

Which?, 2 Marylebone Road, London, NW1 4DF

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Response to: CAA consultation on revisions to 'CAP1324 - Policy for ADR applicants and approved ADR entities'

Consultation Response

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Summary

- Which? welcomes the opportunity to respond to the Civil Aviation Authority's (CAA) consultation on revisions to 'CAP1324 Policy for ADR applicants and approved ADR entities'. We believe the current rules do not work in favour of consumers and the changes proposed in this consultation do not go far enough in addressing the weaknesses of ADR in aviation.
- Which? believes that the CAA and the Government need to act on the recommendations set out in the Aviation Strategy and the recognition that this sector needs mandatory ADR membership in the form of a single statutory-backed ombudsman, enhanced standards, greater transparency and stronger oversight from the regulator.
- Which? is concerned that the amendments proposed in regard to "novel and complex cases" lack the passengers' perspective, and do not appear to offer certainty of outcomes and convincing evidence of how they will make ADR work better for consumers. These proposals continue to deepen the gap between complaint handling bodies and consumers and risk diluting existing rules.
- We broadly welcome proposals to set rules enabling ADR schemes to hold post-decision reviews and to handle claims on a flight basis rather than a passenger basis. However, we are concerned that these practices are already available to ADR schemes and businesses showing there is a poor track record of transparency of processes and decision-making.
- We agree that allowing ADR bodies to set up trust accounts to pay compensation directly to consumers is a positive step for consumers as it could speed up payments. However, it's important that these arrangements are subject to ongoing monitoring and proper financial oversight from the CAA to safeguard consumers who can be confident they are engaging with a reliable and competent scheme.

Introduction

Which? welcomes the opportunity to respond to the Civil Aviation Authority's (CAA) consultation on revisions to 'CAP1324 Policy for ADR applicants and approved ADR entities'. We are disappointed to note that some of the proposed amendments to ADR schemes' rules do not seem to make ADR better for consumers. Existing rules do not work in favour of consumers, and some of the proposed changes are a dilution of current provisions further disempowering consumers.

It is disappointing that the consultation document published by the CAA does not offer a rationale and background for the proposed revisions to CAP1324. We understand that the CAA has been in discussions with a range of stakeholders on potential enhancements to its ADR policy prior to launching this consultation; yet the details of these discussions have not been made public.

This lack of transparency is rather problematic as it risks undermining trust in the sector, perpetuates existing lack of public confidence in aviation and the regulator and, in addition, it does not help consumers get close to the regulator and understand how it is working for them.

Which? research found that trust in the travel industry has dropped to a record low following the coronavirus crisis finding that just one in five (22%) of the respondents has trust in this sector¹. An effective complaint handling system and regulatory framework is fundamental in creating and maintaining trust in markets by supporting passengers who experience a poor service or travel disruption. This is crucial for an industry that scores so low on consumer trust.

We believe the current legal framework for ADR in aviation is ineffective as it sits within a regulatory and enforcement environment in need of fundamental reform. For ADR to be a successful tool of regulatory enforcement, it is crucial that the powers of the CAA are strengthened to incentivise airline compliance and that a single statutory-backed ombudsman is introduced in aviation. In the interim, in light of the proposals put forward in this consultation and the need for urgent action to better support consumers when things go wrong, we also believe it is paramount for the CAA to use its existing powers more effectively within the limits imposed by the current ADR framework.

Therefore, as part of our response, we call on the regulator to:

- seek and promote greater transparency of ADR bodies' complaint handling and decision-making processes and their engagement with the industry;
- routinely review ADR bodies' approved status and monitor their performance to ensure they are accountable to consumers;
- improve and expand its requirements for data reporting and promote improvements by encouraging businesses to act on their complaints data.

