

Compensation for consumers when things go wrong

Which?

Contents

Executive Summary	3
1. Overview of compensation schemes	5
2. How should compensation levels be set	8
3. Broadening the coverage of fixed compensation	12
4. Making compensation easier for consumers	16
Annex: Summary of regulators powers in relation to compensation	19

Executive Summary

When consumers experience interruption to, or disruption of, critical services - like gas, electricity, water supply or mobile and broadband - it is right that they receive appropriate compensation. In the regulated sectors in the UK there are a range of different compensation schemes. Some provide for fixed levels of compensation for specific service failures. Others involve case-by-case awards - usually made by Alternative Dispute Resolution (ADR) schemes such as an Ombudsman.

At present, there is a lack of consistency between compensation schemes across these sectors. This includes the types of services covered, how levels of compensation are set and the actual levels awarded. Consumers find this confusing and difficult to navigate and see merit in a clearer basis for calculating compensation levels. They also think that levels of compensation are often too low and where there are serious failures that are prolonged or exacerbated because of the firms' incompetence, compensation awards should take this into account.

Which? has explored ways of making compensation in a number of regulated sectors work better for consumers. We have looked at payment services, energy, water, post, telecommunications (fixed, mobile and broadband), rail and airline delays. As a result of this work we have identified actions under three headings that regulators, ADR schemes and Government could now take to improve the compensation landscape for consumers.

Processes for setting compensation

Regulators should develop and publish a consistent set of principles that they will use to set fixed levels of compensation. We have laid out a set of potential principles that could be used in section 2. Regulators could also use the principles when assessing whether awards made by ADR schemes are appropriate, and so the principles should also help inform the levels of awards made by ADR schemes. The approach used by both regulators and ADR schemes should include much greater use of consumer engagement and research to understand and take into account consumers' views on levels of compensation. Levels should be reviewed regularly to take into account changing consumer views and market developments.

Regulators should also satisfy themselves that any approved ADR scheme in their sector is taking appropriate approaches to setting levels of awards for consequential and non-financial loss, in line with the overall principles.

If regulators' existing powers are insufficient to allow them to implement these recommendations, then the Government should amend those powers to enable, or require them to do so.

Coverage of fixed compensation

We want regulators to review the scope for fixed compensation in their sectors and, where possible use existing powers to introduce fixed compensation payments for specific service failures. We describe a set of criteria in section 3 that can be used to identify the services where fixed compensation could apply.

As a start, new fixed compensation should be considered for a number of services in the rail, telecoms, energy and water sectors, and regulators should consider other candidate services too.

Where regulators' powers are not sufficient to enable them to do this, the Government should legislate to address this.

Making compensation more accessible

Regulators should require compensation to be paid automatically, without the consumer needing to claim, wherever a firm becomes aware of a breach – as is largely the case currently in utilities. In section 4 we identify services in post, rail, energy and telecoms, where this approach could be applied.

Where it is likely that consumers will have to make a claim to secure their rights to compensation, regulators should require firms to adopt a pro-active strategy to inform consumers of their rights.

If any regulator does not have sufficient powers to do this, the Government should legislate to make it possible.

1. Overview of compensation schemes

This section explains why Which? decided to look at compensation schemes in regulated sectors and includes a description of the nature and purpose of the different types of compensation schemes that exist.

1.1 Background to our project

When consumers experience interruption to, or disruption of, critical services it is right that they receive appropriate compensation. For economically regulated sectors there is a particular need to ensure that compensation schemes work well for consumers, because of the lack of competitive pressure for such schemes to develop naturally. Which? examined compensation provision across a range of regulated sectors and found a mixture of both fixed compensation, set in regulations, licences or contracts, and compensation decided on a case-by-case basis by ADR schemes. We found a lack of consistency between compensation schemes across these sectors – in terms of the types of services covered, how levels of compensation are set and the actual levels awarded.

When we talked to consumers they told us that compensation was confusing and difficult to navigate, there was low awareness of entitlement to compensation, and levels and entitlement appeared unnecessarily inconsistent across sectors. Consumers could see a role for both fixed levels of compensation as well as case-by-case compensation awards. And they had views on the issues that should be taken into account when setting levels of compensation.

