

CONSULTATION ON DRAFT
GUIDANCE FOR: THE PACKAGE
TRAVEL, PACKAGE HOLIDAYS AND
PACKAGE TOURS REGULATIONS
1992: DEFINITION OF A PACKAGE

Government response

JANUARY 2008

URN 08/536

Introduction

1. BERR issued a consultation paper on 2nd July 2007 containing draft guidance for business on the "definition of a package" in the Package Travel, Package Holidays and Package Tours Regulations 1992 (PTRs).
2. The consultation closed on 13th August 2007. 18 responses were received. BERR is grateful for the time taken by respondents to consider the questions we asked. All responses have been analysed and considered in the production of the revised Guidance, attached at Annex A.
3. A list of those who were consulted directly is at Annex B. The consultation was also available on the BERR website and a consultation meeting was held on 16th July 2007. Bilateral meetings were also held with some organisations on request.
4. A list of respondents is at Annex C. A summary of responses can be found below. Some organisations replied on behalf of their members, having first consulted them. If you would like to see a particular response please contact Berenice Napier at BERR berenice.napier@berr.gsi.gov.uk

Executive Summary

5. Responses to the consultation in general indicated support for the need for Guidance. We have revised the Guidance to take into account as many of the comments made as possible, although where these were contradictory, we have taken a view, based on the Judgment and the Government's policy, on how to reflect these.
6. The Guidance is being published together with this response and is effective immediately. An Impact Assessment is attached at the end of this response.
7. If there is future litigation that materially affects the Guidance, we will review whether it remains accurate or needs amendment. In addition, it is likely that following any future change to the Package Travel Directive and to the PTRs as a result, that the Guidance will also require amendment.

Background

8. Package travel is currently defined in the Package Travel, Package Holidays and Package Tours Regulations 1992 (PTRs), with this definition reflecting that in the Package Travel Directive (PTD)¹.
9. Following a Court of Appeal decision in 2006 in The Association of British Travel Agents Ltd v Civil Aviation Authority case ("the Judgment"), the

¹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

Department (BERR) considered whether it needed to adjust part of its existing guidance to the travel industry relating to package travel.

10. BERR published a consultation on 2nd July 2007 containing new draft Guidance, which considered the definition of a “package” in relation the examples and explanation in the Judgment as to when the Regulations apply to particular ways in which leisure travel is organised, and when they do not. The Guidance set out the points we believed to be the key points for the travel industry.

Summary of responses to consultation questions

11. Overall responses to the consultation generally supported the view that there is a need for Guidance. One respondent disagreed because they considered the travel industry would use the Guidance as a means to facilitate de-packaging. We disagree with this view. The Guidance does not change the law or the obligations of business, all it seeks to do is to explain the existing law.

12. Many detailed suggestions for changes to the text have been suggested, and some of these we have been able to incorporate. Where we have not been able to incorporate comments we have given reasons why we have not done so.

13. Some comments have been made that are outside the scope of the Guidance. These include suggestions that the PTRs and the PTD need amendment, because the assessment of whether a package has been sold rests on a number of subjective tests. A few respondents questioned how sales advisers and travel agents can be expected to determine on such a basis whether or not they are selling a package. The European Commission are of course reviewing the Consumer Acquis, and the PTD is one of the 8 consumer Directives under review. The Government agrees that a comprehensive review of the PTD is required in order to look at the considerable market changes since its implementation, and we will be ensuring that the Commission is informed of the impact of these in the UK.

Question 1: Do you have any comments or suggestions in relation to the opening sections of the draft Guidance (paragraphs 1 to 8)?

14. Please note that the relevant paragraphs are now 1 to 9 in the revised draft.

15. In general respondents agreed with the aims of the introductory paragraphs. Specific comments are summarised below.

16. A few responses asked for clarity about what Guidance is being replaced as some respondents thought the reference was to the CAA

guidance on the ATOL regulations. The Guidance being referred to is that on the BERR website [here](#) . This is commonly known in the travel industry as the “Yellow Book” and provides guidance about the operation of the PTRs. Only the parts of the Yellow Book relating to the definition of a package have been withdrawn, and the new Guidance will replace it. Other parts of the Yellow Book will remain as before.

