CAA Response to 2021 Government Consultation Reforming Competition and Consumer Policy Driving growth and delivering competitive markets that work for consumers

CAP 2269

Published by the Civil Aviation Authority, 2021

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First published October 2021

The latest version of this document is available in electronic format at: www.caa.co.uk

Contents

Introduction

1. The CAA welcomes Government's consultation on proposals to reform the UK competition regime and to enhance the enforcement of consumer law and we appreciate the opportunity to respond to this consultation.

2. We agree that the UK competition and consumer protection regimes are well regarded and function well but that it is right to strive to go further. The UK's departure from the EU also poses new challenges and provides new opportunities which, coupled with the fast structural changes spearheaded by Covid-19 and new technologies, as well as the necessity to respond to the challenges of climate change, make it a fitting time to review and reform competition and consumer policies.

3. The CAA, as the UK's aviation regulator, works so that: the aviation industry meets the highest safety standards; consumers have choice and value for money, are protected and treated fairly when they fly; the environmental impact of aviation on local communities is effectively managed and CO2 emissions are reduced through efficient use of airspace; and the aviation industry manages security risks effectively.

4. Our response will focus on the market inquiries proposals presented in Chapter 1 of the consultation, and the consumer law enforcement proposals covered in Chapter 3.

5. In reference to market inquiries, we consider that the concurrent competition regulators including the CAA should continue to be able to undertake market studies with access to formal information gathering powers and the continued ability to refer, if necessary, matters to the CMA for more in-depth investigation, as well as to consider alternative remedies, including to accept undertakings in lieu of a reference. We also welcome the proposals in the consultation to strengthen the enforcement of competition law in the UK, many of which are relevant to the CAA as a concurrent competition regulator.

6. We are very pleased to see the proposals for reform of consumer law enforcement. The CAA agrees that it is time to address the challenges faced by consumer law enforcers through amended powers and sanctions. The existing regime can be slow to deliver results and does not provide the strong incentive to comply with consumer law that would benefit consumers. We urge government to further develop the proposal to allow sectoral regulators access to these alongside the CMA. Not only will this reduce the burden on the CMA, but it will ensure that we and other consumer rights enforcers are able to act quickly and effectively to address consumer harm and advance confidence in our markets using our specialist knowledge and expertise.

Response to Chapter 1: Competition Policy

7. Among other functions, the CAA has concurrent competition and consumer enforcement functions with the Competition and Markets Authority (CMA), including the power to carry out market studies under the Enterprise Act 2002 (EA02) in relation to airport operation and air traffic services. We are also responsible for the economic regulation of those sectors. As part of that economic regulation role, we have statutory duties to promote competition where appropriate. We also have a range of other regulatory functions that make use of competition-based tools, such as undertaking market power determinations for UK airports – before a decision on whether to regulate (or de-regulate) an airport operator by means of an economic licence is taken.

8. We consider that concurrent competition regulators, including the CAA, should continue to be able to undertake market studies with access to formal information gathering powers. Therefore, our view is that we should also continue to be able to refer, if necessary, matters to the CMA for more in-depth investigation, as well as to consider alternative remedies, including to accept undertakings in lieu of a reference. As such, we would prefer the continuation of a two-stage market inquiry toolkit whereby the CMA and other concurrent competition regulators are able to carry out market studies with the CMA having the power to deliver more in-depth investigations and, potentially, impose a wider range of remedies (including structural remedies) at the end of them.

9. We support the proposed reforms aimed at making Market Studies more effective. That said, if a single-stage market inquiry tool becomes the government's preferred option, we consider it is important that sectoral regulators can continue to at least study markets in their regulatory sphere with access to the information gathering powers that would allow us to identify areas where markets might not be functioning well and, if necessary, take appropriate regulatory action as a result.

10. We welcome the proposals in the consultation to strengthen the enforcement of competition law in the UK and to strengthen the investigatory powers available to competition enforcers, many of which are relevant to the CAA as a concurrent competition regulator. Although we have some experience applying some of the antitrust tools in the Competition Act 1998 (CA98), the CAA does not have as much experience in all areas of CA98 enforcement as the CMA and some other concurrent competition regulators. As such, we consider that the CMA and some other concurrent regulators may be better placed to provide a response from the perspective of enforcers of competition law given that they might have had the opportunity to consider those questions in greater detail. That said, it appears to

us that the more effective the UK competition enforcement regime is, the easier it will be for regulators to rely on competition law to address market issues and potential for abuses, leading to more instances where ex-ante regulation can be rolled-back and the market becomes more competitive. As such, the implementation of many of these proposals aimed at strengthening the competition regime is a desired development.

