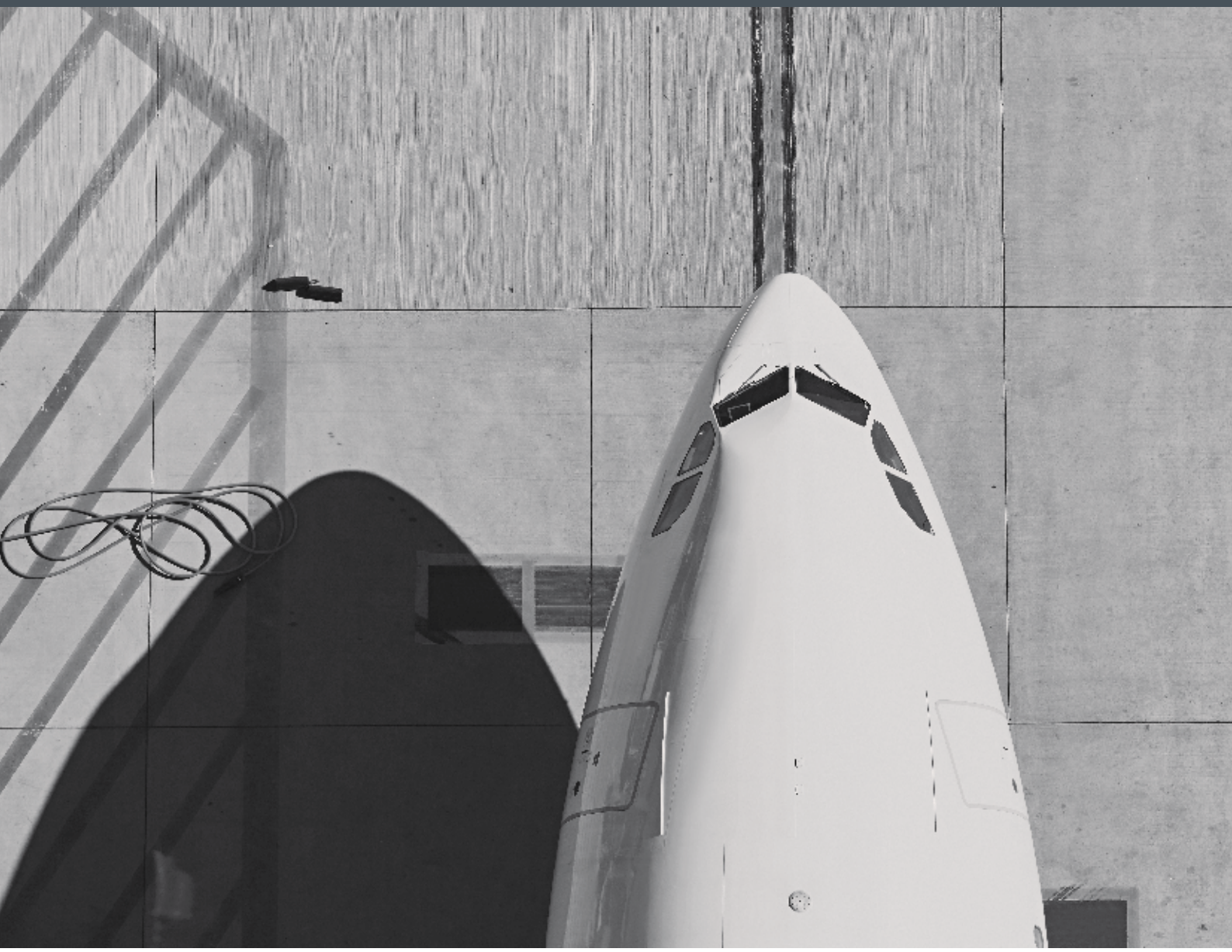

UK AVIATION CONSUMER POLICY REFORM: WHAT AIRLINES NEED TO KNOW

On 31 January 2022 the UK Government opened a consultation[1] entitled "Reforming aviation consumer policy: protecting air passenger rights". This briefing sets out its key points and comments on how airlines might wish to consider responding.

1 https://www.gov.uk/government/consultations/reforming-aviation-consumer-policy-protecting-air-passenger-rights

What is going to change, and when?

The proposed reforms are being put forward by the Government as part of its commitment to "make the most of the Brexit dividend". Importantly, however, they are currently only in the form of broad policy; the consultation document is a first step in developing detailed legislation which will then have to be approved by Parliament following the usual legislative process.

