

Review of airline contract terms

CAP 1815

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Executive Summary

The vast majority of passengers flying to and from the UK have a positive and trouble-free experience. A small minority, however, will experience a problem when they have not followed certain rules set down by the airline. For example, certain airlines charge a fee for passengers that need to check in or print their boarding pass at the airport, even if the passenger had intended to check in online but had simply overlooked doing this in their preparations for the flight. Other airlines have rules on how their tickets are used and will, for example, automatically cancel the ticket for a return flight in cases where the passenger does not take their outbound flight (and will charge the passenger a fee to reinstate the return flight even where the passenger missed their outbound flight through no fault of their own). Although only a small minority of passengers are caught out by these rules in practice, and although issues such as ticket price, convenience and service quality are more important factors in passenger choice, the impact of these rules on individual passengers can be significant, for example in having to pay a sizeable fee in order to travel as planned.

Airlines set out and enforce these rules through the contract between the airline and the passenger. Not all airlines apply the same rules, and differences exist between different airline business models (full service, low-cost and tour operator). Notwithstanding the diversity of the different service offerings of different airlines, as well as the different approaches that they take to the rules in their contract, it is a legal requirement for these rules to be fair and balanced and for consumers to be able to understand the contract and to be made aware of the contract terms which could catch them out.

Over the course of the last two years we have considered the fairness and transparency of the contract terms of fourteen major airlines flying to and from the UK. In our discussions with these airlines they have explained that, across each of the key contract terms that we have considered, the rules set down in their contract terms are intended to protect the economic interests of both airlines and passengers as a whole. For example, airlines say that they charge passengers a fee for checking in at the airport because it encourages passengers to check in online, which allows airlines to reduce the staff and infrastructure they need at the airport and which, in turn, allows them to reduce costs and to pass on savings to passengers in the form of lower fares. Airlines that enforce rules on the order in which their tickets are used do so because they say it allows them to price differently for different market segments, which allows them to offer low fares and special deals which they could not offer otherwise.

We acknowledge that airlines are entitled to pursue such interests, including through setting and enforcing¹ rules through their contract terms. And we acknowledge also that these rules can lead to positive benefits for passengers, for example through the availability of lower fares. However, concerns have arisen for us in relation to the proportionality of these rules for some airlines, and specifically the consequences for passengers in terms of how much they might be charged, and in their ability to travel as planned, if they do not follow the rules correctly. Through our work on airline contract terms we have sought to better understand the nature and extent of the economic and commercial interests that are linked to a number of key airline contract terms. These terms were selected on the basis of their perceived fairness by passengers. We have also explored with the airlines in the project whether there are other, more proportionate, means of protecting these interests. In particular, we have considered whether solutions can be found that distinguish genuine passengers that had intended to follow the rules but had failed to do so through no fault of their own, from situations where an individual or organisation is seeking to exploit the rules to gain a financial or commercial advantage over the airline. Another important consideration for us has been the transparency and prominence of the contract terms that are most likely to catch passengers out. In the CAA's view, if passengers are not aware of, or do not understand, the consequences of not following the rules set down in the contract, it is unfair to expect them to be able to comply.

We are pleased to report that, in many cases, airlines have worked with us to make their rules more proportionate and fairer for passengers. For example, over the course of the project a number of airlines have removed the fee that they charged previously for processing refunds of Air Passenger Duty in situations where the passenger does not travel. We are also pleased to report that a number of airlines have implemented 'key terms' summary documents to give greater prominence to the contract terms that have the potential to catch passengers out. A number of other airlines undertook wholesale reviews of their contract terms in order to make them simpler and easier to understand for passengers. We would like to thank these airlines for their cooperation in these matters.

As explained above, although we feel that we have made substantial progress overall on the fairness, prominence and transparency of the contract terms of these fourteen airlines, there are still a number of areas where we are not satisfied and where we feel that there is further work to be done. In particular, we are disappointed that almost half of the airlines in the project have not implemented a 'key terms' summary document for their contract terms. As explained in this report, although none of these airlines has definitively ruled out introducing a key terms document in the future, it is still disappointing that they have not made progress on what, to the

¹ For example through applying charges for non-compliance.

