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Department for Business, Energy & Industrial Strategy  
1st Floor  
1 Victoria Street  
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4 July 2018

Dear Tim,

**BEIS consumer green paper: *modernising consumer markets***

Thank you for the opportunity to comment on the green paper on *modernising consumer markets*. We agree it is of fundamental importance that markets work well for consumers and that regulation keeps pace with changing technology and consumer preferences. We set out our responses to questions raised in the green paper below. Please note that we are also engaging separately with the Government on the development of the Aviation Strategy, and some of the points below have relevance to the Strategy.

*About the CAA*

The Civil Aviation Authority (CAA) is the UK's specialist aviation regulator. We work to ensure that:

- The aviation industry meets the highest safety standards;
- Consumers have choice, value for money, are protected and treated fairly when they fly;
- Through efficient use of airspace, the environmental impact of aviation on local communities is effectively managed and CO2 emissions are reduced; and
- The aviation industry manages security risks effectively.

We also have other responsibilities such as economic regulation of some airports and certain aspects of air traffic control, and running the ATOL holiday financial protection scheme.

We recognise that overall aviation is working well for consumers. We see choice in the market, our regular consumer tracker survey shows relatively high levels of satisfaction with air travel, and passengers numbers continue to increase. This is not to say that there is not room for improvement, but our detailed comments below should be seen in this context.

Not all of the questions in the green paper are applicable to the CAA, but we have answered those which are relevant. We deal with the topics in the order they are set out in the green paper.

### *Data portability and vulnerable consumers*

We agree with the focus in the green paper on vulnerable consumers. In terms of disabled people and those with reduced mobility (PRMs) often the quality of assistance can depend on good upfront information about people's needs. Ensuring the flow of accurate and timely information from the passenger to the airline, and from the airline to the airport, is key to ensuring that airports can provide a consistent and high quality assistance service for all PRMs, but even more so for people whose disabilities may not be so obvious. The ability for an airline or airport to be able to store and share data about an individual's needs would make booking air travel simpler and reduce the risk of information getting lost somewhere during the booking process. However, needs might alter over time so thought would need to be given to allowing passengers an opportunity to periodically update the information. In addition to this care would need to be taken with the storage and transmission of sensitive data, and thought given to ensuring informed consent is obtained in line with data protection requirements.

### *Incentivising companies to do better*

We note the use of compensation in other sectors being used to drive service improvements which is highlighted in the green paper. In aviation, European Regulation 261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. The Regulation sets defined amounts of compensation to be awarded to passengers in different circumstances but passengers must claim compensation from the airline, it is not awarded automatically. Compensation cannot be claimed in 'extraordinary circumstances' and so airlines should be incentivised to improve resilience in areas which are under their control, and will not be unfairly penalised where they are not.

The CAA's most recent consumer tracker survey shows that 60% of respondents who had experienced a delay or cancellation said they were not made aware of compensation by their airline, and more than half did not go on to claim compensation, although depending on the length of the delay not all of the respondents may have been eligible for compensation. The Government Aviation Strategy next steps document sets out that the Government will consider what means are available to increase compensation claim rates, including strengthening information requirements and setting key performance indicators for responding to complaints.

In aviation, the majority of cases dealt with at the second tier relate to compensation for denied boarding, delay, or cancellation. We are currently considering how access to compensation could be improved. It is possible that in some circumstances, automatic compensation (already introduced in some sectors) may incentivise improved performance, while reducing complaints about compensation to ADR schemes. This could in turn mean that ADR schemes would then be able to concentrate on other types of complaint, in turn helping to feed back and improve performance in other areas. As part of its input to the DfT's Aviation Strategy, which is looking at ways of increasing compensation claim rates, the CAA

will consider the issue of auto-compensation further. We have not yet reached any conclusions, but we would be happy to share our thinking with your team in due course.

### *Publication of performance data*

Our view is that the publication of performance and company information can be an effective means of incentivising performance and responsible behaviour. The use of reputational regulation is being used more widely across regulated sectors. It is a tool that the CAA has already started to use across its activities and is a lever we regard as an essential part of the modern regulatory tool kit. There are groups, such as industry, passenger information services, informed consumer representative bodies or the media who may in some cases be more effective than the CAA in getting information directly to consumers and influencing corporate responsiveness. The way in which the CAA publishes data and information is therefore important.

In relation to quantifiable performance data, there should be a presumption in favour of publication (unless there are compelling reasons not to publish), that data should be published in a format that can be easily and accurately compared, and that it should be machine readable so that third parties can pull together data from different sources and use it to create useful comparisons for consumers. This is likely to work best in a sectoral context, although regulators could work together to decide where information across sectors could be helpful to consumers.

In addition, whilst the above indicators are important, positive performance information highlighting those firms that go over and above the minimum thresholds can also be helpful. As well as being useful to consumers, this type of information can help to increase trust in markets more broadly.