How long it will take for any changes to come into effect is difficult to predict, but this process is at an early stage and changes will not happen overnight. By responding to the consultation, airlines and other stakeholders have the opportunity now to influence the detail and emphasis of the eventual new law.

The consultation covers four areas. Two will affect **all airlines flying into or out of the UK:**

- Enhanced powers for the Civil Aviation Authority (**CAA**)
- Introduction of compulsory Alternative Dispute Resolution (**ADR**) for most claims other than personal injury claims

The other two are currently limited to **UK domestic flights only:**

- Changes to the compensation structure for delays, cancellation and denied boarding
- Enhanced compensation for damage to wheelchairs and other mobility equipment

However, as we explain further below, comments are invited in relation to potential future changes to the compensation structure for international flights.

The consultation closes on 27 March 2022.

Does the UK Government want to abandon EU261?

As airlines will be aware, Regulation EC261/2004 on delay, cancellation and denied boarding (**EU261**) was incorporated into UK law after Brexit and now exists unchanged in domestic form (**UK261**). The UK agreed to continue to be bound by all pre-existing European Court of Justice (**CJEU**) case law relating to EU261 but future cases will be decided by the UK courts alone. The effect of this is that passengers flying within, to and from the UK currently enjoy substantially the same rights and protections as they did under EU261, although this may change over time as the body of UK case law on novel points develops.

The Government is proposing to scrap the UK261 regime for UK domestic flights and replace it with what it describes as "a fairer compensation model" more closely linked to the cost of the ticket, as is the case with train and coach services providers.

The current proposals do not contemplate any change to UK261 as it applies to international flights.

The policy objective is a desire to level the playing-field for low-cost carriers, who bear a disproportionate burden under the EU/UK261 compensation model, with liability exposure said to be in the region of 3% of turnover. By way of illustration, the minimum payable for a delayed or cancelled flight from London to Edinburgh would be £110. Flights on this route are on sale for as little as £21.

The CJEU rejected a 2006 attempt to challenge this on the basis that it offended against the EU law principle of equal treatment. It is evident that the Government now relishes the opportunity to demonstrate its pro-business credentials by righting what has long been perceived as an injustice.

The Government view is clear: passengers are being "overcompensated" for the inconvenience caused to them by delays. Under the new proposals, compensation would range between 25% and 100% of the ticket price, depending on the length of the delay. However, in a bid to soften the blow, they propose to reduce the threshold for delay compensation from 3 hours to 1 hour.

Practical implications for airlines operating domestic UK flights

The proposals are explained in detail, backed by data, in a comprehensive Impact Assessment Paper.[2] The authors of the paper observe:

"This proposed option would mean that more consumers are entitled to compensation, but the average value of this compensation is likely to be lower than is currently the case."

They conclude that the yearly compensation bill for delays over three hours will be reduced by £7.9 million. However £5.9 million will be paid to customers delayed between 1 and 3 hours, so the net overall reduction in compensation is only £2 million.

Any reduction in fixed compensation is positive, but airlines will no doubt want to give careful consideration to the additional administrative burden of processing delay claims for delays between 1 and 3 hours. Could this outweigh the benefit of reducing the sums payable for each claim?

The Impact Assessment rather optimistically estimates 15 minutes to process each compensation claim. Weighed against this is what appears to be a commitment (not mentioned in the main consultation but buried in the Impact Assessment Paper) to retain the concept of the Extraordinary Circumstances/Reasonable Measures defence. Establishing whether the defence is applicable often entails complex analysis, so 15 minutes may be unrealistic. This may also be an opportunity to lobby for clearer definition of the scope of Extraordinary Circumstances, along the lines of the proposals made in 2013 to reform this aspect of EU261.

Why no change to UK261 for international flights?

Changing the compensation structure for international flights has been expressly ruled out at this time. However, the Government's thinking does appear to be somewhat muddled in relation to this. The preamble to the main consultation document starts by explaining, correctly, that passengers can claim damages for delay under the Montreal Convention 1999 (**MC99**) but that this compensation is different to the compensation for inconvenience provided for by UK261 and can be claimed in addition. (This has, of course, been settled law since the landmark case brought by IATA and ELFAA before the European Court

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

of Justice in 2006 which tried and failed to challenge the introduction of EU261 on the grounds that it was incompatible with MC99).

However, the Impact Assessment Paper states that "due to international conventions, the proposed reform would not be possible to take forward at this time for international flights" and Question 21 of the consultation reads as follows:

"Considering that the compensation rates are set by the Convention for international flights that are delayed, Government is interested in views on alternative approaches to recognise the changes in the types of airlines being used to travel and to link compensation to the costs of travel.