11. Furthermore, we welcome that the proposed reforms to competition law enforcement powers or procedures set out in this consultation would apply to the CMA and to concurrent regulators' competition law enforcement powers. In our view, it is helpful that there is as much consistency as possible across concurrent regulators.

12. We appreciated the opportunity to participate in the discussion sessions on this consultation with BEIS, UKCN and CMA colleagues and are available to discuss further on the specifics of how the CAA might utilise concurrent competition powers under the various scenarios for reform under consideration.

More effective market inquiries

13. We agree that market studies and market investigations are very powerful tools in the UK competition policy regime. The airport sector is a very good example of these tools working to increase competition for the benefit of consumers. When the Competition Commission ordered BAA to divest airports in the London area and Scotland, this resulted in greater competition between airports, which in turn led to consumer benefits, the de-regulation of Stansted and to a lighter touch model of regulation at Gatwick. This Market Investigation first started as a Market Study by the OFT that was then referred to the Competition Commission for further investigation and remedy.

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

14. Sectoral regulators with concurrent competition powers can (and do) currently undertake market studies. This allows us to:

- study aspects of markets we regulate where markets might not be working well for consumers;
- consider a variety of possible interventions at the end of a market study, such as to take further action under our sectoral regulatory powers; issue more general recommendations and/or write advisory or warning letters to businesses;
- accept undertakings in lieu of making a reference to the CMA;

- make use of formal information gathering powers from stakeholders that are not subject to detailed economic regulation; and
- refer an issue/market to the CMA for a Market Investigation and potentially for the imposition of remedies.

15. We were unable to ascertain from the consultation document what role government is envisaging for concurrent regulators under its proposals for market inquiries. On the basis that the proposal applies to the concurrent competition regulators as well as the CMA, we would favour Proposal 1 in the consultation document, i.e. retaining market studies and market investigations but improving some of the current market study processes and enabling the CMA (and potentially other concurrent regulators) to impose certain remedies at the end of a market study.

16. If government decides to proceed with Proposal 2 (to introduce a single stage market inquiry tool that would replace the existing market study and market investigation system), we consider that it would be beneficial for the CAA and other concurrent competition regulators to at least retain the ability to carry out market studies or market-study-like activity.

17. We note that government envisages that, even under Proposal 2, sectoral regulators would be able to continue making references to the CMA in the same way that we can currently make market investigation references.[1] However, it is not immediately clear from the consultation document whether sectoral regulators would continue to be able to undertake market studies and critically to make use of its associated information gathering powers in order to form a view on whether such references were warranted or not.

Sectoral powers to study markets

18. It is true that sectoral regulators, including the CAA, have some tools at their disposal that allow them to study aspects of markets without relying on EA02 powers. However, that is not the same at all sectoral regulators, as the tools are varied, often narrower in scope and unlikely to be as flexible as market studies under the EA02.

19. Currently, we have sectoral review functions that are separate from market studies[2]. However, those functions, as they are, do not currently allow us to require businesses to provide us with information. Our information gathering powers are more restricted to supporting the economic regulation of airports and

[1] See footnote 53 of the consultation.

[2] See S64 of the Civil Aviation Act 2012 and S91 of Transport Act 2000.

air traffic services and do not allow us to request information to study more novel aspects of those markets.

20. We are also able to carry out market power assessments of airports, although the main purpose of doing so is to decide whether to introduce (or remove) licence based economic regulation under the Civil Aviation Act 2012. Being able to carry out market studies under EA02 rather than using sectoral powers may be particularly useful to consider novel market issues or subsets of markets where pro-competitive remedies might be better suited to protect consumers than sectoral economic regulation. Paradoxically, although market studies are a regulatory tool, a greater use of this tool by regulators may well avoid the introduction of more distortive regulation or through the introduction of specific legislation.