We explored these issues in more detail in those sectors where there is an established regulatory framework and mechanisms for setting and delivering compensation. Our objective was to see how well compensation schemes were working for consumers, and identify changes that could help improve them, having particular regard to the concerns consumers had shared with us. We looked at payment services, energy, water, telecoms, post and rail travel. We considered compensation for flight delays only in relation to the potential for automatic payment (see section 4) as the provisions governing levels and coverage of fixed compensation for flight delays are set out in EU legislation.

As well as information requests to regulators and ADR schemes in each sector, we carried out primary research to understand consumers' views. Our research involved eight qualitative focus groups, conducted in Newcastle, Leicester, London and Croydon, between 18th and 26th April 2016. They involved a total of 61 participants from a range of socio-demographic groups and ages and representing a variety of service users. The groups considered what would be fair and appropriate levels of both fixed and ADR-determined compensation. We used a number of case studies based on published information to inform the discussions.

1.2 Purpose of compensation schemes

One reason the compensation landscape can be somewhat confusing is the way certain terms are used to mean very specific things, for example the terms ‘redress’, ‘compensation’, and ‘consequential losses’ are all used by regulators and ADR schemes in particular ways. Consumers do not use these terms in the same way and we found it unnecessary and sometimes unhelpful to try to maintain these distinctions.

Instead we considered the purpose of compensation schemes – what they are designed to achieve. The table below describes the objectives that compensation schemes can seek to achieve, and relates this to the traditional terminology.

Objective of compensation	Comment
<p>Put the consumer back in the position they would have been in if the firm had not made a mistake or the service interruption had not occurred</p>	<p>This is the traditional definition of redress – this would be considered to be the minimum award if a complaint were successful.</p>
<p>Compensate the consumer for distress or inconvenience caused by the service problem and the effort they expended to get the problem fixed</p>	<p>This is the traditional description of compensation as used by many ADR schemes and is different from redress. For example a redress award might return to a consumer, money that they spent on a product that did not work, or didn't do what the seller said it would do.</p> <p>A distress and inconvenience award might compensate the consumer for the time she spent arguing with the firm about the fact the product did not work, or the inconvenience she suffered because the product did not work.</p> <p>Consumers consider this to simply be ‘putting the consumer back in the position they would have been’ – i.e. consumers would include this in ‘redress’.</p>
<p>Compensate the consumer for consequential losses incurred because of the service problem</p>	<p>Compensation for consequential losses is different again. For example if a rail journey is delayed and the consumer receives a redress payment (what they spent on the ticket), they might also want to be compensated for the cost of an alternative form of transport, plus the cost of their hotel accommodation because they missed a flight because of the delay.</p> <p>Again consumers do not tend to distinguish this difference – including all such payments in their view of ‘putting the consumer back where they would have been’.</p>
<p>Incentivise firms to improve services to consumers and prevent problems in the first place, so as to avoid making payments to consumers for poor service</p>	<p>Apart from compensating the individual consumers, compensation schemes can act to incentivise the provider to improve their quality of service to all consumers so as to avoid payments – this benefits all consumers, not just those who receive compensation.</p>

1.3 Fixed and discretionary compensation schemes

As mentioned earlier, compensation schemes can be established and run in different ways. The main two categories of scheme are:

- Those set in regulations, licences or contracts which usually set fixed levels of compensation for specified service failures or interruptions, and
- Awards made by ADR schemes, which consider each individual case on its merits.

Previous research by Which?¹ has shown that consumers believe there is a role for both fixed levels of compensation and discretionary awards, depending on the circumstances of the service failure and the losses experienced by the consumer. The key benefits and drawbacks consumers saw for each type of scheme are summarised in the table below

Scheme type	Benefits	Drawbacks
Fixed levels	<ul style="list-style-type: none"> Enables standard minimums to be set Provides more transparency for consumers Potentially allows for compensation to be paid automatically in some cases 	<ul style="list-style-type: none"> Doesn't take into account individual circumstances and impacts Provisions do not cover all service-related problems that consumers identified
ADR-determined	<ul style="list-style-type: none"> Enables individual circumstances and impacts to be taken into account May result in higher compensation awards 	<ul style="list-style-type: none"> May result in inconsistencies in awards Places more onus on the consumer to take their case forward Some perceived ombudsman resources to be stretched

Our assessment of the current compensation landscape in economically regulated sectors is in Section 2 and our recommendations on how levels should be set apply to both fixed and ADR schemes.

