

Responses to CAA Consultation on Policy for ADR applicants and approved ADR entities, CAP1324

CAP 2116

A large, abstract graphic composed of overlapping blue and purple shapes, resembling a stylized wing or a modern architectural element, occupies the lower half of the page. It features a gradient from light blue to dark purple.

Published by the Civil Aviation Authority, 2021

Civil Aviation Authority
Aviation House
Beehive Ring Road
Crawley
West Sussex
RH6 0YR

First published March 2021

CAA's Proposed Revisions to CAP1324

Consultation Response

ADR body name: CEDR

Date submitted to the CAA: 20 November 2020

Please find below CEDR's response to the CAA's consultation on its proposed revisions to CAP1324 (and the related document 'CAA draft list of issues which it does not consider to be complex or novel').

1. Post-decision review process

CEDR welcomes the proposed inclusion in CAP1324 of a facility to review ADR decisions for future reference and learnings.

CEDR already engages with subscribing airlines and airports to discuss decisions that have been made by adjudicators in order to improve the service going forward. However, such discussions do not permit the overturning of ADR decisions, and CEDR supports the CAA's confirmation that this proposed process will not change that principle.

As this process is already provided by CEDR, we have no concerns with this process being made explicit in CAP1324.

2. Complex and novel issues raised by complaints

CEDR supports the principle of ADR bodies being able to have recourse to the CAA for expert advice in complex areas that arise in ADR cases. ADR bodies do not typically have the same level of industry expertise as the CAA, and therefore the ability to seek the views of the CAA on particular matters is to be welcomed.

However, ADR bodies already act under an obligation to put cases on hold when the CAA notifies of a court case going through European or UK courts. This process adequately caters to cases involving legally complex issues. CEDR therefore takes the view that legally complex or novel issues should be captured by this existing process, so that the proposed complex and novel issues process should be restricted solely to technical matters. CEDR would argue that, if no court case exists on a particular legal question affecting ADR cases, then it is not sufficiently complex or novel as to justify deviating from allowing ADR bodies to reach their own decisions on that legal issue. However, technically complex or novel issues would benefit from the ability to be referred to the CAA, as no other forum

exists for such a referral at present.

Any cases which use a complex or novel issues process would also need to be exempted from the usual timescales that ADR bodies work to when processing cases. Indeed, this would need to be taken into account by the CAA in the event that such cases exceed the 90-day total timescale required by the 2015 ADR Regulations.

While CEDR supports a process for complex and novel issues, we take the view that overuse of such a process would have negative consequences. The overuse of such a process would impinge on the independence and impartiality of ADR bodies, who should as a general rule be free to reach their own fair and reasonable decisions on disputes which are within their competence. The role of an ADR body as a forum distinct from the CAA for resolving disputes would be damaged if the complex and novel issues process is overused. CEDR therefore welcomes the CAA's aim for this process to be used no more than twice per year by each airline/airport. CEDR would suggest that it may be appropriate to formally limit the amount of times that an airline/airport can make use of the process, in order to avoid its abuse.

CEDR supports the CAA's view that ADR bodies' provision of a complex and novel issues process should be voluntary. ADR bodies should not be compelled to provide this process.

In relation to the CAA's draft list of issues not considered to be complex or novel, CEDR is in agreement with the issues that appear there. CEDR also supports the principle of the CAA maintaining and updating this list, in order to manage the expectations of all stakeholders and to reduce the risk of the process being overused or otherwise abused.

The proposals will require ADR bodies to actively monitor for new cases which are affected by the same issue, and engage with the airlines, passengers and the CAA which will increase the resource cost that is ultimately passed onto the subscribing airline.

3. Trust account arrangement for paying consumer awards

CEDR welcomes the CAA's proposal to allow ADR bodies to hold funds on behalf of a scheme member for the purpose of paying consumer awards. While CEDR sees no need for such a facility at the present time, to have the ability to implement such an arrangement in future is beneficial.

CEDR therefore has no objections regarding this proposal.

4. Handling claims on a flight basis

CEDR welcomes the proposal to allow ADR entities to establish procedures for claims to be dealt with on a flight basis rather than a claim basis. CEDR currently deals with cases on a claim basis, and rigorously operates a number of processes in order to achieve a high level of consistency across decisions. CEDR therefore has no plans to change this approach at present. However, we support the option to do so being made explicit in CAP1324.



5. Non-regulated ADR schemes

CEDR has no objections regarding the CAA's proposals for ADR bodies to clearly signpost any non-regulated ADR schemes to consumers.





Consultation on amendments to CAP1324 - the CAA's policy for ADR applicants and approved ADR entities

Consultation response by The Consumer Council

September 2020

1. Introduction

- 1.1 The Consumer Council is a non-departmental public body (NDPB) established through the General Consumer Council (Northern Ireland) Order 1984. Our principal statutory duty is to promote and safeguard the interests of consumers in Northern Ireland. The Consumer Council has specific statutory duties in relation to energy, postal services, transport, and water and sewerage. These include considering consumer complaints and enquiries, carrying out research, and educating and informing consumers.
- 1.2 Although not a designated ADR provider, The Consumer Council has been designated to handle passenger complaints made under Regulation (EC) No 1107/2010 (the Access to Air Travel Regulation) relating to an airport in Northern Ireland or a flight departing from an airport in Northern Ireland by the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 (SI 2007/1895). The Consumer Council also handles complaints made under Regulation (EC) No 261/2004 concerning flight delays, cancellations and instances of denied boarding in and out of Northern Ireland.
- 1.3 The Consumer Council uses a set of eight core principles that are commonly used by consumer organisations for working out how particular issues or policies are likely to affect consumers. These are:



1.4 The Consumer Council welcomes the opportunity to respond to the “Consultation on amendments to CAP1324”.

2. Executive Summary

2.1 The Consumer Council supports the CAA objectives to improve the ADR process for consumers and also to encourage more airlines to join the scheme. We ask the CAA:

- In our unique role as passenger complaints representative for Northern Ireland we deal with the same issues and legislation as designated ADR providers. We therefore request that we are given access to the new ‘complex and novel’ complaints process.
- In line with the recommendation made by the Consumer Protection Partnership in its response to Aviation 2050 we would ask that the CAA undertake a review of ADR to ensure it is working in the best interests of consumers.
- Since 2015, The Consumer Council has facilitated the recovery of almost £900,000 in refunds and compensation. Currently we receive no funding from the CAA or the Department for Transport. We ask that our statutory role in assisting Northern Ireland consumers be acknowledged and The Consumer Council receive proportionate funding to grow and develop our representative and complaints role. We would welcome the opportunity to discuss this further with the CAA.

3 Feedback

Post decision review process

3.1 The CAA states the purpose of this review process would be to enable the ADR body to enhance its expertise in handling aviation consumer disputes rather than to overturn the decisions taken in individual cases. We suggest that the CAA introduce some provision within the process to ensure this is the case. This would promote the Consumer Principle of Fairness.

Customer Feedback /Surveys

3.2 Although the CAA has stated applicants need to submit details of how they will gain feedback from consumers using their ADR scheme, it only says it must include use of online surveys. The Consumer Council would like it noted that

not all travellers have access to the internet and so other methods of feedback should be included. This would promote the Consumer Principle of Access.