21. The ORR's market studies are already good examples of regulators making use of this tool. Although the CAA did not yet make use of formal Market Study powers, we have previously undertaken "sector reviews" looking at, for example, market conditions for surface access at UK airports[3] and market conditions for the provision of Terminal Air Navigation Services[4]. These are examples of where the CAA was able to take a proportionate approach to addressing market concerns identified by providing recommendations and an advisory letter to businesses, while not going as far as introducing licence-based regulation. For example, our advisory letter on surface access to airports led to a renewed focus on competition compliance by industry and triggered a leniency application from the Arora group, which resulted in the CMA imposing a £1.6m fine on Heathrow airport for restricting competition on parking prices[5].

22. Although in the examples above, we did not make use of the formal information gathering powers in EA02 and relied on stakeholders to respond voluntarily to our requests for information, it is useful for a regulator to have the option to strengthen its approach, if stakeholders are not forthcoming with the information necessary to successfully study the markets.

23. Our understanding is that like the CAA, other sectoral regulators would also favour retaining the ability to carry out EA02 market studies and that the enhancements BEIS is proposing to make to this important competition tool may make it a more attractive one for regulators to use in the future.

[3] See https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Competition-policy/Review-of-market-conditions-for-surface-access-to-airports/

[4] See https://www.caa.co.uk/Commercial-industry/Airspace/Air-traffic-control/Air-navigation-services/Air-Navigation-Service-Provision--The-Contestability-Assessment/

[5] https://www.gov.uk/government/news/heathrow-and-arora-admit-to-anti-competitive-car-park-agreement

24. We do not consider, however, that there is a risk that there will be a proliferation of market studies by regulators. Market studies under EA02 are discretionary tools that are always subject to administrative priorities of the regulator in question. Given that they have administrative timescales attached and require non-trivial resources from the regulator and stakeholders, regulators would not undertake one lightly.

25. In any case, we agree with the proposals to:

- allow the CMA (and possibly other concurrent competition regulators) to impose certain remedies at the end of market studies, if there is a compelling case for doing so, with more structural remedies reserved for the CMA, after a full Market Investigation;
- allow an additional six months after the end of the market study to implement remedies;
- remove the requirement to consult on a market investigation reference within the six months of a market study as set out in the consultation;
- allow greater flexibility for the CMA to define the scope of market investigations; and
- keep the legal standard for imposing remedies being a previous finding of an adverse effect on competition.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

26. We agree that the CMA should have the power to introduce interim measures at any point of a Market Investigation. We are not so sure whether that is necessary during market studies. If the case for interim measures is made, the case for a launch of a Market Investigation is likely to have been made already, even without a previous market study, but we do not have strong views on this.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

27. We agree that the CMA and concurrent regulators should be able to accept binding commitments at any stage of market studies and market investigation processes, subject to the safeguards envisaged in paragraph 1.75 of the BEIS consultation document, i.e. allowing the CMA and other concurrent competition regulators to consider only commitments which had a high-likelihood of remedying the competition concerns, and allowing the CMA and other concurrent competition regulators to “stop the clock” when commitments are being considered.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

28. We welcome and support government's proposed reforms to help deliver effective and versatile remedies following market studies and market investigations, including on improving the way remedies intending to affect consumer behaviours can be trialled and tested before being rolled out more widely.

29. We also support the proposal to give the CMA (and potentially concurrent competition regulators) expanded powers to periodically review and if necessary, vary the remedies it imposes. However, perhaps some further thought should be given to the interplay between flexible and open-ended remedies and the role played by sectoral regulation, as they may have the same objective and use similar approaches. It may be argued that open-ended remedy reviews in regulated sectors would work better as functions of sectoral regulators that have constant oversight of their industries and therefore are better placed to intervene. As such, close dialogue and coordination between the CMA and regulators on these type of remedies in regulated sectors should be encouraged in legislation.