### *Challenges of digital markets for effective enforcement*

As digital platforms and markets become more and more central to how consumers search, research, make decisions, and buy goods and services it is necessary for regulators to have the tools to promote effective competition and ensure markets work well for consumers. Digital markets have great potential to reduce search costs for consumers and therefore to drive competition. However, companies may react by decreasing headline costs and increasing other less prominent charges for optional and compulsory add-ons ('shrouded charges'). In aviation we do sometimes see low headline ticket prices alongside additional charges in areas such as baggage, choosing a specific seat, food on-board, airport check-in, or fees to carry musical instruments or sports equipment. Companies should be free to structure their prices in this way but consumers still need to have the ability to make effective comparisons, be fully aware of the potential costs at the start of the booking process, and should not be hindered in making clear comparisons and choosing what is right for their needs.

This applies also to the use of digital comparison tools (DCTs): they should be able to seamlessly incorporate add-on fees (which may vary over time as a result of dynamic

pricing) in order to provide a more tailored service to users. The implementation of Open Banking based on the adoption of standard application programme interfaces (APIs) to allow DCTs to be seamlessly interoperable with the largest retail banks could provide a template for future intervention in other sectors.

Currently the CAA is considering the practice of ‘allocated seating’ whereby consumers pay more to choose specific seats so groups of two or more passengers can sit together. If airlines charge for allocated seats they must do so in a fair, transparent way. Our concern is that consumers may not be clear on their chances of being sat together if they don’t pay, and the way sitting together is priced by some airlines (as an optional extra added later in the ticket buying process) might be making it more difficult for consumers to make comparisons and choose the service and price that is best for them. We are currently considering evidence from a survey of recent fliers, a consumer engagement where people told us of their concerns, and information on policies and practices gathered from airlines. We expect to publish the results of this work, along with recommendations, by the autumn.

### *Personalised pricing and opportunities for joint working*

Personalised pricing is the practice of sellers charging different prices to individual buyers based on what is observable about them. Its aim is to assess the price sensitivity of individual buyers in order to set prices accordingly. While personalised pricing predates the internet, online markets, in which prices can be automatically set and based on a consumers’ data profile and browsing history, are ideally suited to the practice and enable it to be carried out with minimal effort on the part of the seller.

Alongside assessments of wealth and income, the following factors are likely to be significant determinants of a given consumer’s price sensitivity:

- *Willingness or ability to shop around and compare prices:* If a consumer’s data profile suggests they don’t often shop around, they may be offered higher prices. Likewise, if a consumer is assessed to be in a hurry, they may be offered higher prices on the basis that they don’t have time to compare prices or to find a better deal. High-income individuals can also be considered time-poor as the cost opportunity of their time is high.
- *The amount consumers have historically paid for items:* If a consumer’s data profile suggests that they typically pay over the odds for things, they may be quoted higher prices. This practice would have a compounding effect, as the more an individual consumer gets quoted higher prices, the more they are marked out as price insensitive.
- *Whether or not consumers are able to walk away from the transaction:* For instance, if a consumer’s data profile suggests that they need to catch a particular flight, it may be possible to charge them a much higher price than otherwise.

The market for commercial flights is characterised by a majority of price sensitive consumers who are flying to get to holiday destinations, and a significant minority of consumers flying for

business or for other, non-discretionary purposes, who are less price sensitive. There is therefore considerable potential for cross-subsidisation from the latter to the former group.

The use of price discrimination can be beneficial. It can increase market participation (as more consumers are able to purchase thanks to the cross-subsidisation). And when there is intense competition the use of price discrimination is likely to intensify pricing rivalry. For example, if two firms have the same information regarding a consumer's willingness to pay, neither of them might be able to charge a higher price because of the threat of being undercut by the rival. However, firms would be able to exploit information about consumer search costs.

There is some evidence that airlines have already introduced personalised pricing on some ticket searches or plan to. The Airline Tariff Publishing Company, which is used by airlines including British Airways, KLM and Air France to set and manage air fares, is reported to be researching how it can introduce personalisation into its customers' ticket sales.<sup>1</sup>

We are concerned that these factors have the potential to result in vulnerable consumers (who may search less or have specific needs when booking a journey) being charged more. Moreover, by increasing prices for those who do not shop around, the likely effects of personalised pricing are in tension with BEIS's intention that "all consumers should expect to get reasonable outcomes, even if they do not actively search for the best deal."

Potential solutions may begin to emerge, for example the ability to screen one's identity behind a third-party shopping agent. Firms might react to this by charging high prices if consumers buy through this screening solution. Such developments may require regulatory intervention. We agree that further work is needed to understand the effects of personalised pricing on consumers and the potential impacts of any legislative or regulatory action on companies.