Section 3 sets out in more detail the specific circumstances when fixed compensation is appropriate and identifies some gaps where new fixed compensation levels could be considered.

Section 4 explores how to make compensation simpler for consumers particularly by making payment of compensation automatic wherever possible.

1. Three half-day deliberative workshops in Newcastle, Birmingham and London took place between 3rd and 17th September 2015. A total of 54 participants took part, with a range of SEG, ages and a minimum number of service users.

2. How should compensation levels be set?

This section summarises how levels of compensation are set in various compensation schemes across the regulated sectors and consumers' views on how those schemes work. We make recommendations for a consistent set of principles that could be used by regulators and ADR schemes to set compensation levels.

2.1 Scope of our project

The table below lists the sectors and compensation schemes we considered and our understanding of the regulators and ADR schemes with oversight or responsibility for those schemes.

Sector	Scheme type	Organisation
Payment Services	ADR awards	FCA FOS
Energy (supply and distribution)	Guaranteed Service Standards (fixed) ADR awards	Ofgem OS:Energy
Water	Guaranteed Service Standards (fixed) ADR awards	Ofwat WATRS WICS
Post	Fixed (in Royal Mail licence) ADR awards	Ofcom Postal Redress Scheme
Communications	ADR awards	Ofcom OS: Communications CISAS
Aviation (flights only)	Fixed (at EU level)* ADR awards	CAA CEDR OS:Aviation
Rail	National Conditions of Carriage (fixed) Delay/Repay (fixed)	n/a**

* because levels are set in EU legislation we only considered flight delay compensation from the perspective of accessibility
- relevant findings are in section 4

** ORR does not have oversight of the fixed compensation schemes in rail as these are set in franchises or by the industry body ATOC.

In each area, we sought to understand the process that was used both by regulators and by ADR schemes, to arrive at levels of compensation including what factors had been taken into account and how consumers' views had been considered.

We also reviewed the actual levels of compensation in each sector, and compared these to the levels that consumers told us they expected to see. Our ability to do this for ADR awards was limited to cases where we found case studies with sufficient explanation of the basis for the award made.

2.2 Process for setting levels of compensation: regulators

We found that Ofgem used a set of explicit principles when deciding on the appropriate levels for fixed compensation, but we were not able to identify that other regulators made use of equivalent set of explicit principles.

Also, there did not seem to be any consistent approach to updating levels of compensation – in some cases fixed levels of compensation have not been updated since 1999.

We found a significant gap in how regulators sought to understand and take into account consumers' views. Regulators did not appear, as a matter of course, to commission or use consumer research to assist them in deciding on compensation levels. Research commissioned by regulators appears to have been occasional and partial and there was rarely a clear line of sight from consumer research to regulators' decisions.

Where research indicated a clear consumer view and this was not subsequently reflected in the levels of compensation, we could not find any justification for the regulators' decision. Conversely, other changes appear to have been implemented without clear reference to consumer views.

Although current 'headline' levels of fixed compensation were broadly in line with consumer expectations, as far as our research could identify, consumers felt that the levels were not adequate to compensate for prolonged and higher impact service failures.

For example, consumers wanted to see higher payments for more impactful delays in meeting appointments, e.g. where an appointment in an emergency is delayed to the next day. They also wanted persistent failures to merit higher payments. For example in electricity outages, they did not agree that amounts payable should reduce for each period after the first outage as they currently do, nor that there should be a cap on the number of times that compensation is paid for low water pressure. They disliked the lack of compensation for repeated short delays in rail. And consumers wanted more consistency across schemes – for example missed appointments in water and energy attract different payments.

2.3 Process for setting levels of compensation: ADR schemes

We found some evidence of ADR schemes taking a broadly similar approach to financial and non-financial consequential losses, however there was little detailed information on how they determine levels of award for non-financial losses, e.g. distress and inconvenience.

None of the ADR schemes we contacted told us that they carried out consumer research into case outcomes. Some carried out satisfaction or consumer experience surveys.

