

# Consumer complaints handling and ADR

## CAA policy statement and notice of approval criteria for applicant ADR bodies

CAP 1286



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## Foreword

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We are today announcing the CAA's final policy on consumer complaints handling and alternative dispute resolution (ADR). This follows extensive consultation with our stakeholders and our recent designation as the competent authority for ADR entities in our sector.

The approach we consulted on at the beginning of the year still largely stands. We believe that the future of consumer complaints handling in aviation lies not in the CAA handling individuals' complaints, but in ADR schemes, such as consumer ombudsmen. These bodies are directly funded by the businesses that use them, but have clear and independent governance, with oversight provided by the relevant regulator. This has been the norm for many years in major consumer service sectors, such as financial services, telecoms and energy. It is now time for aviation consumers to benefit from the simple, swift and effective approach to dispute resolution that ADR brings.

There is one key difference between our sector and the aforementioned markets: ADR will not be mandatory in aviation and the CAA has no powers to require airlines – the focus of our policy – to join an ADR scheme. Our policy is therefore focused on creating the conditions within which voluntary ADR can develop and thrive. As a competent authority for ADR we can set the rules of the schemes in our sector, and deliver better redress outcomes for consumers than we can in our present voluntary role as a complaint handler, but we cannot force airlines to participate.

This means that in developing our policy we have had to make some compromises between what consumers and their representatives want and what the airline industry is prepared to support. Our strong preference is for ADR to be free at the point of use, as it is in other sectors. Nonetheless, we have decided to allow ADR entities to charge a nominal fee to consumers using their services, as permitted under the European Directive on ADR.

Our approach on fees responds to industry concerns that if ADR is free then it will attract spurious and/or poorly prepared complaints, which are costly to administer. This is seen as a particular risk in aviation, because the vast majority of disputes relate to claims for lump sum compensation under the sector's consumer protection rules. However, we have balanced this concession to the industry with a requirement that if a complaint is upheld in any way, the consumer's fee will be refunded. Assuming that complaint outcomes from ADR schemes in aviation will be similar to those in other sectors, this means that the vast majority of consumers will not pay to use ADR.

Airlines have also made it clear to us that they are not prepared to support the costs of both private ADR and the CAA's current complaint handling service. As such, we have decided to make withdrawal of our service conditional on airlines carrying at least 50% of passengers in and out of the UK demonstrating firm commitment to ADR by September

2015 – a realistic target given the characteristics of the airline industry. However, this means that there could be a period when the only option for some consumers seeking redress is the courts. This is not desirable, so we have set out a number of measures to mitigate this risk:

1. The CAA will rigorously enforce the ADR Directive's information requirements, which oblige businesses to tell consumers if they are not prepared to use ADR;
2. We will provide additional information to the market under our consumer information powers, if we feel this will sharpen incentives for industry to participate in ADR;
3. We will, for the foreseeable future, provide a backstop complaints handling service for disability access issues, reflecting the particularly high risk of detriment to this group of consumers; and
4. Finally, if, having been given the chance, voluntary ADR does not develop as we envisage, we will actively seek legislative opportunities to make participation by industry compulsory.

Our overriding objective is for all consumers flying in and out of the UK to have access to high quality ADR. We have been encouraged by the constructive and proactive way that the airline industry has engaged with this issue so far. Now that the CAA has made its position clear, we hope to see real progress towards that goal before the end of this year.



**Andrew Haines**

Chief Executive of the Civil Aviation Authority

# Introduction

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## What is this document?

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1. This document is the Civil Aviation Authority's (CAA) policy on consumer complaints handling and alternative dispute resolution (ADR). We define ADR as a complaints handling process that:
  - Provides an out-of-court solution for disputes between consumers and traders, as specified in the European Directive on consumer ADR<sup>1</sup> (the ADR Directive);
  - Is provided by an ADR entity, which has been approved by an independent competent authority on grounds of independence (from consumers, traders and anyone else that might have an interest in the ADR outcome), and which offers impartial, transparent, effective, fast and fair alternative dispute resolution procedures – again, following the ADR Directive;
  - Is privately, rather than publicly, funded, e.g. through businesses paying membership fees, levies or case fees to the ADR entity – this is common practice in existing UK ADR arrangements
2. In this document we explain the approach we intend to take to ensure that consumers booking flights serving UK airports have access to high quality complaints handling arrangements. Our policy encompasses both how we will carry out our new role as the competent authority for ADR entities in the UK aviation sector, as well as what we will do to encourage as many airlines as possible to make high quality ADR arrangements available to their passengers.
3. We consulted on our draft policy in early 2015<sup>2</sup>, following the conclusion of the Government's own consultation on implementing the ADR Directive, and the publication of the Government Response in November 2014<sup>3</sup>. Alongside our consultation we published the findings of independent consumer research on ADR.
4. We received 15 responses to our consultation, mainly from airlines and their trade associations and consumer bodies. We have also received ongoing input on this issue from the CAA Consumer Panel, which is independent from the CAA. We have published a separate document ([CAP1285](#)) detailing the

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1417446013180&uri=CELEX:32013L0011>

<sup>2</sup> [CAP 1257](#)

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf)

responses we received and the changes we have made to ensure that the issues and concerns raised by stakeholders are addressed in this document.

5. In this document, we provide clarity on two issues:

- **Part 1** explains the CAA's vision for complaints handling in the UK aviation sector. This includes the type of ADR we want to see develop if we are to end our longstanding, direct involvement in complaints handling, as well as the steps we will take to encourage as many airlines as possible to participate in ADR.
- **Part 2** sets out the criteria we will use in our role as a competent authority for the approval of ADR entities in our sector. These will consist of the minimum criteria prescribed by the ADR Directive and a number of additional criteria which we believe are necessary to ensure a higher level of consumer protection principally that ADR entities that we approve must impose binding decisions on businesses if a resolution cannot be agreed between the two parties.