We are especially interested in evidence of the impacts of the practice on consumers and how/whether the new General Data Protection Regulation (GDPR) might be used to address personalised pricing should this become necessary. Personalised pricing is an area which is likely to have cross-sectoral relevance and could be a useful arena for collaboration between regulators and Government, including at an anticipatory stage, as approaches begin to develop. It would be helpful to us to see more evidence from other sectors as we begin to encounter the practice more frequently in the aviation sector.

As there are wide implications for consumers in areas highlighted by the green paper such as personalised pricing and increasing use of algorithms, another area of growing challenge for regulators, we see further opportunities for joint working. We need to be clear that we do not regulate algorithms themselves but the outcomes which are achieved in practice. We note the CMA is building a new team of experts in technology and data. This is likely to be an area which has cross-sectoral relevance, but where regulators may not have the resources to build capability in their individual sectors. Therefore we see merit in sharing

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<sup>1</sup> See: <https://www.telegraph.co.uk/travel/news/dynamic-fare-pricing-airline-ticket-personalisation/>

resources here, potentially allowing regulators access to the CMA team's expertise, which could be complemented by deep knowledge of a particular sector from the regulator. Such combined expertise, when applied to a specific sector, could lead to improved outcomes for consumers.

### *Comprehension of terms and conditions*

We consider that it is very important for consumers to be able to easily read and understand terms and conditions and to be aware of any terms that might have a significant impact on their purchase. Airline terms and conditions tend to be lengthy and complex and can be off-putting to consumers. We carried out research in 2016 to understand consumer views of airline contract terms. Around 40% of consumers did not read the terms and conditions and those that did found them difficult to understand. We also commissioned the Plain English Campaign to review the terms and conditions of the largest 14 airlines flying from the UK. This showed a mixed picture with many airlines falling well below expected standards. We are currently working on a project with these 14 airlines to encourage them to improve the transparency and prominence of their terms and to address a number of issues relating to terms that may catch consumers by surprise or lead to them paying hidden charges if they need to make a change to their booking.

Setting a minimum standard of comprehension would be a positive step to ensuring businesses ensured their terms were easy to read.

### *Alternative Dispute Resolution (ADR)*

The CAA recognised the significant improvements ADR could bring to complaint handling in the aviation sector, and implemented the UK regulations emanating from the European ADR Directive to introduce a voluntary ADR framework in late 2015. Our objective was to achieve full sector coverage, but the option to mandate ADR membership for the aviation sector was not available at that time and therefore we pursued a voluntary approach. We have been pleased with the voluntary take up by airlines and airports, though we continue to take steps to encourage other aviation businesses to participate. Currently ADR covers 79% of all passengers travelling in/out of the UK and 75% of passengers with a disability travelling in UK airports. We want to ensure that all consumers have access to effective mechanisms to resolve their complaints. Where consumers have unresolved complaints against airlines or airports that are not signed up to an ADR scheme, they are therefore able to refer their complaint to the CAA's Passenger Advice and Complaints Team. While a useful service that does help some passengers, we do not have the powers to make a CAA decision binding on airlines and therefore from a passenger perspective, we consider this sub-optimal. Consumers can also take their case to the small claims court.

The framework within the aviation sector allows for more than one ADR provider to operate. We currently have two approved UK providers, and there are three European providers which we have permitted some airlines to signpost consumers to. This multi provider approach has been seen as appropriate particularly where ADR has been voluntary, and competition between schemes can provide some benefits. We recognise the importance of

consumers for each airline knowing which ADR provider can handle their complaint and we maintain a continual oversight of ADR providers to ensure that they continue to meet appropriate service standards relating to consumer outcomes and timeframes for complaint handling.

Now that ADR in the sector has been running for over two years, the CAA is taking the opportunity to review whether there are any evidence-based policy changes that should be made in order to ensure we are achieving the best outcomes for consumers. As part of this we are currently looking at a number of different aspects of the policy, including:

- Whether our objective of all passengers having access to ADR is likely to be delivered through a continuation of the existing voluntary framework with further CAA encouragement, or whether, as is more likely, the only way of delivering the objective is through mandated membership of an ADR scheme;
- Whether our approach to allow multiple ADR schemes to operate in the sector is appropriate;
- How we treat European ADR providers that are approved by other Member States;
- Whether our approach to allow ADR providers to charge consumers a nominal fee is appropriate; and
- Whether we should continue to insist that claims brought by claims management companies are considered by an airline ADR provider.

Once our review is complete we will share the results with the Department for Transport as part of the development of the Aviation Strategy, and we would be happy to share it with the BEIS team as well.

### *Consumer awareness and take-up of alternative dispute resolution*

We note the focus in the green paper on ensuring that all consumers are aware of and can access ADR. It is vital for consumers to know their rights so that they know when they can seek redress and this is an area in which the CAA has been active. We have published two compliance reports on the issue of providing information to passengers on their rights.<sup>2</sup> We also took enforcement action against three airlines for failing to provide information to passengers. The amount of work carried-out in this regard will always be limited to some extent by resources available for consumer awareness-raising.