The factors that ADR schemes considered in setting compensation levels were broadly similar to those that consumers considered – these are summarised in the diagram below. But the approach that consumers took was different in a number of ways.



For example, ADR schemes, especially those that are also Ombudsman schemes, tend to see their focus as being on the traditional definition of 'redress' - putting the consumer back to where they would have been - and then on financial and non-financial consequential losses. But they do not traditionally see a role for compensation awards to be set at levels designed to incentivise improved performance. Consumers on the other hand saw that higher payments where a provider's incompetence has prolonged an issue could act as an incentive for that provider to improve.

Consumers also tended to value non-financial losses more highly than the ADR awards. These two factors meant that in most of the very limited number of cases we could test with them, consumers would set awards at levels considerably higher than the actual ADR award.

Finally, as ADR schemes must, under the ADR regulation, be formally approved by a competent body, and in general this will be the relevant regulator, we asked whether regulators had satisfied themselves that the approach of the scheme they had approved was appropriate. None had done so beyond the initial authorisation of the scheme.

2.4 Improving the process for setting compensation levels: our asks

The process for setting compensation could be greatly improved if regulators and ADR schemes co-operated to develop a consistent approach, made greater use of consumer engagement and research to understand and reflect consumers' views in the design of schemes, and explained more clearly their decisions on levels of compensation and how these reflect consumer expectations.

Regulators should

- collaborate to develop a consistent set of principles that are then published and used to set fixed levels of compensation (and are also used when reviewing how ADR schemes set award levels)
- review levels of fixed compensation regularly to take into account changing consumer views and market developments
- increase consumer engagement and research to understand consumer views and take these into account when setting compensation levels; where consumer views are not reflected in levels this should be clearly set out and reasons given as to why
- satisfy themselves that any approved ADR scheme in their sector is taking appropriate approaches to setting levels of awards for consequential and non-financial loss, with specific reference to the consistent set of principles developed to set levels of compensation.

ADR schemes should

- take into account the general principles described above when setting award levels
- make greater use of consumer engagement and research to explore consumer views on their approach to making awards and the levels they award for non-financial losses
- publish clear summaries of their approaches to making awards, including what types of losses they will take into account and how they determine levels of compensation for those losses, including non-financial losses.

Government should

- amend powers of regulators if necessary to enable, or require them to implement the above changes to their approach to compensation,

2.5 Straw man principles for setting fixed levels of compensation

Based on our desk research of the principles used by some regulators for setting compensation levels, e.g. the most recent set of principles set out by Ofgem, alongside our policy assessment and consumer research, we have developed a 'straw man' set of principles which could be used as a starting point to develop the approach we are calling on regulators to adopt. The elements of our proposed framework are set out below.

Framework elements				
	Incentives	Impact on bills	Redress	Distress and inconvenience
Fixed compensation	Levels of compensation should incentivise firms to improve performance to all consumers.	Compensation should be at levels that do not have a disproportionate impact on bills compared to the consumer benefit.	A 'standard' amount for costs/losses to the consumer as a consequence of a service failure. This might include a refund for the service not received (if applicable), a loss element set at a 'median' level, and an escalation factor for prolonged or exacerbated failures.	
Ombudsmen awards	Ombudsman decisions on levels should include an 'incentive element' where appropriate – both to drive improvements across the sector (through the immediate award and the secondary impact of ombudsman decisions on levels firms offer) and satisfy consumers' expectations.	Compensation should be at levels that do not have a disproportionate impact on bills compared to the consumer benefit.	Repaying the consumer where they have been without a service. Repaying the consumer for consequential financial losses incurred as a result of the failure.	Practical and emotional costs/ losses to the consumer as a consequence of the service failure, and the process to get it fixed/get redress from the firm (where not already covered by fixed compensation).

Fairness/consumer expectations: The levels that consumers consider should be paid, and the circumstances in which they should be paid, should be informed by consumer research or consumer engagement by the regulators/firms.

3. Broadening the coverage of fixed compensation

This section focuses on fixed levels of compensation and describes a set of criteria that indicate when such schemes are most appropriate. We review the current coverage of fixed compensation schemes against those criteria and identify some candidate markets and services for the introduction of new fixed schemes.

