

Response to the Department for Transport's Consultation on Proposals to Update the Regulatory Framework for Aviation

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1 INTRODUCTION

- 1.1 This is the response from the Office of Fair Trading (OFT) to the Department for Transport's consultation on proposals to update the Regulatory Framework for Aviation.
- 1.2 The OFT is the lead public body in the UK responsible for competition and consumer policy and enforcement, and our mission is to make markets work well for consumers. Our goal is for 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 law but are not overburdened by regulation.
- 1.3 Our response, based on the OFT's role and experience as a competition authority and a consumer protection body is confined to areas of particular interest, namely:
- the CAA's consumer role
 - the CAA's enforcement powers
 - proposal to extend the CAA's concurrent competition powers to airport services not provided directly or solely by the airport operator, and
 - proposed reform of the ATOL scheme.

2 THE CAA'S CONSUMER ROLE

Q5.1 We are proposing that the main focus for the CAA in pursuing its consumer objective should be on the 'end users' of air transport services. This primarily means passengers but also includes freight consumers and the end users of services provided by general aviation; for example, pupils at flight schools. Do you agree with this proposal?

2.1 The OFT supports a CAA objective focused on consumers as 'end users'. We suggest that the objective be illustrated with examples (such as freight consumers and pupils) for the avoidance of doubt in the future.

Q5.2 Do you agree that the principles set out in 5.31 are the right ones for the consumer objective and should be reflected in legislation?

2.2 The OFT considers these to be appropriate consumer objectives. There are benefits to having objectives enshrined in statute in terms of clarity, accountability and transparency as long as they are sufficiently high level to accommodate changes in the expectations placed upon the CAA and allows it to react promptly to new developments. Ultimately the CAA would appear to be best placed to consider how those objectives should be applied within the framework of the legal requirements placed upon it.

Q5.3 The Government is not proposing to take legal powers to issue guidance to the CAA in respect of its proposed new consumer objective. Do you agree with this? If not, please explain why.

2.3 The OFT, as stated above, believes the CAA are best placed to consider how its objectives should be applied within the framework of the legal requirements placed upon it.

Q5.5 Do you agree that the CAA should be given additional concurrent competition powers over 'airport services' which are not provided directly or solely by the airport operator? If not, please explain why.

2.4 The proposal to provide additional concurrent powers to the CAA would appear to be a sensible fit with its existing duties and powers.

3 THE CAA'S ENFORCEMENT POWERS

Q12.2 Should the CAA have access to a broad range of civil sanction powers in addition to its existing criminal enforcement powers? What would be the potential costs and benefits of doing this?

- 3.1 The OFT believes it is important for regulators to have a diverse toolkit in order to be able to apply the most appropriate tool for the best outcome across a range of problems. The tool should fit the need. In many cases firms will respond to having the problem drawn to their attention. In some cases injunctive or other civil action is sufficient to prevent harm to consumers but sometimes, where the offence is more serious and consumers are at risk of greater harm or detriment, or a deterrent effect is needed, a fine or prosecution may be appropriate.
- 3.2 The OFT is currently sharing its experience with the CAA on some of the powers we have in common, and will continue to do so in order to enable best practice across the regulatory space.
- 3.3 The OFT has found that access to a range of tools helps us to match the intervention (where one is needed) to the seriousness, scale and type of problem. We have also found that it takes time and effort to develop expertise in new tools and processes.

Q12.3 Which areas of civil aviation law would be appropriately enforced using civil sanctions? Are there any areas, such as safety, where civil sanctions would not be appropriate? (We have provided a list at 12.17 of circumstances where we believe that criminal sanctions are more appropriate).

- 3.4 It may be easier to provide for civil sanctions for all of the relevant legislation, thus enabling the CAA to pick the right tool for the problem at hand, rather than being constrained in their choice of tool. For example, breaches of safety legislation need a strong response, but civil action can allow a greater focus on preventing future harm and thus

should not always be ruled out. It may be appropriate to retain criminal penalties for safety-related problems for their deterrence effect.