Complex and novel issues raised in complaints

- 3.3 We welcome the introduction of a process that seeks to help ADR bodies resolve complaints that raise complex and novel issues. From our experience dealing with airline complaints we are aware that the aviation industry occasionally throws up unusual issues that give rise to complaints and where guidance from the CAA would be welcome. In our unique role as passenger complaints representative for Northern Ireland we deal with the same issues and legislation as designated ADR providers. We therefore request that we are given access to the new 'complex and novel' complaints process to enable us to provide Northern Ireland consumers with the best service possible. This would promote the Consumer Principles of Representation and Redress.

Review of ADR

- 3.4 In its June 2019 consultation 'Aviation 2050 – the future of UK aviation' the Department for Transport proposed to review ADR to ensure that it is working in the interests of consumers. The Consumer Council is a member of the Consumer Protection Partnership (CPP), which in its response to that consultation supported a review of ADR to ensure it is working in the best interests of consumers. The CPP response stated that "this review should consider the type of complaints that make it to ADR given the airline should already have had the chance to resolve the issues. ADR should be a last resort and only for cases where there is a lack of clarity on the entitlement to redress for the consumer". We wish to take this opportunity to reiterate the need for this review of ADR. This would promote the Consumer Principles of Representation, Redress and Fairness.

The Consumer Council funding

- 3.5 Although we are not a designated ADR body, The Consumer Council deals with complaints from passengers in relation to Regulation EU 1107 and EC 261. During 2019-2020 The Consumer Council handled 268 Stage 2 Complaints on behalf of consumers who were due compensation for flights leaving and returning to NI airports. During this period we facilitated the return of £94,000 to those consumers. Since the COVID-19 Pandemic hit the aviation industry in

March 2020 we have facilitated the return of over £700,000 in delayed refunds to Northern Ireland consumers.

- 3.6 The Consumer Council works with airports to improve services for passengers, and is a statutory body required to sit on the three airport forums in Northern Ireland as prescribed in the Airports (Northern Ireland) Order 1994. We work with partner organisations and local media to promote awareness of passenger rights within Northern Ireland and in partnership with the three airports in Northern Ireland to conduct 'Access Audits', whereby we facilitate groups of passengers with a disability and reduced mobility on a tour of the airport facilities. In June 2019, we presented on this at the British-Irish Airports Expo 2019 conference in London. In addition, The Consumer Council produces information guides for passengers on their rights when services are delayed or cancelled, and for passengers travelling with a disability or reduced mobility.
- 3.7 Despite this, no funding is provided for these activities by either the CAA or the Department for Transport. The Consumer Council would therefore request, that the CAA considers funding The Consumer Council. This would promote the Consumer Principles of Representation, Redress Information.

4. Conclusion

- 4.1 The Consumer Council welcome the proposals put forward to encourage more airlines and airports to join the ADR scheme and become regulated ADR entities. We welcome the introduction of a complex and novel complaints category, which recognises that air travel is a complex commercial activity. We believe that ADR should be a last resort for consumers and only for cases where there is a lack of clarity on the entitlement to redress for the consumer. Finally, we wish to see the role of The Consumer Council in representing Northern Ireland aviation passengers recognised and funded by the CAA.

If you require more information please contact Brónach Graham, Policy Officer (Transport) on 028 9025 1630 or at Bronach.graham@consumercouncil.org.uk



The Consumer Council

Seatem House, Floor 3
28 - 32 Alfred Street
Belfast, BT2 8EN

T: 028 9025 1600
F: 028 9025 1663
E: info@consumercouncil.org.uk
W: www.consumercouncil.org.uk

Consumer Panel response to CAA Consultation on Policy for ADR applicants and approved ADR entities, CAP1324

Introduction and background

1. The Panel welcomes this [CAA consultation](#): its subject matter and the proposals in it are of considerable relevance to consumers and of great interest to the Consumer Panel. The CAA states that it has been in discussions with stakeholders on further potential enhancements to the ADR policy, both to make ADR work better for consumers and to encourage airlines that do not currently participate in ADR to consider the merits of the schemes that are offered by the two CAA-approved ADR bodies (namely CEDR and AviationADR).
2. The key focus of the consultation is about allowing complex or novel issues with wider implications (for example, airline strikes) to be determined through a process involving the CAA, or ultimately by the courts. The consultation document also proposes trust account arrangements for paying consumer awards, the opportunity to handle claims on a flight basis, and safeguards in non-regulated ADR schemes.
3. It is possible that airlines that are not currently members of an ADR scheme would be willing to join following the proposed changes. In our view this would be in the interests of consumers. For example, Ryanair was a member of AviationADR, but it left when that scheme decided that flight cancellations caused by strikes by Ryanair's own staff could not properly be classed as attributable to "extraordinary circumstances", and that therefore consumer compensation complaints should be upheld. The underlying issue of cancellations caused by airline strikes is awaiting final determination in a legal case between Ryanair and the CAA – precisely the way that the Consultation Paper proposes big issues like this should be determined. In a [response](#) to the DfT's Aviation Strategy 2050 in June 2019, Jet2 detailed its concerns about the current way major issues would be decided by an ADR scheme, but indicated that if changes along the lines of those proposed in the Consultation Paper were made, it would consider joining one of the schemes.

Poor presentation of this Consultation

4. The Consumer Panel was made aware by the CAA of the general ideas behind the proposal for novel and complex cases in August 2019 and made comments to the CAA in September and October. The Panel heard nothing more of the proposal until it was notified that this Consultation had been launched. The Panel was not given the opportunity to comment on it in advance. The Panel is strongly critical of the way that this Consultation has been presented. Although placed on the [Citizen Space](#) of the CAA website, it has clearly not been drafted or presented with citizens or consumers in mind. There is little excuse for this. The substantive proposals have been under consideration by the CAA for nearly a year. This is nevertheless a public consultation and the CAA should be

and be seen to be consulting everyone: ADR schemes, airlines and airports, consumers, consumer organisations, and other stakeholders such as claims management companies and specialist lawyers and legal firms.

5. The 'Overview' section does not begin to explain the effect of the proposals, merely stating that they are designed to encourage non-ADR-participating airlines to sign up to an ADR scheme. The 'Why We Are Consulting' section just appears to apologise for consulting airlines and airports rather than merely the ADR schemes. There is no mention of consumers. The text of the consultation is simply the legal text of CAP1324 with the proposed amendments shown in track changes. There is no text to explain how the effect of the proposals would work in practice or how they would affect consumers who might have claims that could be impacted.
6. The Consultation has been so poorly presented that consideration was given to whether to propose that it should be withdrawn and re-issued as a redrafted and better presented consultation that complies with good practice guidelines for public consultations. However, despite the inadequate presentation, the reluctant conclusion was that the balance of advantage for consumers lies in for pressing on and ultimately seeing these two airlines, and perhaps others not currently ADR scheme members, actually joining or re-joining a scheme. However, the Panel believes that changes should be made to the detail of the proposed arrangements in order to recognise consumer interests properly. Given the poor presentation, it would be helpful for the CAA to publish an in-depth response to this consultation, setting out its response to the issues and questions posed by respondents and setting out a proposed way forward. The CAA should not publish such an inadequately presented paper for public consultation again.