17. One enforcement authority suggested that these paragraphs should explain the consequences of failure to comply with the PTRs. These are dealt with elsewhere in the Yellow Book, referred to in the paragraph above, so we do not think it necessary to repeat them in this part of the document.

18. Flowchart – some enforcement authorities commented that flowcharts would be useful for business, but business did not suggest them. We have considered flowcharts, however it became apparent that the subjective nature of the tests for determining whether a package exists, do not lend themselves to the more definitive nature of a flowchart. We have therefore decided against providing them.

19. Paragraph 2 – One B2B travel trade body said that the Guidance was not couched in terms that were useful for the B2B sector. In paragraph 2 we have therefore clarified that the PTRs do apply to the B2B sector and added a footnote to indicate that in this sector, references to holidays should be read as to “business travel arrangements” instead. The B2B sector should also note that the Unfair Commercial Practices Directive, referred to a number of times in the Guidance and in this document, does not cover business to business transactions.

20. Paragraph 3 – Trading Standards Institute suggested that we add a link to their website into the Guidance. This is a useful addition and we have therefore done this. We have also checked the other links as there were suggestions that not all of them worked.

21. Paragraph 5 – One respondent suggested adding “albeit at the same time” at end of last sentence. Given the introductory nature of this paragraph we do not think it necessary to add further detail at this point.

22. Paragraph 6 – Two respondents suggested the Guidance should clarify that transport applies to all forms of transport, not just air. We have therefore amended the text.

23. Paragraph 8 (now paragraph 9) – Two respondents questioned the implication that pre-arrangement and inclusive price are a single test. In their view the Judgment says they are separate. We disagree with this view. We have amended the text to refer to paragraphs 24 and 26 of the Judgment which we interpret as meaning that if there is a pre-arranged combination of travel services then the price will be an inclusive one.

Question 2: Do you agree with our view, as expressed in paragraphs 9 to 16 of the draft Guidance, of the explicit examples presented in the Judgment (reproduced in Boxes 3, 4 & 5 in the draft Guidance)? If you do not agree with our analysis, please say why. It would be very helpful if you could provide your reasoning for any alternative analysis, including any “real life” examples to illustrate your position.

24. Please note that paragraphs 9 to 16 are now paragraphs 10 to 17 in the revised draft.

General comments

25. Six respondents specifically said they generally agreed with our view of the examples presented in the Judgment. Nine respondents made comments, summarised below. No respondents specifically disagreed with our view on this question.

26. One enforcement authority considered the boxes with examples too difficult for businesses to understand. Two other respondents thought the examples too simple and of little use in more complex cases.

27. A number of respondents commented (in relation to various of the paragraphs below) that it is very important that consumers are informed whether or not they have purchased a package. We agree this is important – and is likely to be relevant in terms of the requirements of the Unfair Commercial Practices Directive. Please see the Guidance at paragraphs 27 to 32 for further information on this point.

Specific comments

28. Paragraphs 9 – 11 (new paragraphs 10-12) – one respondent suggested that it is unnecessary and incorrect to suggest that there are 2 examples in the Judgment of when a package is created and one when it is not. It was our intention to refer to the examples from the Judgment that are set out in Boxes 3 to 5, and not imply that these are the only examples relevant to the travel industry. Box 3 does set out a number of reasons why the price of a combination may not be the aggregate of prices for separate components. One respondent was concerned that Box 3 implies that criteria for determining a package, or not, depends on whether consumer is charged less or more than aggregate of component prices. We do not think this is what the Judgment is trying to achieve here. Box 3 highlights just one of a number of factors that will need to be taken into account in deciding whether a sale of travel arrangements is a package or not. So it does not represent the whole picture.

29. Box 4 – one respondent asked for more clarity over the words “customer accepts without further enquiry”. We think it unlikely that there is any particular meaning to these words other than to indicate, for the purpose of the example, that there was no further discussion about alternative arrangements and a different conclusion reached.

30. Paragraphs 13 and 14 (new paragraph 14) – three respondents commented that these paragraphs repeated each other. We have therefore amended and brought into one paragraph. Three respondents also asked for more clarity over sequencing of sales and asked what separation in time or distance would be needed to qualify as a separate occasion. The Judgment does not give us any indication on these points, so it is difficult for us to provide clarity. A common sense approach would suggest that a Court may take a view on the circumstances of a sale, whether it was at a travel agents for example or whether online or over the telephone and then consider what is meant by the term.

