Directive

The text of the new Directive is in draft form only but is due to be finalised shortly. The key features of the new Directive are the expanded definition of 'package', more onerous information requirements and changes to financial security.

The preamble to the Directive suggests that packages offered or facilitated occasionally on a not-for-profit basis to a limited group should be excluded from the scope of the Directive. A specific example given being "*trips organised not more than a few times a year by...schools for their members*". The key message to take away here being the 'frequency' point again. On the basis of the limited observations referred to above – it seems likely that unless your college/university is organising only one or two trips a year, you will be doing so other than occasionally.

The essential features of the new Directive remain the same as the current Regulations, save that there are more onerous information requirements and that the scope of the Directive is generally more consumer friendly. The financial protection requirements essentially remain unchanged (the changes being to the Europe-wide recognition of security schemes between member states).

Laura Halfhide,  
Hill Dickinson LLP