4 TRAVEL COMPANY FAILURES: FINANCIAL PROTECTION FOR AIR PASSENGERS

Q13.1 Should the legislation be clarified so that 'flight plus' products fall unequivocally within the scope of the ATOL scheme?

4.1 This would reduce ambiguity. The proposals refer to 'significant' holiday elements. Any definition of 'significant' should be applied with caution as this could be dependent on individual circumstances. Determination of significance could be dependent on whether the consumer would have bought one holiday element without the other. In essence anything that looks to the consumer like a package holiday should be treated like a package.

Q13.2 How should we determine which products sold with flights are merely ancillary and should not therefore turn a 'flight only' sale into 'flight plus' holiday with financial protection? Please give examples.

4.2 Please see our response above on significant holiday elements. Considering the interdependency of products and services, accommodation and vehicle hire would seem obvious candidates for 'flight plus'. We suggest that some sort of threshold might be worth considering in determining what constitutes an ancillary product.

4.3 Non essential services could sensibly be regarded as ancillary.

Q13.4 Should holidays which are sold by companies purporting to act not as a tour operator but as an 'agent for the consumer' be brought into ATOL protection?

4.4 OFT's key concern here would be to ensure that consumers are clear what protections are attached to the options they are considering. An outcome that allows 'agents' to benefit from misperceptions by consumers that they would be covered would have unfortunate

consequences for both consumers and tour operators who could be undercut by those offering lesser levels of protection.

- 4.5 One potential answer might be to compel those not covered by the ATOL scheme to explicitly state they are not covered, although this would need to be considered in the light of other legislation.

Q13.6 Would it be beneficial to consumers to bring package holidays sold by airlines under the ATOL umbrella, rather than providing financial protection through the current alternatives?

- 4.6 This would bring the airline package holidays into line with the protections provided by the tour operators. However, the key issue is to ensure clarity for consumers regarding the level of protection offered by the different alternatives.

Q13.7 Do you agree that click-through or affiliate sales (e.g. where consumers are directed from airline websites towards other holiday products) should be brought under ATOL protection?

- 4.7 This would reduce ambiguity particularly where branding on the click through site is similar to that on the airlines site and therefore potentially confusing for the consumer.

Q13.10 Which of the 3 options should be the basis for regulating 'flight only' sales by 3rd parties (i.e. all parties excluding airlines):

Option A: exclude all 'flight only' sales from the ATOL scheme? Would this option create an unacceptable increase in consumer detriment?

Option B: include all 'flight only' sales in the ATOL scheme but exempt all bona fide airline agents from paying the ATOL Protection Contribution (APC)?

Option C: retain the current arrangements?

Please explain your answer, elaborating where possible the pros and cons of the three options.

4.8 OFT believes that the need for transparency is paramount to enable consumer confidence as well as competition on the merits between the different companies and business models operating in this sector. Option B appears to offer the most clarity.

Q13.11 Option B: do you agree that the 'ticket provider' category is no longer fit for purpose in terms of clarity and consumer protection? If so, should the 'ticket provider' category be removed entirely (and therefore, all third party sales of flights would require ATOL protection). Or, should it be removed in conjunction with the introduction of an 'airline agent' category, so that sales by 'airline agents' would not be required to make an APC payment but could carry the ATOL brand in return for alternative safeguards provided by the airline and its agents?

4.9 OFT considers that the critical issues here are:

- transparency for consumers in terms of the levels of protection provided, and

- a level playing field for different models to compete on, so that internet sales are not given an advantage due to lower levels of protection without the differences being made explicitly clear to consumers

Q13.12 How would you define an 'airline agent'?

4.10 The natural definition would be a trader who sells an airline's products to consumers, whether or not directly employed by the airline.

Q13.14 What are your views on the proposal that all consumers should receive an ATOL Certificate when booking an ATOL protected flight or holiday?

4.11 We agree in principle to the concept of an ATOL Certificate. The important thing from our perspective is that consumers should know early in the booking process whether or not they are ATOL protected. The Certificate would then be a good way of reinforcing what they should already know. This could be a 'virtual' certificate.

4.12 There would be some resource and enforcement implications to creating and maintaining a Certification scheme.