How often would the arrangements for complex and novel issues be needed?

7. The CAA states that on very rare occasions, an individual passenger complaint will raise an issue that is genuinely complex and novel in terms of its broader applicability. Such cases might involve circumstances that have not previously occurred, and/or where there is no established case law or clear principles for determining the outcome of the case. In such cases an alternative approach that incorporates the views of the CAA as well as those of the airline, the ADR body and the passenger, may be more appropriate, it says. For those complex and novel cases where a consensus cannot be reached between the CAA, the ADR body and the airline, the CAA's view is that the issue, and by extension the complaint, would be most appropriately resolved through the courts. In the CAA's view, only one or two complaints each year are likely to be considered complex and novel in this sense.

Should the new arrangements for "novel and complex" cases be part of the requirements for ADR schemes?

8. The CAA does not propose to require approved ADR schemes to adopt the new arrangements. It merely proposes that if an ADR scheme decides to offer

arrangements for deciding novel or complex issues outside the normal ADR process, the scheme and the relevant airlines must comply with the requirements set out in a new appendix to the Policy. One of the two schemes might decide to do so and the other not – or indeed neither might decide to do so. Although the CAA states that it has been in discussion with the schemes, it does not indicate whether either or both schemes are likely to be interested in adopting the new arrangements. While recognising the constraints of the ADR Regulations in which the CAA has to operate, nevertheless it would be helpful for the Consultation Paper to consider the effect if one scheme adopts these proposals but the other does not.

The steps in the process proposed to be adopted in potentially novel and complex cases.

9. The proposals lay down an elaborately choreographed set of steps to be followed involving initially just three parties – the airline, the ADR body and the CAA.

Deciding whether the matter is genuinely novel or complex

10. The initial move begins with an airline that is notified by an ADR body of a complaint that it (the airline) considers raises complex and novel issues. The airline has 14 days in which to notify the ADR body of its view. Within the next 7 days, the ADR body must tell the CAA, and must confirm whether it (the ADR body) agrees that the matter is novel or complex. The CAA will then arrange a discussion involving the CAA, the airline, and the ADR body and in the following 21 days it will seek to reach agreement. If agreement cannot be reached, then the member airline can instead confirm its view that the complaint raises genuinely complex and novel issues. If it is agreed that the matter is novel or complex the complaint file will be transferred to the CAA for it to put forward a view on the application of the “extraordinary circumstances” test. In the meantime, the person variously referred to as “the complainant” or “the passenger” is told by the ADR body that consideration of the complaint will “be informed by the CAA assessment”. At this point all other cases concerning the same issue will be put on hold, pending the outcome of the assessment.
11. However, the CAA does not explain what happens if no agreement is reached and the airline insists that the matter is novel or complex. There appears to be some kind of stalemate. The CAA should explain what is expected to happen in this situation.

The CAA’s assessment process

12. Once it is agreed that the complaint does raise a novel or complex issue, the complainant/passenger is for the first time permitted to be involved. The complainant, the airline and the ADR body may then make submissions on the main question as to whether the circumstances encountered by the airline

should properly be classified as extraordinary or not. These submissions should be made to the CAA within 35 days, with all these submissions being shared with all parties. The CAA may hold discussions or meetings with “the parties” and will consider whether to invite parties to reply to submissions made. Any meetings or further submissions must happen within 28 days of the expiry of the 35 day deadline. The CAA is then to issue its assessment to the parties as soon as reasonably practicable.

13. If the CAA’s assessment does not support the airline’s position, the airline has 14 days in which either to accept the assessment in which case the ADR scheme will finalise its adjudication; or to lodge an objection and then notify the CAA that it will issue legal proceedings, in which case these must be issued within three months of the assessment. Should it fail to confirm this, or fail to subsequently issue proceedings within the time period specified, the ADR scheme rules will set out that the member airline will be deemed to have accepted the CAA’s view and the final adjudication by the ADR body. The member airline will then have 14 calendar days to comply with the adjudication and to provide evidence which satisfies the CAA of compliance.

The Panel’s view: transparency

14. When the Panel was first informed of the general ideas behind these proposals, it urged the CAA to incorporate transparency into these arrangements. What is proposed is far from transparent. There is no suggestion in the Consultation Paper that any of this process would be open to public comment or scrutiny, despite the fact that these proposals are designed to affect potentially large numbers of other people and organisations. The tripartite discussions or submissions are all apparently to be private.
15. Under the heading ‘Transparency’, the CAA states that the CAA, the airline and the ADR body will share with each other relevant correspondence. It does not mention the complainant/passenger. This is a very limited model of transparency. Only when the ADR scheme has made a final adjudication does the CAA propose that details of the case be made public on the ADR body’s website.
16. The outcome – the CAA’s final assessment – represents a significant regulatory policy decision following private tripartite discussion. That is not the way regulatory policy decisions should be made. Public policy demands that such decisions should be preceded by open public consultation. Although not technically binding, that decision will have implications for the other stakeholders, including consumers and consumer bodies, other airlines, and the other ADR scheme, none of whom, it appears, will have been made aware of these discussions – or necessarily the outcome. Although public consultation would increase the timeframe, on balance the Panel considers that transparency is key here.
17. In particular the Panel urged the CAA to consider the position of consumers who have potential claims that may turn on the issue under scrutiny, or who

have made such claims but they have been rejected and now have the option to refer them to an ADR body. Should they spend the time and effort to pursue a claim, or to refer the matter for ADR, only for their claims to be put on hold? The CAA should ensure that the entire process is transparent to consumers and to their advisers at whatever stage they might be. This issue of publishing material whether on novel/complex issues or regularly encountered issues is considered below.

The Panel's view: fair balance for the consumer interest

18. The proposals envisage the CAA considering the legal and technical detail of the case under consideration, taking into account evidence from the airline and the ADR body, in order to come to a decision on the interpretation of the legal point in question. We would expect the CAA to identify a mechanism to ensure the consumer interest is taken into account in these considerations and we look forward to hearing how they intend to do this.

The Panel's view: fair process management

19. When the CAA is considering its assessment, the proposals envisage having *“meetings with the parties to discuss their evidence and submissions, and whether to invite replies to the other parties' evidence and submissions, on a case by case basis”*. As stated above it is important that the consumer interest is considered as part of this process. The process envisaged should be clarified and should ensure that natural justice, that requires all parties to be heard on an equal basis, is not breached. Separate representation of the consumer could be an example of a way of addressing the imbalance we perceive here.

The Panel's view: timescales

20. The proposals outline a sequence of time limited steps involving requirements on the various parties. These precise time limits give the impression of a driven process that admits of no excuses for delay, when the final part of the process – the assessment decision of the CAA - is subject to no time limit at all. Meanwhile all the consumer claims are on hold, the airline and the ADR body have to manage ongoing claims and enquiries. To give this process credibility, the CAA should also set itself a time limit for arriving at its assessment.