Once consumers are aware of the circumstances under which they can seek redress then they need to have clarity over the steps they need to take. Companies have a role in ensuring this clarity by setting out what is required and signposting to ADR. As a competent authority for ADR, we recognise our responsibility to hold businesses to account for correctly signposting ADR and take action where this is not the case.

Recognising that there are multiple providers of ADR for UK consumers across a variety of different industry sectors, it may be helpful for the Government to consider a single portal for

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<sup>2</sup> [www.caa.co.uk/cap1227](http://www.caa.co.uk/cap1227) and [www.caa.co.uk/cap1305](http://www.caa.co.uk/cap1305)

consumers to use, similar to the European Online Dispute Resolution Portal. This portal would redirect consumers to the relevant ADR provider for the specific issue they have, whatever the sector the complaint concerns.

### *Incentivising businesses to participate in ADR*

Businesses could be incentivised to participate in ADR by being made aware of the benefits that it can bring, primarily that it is a cost effective and quicker alternative to court action. The recent research by ICF Consulting for BEIS found 73% of consumers using ADR were looking for a non-monetary resolution such as an apology. Consumers are more likely to rate a business highly when they have complained and had their complaint dealt with satisfactorily,<sup>3</sup> and good complaints handling can even generate increased profits.<sup>4</sup> In addition, improving awareness of which business are, and are not, signed up to an ADR provider could provide a reputational incentive for businesses to participate.

In aviation, where there is a voluntary approach to ADR, the CAA has engaged industry to encourage participation in the multiple ADR schemes that the CAA has approved for use. For those airlines and airports that decide not participate in ADR, consumers have the opportunity to escalate their complaints with the CAA's own Passenger Advice and Complaints Team (PACT) who then charge the business being complained about for the work undertaken to try and resolve the complaint. However, as outlined above, the CAA's PACT service is not able to issue decisions that are binding on the airlines.

Ultimately, where a voluntary approach does not offer ADR access for all aviation consumers, Government and regulators could seek an alternative approach such as implementation of a mandatory ADR framework.

### *An effective framework for protecting consumers*

The CAA participates in the consumer concurrency meetings organised by the CMA and finds this to be a helpful way of sharing information and experience with the CMA and other regulators. We also have informal arrangements in place to meet regularly with key members of trading standards dealing with travel issues to share information on current enforcement priorities. We have considered on a number of occasions how to share information more effectively with trading standards, however, this has proved difficult as there is no central point of contact that we can use to share information with all trading standards offices.

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<sup>3</sup> *Resolving Consumer Disputes, Alternative Dispute Resolution and the Court System*, ICF Consulting report for the Department for Business, Energy and Industrial Strategy, April 2018. In addition, research in 2012 conducted for the Legal Services Board found similarly that most people want some form of apology or acceptance of responsibility for failure on behalf of the legal service provider and for their original issue to be resolved quickly: You Gov, *Consumer experiences of complaint handling in the legal services market*, August 2012. See also the Institute of Customer Service, which found that "nearly all customers would recommend a company to their friends if a complaint had been resolved efficiently". <https://www.instituteofcustomerservice.com/research-insight/guidance-notes/article/handling-complaints>.

<sup>4</sup> Economic Insight, *The Business Case for Good Complaints Handling in Legal Services*, Report for the Legal Ombudsman, November 2013.



We note the proposals in the green paper to introduce the ability for courts to impose a fine on businesses. We welcome this proposal and consider that it would be a beneficial addition to our toolkit. However, we also consider that it would be most effective for the CAA to be able to impose administrative fines itself. This would be a more effective and efficient process and would allow us to deal proportionately and flexibly with the range of breaches that we come across. Currently our powers are limited to the ability to seek criminal sanctions, via the courts, or to use our civil powers under Part 8 of the Enterprise Act 2002. For the majority of the breaches that we are dealing with we do not consider that criminal sanctions are a proportionate response. We are therefore limited to the powers to obtain undertakings or seek an Enforcement Order from the court. We also have difficulties as our powers are not consistent. We have bespoke legislation in place which mirrors Part 8, regarding rights for disabled passengers and price transparency. However, this does not include the enhanced consumer measures introduced by the Consumer Rights Act 2015. We note strong support for the proposal to introduce civil sanctions to give the Civil Aviation Authority more effective and flexible enforcement powers for the ATOL scheme in response to a recent Government consultation on ATOL reform.<sup>5</sup>

We have attached a short paper setting out our more detail on our powers and why we consider the ability to levy fines is important (see Annex A).

