

Consultation: Department for Transport's Aviation Consumer Policy Reform

Summary

Which? welcomes the opportunity to respond to the Department for Transport's proposals for reforming aviation consumer policy. Our views are summarised as follows:

- Reforms in the aviation and holiday sector are long overdue. Which? recognises the immense task facing the government, regulators and industry in getting the travel industry back on its feet. However, if the sector is to build back for the long term then serious limitations and inconsistencies of the regulatory and enforcement framework, exposed in earnest by the pandemic, need to be addressed in the government's long term plans in order to rebuild consumer confidence. Government departments' approaches to reforms in this sector must complement each other for a cohesive, consistent and holistic agenda for reform.
- For this reason, Which? strongly supports the Department for Transport (DfT) proposals to reform the Civil Aviation Authority (CAA) enforcement powers. We believe the CAA's current powers are too weak to secure action from businesses that are breaking consumer law. Administrative fining powers would give the CAA the ability to deter businesses from non compliance with consumer law, which has been flagrant by numerous airlines over many years, and enable it to intervene more swiftly and effectively when there are breaches.
- Which? believes that in the interim, and going forward, the CAA must act as a stronger regulator that acts in the interest of consumers by taking proactive steps to monitor businesses and ensuring compliance with the law. It is crucial the regulator responds quickly to new and emerging issues in the sector, championing passengers rights and protections, and ensuring a level playing field for all businesses by ensuring all of them comply with the law.
- Which? strongly supports the proposals to make Alternative Dispute Resolution (ADR) mandatory in the aviation sector given the scale of consumer detriment. Aviation is the only regulated sector where businesses are not required to be members of an ADR scheme, which leaves millions without access to ADR when things go wrong.

- We are concerned that having more than one ADR provider works against consumers' interests and therefore we urge the government to establish a single provider in the form of a statutory-backed ombudsman. It is crucial that a robust oversight system is set up so that the CAA can effectively monitor the ADR system performance and quality of outcomes.
- We would also reiterate in this context our call for an effective collective redress regime for passenger rights, as for other consumer protection matters, as already exists for competition cases. As set out in detail in our response to the recent BEIS competition and consumer policy consultation, there are many benefits to such a system, especially if it is implemented on an 'opt-out' basis. These include: addressing systemic and widespread consumer detriment; a more efficient use of the court system; and encouraging settlement of meritorious claims.
- Which? has serious concerns about the lack of evidence to support the proposals to change the Regulation EC261/2004 compensation rules, as retained in UK law, for domestic flights that are delayed. The same concerns would also apply if the same approach was applied to cancellations and denied boarding situations. We note that the consultation is only seeking views on cancellations and denied boarding situations and no changes are proposed at this stage.
- The primary purpose of EC261 is to ensure a high level of consumer protection, including by providing sanctions that are 'effective, proportionate and dissuasive', and this crucial point has not been taken into account in the consultation. Any new proposal to replace existing EC261 rules must still meet its original objective. Therefore, we believe that the proposals presented in this consultation do not offer a strong enough deterrent that would stop airlines from delaying, cancelling or overbooking flights.
- Furthermore, we are concerned that the DfT's proposals on compensation would not provide passengers with any compensation for the 'consequential losses' they would incur as a result of the delay. In such circumstances, the ticket price paid by the customer will not be proportionate to the harm caused by the long delay.
- We are also concerned that the impact assessment that accompanies this consultation fails to provide the evidence required to support the proposals that the government is making. Our concerns include:
 - the lack of consideration of the distributional impact of the proposed changes, given that the likelihood of someone taking a domestic flight is strongly related to where they live and it is clear that changes will impact some parts of the UK more than others. The proposed new rules would disproportionately affect some groups of passengers, such as those flying to and from Northern Ireland and Scotland. Likewise, there is no consideration of the impact these

new rules would have on disabled passengers despite the consultation covering separate proposals on accessibility.

- The prominence given to claims made by low-cost airlines that compensation can be equivalent to 3% of their turnover without any substantiated evidence made publicly available to support these claims.
 - The lack of consideration of the impact these new rules would have on cancellations and connecting flights. The ambiguity and lack of clarity in the consultation text and the impact assessment on these topics is disappointing and highly problematic.
- For these reasons, we are disappointed that the DfT decided to proceed with a consultation on the highly complex topic of passenger compensation for disrupted flights without first attempting to collect the evidence via an official call for evidence or through a pre-consultation exercise.

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Introduction

The consumer enforcement landscape in the aviation sector

The scale of the consumer detriment caused by passenger rights violations over the years, and unfair commercial practices by parts of the industry, have put a spotlight on the weakness of the current enforcement framework and the urgent need to reform and enhance the powers of the Civil Aviation Authority (CAA).

As stated in our response to the Department of Business, Energy and Industrial Strategy (BEIS) consultation on consumer and competition reforms in October 2021, we believe the Government has a clear opportunity at present to make progress on key reforms in the aviation sector by strengthening the enforcement powers of the CAA and mandating a single mandatory Ombudsman scheme.¹ The lack of accountability in the sector has allowed unlawful behaviour to persist, with non-compliant businesses facing no consequences and consumers left to shoulder the bill. These systemic issues are particularly evident in the regulators' failed attempts at enforcing consumer protection law during the pandemic.

However, this is not a symptom of the Covid-19 pandemic. The need for regulatory intervention to uphold air passenger rights has been clear for years. The pandemic has only exacerbated structural enforcement problems that were already present before the Covid-19 crisis. Examples of this need include the failure of Monarch and Thomas Cook which required taxpayers intervention, the Icelandic ash cloud that grounded planes and passengers for days with no recourse to refunds, Ryanair workers' industrial action in 2018 that saw passengers refunds refused and the airline ignore CAA and Alternative Dispute Resolution (ADR) scheme rulings, and the long term small claims court backlog costing both individual consumers and the taxpayer.

The lack of enforcement in this sector has been demonstrated in various national and international studies. Key findings include:

- Passenger rights are comprehensive but consumers have to fight to have them protected and enforced, and there is no system of collective redress in contrast with competition law breaches.²
- Consumer's awareness of passenger rights remains relatively low, and passengers on the same flight can be treated differently depending on their understanding of their rights. More importantly, they "frequently do not obtain them due to problems with enforcement".³

¹ 'Which? Response to Reforming Competition and Consumer Policy consultation', Which? <https://www.which.co.uk/policy/consumers/7333/consultation-responses>

² Special report no 30/2018: EU passenger rights are comprehensive but passengers still need to fight for them. <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=47547>

³ Ibid.

- UK passengers are concerned that they would not be treated fairly if things go wrong, with around two in 10 passengers found to be lacking confidence in the sector in 2019.⁴ It is important to consider how a stronger, more effective enforcement toolkit, which works alongside a clearer and more consistent set of consumer rights, would help address the lack of consumer trust in the sector.
- Air passenger rights have not been safeguarded during the Covid-19 crisis with passengers forced to accept vouchers, without the option for a refund, a practice that is unlawful.⁵ In the initial period of the crisis, many passengers were not informed of their rights and were not reimbursed, or had no other choice than to accept vouchers. Despite the airlines' commitments to the CAA and the European Commission⁶, Which? has found a further example of where an airline may still be acting in breach of Regulation EC261, by implementing an alternative refund mechanism where passengers' refunds are initially placed in an e-wallet. Customers will then need to get in touch a second time to ask to withdraw the cash they are due, and there appear to be some limitations in how the balance of refunds held in the e-wallet can be used.⁷

For these reasons, we strongly believe the government should grant the CAA administrative fining powers, bringing it in line with other sector regulators in the UK and abroad, and should make progress on reforming redress mechanisms for consumers. Watering down passenger rights for domestic flights, especially following an unprecedented crisis such as the pandemic, is not the solution to boost the economy and regain consumer confidence in the aviation and holiday sector.

The ongoing CAA v Ryanair case

A clear example of the weakness of the enforcement system in aviation, and how this results in consumer harm, is the Ryanair crew strike cancellation case, which represents the only time in which the CAA has taken enforcement action in the last 19 years. The CAA made an application to the courts against Ryanair in 2018 for its failure to compensate passengers after disruption to flights due to a strike by the airline's pilots. The regulator has been involved in this long running legal case since then, and despite the High Court ruling in favour of the CAA in April 2021, and the Court of Appeal decision against the airline in February 2022, the case is still ongoing as we understand that Ryanair has indicated that it is seeking to appeal to the Supreme Court.

⁴ Wave Seven: UK Aviation Consumer Survey.

<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9203>

⁵ Special Report 15/2021: Air passenger rights during the Covid-19 pandemic: Key rights not protected despite Commission efforts. <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=58696>

⁶ Following a complaint that BEUC and 11 of its members (including Which?) filed in July 2020 about systematic breaches of air passenger rights in the first half of 2020, and investigations by the EC and the Network of Consumer Protection Cooperation authorities (CPC), 16 major EU-based airlines committed to improving their cancellation policies and how they treat passengers in such events. <https://www.beuc.eu/publications/beuc-reports-major-airlines-breaching-passenger-rights-and-calls-in-dustry-investigation/html>

⁷ 'Is Ryanair breaking the law over refunds again? How to get your cash back.' Which? <https://www.which.co.uk/news/2022/03/travel-news-ryanair-refund/>

Ryanair has already faced similar, and faster, action brought by enforcement agencies in other European countries. For example, the airline was fined €1,850,000 by the Italian competition enforcement authority for the 2017 mass strike-related cancellations in relation to flights to and from Italy.⁸ As further explained in answer to Question 1 below, there are other good examples of fining powers, such as those in Greece, where the Hellenic Civil Aviation Authority has established a set of administrative fines that can be imposed on airlines found in breach of Regulation EC261. In particular, the system is set out so that, when airlines refuse paying compensation under Article 7 of EC261, they would have fines imposed upon them that are calculated based on the number of passengers booked on the affected flight.⁹ Internationally, some comparable authorities have more extensive powers¹⁰ and use them regularly, as in Canada.¹¹

Although all companies should have the right to appeal, the process that has been followed in the CAA v Ryanair case is likely to result in passengers waiting at least five years to receive compensation for cancelled flights. If the CAA had had the ability to impose, or threaten to impose, a direct fine on the airline, this lengthy and costly court process could have been avoided.

Airlines malpractice

For consumers to realise the benefits of regulations on air travel and package holidays, the rules have to be clear, coherent and effectively enforced. Consumer rights are meaningless if they are not enforced.

Which? investigations have repeatedly shown that some airlines are prepared to break the law when it comes to refunds and consumer rights, with little fear of facing any consequences. A recent example illustrates how the weakness of the enforcement system fails to deliver for consumers by allowing malpractice.

Earlier in March, Which? published an investigation on Ryanair's Wallet, calling on the CAA to step in and investigate this potential breach of consumer protection law and inform passengers of their rights if an airline cancels their flight. The Wallet is a facility the airline introduced last year whereby refunds are automatically paid into a 'Wallet' attached to customers' Ryanair accounts – from which they must then request to withdraw their funds.