21. A key principle of any complaint handling process is that it should be **responsive, timely and flexible**¹. Complaints need to be dealt with promptly avoiding unnecessary delay and in line with clear and transparent timescales, which are communicated to complainants when their complaint is received. Where there are particularly complex cases, complainants need to be kept informed of reasons for the delay, and how long the process is likely to take. Staff dealing with complaints should have sufficient authority and autonomy to

¹ <https://www.qmu.ac.uk/media/5454/complaints-handling-guide-online.pdf>

make decisions about complaints early in the process where appropriate. It is advisable to have room for some flexibility within the process, where the circumstances require this. It would be useful to have a clear timescale for delivery of the assessment to avoid any unnecessary delay for the complainant and, importantly, for all of those whose claims have been placed on hold. The Consumer Panel's view is that this assessment should be provided in a specified period of time.

22. The Panel is similarly critical of the time allowed for an airline to issue proceedings. Three months is longer than an airline's lawyers need to draft an appropriate claim. The airline has already had time to consider with its lawyers whether to take this course of action. Proceedings could be issued much more quickly and the Panel would urge the CAA to consider imposing a shorter timescale.

The Panel's view: consumer cases on hold

23. Any further passenger complaints submitted to the ADR body concerning the same complex and novel issue are to be put on hold by the ADR body until the issue has been resolved. The fact that future complaints on the same issue will be put on hold should be transparent and visible on the ADR body's website to potential complainants. The ADR body is to advise individual passengers whose cases are on hold accordingly, *"including that they may take legal action themselves against the airline"*. Although nothing in a process of this kind can bind a consumer not to launch court proceedings, they should be informed that by taking proceedings while the case is being determined via a different mechanism, they could be at financial risk. The ADR body should also ensure that it can easily identify the complaints on hold and that it has the contact details of relevant complainants to provide updates. It should be required to update complainants on a regular basis.

Distinguishing issues that are genuinely complex and novel from those where established principles or case law should be sufficient

24. In providing for the possibility of a different route for the handling of cases of broad applicability that all turn on an issue that may be "novel or complex", the CAA has had to ensure that this possibility is not abused. Most cases, it suggests, involve circumstances that have previously occurred, and/ or where there is established case law or there are clear principles for determining the outcome of the case. It has therefore had to identify what are the commonly occurring types of cases where there are already clear principles or decided case law, and the new route should not be available to airlines. In other words, they are issues on which there is established principle and decided case law.
25. The route that the CAA has taken is to publish, alongside this Consultation, a [draft list of 23 commonly occurring issues relating to "extraordinary circumstances"](#) of the kind that might or might not entitle an airline to reject a compensation claim for a cancelled or delayed flight. These, it states, are covered by established principles or case law and should not therefore be

treated under the new process. These 23 issues include matters such as bird strike, ground damage to aircraft, airport system failure, weather, and crew shortage. The issues listed include circumstances that the CAA regards as both extraordinary and non-extraordinary. The list does not distinguish between what is regarded as extraordinary and what is not. It would be helpful to have a clear breakdown on the CAA website and/or that of the ADR websites. It would also be helpful to relate this to other material on the CAA's website on exceptional circumstances.

26. Panel members stressed to the CAA the importance of transparency so that consumers could understand how their complaints might be handled before referring a complaint to an ADR scheme. In particular, the Panel said, there should be more clarity about the approach to commonly occurring scenarios. We look forward to seeing the CAA do this.

Knowledge about extraordinary circumstances

27. These established principles and case law may be familiar to those in the industry, to lawyers, to the ADR schemes, to claims management companies and to the CAA, but they will not be familiar to individual consumers wondering whether to lodge a claim or to refer a rejected claim to an ADR scheme. Nor is there any easily accessible material – although the CAA clearly has a developed understanding of it. This is precisely where the Panel urged greater transparency to assist consumers. It is disappointing that the CAA appears not to have viewed this aspect of these proposals from a consumer viewpoint.
28. The Panel's advice to the CAA was to see how this question of publishing information about the approach to commonly encountered issues was handled in other sectors and by other ADR schemes - and in particular ombudsman schemes where best practice can be found.
29. The Panel's policy is that there should be a single ombudsman scheme for aviation complaints. It has pointed out that all ombudsman schemes aim to do more than just decide complaints - they aim to help consumers with information and industry to raise standards by being transparent with their decision-making and feeding back the results and lessons of what they see in the complaints they handle, so reducing the causes of complaints. They see this as part of a public service.
30. Unfortunately, the aviation schemes do little of this. They see themselves as offering a limited private commercial dispute adjudication function rather than a public service. In particular they do not publish information about their approach to regularly occurring cases, seeing this as commercially confidential intellectual property. No doubt each scheme has developed its decision-making approach to common issues. Both aviation ADR schemes in their latest reports [here](#) and [here](#) point to the extensive training materials each provides to its staff on such matters – none of which either publishes. Each scheme also is likely to make its member airlines clearly aware of its

approach, and the member airlines will no doubt be the best-informed critic of whether the approach taken is consistent with established principle and case law. Without transparency of this information however individual consumers will see only the reasoning applied in their own cases.

31. The cause of this lack of transparency is that there are two competing ADR schemes, and they are currently inhibited from providing this wider service by the fact that they are in competition with each other and have no incentive to cooperate for the benefit of consumers. We recognise that mandating a single scheme is not within the CAA's gift, although the Panel's position has long been that this would be an improvement for consumers. In the absence of legislation, the CAA could further strengthen its authorisation standards for schemes and we would be pleased to work with the CAA to do this.
32. It would be helpful if the CAA would take this opportunity to publish clear and more detailed guidance about the established principles and case law that it sees as applicable in regularly encountered circumstances, showing how different factors lead to different outcomes. It should draw on the experience and training materials of the ADR schemes and of its own PACT scheme. This more discursive material would form a more natural background, and place in context, the unexpected emergence of any novel or complex issue that might have implications for large numbers of actual or potential claims. The material should be kept regularly up to date in the light of new decided case law or changing circumstances. Where substantial changes potentially affecting large numbers of consumers are proposed, these should be subject to proper public consultation.
33. Following the Panel's October 2019 meeting the CAA was provided with information on how UK ombudsman schemes in other sectors aim to raise industry standards and to be transparent about their approach to decision-making. This is contained in Appendix A.

Other Proposals

34. Other proposals concern *trust account arrangements* for paying consumer awards – there is a new standard form trust deed to allow the CAA-approved entity to hold funds on behalf of a scheme member for the purpose of paying consumer awards. The Panel welcomes these proposals since they should have the effect of speeding up the payment of compensation to consumers.
35. There are also proposals for *handling claims on a flight basis*, which the Panel also welcomes.
36. Finally, there are proposals to avoid consumer confusion where ADR entity offers both *regulated and non-regulated* ADR schemes. While the Panel welcomes these proposals to improve signposting for consumers, we reiterate our support for strengthening the redress system and processes by proposing a single mandatory ombudsman scheme which would simplify consumer access to redress.