¹ 'Trust in the travel industry plummets to record low amid coronavirus refunds scandal', Which?
<https://www.which.co.uk/news/2020/05/trust-travel-industry-plummets-record-low-amid-coronavirus-refunds-scandal/>

Which? view on ADR reforms

For a number of years, Which? has called on the Government to reform the current system for Alternative Dispute Resolution (ADR) so that it works more effectively for consumers. In our recent report “Creating a successful enforcement system for UK consumers”², we highlighted the weaknesses of the current consumer enforcement regime and called for the creation of a robust enforcement toolkit that can better deal with the threats posed by the changing consumer landscape. Among our recommendations, we called for the government to “deliver an effective ADR system to sit alongside a robust public enforcement regime for consumers”. More specifically, we called for:

- easier access to the relevant ADR scheme through a single, central portal
- a single scheme per sector
- an obligation on sectors (particularly where significant or essential purchases are involved) to be part of a scheme
- fair and enforceable decisions by ADR bodies
- effective oversight of how ADR schemes are operating by a robust regulator or competent authority
- a system where ADR schemes can feed into and influence public enforcement about areas of consumer detriment and incentivise compliance.

In our response to the 2018 BEIS green paper on Modernising Consumer Markets, we strongly supported the Government’s intention to strengthen the ADR system as well as public enforcement³. As part of this, we highlighted how ADR schemes appear daunting to many consumers. Which? research in 2017 found that 24% of consumers thought they would need specialist skills or knowledge to make a claim - and many are put off from using ADR, thinking it will be time-consuming, with 56% of those who had used ADR finding it so⁴. The changes we proposed to the current system of ADR would ensure that there are effective ADR mechanisms in place that enable consumers to pursue complaints, without having to resort to potentially lengthy, complex and, in some cases, costly procedures through the courts.

In this regard, the CAA’s response to the green paper was encouraging, particularly its recommendations to Government to create a single portal that would improve access to the relevant ADR body and the willingness to review the current voluntary approach to ADR and whether a mandatory system would work best to ensure all consumers have access⁵.

Which? also welcomed the Aviation Strategy’s proposals for a Passenger Charter on consumer standards for airlines and airports which correctly highlighted how a review of ADR in aviation needs to sit alongside an expansion of the enforcement powers available to the CAA⁶.

² Creating a successful enforcement system for UK consumers, Which?, Feb 2019

<https://www.which.co.uk/policy/consumers/3851/ukenforcementsystems>

³ Response to BEIS Modernising Consumer Markets Green Paper, Which?, July 2018 <https://www.which.co.uk/policy/consumers>

⁴ Populus on behalf of Which? interviewed online 2411 nationally representative UK adults.

⁵ Response to BEIS consumer green paper: modernising consumer markets, CAA

https://www.caa.co.uk/uploadedFiles/CAA/Content/Standard_Content/Our_work/Consultations/Responses_to_external_consultations/CAA%20response%20to%20BEIS%20green%20paper%20final%203%20July%202018.pdf

⁶ Aviation 2050: The future of UK Aviation, DfT, December 2018

The fact that Ryanair withdrew its membership from AviationADR in 2018 when it disagreed with its decision on complaints related to crew strikes is evidence of how the complaint handling system is failing consumers and cannot work effectively without mandated ADR. It also highlights the urgent need for enhanced regulatory powers to the CAA that would allow it to issue fines for breaches of Regulation 261/2004. In light of the crisis brought by the Covid-19 pandemic, and the declining consumer trust in the sector, we believe the case for mandating ADR membership with the establishment of a single statutory-backed ombudsman is stronger than ever.

A statutory-backed ombudsman would have the power to enforce decisions directly and would:

1) give consumers a clearer, more consistent path to resolution 2) allow businesses to demonstrate their commitment to providing good customer service 3) help create trust as passengers would know independent support is available when things go wrong and 4) provide feedback and advice to airlines to enhance their performance.

Ultimately, Which? believes that instead of creating new rules aimed at potentially achieving full take-up of ADR across the sector, the CAA and the Government need to act on the recommendations set out in the Aviation Strategy and the recognition that what this market needs is mandatory membership, enhanced standards, greater transparency and stronger oversight from the regulator.