⁸ "Mass cancellation of flights in September and October 2017, Ryanair fined €1,850,000", AGCM. <https://en.agcm.it/en/media/press-releases/2018/6/alias-2498>

⁹ Imposing penalties where an airline does not apply EU Regulation (EC) No 261/2004, March 2022. <https://www.gov.gr/en/sdg/travel-within-eu/passenger-rights/general/imposing-penalties-where-airline-does-not-apply-eu-regulation-ec-no-261-2004>

¹⁰ Study on the EU Regulatory Framework for Passenger Rights, Comparative analysis of good practices, November 2021, EC. <https://data.europa.eu/doi/10.2832/94240>

¹¹ See: <https://otc-cta.gc.ca/eng/summaries-enforcement-actions>

Which? believes this creates an extra step in the process, which could result in fewer people claiming their money back in cash.¹²

Under Article 7(3) of Regulation EC261, airlines are required to obtain travellers' signed agreement if they wish to provide a voucher or 'other services' (which we believe the Wallet would be viewed as) as an alternative to a cash refund. Ryanair does not appear to give passengers a choice as to whether their refunds are issued into the Wallet, which may be in contravention of EC261 and the airline's commitment to the CAA and the European Commission in regards to vouchers and refunds policies.¹³

Travellers need a stronger regulator that is able to take swift, meaningful action and is willing to use its enforcement powers on behalf of the consumer.

Airline's handling of passenger refunds during the pandemic

During the course of the pandemic, tens of thousands of refunds were not paid to consumers within the specified legal time frame with many having to wait weeks or months to receive their refund, in clear breach of Regulation EC261.

To date, there are still millions to be paid for flights that were cancelled at the start of the pandemic while several holiday providers and their customers are still waiting to receive the flight portion of their holiday refunds from the airlines.¹⁴

The scale of the consumer detriment caused by these passenger rights violations and industry's unfair commercial practices has put a spotlight on the weakness of the current enforcement framework and the urgent need for reforming and enhancing the CAA powers. The lack of accountability in the sector has allowed unlawful behaviour to persist, with businesses facing no consequences and consumers left to shoulder the bill. These systemic issues are particularly evident in the regulators' failed attempts at enforcing consumer protection law during the pandemic.

¹² 'Which? calls for investigation of Ryanair's Wallet refunds policy over possible breaches of consumer law', Which?, Available at:

<https://press.which.co.uk/whichpressreleases/which-calls-for-investigation-of-ryanairs-wallet-refunds-policy-over-possible-breaches-of-consumer-law/>

¹³ CAA review into airline refund practices during the Covid-19 pandemic, CAP1947.

<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9711> and Consumer protection: Airlines commit to timely reimbursement after flight cancellations, EC.

https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4944

¹⁴ In a survey of ATOL licence holders carried out in June 2021, Which? found that most respondents are still waiting to receive substantial refund payments from airlines, with some refund requests going back to March 2020. Several of these businesses chose to pay full refunds to their customers using their own cash reserves to cover the flight portion of the holiday, which put significant pressures on working capital, while others had to acquire additional financing to cope and to meet the legal requirements of the PTRs. From recent conversations with industry, Which? understands that there are still a lot of outstanding payments stuck between airlines and travel agents and consumers.

The CAA's review of airlines' behaviour was largely ineffectual in changing airline refund practices. Even though the regulator identified several carriers that weren't paying refunds 'sufficiently quickly', it opted not to take enforcement action after receiving commitments from the airlines to improve their performance.¹⁵ Which? passed on evidence to the regulator showing that some airlines still failed to comply with the law, with passengers who were due to travel in March 2020 still waiting for a refund in the Summer, but no enforcement action was taken against those airlines that failed to meet their commitments to the regulator.

The Competition and Markets Authority's (CMA) own investigation into British Airways and Ryanair over their failure to refund passengers for flights they could not legally take due to lockdown was positive news for consumers, particularly given the success the CMA had had in its intervention in the package holiday sector where it secured commitments from holiday companies to comply with the law and return millions of pounds to affected customers. However, the announcement of the CMA closing the case was a further blow to consumer trust in this market and in the regulators' ability to safeguard their rights.¹⁶ At the time, the CMA's Chief Executive Andrea Coscelli said:

"We strongly believe people who are legally prevented from taking flights due to lockdown laws should be offered a full refund and we launched this investigation in the hope that we would be able to secure a positive outcome for consumers. However, after considering the relevant law and gathering evidence in our investigation, we have concluded that the length of time that would be required to take this case through the courts, and the uncertain outcome, can no longer justify the further expense of public money."

"Given the importance of this to many passengers who have unfairly lost out, we hope that the law in this area will be clarified."

The issue explored by the CMA in their investigation on BA and Ryanair is an evident inconsistency between EC261 air passenger rights, as retained in UK law, and the Package Travel Regulations. Indeed, Regulation EC261 does not cover whether consumers should be refunded when they are legally prohibited from travelling but their flight goes ahead - this is not the case with the Package Travel Regulations, and it's something the DfT should have sought to clarify in the present consultation.

Not all airlines have been refusing refunds for flights passengers couldn't take due to lockdown. For example, when Which? asked the UK's five biggest airlines if their customers could claim a refund if prevented from travelling due to lockdown laws, Jet2, Tui and Easyjet confirmed they could, even if the flight was still operating.¹⁷ However, given the lack of

¹⁵ CAA review into airline refund practices during the pandemic, CAP1947.

<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9711>

¹⁶ CMA closes investigation into British Airways and Ryanair.

<https://www.gov.uk/government/news/cma-closes-investigation-into-british-airways-and-ryanair>

¹⁷ Ryanair and British Airways continue to refuse refunds for customers who can't legally travel, Which?. Available at:

enforcement action on airlines that violated passenger rights, many consumers are having to take matters into their own hands. We have heard from many who are having to incur the financial cost, stress and time challenges of taking the case to a small claims court in order to get the refunds they are owed.

"In June 2020 I booked flights for four to Tenerife (to fly on Dec 23 2020), at a cost of £2,700. On 22 December Spain joined the list of countries banning UK nationals from entering. I duly received an email from Ryanair advising me that we would not be allowed to board the flight. Ryanair refused a refund and merely offered a one-off flight change, to be effected by 31 March 2021. I had to initiate a claim via the small claims court hoping that common sense and justice will prevail".

Some airlines have behaved unfairly towards their customers during the pandemic and this negatively impacted consumers' trust in the market. It is important to note that both the legacy carriers and the low cost airlines have breached consumer law and, unlike the package holiday sector which has been subject to enforcement action by the CMA, these businesses have been emboldened to do so by the absence of regulatory action which encourages further bad behaviour across the industry.

We are aware of airlines breaking or bending the rules, failing to provide refunds to their customers or the travel agents who booked the flight for the consumer, and other airlines then copying them because they effectively 'got away with it'.

We are concerned that this might have an impact on competition in the market, and on the protections, choice, and value available to consumers. When Monarch and Thomas Cook failed, it was the taxpayer who paid. As we come out of the pandemic, we urge the government to consider these issues when looking at the aviation and holiday market.

Which? view on reforms in the aviation and holiday sector

The government's current approach to travel sector reforms lacks ambition and a long-term coherent vision. As consumers return to travel, the government and the CAA should address the long-standing structural problems affecting this sector, including the practice of using consumers' prepayments as working capital, which is the object of discussion in the ATOL consultation, and the disparities between airlines and holiday providers regulations. A more rigorous approach to regulating the industry, and robust enforcement of breaches of consumer law, would also bring much needed stability to the sector in the aftermath of the pandemic.

These issues are not unique to the UK sector and are also being explored elsewhere. As part of its programme on the Sustainable and Smart Mobility Strategy and the New Consumer

<https://www.which.co.uk/news/2021/01/ryanair-and-british-airways-continue-to-refuse-refunds-for-customers-who-cant-legally-travel/>

Agenda¹⁸, the European Commission is currently conducting an analysis of passenger rights and the Package Travel Directive with a focus on ensuring existing rights are properly enforced and the inconsistencies between the two regulatory frameworks are addressed taking in the lessons from the pandemic.¹⁹

We strongly believe that for reforms in this sector, such as the CAA's ATOL reform, to be effective and fair to consumers and industry alike, the Government must aim for an ambitious and harmonised approach to regulation of holidays and flights underpinned by close collaboration between DfT and BEIS. Similarly, it is not enough for the CAA to tinker at the edges, a piecemeal approach to changing rules seems inefficient and could exacerbate and prolong long-term structural problems until a natural disaster or large business insolvency leads to another wave of mass disruption and cancellations. For example, as part of its ATOL reform, we believe the CAA has a clear opportunity to:

- broaden the scope of its ATOL reform to consider the consumer perspective and lack of understanding of the protections the ATOL scheme offers.²⁰
- carefully assess the pipeline money dynamics between the different entities in the payment chain, and how they impact consumer protections. In doing so, it should ensure that new financial requirements for ATOL holders do not exacerbate the regulatory imbalances between the different players in the market.
- Address key changes to consumer protections in the aviation sector as they span both compensation in the event of delay and cancellation, and in the case of insolvency. Air passenger protections and ATOL reforms cannot be looked at in isolation from the airline insolvency provisions.²¹ When airlines go bust, passengers are at risk of being left stranded or without a refund. There have been 87 airline insolvencies from 2011-2019, affecting 5.6m passengers across the European continent, while the collapse of Flybe, Monarch and Thomas Cook is still felt across the industry.²²

The travel regulatory landscape is fragmented and ineffective, and it exposes consumers to significant detriment caused by confusion over the protections they have depending on how and who they book with. The CAA must act as a stronger regulator and take swift action against businesses that are breaking the law by actively monitoring and investigating misconduct; in doing so, it must work closely with the Government on a broader and more ambitious agenda for reforms. We urge the Government to view the current policy landscape

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0696>

¹⁹ Travel - Better protection for passengers and their rights, EC, 2022.

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13290-Travel-better-protection-for-passengers-and-their-rights_en

²⁰ Which? Response to CAA's ATOL Reform consultation, August 2021.

<https://www.which.co.uk/policy/travel/7352/consultation-responses>

²¹ Ibid. and

Air passenger rights in the post pandemic age, BEUC, 2022.

https://www.beuc.eu/publications/beuc-x-2022-005_air_passenger_rights_for_the_post-pandemic_age.pdf

²² Study on the current level of protection of air passenger rights in the EU, EC, 2020.

<https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1>

as an opportunity to design a joined-up strategy whereby the upcoming reforms, including those of the CAA's enforcement powers, the ATOL scheme, the Package Travel Regulations and proposals for an Airline Insolvency Bill (AIB), are viewed holistically to create a coherent and understandable set of protections for consumers. DfT and BEIS' approaches to these regulations must complement each other, rather than duplicate responsibilities.

Therefore, noting the reference to the opportunity of withdrawal from the EU in the consultation's Executive Summary²³, and that the present proposals form part of the government's Brexit Freedoms policy plan²⁴, we would urge the government to ensure that changes to such an important consumer protection as Regulation EC261 are not rushed through, under the powers available in the Withdrawal Act or otherwise, but are given much more careful consideration.

²³ See para 4 of the Executive Summary.

²⁴ The Benefits of Brexit - How the UK is taking advantage of leaving the EU, 2022.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexit.pdf

Key recommendations

In order to create a well functioning and competitive aviation market, it is essential that travellers can book with confidence, are protected when things go wrong, and have high levels of trust in the regulators and businesses that serve them.

