

Response to the Department for Transport's Consultation on Reform of the ATOL

September 2011

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1 INTRODUCTION

- 1.1 The Office of Fair Trading ('OFT') is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our goal is competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.
- 1.2 We adopt a market-informed approach, with a focus on outcomes that support productivity growth and consumer and business welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.
- 1.3 The OFT is broadly supportive of the Government's proposals to modernise the ATOL scheme and extend the protection offered in the Package Travel Regulations ('PTRs') to holidays that look like packages but fall outside the definition of a 'package' under the Package Travel Directive. However, we are concerned that the overall effect of the current proposals may be to increase confusion and decrease consumer protection in this sector.
- 1.4 OFT considers the following principles important in this context:
- transparency for consumers on the level of protection they have
 - clarity about how the provisions of the scheme will apply
 - consistent and appropriate levels of protection for consumers.

Transparency

- 1.5 We strongly believe it is vital, in this sector in particular, that consumers have access to clear information when making decisions. This ensures that consumers are aware of their rights, are empowered when comparing products, and that the market is competitive. Without transparency, consumers' ability to make informed decisions is impaired,

and the market does not operate on a level playing field which may lead to a lessening of effective competition.

- 1.6 There may be an argument for creating a specific legal responsibility on all the traders in the sector, whether agents, airlines or tour operators, to give clear information upfront about the level of protection that their flight or package provides. Specifying that this information needs to be given could help increase transparency and ensure that consumers can make informed decisions about insurance, risk and the comparative advantages of different offers. This could, for example, be achieved by specifying that the level of protection is material information under Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs') The OFT is working with the CAA to produce Guidance on the applicability of the CPRs to the sector.

Clarity

- 1.7 We believe that transparency is supported by clarity, and that without clear definitions and delineations between different levels of protection there is room for uncertainty and also the distortion of both consumer and business incentives.
- 1.8 The way 'Flight-Plus' has been constructed risks creating incentives for business' to circumvent the protections through complex referral systems or delayed approaches to consumers. Additional consideration should be given to this problem. One possible long-term solution could be to require that all flights have the same level of protection, thus avoiding any distortion and ensuring clear expectations by all parties, though this needs to be balanced against the risks of increasing prices for consumers and damaging the competitiveness of UK airlines. We appreciate that this is outside the scope of the immediate proposals but would support further discussions at a domestic and European level to move towards a more unified and consistent system.
- 1.9 The multiple tiers of protection envisaged by the reforms are potentially an obstacle to clarity and transparency – a unified regime might help avoid this – but if there need to be different levels of protection there

also need to be clear demarcations to avoid doubt or confusion about responsibilities and rights.

Effective and consistent protection

- 1.10 The proposals appear to create risks of reductions in the current level of consumer protection, including creating gaps within which consumers might encounter situations where it is not clear who is responsible for dealing with serious difficulties.
- 1.11 The proposal to exempt 'micro-businesses' from some of the provisions has the potential to distort the market by providing a competitive advantage to smaller firms or to companies dealing with consumers through smaller subsidiaries or operators. We think there are serious risks to clarity and consistency here. If the protections are merited for consumers we do not see the logic behind exempting smaller players - they should apply across the market. The end of the moratorium may lead to further uncertainties in the market as businesses try and adjust to the post moratorium environment or exit the market.
- 1.12 Similarly, the case for exempting domestic flights from the provisions is not fully persuasive. A large number of UK domestic flights are between locations on different islands. Physically, it may be equally difficult to get from, for example, Paris or Brussels to London as from Northern Ireland or the Scottish islands. Again, we appreciate that this point may be beyond the practical scope of the current proposals.
- 1.13 Our responses to the questions on the short term reforms and particular questions on the medium to longer term reforms explore these points in more detail.

2 SHORT TERM REFORMS

Definition of Flight Plus set out in Regulation 22

Q1: Do you agree with the proposed definition of a Flight-Plus as outlined above and set out in regulation 22? If not, what alternatives do you propose and why?

Q2: The Department's view is that a short time period between requesting elements of a Flight-Plus is most appropriate. Given this, do you agree with the proposed time period in which elements of a Flight-Plus must be requested by a consumer? If not, what alternative do you propose and why?

- 2.1 We agree in principle with definition of a Flight-Plus, but consider that there is a risk that the 'significant proportion' idea may need to be further specified to avoid uncertainty and a lack of transparency about coverage.
- 2.2 Given this concern, the Department for Transport ('DfT') may want to consider a specific definition for what could be deemed 'significant'. For example 'significant proportion' could be defined in monetary terms, such as x per cent of the total value of the offering. Alternative definitions could include a fixed monetary threshold, or coverage of certain specified products.
- 2.3 We have the following specific comments on the DfT's proposals:
- Para 4.13:
 - the proposals could distort competition between domestic and non-domestic holidays due to the differing levels of protection and the consequent impact on prices

- for domestic holidays, consumers may have specifically chosen them because they are lower cost and/or lower risk, only to face potentially more serious consequences if things go wrong.
- Para 4.1 6:
 - We suggest that the onus should be on the retailer to advise consumers exactly what category of package they have purchased and what level of cover applies. There is potential for CPRs breaches if material information is withheld. For avoidance of doubt it could be specified that the type of protection applicable is regarded as material information for the purposes of the CPRs. This could be achieved through legislation or via the current discussions between the Civil Aviation Authority and/or OFT on CPRs Guidance.
- Para 4.17:
 - We welcome the flexibility for travel trade companies to create an ATOL protected Flight-Plus product in some circumstances. However, this flexibility needs to be balanced with transparency and safeguards to ensure consumers are clear about the timing of ancillary offers where they are seeking an ATOL protected Flight-Plus product. We believe the proposed certificate might help address some of these issues.