31. One respondent said the guidance should be clearer that there will be many cases where the examples are not relevant and in these cases evidential pointers and good practice should be used on a case-by-case basis. We think that paragraph 17 makes this point clearly enough already.

32. Paragraph 15 - one respondent suggested an amendment to improve the clarity of this paragraph, the new words underlined below “...the settling of the three separate invoices by a single payment does not create an ‘inclusive price’, and so does not bring the whole series of transactions within the definition of a package...”. We have included this suggestion.

Question 3: Do you agree with our analysis of the Judgment to the extent that we believe we cannot provide firmer guidance as to the applicability of the Regulations on a case-by-case basis? If you do not agree, please provide examples where you believe the guidance could provide a firmer view based on the content of the Judgment.

33. There was an even split of opinion between respondents on whether firmer guidance could be provided or not.

34. Those respondents who considered firmer guidance was possible generally acknowledged why it may be difficult to do so, but thought that broader statements of principle could be achieved.

35. In our view we have gone as far as possible in giving firm guidance, in an area where much depends on the facts of individual cases.

Question 4: Do you agree that we have given appropriate “weight” to the “evidential pointers”? If not please provide your reasoning and alternative suggestions.

Question 5: Do you agree that we have presented the “evidential pointers” accurately and fully? If not, please provide alternative suggestions.

36. A significant number of comments were received on the evidential pointers. A few respondents referred to the order in which the pointers are presented and suggested that a chronological approach that followed the sales and marketing process would be helpful. We agree this might be helpful and have adjusted the order accordingly. Some respondents thought that the pointers should be given more weight and prominence.

37. Customer perception – three respondents pointed out that the Judgment says that customer perception “may be” a powerful indicator, not, as in the consultation text “is” a powerful indicator. We agree and have changed the text to say “may be”. In addition, two respondents thought that customer perception is likely to change between the time at which a holiday was purchased and when something has gone wrong with the holiday. They suggest that customer perception should be used only when other pointers have been reviewed and “exhausted”. We have therefore reflected in the Guidance that customer perception is likely to be influenced by the way in which the travel arrangements are sold to them, but the point remains that the Judgment says it may be a powerful indicator of the nature of the transaction. One respondent suggests that where business is purchasing travel arrangements they generally know exactly what they are purchasing. We agree that this may well be the case, but in fact many small or micro-businesses may well also purchase travel arrangements and are likely to do so from as similar level of knowledge as an average consumer.

38. Availability of travel services as separate services – one respondent suggested alternate text to provide greater clarity. We agree with their suggestion and have therefore amended the text to “**Non-availability of travel services as a separate service outside the combination** (Paragraph 25) – for example if the services of a local representative would not be available as a separate service outside a combination but would be available within a combination, there is unlikely to be any difficulty in concluding there is a package.”

39. Composite Billing – one respondent suggested an amendment to make clear that the substance of the arrangements are not affected by composite or separate billing. Two other respondents also made this point in relation to paragraphs 9 to 11. We agree that such an addition would be helpful and have amended the paragraph accordingly.

40. Payment - given the amendment made to the composite billing pointer (see paragraph above), we have deleted this evidential pointer so it does not repeat the same point.

41. Describing the services as a package or as dynamic packages – one enforcement authority said this pointer contradicted Box 5, which in their view described the sale of a dynamic package. We do not think there is a contradiction. This pointer is about how the travel arrangements are described to the consumer and how this impacts on their perception of what they have purchased. Box 5 just describes the purchase of separate travel arrangements, with no discussion of how it is described to the consumer. We have recast this pointer so it more closely reflects the point made in the paragraph 47 of the Judgment.

42. Request to buy a holiday – one respondent suggested that the text should end with “..but it may not be” so it follows more clearly on to the next section. We do not think this addition is necessary as the text already says that it is “...likely to be a package” not that it “will”. Another respondent said that this pointer is not relevant to the B2B sector as it is not a “holiday” that is requested in this case. We do not think any adjustment is necessary to take this into account – if a request for a holiday is not made in a particular case, then this will not be an evidential pointer.