### *Joint Government and regulator Consumer Forum*

We note the creation of a new Consumer Forum to be chaired by the Minister for Consumer Affairs and to discuss overarching priorities for the regulated sectors. We firmly believe that regulators working together to share learning and tackle cross-sectoral challenges is important. The CAA is a member of groups such as the UKRN and the UKCN, and has long had strong links with other European and international aviation bodies such as the European Aviation Safety Agency (EASA) and the International Civil Aviation Organization (ICAO). We are committed to working together with others and in our experience joint working can make most efficient use of scarce resources, help with predicting cross-cutting issues, and allow for co-ordination and more consistent outcomes.

We agree that a Consumer Forum is likely to be helpful for these reasons and in our view the areas of focus on vulnerability and maximising the potential for consumers of open, portable data are the right ones. It will be key that the forum has a clear role and sense of purpose.

We note the forum will also focus on principles to determine whether the Government or the regulator should act to deal with a particular problem. This area of focus is important and in this context the principles of regulatory independence are key. Regulators must be free from the influence of industry on the one side and Government on the other in order for consumers to maintain trust in markets and confidence that they will be protected from

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<sup>5</sup> ATOL Reform consultation Government response, May 2018.

unscrupulous business practices. We agree therefore that the forum must ensure (and be seen to ensure) that regulatory independence is protected.

### *Competition regime*

The CAA considers it has the tools required to tackle anti-competitive behaviour and promote competition in the areas where it has concurrent competition jurisdiction with the CMA. Our concurrent jurisdiction is narrowly defined in Part I, Chapter II of the Civil Aviation Act 2012 (CAA12) and in Part I, Chapter V of the Transport Act of 2000. In general terms, we only have competition powers in the areas where we also have economic regulation functions (air traffic services and airport operation services). These powers do not extend to air transport services (airlines) or to the distribution of holiday products. Our experience of using our concurrent competition powers relate mostly to the period after the 2014 reforms so it is difficult for us to comment on the changes that these reforms have made.

We are considering, with DfT, as part of its Aviation Strategy, and in coordination with the CMA, whether there are other areas of the aviation value chain that would merit an extension of the CAA's competition jurisdiction. We consider that there is merit in clarifying and extending the scope of our competition powers to deal with a variety of issues that are connected to the provision of airport services, even if they are not aspects that would fall into the narrow definition provided for in CAA12.

Since we gained concurrent competition powers over airport operation services we have stepped up our competition activity with the aim of promoting competition in our sector and, as a result, securing benefits for consumers.

- We undertook a CA98 investigation relating to the provision of facilities for car parking at an airport. This investigation covered both Chapter I and Chapter II Prohibitions of CA98. The Chapter I element of the investigation resulted in an infringement decision (settlement). The Chapter II element was closed on grounds of administrative priority.<sup>6</sup>
- We conducted a Sector Review looking at market conditions for surface access to UK airports.<sup>7</sup> This review identified a number of concerns regarding business practices that have the potential to infringe the competition prohibitions under competition law and certain aspects of consumer law. As a result, we decided to write an Advisory Letter<sup>8</sup> to UK airport operators, surface access operators and relevant trade associations setting out these concerns. We encouraged all market

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<sup>6</sup> Additional information on this case is available at <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Competition-policy/East-Midlands-airport-car-parking-competition-case/>.

<sup>7</sup> Additional information on this case is available at <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Competition-policy/Review-of-market-conditions-for-surface-access-to-airports/>

<sup>8</sup> Available at [www.caa.co.uk/CAP1473b](http://www.caa.co.uk/CAP1473b).

participants to review their practices and ensure they are compliant with competition and consumer law now and in the future.

- We are assisting the CMA in their Chapter I CA98 investigation regarding facilities at airports<sup>9</sup>, which has included seconding a CAA colleague to the investigation team. This investigation builds upon the work previously undertaken by the CAA (Surface Access review and CA98 case). We discussed case allocation with the CMA and agreed that the CMA would be best placed to take this case forward.
- In 2014 we conducted Market Power Assessments of Heathrow, Gatwick and Stansted airports required by the 2012 Civil Aviation Act. This resulted in the de-regulation of Stansted airport and informed the continued economic regulation of Heathrow and Gatwick airports.
- We published competition guidance and undertook a wide-ranging competition advocacy exercise to ensure providers of Airport Operation Services were aware of CAA's role in enforcing competition law.
- We have provided advice and assistance to the CMA and DG COMP for a range of mergers in the aviation sector (including airline and groundhandling mergers).
- We have been active members of UKCN and worked collaboratively with the CMA and other regulators on many projects. The CMA and regulators mutually benefit from the collaboration taking place through UKCN. UKCN is a good forum for sharing of expertise and resources.