Which? calls for a more ambitious approach to reforms that restores consumers' confidence and trust in the aviation and holiday sector. It is crucial that the government sets a coherent and holistic agenda taking account of the following considerations:

Strengthening public enforcement:

- The government should bring forward legislation that will grant the CAA administrative fining powers for breaches of consumer law.
- The government should set a clear direction on the CAA's role in upholding consumer rights, through effective use of its powers to investigate and enforce against potential breaches of consumer rights across the airline industry.
- The CAA should establish an explicitly consumer-focused code of conduct for the airlines operating in the UK with the objective to hold businesses accountable for their behaviour, setting clear expectations on businesses on what policies and behaviours are fair and transparent.

Reforming private enforcement:

- The government should establish a single statutory-backed mandatory ombudsman scheme in aviation to ensure consumers can enforce their rights directly without the need to resort to the courts.
- The government and the CAA should adopt the ADR recommendations set out in the Aviation Strategy 2050's Passenger Charter including recommendations to introduce mandatory membership of ADR, enhanced standards, greater transparency and stronger oversight from the regulator.
- Where recourse to the courts is necessary, a system for collective redress for passenger rights should be implemented, based on an 'opt-out' approach as for competition cases.

Delivering a coherent and holistic approach to consumer rights in aviation:

- The government should abandon its proposals on compensation, as presented in this consultation, and instead focus on addressing the limits of current legislation and the clarifications that are much-needed. Indeed, the government should consider reviewing EC261 passenger rights, taking in the lessons from the pandemic, by

providing clarity in the law on passengers' eligibility for a refund when they are legally prohibited from travelling but their flight goes ahead, and also by clarifying the law in regards to re-routing provisions.

- Following the UK's departure from the EU, the government has the opportunity to reduce inconsistencies between air travel and the Package Travel Regulations (PTRs), bringing greater clarity and protection to consumers.
- We urge the government to design a joined-up strategy whereby the upcoming reforms of consumer rights in travel, including the ATOL reform and proposals for an Airline Insolvency Bill (AIB), are viewed holistically to create a coherent and understandable set of protections for consumers.

1. Tools for the regulator to protect consumers and ensure fair treatment

Question 1. What, if any, additional powers to enforce aviation consumer protection laws directly through civil sanctions should the CAA have? What specific issues would these powers address beyond the enforcement powers already available to the CAA?

Through our investigations and research, we have demonstrated that the lack of administrative fining powers has undermined the ability of the CAA to enforce consumer law legislation and secure routine compliance, leaving travellers exposed to unfair business practices. We have been calling on the government to reform the powers available to the CAA under Part 8 of the Enterprise Act so that the regulator can take swift and effective action against companies that break consumer law. This will also have a strong deterrent effect on unfair business behaviour and incentivise compliance.

Which? urges the government to grant the CAA administrative powers through a Competition and Consumer Bill which could be presented to Parliament in 2022. This represents a clear opportunity to advance this much needed reform and ensure the aviation regulator is able to take effective action to protect consumers in this sector.

As the sector regulator, the CAA has expertise in matters of consumer rights in aviation that should allow it to identify new and emerging issues affecting passengers in the sector and act swiftly in accordance with its prioritisation principles.

Given these concerns, the government must provide clarity on how it expects enforcement in the travel sector to work in the future and what steps it will take to ensure passengers and travellers alike have a regulator with a clear statutory duty to protect their rights.

The CAA itself acknowledges the urgent need for swift enforcement action given how, over the years and not just during the pandemic, they "have experienced significant obstacles and delays through the process of seeking information when investigating a potential compliance issue, negotiating meaningful undertakings that address the underlying behaviour, and the time taken to reach a resolution in court".²⁵

Aside from the ongoing CAA v Ryanair case over crew-related mass cancellations, four other recent examples demonstrate the impact of the CAA's weak enforcement powers on consumers:

- A. In 2010 an Icelandic volcano caused an ash cloud that grounded all aircraft over Europe for 8 days. This caused cancellations, disruptions and mass compensations

²⁵ CAA Response to 2021 Government Consultation Reforming Competition and Consumer Policy, CAP2269. <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=10900>
<http://publicapps.caa.co.uk/docs/33/CAP2269%20CAA%20Response%20to%20BEIS%20RCCP%20Consultation%20CAP%20Format.pdf>

and refunds to passengers. Months after the event, thousands of passengers were still waiting for refunds and compensation - as some airlines, such as the Dutch KLM, felt emboldened to ignore UK/EU law.²⁶ Which? received thousands of calls with regards to the ash cloud and we shared our concerns with the CAA at the time for not being tough enough and taking legal action against KLM and others that were not paying refunds and compensation to affected passengers.²⁷

- B. As a result of Covid-19 restrictions many airlines cancelled flights during 2020 and 2021, however some airlines failed to give consumers a cash refund within 7 days as required under Regulation EC261. Instead, consumers were given the option of rebooking flights or receiving a voucher; in some cases it was very difficult for consumers to even contact the airlines. During this period the CMA received more than 13,000 complaints relating to airlines' failure to offer refunds. In response, the CAA conducted a review of airlines' behaviour and identified several carriers that weren't paying refunds 'sufficiently quickly', but opted not to take enforcement action after receiving commitments from the airlines to improve their performance. Which? found that this action was largely ineffectual in changing airline practices. Indeed, we continued to hear how some airlines still failed to comply with the law, with passengers who were due to travel in March 2020 still waiting for a refund in the summer.²⁸ At the time, the CAA acknowledged how their "enforcement powers are not well suited to swift action" and how "this leads to a period of time when businesses are able to continue breaching the law without sanction".²⁹
- C. In response to reports from the public and Which? that airlines failed to refund passengers for flights they could not legally take due to lockdown, the CMA launched its own investigation at the end of 2020 and initiated legal action against British Airways and RyanAir in June 2021. The CMA's intervention was positive news for consumers, particularly given the success its Covid-19 Taskforce had had in its intervention in the package holiday sector where it secured commitments from holiday companies to comply with the law and return millions of pounds to affected customers.³⁰ However, it raised questions over the role of the CAA as the lead in consumer protection in the airline sector, while the amount of industry misconduct highlights the need for a stronger, more effective enforcer in this space. The recent announcement of the case closing due to "the length of time that would be required

²⁶ 'Thousands of air passengers still await ash cloud compensation', The Guardian.

<https://www.theguardian.com/business/2010/aug/15/air-passengers-ash-cloud-compensation>

²⁷ 'Airlines still dodging compensation claims', The Times

<https://www.thetimes.co.uk/article/airlines-still-dodging-compensation-claims-d7kr6dbh6k3>

²⁸ Airlines failing on commitments to the regulator about time taken to process refunds, Which?

<https://press.which.co.uk/whichpressreleases/airlines-failing-on-commitments-to-regulator-about-time-taken-to-process-refunds/>

²⁹ CAA review into airline refund practices during the Covid-19 pandemic, CAP1947

<https://publicapps.caa.co.uk/docs/33/CAA%20review%20into%20airline%20refund%20practices%20during%20the%20Covid-19%20pandemic.pdf>

³⁰ CMA action led to commitments to refund hundreds of millions of pounds for people whose holidays were cancelled due to the pandemic, including from Loveholidays, Lastminute.com, Virgin Holidays and TUI UK. <https://www.gov.uk/cma-cases/covid-19-cancellations-package-holidays>

to take this case through the courts, and the uncertain outcome³¹ is a further blow to consumer trust in the market and in the regulators' ability to safeguard their rights. The inconclusive outcome of the CMA's investigation on BA and Ryanair is a clear example of how the lack of accountability and clarity on rules in this sector dilutes the effectiveness of consumer protections. It is evidence of how consumer rights are falling through the gaps as the public enforcement system is unable to address areas of consumer harm that are complex and require extensive resources.

How other regulators in other countries compare

In the European Union, some regulators can issue fines against airlines for their failure to comply with passengers rights, both on a flight level following complaints from individual passengers, or on a systemic level once an issue or trend is identified.³²

For instance, the German civil aviation authority, the Luftfahrt-Bundesamt, can issue administrative fines against airlines that do not act in compliance with Regulation EC261. The maximum penalty is €30,000; in addition, the regulator can impose a fine to recover the financial benefit gained by the airline from the illegal practice.

An example in relation to refunds handling during the coronavirus pandemic is the activity of the Italian Competition Authority (AGCM) which in May 2021 imposed a fine of €4.2 million on Ryanair for unfair commercial practices during the pandemic over the airline's refusal to refund passengers whose flights had been cancelled. Fines were also imposed on Easyjet (€2.8 million) and Volotea (€1.4 million) for similar reasons.³³

Nevertheless, it might be easier to compare the CAA's powers with the enforcement toolkit available to other regulators in the UK, such as the Financial Conduct Authority (FCA) or Ofcom, which are able to issue financial penalties to punish wrongdoing, to deter non-compliance and to ensure a business does not benefit financially from the illegal practice. Indeed, the CAA itself has often used the examples of the FCA, Ofcom or the Pensions Regulator in its calls for greater powers³⁴.

Therefore, whether compared to other international or domestic market regulators, an enhancement of the CAA's civil enforcement powers and/or the CAA utilising additional powers to enforce consumer law would not be without precedent in other markets.

³¹ CMA closes investigation into British Airways and Ryanair.

<https://www.gov.uk/government/news/cma-closes-investigation-into-british-airways-and-ryanair>

³² Study on the EU Regulatory Framework for Passenger Rights, Comparative analysis of good practices, November 2021, EC. <https://data.europa.eu/doi/10.2832/94240>

³³ 'Ryanair fined 4.2 million for non-reimbursement of cancelled flights', ICA <https://en.agcm.it/en/media/press-releases/2021/6/PS11865-PS11830-PS11821->

³⁴ CAA response to BEIS green paper, 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

Question 2. If the CAA were to have increased enforcement powers, should their enforcement remit remain as it is currently, i.e. only for cases of collective harm? What would be the advantages and disadvantages of the CAA having increased powers to enforce consumer laws in individual cases?

The CAA should be one part of a comprehensive enforcement regime that includes statutory backed mandatory ADR and, where necessary, access to the courts. In such circumstances we don't foresee there being a need for the CAA to have powers to enforce consumer law in individual cases.

CAA should be able to focus on cases where a significant number of consumers have suffered harm as a result of an airline's actions so it can have the greater impact. In relation to these cases the CAA has access to enhanced consumer measures which could include, for example, negotiating undertakings or obtaining court orders requiring airlines to pay compensation to passengers that have been affected. In some cases consumers, or those that represent them, should also have access to collective redress through the courts either through a streamlined group action or through an opt out collective action (the latter is available to consumers in competition cases but not in consumer law cases.)

Individual cases should be addressed through a statutory backed mandatory ombudsman scheme that provides free, efficient and independent arbitration between the consumer and an airline. Decisions should be binding on the airline. The consumer should have the option to accept the ombudsman's decision or to take their case to court if they would prefer.