3.1 When is fixed compensation appropriate?

As mentioned in section 1.3 consumers see a role for both fixed and discretionary level compensation schemes - with each type having benefits and drawbacks. The presence of a fixed compensation scheme does not exclude a role for ADR in considering the individual consequences of failures where these are more significant or complex than usual. It is clear that fixed schemes are less appropriate where there are usually complex issues to address and where judgement of an individual's circumstances is usually needed.

We went further and drew up a list of criteria that would positively indicate where fixed schemes would work best.

1. A clear standard exists for measurement

2. Failure is likely to cause harm to each affected customer

3. Fixed level is likely to be broadly right for most affected customers

4. Affected customers can be easily identified (or can self-identify)

5. The firm has the ability to improve the situation

6. Adequate compensation is unlikely to develop through competitive forces

Principle 1: It is necessary for there to be a clear standard against which the failure may be reliably measured, for example failure to meet an appointment time. If the failure is sufficiently subjective, it will require ADR to make a judgement on its extent and impact.

Principle 2: The type of failure should be very likely to cause harm to each affected consumer. Failures that only cause harm to consumers with certain characteristics or in certain circumstances should be dealt with by ADR.

Principle 3: It should be possible to set a fixed compensation level that is broadly right for most affected consumers, given the likely spread of detriment. If the level of detriment is extremely variable, failures should be dealt with by ADR.

Principle 4: Affected consumers can either be identified proactively by the firm, or can identify themselves easily (this is linked to automatic payment of compensation - see section 4).

Principle 5: The firm ultimately bearing the cost of the compensation should have some ability to improve the situation - if it does not then the payment of compensation cannot help incentivise improved performance.

Principle 6: Adequate compensation for the failure is not already provided, or would not be expected to develop organically, as a result of effective competition. Introducing fixed compensation could theoretically have negative effects, by damaging competition or its emergence (e.g. by dampening consumers' incentives to switch following a service failure).

3.2 Candidates for new fixed compensation schemes

We assessed the case for expanding or introducing fixed compensation in rail, telecoms (fixed, mobile and broadband), energy, post, water and payment services. We excluded aviation because the provisions regarding the coverage and level of fixed compensation are governed by EU legislation.

We used our principles, and looked for prima facie evidence of consumer detriment to identify candidate services that we believe merit serious consideration for the introducing fixed compensation.

Rail services

We noted that the main cause of complaints to the ORR is delays in journey times, yet existing compensation rights do not cover delays that are under 30 minutes, indicating that there is likely to be clear consumer detriment caused by this gap.

The ORR has introduced a new complaint category of 'Sufficient room for all passengers to sit/stand', to capture complaints made by passengers about overcrowding. In the provisional figures released for the first three quarters of 2015/16, this category has accounted for 5.5-7.7% of all complaints². This is likely to be higher at peak times, indicating a high likelihood of consumer detriment. As a proxy for overcrowding, compensation could be introduced where peak time services run with fewer carriages.

Telecoms services

We identified five candidate services where there is evidence of consumer harm that makes it appropriate to consider the introduction of fixed compensation:

- 'service' is the single largest complaints category to Ombudsman Services³ Communications in 2014/15 indicating a significant number of consumers are suffering loss or degradation of fixed line services (broadband and telephony)
- SKY estimates that, on average, Openreach changes around 12,500 agreed installation dates for SKY customers each month and over 500 such appointments are missed⁴
- 17% of complaints to Ombudsman Services: Communications in 2014/15 related to billing⁵, and Ofcom complaints data also indicates billing problems are prevalent⁶
- SKY claims that 90% of new line installations requiring an Openreach engineer to attend take 10 calendar days or longer and almost one in ten takes longer than 30 days⁷
- in 2013 Ofcom estimated that around 200,000 households a year have their phone or broadband services either 'slammed' (transferred to a new provider without consent), or subject to an erroneous transfer, when a switch occurs on the wrong line, e.g. a neighbour's⁸

2. <http://dataportal.orr.gov.uk/displayreport/html/html/3d61c86c-0279-4e3e-8cb8-e3e19ac6f014>