Response to Chapter 3: Consumer Law Enforcement

30. Air passengers benefit from a variety of legal rights that cover a range of potential harms. As the enforcer of these rights, the CAA works to address poor performance, tackle non-compliance and improve access to air travel for all using the powers at its disposal. As with the CMA, we rely on Part 8 of EA02 for this enforcement. The challenges faced by CMA when using these powers described in this consultation reflects our own experiences. Enforcement procedures can be time consuming, resource intensive and do not, in too many circumstances, provide a strong deterrent against bad behaviour from businesses determined to benefit commercially from non-compliance. We see the proposals set down by the Government as a really important step to ensuring that we have the ability to respond swiftly and effectively to tackle breaches of the law in the future. Whilst we have held this view for a considerable period of time, our experiences during the pandemic have reinforced our view on this.

31. The CAA also works closely with the CMA, learning from their experience in consumer rights and assisting where our collaboration can have the greatest impact. The work of the CMA's Covid-19 taskforce in ensuring consumers

cancellation rights were upheld in the air travel and air package holiday market in an example of this and demonstrates the value of a strong economy wide body, acting across markets and taking action where the sectoral regulators cannot due to the limitations of their scope and powers.

32. It is frustrating to see consumer harm occurring in the market and be unable to respond to it directly. The CAA's role in regard to package holidays, for example, is in ensuring that the insolvency provisions of the Package Travel Regulations (PTRs) are met for businesses selling flight inclusive holidays through our management of the ATOL scheme. We welcome the review of the PTRs and hope that we can consider how to better address issues that can arise from third-party sales where the consumer would benefit from additional protection. There are many excellent travel agents who add real value to the consumer but unfortunately, we are also aware of a minority of mainly online agents, who appear to have limited appreciation of the legal framework in place, thereby delaying or preventing refunds being made as well as potentially denying the consumer other important legal protections. We look forward to working with Government on proposals to reform the Package Travel Regulations for the benefit of consumers and businesses alike.

33. We welcome the proposals to reform consumer rights enforcement. We agree that the current framework has allowed the CMA and other regulators to address some consumer harm in various markets but that more can be achieved, and often more quickly. We strongly believe that the proposed enhancements should be available to sectoral regulators. Different regulators have different powers to intervene, with Part 8 of Enterprise Act 2002 powers as one option to tackle consumer harm. The CAA's toolkit is more limited, however, and we rely on these powers for the vast majority of our consumer related activity. Access to enhanced powers would bring us more in line with other sectors, improving our ability to collect the required information from businesses and strengthening the sanctions available for tackling non-compliance. Increased use of Part 8 powers by other regulators would also provide more consistency across markets, building on the existing co-operative relationships and improving consumer protection across the economy.

Strengthening enforcement by the Competition and Markets Authority and other enforcers

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

34. To enforce consumer law effectively, the CAA strongly believe that the enforcer must be able to decide whether consumer protection law has been broken and declare the fact publicly, direct businesses to bring infringements to an end and be able to impose remedies and fines. They must also be able to order the

cessation of practices that they suspect may be harming consumers on an interim basis, pending a final decision on whether the law has been broken. To reach this point, the enforcer must have powers in relation to information gathering, including the ability to impose penalties where companies provide information that is inaccurate, incomplete, or not provided on time.

35. With these points in mind, we strongly support the proposed reforms to the CMA's enforcement powers and see real value in allowing it to enforce consumer protection laws directly. The CMA's existing competition enforcement role shows that it is able to manage a robust and fair system which delivers meaningful outcomes for consumers. Applying this to the enforcement of consumer rights would allow quicker action against potentially harmful commercial practices and act as a deterrent to businesses tempted to take advantage of the limitations of the current enforcement regime. It is also worth noting that other regulators already have it within their powers to act in the way proposed for the CMA, with bodies such as the Ofcom and FCA imposing fines for breaches of their respective licensing conditions and consumer protection laws. The CAA therefore believes that extending such powers to the CMA is entirely appropriate given the remit and impact of their work.

36. As with all regulatory decisions, we would expect any such extension of power to come with appropriate due process and the ability to challenge the decision through the Courts.

Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

37. We support the retention of the enforcement scope of the CMA under an administrative model. The CMA is uniquely placed to use its expertise and experience in consumer rights enforcement across the economy to address consumer harm where regulators are unable to act or where there is a significant gain to be made for consumers across different sectors. We appreciate the role that CMA has taken in the air travel market and its ability and willingness to act using sector specific regulations such as the PTRs and general consumer law such as cancellation rights, and look forward to working with them on any future issues that arise where we cannot act directly but where our experience of the market adds value.

38. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

39. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?

40. We have confidence that the CMA is well placed to develop its own administrative decision-making procedures but recognise the value in the four-step process set out in the consultation. This reflects the model employed by the CAA when reviewing compliance and considering enforcement action. Gathering information is a vital first step and it is essential to ensure the appropriate route is chosen by considering all available options before deciding how to proceed. We also believe that transparency and the opportunity for challenge is important, as reflected in the proposal for a provisional view to be made available and subject to scrutiny. Completing these steps ahead of a final decision should ensure that the process is fair and proportionate, along with the opportunity to appeal and for judicial scrutiny.

41. We would expect the same if administrative powers were provided to sectoral regulators, and will work closely with BEIS, CMA and other relevant authorities as well as the DfT to build on our experience in competition enforcement to develop proposals for the CAA to adopt an administrative model of enforcement with the powers proposed for the CMA powers. We would also draw on the approach of other regulators who already benefit from such powers, and fully support a right of appeal for businesses as an integral part of the process.

42. The verdict on whether appeals of a CMA judgment should be heard by a generalist court or specialised tribunal needs to take into account questions of efficiency, consistency and quality of decision making. In the event that such powers were extended to the CAA, we would again work with relevant government departments and regulatory bodies to establish the most appropriate appeals process.

Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

43. We strongly believe that sectoral regulators' civil consumer enforcement powers under part 8 of the EA02 should be reformed as a priority to ensure that consumers across the economy benefit from the enhancements proposed for CMA.

44. We have used part 8 of EA02 extensively in the enforcement of price transparency regulations, regulations concerning flight cancellations and delays and regulations on accessibility and disabled rights. The powers have been effective in changing behaviour however, the required process can be resource intensive and time consuming, both for the CAA and for the business. Considerable engagement is required on both sides and smaller businesses, in particular, are often not resourced to deal with this type of approach. We have

had success working on a more informal basis to review airline compliance with specific air passenger rights and consumer rights to achieve quicker results but we believe that the ability to impose fines would have allowed us to obtain better information from airlines and to achieve more impactful results sooner.

45. As well as the process being time consuming, we also face a long wait for court action. For example, the CAA began enforcement action against an airline for its refusal to compensate passengers when flights were cancelled due to industrial action by staff. Passengers will have to wait for the outcome of the CAA's enforcement action before being able to claim financial compensation from the airline. This has only recently been heard in court, with a finding delivered by the high court in April 2021 that the airline would need to pay compensation to the passengers affected by delays and cancellations. The case is currently being appealed and is ongoing.

46. We also believe that the existing powers fail to act as a meaningful deterrent to businesses tempted to flout the rules. In 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 interest depends on the size of the business and the nature of the investigation. The approach does not work for smaller businesses or more technical breaches.

47. The EA02 powers are also limited to tackling future behaviour. This makes it very difficult to deal with some issues, for example in relation to disability rights where consumers may have faced lengthy waits to receive assistance at the airport and our only option is to seek undertakings to improve the service. The ability to levy a fine for the past non-compliance would send a strong message to airports and consumers that the issue is taken seriously and provide an incentive for airports to get it right.

48. We understand that other regulators have other options for addressing non-compliance. The toolkit available to regulators differs greatly depending on the powers provided by sector specific legislation and the scope and function of different licensing regimes. Where the different regulators enforce the same consumer rights it stands to reason that they should have access to the same sanctions. Consistent application of that law would help build better understanding of the rights of consumers, obligations on businesses and consequences for those who do not comply.

49. It will also allow regulators to build on each other's successes, learning from each other's experiences and relying less on the CMA, who should be able to focus on their role as legal experts and as enforcer for unregulated markets. This would also ensure that the cost of this activity is met by the sector where the harm is occurring. As a public corporation the CAA operates a funding model

that ensures that the cost of aviation regulation is met primarily by the aviation industry. The actions we take benefits aviation consumers directly but also prevents businesses who break the law from gaining an advantage. Add to this confidence in the industry that it provides to consumers there are clear advantages for the aviation businesses that ultimately fund our work.

50. The development and application of an administrative model for sectoral regulators addresses the same issues identified as challenges for the CMA. The need to enforce the law quicker and better is a priority for us, as we 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.

