

# TRAVEL LAW UPDATES – EU, UK AND APAC Q1 2024

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## EU AND UK

### 1. OTAS VS AIRLINES

In our [previous travel law update](#), we discussed a UK court case between Ryanair and On the Beach Limited (et al) in which UK online travel agents (“OTAs”) successfully relied on the package travel regulations’ right of recourse between organisers and third parties. The agents relied on this statutory recourse because they did not have contractual recourse against Ryanair. Ryanair’s T&Cs prohibit the purchase of flights via online travel agents, encouraging consumers to purchase its flights directly through its website or call centre. This is an exclusive distribution model seeking to erase intermediaries from flight sales.

Following a long running battle between Ryanair and OTAs over the role of the latter and other intermediaries in the sale of flights, Ryanair’s exclusive online distribution model has garnered legal support, which has potentially wider impacts on OTAs selling flight tickets without commercial agreements in place with airlines.

In seeking to block, or at least inhibit, the role of OTAs and intermediaries, Ryanair argued that OTAs reduce competition and protection for consumers by increasing fares and charges; fail to disclose its T&Cs; and fail to provide passenger details. OTAs such as Lastminute.com and Viaggiare have argued that Ryanair’s exclusive distribution model is an abuse of its dominant market position to the detriment of consumers seeking to buy flights.

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Ryanair has had a pattern of successful outcomes against OTAs:

- in 2015, the Milan Court of Appeal concluded that Ryanair’s refusal to allow OTAs the right of intermediation of its flight tickets did not constitute an abuse of dominance under EU competition law;
- in 2022, the French courts banned Lastminute.com from offering Ryanair fares in France; and
- in February 2024, the Milan Court of Appeal also held that Ryanair’s exclusive distribution model benefitted consumers, because it allowed Ryanair to communicate directly with passengers and resulted in cheaper fares by eliminating intermediaries’ charges and reducing Ryanair’s operating costs.

Whilst these member state judgments do not create binding EU precedents, Ryanair and, potentially, other airlines with similar restrictions in their T&Cs are likely to rely on them to prevent OTAs from selling their flights unofficially, with the ultimate risk being that OTAs are banned from selling that airline's flights. The courts' response to Ryanair's exclusive distribution model should also inform OTAs attempting to bring a claim against such airlines based on abuse of dominance. In both scenarios, OTAs will need to be prepared to counter the perception that their role results in higher fares for consumers and does not improve competition between airlines. An alternative option that would negate this issue is putting in place commercial agreements with airlines to sell their flights.

## 2. IS IT TIME FOR ONLINE T&CS TO GET AN UPDATE?

In a UK judgment handed down in the Court of Appeal on 12 December 2023 concerning the online gambling industry, helpful indications were given on how online T&Cs can be successfully incorporated into a contract with a consumer, as summarised below.

### Incorporation of online T&Cs

Only reasonable steps need to be taken to bring T&Cs to a consumer's attention, which involves giving them sufficient opportunity to read them. This includes a "click-wrap" procedure (consumers being invited to tick a box confirming they have read all of the necessary terms and conditions before proceeding with using the site or purchasing), in which a hyperlink or drop-down menu to the terms is available. A click-wrap procedure could be insufficient where the website transaction is at risk of timing out.

#### *How up to date are your terms of use? Consider:*

- how do consumers currently agree to your T&Cs and when does this occur (on website entry or when making a booking)?
- are all relevant T&Cs available to view?
- is the time a consumer can review these T&Cs limited? If so, is there another way a consumer could review the T&Cs freely? Via the tool bar, menu or footer of your website?

### Defective sales

If travel products are accidentally sold at an incorrect price, an OTA typically reserves the right to cancel the booking and issue a refund. Whether this type of clause would be considered onerous depends on whether the OTA's exercise of this right is done "reasonably". The judgement indicates that such clauses do not need to be specifically drawn to the attention of consumers to be incorporated, provided the OTA acts in good faith (fairly and transparently) when using this discretion and is protecting a legitimate (business) interest.

#### *Issues and action points:*

- are there any unusual or onerous terms that should be brought to the attention of a consumer before they agree?
- can these be mitigated by the reasonable exercise of a right or a legitimate business interest?

## Clear drafting

Extensive pages of T&Cs with excessive legal jargon are less likely to be found enforceable against a consumer. In contrast, use of hyperlinks within contractual provisions to other relevant clauses or applicable T&Cs, helps signpost a consumer to all relevant provisions. With hyperlinks, it appears courts increasingly accept that it is more likely a consumer is acquainted with all T&Cs, accepted them, and that they are incorporated into a contract.