Question 6: Is it helpful to include this reference to the meaning of pre-arranged in the Guidance?

43. All respondents who commented agreed this is helpful. This section remains unchanged.

Question 7: Do you agree that seeking to translate the terms of the Judgment to internet sales is useful for the industry?

44. All respondents who commented agreed that it is useful to try to apply the Judgment to internet sales.

Question 8: Do you agree with our guidance on the general approach to be adopted by internet traders in this market (paragraph 20, new paragraph 21)?

Question 9: Do you agree with our analysis of how the explicit examples in the Judgment can be reflected in web-based selling (paragraphs 21 & 22, new paragraphs 22 & 23)?

Question 10: Do you agree with our view of the relevance of the Judgment’s coverage of “evidential pointers” to practice in respect of web-based sales (paragraphs 23 to 26, new paragraphs 24 to 26)? If not, please explain which elements you would present differently and why.

45. Three respondents said that consumers should be made aware of the nature of the sale and that this should not be hidden in small print, or in general terms and conditions. We agree that this is important. This point is

dealt with in the context of the Unfair Commercial Practices Directive section below.

46. One enforcement authority said that if the industry are to use words such as “this is not a package” it will encourage some to use them irrespective of whether it is or not. They suggest the last sentence of paragraph 20 (now paragraph 21) should be removed, which refers to the need for clear and unambiguous statements about what the consumer is purchasing. However another enforcement authority thought there should be a clear indication at the end of the selection process whether a package has been purchased or not. We think that passing clear information to consumers is vital. There will always be opportunities for rogues to take advantage of consumers in certain situations and no amount of Guidance will completely control this. It is surely beneficial for consumers to be told clearly what they have purchased, and indeed in the event that a consumer is told (clearly) that something is not a package, when in fact it is, that will make enforcement very much easier as there will be proof that the customer was given incorrect information. In addition, telling a consumer something is a package, when it is not, would also be likely to be a breach of the Unfair Commercial Practices Directive.

47. One respondent said that the Guidance should be clearer on whether the sale of individual components, on the same website is a package or not. Similarly, other respondents said that the question of linked websites should also be considered. The difficulty with this is that the question of whether something is a package does not rest on whether the separate components are on the same website or not. Although common sense might allow us to conclude that consumers’ perception is likely to be influenced by this fact, we doubt that translating this into Guidance that takes account of the many different variations in the sales process is likely to be helpful.

48. Paragraph 24 - two respondents thought this paragraph went too far in regulating how a website could look. This was not the intention, but we have decided to remove it as the information it contains is covered in other parts of the Guidance.

Question 11: Do you agree with our view that the Judgment strengthens the case that business should be aware of good practice of the type set out in Box 6 on page 8, and should seek to apply it?

Question 12: Do you agree that the good practice set out in Box 6 is reasonable and achievable? If not, please explain why.

49. Four respondents agreed with the general principle that good practice is a good idea. Four respondents disagreed or thought that the travel industry would take little notice of it.

50. There were many comments on this section covering the following general points:

- One comment that it may be useful if the industry were to consider establishing a “Code of Practice” at law.
- The good practice is too simplistic, with large parts of industry already following this type of good practice, including some not selling packages.
- Sales of flights only by airlines whose customers may think they are covered under ATOL, but are not, should also be covered by the good practice.
- A suggested alternative that travel companies are encouraged to adopt a best practice of informing customers that they take care to understand who is providing their travel services and the terms and protections that apply to them and they should ask if they have any doubts.
- Three comments that while good practice is a logical approach, the problem is with those who flout a voluntary approach, so they question its value.
- Good practice guidance does not work in relation to the B2B sector.
- One enforcement authority thought good practice should not be optional and would prefer to see a summary at the end of each section.
- Two respondents thought the good practice guidance was not proportionate and difficult to implement.

51. In revising the Guidance following the consultation we have sought to give much clearer assessment of the requirements of the Unfair Commercial Practices Directive (see below for details). In doing so we have come to the view that much of the intent behind the good practice is in fact covered by the requirements of UCPD, which as it is a legal requirement, is of greater impact than good practice guidance can be. We have therefore decided to delete the good practice.