Summary of the Panel's recommendations

1. CAA consultations should follow the good practice guidelines for public consultation in future. (para 6)
2. While recognising the constraints of the ADR Regulations in which the CAA has to operate, nevertheless it would be helpful for the Consultation Paper to consider the effect if one scheme adopts these proposals but the other does not. (para 8)
3. The CAA does not explain what happens if no agreement is reached and the airline insists that the matter is novel or complex. There appears to be some kind of stalemate. The CAA should explain what is expected to happen in this situation. (para 11)
4. We would expect the CAA to identify a mechanism to ensure the consumer interest is taken into account in their consideration and we look forward to hearing how they intend to do this. (para 18 & 19)
5. The CAA should specify a time period within which it will complete its assessment decision. (para 20)
6. If an airline proposes to take proceedings to challenge the CAA's assessment, these should be issued quickly and the Panel would urge the CAA to consider imposing a shorter timescale than that proposed. (para 22)
7. If cases are put on hold the ADR scheme must regularly update the complainants affected. (para 23)
8. The CAA should publish clear and more detailed guidance for consumers about the established principles and case law that it sees as applicable in regularly encountered circumstances, showing how different factors lead to different outcomes. It should draw on the experience and training materials of the ADR schemes and of its own PACT scheme. This explanatory material should place in context any unexpected emergence of a novel or complex issue that might have implications for large numbers of actual or potential claims. The material should be kept regularly up to date in the light of new decided case law or changing circumstances. Where substantial changes potentially affecting large numbers of consumers are proposed, these should be subject to public consultation. (para 32)

APPENDIX A: Ombudsman schemes in other sectors

The **Financial Ombudsman Service** outlines on its website its approach to types of complaints. The link below shows how it explains for instance its approach to insurance cases, listing different types of insurance and its approach in each main area.

<https://www.financial-ombudsman.org.uk/businesses/complaints-deal/insurance>

The **Legal Ombudsman** already gives a fair amount of information on its site and recently published a consultation paper on how it might become more transparent and report its impact.

<https://www.legalombudsman.org.uk/wp-content/uploads/2019/10/Transparency-discussion-paper-October-2019.pdf>

It offers training courses to legal service providers to improve complaint handling and offer feedback <https://www.legalombudsman.org.uk/raising-standards/>

The **Local Government and Social Care Ombudsman** publishes all its decisions

<https://www.lgo.org.uk/decisions>

It also provides training courses for councils and care providers

<https://www.lgo.org.uk/training>

The **Energy Ombudsman** describes common areas of complaint

<https://www.ombudsman-services.org/sectors/energy> and has done more since Ofgem commissioned a review of the scheme

https://www.ofgem.gov.uk/sites/default/files/docs/2015/09/review_of_ombudsman_services_energy_2.pdf

As that report stated "*There is a potentially much wider role for the [Energy Ombudsman] than the one it is currently focussed on – which involves learning from the people who do complain and using this information to reduce the **causes** of complaints. This would benefit everyone, those who do complain, those who complain initially but do not pursue their claim, and those who do not complain.*"

The **Office of the Independent Adjudicator for Higher Education** publishes a Good Practice Framework as a guide to handling student complaints

<https://www.oiahe.org.uk/resources-and-publications/good-practice-framework/>

The **Housing Ombudsman Service** provides online training, case studies and complaint handling workshops for landlords and other material for residents

<https://www.housing-ombudsman.org.uk>

The **Independent Football Ombudsman** publishes its adjudications

<https://www.theifo.co.uk/adjudications.html> and an Annual Report [https://www.theifo.co.uk/docs/IFO_Ann-Rep_2018-19\(Web\).pdf](https://www.theifo.co.uk/docs/IFO_Ann-Rep_2018-19(Web).pdf) that reports on issues and makes recommendations in addition to its Annual Activity Report.

The **Waterways Ombudsman** publishes summaries of completed investigations

<https://www.waterways-ombudsman.org/publications/case-summaries/2019-20-case-summaries/>

The **Property Ombudsman** hosts industry and consumer forums, runs annual conferences, provides training, issues guidance notes, oversees the internal complaints procedure of its members, conducts member compliance surveys of members' internal complaint handling, and publishes case studies
<https://www.tpos.co.uk/about-us>

The **Rail Ombudsman** (which has only recently started) publishes cases studies, and says that in addition to investigating complaints it aims to support the rail industry to improve standards <https://www.railombudsman.org>

The **Adjudicator's Office's** (deals with complaints about HMRC and the Valuation Office Agency) website publishes information on how it provides feedback to consumers and to HMRC and VOA

<https://www.gov.uk/guidance/how-the-adjudicators-office-supports-hmrc-and-the-voa-to-learn-from-complaints>

The **Furniture Ombudsman** publishes consumer advice on particular topics, runs specialist training courses (eg on handling complaints about mattresses and beds).

It aims not just to deal with complaints, but to raise standards across the industry.

<https://www.thefurnitureombudsman.org>

The **Pensions Ombudsman** publishes all its decisions. It also provides guidance on commonly seen issues such as overpayments, ill health, misleading information etc.

<https://www.pensions-ombudsman.org.uk/guidance/>

From: Helen TCC <helen@thecomplainingcow.co.uk>
Sent: 28 October 2020 09:51
To: consumerenforcement
Subject: Policy for ADR applicants and approved ADR entities

As regards the above consultation I submit the following:

- 1) There should be a single redress scheme which should be an Ombudsman as it has higher standards as demonstrated in the report [More Ombudsman Omnishambles](#), see in particular the Ombudsman Association's minutes on cancelling the Retail Ombudsman's membership who has been allowed to continue as an ADR provider.
- 2) There is already an Ombudsman in the travel sector and it would therefore be sensible for airlines to have an Ombudsman
- 3) There are a number of issues with one of the providers as detailed in the Ombudsman Omnishambles and More Ombudsman Omnishambles reports and I refer you to those recommendations
- 4) There is no annual fee for ongoing approval in any other ADR scheme as the CTSI does not charge it is difficult to understand why the CAA should be charging
- 5) There should be no extension to time allowed to deal with complex issues. 90 days is more than long enough and a well established and experienced provider would be able to ensure that systems are in place to manage this. An ADR scheme should be fair to both parties and extending this time is swayed in the airline's favour.

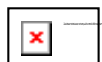


The Complaining Cow ©

--

Website: www.thecomplainingcow.co.uk
Facebook: www.facebook.com/thecomplainingcow
Twitter: [@complainingcow](https://twitter.com/complainingcow)
Youtube: [Helen Dewdney](https://www.youtube.com/HelenDewdney)
Mobile: 07950 258234

[Helen Dewdney showreel](#)



Virus-free. www.avg.com

From: Vanhecke, Caroline (LON PC LG) - KLM <Caroline.Vanhecke@KLM.COM>
Sent: 20 November 2020 14:04
To: consumentenforcement
Subject: CAA amendment consultation on ADR

Dear Matt,

I have read the CAA's proposal to introduce a facility for an independent review of ADR decisions for future reference and learnings. Air France KLM welcome the 'right to reply' of the airlines once the Alternative dispute resolution handlers have made a decision on a particular case. The added option for airlines to have an opportunity to explain specific situations that sometimes lead to complaints from passengers is welcomed. The CAA's recognition of the fact that complex and novel issues have merit in having a process where these can be considered outside the normal process for handling the individual complaint is welcomed. The fact that an alternative approach that incorporates the view of the CAA as well as those of the airline, the ADR body and the passenger is welcomed.