## Who is this document for?

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6. This document is aimed at informing all stakeholders with an interest in aviation consumer complaints handling, or consumer complaints handling in general, especially:

- Airlines operating in the UK market, who receive consumer complaints (some 20,000 of which are passed to the CAA each year because they have not been resolved to the consumer's satisfaction);
- UK airports, who also receive complaints from consumers (some of which are referred to the CAA), although not usually in the volumes experienced by airlines;
- Trade bodies, particularly given the important role trade bodies have played in other sectors in setting up complaints handling schemes;
- Providers of ADR services, such as ombudsman schemes, who may be good candidates to deliver an aviation complaints handling scheme;
- Consumer bodies, due both to their broad interest in improving outcomes for consumers through efficient and effective complaints handling, and their own roles in dealing with enquiries and complaints from individual consumers;

- Legal professionals and claims management companies (CMCs), who are playing an increasingly prominent role in aviation complaints by helping consumers take court action;<sup>4</sup>
- The media, who play an important role in helping consumers understand their rights and the redress available to them; and
- Regulators and other authorities in the UK and Europe, who can assist us with broader perspectives on good practice, and on how the complaint handling landscape is evolving at both the national and cross-border level.

## Scope of our policy

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### Which consumer complaints are covered by our policy?

7. The ADR Directive applies to “disputes between consumers and businesses concerning contractual obligations in sales or services contracts, both online and offline”. The terms and conditions of a service contract between an airline and its passengers are set out in the airline’s conditions of carriage. Certain statutory rights flow from these contracts.<sup>5</sup> The issues that dominate complaints currently handled by the CAA are all covered by airlines’ conditions of carriage. These include: delayed and cancelled flights; denied boarding; lost or damaged baggage; and disability access.<sup>6</sup> We expect ADR entities to deal with all of these types of complaints.
8. Indeed, one of the core requirements of the ADR Directive is that approved ADR entities must have a general understanding of law to understand the legal implications of the disputes they deal with. Clearly, in the aviation context this must be the relevant law for resolving passenger disputes. To support this, the Directive also places an obligation on consumer protection authorities, such as the CAA, to cooperate closely with ADR entities. This cooperation includes the provision of information and guidance necessary for the handling of consumer disputes.<sup>7</sup> This will help ensure that ADR entities are equipped to deal with the main issues that give rise to air passenger complaints. However, we will also expect ADR entities that we approve to build on their own knowledge and expertise.

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<sup>4</sup> Particularly claims against airlines for fixed sum compensation under Regulation (EC) 261/2004 (covering passenger rights in the event of denied boarding and of cancellation or long delay of flights – see <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0261>)

<sup>5</sup> For example, compensation for denied boarding under Regulation (EC) 261/2004.

<sup>6</sup> Based on data collected by the CAA’s Passenger Advice and Complaints Team (PACT), the main drivers of consumer complaints are: denied boarding, cancelled or delayed flights (these alone account for over 90% of PACT complaints); delayed, damaged and lost baggage; and assistance for passengers with a disability or reduced mobility.

<sup>7</sup> See Article 17 of the ADR Directive.

9. Moreover, the ADR Directive does not prevent approved ADR entities from dealing with non-contractual complaints. In practice, we would expect any approved aviation ADR entity to be able to deal with the main issues faced by passengers, whether or not statutory protections apply. In the event of ADR becoming compulsory in aviation in the future, we would expect that it would cover disputes over contractual and statutory obligations.

### **Which businesses are covered by our policy?**

10. Under The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 the CAA has been designated as the competent authority for ADR entities offering ADR services in:
- Areas for which the CAA has regulatory responsibility; and/or
  - Any other areas for which the CAA has oversight under any enactment.
11. The CAA is therefore the competent authority for ADR entities covering disputes concerning contractual obligations arising from consumer contracts for air transport services provided to or from a UK civil airport. In practice, this means complaints about airlines, whether or not they are based in the UK. Any ADR entity established in the UK and seeking approval from a competent authority to provide ADR services in this area would have to apply to the CAA.
12. For clarity, although we have regulatory responsibility under certain pieces of consumer protection legislation for the sale of flights to UK consumers by travel agents, we do not intend to be the competent authority for ADR entities handling complaints about travel agents. This is because the vast majority of complaints about travel agents are not about activities or issues that we regulate.<sup>8</sup> Our view is that the competent authority for ADR schemes covering travel agents should be the Trading Standards Institute, which will act as a 'generic' competent authority for sectors that do not have a designated competent authority.<sup>9</sup>
13. The provisions of the ADR Directive do not apply to airports, as airports have no contract with the consumer. However, we see no reason why UK airports could not use an approved ADR entity to handle the type of complaints they receive. We would therefore encourage the voluntary use of ADR by airports, and would ensure that we make our competent authority function available for the approval of such scheme. In the event of ADR being made compulsory in aviation at some point in the future, we would make a strong case for the inclusion of airports in

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<sup>8</sup> In respect of travel agents, the CAA primarily considers enforcement action regarding price transparency and unfair contract terms.

<sup>9</sup> The Trading Standards institute will perform this role on behalf of the Secretary of State for Business, Innovation and Skills.

such arrangements, given the statutory obligations they have towards disabled passengers and passengers with reduced mobility.

### **Which businesses are the focus of our policy?**

14. Our policy is primarily concerned with how complaints against commercial airlines are handled, particularly whether airlines voluntarily use ADR entities. This is because the ADR Directive is about disputes arising from consumer contracts, and it is airlines that passengers contract with. Furthermore, the vast majority of complaints currently received by the CAA are about airlines.
15. However, there is no reason why other aviation businesses could not join an ADR entity overseen by the CAA as a competent authority. For example, as noted above, ADR could be used to resolve complaints about assistance that the law requires is provided to consumers with a disability or reduced mobility at airports.

