

Final boarding call: Which? vision for consumer reforms in the aviation and package holiday sectors

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Foreword

Which? has been working for improvements to consumer rights in the aviation and holiday sectors for many years but the pandemic brought systemic failings to a head. Since 2020 we have been helping consumers struggling to have their rights upheld, working tirelessly to monitor the market and working with industry, government and the regulators to ensure the consumer's voice is being heard.

It is urgent that the Department for Transport (DfT) listens to consumer groups and works with regulators to build the travel industry back better post-pandemic and enhance consumer protections.

Despite the rising cost of living, consumer spending on international travel is reportedly on the rise. The latest figures from the British Retail Consortium and KPMG show that UK consumers are cutting back on spending in all areas apart from holidays. At a time when household budgets are tighter, and two-thirds of consumers are planning to spend savings this year with holidays being their most common big-ticket purchase, it would be even more unacceptable that consumers are left out of pocket by businesses that are still able to get away with breaking the law.

The 2022 travel season has begun with mass cancellations of domestic and international flights caused by staff shortages - with thousands of travellers having their Easter travel plans disrupted and some airlines seemingly ignoring their legal obligations to consumers. This includes a failure to comply with re-routing rules and offer rebooking options with rival carriers. After gathering evidence from passengers who had their flights cancelled at short notice, Which? called on the Civil Aviation Authority (CAA) to investigate British Airways' re-routing policy.

Just weeks later, travellers experienced even worse disruption to their travel plans. Millions of consumers who had booked to travel during half-term and the Jubilee bank holiday weekend were subjected to last-minute flight cancellations and airport queues.

It is clear that poor treatment of travellers by some airlines has become routine, and there is much work to be done to restore consumer confidence in the sector.

Our recent investigation into airlines' contract terms demonstrates the ineffectiveness of the CAA's approach to enforcement, an approach driven by the limits of its current powers, and how some parts of the industry may feel empowered to act unfairly towards consumers knowing that their actions will go unpunished. Our findings serve to highlight the need for a stronger aviation regulator, one with the means and the appetite to proactively monitor the market and intervene when passengers' rights are breached.

The government is looking at the future of the aviation sector through the recently announced *Flightpath to the Future Strategic Framework*, which is a welcome move. As part of this work, the DfT will establish a Passenger Charter to ensure passengers are better informed of their rights and responsibilities when travelling.

However, what passengers really need is a regulator to enforce the rights they already have, which offer some of the strongest protections in the world. Which? is pleased that the government is proposing to enhance the CAA's powers so it can effectively hold airlines to account when they flout the law. However, we are calling for the DfT to drop plans that it has proposed to reduce compensation passengers are entitled to when domestic flights are severely disrupted, as we are concerned that if implemented, these changes would remove an important deterrent against bad business practices. For example, for a flight between London and Edinburgh with a full capacity of 180 passengers, an airline would potentially have to pay out up to £39,600 for delays of three hours or more under the current rules. Under the government's proposed scheme the maximum payout is reduced to just £7,920.

Of course in an age of climate emergency passengers will want to consider their need to fly, both short and long-haul, but when people do travel Which? believes that passengers should be getting a far better service from the industry – and for that to happen there needs to be a drastic overhaul of the sector's consumer protection regime.

In this report we highlight the weaknesses of the current consumer protections framework in travel and make twelve recommendations on how to create a system that will protect consumers effectively and support the recovery of the sector.

It is evident that the time is now to deliver a strategy that is ambitious, coherent and holistic in scope. Which? wants to help restore consumer confidence in the sector and we are ready to support the government, regulators and industry in delivering a future-proof strategy – one that places consumers at its heart.

Rocio Concha,

Director of Advocacy and Chief Economist at Which?

Executive summary

Following two years of unprecedented strain and chaos, it is vital that the government's strategy to aid the recovery of the aviation and holiday sectors is delivered in a fair, transparent and coordinated way, to ensure consumers can be confident they can make travel plans without suffering undue distress and financial loss.

Consumers in the UK have some of the strongest legal protections for flights and holidays in the world, yet for consumers to realise the benefits of these regulations, the rules have to be clear, coherent and effectively enforced. Consumer rights are meaningless if they are not complied with and enforced.

The continued disruption experienced by travellers at the start of the 2022 season is yet more evidence of a system that isn't working for consumers; reforms are much-needed and long overdue. The lack of accountability in the sector has allowed unlawful behaviour by some players in the market to persist, with these businesses facing no consequences and consumers left to shoulder the bill, as well as the emotional distress. Crucially, the unlawful behaviour is harmful not only to consumers but also to good businesses striving to do right by their customers.

Which? recognises the immense task facing the government, regulators and industry in getting the travel industry back on its feet at a time when both consumers and the industry are suffering from the impact of the pandemic and the rise in living costs. However, if the sector is to build back for the long term then the 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 and ensure a cohesive, consistent and holistic agenda for reform. As consumers return to travel in 2022, which will be the first time in two years for many, the government and regulators should address the long-standing structural problems affecting this sector 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 as it begins to recover in the aftermath of the pandemic.

There are several opportunities on the horizon to enhance consumer protections and give consumers the confidence to book knowing their rights will be protected when things go wrong. These include the Aviation Consumer Policy Reform, the plans for a Passenger Charter as set out in the government's strategic framework *Flightpath to the Future*, and the upcoming Transport Bill. Therefore, it is essential that the government's approach to reform of air travel and holidays regulations is ambitious, effective and fair to consumers by ensuring their needs are being taken into consideration and met.

For too long travellers have had to fight to have their rights protected and enforced while navigating a system where the protections they have depend on how and who they make a booking with. This is why Which? has been vocal about the need to create consistency between Regulation

EC261/2004, the air passenger rights as retained in UK law, and the Package Travel Regulations (PTRs) not only in terms of the rules and how they are set out, but also in how they are enforced.

In addition, we strongly believe there is an urgent need to ensure the insolvency protections available deliver for both consumers and the industry; and that the government commits to make progress on the Airline Insolvency Bill announced in the 2019 Queen's Speech before it is too late and the sector is hit by yet another airline collapse.

This paper focuses on the challenges and constraints, as well as the opportunities for reform of the public and private enforcement systems and the consumer protection rules that regulate the travel sector. As we consider what works and what doesn't from the perspective of the consumer, Which? offers twelve recommendations on how to ensure reforms in this sector deliver for consumers and create a well functioning market.

It is worth noting that with the term 'travel sector' we are referring to the aviation and package holiday sectors, drawing on the regulatory protections that govern these areas of consumer law. We are therefore excluding the rail and maritime sectors from this assessment.

Which? recommendations

In order to create well functioning and competitive aviation and holidays markets, 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:

1. The government should bring forward legislation that will grant the CAA administrative fining powers for breaches of consumer law. The government should equip the CAA with a regulatory toolkit for the enforcement of consumer rights in aviation, which would enable it to obtain information from the industry more easily.
2. 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.
3. The CAA should establish an explicitly consumer-focused code of conduct for the airlines operating in the UK with the objective to hold companies accountable for their behaviour, setting clear expectations for businesses on what policies and behaviours are fair and transparent.

Reforming private enforcement:

4. 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.
5. The government and the CAA should adopt the Alternative Dispute Resolution (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.
6. The government should review dispute resolution in the package holiday sector which at present leaves a large number of travellers with no access to ADR while those who do might be deterred given the cost of making a claim.
7. 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 travel:

8. The government should abandon its proposals on changes to compensation for domestic flights, as presented in DfT's recent consultation on Aviation Consumer Policy Reform, and instead focus on addressing the limits of current legislation and the clarifications that are much-needed. The government should build on EC261 passenger rights, learning 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.