3. https://www.ombudsman-services.org/downloads/OS_annualreport_comms_2015.pdf

4. <https://corporate.sky.com/media-centre/news-page/2015/sky-reveals-evidence-of-openreach-service-failure-and-calls-for-market-investigation>

5. https://www.ombudsman-services.org/downloads/OS_annualreport_comms_2015.pdf

6. <http://consumers.ofcom.org.uk/news/telecoms-and-pay-tv-complaints-dec2015/>

7. <https://corporate.sky.com/media-centre/news-page/2015/sky-reveals-evidence-of-openreach-service-failure-and-calls-for-market-investigation>

8. http://stakeholders.ofcom.org.uk/binaries/consultations/consumer-switching-review/summary/Consumer_Switching.pdf

Energy services

Research published in 2014 showed that 64% of energy supplier complainants were quite or very dissatisfied with the speed of the resolution of their complaint in 2014, while 59% were quite or very dissatisfied with how well they were kept informed of next steps⁹.

Our own consumer research showed the importance consumers place on speedy resolution - where this is not possible being kept informed is a minimum requirement.

In 2014/15, 86% of complaints to the Ombudsman Services: Energy were about billing problems¹⁰. This is up from 82% in 2013/14¹¹, 81% in 2012/13¹², and 80% in 2011/12¹³, indicating a clear area of considerable and persistent detriment to consumers.

The second largest category of complaints to Ombudsman Services: Energy is transfer issues. In 2014 Ofgem found that over 20% of domestic electricity and 80% of domestic gas switches took over three weeks (without a valid reason¹⁴) and that over 1% of successful switches were erroneous¹⁵.

Water services

As mentioned earlier, our consumer research showed the importance consumers place on speedy resolution. Further, a 2015 report by CCWater¹⁶ found that only 53% of complainants were satisfied with their contact with their water company (although this is not broken down by speed, being kept informed or other reasons).

Ofwat's 2014/15 review of the Service Incentive Mechanism found that in relation to any contact 'where customers felt their water company could have handled the matter better, a quicker response, quicker resolution time and keeping customers better informed were mentioned most frequently¹⁷.

Other candidate services

We also identified the issue of delays in making payment of fixed compensation as a candidate for further fixed payments. These provisions exist in water and energy and there seems no reason not to apply these to other sectors.

Finally, think that there is a case for considering fixed compensation for payment service failures, including outages. Our consumer research lent some support to this. As more consumers use electronic payment services more often throughout their day, the payments services, or the payments systems they rely on, are likely to become more like utilities. So over time the impact of payments service outages is more likely to meet our criteria for fixed compensation.

9. https://www.ofgem.gov.uk/sites/default/files/docs/2014/09/ofgem_complaints_report_final_8_august_2014_0.pdf

10. https://www.ombudsman-services.org/downloads/AR2015_Energy_FINAL.pdf

11. https://www.ombudsman-services.org/downloads/OS_annualreport_energy_2013-14.pdf

12. <https://www.ombudsman-services.org/downloads/OS%20Annual%20Report%202013.pdf> p 38

13. <https://www.ombudsman-services.org/downloads/OS%202012%20AR%203-7-12%20for%20web.pdf> p43

14. https://www.ofgem.gov.uk/sites/default/files/docs/2013/12/3_week_switching_consultation.pdf p2

15. https://www.ofgem.gov.uk/sites/default/files/docs/2013/12/erroneous_transfer_consultation_-_decemeber_2013.pdf

16. <http://www.cwater.org.uk/wp-content/uploads/2015/08/CCWater-Water-Matters-2014-Report-FINAL.pdf>

17. http://www.ofwat.gov.uk/wp-content/uploads/2015/10/rpt_com201503sim.pdf p36

The diagram below summarises our findings.



While we have focused on those service failures where we could find prima facie evidence of consumer detriment, we expect that further work will be needed to verify these. And regulators should consider other candidate services, especially where they have access to data that could help identify these.

For example, we identified a need for further work to test the suitability of a number of areas for fixed compensation, including:

- Billing is a significant cause of consumer problems in energy and telecoms. Fixed compensation would need to be linked to particular defined billing failures. The data available to us was insufficient to identify which such failures are the main causes of consumer detriment.
- There are particular technical issues in the telecoms sector – in terms of the extent to which loss or degradation of service can be identified, verified and linked to particular consumers – that require further work.