Question 13: We have included a section (paragraphs 27 to 29, now 27 to 31) to alert the industry to the provisions of and the implications of the Unfair Commercial Practices Directive. Do you think this will be helpful?

52. Eight respondents agreed it is useful to refer to the Unfair Commercial Practices Directive. One respondent thought it was not useful as it was not specific enough to the travel industry. Enforcement authorities suggested examples that linked to the travel industry, and we have therefore expanded the section to try and explain the implications for the travel industry more clearly.

53. Four respondents said that UCPD should be applied across the leisure industry to ensure a level playing field. In fact it will apply, when it comes

into force in the UK in April 2008, to all business to consumer transactions, whether in the leisure industry or not.

54. Specific guidance for business will be available on the BERR and OFT websites early next year.

55. UCPD is of direct relevance to all business to consumer transactions throughout the European Union and will introduce new provisions for these transactions in the United Kingdom. We have therefore included the key provisions of UCPD in the Guidance that place important obligations on businesses selling travel arrangements.

Impact

56. One trade body questioned the relevance of calculating the impact of Guidance. In their view "Whilst we understand that there are now requirements imposed on the Department in relation to producing Regulatory Impact Assessments even in relation to guidance, we question whether the starting point should indeed be to calculate the impact of producing guidance. By implication, guidance should do no more than guide on the existing rules and should therefore only add clarity, not cost to business. If the guidance demonstrates that businesses are currently trading improperly then even though a cost may be implied, that is not a negative factor to be taken into account within the Regulatory Impact Assessment, but indeed a positive recognition that some businesses are not properly complying with the law. It is therefore our view that in these circumstances, a formal Regulatory Impact Assessment is largely meaningless, and should not be a factor to be born in mind when determining whether to introduce any guidance."

Impact relating to firms who either need to comply, or do not need to comply, with the Regulations

Question 14 - Is it possible to quantify the number of businesses who do not need to change their view on whether their travel arrangements fall within the PTRs or not?

57. Nine respondents replied to this question. Of those who did none were able to quantify the number of businesses. One respondent thought that responsible companies will have already sought guidance from trade bodies or external legal advisers and will therefore be compliant already. The impact will only be on those companies who were not already compliant with the PTRs.

Questions 15 and 16: Is it possible to quantify the number of businesses affected and the costs where the Guidance indicates to a firm that their services actually fall within the PTRs, when previously they were not complying with the Regulations?

58. One trade body indicated that approximately 25 out of 150 members will need to fine-tune their operating methods as a result of the Guidance. Another trade body (and one of their members) estimates that the cost of financial protection and compliance with it under the PTRs is about £2 per customer, for short haul holidays (more for long haul). The cost of compliance with all other parts of the PTRs is around £4 to £5 per customer, for short haul holidays. However, these are of course costs relating to compliance with the PTRs, not to the Guidance. In practice we think it very unlikely that those selling travel arrangements will consult the Guidance in relation to every holiday they sell.

Questions 17 to 19: Is it possible to quantify the number of businesses where there is a positive impact of the Guidance in indicating to firms that they no longer need to comply with the PTRs, when previously they were. Is the Guidance sufficiently clear to provide a reasonable assurance to business that the services in question do not after all fall within the Regulations? If so, can this assurance be translated into savings for business as they will no longer have to comply with the Regulations, and if so can you quantify these savings?

59. No respondents were able to quantify the number of businesses where there may be a positive impact. Three trade bodies commented that their Members had already had access to advice, which was unlikely to be altered by the Guidance.

60. Of the respondents who commented, about half thought that the Guidance was unlikely to be sufficiently clear to provide reasonable assurance to business, especially given the emphasis given in the Judgment and Guidance on customer perception. Some respondents said that this was not the fault of the Guidance, but with the definition in the Regulations as it stands at present. Three respondents thought the Guidance was clear enough.

Impact relating to familiarisation with the Guidance

Question 20: Is it possible to quantify the cost of this initial familiarisation?

Question 21: Is it possible to quantify the possible change in ongoing familiarisation costs to business?

61. Of the nine respondents who commented none were able to quantify the cost of any initial familiarisation.

62. One trade body and three travel businesses thought that businesses would already have reviewed their practices in the light of the Judgment and

that therefore there would only be a small time and cost involved in reviewing the Guidance.