The regret however is that the CAA will not adjudicate on the complaint and that it will be for the ADR body to determine and issue the final independent adjudication on reviewed cases and only have to take into account the CAA's advice. As the body who appoints the ADR bodies, Air France KLM would welcome the CAA adjudicating on particular complaints where the opinion of the CAA and the ADR body differ.

Kind regards,

Caroline



Caroline Vanhecke | Legal and Regulatory Affairs Manager, AIR FRANCE and KLM, UK & Ireland
Tel: +44 (0) 20 8584 4459

E-mail: caroline.vanhecke@klm.com

Plesman House, 2a Cains Lane, Bedfont, Middlesex, TW14 9RL

For information, services and offers, please visit our web site: <http://www.klm.com>. This e-mail and any attachment may contain confidential and privileged material intended for the addressee only. If you are not the addressee, you are notified that no part of the e-mail or any attachment may be disclosed, copied or distributed, and that any other action related to this e-mail or attachment is strictly prohibited, and may be unlawful. If you have received this e-mail by error, please notify the sender immediately by return e-mail, and delete this message.

Koninklijke Luchtvaart Maatschappij NV (KLM), its subsidiaries and/or its employees shall not be liable for the incorrect or incomplete transmission of this e-mail or any attachments, nor responsible for any delay in receipt. Koninklijke Luchtvaart Maatschappij N.V. (also known as KLM Royal Dutch Airlines) is registered in Amstelveen, The Netherlands, with registered number 33014286

From: Marcus Williamson <marcus@connectotel.com>
Sent: 20 November 2020 16:20
To: consumerenforcement
Subject: Response to consultation on proposed changes to CAP 1324

Hello

Please find here my responses to the consultation on the proposed changes to CAP 1324:

Section 3 - ADR applicants should be ombudsmen and also be members of the ombudsman association (OA), which has higher standards than the current ADR certification requirements of the CAA.

The CAA should carry out a "fit and proper person" test on all directors of ADR applicant companies to ensure that they do not have a criminal record and do not have a background of financial problems, either individually or at companies with which they have previously been involved.

The CAA should now carry out such a "fit and proper person" test on all current directors of ADR bodies to determine whether they are fit to continue to serve as directors.

Please see Appendix F of the document "More Ombudsman Omnishambles" at the link below for details of known breaches of Company Law by a director of CDRL, the company which currently runs Aviation ADR, a CAA-approved ADR body:

https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Furldefense.com%2Fv3%2F__https%3A%2F%2Fceoemail.com%2Ffoo2final.pdf__%3B!!LYoxqgdACpl!bLzUXF-BBQhq2ndOZvwNZcErveGB0cEdvG0xZDSUnX9MmBZTt8RUUpFzq9N_hxH3OtqfcDmw7A%24&data=04%7C01%7Cconsumerenforcement%40caa.co.uk%7C4868fada0ac64ff417eb08d88d7084ef%7Cc4edd5ba10c34fe3946a7c9c446ab8c8%7C0%7C0%7C637414861688309487%7CUnknown%7CTWfPbGZsb3d8eyJWljoiMC4wLjAwMDAiLCJljoiv2luMzliLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&data=oejmffp7FBsuXH11p1neZdxA%2By9Cj7ZsCPkG3BGmP%2Bo%3D&reserved=0

This additionally shows significant financial debts, including a large sum owed to HMRC, by a company of which this individual was previously the controlling director.

Such an individual should not be regarded as a "fit and proper person" to run an ADR scheme regulated by the CAA.

Section 4.8/4.9 - ADR entities should never charge a "consumer fee". The service should be free to the consumer at all times.

Section 6.2.iv - A case should never be allowed to go beyond 90 days under any circumstances.

Section 7.2 - ADR entities should never charge a "consumer fee". The service should be free to the consumer at all times.

Section 18 - A case should never be allowed to go beyond 90 days under any circumstances, as this will be harmful to consumers. This entire section should be deleted.

Section 21.2 et seq - It should not be possible for any CAA-approved ADR entity to offer both regulated and non-regulated ADR schemes, as this will cause significant confusion for consumers and may bring the regulated ADR scheme into disrepute.

Please stipulate this requirement in the CAP 1324 document.

My interest is as a journalist and as the editor of the consumer information website
https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Furldefense.com%2Fv3%2F__http%3A%2F%2Fwww.ceoemail.com__%3B!!LYoxqgdACpl!bLzUXF-BBQhq2ndOZvwNZcErveGB0cEdvG0xZDSUnX9MmBZTt8RUpFzq9N_hxH3Otqeybrk5OA%24&data=04%7C01%7Cconsumerenforcement%40caa.co.uk%7C4868fada0ac64ff417eb08d88d7084ef%7Cc4edd5ba10c34fe3946a7c9c446ab8c8%7C0%7C0%7C637414861688319482%7CUnknown%7CTWFpbGZsb3d8eyJWljoimC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Ikk1haWwiLCJXVCi6Mn0%3D%7C3000&reserved=0 which helps more than 3 million people a year with resolving escalated customer service issues.

I look forward to receiving acknowledgement of my submission to the consultation.

best wishes

Marcus Williamson

Editor

https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Furldefense.com%2Fv3%2F__http%3A%2F%2Fwww.ceoemail.com__%3B!!LYoxqgdACpl!bLzUXF-BBQhq2ndOZvwNZcErveGB0cEdvG0xZDSUnX9MmBZTt8RUpFzq9N_hxH3Otqeybrk5OA%24&data=04%7C01%7Cconsumerenforcement%40caa.co.uk%7C4868fada0ac64ff417eb08d88d7084ef%7Cc4edd5ba10c34fe3946a7c9c446ab8c8%7C0%7C0%7C637414861688319482%7CUnknown%7CTWFpbGZsb3d8eyJWljoimC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Ikk1haWwiLCJXVCi6Mn0%3D%7C3000&reserved=0

Civil Aviation Authority
Aviation House
Gatwick Airport South
West Sussex, RH6 0YR

19 November 2020

By email to: consumerenforcement@caa.co.uk

Dear Sir / Madam,

Policy for ADR applicants and approved ADR entities

I am writing in response to the Civil Aviation Authority's (CAA) consultation on the update to the Policy for ADR applicants and approved ADR entities.

Summary

1. The Ombudsman Association welcomes the CAA's desire to strengthen the current system of redress in the aviation sector, however, the changes proposed to the CAA's policy do not go far enough to meet the needs of aviation consumers.
2. A single, mandatory, aviation ombudsman should be established to provide comprehensive and effective redress for all aviation consumers and enable holistic feedback to both the airline sector and the CAA.