CAA, is a relatively simple and straightforward pro-consumer measure which would, in fact, assist passengers in complying with the airline's contract terms. In addition, we remain concerned at the level of the charges applied by some airlines for providing refunds, correcting a spelling mistake in a name in a booking, and checking in or printing a boarding pass at the airport. We are also concerned that a number of airlines have not made further progress in updating their rules to ensure that passengers who do not take their outbound flight are not caught out when their return or onward flight has been cancelled by the airline.

In terms of progressing these issues, we will continue to keep the contract terms of each of the airlines in the project under review. We will also write to a broader range of airlines to alert them to this report and to encourage them to review their contract terms for fairness, prominence and transparency, and to adopt the good practices highlighted in this report. We will also continue to consider whether the CAA is best placed to tackle the contract terms issues identified in this report using its legal enforcement powers. However, it should be noted that the underlying law on contract terms, which the CAA has drawn on to establish its assessment criteria, is general consumer protection law and was not designed to tackle the specific issues that we have encountered in our work and as set out in this report. It should be noted also that the success of any legal action against a particular contract term is likely to depend heavily on the facts in each case, in particular how the contract term was enforced in practice by the airline and the impact of this on the individual consumer. In contrast, the CAA's enforcement powers are based on the collective interests of consumers, which suggests to the CAA that action by individual consumers might be more successful than that by a public body such as the CAA.

We are of the view that, in order to drive a further step-change in the fairness, prominence and transparency of airlines' contract terms, a change to the underlying rules covering airlines' contract terms, and the enforcement of these rules, would be necessary. Unfortunately, the CAA is not a rule-making body in its consumer protection role and its associated enforcement powers are relatively limited. Instead, as part of our response to the Government's Aviation 2050 green paper consultation we intend to encourage the Government to consider the issues raised in this report and whether there are any further interventions open to it to ensure that the contract terms of all airlines flying to and from the UK are fair and balanced, that consumers are able to understand the contract, and that airlines make consumers aware of the contract terms that could catch them out.

Introduction

More than 290 million passengers flew to and from the UK last year. The vast majority of these passengers had a trouble-free journey, but a small proportion will have suffered disruption to their flight when things did not go 'according to plan' for the airline. For example, delays and cancellations will have occurred due to issues with the operation of the flight, such as a technical fault with the aircraft, or due to external factors such as bad weather. But disruption is not just limited to incidents where the physical operation of a flight does not go according to plan. Airlines' business and operational models are based, in part, on passengers following certain rules, in particular rules around booking a flight, checking in, carrying baggage, and taking the flight itself. In many cases, airlines seek to encourage passengers to comply with these rules through the imposition of financial sanctions (i.e. additional fees and charges) for failing to follow the rules correctly.

Airlines benefit from such rules in that they can enable them to reduce costs. For example, airlines that require passengers to check in online are able to reduce the number of staff that they need at the airport. Alternatively, such rules can assist airlines in maximising their revenue, for example through the sale of ancillary products such as additional cabin baggage. Competition between airlines means that a proportion of this benefit is passed through to passengers, for example through lower fares, or through allowing passengers to customise the service to their needs and their budget (for example in choosing to take only hand luggage in order to reduce the price of their ticket). Although, in principle, such rules can work in the interests of passengers as a whole, passengers that fail to follow these rules correctly, even if as the result of an honest mistake by the passenger, can encounter problems with their bookings and, in some instances, can find themselves unable to board their flight.

Although the specific rules applied by different airlines have changed over time, these rules have a long history. For many decades airlines based their rules on a standard template developed by the International Air Transport Association (IATA), which is a trade association incorporating many, but not all, of the world's major airlines. Following liberalisation, new airline business models developed, in particular the low-cost airline model, which led to greater flexibility in these rules in some areas², but new restrictions in others³. Although the rules have changed over time,

² See, in particular, the later section on using tickets out of order (so called 'coupon sequence and use').

³ For example only offering the ability to check in for free if the passenger does so online.

and differences exist between different airline business models and between airlines themselves, it is standard practice for airlines to apply their rules through contract terms included in a document typically called the ‘conditions of carriage’.