### *Issues and action points:*

- How clear and accessible are your terms and conditions to an everyday person?
- How are changes to your terms and conditions brought to the attention of consumers?

## 3. UK 261 IS HERE TO STAY

EU [Regulation 261/2004](#) (“EU 261”) established rules for compensating and assisting passengers in the event of denied boarding, cancellations and long flight delays. Following the end of the Brexit withdrawal period, EU 261 was retained in the UK via the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019 (“UK 261”). UK 261 applies to all non-UK airlines departing the UK; to passengers arriving at a UK airport on a UK or EU airline; or to passengers arriving in an EU Member State on a UK airline.

The Retained EU Law (Revocation and Reform) Act 2023 (“REUL”) came into force in the UK on 1 January 2024. Under REUL, UK 261 became “Assimilated Law” which means that the European Court of Justice’s (“CJEU”) case law pre-dating 1 January 2021 must be applied by the UK lower courts when interpreting it, but this can be overruled by the Court of Appeal or higher courts.

However, entry into force in the UK of the Aviation (Consumers) (Amendment) Regulations 2023 (“Aviation Act”) on 14 December 2023 will affect the court’s new powers in relation to UK 261. The Aviation Act codifies certain key CJEU case law into UK law to “maintain the status quo” and ensure that the level of protection given to UK consumers will remain the same after REUL. While consistency between the UK and EU is usually a welcome sight in terms of reducing dual-compliance burden, the CJEU has put in place a number of interpretations under EU 261 via case law relating to: (i) “extraordinary circumstances” as an air carrier defence; (ii) the time of arrival; (iii) treatment of connecting flights; and (iv) limitation periods. The effect of the Aviation Act will be to limit scope for challenging some of these historic interpretations that could be brought by air carriers in UK courts.

## On our radar: EU and UK

- antitrust proceedings were launched against Ryanair during Q4 2023 by the Italian Competition Authority. This will focus on discriminatory treatment between passengers purchasing flight tickets directly through the Ryanair website and through online travel agencies. The effect of Ryanair’s website and T&Cs restrictions on intermediaries may also result in exclusionary effects against online travel agencies. There have been similar calls made by online travel agencies to the UK Competition and Market’s Authority. Whether this will lead to any adjustment of such practices and resulting benefits to intermediaries remains to be seen;
- the UK consultation of the Package Travel Regulations is still pending feedback from the government;

- UK ATOL reform: the UK CAA planned to have a new ATOL system in place by 1 April 2024. With that deadline now scrapped and no sight of final proposals, the UK CAA has avoided making any clear commitments on timing. However, it expects that the next consultation (which could take place at some point this year, given the period of time since the last consultation) will be a joint one between the Department for Transport and the UK CAA; and
- the Spanish Competition Authority ("CNMC") has proposed a EUR 486m fine for Booking.com for potential abuse of its dominant market position. This focusses on whether Booking.com imposed unfair conditions on Spanish hotels and whether it implemented commercial policies that could have forced other OTAs and online distribution channels out of the Spanish market. If imposed, this would be the largest fine ever imposed by the CNMC. It is currently unclear when the final decision will be released. A conviction, if not overturned on appeal, could force OTAs to change the terms on which they offer Spanish hotels and other travel products in and to the Spanish market.

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## APAC

### 1. CASE LAW – AIRBNB

In December 2023, the Federal Court of Australia fined Airbnb's Irish subsidiary ("Airbnb") AU\$15m and ordered Airbnb to also pay up to AU\$15m in compensation (totalling approximately US\$19.6 million) for misleading and deceptive conduct by not making it clear to Australian consumers that some bookings were not in Australian dollars. Airbnb was prosecuted for only using the "\$" sign in the price displayed on its platform without clearly identifying the currency. Currency movements meant that prices in USD converted into significantly higher AUD amounts.

Importantly, Airbnb *did* disclose to consumers that the pricing was in USD, but only at the bottom of the first three webpages of the booking and then on the fourth page when the consumer paid for the booking. This was not sufficiently clear or prominent enough under Australian consumer law. A key factor is the court's view that that Airbnb likely benefitted from consumers assuming that the pricing was in AUD, because it would have made the USD-priced accommodation on its platform appear cheaper than that of rivals.