If the CAA were to have responsibility for individual cases it would create an additional burden on the CAA and may distract them from addressing cases involving collective harm. It also has the potential to add an unnecessary complication with airlines and consumers having to choose and agree as to whether their dispute is considered by the CAA or by the Ombudsman.

Question 3. Are there any specific issues for the aviation sector that should be considered in the development of any administrative framework for the CAA?

For a number of years, the CAA has been asking the government to reform its enforcement powers given the limitations it currently has to enforce consumer protection laws by being reliant on the current powers available under the Enterprise Act. These calls have extended to other areas of consumer protection, including airlines' contract terms. Indeed, in recognition of its limited powers and inability to act as a rule-making body in its consumer protection role, the CAA has made the case to the government to consider what other

interventions to its enforcement toolkit could be made to ensure contract terms of all airlines operating in the UK are fair and balanced.³⁵

In addition to enhancing the CAA's enforcement powers, the government should ensure the CAA is appropriately resourced to tackle consumer detriment in this sector. In addition, whilst respecting the CAA's position as an independent regulator, the government should take appropriate steps to encourage the CAA to actively use these powers, as well as its existing soft powers, to actively defend the rights of consumers in this sector. This could be achieved through actions such as requiring the CAA to consult on a revision of the "Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation Work CAP 1233".

We would encourage the DfT to consider creating accountability systems that would support the CAA in its role as a consumer enforcer, ensuring it is always acting in the consumer interest; as part of this, there might be scope for giving a greater voice to the CAA's Consumer Panel under its role as a non-statutory critical friend to the regulator.

Furthermore, we recommend the DfT and CAA consider creating a code of conduct for the airlines, working in conjunction with the CAA consumer panel and other consumer representatives such as Which?, and ensure this is in line with the commitments made by the DfT's Global Travel Taskforce in 2021.³⁶ By setting clear expectations on businesses on what policies and behaviours are fair and transparent, the CAA can be better equipped to identify new and emerging issues and respond to significant breaches when they occur.

³⁵ Unfair Contract Terms In Aviation Report, CAA, CAP1815.

<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9136>

³⁶ 'Global Travel Taskforce: safe return of international travel' policy paper, April 2021.

<https://www.gov.uk/government/publications/global-travel-taskforce-safe-return-of-international-travel>

2. Resolution for individual consumers

Question 4. Should ADR be mandatory for all airlines flying to and from the UK? Please explain the reasons for your answer.

ADR provides consumers with the opportunity to escalate complaints about a business when they have found themselves unable to resolve a problem directly with the trader and need the intervention of an independent third party. In addition to dealing with individual consumer complaints, ADR schemes also have the important role of improving complaint handling by businesses and driving improvement in their practices by collecting data and sharing intelligence on problems that are occurring in a particular sector, which should ultimately reduce the causes of complaints.

For a number of years, Which? has called on the government to reform ADR so that it works more effectively for consumers and provides an accessible and affordable alternative to court proceedings. Enforcing their rights through ADR should be easier, cheaper and quicker for consumers than going through the court system.

In our analysis of ADR in different sectors, aviation stood out among regulated sectors for not having mandated membership of an ADR scheme.

In the absence of mandatory ADR, businesses have the ability to leave if the ADR does not find in their favour. The impact of this was starkly illustrated when Ryanair withdrew from AviationADR in November 2018 after the scheme made decisions the airline did not like. Ryanair rejoined AviationADR in June 2021 after the CAA made changes to the ADR scheme rules which do not appear to be beneficial to consumers and appear to favour airlines considerably. Other airlines have also decided not to be members of an ADR scheme, leaving millions without access to ADR.

In a recent Which? survey looking at eleven sectors, the airlines and holiday sector scored the lowest with only 37% of consumers saying they feel confident that businesses in this sector would resolve their complaints satisfactorily.³⁷ An effective complaint handling system and regulatory framework is fundamental in creating and maintaining trust in the aviation and holiday sectors by supporting travellers who experience poor service. This is crucial for an industry that scores so low on consumer trust.

In the absence of a mandatory ADR scheme there is also the risk that ADR providers are under pressure to adapt the service they offer to encourage businesses to join and this might unfairly work in favour of the business and against the consumer. There is no equivalent incentive for ADR providers to adopt practices that favour consumers as the only other option for consumers is the relatively expensive, time consuming and complex option

³⁷ The survey was conducted by Yonder, on behalf of Which?. 2145 UK adults were surveyed online between 13th and 15th August 2021. Data were weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status.

of taking their dispute to court. This dynamic is compounded where there are multiple ADR providers that are competing for business membership.

In this regard it is interesting to compare the uphold rates following easyJet's move from the Aviation Adjudication Scheme to AviationADR. The number of cases involving easyJet that were upheld fell from an average of 79% in the last six quarters when it was a member of the Aviation Adjudication Scheme to 29% in the most recent six quarters it was a member of Aviation ADR.³⁸ Decisions should depend on the individual cases being considered, but a consistent change over a period of time should warrant an investigation by the competent authority. In 2021 AADR also took an average of 73 days to resolve a dispute (from the date of receipt of the complete case file) and CEDR took 39 days.

Voluntary ADR can also put pressure on the regulator to introduce reforms to encourage airlines to join, or stay with, an ADR scheme that may undermine consumers' rights within the scheme. In February 2021, the CAA implemented a number of changes to the rules set out in the 'CAP1324 - Policy for ADR applicants and approved ADR entities'.³⁹ The reason for advancing these policy changes was to incentivise airlines to sign up or re-join ADR schemes. However, in doing so, the CAA did not provide convincing evidence of how the new rules would make ADR work better for consumers.

As stated in our response to the CAA⁴⁰, these proposals do not appear to fall within the scope of Schedule 3 of the Alternative Dispute Regulations 2015 or within any additional statutory remit of the CAA to specify requirements that go beyond those in Schedule 3. Under Regulation 9(5), requirements not within Schedule 3 must be limited to those that are 'imposed for ensuring a higher level of consumer protection'. It is our view that neither of the proposals appear to offer a higher level of consumer protection, in fact the opposite might be true.

We believe the existing rules are effectively being diluted, damaging the very purpose of ADR and its objectives as set out in the ADR Regulations. The fact that the CAA concedes that the new policies might not be beneficial to consumers but that, on balance, it is best to give them a try and review in two years is clearly partial to the industry and detrimental to consumers.

Also, we noted that an airline like Ryanair, which left the AviationADR scheme in November 2018 when it disagreed with the scheme's decision over claims related to crew strike cancellations, could always choose to leave again should it find itself in disagreement with the scheme in the future.

³⁸ Passenger Complaints Data, CAA.

<https://www.caa.co.uk/Data-and-analysis/Data-for-passengers/Complaints-and-enforcement/Passenger-complaints-data/> [Accessed March 2022].

³⁹ Policy for ADR applicants and approved ADR entities, CAP1324 - updated February 2021. <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=6819>

⁴⁰ Supplementary note to Which? response to CAA revisions to CAP1324, November 2020. <https://www.which.co.uk/policy/travel/7352/consultation-responses>

In particular, Which? was critical of two new processes that the CAA will allow ADR schemes to adopt on a voluntary basis following amendments made in 2021:

1. The first are “post-decision reviews” that give airlines and airports the ability to request a review of an ADR decision. This review is conducted between the airline or airport and the ADR scheme and does not involve consumer representation. While the review is not aimed at changing a decision on an existing case, which is binding on the airline, it may affect future outcomes for consumers.
 - These are defined as an opportunity to give “airlines ‘a right of reply’ to ADR decisions, treating these as ‘sample cases’ for further discussions with other parties, such as legal experts, groups representing consumers, and others”.
 - In our response to the CAA⁴¹, we flagged our concerns that the consumer does not have any representation in the review, and stressed our call for transparency of processes and outcomes and the importance of the CAA playing an oversight role when these reviews take place.
 - While these post-decision reviews are not aimed at changing a decision on an existing case, which is binding on the airline, they are intended to affect future outcomes for consumers. This is highly problematic as it undermines the purpose of ADR and allows private conversations between ADR bodies and airlines to include future complaints without those complainants knowing. We believe this is incompatible with Paragraph 7 of Schedule 3 of the ADR Regulations.

2. The second enables airlines and airports to refer ADR cases they feel raise ‘novel and complex issues’ to the CAA and, if they don’t agree with the CAA decision, challenge it in court. This gives companies the opportunity to frustrate and delay cases they have identified as problematic, potentially delaying consumer compensation for years. Ultimately, it creates a clear asymmetry between what airlines and consumers are able to do: airlines can trigger this process whereas consumers cannot, with much larger resources at their disposal (in terms of legal capacity) as compared to consumers.

Question 5. Should all airlines flying to and from the UK be required to register with the ADR provider, or should parent organisations be able to register on behalf of all businesses within their parent group? What are the advantages and disadvantages of each of these options?

Any airline that contracts with passengers as a legal entity should be registered. Otherwise, enforcement of the rules would be even more difficult. In other areas of ADR, this is the approach e.g. for estate agents, it is ‘any person who engages in estate agent work’.

⁴¹ Which? response to CAA revisions to CAP1324, September 2020.
<https://www.which.co.uk/policy/travel/7352/consultation-responses>

To ensure effective enforcement of the rules, it is crucial that the rules make it clear that both parent organisations and related entities are jointly liable. Consequently, the joint responsibility of both parent organisations and related entities must be clearly communicated to passengers both at the time of purchase of the flight ticket and at the time of incident (e.g. flight cancellation, delay) to ensure they can appropriately enforce their rights through ADR.

Question 6. How successful are the current compliance and enforcement mechanisms for the voluntary ADR schemes, and what alternative enforcement mechanisms should be in place to ensure compliance with any determinations made by an ADR body?

There is a disturbing lack of information about compliance with ADR decisions in the aviation sector. This is despite the fact that the issue of late payment of claims was flagged by the CAA in its first report on ADR published in December 2017 (CAP 1602). This report stated: 'More recently we became aware of an issue of late payment of claims. Having looked into the issue, and having discussed the matter with the parties involved, we have been assured that the situation is now resolved. However, we will continue to monitor this issue and we have asked the CAA approved ADR providers to report to us quarterly on any outstanding payments that they are aware of.'⁴² Despite the commitment to monitor the issue on an ongoing basis, we have not been able to find any publicly available information about compliance with ADR decisions or the payment of claims.

Indeed, the issue of missed or delayed payments to passengers following case rulings is one of the big complaints we hear about. Therefore there is an issue with whether consumers are getting their money promptly after a ruling. We've various examples of people being 'awarded' compensation but not receiving it for months if at all.

Similarly a review conducted by Verita on behalf of the CAA in 2021⁴³ included a reference to the fact that 'Passengers currently face long delays between receiving an outcome of the case, and the financial payment' (13.20). Despite this concerning finding there is no further investigation of this aspect of the consumer experience.