The fact that these rules are incorporated into the contract between the passenger and the airline means that the contract, and the rules within it, must comply with domestic and EU legislation covering fair trading. In the UK, the Consumer Rights Act 2015 (‘CRA15’) is the main piece of law protecting consumers from unfair terms in consumer contracts⁴ (in the context of this report, the term “consumers” should be interpreted as referring to “passengers” and the two terms are used interchangeably). The CRA15 sets out two requirements for a contract term to be compliant: first, the term must be fair and, second, it must be transparent. As explained by the Competition and Markets Authority (‘CMA’) in its guidance on the unfair terms provisions in the CRA15⁵, the purpose of both requirements is to achieve fairness overall, and the fairness test is more likely to be met where there is transparency. The practical application of these tests is covered in more detail in the section in the report on the relevant law. From the perspective of the consumer, the effect of these requirements is that a contract term that is found to be unfair under the CRA15 cannot be enforced by the business against the consumer.

It is ultimately for the courts to interpret and apply the provisions in the CRA15 to specific airline contract terms, based on the facts in each case. Passengers impacted by unfair contract terms are able to seek a remedy themselves through the courts. In addition, by virtue of it being the sectoral regulator for aviation and an enforcer of the CRA15, the CAA is able to take action to tackle more general issues of fairness in contracts for carriage by air using its enforcement powers under the Enterprise Act 2002. The CAA’s enforcement powers under the Enterprise Act 2002 limit its scope to infringements which harm the “collective interests of consumers”. Accordingly, it is not the role of the CAA to become an alternative source of private redress⁶ for passengers impacted by specific airline contract terms, but rather it is the CAA’s role to identify and address, where appropriate⁷, broader fairness issues

⁴ Parts 1 and 2 of the Act consolidate and replace the Unfair Terms in Consumer Contracts Regulations 1999.

⁵ <https://www.gov.uk/government/publications/unfair-contract-terms-cma37>.

⁶ The CAA is the Competent Authority for approving bodies providing alternative dispute resolution (ADR) to operate in the aviation sector. The CAA’s policy statement covering consumer complaints handling and ADR (CAP1324; <http://www.caa.co.uk/CAP1324>) sets out the criteria that ADR bodies must meet in order to receive approval from the CAA. One of these criteria is that ADR must be available for the most common types of disputes between passengers and airlines, including general disputes arising where the consumer alleges that the business is not trading fairly, which includes disputes arising under the CRA15.

⁷ For further information on how the CAA prioritises its consumer protection work, please refer to “CAP1233: Prioritisation Principles for the CAA’s Consumer Protection, Competition Law and Economic Regulation Work”, which can be found here: <https://goo.gl/gxW4vj>.

with airline contract terms or industry-wide practices which, in the CAA's view, harm (or have the potential to harm) a large number of passengers.

It is within the scope of this role that the CAA has conducted its review of airline contract terms. Given that airlines' contract terms, as included in their conditions of carriage, can sometimes run to many dozens of pages, it was necessary for the CAA to focus its review on the contract terms that, in its view, give rise to the greatest potential to harm the collective interests of consumers. In order to guide it in identifying these terms, the CAA conducted consumer research to understand consumers' perspectives on the fairness of airline contract terms, the main findings of which are covered in subsequent sections of this report. Although the research showed that individual consumers have varied views on the fairness of different contract terms, and indeed that the concept of fairness is often a very personal one, the research was helpful in assisting the CAA in identifying the contract terms that consumers consider to be unfair or, in some cases, very unfair. In addition, in revealing consumers' views on the factors that drive fairness and unfairness, the CAA has been able to benchmark individual airline contract terms against consumers' overall expectations of what represents a fair deal and, in doing so, has revealed where improvements could be made to make the arrangements fairer and more balanced in the eyes of consumers.

Having identified the priority issues and contract terms to focus on in its review, the CAA then engaged with the top fourteen⁸ airlines flying to and from the UK⁹ to seek improvements to their contract terms in relation both to the transparency of the terms and their fairness. The outcome of the CAA's work with these airlines can be found in later sections of this report.

⁸ The CAA began its project with fifteen airlines, however Monarch Airlines went into liquidation in October 2017.

⁹ By numbers of passengers carried. See Appendix 1 for a list of these fourteen airlines.