We consider that the competition regime is equipped with the necessary legal tools to meet the emerging challenges. The UK Markets regime, in particular, is one of the most flexible in the world to address market failures. Given the CAA's currently relatively narrow concurrent competition law remit, focused on airports and air traffic control, we have not identified any particular aspects of competition law that would need to be changed to ensure competition law is fit for purpose as digital markets grow in significance. However, we are very aware of the use and continued growth in use of digital platforms to sell flights, holidays and to inform pricing and marketing of flights and holidays. We would be happy to work further with the Government, CMA and other sector regulators who have dealt with competition issues heavily affected by digital markets, to ensure that competition law is fit for purpose for the future in parts of the aviation sector that are heavily impacted by digital markets.

Under the concurrency regime, sector regulators and the CMA are able to consult each other and cooperate as appropriate in respect of a complaint, issue or investigation, which is very helpful. It ensures we are aware of a complaint or investigation which could impact on our industry and we are able to contribute with industry knowledge. The latest investigation in

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<sup>9</sup> Additional information on this case is available at <https://www.gov.uk/cma-cases/conduct-in-the-transport-sector-facilities-at-airports>.

the airport sector, where CMA are the lead investigator, is good evidence of this helpful cooperation. We worked with the CMA before the investigation was launched and we are kept informed and involved from time to time at key decision points. Furthermore, we have had a CMA member of staff seconded to the CAA for our first CA98 investigation, and we seconded a person to the CMA to assist with the subsequent investigation.

The information sharing between the CMA and sector regulators has been valuable in considering issues and complaints and assessing what next steps to take. It has also been useful for the sector regulator to be aware of actions that the CMA is taking that have a relevance to the sector regulator. The change to allow greater information sharing has empowered the CMA and the sector regulators to work more effectively together.

Brexit is probably the greatest emerging challenge affecting competition enforcement by UK authorities. UK authorities will have to deal with more significant and complex cases and, in particular, cases that have an international dimension. It is therefore critical that the UK maintains and develops its international cooperation arrangements to work alongside DG COMP and other international competition authorities. This is true not only for anti-trust but also for mergers, markets and state aid regulation. The aviation industry (although not necessarily in the narrow areas where the CAA has concurrent competition powers) is a good example of where that level of international coordination is critical. For example, DG COMP currently investigates anticompetitive agreements between airlines or airline mergers, given the international nature of airline services. When it does so, DG COMP already coordinates its work with other competition jurisdictions. Notably, when it reviewed airline transatlantic joint ventures, it cooperated closely with US authorities. Post Brexit, the CMA will therefore need to establish or reinforce similar cooperation relationships not only with the EU, but also the US and globally.

### *Collective redress*

We have followed the amendments to the Competition Act 1998 via the Consumer Rights Act 2015 to allow for an opt-out regime of class actions (with safeguards) to permit consumers to obtain redress for competition infringements. The reforms were intended to stimulate competition and facilitate access to redress in cases where individual amounts of compensation are likely to be low (and potentially not worthwhile pursuing on an individual basis) and to address the costs to society of anti-competitive behaviour. However, the regime is yet to be widely utilised. In this context we also note the proposal for a European Directive on representative actions for the protection of the collective interests of consumers.<sup>10</sup> The legislative basis of this proposal are the TFEU articles on the functioning of the internal market and consumer protection, rather than competition, and the proposal (as it currently stands) could allow for wider collective actions than currently provided for in the UK. Collective redress is of particular interest in the aviation sector since often identical circumstances will pertain to all individuals on a given flight. It may be helpful for the

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<sup>10</sup> See: [https://eur-lex.europa.eu/resource.html?uri=cellar:adba9e47-3e34-11e8-b5fe-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:adba9e47-3e34-11e8-b5fe-01aa75ed71a1.0001.02/DOC_1&format=PDF)

Government to consider any potential barriers to access to collective action as part of the wider work on the green paper.

*Strategic steer to the CMA*

We agree with the approach set out in the draft strategic steer to the CMA. It looks sensible with respect to the current functions of the CMA. The draft revised steer is particularly helpful in relation to the CMA's role in coordinating the overall competition regime. Nonetheless, the strategic steer may need to be revisited in the context of exiting the European Union, as more clarity emerges on the consequences for the CMA of Brexit.

In conclusion, I hope this response is helpful. If you would like any further information please contact me at [Harriet.Gamper@caa.co.uk](mailto:Harriet.Gamper@caa.co.uk).

Yours sincerely

A handwritten signature in blue ink that reads 'H Gamper'.

**Harriet Gamper**

Principal, CAA Strategy & Policy

## ANNEX A: OPTIONS FOR A MORE FLEXIBLE REGULATORY TOOLKIT

### Our current enforcement toolkit

1. The CAA enforces passenger rights legislation that is specific to aviation and is also a concurrent enforcer of general consumer law along with the CMA and other regulators. The aviation sector includes airlines, tour operators, travel agents and price comparison providers and business range from large multinational airlines and tour operators to travel agencies who are sole traders.
2. There are three main pieces of passenger rights legislation in the aviation sector:
  - Regulation 261/2004<sup>11</sup> – providing rights to passengers who are denied boarding or their flight is delayed or cancelled;
  - Regulation 1107/<sup>12</sup> – providing rights of access to disabled passengers and those with reduced mobility;
  - Regulation 1008/2008<sup>13</sup> – Article 23 requires prices to be displayed transparently
3. Our powers differ across these three pieces of law.