Under ADR regulations all approved ADR schemes are required to provide a rate of compliance in their annual activity reports. However AviationADR's annual activity report only provides a brief comment but no figures.⁴⁴ The Aviation Adjudication Scheme annual report 2021 states that all outcomes that were accepted by consumers were complied with

⁴² 'ADR in the aviation sector – a first review': Civil Aviation Authority

⁴³ CAP2105: Independent expert audit of ADR decision making for the Civil Aviation Authority conducted by Verita

⁴⁴ [AADR activity report](#) 2021

by traders, however there is no information as to the timescale within which payments were made.⁴⁵

More generally compliance in sectors with voluntary, rather than mandatory ADR, can be a major challenge. In most sectors without mandatory ADR, the ultimate sanction available for non-compliance is to suspend the business from membership of the scheme. This is the approach taken by CEDR. As an enforcement tool against businesses in sectors where ADR is not mandatory, or where there are multiple schemes, this allows a non-compliant business to move to another ADR provider (whether approved or not) or to simply withdraw from offering any ADR at all. Neither outcome results in the consumer receiving the compensation they are due. In effect this is what happened when AviationADR found against RyanAir when flights were cancelled as a result of a strike by the airline's crew, except in this case RyanAir left the ADR scheme rather than being suspended.

However, there are approaches that ADR schemes can take to make decisions enforceable. Ombudsman schemes generally have better systems for enforcement. For example, for a small fee consumers can ask the court to allow a decision by the Financial Ombudsman Service to have the effect of a court order. Decisions by 'Ombudsman Services: Communications' and 'The Energy Ombudsman' are enforceable as member firms sign a deed poll with Ombudsman Services, which gives consumers the right to benefit from that contract and enforce the contract in the English courts.⁴⁶

Therefore, we would encourage the CAA 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.

Question 7. What mechanisms could be put in place to ensure compliance with mandatory ADR for non-UK registered airlines?

We are aware that a number of other countries including Germany and the Netherlands have versions of 'mandatory' ADR for all airlines that fly in and out of their airspace, and would encourage the UK government to investigate the mechanisms that these authorities are using.⁴⁷ However, in our view, in order to maximise effectiveness the best option is likely to

⁴⁵ [CEDR annual report 2021](#)

⁴⁶ Sharper teeth: the consumer need for Ombudsman reform, Money Saving Expert, 2017

⁴⁷ "BEUC' preliminary list of issues to consider when revising the regulatory framework for consumer ADR/ODR in Europe", July 2021.

https://www.beuc.eu/publications/beucx-x2022-123_preliminary_list_of_issues_for_revising_the_consumer_adr_framework.pdf

be making ADR membership and compliance with awards an access condition for all airlines that use UK airports.

Question 8. Are there any other alternatives to mandatory ADR? What incentives could be used to encourage more airlines to voluntarily utilise ADR?

Whilst there are alternatives to mandatory ADR we believe these options would be significantly less effective in protecting consumers, raising standards and improving consumer trust in the industry.

Which? was disappointed by the implementation of amendments to ADR scheme rules which were proposed by the CAA in 2020 as a way to encourage more airlines to join the ADR scheme. We believe the current rules do not work in favour of consumers and the changes implemented in the CAP1324 do not go far enough in addressing the weaknesses of ADR in aviation.⁴⁸ Instead, some of the policy changes appear to favour airlines disproportionately by disempowering consumers and diluting existing rules further.⁴⁹

In response to previous questions we have highlighted the shortcomings of the current voluntary system of ADR, including the lack of accessible redress for passengers that have flown with an airline that is not a member of an ADR scheme, and the pressure that voluntary membership places on the regulator and the provider to adopt practices that may encourage airlines to join, or stay with, the ADR scheme.

The following measures are likely to reduce the number of disputes that arise between consumer and airlines and therefore reduce the burden on ADR providers. However, these measures should be seen as complementary to mandatory ADR, rather than an alternative to ADR:

- Enforcement of consumer law by a proactive regulator with effective enforcement powers that act as a deterrent to non compliance.
- Opportunities for collective redress through the courts through group action or through consumer bodies launching a collective action on behalf of consumers on an opt out basis. Collective action is currently available in competition cases but is not available in consumer law.
- Fair, effective and transparent complaint handling by airlines, with procedures overseen by the regulator.

⁴⁸ <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=6819>

⁴⁹ Which? response to CAA revisions to CAP1324.

<https://www.which.co.uk/policy/travel/7352/consultation-responses>

Question 9. Do you have any further evidence on the likely impact of mandatory ADR on the number of ADR cases brought forward by consumers?

Nothing further to add at this stage.

Question 10. What, if any, considerations should be had in relation to whether ADR should be mandatory for airports in relation to complaints around services for disabled passengers and those with reduced mobility?

Mandatory ADR should be available for consumers that have complaints about airports as well as for consumers that have complaints about airlines. From a consumer perspective this will reduce potential confusion about where and how disputes related to airline travel can be resolved.

As the competent authority, the CAA should ensure that airports make consumers aware that ADR is available to resolve disputes with clear guidance about where and how this information is given.

Where the consumer is unsure as to whether the airline or the airport should be handling a complaint and their complaint is passed from one to the other, the consumer should be able to submit their unresolved dispute to a single ADR body that can make a decision as to which business is responsible.

Question 11. What incentives could be used to encourage more airports to voluntarily use ADR?

ADR should be made mandatory for all UK airports, so that all consumers have access to an independent body that can resolve disputes. Whilst some incentives are used in other sectors, they may not be effective in securing membership for small airports creating the possibility of gaps in the coverage of ADR.

Question 12. Should ADR be completely free for consumers or would an 'nominal fee' in the event of an unsuccessful claim across ADR be advantageous to deterring frivolous claims?

Access to ADR should be free for all consumers.

Which? research suggests that any move to introduce fees is likely to have a significant impact on the number of consumers that use ADR to resolve disputes.⁵⁰ Our survey also suggests that even a nominal fee would discourage a significant number of consumers from bringing a case to ADR.⁵¹ Almost a quarter (24%) say that they would not pay a fee in any circumstances and significant numbers would not pay a fee if the transaction was less than £200. It should be noted that there is no evidence of consumers making frivolous claims so a charge cannot be justified on these grounds. In fact, there is a strong business argument for encouraging consumers to engage with ADR processes as the alternatives may be more damaging and costly for the company in the long term. Our survey suggests that consumers are currently unlikely to escalate a complaint and are more likely to stop using the company (47%) voice their dissatisfaction to friends and family (40%), give negative feedback in a customer care survey (38%) or leave a bad review on social media (34%). None of these responses is in the interests of the company.

Question 13. Should the cost per ADR case for the airline be capped at specific amount? If so, at what level? Should there be different cost levels for different types of case and if so, how could those be determined?

Whatever the mechanisms for case fees, it should be a priority that ADR cases are dealt with from the perspective of the public interest in consumer protection being effectively guaranteed. Therefore it may be fairer for higher fees to be charged for airlines that are the subject of a large amount of complaints.

Question 14. What are the advantages and disadvantages of CAA approved ADR entities as opposed to other options such as a single ombudsman? What benefits would there be to moving away from the current model?

For a number of years, Which? has called on the Government to reform the current system for ADR so that it works more effectively for consumers. In our recent report "Are Alternative Dispute Resolution schemes working for consumers?"⁵², 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.

⁵⁰ The survey was conducted by Yonder, on behalf of Which?. 2145 UK adults were surveyed online between 13th and 15th August 2021. Data were weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status.

⁵¹ 'Which? response to Reforming Competition and Consumer Policy consultation', Which? <https://www.which.co.uk/policy/consumers/7333/consultation-responses>

⁵² 'Are Alternative Dispute Resolution schemes working for consumers?', Which?, Apr 2021 <https://www.which.co.uk/policy/consumers/7428/adrschemes>

Among our recommendations, we asked that the government “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.

A statutory-backed ombudsman in the aviation sector would be the preferable way to reform ADR because it 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.

Multiple providers can cause unintended consequences which could be avoided by having a single provider in the sector, appointed by a competitive process run by the competent sector regulator representing both consumers and business interests.⁵³ Where there are multiple providers in a sector we are concerned that this can create pressure on providers to make decisions about processes and cases that favour businesses over consumers.

Impact on case decisions

An ADR system with multiple providers allows airlines to choose between schemes based on cost, convenience and other factors. With firms having freedom to choose which ADR provider they use, there is an incentive for them to choose to have disputes resolved by a provider that they perceive to be more sympathetic to their cause. There is evidence of this ‘forum shopping’ behaviour taking place in civil justice systems where one side of a legal case is able to choose the court in which it is heard.⁵⁴ While there appears to be little research on this phenomenon in consumer ADR systems, our analysis of the aviation industry, where there are two competing providers, suggests there may be cause for

⁵³ Are Alternative Dispute Resolution schemes working for consumers?, Which?, 2021 <https://www.which.co.uk/policy/consumers/7428/adrschemes>

⁵⁴ Wagnes, G. “Dispute resolution as a product: competition between Civil Justice Systems” Regulatory Competition in Contract Law and Dispute Resolution, page 360-435.

concern. For example, when easyJet moved from the CEDR to AviationADR, the number of cases involving easyJet that were upheld fell from an average of 79% in the last six quarters it was a member of the CEDR to 29% in the most recent six quarters it was a member of Aviation ADR.⁵⁵

Impact on cost/efficiency

ADR schemes should be seeking to find a fair outcome for both the consumer and the firm, at a reasonable cost to both parties. The simplest way to avoid incentives that undermine these objectives is to have a single provider of ADR in an industry, appointed by a competitive process run by an authority representing both the consumer and business interest. Such a process could be run by sector regulators, the CMA or CAA itself. By appointing a provider through a competitive process, there will also be incentives for the appointed provider to run an efficient service.⁵⁶

A single provider would also deliver benefits in relation to:

- Gathering intelligence. A single provider will be much better placed to gather data and insight on the whole sector and engage with stakeholders in order to improve standards.
- Consumer awareness. Awareness is a critical issue in relation to ADR with only about 20% of people aware of the term.⁵⁷ Increasing awareness of ADR will support the use of ADR and increase the value of ADR membership for companies, as membership will provide assurance and build trust for potential customers. It is much easier to promote a single brand, such as the Financial Ombudsman Service, than it is to promote multiple brands.
- Accountability and oversight. It is critical that the CAA has effective oversight of the provider's decision-making and performance. Having a single provider should make it easier for the regulator to monitor the provider's performance and ensure that all consumers are treated consistently.

What a new dispute resolution service could look like in aviation

Due to the particular characteristics of ADR, we believe a single ADR provider is more likely to result in a service with high standards that works for both businesses and consumers. It

⁵⁵ Passenger Complaints Data, CAA.

<https://www.caa.co.uk/Data-and-analysis/Data-for-passengers/Complaints-and-enforcement/Passenger-complaints-data/> [Accessed March 2022].

⁵⁶ Such a system was also advocated by Citizens Advice, Queen Margaret University and University of Westminster in [Confusion, gaps, and overlaps](#), 2017.

⁵⁷ The survey was conducted by Yonder, on behalf of Which?. 2145 UK adults were surveyed online between 13th and 15th August 2021. Data were weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status.