The relevant law

Consumers frequently purchase goods and services and, as a result, enter into a wide range of standard contracts. However, consumer research has shown that consumers do not generally read contracts thoroughly before they make their purchase. Research¹⁰ conducted by the CMA¹¹ in 2011 found that many consumers do not read contracts in full, but instead focus on headline elements such as the price. The research also found that, in the real world, consumers have limited processing power and that, even for consumers that take the time to read contracts, their ability to make sense of contracts is significantly affected by the way information is presented. For example, complex information in contracts can lead consumers to take different decisions than they would have otherwise taken had they been given simple, clear and easy to understand information about the contract in good time. Similarly, consumers can make particular errors when a contractual decision relates to things (such as charges or services) that take place over time, or in uncertain circumstances. Further, consumers typically overvalue the present relative to any future time, which makes them less willing to spend time now in understanding how the contract deals with problems which may occur in the future. It also means that consumers tend to ignore or undervalue future (and contingent) charges, so firms can make such charges higher than if consumers paid them full attention.

According to the CMA's research, although most consumers thought that the most important information about the deal was clear to them, fewer than half agreed that contracts were clear about key risks involved or what would happen if things went wrong. This is an especially relevant point in relation to passenger air travel since tickets based on basic economy fares tend to be non-refundable and non-transferable. The findings of the CMA's research suggest that, at the point that a consumer is booking a flight, they would be unlikely to consider the possibility that they might fall ill, for example, and therefore might need to cancel their flight or transfer it to another person, or that they might miss their flight through circumstances outside of their control and might therefore need to change their journey plans. Passengers' rights and obligations in each of these uncertain future scenarios are typically dealt with in the airline's conditions of carriage. For these reasons, it is especially important that businesses ensure that the terms in their

¹⁰ https://webarchive.nationalarchives.gov.uk/20140402172855/http://oft.gov.uk/shared_oft/market-studies/consumercontracts/oft1312.pdf.

¹¹ At that time the Office of Fair Trading.

conditions of carriage are fair and that they specifically highlight any terms that impose potentially surprising, significant or onerous obligations on the consumer.

The particular difficulties experienced by consumers in engaging with contracts, and the ease with which these difficulties could be exploited by businesses, has led to legal protections for consumers to ensure they are treated fairly. The CRA15, which came into force in October 2015, strengthened the already existing consumer rights in place for protecting consumers against unfair contract terms. As described previously, the CMA has provided detailed guidance on the unfair terms provisions of the CRA15 and has also published a number of short guides¹² to assist businesses in ensuring their terms are fair. It is the responsibility of all consumer facing businesses, including airlines, to keep their contract terms under review to ensure that they are fair and comply with the CRA15. In addition, airlines and other consumer facing businesses must ensure that their contracts, and the information they provide to consumers more generally, comply with the Consumer Protection from Unfair Trading Regulations 2008 ('CPUT') and do not mislead consumers.

The CRA15¹³ states that a contract term is unfair "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer". As explained by the CMA in its guidance, there will be a 'significant imbalance' in the term if it is significantly weighted in favour of the business, for example by allowing it to impose a disadvantageous burden on the consumer. In the CMA's view, balanced contracts provide for consumers and businesses to enjoy rights that are of equal value and of equal extent. A 'significant imbalance' can also occur where a business uses a term to put the consumer in a position that is less favourable than that provided for by the law. In the CMA's view, this can occur when a business imposes excessive financial sanctions on the consumer for breaching the contract. The CMA's guidance explains also that a term can be unfair even if it has not yet caused any detriment to consumers – the test of unfairness is based on the potential to do so.

As quoted in the paragraph above, the imbalance between the parties is described in the CRA15 as being 'contrary to the requirement of good faith'. As explained by the CMA in its guidance, 'good faith' requires there to be open and fair dealing and covers the drafting of contracts as well as how they are carried out. The CMA characterises the concept as looking to good standards of commercial morality and practice. In the CMA's view, businesses should draft their contracts in a way that respects the legitimate interests of consumers. In order to achieve the openness required by good faith, the CMA considers that terms should be clear and should not

¹² <https://www.gov.uk/government/publications/unfair-terms-explained-for-businesses-individual-guides>.