9. The government and CAA should work towards improving compliance with the retained version of Regulation EC1107/2006 as a priority to ensure the rights of passengers with accessibility needs are protected and enforced.
10. Following the UK's departure from the EU, the government has the opportunity to reduce inconsistencies between air passenger rights under EC261 and the Package Travel Regulations (PTRs), bringing greater clarity and protection to consumers.
11. Linked Travel Arrangements should be given appropriate levels of consumer protection in the form of liability and enhanced insolvency requirements. The government and regulators should ensure the rules can be enforced, non-compliance effectively monitored and that consumers are given clear information on the level of protection they have.
12. The government should design a joined-up strategy whereby the upcoming reforms of consumer rights in travel, including the CAA's ATOL reform and proposals for an Airline Insolvency Bill (AIB), are viewed holistically to create a coherent and understandable set of protections for consumers.

Introduction

A sector at a crossroads

Consumer confidence in a market is central to its economic recovery and growth.

While the industry is responsible for respecting consumer rights, the regulators are key to ensuring this happens by promoting compliance and taking action in case of misconduct. Good, responsible businesses and the wider economy benefit from a successful enforcement system that is underpinned by strong consumer confidence.

At the beginning of the pandemic, Which? found that trust in the travel industry plunged to a record low in May 2020 as airlines and holiday companies denied and delayed refunds for coronavirus cancellations. At the time, our quarterly Consumer Insight Tracker showed that trust in airlines and holiday companies dropped from a net score¹ of 9% in February 2020 to -12% in May 2020 – a drop of 21 points, and the lowest score ever recorded in the seven years Which? has collected the data.

This was the second time since Which?'s records on consumer trust began that the net score for trust in airlines and holiday companies dropped below zero – the only previous occasion net trust in the industry entered negative figures was briefly after the collapse of Thomas Cook in September 2019, when the net score decreased to -1%.²

As consumers return to travel this summer, many for the first time since the coronavirus pandemic began, lessons should be learnt to ensure there is no repeat of the sector-wide failings consumers have experienced.

After all, holidays are the single largest purchase most families will make each year. When something goes wrong, it is not just the extra financial costs that burden consumers but also the emotional toll of having saved up and paid in advance for an experience they looked forward to, only to suffer from businesses that ignore their legal obligations.

Against the backdrop of rising costs of living, we know that many consumers are keen to avoid cutting back on travel this year, following a long period of lockdowns and travel restrictions.³ Research suggests that two-thirds of consumers are still planning to spend savings on large purchases this year, with holidays being the most common big-ticket item followed by home improvements.⁴

1 Net trust is calculated by subtracting the proportion of those who don't trust the industry from those who do. A score below zero indicates that a greater proportion don't trust the industry than do.

2 'Trust in the travel industry plummets to record low amid coronavirus refunds scandal', Which? <https://press.which.co.uk/whichpressreleases/trust-in-the-travel-industry-plummets-to-record-low-amid-coronavirus-refunds-scandal/>

3 "The Score by Kokoro Global". A weekly representative survey with 2000 responses from UK adults 18+ weighted to age, socio-economics and geographies. The survey is complemented by a qualitative community of c.30 households.

4 'Survey highlights impact of rising cost of living on consumer spending', KPMG, April 2022. <https://home.kpmg/uk/en/home/media/press-releases/2022/04/survey-highlights-impact-of-rising-cost-of-living-on-consumer-spending.html>

The time for reforms in travel is now

Over the last two years, two significant changes have shaken the legal framework governing consumer rights and protections in travel:

- The pandemic and the disruption it is still causing for passengers as evidenced by the ongoing chaos at airports across the country due to staff shortages and lack of adequate preparation following the lifting of travel restrictions;
- The UK leaving the European Union in 2021 and the opportunities this major shift presents to build on the rights and protections we had as part of the EU for the benefit of UK consumers and businesses.

During this time Which? has provided advice and support to many frustrated consumers who have lost money, time and energy in fighting to get their money back for cancelled flights or holidays, in navigating the constantly changing travel rules and restrictions and in dealing with a poorly regulated private covid-19 testing market that left them exposed to scams and fraudulent behaviour. We have shared our investigations with the regulators urging them to take action, and have also commented extensively on what can be done to help consumers access redress when things go wrong, and on the crucial need to ensure consumer rights in travel are protected and effectively enforced.

In 2018 the government set out its vision for the future of aviation in the green paper consultation *Aviation 2050: the future of UK aviation*, which contained a number of proposals aimed at enhancing the passenger experience. Among these it had set out plans to: review effectiveness of ADR in the sector, expand the CAA’s powers so it can better tackle consumer rights violations in the sector, and set out a “Passenger Charter to promote good practice in the sector, create a shared understanding of the level of service that passengers should expect, and communicate roles and accountabilities clearly”.⁵

It is positive to see that proposals to reform the CAA powers and the ADR system are currently being considered by the DfT in the Consumer Aviation Policy Reform consultation.⁶ However, Which? has serious concerns about separate plans proposed in this consultation that seek to change EC261 compensation rules for domestic flights that are delayed.⁷ 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, significantly reducing the crucial deterrent effect it has on airlines behaviour.⁸

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”.⁹ We are urging the government to drop these to ensure this effective deterrent against airlines’ malpractice isn’t removed.

5 Government consultation on ‘Aviation 2050: The future of UK aviation’, December 2018.

6 DfT consultation on ‘Aviation Consumer Policy Reform’, January 2022.

7 Which? response to DfT Aviation Consumer Policy Reform consultation, March 2022.

8 “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/>

9 ‘Air transport: Europe reinforces passengers’ rights’, 16 February 2005.
https://ec.europa.eu/commission/presscorner/detail/en/IP_05_181

Which? would like to see that reforms in the travel sector are delivered with an approach that is both ambitious and cognisant of the need for better enforcement and compliance with consumer protection laws. Consumers are scarred by poor practices from before and during the pandemic, and many are preferring “staycations” to avoid the risk of disruption. In this context, there is a danger that consumers’ sensitivity towards refund rights amid the continued disruption at airports could lead to damage to consumer trust that is beyond repair.

Now more than ever is an important time to examine and enhance consumers’ payment protections, including through EC261 and the Package Travel and Linked Travel Arrangements Regulations (PTRs), and ensure consumers have access to affordable dispute resolution in the form of a statutory-backed ombudsman in the aviation and holiday sectors.

The need for reform in travel is not unique to the UK and is also being explored elsewhere. As part of its programme on the Sustainable and Smart Mobility Strategy and the New Consumer Agenda,¹⁰ 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 in air travel and holidays are addressed taking in the lessons from the pandemic.¹¹

With many in the industry predicting a busy summer and a clear pent-up demand for travel as seen during the Jubilee Bank Holiday weekend, there can be no excuse for a repeat of these failings. It is crucial that the government listen to consumers and understand their frustrations. Consumer-focused reforms, and consumer confidence in the sector, are intrinsically linked to the government’s wider economic agenda of “building back better” post-pandemic. It is imperative that the government reforms deliver for consumers and their confidence in travel is restored.

Which? Vision for consumer reforms in travel

This paper focuses on the challenges and constraints, and the opportunities for reform, of the public and private enforcement systems and the consumer protection rules that regulate the travel sector. We consider what works and what doesn’t from the perspective of the consumer, and offer recommendations to government and regulators on how to ensure reforms in this sector deliver for consumers and create a well functioning market.

We begin by offering an overview of enforcement of consumer rights in travel, with several examples of business malpractice demonstrating the need for urgent reform and strong regulatory action to better protect consumers. Among these, we present the findings of our latest investigation on airlines’ contract terms which shows how ineffective the CAA’s approach to enforcement is and how the aviation industry may feel empowered to act unfairly towards consumers knowing that their actions will go unpunished.