Findings are included in 'Which? Response to Reforming Competition and Consumer Policy consultation', Which? <https://www.which.co.uk/policy/consumers/7333/consultation-responses>

is therefore our view that consumers would benefit from the introduction of a single statutory-backed ombudsman in the aviation sector, similar to those established in the financial, energy and rail sector. Examples of what a new dispute resolution service could look like in aviation include the Energy Ombudsman and the Rail Ombudsman:

- Both schemes conduct user surveys to monitor and improve their services.
 - In contrast, we could not find any results of recent consumer surveys from ADR schemes in the aviation sector, and the quality of data reporting and analysis of complaints is poor.
- To reduce the time it takes to resolve a dispute and drive efficiency, the Energy Ombudsman has established a process for the company and consumer to find a resolution prior to mediation. This process enables the supplier to make an offer following the initial exchange of information. If the consumer agrees this negates the need for a full investigation.
 - In comparison, the CAA recently implemented a new set of rules on 'complex and novel cases' which allows for an extension to the 90 days timeframe for resolving a dispute. Considering that one of the two ADR schemes in the sector, AviationADR, takes an average 126 days to complete a case from the point a complaint is made, enabling further extensions for dealing with complex and novel cases does not work in favour of consumers in light of these data records.
- Both schemes are active in supporting their respective sectors to improve complaint handling and address business practices that result in complaints. For example, the Rail Ombudsman makes recommendations to service providers to improve the way their service is delivered and publishes case studies and data which can provide insight into common complaints and how to raise standards. The Energy Ombudsman publishes the Ombudsman Services Consumer Impact report and has established a formal tripartite agreement between the Ombudsman, Citizens Advice and Ofgem to share data and identify market trends."

ADR in Northern Ireland

It is important that the government takes account of the role the Consumer Council plays in Northern Ireland (CCNI) as the lead body for dealing with aviation complaints in Northern Ireland. Although not a designated ADR provider, the Consumer Council handles thousands of air passenger complaints a year such as those related to delayed or cancelled flights in and out of Northern Ireland. Between 1 January 2017 and 31 December 2021, CCNI have dealt with 5,897 aviation consumer contacts and investigated 2,967 aviation consumer complaints. During this time, 2,719 of airline complainants received money back totalling £1,241,552.⁵⁸

⁵⁸ Enquiries and Complaints Report 2020-21, Consumer Council Northern Ireland.
<https://www.consumercouncil.org.uk/policy-research/publications/enquiries-and-complaints-report-2020-21>

We would like to note the quality of the Consumer Council reporting of passenger complaints and how it can set an example of the type of good data sharing and reporting that can help both consumers and industry in their decision making.

For these reasons, we strongly believe the CCNI's current statutory role should be acknowledged and taken into consideration as part of these proposals to mandate ADR in the aviation sector, and encourage the DfT and CAA to engage with the Consumer Council to explore solutions on how their role could fit into the proposed mandatory ADR framework.

3. Compensation for delays and cancellations

Which? view on these proposals

Before addressing each question in this section, we would like to express our concerns about these proposals and the inadequacy of the policy rationale they are based on. While the proposals around the CAA enforcement powers and ADR reform have been subject of consultations before, through the Aviation Strategy 2050 and the more recent BEIS consultation on reforming competition and consumer policy, there has been no previous public debate on changing compensation rules at UK level and certainly since the UK has left the EU.

EC261 compensation rules are a highly complex topic, which should have prompted the government to initiate wider pre-consultation discussions with consumer groups and industry prior to the publication of the present consultation. There was no prior engagement with consumer groups on these proposals, nor has DfT conducted consumer research on this topic, which is disappointing particularly given that the consultation period is very short at seven weeks and no advance warning was given to stakeholders to prepare for it. For this reason, we were surprised to note that the DfT has had prior stakeholder engagement sessions with some of the industry as stated in the Impact Assessment⁵⁹:

"Discussions with industry during stakeholder engagement sessions highlighted calls from airlines for compensation rates to be amended to be more representative of the cost of travel. Low cost airlines have told DfT that the impact of the compensation on their turnover is far more material than it is for standard airlines, indicating verbally it can reach a value equivalent to 3% of their turnover.

Unfortunately, they have not shared any evidence to prove this claim because of commercial sensitivities but we expect a cap of the compensation to the ticket price to be very welcome across all airlines and particularly the low-cost section. We welcome evidence to enable us to assess the scale of the problem as part of the consultation process."

It seems unusual that the consultation and Impact Assessment were published without prior engagement with consumer groups or the wider sector and an effort to gather the evidence needed to build these proposals. On this note, we would like to point out that there appears to be a data transparency problem affecting the sector that is wider than just this consultation. From our conversations with government, regulators, industry and other consumer groups, we have found that the aviation industry is the sole gatekeeper of data around not only compensation, but also scheduling patterns around flight delays and cancellations.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051926/compensation-for-delays-to-uk-domestic-flights-impact-assessment.pdf

Please refer to Annex 1 'Which? view of DfT's compensation proposals and related Impact Assessment' where we have set out our key concerns.

Question 15. Should compensation for delays to domestic flights be calculated as a percentage of the cost of the ticket?

Which? strongly believes that compensation for domestic flights should not be calculated as a percentage of the cost of the ticket, and urge the government to abandon these proposals. We are concerned that this policy rationale does not sufficiently consider all of the issues necessary for the optimal design of a compensation framework. We believe there are a number of particularly important omissions.

EC261 is a deterrent against flight disruption caused by airline's decisions

First, the policy rationale fails to consider the relationship between compensation levels and the likelihood of a passenger being unable to travel as a result of either denied boarding due to overbooking or flight cancellation. Such practices can lead to very bad outcomes for passengers and an intention to deter airlines from strategic use of these practices was a key motivation for the design of the current system of compensation.⁶⁰ More generally, systems of consumer rights that award relatively high levels of compensation for very long delays and low levels of compensation for short delays are intended to incentivise airlines to act in ways that minimise the risk of these very bad outcomes. In effect, strong consumer rights for very long delays and cancellations create a deterrent effect.

We are disappointed that there is no consideration of this crucial point in the proposals, particularly given that when EC261 came into force in 2005, it was clearly promoted as a measure that would "help bring about a dramatic reduction in the frequency of denied boarding, for which airlines will have to pay compensation as a deterrent".⁶¹ In addition, it was thought that:

"Better protection of passengers' rights will contribute to improving the image of air transport and in particular of certain companies. The quality of service forms part of competitiveness and runs in parallel with guarantees of passengers' rights. In particular, the rights contained in this Regulation will help to greatly reduce the problems caused to passengers by the practice of denied boarding, of cancellation or of long delays, which give a bad image to the airlines."

A recent international study shows that the need for enforcement system reforms has become even more urgent since 2013. These reforms must ensure regulators are equipped

⁶⁰ 'Air transport: Europe reinforces passengers' rights', 16 February 2005.

https://ec.europa.eu/commission/presscorner/detail/en/IP_05_181

⁶¹ Ibid.

with strong enforcement toolkits that enable them to tackle industry malpractice.⁶² Indeed, the level of flights disrupted, in terms of cancellations and delays over two hours, has increased significantly, and for passengers it is still rather difficult to enforce their rights, due to the complexity of the regulatory setting and the lack of information. For airlines the burden has increased, driven by increased levels of disruptions and rising claim rates. The overall claim rate has been estimated as 38%, which is consistent with the level of consumer awareness of their rights.⁶³

Which? estimates⁶⁴ that the system proposed by the government could save airlines tens of thousands for a single flight, while compensation would plummet to just over a quarter of the current amount as the average sum eligible to each passenger dropped from £220 to just £57, significantly reducing the crucial deterrent effect.⁶⁵ We looked at figures provided by Skyscanner to calculate how much airlines would have to pay out for long delays on some of the most popular UK routes under the possible new system, assuming planes have a full capacity of 180 passengers and everyone eligible was to be compensated.

- Edinburgh to London, average economy ticket price £44: If it were full, an airline would potentially have to pay out up to £39,600 for delays of three hours or more. Under the government's proposed scheme the maximum payout is reduced to just £7,920.
- Gatwick to Belfast, average price £55: If it were full, an airline could have to pay out up to £39,600 for delays of three hours or more. Under the proposed scheme the maximum payout falls to just £9,900.

Consequential losses incurred by passengers as a result of disruption

Secondly, there is no consideration of how compensation under these proposals relates to or complements other claims that may be available for 'consequential losses' the passenger incurs as a result of the delay. EC261 was never intended to be linked to the ticket price and it has been held specifically by the courts to be a strict liability, fixed rate scheme. Consequential losses can be substantial if travellers miss connecting flights or need to book alternative travel at the last minute, perhaps with a more expensive airline. In such circumstances, the ticket price paid by the customer will not be proportionate to the harm caused by the long delay or cancellation. Damages claims under the Montreal Convention (if it applies) may be available, but a passenger cannot recover twice for the same loss.

For the above reasons, the issue of fixed rate compensation should not be looked at in isolation from EC261 rights generally (re-routing, care and assistance etc) and how the price

⁶² Study on the current level of protection of air passenger rights in the EU, EC, 2020.

<https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1>

⁶³ Ibid.

⁶⁴ "Government plan to slash compensation for severely delayed or cancelled flights", Which?, 2022 <https://www.which.co.uk/news/2022/03/government-plan-to-slash-compensation-for-severely-delayed-or-cancelled-flights/>

⁶⁵ See Annex 2 for additional detail.

of the ticket is just one factor overall. While a passenger could buy a very cheap ticket, the delay may have terrible consequences that are entirely foreseeable in addition to the missed connections issues - for example, missing seeing dying relatives or a last stage interview for the perfect job. The case law of the Court of Justice has consistently emphasised a key aim of EC261 being to ensure a high level of protection for passengers (see Recital 1), and these proposals fail to do that.

Consultation is unclear on cancellations and connecting flights

Thirdly, although the consultation has a chapter entitled 'Compensation for delays and cancellations', it is unclear whether the consultation is proposing a change to the current 100% reimbursement for cancellations under EC261. There is no explicit consideration of cancellations or denied boarding rights in the impact assessment or in the background material. Similarly, there is no consideration of the consumer entitlements in the event of connecting flights and the potential impact of this on the cost-benefit analysis. The lack of clarity about these crucial issues makes it difficult to assess the compensation proposals, while if they are out of scope then it is troubling that there is no attempt to consider the interaction from having different consumer rights applying to different circumstances.

Recent international studies highlight that enforcement alone is still not sufficient even in passenger rights regulations where compensation is based on the ticket price - a change will therefore not encourage traders to comply with law - but to the contrary - will be highly detrimental for consumers.⁶⁶

Switching from a lump sum to a percentage of the ticket price will make the enforcement of the regulation even more complicated for the authorities, as they will have to look at the compensation to be paid to consumers in each case. A lump sum compensation has the merit of being clear and easily enforceable for the authorities.

Therefore, rather than reducing the deterrent on airlines, the government should shift its focus on enforcement: a better application of the current rules will most likely increase compliance with the regulation and diminish the likelihood of delays and cancellations. The CAA has also never instituted a UK criminal prosecution against an airline for breach of EU261, despite having the power to do so.⁶⁷

Aviation, rail and maritime are not comparable modes of transport.

Lastly, a key assumption within the Impact Assessment is that the domestic train and maritime travel markets are sufficiently similar to domestic aviation travel.