Q21. Is there anything else that can be done internationally within the confines of the 1999 Montreal Convention to help link compensation to the costs of travel for delay?"

An important observation to make here is that MC99 does not set compensation rates for delay claims. It provides a mechanism whereby passengers can be compensated for their actual losses, up to a limit specified in the Convention, which is currently 5,346 Special Drawing Rights (**SDRs**) per passenger, equivalent at current rates to US$7,490/£5,531. In other words, it is for the passenger to prove the financial impact of the delay. This requirement already acts as a safeguard against airlines finding themselves liable to pay disproportionate levels of compensation. It is also worth adding that, unlike some civil law jurisdictions whose jurisprudence includes the concept of "moral damages", English law does not award significant sums to reflect distress and inconvenience in delay cases.

It is not clear why the Government makes no reference here to UK261, which does set fixed compensation rates for delays to international flights, compensation which is available even in circumstances where passengers would be unable to prove any actual losses for the purpose of an MC99 claim. This fails to recognise the economic reality of the airline claims environment, which is that the vast majority of delay claims are made under EU/UK261 and very few MC99 delay claims are actually pursued. What is more, nothing in the consultation recognises that most claims are motivated not by a need to recover costs incurred by reason of the delay, but rather by the easy availability of fixed compensation with no evidential burden to discharge, encouraged and enabled by myriad "claims farm" organisations.

Obstacles to change

The UK is, in theory, free to legislate to create an entirely new system of compensation for delays, cancellation and denied boarding for international flights and operate that in parallel with MC99, just as it currently operates UK261. This could mirror the domestic system proposed, extending the benefit of ticket price-related compensation to low-cost carriers operating regional flights. (The concept translates less directly to more expensive long-haul flights but could be modified with retention of the three-hour delay compensation trigger and the addition of a cap in order to avoid the scenario whereby quantifying compensation as a percentage of the ticket price results in potential compensation payments in excess of the maximum €600/£520 under EU/UK261.)

The position is, however, slightly complicated by the terms of the Trade and Co-operation Agreement (**TCA**) reached between the UK and the EU in January 2021 (otherwise known as the "Brexit Deal"), which committed the UK to maintaining a high level of consumer protection and continuing to offer compensation for denied boarding, cancellation and delay. It also requires consultation with the EU on any matter related to consumer protection.

The TCA is not mentioned in the consultation, probably because to do so would not be compatible with the political characterisation of these proposals as a "Brexit dividend". The TCA may perhaps lie behind the Government's reluctance to propose any changes which would alter the compensation available to passengers on flights in and out of the EU. However, the TCA notably falls short of obliging the UK to continue to provide *identical* rights and protections to those available under EU261, so it is by no means an insurmountable obstacle to change.

Another clue to the motivation for maintaining the status quo may lie in the words of Lord Justice Newey in the English Court of Appeal judgment in *CAA v Ryanair* handed down earlier this month. The Court were being asked to diverge from a post-Brexit CJEU decision on extraordinary circumstances relating to strike action:

"In the context of international travel, there is virtue in a passenger's rights being the same whether his flight is from, say, London Stansted or Dublin. In fact an air carrier which had to make cancellations as a result of a strike would have an incentive to cancel flights from the United Kingdom rather than European Union airports were we to agree [with the request to diverge]"

With this in mind, international airlines may wish to comment on how they might commit to maintaining high standards of consumer protection for UK customers in circumstances where the penalties for not doing so are less onerous than in other jurisdictions.

We would suggest that consultation responses challenge the statement made in Question 21 that MC99 is an impediment to change, and put forward proposals for similar reforms in relation to international flights. This may serve to draw out the UK's policy position more clearly, but it is unlikely to result in this current round of changes being extended to include international flights.

Compulsory ADR

The proposed change with the most immediate practical impact on international airlines is the proposal that the granting of a licence to operate into and out of the UK be made conditional upon agreement to offer all passengers the opportunity to submit disputes to Alternative Dispute Resolution. Personal injury claims would be excluded from this, but the scheme would cover baggage claims, complaints in relation to disability regulations and unfair trading complaints (such as misleading advertising) as well as UK261 claims.

Airlines would pay a fee to sign up to an approved ADR provider, as well as a small fee of around £160 per case referred. They would be required to publicise the availability of ADR to passengers, who could choose to submit the dispute to ADR, but would not be obliged to do so. Decisions of the ADR body would be binding on the airline but not on the consumer.