Q3: Do you support the proposed definition of a Flight-Plus arranger in regulation 23? If not, what are your reasons? What alternatives might be proposed?

2.4 Whatever definition is agreed upon for a Flight-Plus arranger, the consumer must be in no doubt as to who is liable, and for what, in the event of a possible claim. Again, we believe the certificate approach could be helpful in providing clarity and reassurance to consumers.

Liabilities of a Flight-Plus arranger

Q4: Do you agree with the proposed liabilities of Flight-Plus arrangers in regulation 24 to 29 to provide alternative or refunds in the event of the insolvency of a supplier? Do you agree with the proposed changes to the ATT payment policy outlined in paragraph 4.28 and annex F? If not, what are your reasons and what alternatives could you suggest?

2.5 We support the proposals for alternative arrangements or where this is not possible, a refund and appropriate compensation.

2.6 With respect to:

- Paragraph 4.24 - we note the proposals to offer consumers of Flight-Plus products protections that are similar to some of those that tour operators selling package holidays are required to provide for consumers under the PTRs. Given the similarity in the nature of the products, we would prefer full alignment with the PTRs. We believe introducing an additional tier has the potential to confuse
- Paragraph 4.25 – we suggest there should be a mandatory requirement for arrangers to have insurance/protection rather than, as stated in the consultation document, an expectation that Flight-Plus arrangers 'will want to consider taking out supplier failure insurance to protect themselves against the possible cost of these liabilities.' Making it a requirement would:
 - ensure that consumer protection is not compromised, and
 - demonstrate commitment from the arranger and
 - provide certainty and clarity for consumers.

Approved body

Q5: Do you agree with the proposals to create an Approved Body as a new option for small businesses to meet the requirements of the ATOL scheme?

- 2.7 We see the rationale behind this approach but safeguards will need to be in place to ensure consistency in the level of protection offered and a level playing field.

Agency agreement

Q6: Do you agree that there should be a written agency agreement between principal and agent ATOL businesses covering the points in regulation 30? If not why not, and what reasons do you have?

- 2.8 Yes. We suggest that the written agreement should, in addition to the points in draft Regulation 30, include complaints handling and enquiries processes and information on where liabilities lie in the event of a claim.

Offences

Q7: Do you agree with the offences and penalties created? If not what alternatives do you propose? Are prison sentences appropriate for any breach of the ATOL regulations? Do you agree with the due diligence defence?

- 2.9 We agree with the proposals and suggest that the regulations may also want explicitly to refer to [possible] breaches of relevant banned practices in the CPRs as likely to raise concerns over a business' integrity and fitness. See our earlier comments on CPRs Guidance.

Micro-businesses moratorium from new regulations

Q8: Do you believe that micro businesses and start ups should be exempt from the parts of the draft regulations dealing with Flight-Plus? What would the impact of the moratorium be on the micro businesses concerned?

2.10 We believe the risks to consumers outweigh the potential benefits. On present expectations the regulations will come into operation in January 2012 and the moratorium ends in April 2014. We believe it is impractical to have a two tier system in operation in a market which is dynamic and international in nature. We think that that it:

- has the potential to cause consumer confusion about the level of protection available to them depending on their choice of supplier
- risks reduction in clarity for consumers
- has the potential to distort the competitive process.

Flight-Onlys

Q9: Do you agree with the proposal to amend ATOL protection for Flight-Only sales in this way and the rationale behind it?

2.11 We would not wish to see changes that result in a reduction in ATOL protection for some consumers. However, we can see that providing repatriation in the event of consumers being stranded without assistance could be a useful step in the absence of comprehensive cover for all flights. We think that in the long-term the UK and EU should consider moving towards consistent protections for all flights.

Q 10: Do you support the 'right to fly provider' exemption as set out in the draft regulations, including the concept of a 'specified operator'? If not what changes would you propose?

- 2.12 We support the principle contained within the proposal to protect and honour a commitment by an agent that has failed following the sale of a ticket.

Q11: How can it best be ensured that the proposed certificate is effective and proportionate, with costs kept to a minimum? Are there any practical difficulties with the proposals?

- 2.13 We support requiring greater clarity in the documentation that consumers receive. We think that a standard format, for example with tick boxes to show key information at a glance, would facilitate greater clarity.
- 2.14 A process to ensure that any follow-up paperwork is not issued until after the certificate has been issued should be developed and misuse of that process should carry a penalty. Proper use of the statement could be separately regulated or dealt with under the CPRs – several of the Schedule 1 banned practices deal with the misuse of membership of a code or endorsement. Improper use of the statement may breach various provisions of the CPRs, including Regulation 3 relating to professional diligence.
- 2.15 There will be some resource and enforcement implications in creating and maintaining a certification scheme.

3 MEDIUM TO LONGER TERM REFORMS

Bringing airlines into ATOL

Q 13: Should holidays sold on an 'agent for the consumer' basis be brought within ATOL? If so, what are your reasons? If not, why not?

- 3.1 Yes. This would bring consistency and reduce confusion for consumers – a key overriding consideration.

Q14: Should airlines be included in ATOL, so that consumers receive the same protection for all Flight-Plus and flight inclusive package holidays sold in the UK? If so, what are the reasons? If not, why not?

- 3.2 Yes, from the perspective of consumer protection, but the potential impact of the proposals on competition also requires some consideration.

EU initiatives: Package Travel Directive review and airline insolvency protection

Q18: We would welcome any preliminary views and evidence on PTD reform as it relates to packages involving air travel, and on EU thinking on airline insolvency.

- 3.3 OFT is generally supportive of wide coverage of travel protections at a European level, in order to ensure consistency and clarity.