⁶⁶ Passenger rights studies: External evaluation support study on the EU Regulatory Framework for Passenger Rights, Part B (buses and coaches) and Part C (maritime travel), EC, 2021.

https://transport.ec.europa.eu/transport-themes/passenger-rights/passenger-rights-studies_fr

⁶⁷ <https://www.caa.co.uk/media/cs4pjnc0/f0002743reply.pdf>

"The domestic train and maritime travel markets are sufficiently similar to domestic aviation".

However, the consultation and impact assessment do not justify why this is a reasonable assumption to make. While under these proposals a lower level of compensation could become available to more people, we believe it would be wrong to switch to a system like that in operation for the rail industry. Passengers can face missing out on a holiday, with ongoing travel and accommodation costs, if their domestic flight is affected by severe delays once they have reached the airport terminal, so in many cases it is potentially far more costly than missing a train.

The changes would also disproportionately affect people living in the devolved nations and regions of the UK, who are more likely to take domestic flights, whether to visit family, for business or as the first leg of a trip abroad. Similarly, these new rules would have a disproportionate effect on disabled passengers travelling within the UK. We are surprised by the lack of this consideration towards passengers with disabilities, including those with hidden disabilities, chronic illnesses or reduced mobility, particularly given how the consultation covers separate proposals on improving accessibility compensation rules (see Question 29).

Indeed, the likelihood of someone taking a domestic flight is strongly related to where they live and it is clear that changes will impact some parts of the UK more than others. Between July and September 2021, around 37% of passengers on domestic flights in the UK were flying to or from Northern Ireland and ten of the sixteen domestic routes with most passengers included either Belfast international or Belfast City airport. In addition, 39% were flying from the Scottish mainland to or from elsewhere on mainland Great Britain and 3% were flying to or from the Scottish Islands.⁶⁸

The proposals do not make an attempt to consider differences in market structure or firm incentives, for example:

- Rail is often used for shorter trips (intra-country).
- Rail compensation already has some of the problems we anticipate for the new system, i.e consumers are disincentivised from claiming.⁶⁹
- Passengers flying from Northern Ireland and Scotland do not have the same access to alternative rail transport as those travelling within England.
- Train travel in the UK can be a lot more expensive than travelling by plane. A Which? investigation found that passengers travelling around the UK face a near-impossible

⁶⁸ <https://commonslibrary.parliament.uk/domestic-flights-in-the-uk-where-do-we-fly/>

⁶⁹ 'Are you missing out on hundreds of pounds in rail compensation?', Which, 2019. <https://www.which.co.uk/news/2019/04/are-you-missing-out-on-hundreds-of-pounds-in-rail-compensation/>

trade-off between low fares and reducing their carbon footprint as rail fares can be around 50% more expensive than flight tickets.⁷⁰

- While DfT states it wants to harmonise rules between aviation, rail and ferries, the current compensation rules in rail and ferries are very different, therefore the argument that aviation should be harmonised with rail and ferries seems irrational.⁷¹ In rail, access to, and levels of, compensation are hinged upon a sliding scale based solely on the length of the delay time, however, in maritime, access to compensation is based upon the delay time in proportion to the total journey time. For example, a consumer suffering a delay of an hour in rail would be entitled to compensation whereas an hour delay to a ferry journey would only be compensated if the port to port journey time was four hours or less.

Question 16. What are the advantages and disadvantages to the above proposal for compensation for delayed domestic UK flights?

See answer to Q15.

Question 17. What other options, if any, are there for delay compensation, delay triggers, and proportion of ticket price for domestic UK flights?

Consumers need a set of rights and protections that are clear and consistent, awareness of what they should do when things go wrong, knowledge that the enforcement system is accessible and works in their interest, and understanding that there are systems in place to protect them when businesses act unfairly.

Any reforms to the current legislation should build on the principles that underpin it. This includes, as we have set out, ensuring that compensation acts as an effective deterrent against poor treatment of customers, while also better incentivising good customer service. Consumers also need to have confidence that they will be reasonably compensated for any indirect or consequential losses as well as those that they experience directly.

We would welcome the opportunity to work with the DfT to establish how an evidence-based approach would bring consumers meaningful improvements without losing the fundamental rationale that the current regime is based on.

Question 18. Should similar changes be made to compensation for cancelled flights and denied boarding? What are the advantages and disadvantages of both?

⁷⁰ 'UK domestic flights nearly 50% cheaper than the train, but six times worse for carbon', Which?. <https://www.which.co.uk/news/2021/07/uk-domestic-flights-nearly-50-cheaper-than-the-train-but-six-times-worse-for-carbon/>

⁷¹ 'What are my rights if my ferry is delayed or cancelled?', Which?. <https://www.which.co.uk/consumer-rights/advice/what-are-my-rights-if-my-ferry-is-delayed-or-cancelled-a5lm07L4CsXE#:~:text=Ferry%20delay%20compensation.of%20up%20to%20four%20hours>

No. The disadvantages for consumers as outlined in previous questions would be even more significant.

Question 19. If compensation for delayed domestic UK flights is linked to ticket price, what should the definition of ticket price include?

Article 8 of the EC261 Regulations on the right to a refund states that: "reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant".

Any deviation from this rule in Art 8, may leave consumers worse off and potentially lead to more complaints and ultimately litigation, which is what ADR aims to prevent.

In addition, any reform along these lines must include anti-avoidance measures specifying that deductions from the compensation such as 'administrative fees' must not be allowed. Furthermore, it will be very complicated in practice to have a new system linked to ticket pricing when the business models of airlines can vary as regards so-called 'optional' extras, outward and return flight pricing and many other factors. The current approach is much simpler.

A couple of examples help provide additional context to the above:

- Firstly, the CAA notes that when a passenger cancels a ticket, it might not be acceptable to require the airline to refund all costs due to the uncertainty associated with being able to re-sell the ticket. However, flexible booking options per se do not mean that restrictions on refunds applied to basic economy fares are fair and balanced.⁷²
 - As part of its work reviewing airline contract terms, the CAA engaged with consumers for their views and found that consumers believe that airlines would be 'profiting twice' in circumstances where a passenger has had to cancel their ticket. For this reason, the CAA considered that a fair and balanced approach would be for airlines to pass back any unpaid taxes and charges to the passenger in question, free of charge.
 - When reviewing airlines contract terms in 2018, the CAA found that some airlines refunded all unpaid taxes and charges for free whereas others either did not refund anything or charged a fee for refunding APD only.

Secondly, if the proposed system was not to include added charges at the airport i.e baggage, claiming a seat etc. this would presumably lead to a race to the bottom in terms of

⁷² CAP1815 Review of airline contract terms 2019, CAA.
<https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9136>

weighting the total price paid by the consumer on these charges rather than the ticket. Indeed, Which? research shows that passengers are sucked in by low fares only to be charged a premium for add-ons.⁷³

Question 20. Government is keen to understand the impact of the proposal to link compensation to ticket price:

- **Please provide any evidence on the number of passengers on domestic flights who are currently eligible to claim compensation for delays.**
- **Please provide any evidence on the proportion of eligible passengers who currently make a successful compensation claim for delays of domestic flights.**

We do not have relevant data to say how many passengers are eligible. As noted previously, only the airline industry holds the data on compensation claims. However, in the period April 2021 and February 2022, 8% (103 of 1,300) of consumers using Which?'s publicly-available flight delay and cancellation compensation tool⁷⁴ to make a complaint did so in relation to a domestic flight.

It is important to note that we do not know whether the claims to the airlines were successful and whether the passengers received compensation from the airlines.

Question 21. Is there anything else that can be done internationally within the confines of the 1999 Montreal Convention to help link compensation to the costs of travel for delay?

Under the Montreal Convention, the assessment of damages for delay would rightly be wider than the 'costs of travel' if the circumstances of the delay and consequential loss justify it. Under Article 19 of the Convention, an airline is liable for damage occasioned by delay in the carriage by air of passengers unless it took all measures that could reasonably be required to avoid the damage. We think this is a sensible approach as a matter of principle and therefore the government should not pursue its apparent line of thinking in this Question further. If airlines choose to operate a low fares business model for some (but often not all) passengers, that is a commercial decision for those airlines and should not be relevant in this context.

Question 22. What would be the advantages and disadvantages of enabling package organisers to seek a refund for cancelled flights that are part of a package holiday through legislation?

⁷³ 'The true cost of cheap flights: airline essentials compared', Which? September 2019.

<https://www.which.co.uk/news/2019/09/true-cost-of-cheap-flight-extras-compared/>

⁷⁴ <https://www.which.co.uk/tools/flight-delay-cancellation-compensation/>

We support the proposal to clarify the law on this point by including a provision in Regulation EC261 that would enable package holiday organisers to seek a refund for cancelled flights on behalf of their customer. However, we note that this provision is already set out in Regulation 29 of the Package Travel Regulations. Therefore, it is our view that in order to help package holiday organisers in their endeavours to seek refund payments from the airlines, the government should work towards ensuring the CAA's enforcement powers are strengthened supported by monitoring and scrutiny of a stronger, proactive sector regulator.

4. Accessibility

Question 23. What are the advantages and disadvantages of special declarations to anyone travelling with a wheelchair or mobility equipment?

It is important that special declarations for those travelling with a wheelchair or mobility equipment are easy to complete, affordable and easily accessible. We understand that disabled passenger groups are concerned that these declarations place too much responsibility on the passenger to accurately assess the value of their equipment. Given the high cost of some wheelchairs, such as the new electric models, and mobility equipment, passengers may struggle to obtain the details of the cost, particularly given that many disabled passengers will be using equipment provided by the NHS or other charity schemes. We would therefore encourage the DfT to consider how the process can be made easier for passengers with accessibility needs, and we would urge the Department and the CAA to engage in discussions with disabled passenger groups and other consumer representatives, such as the CAA Consumer Panel or Which?, on this matter.

Question 24. What would be the impact of removing the need to pay a supplementary fee for wheelchairs and mobility equipment?

Which?'s view is that access to redress should be free for all passengers. We believe removing the fee would be a positive step and would reduce the likelihood of passengers being discriminated against for their disability.

Question 25. What evidence would it be reasonable to expect a passenger to provide to demonstrate like-for-like replacement/repair of a wheelchair or mobility equipment for a special declaration?

We would encourage the DfT and CAA to engage with industry on what other measures can be implemented to ensure wheelchairs and mobility equipment is not damaged. The responsibility should sit on the airlines as they have a duty of care towards their passengers.

Question 26. What, if any, steps could be taken, beyond special declarations, to provide sufficient compensation for wheelchairs and mobility equipment damaged during transit on a domestic UK flight?

No response.

Question 27. Other than compensation for the damaged or lost wheelchair or mobility equipment, are there any additional provisions that would reduce the impact on an individual whose wheelchair or mobility equipment has been damaged in transit on a UK domestic flight?

No response.

Question 28. What else could be done to protect wheelchairs and mobility equipment during carriage? What would the impact on the individual and the airline be?

No response.

Question 29. What other reforms can we consider, to encourage more support of passengers with accessibility needs when travelling by air?

There is evidence from reviews of the current regulation of an urgent need for better requirements for training of staff in relation generally to assisting passengers with disabilities or of reduced mobility⁷⁵. In addition, legal definitions relating to mobility and medical equipment could be broadened, and much more attention given to monitoring and enforcement, including sanctions. It is surprising that more detailed attention has not already been given before this consultation was published to the views of passengers with different accessibility needs and existing published good practice, and we hope this can be rectified going forward.