3.3 Improving the coverage of fixed compensation: our asks

Regulators have a variety of different powers and duties in relation to compensation for consumers, ranging from an ability to propose and require changes to compensation schemes set in secondary legislation (Ofgem and Ofwat), to no power whatsoever over compensation schemes (ORR).

Our understanding of the current landscape of regulators powers and duties is summarised in the Annex to this report.

Regulators should

- review the coverage of fixed compensation in their sector with a view to identifying appropriate new service failures where such compensation is warranted
- use existing powers wherever possible to initiate and make changes to schemes to broaden coverage of fixed compensation.

Government should

- legislate to clarify that all economic regulators have the power to propose and require fixed compensation schemes where these are appropriate
- require regulators to review schemes in their sector and propose changes and improvements along the lines recommended by Which? in this report.

4. Making compensation easier for consumers

When we first started to talk to consumers about compensation they told us that compensation was confusing and difficult to navigate, that there was low awareness of entitlement to compensation.

We know that only a small percentage of consumers who are entitled to compensation actually claim that compensation. A report for Ofgem at the end of 2013¹⁸ found that only 5% of consumers who were eligible did in fact take their complaint to the Energy Ombudsman. In 2015 we submitted a super-complaint to the ORR because of our concerns about the low awareness and take up of compensation for rail delays. The ORR agreed that awareness and take-up were too low.

4.1 Making payment automatic

One way of making it easier for consumers to get the compensation to which they are entitled is to make the payment of the compensation automatic wherever possible, without the consumer needing to make a claim. Automatic payment already exists for some fixed compensation payments in energy and water. This is possible because the firm has a direct relationship with the consumer, can identify which consumers are affected by a service failure and has a means to make the payment automatically (via its billing relationship).

It ought to be possible to extend this approach to a number of other service failures where there is already a fixed compensation scheme in place but payment is not currently required to be automatic.

18. Complaints to Ombudsman Services: Energy – Report for Ofgem exploring why few consumers refer their complaint to Ombudsman Services: Energy. https://www.ofgem.gov.uk/sites/default/files/docs/2013/12/ofgem_gfk_complaints_to_ombudsman_services_energy_report_2013_0.pdf

Postal services: The fixed compensation for delays and failures to deliver guaranteed tracked postal packages could be paid automatically to the sender within a set period from the guaranteed delivery date or 'lost' threshold being reached, unless the recipient has made a claim in that time. At present this is likely to only be applicable to tracked services, although if Royal Mail were to track items more generally it could be expanded.

Rail services: Fixed compensation due for delayed rail services could be paid automatically to advance ticket-holders where the Train Operating Company (TOC) can access the details of ticket-holder (and some TOCs are already implementing this).

And many of the potential candidate services for new fixed compensation that we identified in section 3 also appear to be candidates for automatic payment.

Rail services: Payment could be made automatically where

- there are repeated short delays, for passengers with smartcards or season ticket-holders who have nominated a service
- there are short-formation peak-time trains, for passengers with advance tickets, smartcards or season ticket-holders who have nominated a service.

Energy: Payment for delays in switching energy supply could be made automatically.

Telecoms: Automatic payment could be made in the case of qualifying outages caused by an Openreach street cabinet failing (which affects known households), or missed/short-notice cancellation of engineer appointments.

There may be other opportunities for fixed compensation for individual service issues to be paid automatically, including payment of fixed compensation for **flight delays**. Whilst the levels of such compensation are set in EU legislation there appears no reason not to make consumers' access to the amounts due as simple and easy as possible.

We recommend that regulators require compensation to be paid automatically whenever a firm becomes aware of a breach affecting known consumers, as is currently the case in utilities, and that this should cover at a minimum, the services listed in this section.

4.2 Improving accessibility where payment cannot be made automatically

For other failures it may be possible for the firm to make a payment automatically in some cases, but not in others, depending on the circumstances of the failure. For example, a failure to substantively respond to a consumer complaint or to respond to account queries may be identifiable by a firm - but the failure may also be due to a system failure that means the firm is unable to identify the affected consumers.