We then look at the limits of the public enforcement system and the role of the CAA as the aviation sector regulator, as well as those of the private enforcement system. As part of this, we consider what reforms are needed to enhance ADR provision and delivery in the aviation and package holiday sectors. Finally, by highlighting the gaps and inconsistencies in the consumer rights framework, we offer a view on the opportunities the government has to enhance regulations in the interest of consumers.

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

11 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

By examining the constraints of the current regime, and the opportunities to make positive changes to the enforcement framework in travel, we hope to provide a vision for the future and what a successful set of protections could give consumers the confidence to book.

What a successful consumer rights framework in travel could look like

-  Overall, consumers have a positive and frictionless experience when dealing with airlines and holiday providers.
-  They can book with confidence, safe in the knowledge that their rights and booking payments are protected in case of disruption or problems with the service.
-  Their rights across the aviation and holiday sectors are coherent and strong. The consumer rights framework effectively protects them from emotional and financial detriment in case of disruption.
-  They have clear, accessible information about their rights and can easily understand the protections they're afforded, and the distinction between these and travel insurance cover. This means the industry sets out clear and fair terms and conditions and communicates these clearly and in Plain English.
-  Similarly, they are aware of the insolvency protections that come with an ATOL booking and understand the distinction between these and air passenger and package holiday rights.
-  Consumers are aware of their rights in regards to delays and cancellations and know they can access refunds or compensation from an airline or holiday provider quickly and easily in case of disruption.
-  In case of systematic malpractice in the sector, they know they are protected by the sector regulator who proactively monitors the market and intervenes when needed.
-  Finally, they know that they have access to a simple and effective redress system should they need to escalate a complaint about an airline or holiday provider, and are confident that this system will deal with their dispute fairly, swiftly and transparently.

Enforcement of consumer rights in travel

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).

The travel regulatory landscape exposes consumers to significant detriment caused by confusion over the protections they have depending on how and who they book with. It is also fragmented as the enforcement of consumer rights in air travel and package holidays falls on different regulators.

- The CAA is responsible for enforcing consumer rights in aviation, including legislation relating to air passengers rights during disruption (Regulation EC261) and the rights for passengers with reduced mobility (Regulation EC1107).¹²
- The CAA has concurrent powers with the CMA with regards to general consumer law under Part 8 of the Enterprise Act 2002, which also includes enforcement of the Package Travel and Linked Travel Arrangements 2018 (PTRs).
- However, the enforcement of the PTRs also depends on the type of package and who it is booked with. The CAA and Trading Standards within local authorities are the designated enforcers of the PTRs, however the CAA's remit pertains only to flight-inclusive package holidays.
- In addition, when it comes to flight-inclusive package holidays, the CAA is responsible for running the ATOL holiday protection scheme and for monitoring and regulating ATOL holders' financial health.

During the pandemic, the CMA has been active in responding to consumer protection breaches in the travel sector. The CMA's Covid-19 Taskforce responded to the unfair practices relating to package holiday cancellations and refunds, investigating non-compliant behaviour and taking action to secure refunds for those who had been affected.¹³ The regulator also stepped in to investigate the behaviour of British Airways and Ryanair for their failure to refund passengers who were legally unable to travel, and carried out a rapid review of the PCR covid testing market for travel, producing a set of recommendations which reinforces Which?'s repeated warnings to the government that the PCR market was not fit for purpose.

The CAA's approach to consumer enforcement tends to rely on informal measures, whereby the regulator engages with businesses and "initiates a dialogue with a view to improving compliance".¹⁴ While in some cases this pragmatic approach may have been beneficial, we believe that it may have also enabled the behaviour of some airlines in the industry who appear to act

12 Consumer protection laws, which includes information on legislation that applies to air travel. <https://www.caa.co.uk/passengers/resolving-travel-problems/how-the-cao-can-help/consumer-protection-law/>

13 CMA case on Covid-19 cancellations: package holidays. <https://www.gov.uk/cma-cases/covid-19-cancellations-package-holidays?=0#investigation-launch>

14 CAA response to DfT consultation on Aviation Consumer Policy Reform, March 2022.

in disregard of the law. It is our view that the CAA must act as a stronger regulator that actively monitors and investigates misconduct. The government should equip the regulator with adequate tools and resources that would enable it to identify new and emerging issues and respond to significant breaches when they occur.

We urge the government to view the current policy landscape 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. Government departments' approach to these regulations must complement each other, rather than duplicate responsibilities.

Which? strongly 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 in aviation.¹⁵ 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 many 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' refund requests refused and the airline ignoring CAA and Alternative Dispute Resolution (ADR) scheme rulings, and the long-term small claims court backlog costing money for individual consumers and the taxpayer.

It is during the current period of chaos at airports across the country, in which passengers have been facing mass flight cancellations and extremely long queues at check-in, baggage drop and security, that the absence of a strong regulatory enforcer that is consumer-friendly and proactive in safeguarding passengers' rights becomes very apparent.

For example, Which? urged the aviation regulator to investigate BA's delay and cancellation policy in April 2022, but no action has been taken.¹⁶ While the CAA may be looking into the matter and collaborating with the airline to understand its behaviour, having a regulator whose preferred mode of action is that of behind the scenes engagement does not give passengers the confidence that their rights are being taken seriously and actively protected.

The lack of compliance and enforcement in the aviation sector is not limited to the UK and has been demonstrated in various national and international studies. Key findings include:

- **Consumer 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".¹⁷

15 'Which? Response to Reforming Competition and Consumer Policy consultation', Which?

<https://www.which.co.uk/policy/consumers/7333/consultation-responses>

16 'Which? urges the CAA to investigate British Airways cancellation and re-routing policy', Which?

<https://www.which.co.uk/policy/travel/8835/ba-cancellation-and-re-routing-policy>

17 Ibid.

- **UK passengers are concerned that they would not be treated fairly if things go wrong**, with around two in ten passengers found to be lacking confidence in the sector in 2019.¹⁸ 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.**¹⁹ 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 Commission,²⁰ 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.²¹
- **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.²²

Poor business practices in the sector

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.

All too often when passengers experience disruption, some in the industry tend to act in disrespect of the law and the legal obligations towards their customers; this is harmful not only to consumers, but also to businesses who act in accordance with the law. The travel season of 2022 started with thousands of travellers having their holiday plans disrupted by mass cancellations of domestic and international flights that are caused by staff shortages – with some airlines seemingly ignoring their legal obligations by not informing passengers of their rights to compensation or rerouting when their flights are disrupted.²³

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.

18 Wave Seven: UK Aviation Consumer Survey. <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9203>

19 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>

20 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-industry-investigation/html>

21 '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/>

22 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>

23 'Is British Airways breaking consumer law on flight cancellations again?', Which? <https://www.which.co.uk/news/article/is-british-airways-breaking-consumer-law-on-flight-cancellations-again-aM9S76eOPQmC>

Airlines' terms and conditions

In June 2019, the CAA published a report detailing the results of a review into the contract terms of fourteen airlines flying to and from the UK. The CAA's review focused on terms' fairness, transparency and prominence; crucially, it highlighted a number of aspects of airlines' terms where there could be the potential for legal challenge.²⁴

Although the CAA suggested that it had worked with the airlines to improve those contract terms and practices it had found problematic, it also reported that disappointingly some airlines did not act on its recommendations. At the time, the regulator argued that to drive further positive changes, the rules that govern airlines contract terms and their enforcement should be looked at. In doing so, it also encouraged the government to consider these issues as part of its work on the Aviation 2050's Passenger Charter which aimed "to promote best practice and create a shared understanding of the required service levels for passengers", including by setting standards for clear and transparent terms and conditions.²⁵

Three years have now passed since the CAA published its findings. Which? understands that during this time no further engagement has taken place between the regulator and the airlines on these issues, nor progress made with the Passenger Charter proposed in 2018.