Which? calls for a more ambitious approach that includes:

- **Work on the recommendations set out in the Aviation Strategy and the review of ADR and complaint standards envisaged in the Passenger Charter;**
- **Establishing a single statutory ombudsman scheme, and for such a scheme to be mandatory for all airlines;**
- **Providing the CAA with enhanced enforcement powers including fining powers for breaches of Regulation 261/2004 allowing the regulator to hold businesses to account and punish for bad behaviour.**

Which? view on the proposed changes

New process for complex and novel complaints is detrimental to consumers

Which? is concerned that the amendments proposed in Section 6 and Section 18 of the Draft CA1324 policy document lack the consumer perspective and continue to deepen the gap between complaint handling bodies and consumers. The creation of a new process for dealing with complaints of a complex and novel nature risks diluting existing ADR rules and could create opportunities for airlines to use this process to delay and ultimately refuse compensation.

Which? disapproves of the ambiguity and lack of clarity in 'Section 18' and 'Annex G: Resolving complaints that raise complex and novel issues' in the CAP1324 document. The new process is



designed for complaints related to Regulation EC 261/2004 involving circumstances “that have not previously occurred, and/ or where there is no established case law or clear principles for determining the outcome of the case”⁷.

While we agree with the CAA that novel and complex cases that are difficult to assess and clearly apply the Regulation EC 261/2004 on can exist, we believe that creating a new language of ambiguity in the ADR scheme rules is counterproductive and potentially detrimental to passengers. Given that the vast majority of complaints escalated to ADR schemes are related to Regulation EC 261/2004, and that it is only on very rare occasions that an agreement cannot be found between the ADR, CAA and airlines on the law applicability⁸, it seems unwise to add a new layer of complexity and uncertainty to the complaint handling process.

The proposed rules lack certainty of outcomes and convincing evidence of how they will make ADR work better for consumers. While we agree with the CAA that the current system does not work in those cases where the law isn't clear and airlines do not agree with ADR bodies' decisions on cases (such as the Ryanair's crew strikes case), we believe this issue stems from the lack of suitable enforcement powers available to the CAA and from the voluntary, fragmented nature of the current ADR system.

In addition, we believe it's important to ensure ADR bodies have adjudicators that have the relevant qualifications, skills and experience to navigate the law, be it British, European or international. It should be among the CAA's priorities as the aviation regulator to monitor ADR schemes' performance and quality of outcomes and to be provided with evidence of the competency of their staff when applying to be a CAA's approved scheme.

Timeframe for resolving complaints

The European Directive on Consumer Alternative Dispute Resolution 2013/11/EU gives the timeframe in which disputes should be resolved as 90 days; this is not only too long but is measured from the date on which all information necessary to investigate the case has been submitted. If the airline stalls on providing this key data, this potentially adds weeks, or even months, to the length of time a consumer is out of pocket.

The Directive establishes that in exceptional cases of highly complex nature, this timeframe can be extended by the ADR scheme for the purpose of investigating the case and finding a resolution. A second exception to the given timeframe for complaints of a complex and novel nature is unnecessary and risks diluting existing rules and being detrimental to consumers.

The standard timeframe of 90 days is too long. The latest set of data available from AviationADR shows that the average time for resolving complaints was 82 days in 2017-18 and 78 days in the

⁷ From the 'Complex and novel issues list' attached to this consultation

https://consultations.caa.co.uk/cm/policy-for-adr-applicants-and-entities/supporting_documents/ComplexAndNovelIssuesListDraftForConsultation.pdf

⁸ Given that the 'Complex and novel issues list' provided by the CAA with this consultation is fairly comprehensive and that past court cases have helped reduce gaps in the applicability of the Regulation.



previous year⁹. Enabling further extensions for dealing with complex and novel cases does not work in favour of consumers in light of these data records.

The process for resolving disputes should be unambiguous, quick and straightforward. Consumers should be given clear guidance on what to expect when escalating a complaint and be kept informed of the process at various stages.