There is another detailed Impact Assessment Paper[3] which accompanies the ADR proposal. Airlines will be aware that an ADR scheme is already offered in the UK on a voluntary basis and that the CAA also operates a consumer complaints resolution service called PACT. The policy rationale for change is summarised as follows:

"...consumers may be able to complain to the CAA through PACT, however the CAA does not have power to impose decisions on the airline. Alternatively, consumers can take action through the courts, but given the expense and required knowledge to do so this is not available to all consumers. Without mandatory coverage of consumers by ADR, we do not expect 100% voluntary ADR coverage to occur. As a result, intervention is required to ensure that all consumers have an accessible and affordable means of protecting their consumer rights. This proposal seeks to reduce consumer

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051030/mandatory-alternative-dispute-resolution-impact-assessment.pdf

“Surprisingly, claims farms do not appear to be deterred from taking on cases in which there has already been an ADR decision in the airline’s favour.”

detriment by offering all consumers such a mechanism to make a claim in cases where they believe consumer law has been breached”

An additional policy objective is to reduce the pressure on the courts of having to hear numerous low-value compensation cases. It is striking that the Impact Assessment refers to the perceived expense of pursuing a claim through the courts but makes no reference whatsoever to the role of “claims farms” in pursuing UK261 claims on a no win no fee basis, with minimal effort on the part of the passenger. It also neglects to recognise the role of claims farms in issuing proceedings at an early stage in order to exert pressure on airlines, instead painting a generalised picture of intransigent airlines who refuse to act reasonably and leave consumers with no option but to seek redress through the courts.

Anecdotal evidence from airlines who have chosen to participate in ADR suggests that many passengers faced with an ADR decision in favour of the airline will nonetheless still pursue a court claim. Surprisingly, claims farms do not appear to be deterred from taking on cases in which there has already been an ADR decision in the airline’s favour. This results in double expense for the airline in defending the claim through both ADR and the court.

The imposition of ADR is not, in itself, negative for airlines. The consultation seeks views on the structure of the scheme (e.g. multiple providers versus a single ombudsman) and the CAA does have the benefit of lessons learned from the current scheme, in particular the need to ensure appropriate levels of adjudicator expertise, a mechanism whereby airlines retain the ability to refer complex and novel matters to the courts and proposals to enable ADR providers to make decisions on a per flight rather than a per passenger basis. Consideration could also be given to making ADR providers’ decisions binding on both parties (absent manifest error, for example). There is scope to develop a system which benefits all involved.

However the most effective way to reduce the number of compensation claims in UK courts would be to reduce the available levels of compensation to the extent that the business models of the claims farms are threatened.

Greater enforcement powers for the CAA

Currently the CAA’s enforcement powers in relation to breaches of consumer law are limited to bringing court proceedings in circumstances where the breaches harm the collective interests of consumers. This is seen as increasingly unworkable; in its recent press release relating to the ongoing proceedings against Ryanair relating to UK261 claims arising out of flights cancelled due to industrial action, the CAA commented:

“Given consumers have been waiting for clarity on this subject since 2018, this process reinforces the need to modernise our powers. In this respect, we welcome the Government’s recent consultation on strengthening airline passenger rights.”

The new proposals would give the CAA the power to:

- Decide if an aviation business has breached consumer rights law
- Make directions to end infringements or stop them from happening in the future ·
- Order compensation or redress for the breach
- Impose financial penalties, where appropriate

The policy detail will be structured with reference to a prior consultation in relation to regulatory powers generally but this consultation asks whether there are any specific issues for the aviation sector that should be considered in the development of the CAA’s new administrative framework.

Accessibility of air travel and compensation for damage/ delay to mobility equipment

Mobility equipment is currently defined as baggage under UK domestic carriage by air legislation, which mirrors MC99. As such, the liability of airlines for its damage or loss on UK domestic flights is limited to 1,288 SDRs (approximately £1,300 or US$1800). The cost of modern wheelchairs far exceeds this. This limit can be waived if the passenger makes a Special Declaration of Value at check in and pays an appropriate fee.

It is proposed that the fee related to the Special Declaration of Value be abolished and the limit be replaced with an obligation to provide a suitable temporary replacement without delay and compensate up to the full value of the wheelchair or mobility aid, subject to the provision of reasonable evidence. This is based on a successful Canadian model. Other suggestions for improving the support for passengers with accessibility issues are sought.

This element of the consultation is principally aimed at giving consumers with disabilities the opportunity to help shape the policy and we imagine that airlines are unlikely to wish to object to the proposals. Many airlines already voluntarily waive liability limits in these scenarios. The imposition of increased liability by statute should provide clarity which will assist airlines in obtaining appropriate insurance coverage.

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