### **What is the geographical scope of our policy?**

16. We want to see ADR arrangements that meet the criteria set out in this policy statement in place for complaints from consumers of any nationality about flights operated by any airline departing from or arriving at UK airports.
17. This goes beyond our duties under Regulation (EC) 261/2004 (covering the rights of passengers in the event of flight disruption) and Regulation (EC) 1107/2006 (covering the rights of disabled persons and persons with reduced mobility when travelling by air) to provide facilities for consumers to complain about infringements of their rights:
  - Under Regulation (EC) 261/2004, the CAA only accepts complaints about disrupted flights from UK airports (or disrupted flights from a non-EU airport to a UK airport).
  - Under Regulation (EC) 1107/2006, the CAA only accepts complaints about the provision of assistance at UK airports and on flights from UK airports.
  - For all other journeys where there is an alleged infringement of rights (i.e. from another EU Member State to the UK), passengers must complain to a designated body in that country.
18. These arrangements – which apply to the vast majority of complaints seen by the CAA – do not serve consumers or airlines well. For example, UK consumers can be faced with the difficulty of trying to make their case with an organisation based in a different country and with the possibility of language barriers.
19. We know that some airlines would prefer a pan-European system for ADR as it would mean having to deal with fewer organisations when resolving consumer complaints, but we see no evidence of such a system developing in the short- to

medium-term. However, by putting all flights in and out of the UK within the scope of our policy, our intention is that more consistent and coherent complaint handling arrangements will at least develop for the UK aviation sector in the coming years.

20. In practice, the above means that consumers flying to or from UK airports with an airline that is signed up to ADR should be able to use the same approved scheme to deal with a complaint regardless of where their flight departed from. Airlines, on the other hand, would only have to deal with a single ADR entity in order to resolve the complaint. For airlines that do not use ADR, we will ensure that our duties under Regulation (EC) 261/2004 and Regulation (EC) 1107/2006 will continue to be met (see paragraph 58).
21. The CAA will ensure that any ADR entity approved by us as a competent authority meets the requirements set out in this policy statement. Where an airline joins an ADR entity approved by a competent authority in another Member State and uses that ADR entity to handle complaints about flights in and out of the UK, we will look at the type of ADR provided by that ADR entity and consider whether it satisfies our policy. Ultimately, the type of ADR that airlines choose to sign up to will determine:
  - Whether the CAA withdraws its own complaint handling service – we will not do this unless at least half of the market is covered by ADR arrangements that meet the criteria in this policy statement (see paragraph 57); and
  - Whether there is a need to press the UK Government for national legislation mandating participation in ADR if airlines are resistant to voluntarily signing up to ADR that meets our requirements.

## Part one – Our approach

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### Our objectives

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22. Effective and efficient complaint handling is a cornerstone of any industry that delivers choice, value and fair treatment for its consumers. If consumers know that, in the event of anything going wrong with their purchase, their complaints will be resolved quickly, fairly, professionally and transparently, they will be more confident as a result. Confident consumers are more likely to shop around, driving effective competition and economic growth. They are also more likely to hold businesses that don't meet their expectations to account, resulting in higher standards.
23. The CAA has no specific statutory duties relating to consumer complaints handling.<sup>10</sup> However, the strong relationship between effective complaints handling and well functioning markets gives us a legitimate interest in this area. The better that markets function, the less need there should be for regulatory intervention, supporting Better Regulation and deregulation agendas.
24. Our objective is to ensure that all consumers flying in and out of the UK have access to high quality ADR mechanisms if they cannot resolve their complaint with an airline. In line with the ADR Directive, ADR must be independent, impartial, and a quicker, cheaper and more attractive option than court action. It must also be able to provide the consumer with a final decision on their complaint, avoiding the need for consumers to have to go to court. ADR mechanisms should also:
  1. Ensure that airlines face strong incentives to resolve complaints relating to flights to or from UK civil airports efficiently, effectively and fairly 'in-house'. (We want other service providers to face these incentives too, but we focus on airlines for the reasons set out in paragraph 14); and
  2. Not adversely affect the CAA's enforcement role, which relates to the collective interests of consumers and depends on, among other things, access to timely and accurate data about consumer complaints. Equally, the CAA's enforcement role will not in any way adversely affect the operation of complaints handling arrangements.

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<sup>10</sup> The CAA has duties under Regulations (EC) No 261/2004 and (EC) No 1107/2006 to receive complaints relating to, respectively, denied boarding and delayed and cancelled flights, and provision of assistance for disabled persons and persons with reduced mobility. However, these do not extend to handling complaints (i.e. considering representations of both sides and proposing a resolution).

## The need for change

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### The problem with current arrangements

25. The above objective will not be achieved if the CAA continues to handle consumer complaints itself, through its Passenger Advice and Complaints Team (PACT). Instead, we want complaints that cannot be resolved through airlines' in-house processes to be referred to private ADR entities funded directly by the businesses that use them and with independent regulatory oversight by the CAA.
26. In our view, the two main benefits of private ADR over current arrangements are:
- **Greater flexibility to design funding arrangements that set correct incentives.** At present, UK airlines fund most of PACT costs (currently around £1.3m per year), through direct and indirect CAA charges. UK airlines, as a whole, are responsible for approximately three quarters of PACT complaints. However, there are significant differences in the average cost-per-complaint paid by airlines in this group, which ranges from £10 to over £150. This is because our charges to airlines are based on passenger and cargo volumes, so are not directly related to how many PACT complaints or enquiries that airline generates. By contrast, ADR presents the opportunity to eliminate 'free riding', enforce 'polluter pays' for poor in-house complaints handling, and establish that individual airlines (both UK and foreign) pay a proportionate and fair contribution towards the handling of complaints from dissatisfied consumers.
  - **Contractual arrangements that can bind airlines to implement rulings.** This is essential in a sector with strong and often contested consumer protection provisions. The CAA has no such powers to require airlines to adhere to decisions made by PACT (or even require airlines to provide information to inform our decisions), and this significantly undermines consumer confidence.

### Could PACT be turned into an approved ADR entity?

27. If the CAA had not become a competent authority, the ADR Directive would not have prevented us from developing PACT into an approved ADR entity that could contract privately with airlines. However, there was no compelling reason to do this, given that complaint handling is not an activity that we are required to carry out, and that specialist consumer ADR entities already exist (and have expressed an interest in the aviation sector).
28. Furthermore, the ADR Directive does not compel airlines to use ADR, so we would have been in no better a position than specialist ADR entities in terms of our ability to introduce incentive funding and binding decisions, which we see as key to delivering the outcomes set out above.