In a further set of cases it is likely that a payment will require a consumer to make a claim. This may be because the failure is difficult for the firm to identify or because it is difficult to identify the affected consumers, e.g. rail commuters without smartcards or nominated services.

Where identifying a breach - or those affected - may or will require a consumer to make a claim, firms should be required to adopt a proactive strategy to inform consumers of their rights. This strategy should be developed either at a regulator or provider level through engagement with consumers, to identify the most effective methods of raising awareness.

4.3 Making compensation easier for consumers: our asks

Making payment of compensation easier will improve outcomes for consumers. It will mean that consumers who are entitled to compensation are more likely to receive it and it will provide an incentive on firms to improve performance so as to avoid having to pay significant payments.

Regulators should

- require compensation to be paid automatically wherever a firm becomes aware of a breach affecting known consumers (as is the case currently in utilities)
- require firms to adopt a proactive strategy to inform consumers of their rights where identifying a breach or identifying the consumers affected by a breach may or will require the consumer to make a claim.

Government should

- legislate where necessary to clarify that all economic regulators have the power to require that compensation be paid automatically
- require regulators who have not already done so, to review the potential for making compensation automatic in their sector and to make changes to schemes to bring this about.

Annex: Summary of regulators' powers in relation to compensation

The powers of regulators to set fixed levels of compensation and to make payment of that compensation automatic where possible, varies widely and in some cases may be ambiguous. This annex summarises our understanding of existing powers of regulators. In sections 3 and 4 we recommend that these powers are clarified where necessary to enable regulators to implement the recommendations in this report.

A.1. Telecommunications

Ofcom does not have an explicit statutory power to set fixed compensation for telecoms providers, nor to make it automatic. However, it could attempt to introduce such provisions through amendments to its General Conditions of Entitlement, the regulatory framework that applies to service providers in the UK.

Openreach's compensation levels are set out in its Service Level Guarantees, which form part of contracts between Openreach and providers. Ofcom has previously made directions to amend these, following consultation.

A.2. Post

Royal Mail's compensation arrangements are set out in their Scheme, which they have a statutory duty to publish. Any changes to that Scheme require notification to Ofcom and consultation, following which Ofcom can direct Royal Mail to make amendments to the Scheme.

Ofcom does not appear to have the power to make an 'unprovoked' direction to change the Scheme, although the Scheme appears to be updated frequently, which would allow Ofcom regular opportunity to make such a direction.

A.3. Rail

Compensation arrangements currently are included in the National Rail Conditions of Carriage and franchise agreements between the DfT and TOCs, neither of which are under the regulator's control. Our super-complaint in late 2015 called for these arrangements to be brought into licences, which the ORR can either modify by agreement with TOCs (after allowing representations) or via referral to the CMA.

A.4. Energy

The existing Guaranteed Service Standards (GSSs) for networks and suppliers of gas and electricity are set out in secondary legislation, to which Ofgem can propose changes. It must:

- Consider the results of research to discover the views of a representative sample of persons likely to be affected by the changes.
- Published a notice of its proposals and consider the representations made in respect of those proposals.
- Consult Citizens Advice and Citizens Advice Scotland, gas suppliers, electricity suppliers, and persons and bodies appearing to be representative of persons likely to be affected by these Regulations.

A.5. Water and wastewater

The existing GSSs for water and sewerage are set out in secondary legislation, to which Ofwat can propose changes. It must:

- Arrange for such research as it considers appropriate with a view to discovering the views of a representative sample of persons likely to be affected by the changes, and then consider the results.
- Serve copies of its proposed changes on every affected water/sewerage company, and on persons or bodies appearing to them to be representative of persons likely to be affected by the changes, and allow representations.

A.6. Requirement to make payment automatic

Where the regulator can propose changes to levels, it seems likely that they could also require payment to be automatic. However, this might make the test of proportionality (relevant to Ofcom when changing the General Conditions of Entitlement) a little harder to pass.

The logo for 'Which?' is displayed in white text on a red square background. The word 'Which?' is written in a bold, sans-serif font, with a question mark at the end.

Which?

JUNE 2016

Which? 2 Marylebone Road, London, NW1 4DF
which.co.uk | 020 7770 7000

Which? is the trading name of Consumers' Association - a registered charity No 296072