Background

3. The Ombudsman Association (OA) was established in 1993 and includes as members all public and private sector Ombudsman schemes and major complaint handling bodies in the United Kingdom, Ireland, the British Crown Dependencies and the British Overseas Territories.
4. The Vision of the OA is that throughout the public and private sectors:
 - It is straightforward and simple for people to complain.
 - People making a complaint are listened to and treated fairly.
 - A complaint is dealt with quickly, fairly and effectively at the earliest stage by suitably trained staff.
 - People have access to an ombudsman in all areas of consumer and public services.
 - The learning from a complaint is used to improve services.
5. An Ombudsman helps to underpin public confidence in the organisations that they cover; by providing accessible and effective redress, and by feeding back the lessons from their work in order to help improve service delivery and complaints-management for the future.
6. The OA's membership criteria are recognised as representing best practice. This is reflected in the Cabinet Office's *Guidance for government departments on setting up Ombudsman schemes*¹, which addresses the point of when it is appropriate to use the title 'ombudsman', and in the criteria used by Companies House on when a company can use the protected term 'ombudsman'².

¹ www.gov.uk/government/publications/new-ombudsman-schemes-guidance

² www.gov.uk/government/publications/incorporation-and-names/annex-a-sensitive-words-and-expressions-or-words-that-could-imply-a-connection-with-government

Current issues – the need for a single mandatory ombudsman

7. The ‘General statement’ of the consultation document sets out that the purpose of the CAA’s policy is to “approve...the alternative dispute resolution services that are *needed* by aviation consumers” and also notes that “consumer and trader confidence is vital to the success of ADR within the aviation sector”.
8. Unfortunately, there is ample evidence, notably that compiled by *Which?*³, that the current framework and policy in the aviation sector is not providing the resolution services that aviation consumers need and that there is little confidence in the current system.
9. There are a number of small alterations proposed in the CAA’s consultation to strengthen redress, and our response will touch on those later, but those proposals only seek to address the symptoms rather than the cause; which stems from a policy of ADR not being mandatory for airlines and of having more than one redress body in the sector. That diagnosis is supported by evidence from other sectors.
10. The position that there should only be one redress provider within a sector, and preferably an ombudsman, has been reinforced by a number of recent reports, including the 2017 Citizens Advice report *Confusion, gaps and overlaps*⁴. Those reports are clear that it is in the interests of consumers for access to redress to be simple and straightforward and that confusion is caused by having multiple providers, without any clear evidence of the benefits. The CAA’s identification of the need to mitigate the confusion caused by the activities of non-regulated ADR schemes in the aviation sector underscores this point.
11. The responses to Ofgem’s call for evidence in 2018, on whether to allow an additional redress provider to operate in the energy sector alongside the Energy Ombudsman, further underlined what is recognised to be best practice; both consumer representatives and the energy companies themselves highlighted that having multiple redress providers did not benefit either consumers or businesses.⁵
12. Furthermore, research published alongside the UK Government’s Consumer Green Paper has shown that relying on individual businesses to sign up to ADR voluntarily has not been successful across the consumer sector. The research undertaken by ICF and published alongside the Consumer Green Paper highlighted that 70% of consumers who went to Court did so because the trader refused to participate in ADR.⁶ The apparent 5,000 claims waiting at Luton County Court, regarding easyJet and Tui, and the need to resort to using bailiffs⁷, alongside the high profile decisions taken by Ryanair, Emirates, and Norwegian not to engage with the ADR process at all, shows the scale of failure of the current approach in aviation to ADR.
13. Whilst the failings of voluntary ADR, delivered by multiple providers, are well known, so is the solution; having a single, mandatory, ombudsman.
14. A single mandatory ombudsman not only provides clarity for consumers. Having a holistic view of complaints across the sector enables the ombudsman to spot systemic issues both within a single organisation and across several different organisations, providing the feedback to the sector to help drive improvements in service delivery and customer service, and to inform the regulator’s activities.

³ www.which.co.uk/news/2020/10/more-airline-passenger-misery-as-court-cases-could-take-years/

⁴ www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf

⁵ www.ofgem.gov.uk/publications-and-updates/application-utilities-adr-be-certified-adr-provider-energy-sector-ofgem-decision-following-responses-our-open-letter

⁶ www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system

⁷ www.which.co.uk/news/2020/10/more-airline-passenger-misery-as-court-cases-could-take-years/

15. An ombudsman is just one piece of the puzzle. Ombudsman schemes are most effective in sectors where they work closely with a regulator and other accountability bodies. This can be seen for example in the energy sector where the ombudsman shares relevant information with Ofgem to inform their regulatory activities and ensure enforcement.
16. Several of CAA's fellow regulators have recognised the benefit of having a single mandatory ombudsman, reflected in the long-standing positions of the Financial Conduct Authority in terms of the Financial Ombudsman Service, and Ofgem in terms of the Energy Ombudsman – with the latter's position recently reinforced by the rejection of an application from an additional redress provider to enter the regulated energy market.
17. That recognition of it as the 'gold standard' for consumer redress has been further reflected in recent Government policy to establish single mandatory ombudsman schemes in both the rail sector and the new homes sector. In those two scenarios that has been achieved without primary legislation.
18. In terms of the rail sector, that was delivered via a modification to the passenger licence conditions by the Office of Rail and Road to mandate membership of an approved ADR scheme. In the new homes sector, that is being achieved by making it a condition of commercial lending that developers are registered members of the proposed ombudsman. In both instances that approach is supported by the relevant Government department, respectively the Department for Transport and the Ministry of Housing, Communities & Local Government.

Proposed amendments

19. The OA welcomes the CAA's acknowledgement that changes are required to strengthen redress in the aviation sector, and two of the proposed changes would appear to be attempts to plug the gaps that exist when a straightforward adjudication process is opted for rather than an ombudsman.

Post-decision review process

20. It is a requirement of all ombudsman schemes, as set out in the OA's criteria, to have a quality assurance mechanism in place. An ombudsman is the final stage of the administrative complaints process and as such it is best practice for an ombudsman to have internal quality control processes to consider any complaints that are made either about the service they provided, or if factual errors or a failure to consider certain evidence has impacted on the decision. We welcome that the CAA recognise this is best practice.

Complex and novel issues

21. The proposals CAA have put forward appear to recognise that the straightforward adjudication process that is currently in place, rather than the inquisitorial approach taken by an ombudsman, has left a significant gap in terms of 'complex and novel' issues. That the current approach is 'transactional' would appear to be evidenced by the concern that an issue would arise if there was 'no established case law'. Case law is of course a matter for the courts; alternative dispute resolution, and ombudsman in particular, should be more concerned with principles of 'fairness'. It is not unusual for ombudsman schemes, in all sectors, to deal with complex and novel issues; it is through their inquisitorial approach to investigations and their conclusion as to whether something was 'fair' or not that these issues are addressed.
22. The proposed approach, in designating that the airlines themselves make an initial decision as to whether something is too 'complex and novel' for ADR, and the suggested 'mediated' approach afterwards between the airline, the ADR body, and the CAA, would appear to give far too much influence to the organisation complained about. For comparison; it is for an ombudsman to determine whether something is within their jurisdiction and whether to investigate. There are of course occasions when an ombudsman might determine that an issue is best pursued through the courts, or that clarification on a point of law is required, but it is not for the organisation complained about to determine how that complaint should be dealt with by an independent adjudicator.