Anticipating that several issues would still be present, and that new ones might have arisen in the context of the pandemic, Which? engaged external barristers to review the contract terms of seven airlines in April 2022 and analyse them against the legal framework governing unfair contract terms.²⁶ We also compared some of the commitments airlines made to the CAA with our findings to find out whether the airlines had indeed created 'key terms' documents or changed specific terms and conditions as the CAA had recommended.

Most of the airlines we looked at had terms which our barristers believe are likely to be in breach of consumer rights law, and some terms are almost certainly in breach of the law.²⁷ We also found additional issues among the airlines' contract terms that were not identified by the CAA when it carried out its review – a particularly concerning one being that of "blacklisting", whereby airlines can refuse to carry customers who have previously sought to obtain a refund through chargeback claims made to their credit or debit card provider. In the context of the pandemic, this term may have applied to passengers who made a claim under section 75 of the Consumer Rights Act 1974 to obtain a refund for flights they were unable to take because of lockdowns or travel restrictions, after having struggled to obtain redress from the airline itself.

24 'Review of airline contract terms, CAP1815', CAA, June 2019.

25 Government consultation on 'Aviation 2050: The future of UK aviation', December 2018.

26 Which? instructed barristers Sarah Prager and Thomas Yarrow at 1 Chancery Lane.

27 Baker, T. "Are airlines above the law?", *Which? Travel*, July 2022 issue.

Below we provide a summary of some of the key findings from our investigation on airlines' T&Cs broken down by themes.

Terms relating to passenger rights under Regulation EC261:

- American Airlines' terms appear to ignore the fact that the airline is subject to EC261 rules when carrying passengers from the UK. Accordingly, the airline does not inform passengers of their rights under EC261 and does not seem to have put in place systems for complying with these rules.
- British Airways (BA) states that it provides for rerouting and compensation in the event of cancellation or delay if it 'delays a flight by five hours or more'. But compensation for flight delays kicks in after three hours, not five. This clause could mislead passengers whose flights are delayed by between three and five hours into thinking they are not eligible for compensation.
- Ryanair's form for claiming compensation for flight delays and cancellations could lead passengers to think they are only entitled to compensation when the disruption is within the airline's control. Therefore, Ryanair's passengers may incorrectly believe that they are not entitled to compensation in the event of issues such as adverse weather, strikes or technical problems and might choose not to make a claim.
- TUI includes a term which gives the incorrect impression that in the event of a flight cancellation it is up to the airline to decide whether to reroute or refund passengers, when in fact EC261 rules stipulate that it is the passenger who chooses.
- Wizzair states that in the event of a diversion the airline is not liable to compensate the passenger, which is untrue.

Limitation periods for making claims:

- BA states correctly that passengers have six years to claim compensation under EC261 in the event of a severe delay or cancellation. They also explain that passengers have two years to claim damages for something serious like personal injury during a flight under the Montreal Convention.²⁸ The problem is that these terms appear near to each other, but the six years rule is set in bold text. This is potentially confusing and misleading: it could lead passengers to misunderstand how long they have to make a claim for personal injury, which means they may be excluded from bringing proceedings for substantial damages in respect of life-changing injuries, for example.
- Eurowings states that passengers have two years to bring any claims, when in fact the limitation period is six years for delay, cancellation and disruption claims under EC261.

Potentially excessive administration fees:

- When the CAA reviewed airline contract terms in 2019, it found that Ryanair and Wizzair's fees for correcting a booking "fall short of the CAA's expectations on fairness and transparency" and that they could provide the basis for a legal challenge.²⁹

In addition, the regulator recommended "that these airlines review the fees that they charge passengers to check in and print their boarding passes at the airport such that

28 The Montreal Convention 1999 establishes airline liability in the case of death or injury to passengers, as well as in cases of delay, damage or loss of baggage and cargo.

29 'Review of airline contract terms, CAP1815', CAA, June 2019.

these fees are more explicitly aligned to the administrative cost to the airline of providing the function.”³⁰

- We found that both airlines still charge significant fees for simple admin services such as ticket transfer, correcting names and checking in at the airport. For example, Wizzair lists 51 fees on its website, including up to €13 for ‘admin’ and €15 for booking through a call centre. Whereas Ryanair’s fee for airport check in is £55; the fee for changing flights is £45 or £60 per flight; the fee for administering a tax refund is £17; the missed departure fee is £100. It is difficult to understand why printing a boarding card should cost £20 or why missing a flight should cost £100.

Blacklisting of passengers:

- Ryanair states it can refuse to carry a passenger on the grounds that (s)he ‘owes us any money in respect of a previous flight owing to payment having been dishonoured, denied or recharged against us’. This could discourage passengers from seeking chargebacks, which could amount to a denial of their rights to seek redress in cases when the airline refuses to refund passengers.
- Concerningly, Ryanair has been enforcing this rule by refusing to carry some passengers who had made a successful chargeback claim for a flight they could not legally take because of lockdown restrictions or a travel ban, only because the airline had refused their request for a refund in the first place.³¹ In response, Ryanair defended its position, noting that it was simply enforcing its T&Cs.
- While this practice may be unique to Ryanair, we have found similar wording in WizzAir’s T&Cs though it is unclear whether the clause would be used in the same way.

How the airlines responded:

- **American Airlines** did not respond to a request for comment.
- **British Airways** said: ‘Our terms and conditions are easily accessible, written in plain English, and are kept under review. We take unfounded and unsupported allegations very seriously and we discourage Which? from making them. We always seek to meet our legal obligations and when a customer’s flight is cancelled or disrupted, we provide the relevant information to fully inform them of their rights.’
- **Eurowings** did not respond to a request for comment.
- **Ryanair** denied its terms and conditions mischaracterised passengers’ rights to compensation and said passengers could get more information on their rights by clicking on dedicated links within the terms. It also said it doesn’t charge large fees and that airlines have the commercial freedom to set fees as they see fit. In response to blacklisting it said less than 850 passengers had unlawfully processed chargebacks via their credit card company, and that these few passengers were required to settle their outstanding debt before being allowed to fly with Ryanair again.
- **TUI** said ‘The travel industry is heavily regulated and we therefore would be unable to operate unless we complied with the laws of England & Wales and the laws of other applicable

30 Ibid.

31 ‘Ryanair bans covid refund passengers from boarding new flights’, The Guardian. <https://www.theguardian.com/business/2021/oct/12/ryanair-bans-covid-refund-passengers-from-boarding-new-flights>

jurisdictions. We review our conditions of carriage on a regular basis with a key focus on both the law and what is most important for our customers. Ongoing internal reviews of the language used in our terms and conditions are a part of this.

- **WizzAir** said ‘Based on our 18 years of doing business in the UK, we are satisfied that General Conditions of Carriage are fully compliant with all of the applicable laws and regulations set out by the UK Civil Aviation Authority.’

British Airways cancellation and re-routing policy

In April 2022, Which? gathered evidence from passengers who had their BA flights cancelled at the last minute due to an IT meltdown and staff shortages which suggests that BA may be failing to comply with Regulation EC261 and to inform passengers effectively of their rights to compensation and re-routing.³²

Under EC261, airlines are legally required to inform passengers, in writing, of their right to compensation and assistance. Article 14 (2) of the Regulations stipulates that “an operating air carrier denying boarding or cancelling a flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance”. Many of the BA passengers affected by the disruption were eligible for compensation having suffered cancellations and delays to their flights; yet, cancellation emails and letters BA issued to passengers, and seen by Which?, make no mention of compensation rights.

In addition, BA is required by law to offer passengers whose flights it has cancelled re-routing to their destination at the ‘earliest opportunity’. Crucially, this includes booking them with other airlines when necessary. We have seen some evidence of BA informing its customers that it will only rebook flights for them on its own jets or with carriers it has a commercial relationship with, even when this may not be available for a number of days.