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

51. The ability to impose fines in relation to information gathering could have a profound effect on our enforcement work. Where we do achieve results using our part 8 powers, it is usually as a result of a detailed compliance project which starts with the need for information from the airlines. We have the powers to obtain information from businesses to decide whether there has been a breach of the law but have often experienced issues where businesses fail to provide the information that has been formally requested. This leaves us with the option of pursuing the information through the courts, which is time consuming and resource intensive, proceeding with enforcement action based on limited information or dropping the case entirely.

52. The incentive to businesses to comply provided by the ability to impose monetary penalties would ensure that our decision whether to pursue enforcement action can be based on specific evidence, and not be dictated by businesses procrastinating over the provision of information or the poor quality of the information that is provided. We do not believe that the costs would be significant as the information requested should be easily available for those with adequate business systems and corporate governance in place and would be less than the costs associated with pursing Information Orders through the courts.

Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

53. The CAA agrees with the arguments for treating failure to comply with an undertaking an aggravating factor when considering the next level of enforcement or severity of sanctions but would also value the ability to consider

a breach of undertaking as an enforceable offence. The ability to enforce an undertaking directly would significantly improve the business' attention and commitment to the drafting and negotiations. It would be important that the undertaking included the measure that will be used to assess compliance and that it did not remove the option to escalate it to the courts if appropriate.

54. The addition of monetary penalties would further strengthen this process and the CAA strongly supports the proposal. The level of the fine must act as a serious deterrent and be sufficient to negate any commercial gain from the non-complaint behaviour. Linking the penalty to turnover is an effective way of achieving this, with the level set being justifiable as proportionate to the severity of the breach.

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

55. An undertaking from a business believed to be in breach of consumer law is a promise to behave in a certain way in the future. It is entered into voluntarily and, as the consultation states, has benefits to both the regulator and the business so is a useful tool to stop certain behaviour and prevent further harm. A process to allow the inclusion of an admission of liability may be useful in some sectors or in specific scenarios. In our experience, however, such as admission reduces the attractiveness of undertakings as an option for the business and is potentially complicated by the international conventions that govern certain types of liability in aviation.

Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?

56. The CAA agrees that, where included in an undertaking, the admission of liability should be linked in some way to the penalty and would be most effective if linked to redress measures for impacted consumers, where a direct link between their behaviour and their customers can be made. The undertaking would again have to clearly state how such a penalty would be calculated to effectively deter a breach of the undertaking.

Empowering the sector regulators to enforce consumer law directly

58. The introduction of ADR is aviation has had a positive impact on consumers and we welcome proposals to extend these benefits to other sectors. Access to ADR is a key tool in enabling consumers to enforce their rights and to encourage greater compliance with consumer rights from businesses who know that their customers have an easily accessible route to escalate a complaint without the need to go to court. In 2019, the two authorised ADR bodies handled over 20,000 escalated complaints and ensured that over £12million of statutory compensation was paid to consumers. 32 airlines and 7 airports are currently members of an ADR scheme and around 80% of passengers departing the UK currently have access to ADR to resolve complaints.

Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

59. We agree that consumer awareness of ADR needs to be improved and that signposting is key. Aviation businesses are required to advise passengers of the option to use ADR and we regularly review passenger communications to ensure that this is occurring. For consumers with specific needs such as those who need adjustment to be able to travel, we work with advocacy groups and charities to promote the legislation that provides accessibility rights and to raise awareness of redress options. We therefore agree with the proposals to assist vulnerable consumers in other markets through direct referrals and understand the attraction of data transfer to remove potential barriers.

Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

60. When complaints are escalated to ADR it is usually either due to the failure of the business when managing the original complaint or because the business and consumer disagree over the outcome of a complaint. In aviation, most complaints relate to delays or cancellations, for which redress is set down in law[6]. In most cases, the airline is able to assess a claim for a refund or compensation with little delay and apply that assessment to other claimants on the same flight. In some instances, however, the airline will need to investigate the cause of the disruption which may be a time-consuming process. Whilst ADR remains voluntary, applying pressure to reach a conclusion sooner would, we believe, create unnecessary tension and potentially disincentivise business participation. We do agree that 8 weeks is a long time to wait when the business fails to respond and are focussing on improved communication so that

[6] In 2019, 92% escalated complaints handled by the two ADR bodies that operate in aviation related to the regulations that require refunds or compensation be paid in certain instances of denied boarding, cancellation or long delay.

consumers better understand the reason for the time taken to assess a claim and may escalate sooner if both parties agree that the claim is going to be disputed.