29. Moreover, the CAA being a public enforcement body raises a number of other challenges that would not apply to commercial ADR entities. These include: susceptibility of ADR decisions to judicial review; the need for information barriers between ADR and enforcement functions; and perceptions of independence, e.g. if the CAA was taking enforcement action against a particular airline that was also involved in an ADR case at the same time.
30. The CAA accepted the Government's invitation to be designated as a competent authority because the role is much better suited to our core skills and expertise as a regulator. As a competent authority, the CAA will ensure that ADR operates in the general consumer interest by ensuring that the criteria to qualify as an ADR entity in the ADR Directive (and any additional criteria we believe should be applied in the consumer interest) are adhered to. At the same time, we will not be encumbered by negotiations or disputes with individual airlines over ADR funding, service quality or decisions, and with no conflict arising with our primary role as an enforcement body.

### **Could PACT continue its service without being an approved ADR entity?**

31. We explain above why it is not appropriate for the CAA to act as both a competent authority and an approved ADR entity. However, it would be possible to continue to run PACT on an unapproved basis. This is because the ADR Directive does not prohibit unapproved consumer complaints handling services from operating. However, we believe that there are good reasons for not continuing the PACT service once ADR is established in the aviation sector:
  - The information obligations in the ADR Directive discourage the promotion of unapproved complaint handling schemes. As explained below, in the event of an unresolved dispute, airlines must provide information about an approved ADR entity or entities, regardless of whether or not the business is willing to use ADR. We believe it would be confusing for consumers if an unapproved ADR entity was signposted at the same time.
  - More fundamentally, the CAA continuing to provide a complaints handling service is likely to discourage the industry from establishing its own ADR arrangements. UK-based airlines, who largely fund PACT, have told us they are unwilling to support the costs of both PACT and private ADR. Non-UK airlines may see little reason to change their approach if they continue to receive the benefits of PACT (including the 'buffer' it appears to provide between consumers and the courts) in return for their current minimal financial contribution.

## The type of ADR we want to see

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32. Because ADR will be voluntary in aviation, there is a need for us to balance the needs of consumers against what industry is prepared to offer, in order to maximise the chances of industry-led ADR being established at all. The responses to our consultation have indicated some differences between consumer and airline views. These centre largely on charging consumers to use ADR and the proportion of the market that needs to be signed up to private ADR before we start to withdraw our own complaints handling service.
33. In this section we explain the type of ADR we want to see develop in the UK aviation sector. In the following section we set out how we will ensure that all consumers flying in and out of the UK have access to this type of ADR.

## A high level of consumer protection

34. As the competent authority for the aviation sector, the CAA will be required to ensure that the ADR entities that it assesses meet the minimum requirements set out in the ADR Directive (see below). However, the CAA may also apply more stringent approval criteria for the purpose of ensuring a higher level of consumer protection.
35. Part two of this document sets out the criteria the CAA will use to assess ADR entities who apply to us for approval. In the remainder of this section we explain our rationale for selecting these criteria.

## Minimum requirements under the ADR Directive

36. The main operational rules that have to be followed by all ADR entities in all sectors are summarised below. As the ADR Directive is a minimum harmonisation directive, the CAA must adopt the following criteria as a competent authority:
- The individuals in charge of the ADR process must have a general understanding of the law, possess the necessary knowledge and skills in dispute resolution, and be independent and impartial.
  - The ADR procedure must be free of charge or available at a nominal fee to consumers.
  - ADR entities have three weeks from receiving a complaint file in which to inform the parties concerned if the ADR entity is refusing to deal with a case.
  - Dispute resolution must be concluded within 90 days of receiving the complete complaint file. This timeframe can be extended in the case of highly complex disputes.
  - ADR entities must make available specific information about their organisation, methods and cases they deal with, and provide annual activity reports.

- Consumers must have the option to submit a complaint (and supporting documentation) and to exchange information with the airline through the ADR entity either online or offline.

### **Additional CAA requirements for approval**

37. Following consultation, the CAA has chosen to apply the following additional criteria for ADR entities who apply to us for approval:

- ADR must be available for the most common types of disputes between passengers and airlines (see paragraph 38 below);
- If ADR entities are unable to reach a mutually acceptable settlement, they must make a decision that is binding on the airline (if the consumer agrees with the decision);
- Fees for consumers must be kept to a minimum;
- Fees for consumers must be refunded by the ADR entity if the complaint is upheld by the ADR entity in any way;
- Fees must not be charged to consumers whose complaint relates to access or equality issues.

### **ADR must be available for the most common types of disputes between passengers and airlines**

38. We would expect any approved ADR entity to be able to deal with all of the most common causes of complaints currently handled by the CAA. At a minimum, consumers must be able to use ADR to resolve disputes relating to a flight to or from the UK in the following areas:

- Denied boarding, delay, or cancellation;
- Destruction, damage, loss, or delayed transportation of baggage;
- Destruction, damage, or loss of items worn or carried by the passenger;
- Problems faced by disabled passengers or passengers with reduced mobility when using air transport services; and
- Any more general disputes arising where the consumer alleges that the business is not trading fairly.

### **ADR decisions must be binding on businesses**

39. Aviation consumers have robust rights. These rights, and particularly the availability of substantial compensation for certain infringements, means the possibility of litigation is perhaps greater in aviation than some other consumer markets. Civil court action provides a route to a binding outcome and therefore ADR needs to offer an attractive alternative. This should not prevent an ADR

process from also being able to negotiate mutually acceptable settlements between parties – many ADR complaints are resolved this way, see paragraph 47).