We understand these practices may be in contravention of the Regulation which places a legal duty onto the carrier to offer re-routing as close to the destination landing time of the cancelled flight as possible and on any carrier. The CAA issued guidance on this subject in 2021 stating that re-routing on other airlines should be an option even “where airlines do not have such arrangements in place, we do not accept that this should be a barrier to re-routing passengers on other airlines”.³³

The CAA issued a letter to airlines on 7th April 2022 reminding them of their obligations to passengers and warning them that they must reroute passengers on any alternative service, not just using airlines which have a commercial relationship with BA.³⁴ While this was an important reminder of airlines’ responsibilities from the CAA, we are concerned that this intervention comes too late and may make little difference to the tens of thousands of would-be passengers whose flights are being cancelled at short notice.

32 ‘Is British Airways breaking consumer law on flight cancellations again?’, Which? <https://www.which.co.uk/news/article/is-british-airways-breaking-consumer-law-on-flight-cancellations-again-aM9S76eOPQmC>

33 CAA guidance on re-routing, CAP2155, 2021. [http://publicapps.caa.co.uk/docs/33/Re-routing%20Guidance%20\(CAP2155\).pdf](http://publicapps.caa.co.uk/docs/33/Re-routing%20Guidance%20(CAP2155).pdf)

34 Link to CAA Letter to airlines on 07/04/2022: <https://www.caa.co.uk/media/jurl1tdf/april-2022-disruption-letter-to-airline-for-comms.pdf>

The CAA has written letters to airlines in the past, laying out its concerns around airlines' failures to comply with their re-routing obligations under EC261;³⁵ yet, we are still seeing evidence of failures to comply.

Ryanair's Wallet

In March 2022, 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. Which? believes this creates an extra step in the process, which could result in fewer people claiming their money back in cash.³⁶

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' (we believe the Wallet would be viewed 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.³⁷

At the time, Ryanair said the Wallet facility "provides customers with complete control over their refunds, by giving them immediate access to their Wallet balance (for use on future bookings) and the ability to withdraw their refund in cash in just one click. All passengers' rights and entitlements under consumer protection law continue to be fully respected".

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, while others had no other option than to accept vouchers.

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.³⁸

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

35 Which? informed the CAA of airlines' re-routing malpractice in 2017, 2018 and 2020.

36 '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/>

37 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

38 From recent conversations with industry, Which? understands that there are still a lot of outstanding payments stuck between airlines and travel agents and consumers. 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.

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.

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.³⁹ 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.⁴⁰ 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.

Given the lack of 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.

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

39 CAA review into airline refund practices during the pandemic, CAP1947. <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9711>

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

action which encourages further bad behaviour across the industry. Also, as our survey of ATOL holders showed, many holiday providers struggled to obtain refunds from some airlines who simply ignored their obligations under the Package Travel Regulations.⁴¹

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.

41 As set out in Regulation 29 ‘Right of redress’ of the Package Travel Regulations.

Public Enforcement: why consumers need a stronger regulator

Through our investigations and research, we have demonstrated the CAA's limited ability to intervene, even when there are clear breaches of consumer law. A lack of administrative fining powers has undermined the ability of the CAA to enforce consumer legislation and secure routine compliance in aviation, 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 or 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 the draft Digital Market, Consumer and Competition 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.⁴²

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”.⁴³

42 CAA Prioritisation Principles, CAP1233. <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=6483>

43 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>

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.

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.⁴⁴ As further explained in the next section, 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.⁴⁵ Internationally, some comparable authorities have more extensive powers⁴⁶ and use them regularly, as in Canada.⁴⁷

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.

Aside from the ongoing CAA v Ryanair case over mass cancellations related to crew strikes, 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 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.⁴⁸ Which? received thousands of calls with regards to the ash cloud and we shared

44 “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>

45 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>

46 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>

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

48 ‘Thousands of air passengers still await ash cloud compensation’, *The Guardian*. <https://www.theguardian.com/business/2010/aug/15/air-passengers-ash-cloud-compensation>

our concerns with the CAA at the time for not being tough enough and taking legal action against airlines that were not paying refunds and compensation to affected passengers.⁴⁹

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. Consumers were given the option of rebooking flights or were imposed 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.⁵⁰ 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".⁵¹

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 (BA) 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.⁵² 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 to take this case through the courts, and the uncertain outcome"⁵³ 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.

49 'Airlines still dodging compensation claims', The Times <https://www.thetimes.co.uk/article/airlines-still-dodging-compensation-claims-d7kr6dbh6k3>

50 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/>

51 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>

52 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>

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

How 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.⁵⁴

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.⁵⁵

Elsewhere in North America, the Canadian Transportation Agency (CTA) is able to sanction airlines with monetary penalties of up to \$25,000 per incident for non-compliance with the *Air Passenger Protection Regulations*.⁵⁶ The list of enforcement actions undertaken by the regulator are publicly available on its website and regularly updated.⁵⁷

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 powers⁵⁸ and noted how "other regulators can employ sector specific sanctions or make use of licence requirements to manage non-compliant behaviour".⁵⁹ Moreover, the government's commitment to giving the CMA administrative fining powers reinforces the argument that the CAA, as the sector regulator with specialist knowledge and expertise in aviation, should also be granted similar sanctioning powers for breaches of consumer law.

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.

Which? Recommendation:

The government should bring forward legislation that will grant the CAA administrative fining powers for breaches of consumer law. The government should equip the CAA with a regulatory toolkit for the enforcement of consumer rights in aviation, which would enable it to obtain information from the industry more easily.

54 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>

55 '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->

56 <https://otc-cta.gc.ca/eng/air-passenger-protection-regulations-highlights>

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

58 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

59 CAA response to DfT consultation on Aviation Consumer Policy Reform, March 2022.

A stronger regulator with a clear consumer mandate

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 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.⁶⁰

In addition to enhancing the CAA's enforcement powers with a civil sanctions regime, 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 its prioritisation principles which offer an overview of the regulator's powers in consumer protection and set out the regulator's approach to deciding which issues to explore and investigate.⁶¹

We would encourage the DfT to consider creating accountability systems that would support the CAA in its role as a consumer law enforcer, ensuring it is always acting in the consumer interest. For example, the CAA has a Consumer Panel which "provides expert advice to make sure that the consumer interest remains central to CAA policy development".⁶² There might be scope for giving a greater voice to the Consumer Panel under its role as a non-statutory critical friend to the regulator.

Building on the government's current plans to deliver a Passenger Charter⁶³, and on the ideas proposed in the Aviation 2050 strategy,⁶⁴ we believe there is a clear opportunity for the DfT to consider tasking the regulator with the creation of a consumer-focused code of conduct.

The CAA should establish a code that sets out clear expectations on businesses on what policies and behaviours are fair and transparent. Working with the industry and consumer groups, and drawing on existing guidance and rules, the regulator would be able to promote good practice in the sector and communicate good industry practices to passengers in a clear, transparent and accessible way. It is critical that the government ensures the regulator has the resources and the enforcement tools to monitor business compliance with the code and request information from the industry on their performance.

Which? recommendation:

The CAA should establish an explicitly consumer-focused code of conduct for the airlines operating in the UK with the objective to hold companies accountable for their behaviour, setting clear expectations on businesses on what policies and behaviours are fair and transparent.

60 Unfair Contract Terms In Aviation Report, CAA, CAP1815. <https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=9136>

61 Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation Work, CAP 1233. Section 2.30 on 'Updating the Prioritisation Principles' states that the CAA "will keep the principles under review in light of our experience and developing best practice".

