
NEW PACKAGE TRAVEL INSOLVENCY FUND REGULATIONS

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The Minister for Tourism (the Minister), on the recommendation of the Malta Tourism Authority (the Authority), has through Legal Notice 315 of 2016, created the Package Travel Insolvency Fund Regulations (the Regulation) in virtue of the powers conferred by article 47 of the Malta Travel and Tourism Services Act, Chapter 409 of the Laws of Malta (the Act). The Regulation was promulgated on 4 October 2016 by virtue of Subsidiary Legislation 409.18 of the Laws of Malta.¹

The Regulation provides the legal means to set up an insolvency fund to provide security for the refund of all payments made by or on behalf of travellers insofar as the relevant services are not performed as a consequence of the organiser's insolvency, including repatriation where applicable. The fund shall be managed and administered by a Managing Board as set up by virtue of the Regulation. The Regulation operates in accordance with a partial transposition of the European Union Directive 2015/2302 on package travel and linked travel arrangements, amending (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council, and repealing Council Directive 90/314/EEC (the Directive).²

Insolvency Fund Managing Board

The Minister shall appoint an Insolvency Fund Managing Board (the Board), which shall consist of five voting members, being:

- a) two persons, to be nominated by the Authority;
- b) two persons, to be nominated by the Federated Association of Travel and Tourism Agents of Malta (FATTA);
- c) one person to be nominated by the Minister.

The Chairman, who shall preside over the Board, shall be appointed by the Minister in consultation with FATTA. The members of the Board shall be appointed for a period of three years and shall be eligible for re-appointment.

Any member of the Board, may, before the expiration of his term of office, resign by a letter addressed to the Minister, provided that any member

¹<<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10614&l=1>> accessed 22 October 2016.

² *ibid* regulation 2.

may be removed from the Board prior to the expiration of his term of office on any one of the following grounds:

- a) the member has been guilty of misconduct;
- b) the member is unable and/or incompetent to perform the duties of his office;
- c) the member has acted in gross negligence;
- d) the member has committed any other acts or omissions unbecoming of a member of the Board.³

The Board shall have the following functions, and any ancillary functions related thereto:

- a) set up the fund;
- b) administer and manage the day-to-day affairs of the fund;
- c) decide and examine the current travel package market and decide who shall be deemed as a contributor to the fund;
- d) monitor and control contributors that are contributing to the fund;
- e) report regularly to the Authority on any matter affecting and/or relating to the fund and the fund's contributors;
- f) refund and/or repatriate consumers having valid claims in accordance with the Regulation;
- g) undertake any appropriate action in connection with the performance of its functions through the licensing and enforcement directorates of the Authority;
- h) assist and cooperate with other Member States in accordance with the Directive;
- i) annually publish contributions and information in accordance with the Act;
- j) recommend to the Authority as to whether a license shall be issued or not for new applications of travel agents, after it undertakes to carry out an assessment;
- k) recommend to the Authority the renewal or otherwise; or the suspension or revocation of travel agents' licenses and other actions, as it may deem appropriate;
- l) to submit an annual report to the Authority.⁴

The Authority is to provide administrative support through its offices to the Board, provided that the Board shall authorise the reimbursement of relative administrative costs borne by the Authority. The Board's administrative costs shall be paid for from the fund itself, provided that such costs transpire from a budget approved by the Board.⁵

The Board shall draw up its own terms of reference, which shall be approved by the Authority and endorsed by the Minister prior to coming into effect, including all amendments thereto. The terms of reference shall be published on the Authority's website.⁶

³ ibid regulation 4.

⁴ ibid regulation 5.

⁵ ibid regulation 6.

⁶ ibid regulation 7.

The Fund

The Board shall set up a fund, which shall be used to refund payments made by or on behalf of travellers insofar as the relevant services are not performed as a consequence of the organiser's insolvency. This also includes repatriation where applicable. All package travel organisers which are duly licensed by the Authority and which the Board deems as contributors, shall contribute to the fund. All contributors are to submit audited financial statements to the Board annually or more frequently upon the request of the Board and/or the Authority.

When a contributor fails to contribute and sustain the fund when requested to by the Board the provisions of regulation 10 would apply. The Authority shall not renew the contributor's license for the following year on the notice of such failure of the contributor to contribute to and sustain the fund. The Authority may also take any such other action in accordance with the provisions of the Act and of the Regulation.