40. As such, we see it as essential that, if a mutually acceptable settlement cannot be found, any ADR entity we approve should make a decision that is legally binding on the airline, if the consumer agrees with the decision. This is common practice in other UK ADR schemes. We set out below why we will not approve ADR entities that propose to resolve disputes by also imposing a decision on the consumer.
41. Our consumer research on ADR<sup>11</sup> found strong support for the proposition that if the consumer accepts an ADR entity's decision it should be binding on both parties, but if the consumer rejects the decision there should be the right to have recourse to court. This arrangement is standard practice in most UK ADR schemes.
42. Airlines generally support such 'one way' binding decisions, although some have claimed that these arrangements would be unfair to airlines. We do not agree with this minority view for the following reasons:
  - Consumer confidence in industry-funded ADR arrangements (and consumers' willingness to use ADR as an alternative to the courts) will be enhanced if consumers have a fallback option.<sup>12</sup> This should be seen as a way of building trust in new arrangements, rather than giving consumers any real advantage over businesses. This is because feedback from established ADR entities strongly suggests that consumers very rarely do take court action, even if an ADR decision is not in their favour. This appears to be because, through use of the scheme, consumers come to view the ADR scheme as independent and impartial.
  - There is the potential for consumer confidence in ADR provision in general to be undermined if consumers can incur time and effort in pursuing a dispute through ADR only for the business not to comply with the ADR entity's decision. If cases such as this receive public attention, the result could be many consumers deciding to go direct to court.

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<sup>11</sup> We published this research in our consultation document ([CAP 1257](#)).

<sup>12</sup> Research has found a clear link between ADR schemes in which businesses are bound to accept the decision and the level of consumer trust in the scheme, as reflected in the level of complaints directed to the scheme. See: Hodges, C., Benöhr, I. and Creutzfeldt-Banda, N. Consumer ADR in Europe (Hart Publishing, 2012).

- There is also the potential for consumers to be misled into making purchases from businesses which refer to ADR membership as a benefit of buying from them, but who do not comply with ADR decisions arising from those purchases.

43. It should also not be the case that an ADR decision is completely immune from challenge and we would encourage ADR entities and participants to explore ways for legal issues that emerge from ADR cases to be referred to the courts for a ruling to provide legal certainty. For example, the UK Pensions Ombudsman is able to refer any question of law to the high court for determination.<sup>13</sup> However, this should be on the basis that the parties agree that the court's ruling would not affect the outcome of the specific ADR case in hand but would provide certainty for future cases.

### **Fees must be kept to a minimum**

44. As set out above, airlines believe that charging consumers to use ADR will discourage spurious and poorly prepared claims and limit the involvement of CMCs, since a fee would have to be paid for each individual claim.
45. Our strong preference is that ADR is free at the point of use. Nonetheless, the ADR Directive does permit a 'nominal fee' to be charged to consumers and we have decided to allow this for ADR entities that we approve in order to maximise the chances of voluntary ADR developing. However, we recognise consumer groups' strong opposition to 'charging consumers to complain', and would emphasise that any reputational benefits to businesses from voluntarily joining ADR are likely to be diminished if the scheme they join charges consumers a fee.
46. Neither the European Commission, nor the UK Government, has defined what 'nominal' means in the context of consumer fees for using ADR. In practical terms, our view is that a nominal fee should be much lower than the fee charged to the business for using the ADR process and its sole purpose should be to help deter consumers or their representatives from submitting frivolous complaints.
47. As ADR in the UK is typically free at the point of use, there are no direct comparators from other sectors, against which an ADR fee for aviation complaints could be benchmarked. However, we consider that the lowest fee for starting a claim in the civil court provides a relevant yardstick in the sense that it represents an existing direct cost to the consumer to access a dispute resolution process. This fee is currently £25<sup>14</sup> and we would be very unlikely to approve an ADR entity proposing a higher fee.<sup>15</sup> Additionally, if an identical complaint has

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<sup>13</sup> Pension Schemes Act 1993, s 150(7)

<sup>14</sup> <https://www.justice.gov.uk/courts/fees>

<sup>15</sup> We would only consider revising this position if we were presented with sound evidence that a fee of this

been submitted by multiple passengers on the same booking (as is frequently the case with complaints related to EC 261/2004), the fee should only be charged once.<sup>16</sup>

48. Some stakeholders have argued that this approach ignores the fact that civil court claims attract additional fees if the case proceeds to a hearing. However, we do not accept this argument, because ADR is not bound by the rules of civil procedure, which increase the handling time and cost of cases in court. These include an ordered sequence of investigation and presentation of evidence and arguments, and a hearing with a judge in the presence of all parties.<sup>17</sup> (In fact, according to the most recent figures from Ombudsman Services, over half of the complaints investigated by its energy and telecoms ADR schemes are resolved without the need for any kind of formal determination.<sup>18</sup> For the Financial Ombudsman Service, the proportion is even lower: the latest figures show that just 6% of cases required an ombudsman to make a final decision.<sup>19</sup>)

### **Fees must be refunded if any award is made to the consumer**

49. There is a risk that allowing consumers to be charged to use ADR may deter consumers with genuine grievances from seeking redress. In order to ensure that only consumers whose complaints are entirely without merit have to pay a fee we will require that:
- Any fee charged to the consumer is refunded if their complaint is upheld in any way by the ADR entity; and
  - This refund arrangement is made clear to consumers by the ADR provider before they agree to enter into the ADR process.
50. We also encourage ADR entities to explore whether pre-authorisation of debit and credit cards could be used so that the consumer is not out of pocket until their complaint has been resolved.

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level was failing to prevent spurious or vexatious complaints.

<sup>16</sup> For the avoidance of doubt, this would mean a family of four travelling on the same booking would pay £25 to submit four compensation claims, not £100.

<sup>17</sup> Hodges, C., Benöhr, I. and Creutzfeldt-Banda, N. Consumer ADR in Europe (Hart Publishing, 2012)

<sup>18</sup> For energy the proportion of complaints requiring a binding 'Ombudsman Services decision' in 2013-14 was 44% ([http://www.ombudsman-services.org/downloads/OS\\_annualreport\\_energy\\_2013-14.pdf](http://www.ombudsman-services.org/downloads/OS_annualreport_energy_2013-14.pdf)). For telecoms the equivalent figure was 48% ([http://www.ombudsman-services.org/downloads/OS\\_annualreport\\_communications\\_2013-14.pdf](http://www.ombudsman-services.org/downloads/OS_annualreport_communications_2013-14.pdf)).