Post-decision reviews

Which? welcomes the proposal enabling ADR schemes to establish internal processes for evaluating case decisions taken by ADR officials in post-decision reviews. Nevertheless, we are concerned that this practice is already available to ADR schemes and businesses. While embedding these practices in the scheme rules is a positive step towards greater transparency, the fact that these might not be new and are already permitted is again evidence of how complaint handling should be assigned to a single statutory-backed ombudsman.

Transparency of the activities ADR schemes undertake with businesses when resolving disputes is paramount to an effective complaint handling system that is built upon trust with consumers and with the industry. Data transparency must be improved by ADR schemes so that they can be held accountable for their performance and improvements can be driven.

It is not clear from the proposed scheme rules whether these reviews are expected to be initiated by ADR officials or prompted by airlines or airports. We believe it's important to clarify this point and ensure that the learnings from these reviews are shared with the industry, the regulator and the public to build trust and confidence in the sector in their annual reports and on their website. In this regard, we recommend that the CAA makes post-decision reviews a transparent process and for the regulator to play an active role in monitoring outcomes of these reviews to ensure it is aware of the issues raised and satisfied with any potential changes to internal complaint handling processes.

Trust account arrangement for paying consumer awards

Which? welcomes the plan to give ADR schemes the option to set up trust account arrangements to pay compensation directly to consumers, effectively reducing the number of transactions between the consumer, the ADR scheme and business in question. Allowing ADR schemes to collect and distribute compensation should simplify the process and make it more efficient.

However, it's important that these arrangements are subject to ongoing monitoring and proper financial oversight from the CAA to safeguard consumers who can be confident they are engaging with a reliable and competent scheme. It makes it even more crucial that a 'fit and proper persons test' should be employed when approving ADR bodies, to ensure that those registered as directors of the scheme are of sound conduct, and that the schemes are subject to a regular performance review.

⁹ Annual Activity Report to CAA (2019, 2018), CDRL <https://www.aviationadr.org.uk/annual-activity-report/>



Handling claims on a flight basis

Which? supports the proposal to allow ADR schemes to establish processes for assessing claims requesting financial compensation on a flight basis, rather than on a passenger basis. This process should ensure that different passengers complaining about the same flight for the same reasons receive the same outcome, while also creating efficiencies in the complaint handling process which should ultimately be beneficial for passengers.

The draft rules as set out in this consultation do not make it clear that this process would only be applicable when complaints include additional passenger requests, such as for refunds of expenses incurred because of a delayed flight. We ask the CAA to clarify this point to ensure that individual passengers' requests are still assessed on a passenger basis rather than on a flight basis.

We agree with the CAA that the establishment of these procedures need to be incorporated into the relevant scheme rules at the ADR bodies. In addition, it is important that ADR schemes publish information on the cases they assess under this process, to provide clarity on the scheme's operations and their decision-making process. ADR schemes should be required to provide a minimum dataset in an agreed, transparent format. This would help demonstrate that a scheme is impartial and that outcomes are not biased in favour of consumers or the industry.

We recommend that the CAA expands and improves its data reporting requirements to ADR bodies to include the following data:

- information on the number of claims that have been handled on a flight basis, rather than a passenger basis;
- an analysis of the potential efficiencies resulting from this process;
- timeframes for resolving complaints that have been streamlined using this process.

Non-regulated ADR schemes

Which? welcomes the proposal requiring ADR bodies offering both regulated and non-regulated dispute resolution services to provide clear information on the key differences between the two schemes on their website. Prompting ADR bodies to also include information on the CAA's Passenger Advice and Complaints Team (PACT), including their contact details, for customers wishing to make a complaint against an airline that participates in a non-regulated scheme is also positive. We recommend that the ADR bodies include additional information on PACT, clearly explaining that the CAA's rulings are purely advisory and can only be enforced by the courts, and that PACT does not have a legal timeframe within which to handle complaints.



About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions. We're not influenced by third parties – we never take advertising and we buy all the products that we test.

For more information, please contact Francesca Lo Castro, Senior Policy Adviser
francesca.locastro@which.co.uk

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