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

61. As competent authority for aviation, we have developed a policy for ADR that reflects the needs of consumers whilst acknowledging the requirement to attract airlines to the scheme. We require ADR entities to publish details of a complaints review policy and to appoint an independent assessor to provide a 6-monthly report detailing their view on any potential improvements which could be made to aid the effectiveness of the ADR scheme, including the review process. We also commissioned an independent audit which considered the quality and consistency of decision to ensure that we have sufficient oversight whilst remaining autonomous.

62. The development and maintenance of the scheme represents a significant proportion of the work carried out by our consumer enforcement team. This reflects the importance we place on the success of the scheme and is the cost of ensuring that the scheme runs well. When ADR works well, it genuinely benefits all parties involved and we welcome suggestions from Government, industry and consumer groups on how to encourage further take up and how to address potential issues that could delay consumers reaching a satisfactory outcome.

Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?

63. As stated above, since the CAA was appointed competent authority for ADR in aviation, we have developed and amended our scheme within the parameters of the law to balance the need for a robust and effective regime for consumers and the need to encourage industry participation. We go beyond the minimum standards set down in the ADR Regulations in important areas such as the need for the decision to be binding, which we see as a key consumer benefit of ADR. We can see the benefit to a code of practice that takes into account the different circumstances that may arise in different sectors. We also believe that any mandating of standards or enforced code of practice will be most effective where ADR is mandated and should not act to disincentivise businesses from participating where use of ADR remains voluntary.

Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

64. We understand the focus on unregulated markets where there is currently very low take up and agree with the arguments for mandated ADR in the motor vehicles sector and home improvements market.

65. We also urge the Government to consider the need for ADR to be mandated in aviation. Whilst other regulators may use licencing regimes and other levers to require participation in ADR, the CAA does not have the equivalent tools at its disposal. We are proud to have achieved a high level of participation in our sector despite ADR being voluntary but are concerned that around 1/5th of those flying from the UK each year are excluded from ADR. For these consumers, complaints can be escalated to our Passenger Advice and Complaints Team (PACT) who will consider the case and deliver their findings, but they cannot provide a binding decision. Businesses may choose to leave ADR at any time, increasing the pressure on PACT and meaning that even more consumers may miss out. There is also a clear financial argument for ADR to be mandated in aviation as although PACT charge the businesses concerned for their services, instances of non-payment are high and unfortunately some of these costs end up being met by the taxpayer.

66. Considering the stated criteria for assessing the extension of mandatory ADR provision, we consider that the nature of the consumer, nature of the purchase, consumer experience and potential alternative routes qualify aviation for mandatory ADR. Air travel is an infrequent purchase for most and the operational complexity of international air travel places the balance of power firmly with the business.

Q70. How would a ‘nominal fee’ to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?

Q71. How can government best encourage businesses to comply with these changes?

67. We have two ADR providers operating in the aviation sector, one of which charges a nominal fee which is waived if the complaint is upheld and one that does not. We have no evidence that the fee has acted as a deterrent to consumer and equally have no clear indication that without this charge consumers would make frivolous or vexatious claims.

68. In aviation, over 90% of cases escalated to ADR concern a claim for redress following a disruption. The amounts available are set down in law along with the facts that need to be established to qualify for it, which may reduce the need for such a measure. We would expect the experience to be different in other sectors were such parameters are not so clearly set.

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?

69. The impact of flight disruption is by its very nature a collective experience. If one air passenger is entitled to compensation, then every passenger on that flight is also entitled to compensation. The CAA does not currently have the power to intervene in individual cases and does not consider acting to seek collective redress to be fully meet its remit to act in the collective interest of consumers. We support the aim of opening up new routes to collective consumer redress and are interested in the development of these proposals including the consideration to allow a wider range of organisations to bring actions on behalf of consumers, and the role of the enforcer in this.