<sup>19</sup> <http://www.financial-ombudsman.org.uk/publications/ar14/index.html>

## **Fees must not be charged to consumers complaining about access or equality issues**

51. Under Regulation (EC) 1107/2006, airlines and airports are required to provide assistance to consumers with a disability or reduced mobility to enable them to participate in the market on the same basis as other consumers. The Equality Act 2010 also provides individuals with protected characteristics with protection from unfair treatment by businesses.
52. We do not believe consumers should be charged to make a complaint about their fundamental right to access air travel services. As such, a consumer fee should not be charged in these types of cases.

## **How the CAA will enable change**

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53. We have set out above the type of ADR that we wish to see develop in the UK aviation section. Because the CAA has no power to mandate industry participation in ADR, we will need to implement strong incentives for industry to voluntarily join an ADR entity that meets our requirements. This is a key difference between aviation and other major consumer service sectors in the UK, such as financial services, legal services, energy and telecoms, where ADR is mandatory. We set out these incentivising measures in this section.
54. Our policy is designed to allow for the possibility that airlines may choose to join an ADR entity overseen by a competent authority in another Member State to resolve complaints about flights to or from the UK. Indeed, it is likely to be impractical and uneconomic for airlines to join an ADR scheme in every Member State that they operate in.
55. The CAA will ensure that any ADR entity approved by us as a competent authority meets the requirements set out in this policy statement. Where an airline uses an ADR entity approved by a competent authority in another Member State to handle complaints about flights in and out of the UK, we will look at the type of ADR provided by that ADR entity and consider whether it satisfies our policy. Ultimately, the type of ADR that airlines sign up to will determine:
  - Whether the CAA withdraws its own complaint handling service – we will not do this unless at least half of the market is covered by ADR arrangements that meet the criteria in this policy statement (see paragraph 57); and
  - Whether there is a need to press the UK Government for national legislation mandating participation in ADR if airlines are resistant to voluntarily signing up to ADR that meets our requirements.

## **Ending the PACT service**

56. As stated above, we see ending the PACT service as a necessary measure to enable the development of private ADR. However, we are committed to

continuing to provide the PACT service until at least half of all passengers departing from or arriving at UK airports are served by airlines who are committed to a form of ADR that meets our requirements. It does not matter if the relevant ADR entity is approved by us as a competent authority. We explain why we have chosen this threshold below.

57. Table 1 (below) sets out an indicative timetable for the closure of the PACT service. It assumes that we see contractual commitment on our deadline of 1 September 2015.

**Table 1: Indicative timetable for closure of PACT service**

Date(s)	Milestone	CAA response
1 September 2015	Contractual commitment to ADR by airlines who collectively carry at least half of all passengers to or from UK airports.	Begin preparations to wind-down the PACT service in time for the potential ADR 'go live' date of March 2016 (see below).
September 2015 – March 2016 <sup>20</sup>	Period between contractual commitment and the ADR 'go live' date.	Continue to accept complaints into PACT and handle them in line with prevailing procedures.
March 2016 onwards	ADR covering half of passengers ready to accept complaints from consumers.	PACT switches to approach set out in Table 2 and will only handle complaints about access issues; any existing 'open' complaints retained and handled in line with prevailing procedures (unless airlines wish for them to be passed to ADR).

### Our legal obligations to receive complaints

58. Unless every airline serving the UK joins ADR at the same time, ending PACT's service would not mean an end to our direct involvement in consumer complaints. This is because we have statutory duties to receive complaints in accordance with Regulation (EC) 261/2004 and Regulation (EC) 1007/2006<sup>21</sup>, whichever ADR arrangements emerge as a result of our policy. We set out in Table 2 (below) how we are likely to respond to the situations that we think will emerge, depending on circumstances that exist at the time.

<sup>20</sup> We understand that it takes around six months from an ADR provider being awarded a contract to it being ready to accept complaints from consumers.

<sup>21</sup> Under Article 16 of Regulation (EC) 261/2004 and Article 15 of Regulation (EC) 1107/2006, Member States must designate a body to whom consumers can complain regarding infringements of the Regulations. The CAA is designated as the body to receive such complaints in the UK and must forward complaints to designated authorities in other Member States as appropriate.

**Table 2: How the CAA will meet its legal obligations to receive complaints**

Situation	CAA response
For airlines and airports that have joined ADR	We would expect complaints from consumers that would have previously been received by the CAA to go to ADR instead. We would continue to receive intelligence about these complaints in order to ensure that we are still able to carry out our role as the UK enforcement body for the Regulations (as provided for under Article 17 of the ADR Directive). We do not think a system where consumers are expected to recount their complaint to both the CAA and ADR would be in consumers' interests.
For airlines and airports that have not joined ADR	The CAA still needs to provide a service to receive complaints from consumers about an infringement of their rights under Regulation (EC) 261/2004 and Regulation (EC) 1107/2006. Our approach to the two Regulations will be different:
	<ul style="list-style-type: none"> <li>▪ <b>For Regulation EC 261/2004 complaints</b>, which represent around 80% of current PACT complaints, the CAA providing any kind of complaint handling service is likely to be a disincentive to airlines using a private ADR entity. Therefore, we will only do the minimum required in terms of handling complaints under the Regulation. This is likely to mean us treating the complaint as intelligence to support our enforcement work (mirroring the approach we would take for airlines that do join ADR, see above). We would not seek to investigate and mediate individual complaints as PACT does at present. Instead, we would encourage consumers to report the apparent infringement to us, and provide information on our website explaining the law and how consumers can seek a remedy through the courts.</li> </ul>
	<ul style="list-style-type: none"> <li>▪ <b>For Regulation EC 1107/2004 complaints</b>, which are relatively few in number and can involve significant detriment to consumers in vulnerable situations, we will continue to take responsibility for investigating and mediating complaints. Additionally, these complaints may be made against airports as well as airlines, and airports, which have no contract with consumers, are not within the scope of the ADR Directive.</li> </ul>

**The 50% milestone**

59. The UK airline sector is characterised by a large number of operators of varying sizes. While this is good for competition, it also presents significant challenges to collaborative initiatives, such as the establishment of voluntary ADR. For example, only four airlines have a market share of more than 5% (in terms of passengers carried), and over 150 airlines account for about half of the market. We therefore believe that 50% is a realistic target for a critical mass of participation that will then encourage the rest of the market to follow.
60. However, we want to be absolutely clear that we see 50% as a milestone, rather than the end point for the CAA's interest in complaints handling. We recognise the risk that PACT's service may end without every airline serving the UK committed to private ADR. For passengers of those airlines who have a

complaint that they have not been able to resolve directly with the business, court action will be their only option.