#### *Regulation 261/2004*

4. We have criminal powers to enforce the legislation and we can also use civil powers under Part 8 of the Enterprise Act 2002 (Part 8 EA02). The civil powers allow us to require information from businesses, to seek undertakings and to seek an Enforcement Order from the Court. The Consumer Rights Act 2015 introduced some additional powers for legislation falling under Part 8, this included the ability to apply enhanced consumer measures. These include measures such as consumer redress schemes, appointing a compliance manager and including statements on websites about compliance failings.
5. We have access to the enhanced consumer measures for Regulation 261/2004, but we do not have the ability to impose fines on a business. Other regulators in the EU do have such a power and consequently this has the potential to distort the market. For example, given a choice as to whether to cancel a flight in the UK or in another EU country, when the business knows that in the other EU country it will receive both a fine and more claims for compensation, it is clear what decision will be taken.

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<sup>11</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights

<sup>12</sup> Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air

<sup>13</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community

*Regulation 1107/2006 and Regulation 1008/2008*

6. We do not have criminal powers for these Regulations. They do not fall under Part 8 EA02 and there is a bespoke set of enforcement regulations<sup>14</sup> in place for each that mirrors the Part 8 regime. This includes information gathering powers, undertakings and Enforcement Orders. It does not include enhanced consumer measures and we do not have the ability to impose fines on a business. Including these pieces of legislation under Part 8 EA02 would ensure we had consistency with our powers under Regulation 261/2004 and general consumer law.

*General consumer law*

7. We can enforce general consumer law in the aviation sector. This includes legislation regarding unfair contract terms<sup>15</sup> unfair commercial practices<sup>16</sup>, e-commerce obligations<sup>17</sup>, package travel<sup>18</sup> and alternative dispute resolution<sup>19</sup>. The legislation falls under Part 8 EA02 and we can therefore gather information, seek undertakings and Enforcement Orders and we have access to the enhanced consumer measures.

**The limitations of the CAA's powers in terms of securing routine compliance**

8. Clearly, criminal powers are important for the most serious offences, such as cases where businesses act negligently or cause serious harm. However, the majority of compliance issues that we come across are not of this nature and do not suit this type of approach. We have not taken any cases using our criminal powers as we did not consider this to be proportionate.
9. Our only other option is to use our civil powers to obtain undertakings from businesses or to seek an Enforcement Order from the court (similar to an injunction). We have used these powers extensively in regard to price transparency and Regulation 261 and also more recently in respect of Regulation 1107. The powers have been effective in changing behaviour, however, the required process can be lengthy and time consuming, both for the CAA and for the business. Considerable engagement is required on both sides and smaller businesses, in particular, find the process difficult and are often not resourced to deal with this type of approach.
10. One of the purposes of enforcement is to deter non-compliance and our current powers do not have a strong deterrent effect. This is due to the fact that, in e.g. providing the CAA with an undertaking under Part 8 EA02, a business is merely promising to comply in the future, it does not face any penalty for its previous failings. To try and deal with this issue we have combined our action with publicity at the start of an enforcement case. However, this approach is not without its risks and media

<sup>14</sup> The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014 and The Operation of Air Services in the Community (Pricing etc.) Regulations 2013

<sup>15</sup> Consumer Rights Act 2015

<sup>16</sup> Consumer Protection from Unfair Trading Regulations 2008

<sup>17</sup> The Electronic commerce (EC Directive) Regulations 2002

<sup>18</sup> The Package Travel, Package Holidays and Package Tours Regulations 2008

<sup>19</sup> The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

interest depends on the size of the issues, businesses and the nature of the investigation. The approach does not work for smaller businesses or more technical breaches.

11. The ability to impose fines would be a significant addition to our toolkit and would provide us with greater flexibility. It would allow us to target our action using the most appropriate tools to tackle the compliance issue and assessing what would be most effective for specific businesses. It would also provide a deterrent effect to other businesses and ensure that consumers felt that non-compliance had been punished.
12. Please note that the Regulatory Enforcement and Sanctions Act 2008 (“RESA”) was introduced to provide access to a more flexible toolkit for regulators, including the ability to impose financial penalties. However, the CAA’s powers to enforce passenger rights legislation were made under the European Communities Act 1972, rather than the Civil Aviation Act. As a result of this we are unable to obtain access to the powers. The same is true of powers flowing from Part 8 of the EA02.