63. Trading Standards Institute made the point that there will be a cost to Trading Standards Services and a need for TSOs to become familiar with it. LACORS thought the cost to local authorities could be estimated at two officer hours for 10% of the trading standards profession. There may also be more businesses contacting TS for advice, although it should be noted that those who are members of trade bodies will already have had access to advice from them.

Impact of not publishing any revised guidance

Question 22: Are the enforcement costs of 'avoidable' court action, i.e. those that could be avoided if guidance was provided, quantifiable?

64. One trade body commented that the level of enforcement in respect of the PTRs and ATOL Regulations is low, and therefore potential savings from the Guidance are minimal. Another trade body thought that companies who were members of trade bodies had already had advice, but those who were not should be helped by the Guidance in saving any costs of avoidable court action. Another trade body commented that they did not think it was possible to quantify litigation in this way, and that this type of impact is not quantifiable in this way. In our view, enforcement will be made easier with the release of the Guidance as the guide clarifies the law and includes reference to other legal provisions such as UCPD. It is important that industry understanding of the law is increased so firms can avoid enforcement action. The Guidance serves to do this.

65. TSI and LACORS thought that the costs of advisory work if guidance were not published could amount to 100 officer hours per authority (there are over 200 TS authorities).

66. One travel company said that large tour operators had taken their own legal advice for those difficult areas, such as linked websites and virtual packages, where it is not clear whether a package has been sold, as the Guidance did not cover it.

Question 23: Any ideas on how to estimate the number of cases brought to court that could be avoided if guidance is provided?

67. TSI thought that the number of cases would be likely to increase as more business neglects due diligence procedures, and concentrate on ways of avoiding compliance with the PTRs. In our view, we think that the release of the Guidance will make it more difficult for business to avoid compliance with the PTRs.

Question 24: Is it possible to quantify the cost of the travel industry taking their own legal advice on the meaning of the Judgment?

68. One trade body and a travel company commented that if the Guidance were not produced that most travel companies would continue to trade in accordance with advice they had already from trade bodies and legal firms. Another trade body agreed and in addition thought that those companies with no access to advice from trade bodies would probably seek their own legal advice.

Question 25: Is it possible to quantify the cost to a business of taking a precautionary approach if guidance were not published?

69. One trade body thought that without guidance business would take a least cost option and trade outside of the PTRs, when perhaps they should be trading in them. Another trade body thought that the consultation encourages the sale of packages. A further trade body commented that market uncertainty is likely to continue until such time as there is further litigation on the issue. An enforcement authority thought that there would also be business who take a precautionary approach and comply with the PTRs to avoid incurring the expense of taking their own legal advice. One travel company said that the costs will depend on the size and business strategy of an organisation and therefore cannot be quantified.

ANNEX A

WHAT IS A PACKAGE?

A Guidance Note for Travel Organisers

Summary

1. This note provides guidance to the travel industry in assessing whether part or all of their business constitutes a “package” for the purposes of the Package Travel, Package Holidays and Package Tours Regulations 1992 (“**PTRs**”) and the Civil Aviation (Air Travel Organisers’ Licensing) Regulations 1995 (“**ATOL Regulations**”). It replaces earlier guidance provided by this Department relating to the definition of a package (guidance on other aspects of the PTRs remains available on the BERR website [here](#)) and represents our view of the law in the light of recent court decisions.
2. This guidance is relevant to all businesses selling travel arrangements, including those selling to business customers².
3. Consumers can find a range of advice by clicking on the following website links, including what to look out for when booking a holiday and how to ensure they are protected if something goes wrong.

[Civil Aviation Authority](#)

[Consumer Direct](#)

[Trading Standards Institute](#)

[Department for Business, Enterprise and Regulatory reform](#)

Definition of a Package

4. The legal definition of a “package” is set out in the PTRs and repeated in Box 1 below. It is also the definition used in the ATOL Regulations, which form a protection scheme for flights and air holidays, managed by the Civil Aviation Authority (CAA).

² References to “customers” includes business customers. References to “holidays” may not always be relevant to business customers, and such references should be read as if to “business travel arrangements”.