61. One of our mitigations is that participation in ADR is likely to be attractive to airlines. At present virtually all passenger airlines serving the UK cooperate to some extent with the PACT service – which has some similarities to ADR – even though they do not have to. Compared to PACT, ADR is likely to provide better information to airlines about customer problems. It also offers the opportunity to rebuild and improve relationships with customers, which may be damaged irreparably if a regulator has to get involved. Other key benefits include enhanced corporate reputation and access to a more cost effective and consistent alternative to litigation. Evidence suggests support for ADR among businesses that have used it.<sup>22</sup>
62. There are also a range of measures that we can use to encourage participation among more reluctant airlines, as described in the next section. These range from informational interventions to seeking legislation to mandate participation in ADR once voluntary approaches have been exhausted.
63. We believe that ADR offers significant benefits to consumers compared to current complaint handling arrangements. We also believe there are good reasons that airlines will want to switch voluntarily to ADR, although the CAA needs to make its position on PACT clear first. However, we want to be clear that we can only accept a situation where the PACT service has been withdrawn and some passengers have no access to ADR on the basis that this situation is temporary.

## Maximising participation in ADR

64. This section explains the measures we may take to encourage airlines to participate in ADR. In line with our usual approach, our preference is to use the provision of information to consumers to maximise incentives for airlines.
65. However, it is necessary to have fallback options if, for whatever reason, private arrangements do not materialise, fail after having been established, or if widespread adoption of ADR does not happen once the initial threshold is met.
66. We have deliberately not devoted significant resources at this stage to exploring options beyond the provision of information to consumers, as our strong preference is for industry to lead on the provision of ADR. The time we allow for industry to come to its own arrangements will also allow us time to give further consideration to our contingency plans. Therefore, at this stage it is only

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<sup>22</sup> E.g. [a survey of 335 businesses](#) by the European Commission's Business Test Panel found that 73% of businesses were satisfied with their experience of using ADR, that 82% said they would use ADR again in the future, and that 70% preferred ADR to the courts to settle disputes.

necessary to provide a brief overview of the options we are considering beyond the provision of information.

### **Information obligations under the ADR Directive**

67. The ADR Directive introduces a range of information obligations on businesses that are intended to encourage voluntary participation in ADR, principally by raising consumer awareness of ADR and requiring businesses to disclose whether they are willing to use it. Businesses should be aware of the following requirements:
1. From July 2015, any business that is obliged or has voluntarily committed to using an approved ADR entity to resolve disputes, must provide information about that ADR entity on their website and, if applicable, in the terms and conditions of sales or service contracts.
  2. From July 2015, in the event of an unresolved dispute, all businesses must provide information about an ADR entity that would be competent to deal with the complaint, and advise whether or not the business will use ADR in an attempt to settle the dispute in question. This means that businesses operating in sectors where the use of ADR is voluntary will have to advise their customers whether or not they are willing to refer the complaint to an appropriate ADR entity.<sup>23</sup>
  3. From January 2016, all businesses who sell their goods or services online (e.g. airlines) must provide a link to the Online Dispute Resolution (ODR) platform on their website, whether or not the business has voluntarily committed to using ADR.<sup>24</sup> All websites which act as a platform for businesses to sell their goods and/or services (e.g. online travel agents; price comparison websites) must also provide a link to the ODR platform.

### **Information obligations under the Civil Aviation Act 2012**

68. We will give serious consideration to whether there is a need for disclosure of information regarding ADR provision beyond the requirements of the ADR Directive, particularly if those requirements do not appear to be having the desired effect in terms of airlines joining ADR.

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<sup>23</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf)

<sup>24</sup> [Regulation \(EU\) No 524/2013](#) obliges the Commission to establish an online platform (the ODR platform) to facilitate communication between the parties and an approved ADR entity, in the event of a contractual dispute arising from an online transaction. A translation service will be available on the platform to assist with disputes involving parties based in different EU member states. The ODR platform will not seek to resolve the dispute itself; rather it will (if both parties agree) channel such disputes to a relevant ADR scheme.

69. The CAA has a duty under the Civil Aviation Act 2012 to make information available to help consumers compare the offers available to them in the market; this may include whether a business is committed to using ADR to resolve any disputes. Our information duties policy statement ([CAP 1143](#)) explains our duties and the powers that underpin them in more detail.
70. It is not possible to say what the appropriate intervention would be at this stage (or indeed whether we would need to intervene at all), but the options available to us include:
- Simply providing information to the market (including other providers of consumer information) about which airlines are committed to using ADR;
  - ‘Naming and shaming’ airlines that do not participate in ADR (an approach that may be more appropriate where airlines also have a poor record of compliance with consumer protection legislation);
  - Requiring airlines to actively disclose in an appropriate place on their website<sup>25</sup> whether or not they are a member of an approved ADR scheme (rather than only in response to an unresolved complaint, as required by the ADR Directive).

### Other consumer information

71. Our dialogue with airlines found that ADR was seen by airlines as an effective way to respond to an increasingly high profile claims management industry in the aviation sector. Airlines told us they are particularly concerned about the cost of investigating spurious or poorly prepared claims for financial compensation. Some airlines see these risks as greater when claims management companies (CMCs) are involved.
72. We do believe, however, that CMCs will remain a viable option for some customers of airlines that have not joined an ADR scheme. We will provide clear information on our website (and encourage other consumer information providers to do the same) about the option of enforcing a claim against an airline through the courts to encourage consumers to take action themselves. This may include providing information about CMCs, including the advantages and disadvantages of using them.