¹³ Section 62 of the CRA15.

include hidden traps for consumers. Where terms are particularly disadvantageous or surprising they should not be hidden away in the small print, but instead should be drawn to the consumer's attention. Openness is not enough on its own. In the CMA's view, businesses must also deal fairly with consumers and must not take advantage of them¹⁴. The Court of Justice of the European Union (CJEU) has also considered the meaning of 'good faith' and said that it should be considered broadly and that courts should consider whether the consumer would have accepted the term if the contract had been agreed on in individual contract negotiations with the consumer¹⁵. The CMA considers that the CJEU's ruling means that, in formulating their contract terms, businesses should actively take into account the legitimate interests of the consumer.

Transparency is a key aspect of fairness and there is a separate obligation¹⁶ for terms to be written in plain and intelligible language and to be legible. The CMA's guidance explains that consumers should be able to understand the impact of particular terms on them. The CJEU's view is that it is of fundamental importance for consumers to require information on the terms of the contract and the consequences of entering into the contract¹⁷. Businesses are therefore required to ensure that consumers can make an informed choice and that any technically difficult terms are explained clearly. If a business fails the specific transparency test this does not automatically make the term unfair. However, as explained by the CMA, if there is any ambiguity in the meaning and a consumer takes court action, the court is required to apply the interpretation most favourable to the consumer. Where ambiguity could cause consumer detriment, it remains open to regulators to take action on the basis of unfairness. Action can also be taken on the basis that the term fails the transparency test.

A related issue to transparency is that of the prominence of certain types of contract terms. In the CMA's view, the average consumer cannot be expected to have to carry out 'legal mining'¹⁸ to discover disadvantageous terms that may trap them. Where terms are complex or they contain terms that could surprise consumers or place onerous obligations on them if a future event occurs, the CMA considers that the businesses should bring them to the attention of the consumer. In the CMA's view, providing this type of information at an early stage and clearly highlighting it is likely to improve the transparency of the relevant terms and ensure that consumers

¹⁴ Lord Bingham of Cornhill in *The Director General of Fair Trading v First National Bank* [2001] 1 AC 413.

¹⁵ C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*.

¹⁶ Section 68 of the CRA15.

¹⁷ C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*.

¹⁸ *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch) – paragraph 74.

can understand their implications. Where transparency is achieved, terms are more likely to be considered to be fair.

The CRA15 also includes a Grey List¹⁹ which details terms that are potentially unfair. Of particular relevance to airlines are terms which impose disproportionate financial sanctions on consumers²⁰. This includes potentially penal terms where there may be a requirement to pay a fixed sum if the consumer breaches the contract. These types of terms are particularly likely to be unfair if the business has excessive discretion to decide on the level of the fee or it is unclear what consumers might have to pay. Termination charges where a consumer decides to cancel the contract may also be challenged as unfair if the business is able to retain all the money or claim additional money. Airlines typically collect full payment at the time of booking and, as highlighted previously, seek to use their contract terms to enforce a policy of non-refundability (at least for the basic economy fares). In the CMA's view, if a business can mitigate its loss, for example for an airline by re-selling the flight to another consumer, generally the law would allow it to claim no more than the likely costs of doing so, together with any difference between the original price and the re-sale price.

The Grey List also identifies that binding consumers to hidden terms²¹ is potentially unfair. This would occur when consumers have no real opportunity to read and understand contracts. According to the CMA, the use of tick boxes which say "I have read and understood these conditions" may be unfair if in reality the consumer has no reasonable prospect of reading the terms. It is important that businesses draw attention to important terms and flag them up clearly.

The Supreme Court considered the issue of unfair terms in consumer contracts in the case of *ParkingEye Limited v Beavis*²². The Court considered the test for fairness as set out in the Unfair Terms in Consumer Contracts Regulations 1999²³. In this case, ParkingEye Limited operated a car park for a retail park, where consumers were able to park for free for 2 hours. If consumers overstayed then they faced a charge of £85, which could be reduced to £50 if they paid early. The Court held that the charge did not fall into the core exemption²⁴ as it did not relate to the main

¹⁹ Part 1 of Schedule 2 of the CRA15.

²⁰ Part 1 of Schedule 2, paragraph 6 of the CRA15.

²¹ Schedule 2, Part 1, paragraph 10 of the CRA15.