62 <https://www.caa.co.uk/Our-work/About-us/CAA-consumer-panel/>

63 Flightpath to the future: a strategic framework for the aviation sector. <https://www.gov.uk/government/publications/flightpath-to-the-future-a-strategic-framework-for-the-aviation-sector>

64 Government consultation on 'Aviation 2050: The future of UK aviation', December 2018.

Lack of data on airlines behaviour and compliance

There appears to be a data transparency problem in the aviation sector that hinders the monitoring of business practices and ability to identify non compliance. 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.

The lack of information on airlines compliance with the law makes it difficult to scrutinise behaviour in the sector and evaluate whether consumer rights are effectively protected and enforced. In this respect, we believe that a code of conduct, coupled with the regular monitoring and reporting of airlines policies and behaviours, would be beneficial to both the industry and consumers.

The CAA itself recognises the considerable benefits of reputational regulation and how “the publication of performance and company information can be an effective means of incentivising performance and responsible behaviour”.⁶⁵ However, the regulator is constrained by the limits of its enforcement powers under the Enterprise Act 2002 which do not currently provide the necessary incentives for businesses to respond to information requests from the regulator. It is therefore essential that the CAA is given an enhanced regulatory toolkit that would enable it to access information from businesses without having to resort to court action.

By regularly reporting on airlines policies and behaviours, and their compliance with the law, and by highlighting examples of good practice, the regulator may be able to drive improvements in the sector with the use of the “softer” powers at its disposal. For example, a regular assessment of good and poor practices in the sector would not only provide consumers with information on businesses’ behaviour and compliance with the law, but would also help raise standards as businesses would be incentivized to do right by their customers. It would also promote awareness of consumer rights and what should be expected of the industry and the regulator with regards to consumer protection, while also providing confidence to consumers that the sector regulator is working in their interest.

Monitoring good practice: flexible terms and conditions

Flexibility has become a crucial element of flight and holiday bookings in the context of the pandemic, and it’s something consumers will continue to expect from industry. When it comes to making a booking, Which? advises consumers that the safest option is to choose a package holiday provider with a great flexible booking policy. Unlike DIY packages where the consumer books each part of the holiday individually, a package holiday booking offers the benefit of financial protection should the holiday provider become insolvent. However, many travellers may already have accommodation for the trip and will therefore have to opt for a flight-only booking, which can be a much riskier option given the lack of financial protections flight-only bookings come with.

To help consumers make informed decisions when booking, Which? examined hundreds of holiday providers’ policies and found some have restrictions or gaps that could leave travellers out of pocket when they need to change their trip.⁶⁶ We have also looked at the flexible booking options offered by major airlines to find out which allow making changes to flights for free.⁶⁷

65 CAA response to BEIS consumer green paper: modernising consumer markets, 2018.

66 Package holiday providers with flexible booking policies, Which?. <https://www.which.co.uk/reviews/travel-agents/article/package-holiday-companies-with-flexible-booking-policies-azO902I4eCIk>

67 Flexible flight booking policies: which airlines will refund you if you can’t fly, Which?. <https://www.which.co.uk/news/article/flexible-flight-booking-policies-which-airlines-will-refund-you-if-you-cant-fly-aX4A47d0ZvD5>

Given the wide variation between different airline and holiday operators' flexible booking policies, it is crucial that businesses are clear in their marketing material and policy documentation about the level of flexibility and the key limitations of their offer. It is also essential that the CAA, alongside other relevant authorities such as Trading Standards, actively monitor business practices and drive improvements across the aviation and package holiday sectors.

Which? Recommendations:

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.

Private enforcement: reforming the ADR system

What is Alternative Dispute Resolution?

Alternative Dispute Resolution (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 recent report “Are Alternative Dispute Resolution schemes working for consumers?”,⁶⁸ 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.

ADR in the aviation sector

Why voluntary membership does not deliver to consumers

In our analysis of ADR in different sectors, aviation stood out among regulated sectors for not having mandated membership of an ADR scheme.⁶⁹

In the absence of mandatory ADR, businesses have the ability to leave the scheme 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 dispute resolution scheme made decisions the airline did not like. Ryanair rejoined AviationADR in June 2021 after the CAA made changes to the ADR

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

69 Ibid.

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 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 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 AviationADR.⁷⁰ 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 AviationADR 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'.⁷¹ 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.

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 3.⁷² 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.

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

71 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>

72 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? has concerns about about 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 CAA,⁷³ 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.

Lack of transparency and data on ADR decisions

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”.⁷⁴ Despite the commitment to monitor this 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.

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

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

74 ‘ADR in the aviation sector – a first review’: Civil Aviation Authority

Similarly a review conducted by Verita on behalf of the CAA in 2021 included a reference to the fact that “Passengers currently face long delays between receiving an outcome of the case, and the financial payment”.⁷⁵ Despite this concerning finding there is no further investigation of this aspect of the consumer experience.

Under the ADR regulations, all approved ADR schemes are required to provide a rate of compliance in their annual activity reports. AviationADR’s annual activity report only provides a brief comment but no figures.⁷⁶ The Aviation Adjudication Scheme’s annual report 2021 states that all outcomes that were accepted by consumers were complied with by traders; however, there is no information as to the timescale within which payments were made.⁷⁷

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.

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.⁷⁸

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 higher standards that works for both businesses and consumers. It 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.

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

76 [AADR activity report 2021](#)

77 [CEDR annual report 2021](#)

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

- 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.

Which? Recommendation:

The government and the CAA should adopt the Alternative Dispute Resolution (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.

Why Which? calls for an aviation ombudsman

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 ADR providers can cause unintended consequences which could be avoided by having a single ADR provider in the sector, appointed by a competitive process run by the competent sector regulator representing both consumers and business interests.⁷⁹ Where there are multiple providers in a sector, where businesses have a choice, 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.⁸⁰ 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

⁷⁹ Are Alternative Dispute Resolution schemes working for consumers?, Which?, 2021 <https://www.which.co.uk/policy/consumers/7428/adrschemes>

⁸⁰ Wagnes, G. “Dispute resolution as a product: competition between Civil Justice Systems” Regulatory Competition in Contract Law and Dispute Resolution, page 360-435.

may be cause for 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 AviationADR.⁸¹

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.⁸²

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.⁸³ 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.

Which? Recommendation:

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.

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 £1,241,552.⁸⁴

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

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

83 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'. <https://www.which.co.uk/policy/consumers/7333/consultation-responses>

84 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 the government's proposals to mandate ADR in the aviation sector. We 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.

The case for collective redress

The 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).

Which? Recommendation:

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.

ADR in the package holiday sector

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.⁸⁵ 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.

A holiday represents an expensive purchase for most people and the involvement of different providers can lead to complex disputes. However, the package holiday sector is only partially covered with ADR only available to customers of ABTA members through ABTA's arbitration service with claimants having to pay substantial fees to register a dispute. At present, a large number of travellers have no access to ADR while those who do might be deterred given the cost of making a claim. Therefore, we urge the government to review dispute resolution in the package holiday sector to ensure more travellers have access to alternative means of resolving complaints other than the courts.

Which? Recommendation:

The government should review dispute resolution in the package holiday sector which at present leaves a large number of travellers with no access to ADR while those who do might be deterred given the cost of making a claim.

⁸⁵ 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'. <https://www.which.co.uk/policy/consumers/7333/consultation-responses>

Enhancing regulations to better protect consumers

Consumers need a set of rights and protections that are clear and consistent, awareness of what they should do when things go wrong, and an understanding that there are systems in place to protect them when businesses act unfairly. However, the consumer rights framework in travel is complex and fraught by inconsistencies, and the pandemic has highlighted discrepancies between the frameworks governing air travel and package holiday rights that needs to be corrected.

There are clear opportunities in the aftermath of the pandemic and post-Brexit to review passenger rights and package holiday regulations in the UK with a view to enhance consumer redress and improve travellers' awareness and understanding of their rights. The pandemic has highlighted problems between the two travellers rights frameworks and their enforcement which severely impacted consumers and several actors in the travel supply chain. It is essential that gaps between EC261 and the PTRs are addressed.