### Exploring legislative options

73. We believe that consideration should be given to making the use of ADR in the aviation sector mandatory if the approach set out in this policy statement fails to deliver our vision. We note that legislation was required to deliver aviation ADR in Germany when voluntary approaches failed. We note that the Government

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<sup>25</sup> E.g. ‘Customer services’, ‘complaints’, ‘feedback’ areas.

intends to continue to consult with stakeholders and to carry out further work to assess the costs, benefits and impacts of any future simplification of ADR provision in the UK, including making ADR compulsory for all sectors of the economy.<sup>26</sup> We will therefore remain in close contact with the Government on this issue.

### **A CAA-procured ADR scheme**

74. Another option to encourage industry participation in ADR would involve the CAA procuring an ADR scheme from an approved ADR entity. We could either do this unilaterally or in partnership with airlines which support ADR but which are unable to meet our 50% market share threshold.
75. The model that seems most viable would be to fund the essential overheads of the scheme (i.e. to make it available for use) through regulatory charges, with the handling of complaints accepted by the scheme funded through case fees paid directly by businesses. This approach has already been used in the UK: it was used by the self-regulatory body the Royal Institution of Chartered Surveyors (RICS) to deliver an ADR scheme for the industry it oversees. The information obligations in the ADR Directive would also apply, and the additional measures described above would be available to us to encourage participation. We would ensure that any funding from our charges is recovered in the most equitable way possible, i.e. an ADR scheme that we procure would not be funded in the same way as PACT.
76. We do not see that this would be a conflict of interest as the CAA would not run the scheme, but would procure it from an independent ADR entity which would need to be approved and overseen according to the same criteria as any other ADR entity. If we withdrew our approval from that ADR entity for failing to meet the relevant criteria, we would simply seek to replace it with a different ADR entity. Moreover, the objective would be to eliminate the CAA's involvement in time, by handing over the full financing of the scheme to the industry, once enough airlines were committed to it.

### **A simple ADR landscape**

77. Regardless of the sector in which a dispute arises, there should be a consistent way for consumers to understand the responsibilities of businesses and their rights to redress, and to obtain assistance in accessing ADR and contacting a relevant ADR entity. This will help ensure that ADR can deliver the widest possible benefits to consumers and the economy.

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<sup>26</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf)

78. The Government sees a single point of contact as key to making the ADR landscape easier for consumers to navigate. The Government has announced that it will be providing additional funding to the Citizens Advice telephone and online consumer advice service<sup>27</sup> so that it can provide specific advice and assistance to consumers attempting to resolve a disputes, including referring them directly to ADR entities where appropriate.
79. The CAA supports the Government's objective to make the ADR landscape easier for consumers to navigate. Although we will continue to provide consumer information on the CAA website, we do not see that providing a separate frontline advice and guidance service for aviation consumers is conducive to this aim, particularly when we no longer have a complaints handling role. We have therefore begun to explore how this advice function could be provided in future by Citizens Advice.

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<sup>27</sup> The Citizens Advice consumer advice service replaced the OFT's Consumer Direct service in 2012.

## Part two – Approval criteria for applicant ADR entities

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### Core requirements

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80. As the competent authority in relation to ADR services in the areas for which the CAA has regulatory responsibility, the CAA must be satisfied that ADR applicants seeking to provide ADR services in these areas either meet, or would be able to meet within a reasonable period of time, the requirements set out in
- Schedule 3<sup>28</sup> of The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015<sup>29</sup>.

### Additional requirements

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81. Pursuant to regulation 9(5) of The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, the CAA is using its existing power under section 20 of the Civil Aviation Act 1982 to impose additional requirements on ADR applicants for the purpose of ensuring a higher level of consumer protection.
82. These additional requirements are deemed to be included in Schedule 3, regulations 12 and 13(1) and (2) and paragraph (i) of Schedule 2 of the Regulations.
83. The CAA's additional requirements are that ADR applicants must satisfy the CAA that they meet, or will meet within a period of time that the CAA considers reasonable, the following requirements:
1. As a minimum, the ADR process is available for consumer disputes relating to flights to or from UK civil airports in regards to the following issues:
    - a) Denied boarding, delay, or cancellation of flights;
    - b) Destruction, damage, loss, or delayed transportation of baggage;
    - c) Destruction, damage, or loss of items worn or carried by the passenger; and

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<sup>28</sup> <http://www.legislation.gov.uk/ukxi/2015/542/schedule/3/made>

<sup>29</sup> [http://www.legislation.gov.uk/ukxi/2015/542/pdfs/ukxi\\_20150542\\_en.pdf](http://www.legislation.gov.uk/ukxi/2015/542/pdfs/ukxi_20150542_en.pdf)

- d) Problems faced by disabled passengers or passengers with reduced mobility when using air transport services<sup>30</sup>; and
  - e) Any more general disputes arising where the consumer alleges that the business is not trading fairly.
2. In the event of being unable to reach a mutually acceptable settlement, the ADR entity will make a decision which, if the consumer agrees with the decision, becomes legally binding on the trader.
3. Any fee charged to the consumer by the ADR entity to use ADR procedures is:
- a) Kept to a minimum, its sole purpose being to deter consumers or their representatives from submitting frivolous complaints;
  - b) Charged only once if an identical complaint is submitted by multiple passengers on the same booking;
  - c) Refunded to the consumer if the complaint is upheld by the ADR entity in any way, with this arrangement being made clear to the consumer before they agree to use the ADR process;
  - d) Not charged to consumers whose complaint relates to access or equality issues.

## Supplying information

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84. ADR entities seeking approval from the CAA must provide with their application:
- 1. The information required under Schedule 2 of The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. This includes a reasoned statement which sets out how the applicant complies, or proposes to comply, with the requirements set out in Schedule 3, and our additional requirements as set out above;
  - 2. Information to satisfy the CAA that the ADR applicant is established in the UK for the purposes of regulation 9(4)(a) of the Regulations; and
  - 3. Such other information as the CAA may require in order to assess whether the ADR applicant meets the requirements in Schedule 3.

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<sup>30</sup> As defined in section 83(7) of the Civil Aviation Act 2012 as “a service for the carriage by air of passengers or cargo to or from an airport in the United Kingdom”.