### **Sanctions available to other regulators**

13. In other sectors regulators oversee a broad and varied set of businesses, similar in range to the CAA. Below we have set out briefly the regulatory toolkit available to other regulators. We have also considered the sanctions available to ABTA, the travel industry’s largest trade association.

#### *The Pensions Regulator*

14. The Pensions Regulator regulates a large number of pension schemes that are operated by a range of employers from very small to very large. They will normally work informally with a business and provide them with the opportunity to voluntarily move into compliance. If they are unable to achieve this informally they have a flexible regulatory toolkit available to them, including:
  - statutory notice – a legal requirement to provide information to the regulator
  - inspections – power to inspect premises and take documents
  - compliance notices – these set out the steps required for the business to comply
  - the removal and appointment of trustees
  - financial penalties
  - setting funding levels
  - anti-avoidance powers through structural remedies
  - criminal prosecutions – these are used for the most serious offences where there has been dishonest, wilful or fraudulent behaviour
  - winding up a scheme
15. In terms of financial penalties, there are a range of options available to the Pensions regulator:
  - fixed penalty notices of £400 for failing to abide by a Statutory Notice or Compliance Notice



- if the fixed penalty notice does not result in compliance the regulator can impose fines based on a daily rate, the amount is subject to the number of employees in the business, 1-4 employees would face a daily rate of £50 and the largest businesses with over 500 employees would face £10,000 a day
- civil penalty notices can also be issued for administrative breaches, such as the failure to provide data on time. The regulator will determine the amount of the fine up to a maximum of £5,000.

### *FCA*

16. The Consumer Credit function of the FCA also covers both large and small businesses and includes individuals who act as financial advisers. The FCA works informally with a business to secure compliance and if this is unsuccessful they have a flexible regulatory toolkit that they can use.
17. The FCA has a set of “Principles for business” that set out how the FCA expects a business to behave. These include principles that the business should deal with customers fairly, organise and control its business effectively and deal with the regulator openly and constructively. The principles can be enforced against and the FCA have found them to be very helpful in providing clarity to businesses on what is expected from them. In particular, small businesses have found them much easier to understand than detailed and complex prescriptive rules. Other powers include:
  - undertakings from businesses that they will change their practices
  - varying permissions about the products that can be sold
  - suspension of a firm or individual from undertaking specific activities
  - banning financial promotions
  - censure firms through public statements
  - financial penalties
  - apply to the court for Injunctions/restitution orders/freezing assets
  - withdrawing an individual or firms authorisation
  - criminal prosecutions to tackle financial crime, such as insider dealing, unauthorised business and false claims to be FCA authorised
18. The FCA has three criteria for deciding on the level of financial penalties: to ensure a business does not benefit from the breach; to penalise wrongdoing; and to deter the business and others from committing the breach in future. If the FCA can determine the level of revenue generated by the business as a result of the breach, they will then apply a percentage ranging from 0-20% based on the seriousness of the offence. They can also apply penalties based on late or incomplete submission of reports.

### *Ofcom*

19. The broadcast licensing function covers large businesses such as the BBC, down to very small broadcasters specialising in niche areas. Ofcom issues licences to businesses and publishes a code to provide guidance on their obligations. The sanctions available to them include:
  - directions not to broadcast/repeat a programme or advertisement

- directions to broadcast a correction
  - financial penalties
  - shorten, suspend or revoke a licence
20. The maximum financial penalty is £250,000 or 5% of turnover.

### *ABTA Code of Conduct*

21. Membership of ABTA is voluntary, but all members who join must agree to abide by the Code of Conduct. ABTA membership covers large and small businesses. The Code covers a range of issues such as rules on advertising, information provided to consumers, cancellations, problems with holidays and complaint handling. It also covers general administrative issues such as demonstrating the business has insurance in place. There are a range of sanctions that can be imposed on members:
- fixed penalty notices of £400 for a range of offences including failing to respond to ABTA within fixed timescales
  - variable fines
  - warnings
  - undertakings
  - removal of membership

### **Options for a more flexible regulatory toolkit for consumer protection law**

22. Other regulators dealing with a range of businesses, from the very small right up to large multinationals, have a much more flexible toolkit to address compliance issues. The toolkits available to the other regulators also provide for a range of financial sanctions to tackle compliance issues, including routine issues such as failing to provide information, to large fines for non-compliance. Most have the ability to obtain undertakings or compliance notices along with the ability to deal with really serious issues through criminal sanctions.
23. We consider that the powers in Part 8 EA02 are useful and we would like to retain these powers. However, our powers also lack consistency and it would be helpful to have access to enhanced consumer measures under Part 8 EA02 for legislation covering disabled passenger rights and price transparency. The ability for the CAA to impose financial penalties would provide us with the same flexibility as other regulators, ensuring that we can take proportionate action to tackle the compliance issues that we face and that we and we can use the most effective approach in each case.