It is crucial that any work to reform consumer rights in travel addresses key changes to consumer protections in the aviation sector which span both compensation in the event of delay and cancellation, and in the case of insolvency. 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.⁸⁶ Air passenger protections and the CAA's ATOL reforms cannot be looked at in isolation from plans to establish airline insolvency provisions.⁸⁷

Finally, consumer's awareness of passenger rights remains relatively low, and passengers affected by travel disruption on the same flight can be treated differently because they are not made aware of the cause of the disruption.⁸⁸ We urge the government and regulators to take action to promote consumer rights in travel and inform travellers of the practical steps they need to take to enforce their rights.

Safeguarding and strengthening EC261

Regulation EC261, also commonly referred to as the Denied Boarding Regulations, is arguably the pillar and cornerstone of consumer protection in air travel. A recent international study found that passenger rights are comprehensive but consumers have to fight to have them protected and enforced.⁸⁹

86 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>

87 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

88 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>

89 Ibid. The EU Court of Auditors report, as cited above, looked at ten EU member states and did not include the UK among these. However, the study's findings on consumer awareness of passenger rights and their enforcement are consistent with other relevant EU studies that included the UK, such as the 2019 Eurobarometer research or the 2020 EC report cited in footnote 86.

The pandemic and ongoing travel chaos shows the need to strengthen Regulation EC261 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. Instead, the government is proposing to change compensation rules for domestic flights that are affected by delays,⁹⁰ a topic that had no previous public debate at UK level and certainly since the UK has left the EU.

Which? strongly opposes these proposals and believe 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 the policy rationale presented by the DfT does not sufficiently consider all of the issues necessary for the optimal design of a compensation framework.

It is of utmost importance that reform to current legislation builds on the principles that underpin it. As we noted in our response to the DfT's consultation, the government must ensure that any new rules on compensation act as an effective deterrent against poor treatment of customers, while also better incentivising good customer service.⁹¹ 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.

EC261 as a deterrent against flight disruption

To appreciate the role of EC261 as a deterrent, it is crucial 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.⁹² 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.

When EC261 came into force in 2005, it was clearly promoted as a measure aimed at raising standards across the industry:

“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.”⁹³

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 with strong enforcement toolkits that enable them to tackle industry malpractice.⁹⁴ Indeed, the level of flights

90 DfT consultation on ‘Aviation Consumer Policy Reform’, January 2022.

91 Which? response to DfT ‘Aviation Consumer Policy Reform’ consultation, March 2022.

92 ‘Air transport: Europe reinforces passengers’ rights’, 16 February 2005. https://ec.europa.eu/commission/presscorner/detail/en/IP_05_181

93 Ibid.

94 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>

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.⁹⁵

Which? estimates 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.⁹⁶ 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 as a result of disruption

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 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).

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.

⁹⁵ Ibid.

⁹⁶ "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/>

Furthermore, we would urge the government and CAA to work towards improving compliance with the retained version of Regulation EC1107/2006⁹⁷ 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.⁹⁸

Which? Recommendation:

The government should abandon its proposals on changes to compensation for domestic flights, as presented in DfT's recent consultation on Aviation Consumer Policy Reform, and instead focus on addressing the limits of current legislation and the clarifications that are much-needed. The government should build on EC261 passenger rights, learning 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.

The government and CAA should work towards improving compliance with the retained version of Regulation EC1107/2006 as a priority to ensure the rights of passengers with accessibility needs are protected and enforced.

Inconsistencies between EC261 and PTRs

The Package Travel and Linked Travel Arrangements Regulations (PTRs) provide that consumers may cancel their package and receive a full refund at no cost, "in the event of unavoidable and extraordinary circumstances" (Article 12(7) PTRs). However, consumers' right to a full reimbursement, if they cancel their flights due to unavoidable and extraordinary circumstances, does not exist in the EC261 Regulation where consumers cannot benefit from such reimbursement. In the airline sector, consumer rights in such circumstances are governed by the terms and conditions of the ticket and/or the goodwill of the airlines. Of course, this has greatly affected consumers during the pandemic.

As explained earlier in this paper (see page 20), the inconclusive outcome of the CMA's investigation on British Airways and Ryanair for their refusal to refund passengers who could not travel because it was illegal to, is clear evidence of the need to clarify the law in this respect. It also demonstrates how two passengers who booked flights on the same plane could be treated differently depending on who and how they booked their journey with.

Many consumers lost their money because they complied with the recommendations of the national authorities (ban of travel to certain destinations, or dissuasive/negative travel advice), but their flights were maintained by the airlines. Moreover, this situation created a disparity between consumers who, depending on the type of service booked (package vs single air service), have/have not the right to be reimbursed despite boarding the same plane. To be consistent, travellers' rights to cancel the journey in case of "extraordinary circumstances" and to be fully reimbursed should be introduced in the EC261 Regulation as it exists in the PTRs. Therefore, the reviews of both legislative texts will need to be done in a consistent manner.

⁹⁷ Regulation EC1107/2006, as retained in UK law, concerns the rights of disabled persons and persons with reduced mobility when travelling by air.

⁹⁸ There is evidence from reviews of the current regulation (EC1107) of an urgent need for better requirements for training of staff in relation to assisting passengers with disabilities or of reduced mobility. In addition, legal definitions relating to mobility and medical equipment could be broadened, and much more attention given to monitoring and enforcement, including sanctions.

The refusal of some airlines to refund passengers for lockdown flights also impacted a number of holiday providers and online travel agents (OTAs) who are legally required to refund their customers for these flights, but who might not have received the refunds from the airlines themselves. Therefore this issue created a knock-on effect on the industry as a whole, with organisers and agents finding themselves exposed to the airlines. This is a salient concern for many in the industry who would like to ensure improvements are made to the flow of refunds between businesses forming part of the package.

It's important to highlight the good practices from some players in this market. Not all airlines refused 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.⁹⁹

Which? Recommendation:

Following the UK's departure from the EU, the government has the opportunity to reduce inconsistencies between air passenger rights under EC261 and the Package Travel Regulations, bringing greater clarity and protection to consumers.

Enhancing the Package Travel Regulations

What is a package holiday?

Put simply, a package holiday is defined as the combination of two or more different types of travel services, such as flights, accommodation and car hire, which are combined for the purpose of the same trip and purchased from one company for a total price.

The Package Travel and Linked Travel Arrangements Regulations (PTRs), which govern this type of holiday bookings, require travel businesses to refund passengers within 14 days of their holidays being cancelled or significantly changed, regardless of whether the travel organiser (be it a tour operator or travel agent) has received the money back from suppliers, such as accommodation providers or airlines.

Package holidays offer additional financial protection to flight-only bookings: UK consumers purchasing a package holiday are entitled to a refund or repatriation in case of the travel operator's insolvency. All package holiday providers selling to UK customers need to meet the insolvency requirements set out in the PTRs and offer financial protection via ATOL, ABTA or other schemes approved by the CAA or BEIS.

Package holidays offer a high level of consumer protection that should be preserved. Attempts to diminish the scope of the definition, or to introduce exemptions to this definition, should be rejected in the consumer interest.

What is an LTA?

A 'linked travel arrangement' (LTA) is the separate selection and purchase of travel services for the purpose of the same trip or holiday. The consumer selects one service from a holiday provider and then adds another within 24 hours, but the payment details and related information needs to be entered again. The combination of the services is facilitated by the trader who prompts the

⁹⁹ "Ryanair and British Airways continue to refuse refunds for customers who can't legally travel", Which? <https://www.which.co.uk/news/2021/01/ryanair-and-british-airways-continue-to-refuse-refunds-for-customers-who-cant-legally-travel/>

traveller to book additional services in a targeted manner. As the traveller's information and payment details are not transferred and need to be entered by the traveller again, separate contracts with individual service providers will exist.