Paying consumer awards

23. The novel proposal to allow an ADR body to hold funds on behalf of an airline for the purpose of paying consumer awards appears to be a recognition that the airlines are not complying with the ADR bodies' binding decisions in a timely manner.
24. Having identified this as a failing, the goal should be to ensure that airlines respect the decisions made by the ADR body, take responsibility for whatever mistakes have been made, and comply with the binding decisions in a timely fashion. That they are apparently failing to do so suggests a lack of 'ownership' and raises further questions about whether they are taking on board the lessons that should be learnt and making the necessary changes to improve their service and avoid the same issues arising again. 'Delegating' responsibility for refunding their customers for the mistakes the airline has made is likely to compound those issues.
25. In other sectors, ombudsman schemes do not hold funds on behalf of the organisations under their jurisdiction. There are specific deadlines set for the organisations to comply with the decisions made. If they are not complied with, the ombudsman would raise the non-compliance with the relevant regulatory / oversight body for enforcement action, which can include suspension of trading.

Other elements of the existing policy

26. Two elements of the CAA's existing policy do not reflect best practice: allowing an ADR provider to charge a fee for use of the service, and making consumers wait 8 weeks before they can access redress. On the former, the airline industry was open in admitting that their call for a fee to be put in place was simply to deter consumers from making a complaint. There should never be a financial barrier put in place to discourage consumers from accessing their statutory rights; the CAA should immediately end this anomaly.
27. In regard to the '8-week period', there has been much attention drawn to the unfairness of the delay this causes, notably by Money Saving Expert⁸, and this should be reduced in line with changes in other consumer sectors.

It is welcome that, having recognised the deficiencies in the current system, the CAA is trying to identify ways in which to strengthen it. However, there is no need to reinvent the wheel; these issues are already addressed in other sectors by having a strong ombudsman working in tandem with a proactive regulator. Having a single mandatory ombudsman provides more effective consumer protection, facilitates more effective feedback to the sector, and supports the regulator in performing their duties.

The OA would be happy to provide any further information or meet to discuss if you would find that helpful.

Yours sincerely



Donal Galligan
Chief Executive

⁸ www.moneysavingexpert.com/pressoffice/2019/11/time-to-scrap-8-week-ombudsman-rule-and-drag-it-into-21st-centur/

CAA's consultation on its proposed revisions to CAP1324

By email consumerenforcement@caa.co.uk

20th November 2020

Dear Sirs

We read with interest your recent consultation in which we note you are seeking to enhance current ADR processes in the aviation sector. The Rail Ombudsman is, at present, the only Ombudsman within the travel sector in Great Britain and has been operating since November 2018.

We have, over that time, gained valuable insight in setting up the country's most recent Ombudsman scheme, working collaboratively with the Department for Transport, statutory consumer bodies, members and the regulator. The involvement of these stakeholders has meant that the scheme works well for passengers and ensured industry buy-in from the outset.

Now coming into its third year of operation, the Rail Ombudsman has much learning to impart with regards to resolving disputes arising out of the conveyance of passengers and closing the feedback loop in terms of learnings and data back to the industry.

We would welcome the opportunity to share this with you and to this end, we invite you to schedule a telephone call or video meeting to discuss how our experience can assist you in shaping an ADR mechanism which provides the same advantages to the aviation sector and its consumer-users.



Kevin Grix
CEO and Chief Ombudsman

Consultation Response

Which? response to CAA consultation on revisions to 'CAP1324 - Policy for ADR applicants and approved ADR entities'

Summary

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



Introduction

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

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

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

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

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

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

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

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

Which? view on ADR reforms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Which? calls for a more ambitious approach that includes:

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

Which? view on the proposed changes

New process for complex and novel complaints is detrimental to consumers

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

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



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

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

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

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

Timeframe for resolving complaints

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

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

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

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

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

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



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

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

Post-decision reviews

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

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

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

Trust account arrangement for paying consumer awards

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

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

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



Handling claims on a flight basis

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

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

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

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

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

Non-regulated ADR schemes

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



About Which?

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

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

September 2020



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

Date: 20th November 2020

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

Supplementary note to Which? response to CAA consultation on revisions to 'CAP1324 - Policy for ADR applicants and approved ADR entities'

Which? submitted a response to the Civil Aviation Authority's (CAA) consultation on revisions to 'CAP1324 Policy for ADR applicants and approved ADR entities' on 25th September 2020. We welcome the additional 'explanatory note' published at the reopening of the consultation in October and, in light of this, we take the opportunity to issue a supplementary note to our existing official response.

We note many of the proposals of the CAA in the revised Policy do not appear to fall within the scope of Schedule 3 of the Alternative Dispute Regulations 2015 or within any additional statutory remit of the CAA to specify requirements that go beyond those in Schedule 3. Under Regulation 9(5), requirements not within Schedule 3 must be limited to those that are 'imposed for ensuring a higher level of consumer protection'. We are concerned in particular as follows:

- We strongly believe that some of the clarifications in the 'explanatory note' further illustrate how the proposed rules fail to address the weaknesses of the current ADR regime in aviation. Ultimately, they strengthen our call for mandatory ADR membership in this sector in the form of a single statutory-backed ombudsman.
- We are concerned by the CAA's view that post-decision reviews would be an opportunity to give airlines a 'right of reply' to ADR schemes' decisions on cases. We consider this 'right of reply' analogy as problematic and question the intent of this facility. We're also disappointed by the lack of information on the mechanisms that would ensure fairness for passengers and help make ADR work better for consumers.
- We believe the objective of the proposal for post-decision reviews must be revisited and centered around achieving fair outcomes for consumers while aiming to provide a platform for learning and improving internal processes of the ADR bodies. We believe these objectives should be clearly specified in the final CAP1324 policy.
- In addition, it is unclear how the independence of these reviews will be guaranteed so as not to impact the outcomes of future similar cases; how relevant parties (including legal experts and consumer groups) will be selected for the discussions; and how passengers' views will be represented. Therefore, it is crucial that the new CAP1324 rules clarify the questions raised above, as well as the role of the CAA in these reviews, and include provisions on regulatory oversight and transparent reporting of activities and outcomes.

- As set out in our response, we strongly disagree with the proposal to create a new process for dealing with complaints of a novel and complex nature. Passengers escalating complaints to ADR schemes need to be assured that the ADR body will be able to deliver outcomes and provide them with a clear and consistent path to resolution. To argue that in some cases “there is no need for a separate body to be involved in the process to advocate for the passenger’s interests”¹ is a further blow to consumers' confidence in the sector and in the ADR schemes' ability to help passengers when things go wrong.
- The proposed rules and explanatory note fail to acknowledge that an uneven adoption of this process, whereby one ADR scheme implements it in its rules but not the other, could have a negative impact on passengers' experience when escalating a complaint, further exacerbating the inconsistencies of the current ADR regime, and could also lead to airlines switching from one scheme to another.

About Which?

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

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

November 2020

¹ Explanatory Note on proposed revisions to CAP1324
https://consultations.caa.co.uk/cm/policy-for-adr-applicants-and-entities/supporting_documents