### Key takeaways

The EU, UK and Australia have particularly stringent consumer protection laws in place. This judgment demonstrates the level of detail and focus of consumer protection organisations and prosecutions. Australia's high levels of transparency and standards of disclosure are also reflected in EU and UK statutory requirements that consumers be fully informed of the total price of their bookings.

This demonstrates the scrutiny that international parties within the travel industry – including all suppliers of travel products and their agents or intermediaries – will be under in these markets, even where there is no physical presence in these jurisdictions. Booking flows, and not just T&Cs, on websites should be reviewed for local compliance whenever sales are first made into that jurisdiction. As demonstrated by Airbnb, it is not just the presence of mandatory consumer disclosures, but also their *prominence*, that will be important.

## 2. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (“ACCC”) 2024/25 FOCUS AREAS

The ACCC, Australia’s competition and consumer regulator, has issued its enforcement and compliance priorities for the year ending 30 June 2025. The relevant key focus areas are:

- competition and consumer issues in the aviation sector: in 2023, the ACCC commenced proceedings against Qantas claiming it had engaged in false, misleading or deceptive conduct in the way it advertised tickets for flights. Stemming from this, the ACCC has highlighted aviation as a focus sector and this may result in investigations into how air fares are offered, sold and priced;
- consumer and fair-trading issues in the digital economy: misleading or deceptive advertising, online reviews, in-app purchases and price comparison websites. The ACCC has identified an increase in consumer issues and complaints stemming from these issues;
- environmental claims and sustainability: aggressive investigations into misleading sustainability and environmental claims, which are expected to continue and expand;
- misleading pricing and claims: examination of pricing practices to minimise the misleading of consumers. For OTAs, the focus may be on price comparisons, particularly on ensuring that where travel products are listed, the differences between the products are communicated as clearly as possible, such as cancellation and change fees and restrictions; and
- unfair contract terms in consumer and small business contracts: following recent updates to the unfair contract terms regime in the Australian Consumer Law and the introduction of penalties, prosecuting companies continuing to enter into standard form contracts containing unfair contract terms.

## 3. THAILAND – NEW DIGITAL PLATFORM SERVICE BUSINESS LAW

From 1 January 2024, digital platform operators must ensure full compliance with the *Royal Decree on the Operation of Digital Platform Service Businesses that are subject to Prior Notification (2022)* (the “Royal Decree”). This sets out rules for digital platform operators, which include:

- notifying Thailand’s Electronic Transactions Development Agency (the “ETDA”) of their business operations under the Royal Decree;
- notifying the ETDA within 30 days of any changes to the information submitted to the ETDA, such as (i) the operator’s details; (ii) the platform’s name; (iii) the platform type; (iv) the channel via which the platform is provided; and (v) details of the platform’s coordinator in Thailand when the operator is based abroad;

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- notifying consumers of their T&Cs before or upon use of the platform, for platforms that charge service fees, act as an intermediary in offering goods or services to consumers, and who have contractual relationships with businesses that offer goods or services on the platform; and
- notifying consumers of any changes to T&Cs at least 15 days before the effective date on which they are to be made. There are exceptions to this.

The above does not apply to companies operating digital platforms with an annual gross income from services provided to users in Thailand of up to THB50m (approximately US\$1,375,000) and up to 5,000 active monthly users in Thailand.

Failure to comply with the Royal Decree can result in the authority issuing a business suspension order to the business operators.

## 4. PHILIPPINES – NEW INTERNET TRANSACTIONS ACT (REPUBLIC ACT NO. 11967)

The Philippines has introduced the Internet Transactions Act which regulates e-commerce. The law has a broad scope and captures all business to consumer/business transactions, including where the digital platform is outside the Philippines but targets consumers in the country.

The Internet Transactions Act requires e-marketplaces and digital platforms to exercise due diligence in onboarding online merchants, maintaining a list of all online merchants available on their platforms, and provide for redress mechanisms for online merchants and consumers. E-retailers and online merchants must issue invoices and publish information on their identity and contact information in a clearly identifiable way.

Digital platform operators, e-retailers and online merchants are liable for civil penalties if they fail to comply with the Internet Transactions Act. Businesses can also be blacklisted or have their website or digital platform taken down. The legislation provides a transitionary period to June 2025 for parties to comply with its requirements.

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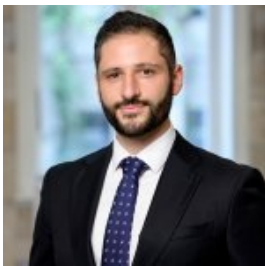
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