For example, an email with flight information has a link to a hotel site, but you have to re-enter your travel dates, location, personal information and payment details. Paying separately for the services does not in itself constitute an LTA: a service must have been booked and paid for first, before the second or further services are added to the trip.¹⁰⁰ Crucially, it is the responsibility of the first travel company to tell you that you've been sold a Linked Travel Arrangement.

Consumer protections for LTAs are weaker than those that come with package holiday sales, with facilitators also having fewer obligations towards their customers, such as weaker insolvency protections and the lack of liability protection. This measure is particularly important given the opportunity for abuse on 'flight-inclusive' LTAs – for example, airlines may be able to sell what appear to be holiday packages without having an ATOL licence and without complying with the PTRs. The looser definition of LTAs, and the fact that they are difficult to prove, has allowed some businesses to offer products that may appear as LTAs, when in fact they are packages.

If it can be shown that after buying a flight, a consumer receives an email with a link that enables them to select and purchase a hotel room or other service within the relevant 24 hour period, then this would appear to be an LTA. However, we have seen examples where a consumer is able to purchase a flight and accommodation or other services together in a single transaction without having to re-enter their details more than once, yet the service is not defined by the seller as a package.

The government is looking to make changes to the PTRs in the near future focusing on "the 'essential features' of a package rather than arbitrary rules, in order to provide clearer rules which are easier to interpret, and they simplify the regulations around linked travel arrangements."¹⁰¹ Which? believes that rather than simplifying definitions at the expense of consumer protections, LTA arrangements should be given appropriate levels of consumer protection in the form of liability and enhanced insolvency requirements. In particular:

- When it comes to insolvency protection, it is problematic that the financial protection of LTAs may be temporary, with liability ending once the LTA facilitator has passed on the money they receive from the consumer. This makes it difficult for consumers to understand what level of protection they have, if any, as the consumer is not aware of or in control of the transfer of funds from the facilitator to the service provider.
- It is crucial to address the lack of contractual obligations on LTA facilitators and a similar liability regime to packages for the performance of the services. Indeed, this can lead businesses to mislead consumers in arranging an LTA to avoid the obligations that come with package holidays, leaving consumers with low protection. Consumers making this type of booking are given no information on what protection they will have in case of insolvency, which exacerbates the confusion around what constitutes an ATOL protected holiday and what is instead to be treated as an LTA or a package. Providing clarifications and enhanced protections on LTAs would deter businesses from exploiting gaps in the regulations and use these products to avoid the obligations of package holidays.

100 CTSI, Package Travel and Linked Travel Arrangements: Guidance for Traders, 2019. <https://www.tradingstandards.uk/media/documents/news--policy/consultation-responses/travel-consultation-final.pdf>

101 Reforming competition and consumer policy: government response, April 2022 <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response>

- As LTAs can be difficult to define and identify, as well as enforce, we urge BEIS to enhance the definitions and information requirements on businesses, expand the obligations on businesses providing these services, clarify how enforcement of the regulations can be actuated and work towards establishing collective redress for package travel regulations.
- Finally, we urge BEIS to continue working with Trading Standards and the CAA on ensuring effective compliance and enforcement of the regulations. As stated by the European Commission in its latest report on the Package Travel Directive, “public enforcement is particularly relevant for checking compliance with insolvency protection requirements and information requirements”.¹⁰²

Which? Recommendation:

LTAs should be given appropriate levels of consumer protection in the form of liability and enhanced insolvency requirements. The government and regulators should ensure the rules can be enforced, non-compliance effectively monitored and that consumers are given clear information on the level of protection they have.

Reforming the ATOL scheme

Which? welcomed the CAA’s proposals to reform the ATOL scheme in recognition of the impact the coronavirus pandemic has had on refund requests, the risk of insolvencies and the current state of the Air Travel Trust (ATT) fund. We agree with the CAA’s view that the current regulatory framework of the ATOL scheme is not as effective in ensuring proper capitalisation of holiday businesses and appreciate the acknowledgment that the practice of using customers’ prepayments to fund operations was a factor in the failure of Thomas Cook and Monarch.

These recent major collapses highlighted how vital insolvency protection is for holidaymakers. Current consumer protections do not reflect the changing holiday market, as most flight-only bookings are not covered by ATOL, yet these make up a growing proportion of purchases. Which? ATOL consumer survey shows that many consumers believe that flight-only bookings purchased from ATOL licence holders are ATOL protected, while four in ten think that ATOL protects all flights operating from the UK.¹⁰³

The CAA should consider whether expanding the scope of the ATOL scheme to include flight-only bookings would be beneficial to consumers so that all passengers departing the UK on an airline that fails while they are abroad have financial protection and are repatriated, regardless of how they bought their ticket. Similarly, it is crucial that the government makes progress on its proposals for an Airline Insolvency Bill that would help provide much needed reassurance to consumers and the many players in the travel supply chain. It would also serve to create a level playing field for businesses operating in the travel sector, ensure consumers continue to have sufficient protections in place when things go wrong and that the market can grow sustainably without over relying on government intervention.

102 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A90%3AFIN>

103 Which? (2021) ‘Consumer understanding of the ATOL scheme’. Yonder, on behalf of Which?, surveyed 2,103 UK adults online between 4 and 6 June 2021. Data was weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status. Of this sample 717 people booked a flight-inclusive package holiday in the last 5 years. Findings are included in Which? Response to CAA’s ATOL Reform consultation, August 2021. <https://www.which.co.uk/policy/travel/7352/consultation-responses>

Establishing new financial requirements for ATOL holders could risk creating further regulatory imbalances between different players in the market. The CAA must carefully assess the withholding of flight refunds monies during the pandemic and how it impacted ATOL holders and their ability to comply with the PTRs and refund their customers in full for cancelled holidays. Given that payments for the flight portion of the holiday need to be made to the airlines in advance, requiring ATOL holders to fully segregate customer monies would only work effectively if airlines act in accordance with the law, processing their refunds without undue delay when necessary, and the law is properly enforced by the CAA.

It is going to be difficult to implement regulatory changes in a time when the travel industry's profits have already been decimated by the global pandemic. While the ultimate objective is to strengthen the holiday sector's financial resilience, bringing in stronger protections may make some businesses unprofitable in the short term and we may see a shrinking of the number of providers with the unintended consequence of reducing choice and value to consumers.

A phased approach that includes initial short-term objectives and a timescale for regulatory changes needs to be delineated so that there is a balance between the need for new regulation to protect consumers, particularly in the interim while changes are implemented, and minimal financial disruption on businesses. The CAA should consider focusing the initial implementation phase on businesses which carry the most risk and which fund their operations using customers' prepayments.

When we asked consumers about their understanding of the ATOL scheme and its protections, we found worrying numbers of consumers uncertain about the coverage it offers. While this finding is unsurprising, as ATOL regulations are very complex, it is concerning as consumers could be at risk of significant detriment when navigating the holiday market. Crucially, we found that many consumers overestimate the protection the ATOL scheme offers.¹⁰⁴

Therefore, the CAA must also focus on improving consumer understanding of the scheme and ensure consumers are aware, when making a booking, of what coverage they have in case of business failure. Improving communication on the scheme's rules can help enhance its value, and ensure information on ATOL protections is clear, accessible, and transparent. In this regard, it is essential for the CAA to work closely with BEIS as the information requirements for businesses selling packages, designed to ensure consumers are better informed both before and after a sale has been made, are set out in the PTRs.

Which? recommendation:

We urge the government to design a joined-up strategy whereby the upcoming reforms of consumer rights in travel, including the CAA's ATOL reform and proposals for an Airline Insolvency Bill (AIB), are viewed holistically to create a coherent and understandable set of protections for consumers.

Which?

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