The contributor shall pay the relevant contributions, which shall be of such an amount and of such a manner that the Board may decide on from time to time. All contributors shall remain obliged to contribute to the fund until they relinquish their license with the Authority and settle all pending claims over the said fund.

The fund shall at all times be kept at a minimum threshold of Euro 500,000 or any other higher amount, as shall be determined by the Ministry and the Authority from time to time. The Board shall be entitled to request any or all contributors to contribute further to the fund, should the fund be below the minimum threshold established hereinabove or for any reason whatsoever.

Should the Board consider the accumulated funds to be in excess of what it considers necessary to cover consumer exposure, but not less than the minimum amount established hereinabove, then any excess amounts may be distributed back to the contributors, subject to the approval of the Authority, and on the advice of the Board.

In the event that one of the contributors becomes insolvent, any claims made by the consumers of the insolvent contributor shall be paid first from the insolvent contributor's share of the contributions made under the fund. This is the case, provided that should the insolvent contributor's share not be sufficient in order to cover all claims, then the balance shall be paid from the net funds collected through the certification scheme. This is provided further that the Board may request the other contributors to increase their bond to cover any shortfall of funds to settle the outstanding claims and to ensure that the aforementioned minimum threshold is kept.⁷

⁷ *ibid* regulation 8.

Establishment of online system and issuing certificates

The Board, in collaboration with FATTA, shall set up and manage a central online system. The system shall allow all contributors to issue certificates to consumers. A fee, as determined by the Board, shall be paid in to the fund for every certificate issued. The certificate shall contain at least the following information:

- a) all prepaid amounts made by the consumer to the contributor;
- b) dates of travel; and
- c) any other details which are relevant to the travel package ordered and/or purchased by the client, such as information on the accommodation provider, if applicable.

All contributors are obliged to issue the certificate to their consumers. The certificate shall be used by consumers to make any necessary claims under the fund should the contributor become insolvent. The Board shall have full access to the system, and to any information transpiring therefrom.

Claims under the Insolvency Fund

In the event that one of the contributors becomes insolvent, the consumer must file a claim with the Board and provide full details of payments received, and of services which are not performed as a consequence of the organiser's insolvency, including repatriation of travellers as applicable. The consumer shall, when presenting a claim, also present the certificate, otherwise the Board shall not be obliged to provide a refund and/or repatriate the consumer. The fund shall only be used for claims which relate to bookings made as from the date of the coming into force of this Regulation.⁸

Offences and penalties

Compliance with the provisions of the Regulation by contributors shall be deemed to be a condition to which a license to operate any tourism operation is subject, irrespective of whether reference to the Regulation is made in the license itself. Any contributor who fails to comply with any of the provisions of the Regulation shall be guilty of an offence, and shall be liable to the fines and penalties established in the Act.⁹

The Directive

The Directive lays down a number of important consumer rights in relation to package travel, in particular with regard to information requirements, the liability of traders in relation to the performance of a package, and protection against the insolvency of an organiser or a retailer. It

⁸ *ibid* regulation 10.

⁹ *ibid* regulation 11.

provides specifically for information, obligations, and content of the travel package contract, changes to the travel package contract before the start of the package, performance of the package, insolvency protection and linked travel arrangements.¹⁰ The Regulation only provides for insolvencies as it only partially transposes this Directive.

Considerations

The Regulation has been pending since 2009 and is intended to mitigate situations such as the Fantasy Tours case of 2013, where Golden Travel Club Limited was declared bankrupt and liquidated by the First Hall of the Civil Court. Numerous travellers suffered losses amounting to circa Euro 400,000.¹¹ The operative parts of the Regulation still have to be executed, such as the Board and the term of references. The Regulation will have jurisdiction over circa 70 current local travel agents.

¹⁰ Directive EU 2015/2302 of the European Parliament and the Council on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326/1 <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2302&from=EN>> accessed 22 October 2016.

¹¹ Chris Mangion 'Fantasy Tours is officially declared bankrupt' (*Maltatoday.com.mt*, 4 February 2014) <http://www.maltatoday.com.mt/news/court_and_police/35832/court-dissolves-fantasy-tours-20140204#.WAtmU6Nh2Rt> accessed 22 October 2016.