As stated in our response to Question 15, the DfT's proposed rules on compensation would have a disproportionate effect on disabled passengers travelling within the UK. We would encourage the government to consider the unintended consequences of its proposals around compensation for domestic flight delays and how a reduced deterrent to airlines against severe delays, cancellations and overbooking may render domestic air travel a very unpleasant experience for those with disabilities or reduced mobility.

Finally, we would urge the government and CAA to work towards improving compliance with the retained version of Regulation EC1107/2006⁷⁶ as a priority to ensure the rights of passengers with accessibility needs are protected and enforced, and to build upon and enhance current rights so that air travel can be genuinely inclusive.

⁷⁵ See, 'Review of Regulation 1107/2006 (EC), Executive Summary, SWD(2021)418 final'.

⁷⁶ Regulation EC1107/2006, as retained in UK law, concerns the rights of disabled persons and persons with reduced mobility when travelling by air.

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.

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March 2022

Annex A. Which? view of DfT's Impact Assessment (IA) relating to the compensation proposals.

Inadequacy of the policy rationale

The impact assessment states that the problem under consideration is that the existing compensation rules for delayed and cancelled flights were designed before the growth of low-cost airlines. The current regulations set compensation at fixed amounts for flights that are cancelled flights or delayed by more than three hours. For example, for flights of 1,500km or less the compensation is £220. There is no entitlement to any compensation for customers delayed by less than three hours. Low cost airlines have argued that the current rules of a fixed level of compensation adversely affect them since their ticket prices are lower. DfT is therefore proposing to amend the rules so that compensation be proportionate to the ticket price: passengers delayed 1 to 2 hours would be entitled to 25% of the value of their ticket, passengers delayed 2 to 3 hours would be eligible to 50% of the ticket value, and passengers delayed by more than 3 hours would be eligible to claim reimbursement of 100% of the value of their ticket.

Which? is concerned that this policy rationale does not sufficiently consider all of the issues relating to the optimal design of a compensation framework. We believe there are a number of particularly important omissions.

First, the policy rationale fails to consider the relationship between compensation levels and the likelihood of a passenger being unable to travel as a result of denied boarding due to overbooking or flight cancellation. Such practices can lead to very bad outcomes for passengers and an intention to deter airlines from strategic use of these practices was a [key motivation](#) for the design of the current system of compensation. More generally, systems of consumer rights that award relatively high levels of compensation for very long delays and low levels of compensation for short delays are intended to incentivise airlines to act in ways that minimise the risk of these very bad outcomes. In effect, **strong consumer rights for very long delays and cancellations create a deterrent effect**. We are disappointed that there is no consideration of this in the impact assessment compensation for delays to UK domestic flights.

Second, there is no consideration of compensation for consequential loss. Consequential losses can be substantial if travellers miss connecting flights or need to book alternative travel at the last minute, perhaps with a more expensive airline. **In such circumstances, the ticket price paid by the customer will not be proportionate to the harm** caused by the long delay or cancellation. Again, we are disappointed that there is no consideration of this in the impact assessment.

Thirdly, although the consultation has a chapter entitled 'Compensation for delays and cancellations' it is unclear whether the consultation is proposing a change to 100%

reimbursement for cancellations as there is no explicit consideration of cancellations in the impact assessments. Similarly, there is no consideration of the consumer entitlements in the event of connecting flights and the potential impact of this on the cost-benefit analysis. The lack of clarity about these crucial issues makes it difficult to assess the compensation proposals, while if they are out of scope then it is troubling that there is no attempt to consider the interaction from having different consumer rights regimes applying to different circumstances.

In addition to the omissions, we are concerned that there is no evidence that DfT has critically assessed the information provided to it by low-cost airlines. The impact assessment states that low-cost airlines have told them verbally that compensation can be equivalent to 3% of their turnover, but that commercial sensitivities have prohibited the airlines from providing evidence of this. In fact, Easyjet publishes the amount it sets aside for compensation claims provision in its annual report. Using this, we calculate the amount set aside to be equivalent to 0.8% of turnover across the years 2018 to 2021, and in no individual year was it greater than 1.4%.

Overall, we believe that the impact assessment shows an insufficient level of understanding of the airline market and that the presentation of a single policy option outside of the 'do nothing scenario' is indicative of this. We note that the [government's own advice](#) is that having **an inappropriate range of options is highly likely to result in an impact assessment not being fit for purpose** at consultation stage, and we believe that if DfT had a better understanding of the market it would have felt it appropriate to provide additional options.

Insufficiently justified assumptions

Further, to our general concern about the policy rationale, we feel that a number of the specific assumptions used in the impact assessment are not sufficiently justified and may give an erroneous estimate of the cost-benefit of the options.

Of particular concern is the assumption about the proportion of eligible passengers who successfully claim compensation. This assumption is based on data from the Office of the Rail Regulator that shows that in 2020 the compensation rate for train passengers eligible for 25% of the price of their ticket was 22%, while for passengers eligible for 50% of the price of their ticket it was 46%. People are more likely to make a claim when the value of the entitlement is greater and airline tickets are likely on average to be more expensive than train tickets then it is assumed that 65% of eligible passengers successfully claim compensation from airlines.

We have a number of reasons to suppose that this could be a large overestimate. Which? made a super-complaint to the Office of the Rail Regulator in 2015 because the industry was not doing enough to help consumers to claim compensation. The data cited from the rail industry relates to the year 2020 and reflect substantial efforts in that sector to reduce the

amount of unclaimed compensation, including the introduction of automatic compensation on some routes. Further, our sector intelligence suggests that even for international routes, for which the levels of compensation are significantly higher, current compensation rates are typically between 40% and 50%. Overall, it seems more likely that compensation rates for domestic flights will resemble the rail industry in 2016, at which time only 35% of passengers entitled to a 50% refund successfully claimed it, although even this could be generous for an industry in which claiming compensation is so routinely difficult that specialist claims agencies exist.

An overestimate of the current claims rate will give a misleading idea of how much airlines are paying out under the existing framework that, it is argued, is unfair on low-cost airlines. The impact assessment estimates that under the current rules airlines are paying £10.6m per annum in compensation. Our own sensitivity analysis indicates that if we assume a current compensation rate of 50% then this falls to £8.1m, while with a rate of 35% it is just £5.7m.

Similarly, overly optimistic predictions of how many eligible passengers are likely to claim compensation if entitlements are tied to ticket prices will give an overestimate of the benefit to consumers from introducing eligibility to partial compensation for delays of between 1 and 3 hours.

Distributional impacts

There appears to be no consideration of the distributional impact of the proposed changes, but the likelihood of someone taking a domestic flight is strongly related to where they live and it is clear that changes will impact some parts of the UK more than others. Between July and September 2021, around 37% of passengers on domestic flights in the UK were flying to or from Northern Ireland and ten of the sixteen domestic routes with most passengers included either Belfast international or Belfast City airport. In addition, 39% were flying from the Scottish mainland to or from elsewhere on mainland Great Britain and 3% were flying to or from the Scottish Islands.⁷⁷ **The proposals in the consultation have the potential to negatively impact on regional connectivity** and the likelihood of this should be carefully considered.

The consultation process

In addition to our concerns about the impact assessment we feel more generally that the consultation process has not been run in such a way as to lead to well designed reforms. Our primary concern is that we feel that the engagement between the government and stakeholders has been partial. We understand from the impact assessment that DfT has had prior stakeholder engagement sessions with some of the industry at which low-cost airlines called "*for compensation rates to be amended to be more representative of the cost of travel*" (see page 4, Point 5 in Impact Assessment). Disappointingly, there was no

⁷⁷ <https://commonslibrary.parliament.uk/domestic-flights-in-the-uk-where-do-we-fly/>

engagement with consumer groups on these proposals, nor has DfT conducted consumer research on this topic.

It seems unusual to us that the Impact Assessment was published alongside the consultation without prior engagement with consumer groups or the wider sector. Given the lack of advance notice, the relatively short consultation period of just 7 weeks is problematic. It is not conducive to organisations being able to fully consider the proposals and consult their own stakeholders. We feel this is particularly likely to cause problems for third sector organisations who are likely to be more resource constrained than businesses, and this is recognised in the government's own [consultation principles](#).

The partial nature of DfT's engagement with stakeholders was also apparent at a consultation workshop held during the consultation period. This had unbalanced representation with the majority of the attendees from the airline or airport industry and very few representatives from consumer groups and package holiday organisers, while it was too short to fully cover all of the content in the consultation document. The proposed changes to the compensation regime received just a few minutes.

More generally, we have concerns about the lack of clarity contained in the document, and elicited through our engagement with DfT about how the proposals in the consultation could be implemented. The reforms set out in the consultation would likely need to be implemented using different processes, for example some are likely to require primary legislation, and would be implemented on different time scales, but the consultation is silent on this.

Finally, we feel that the consultation is being conducted with scant regard to the wider policy environment and that this may lead to suboptimal policy making. The consultation acknowledges, but gives no consideration of reform of the Air Travel Organisers' Licensing (ATOL) scheme. However, it does not even consider the Package Travel Regulations (PTRs). The perspective of package holiday providers is absent, despite a close link between the Package Travel Regulations and flight compensation, and the obligations holiday providers have on refund payments.

In conclusion, for the reasons set out above, Which? is concerned that DfT is undertaking change to important consumer rights without giving due consideration to the potential impact of regulatory change. We feel this is likely to lead to the design of bad policy.

Annex B. Which? investigation on DfT's compensation proposals

Which? looked at figures provided by Skyscanner to calculate how much airlines would have to pay out for long delays on some of the most popular UK routes under the possible new system.⁷⁸ For comparative purposes, Which? looked at scenarios where planes were full and all affected passengers made a claim under the reformed system.

Flight route	Average ticket price	Compensation paid for delay of more than three hours	How much airline would pay under new rules	Saving
Edinburgh to London	£44	£39,600	£7,920	£31,680
Gatwick to Belfast	£55	£39,600	£9,990	£29,610

The figures are equally stark when calculated using average load factors for these routes:

- Edinburgh to London, with average load factor on this route for all airlines 68% and average prices £44. Previously an airline should have paid £26,840 for a delay of three hours or more. Now it would pay £5,368.
- Gatwick to Belfast, with average load factor on this route for all airlines 79% and average prices £55. Previously an airline should have paid £31,240 for a delay of three hours or more. Now it would pay £7,810.

Which? also looked at an alternative scenario where the government reformed the rules so that passengers are refunded their ticket price and paid 100 percent compensation. For an average UK flight they would receive a refund on their full ticket price of £57 and £57 compensation – still £106 less than under the current system.

Figures provided by Skyscanner. Prices for a one way ticket in economy class:

- Gatwick to Belfast 2019 average - £55
- Belfast to Gatwick 2019 average - £45
- Heathrow to Edinburgh 2019 average - £46
- Edinburgh to Heathrow 2019 average - £44
- All UK domestic flights 2019 average - £57

⁷⁸<https://www.which.co.uk/news/2022/03/government-plan-to-slash-compensation-for-severely-delayed-or-cancelled-flights>