²² *ParkingEye Limited v Beavis and Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67.

²³ Now part 2 of the CRA15.

²⁴ Terms that cover the main subject matter of the contract or the adequacy of the price are exempt from the fairness test. However, this is subject to the terms being transparent and prominent. The core exemption also requires the relevant term to be prominent. The scope of CAA's project on contract terms has not included any terms which cover the main subject matter of the contract.

subject matter of the contract and was not related to the adequacy of the price. The term could therefore be assessed for fairness. The Courts considered whether there was a significant imbalance and took the position set out in the CJEU case of *Aziz*²⁵. *Aziz* looked at whether the party had a legitimate interest in imposing a charge on the party that breached the contract. The Supreme Court considered that ParkingEye did have a legitimate interest as it needed to ensure that car parking was available for users of the retail park and it needed to deter commuters from parking there all day. The Court decided that the charge was no higher than it needed to be to achieve its objective and that it was a legitimate part of ParkingEye's business model that charging £85 for those who overstayed allowed it to provide 2 hours free parking for everyone else. The Court also looked at whether a consumer entering the contract in individual negotiations would have been likely to accept the clause. It found that a reasonable motorist being offered 2 hours free parking subject to a fee of £85 if they overstayed would have been likely to accept it. The car park notice was clear and prominent and the charge was in line with that imposed by statute for on-road parking and in the BPA Code of Practice. The Court therefore found that the charge was not unfair.

The Court also considered the common law relating to contractual penalty clauses. The Court said that the test should consider whether a clause was extravagant or unconscionable in light of any innocent party's interest in the performance of the contract. Punishing a contract-breaker can never be a legitimate interest. The Court found that the charge was not a penalty clause as ParkingEye was protecting a legitimate interest in ensuring parking was available for use by consumers of the retail park. The charge was not extravagant or unconscionable as it was in line with guidelines and other statutory schemes.

As is covered later in this report, a number of the airline contract terms considered by the CAA appear to share similar traits to that at issue in the *ParkingEye v Beavis* case, in particular the imposition of financial sanctions in cases where the individual fails to follow certain rules correctly. As such, as explained further later in this report, the concept of businesses having a 'legitimate interest' to protect through their contract terms is one which has particular relevance for airlines and their conditions of carriage. Further, for contract terms that are coercive in nature, for example in employing the threat of financial sanctions to encourage a contracting party to perform their obligations, a key factor in any assessment of fairness is whether the

²⁵ *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (Case C-415/11) [2013] 3 CMLR 89.

sanction (e.g. a fee or a charge) is no higher than it needs to be²⁶ to achieve its objective of protecting the legitimate interest of the business.

On the issue of the levels of the fees and charges associated with contract terms, some airlines have argued that Regulation EC 1008/2008²⁷ (on common rules for the operation of air services in the Community) allows them the freedom to set prices, including the fees and charges associated with contract terms. As set out in the CJEU case of *Air Berlin*²⁸, the provisions on pricing freedom laid down in Regulation EC 1008/2008 cannot prevent the application of national consumer protection legislation, in this case the CRA15, to the terms of contracts of carriage by air.

²⁶ In his concurring judgment in the *ParkingEye v Beavis* case, Lord Hodge wrote that “I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable”.

²⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R1008&from=en>.

²⁸ *Air Berlin plc & Co. Luftverkehrs KG v Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e. V.* (Case C-290/16) [2017].

Consumer research on airline contract terms

The CAA commissioned Opinion Leader to conduct consumer research into the issue of airline contract terms to assist its understanding of consumers' views on the fairness of airlines' contract terms, as included in their conditions of carriage, including how consumers feel about certain specific contract terms, how effective airlines are at communicating key terms, and what their experiences or expectations are in relation to airlines' contract terms. The research included a quantitative component, with over 1,000 surveys conducted among a representative sample of people who had recently travelled abroad, as well as a qualitative component based on eight focus groups. The final report can be found here: caa.co.uk/CAP1815R

On the issue of transparency, the research found that, although around three quarters of the survey participants were aware that they have the opportunity to read the airline's contract terms when booking a flight, nearly four in ten survey participants did not read the contract terms at all and only around half read some (but not all) of the contract terms document. It is not surprising to us that this finding agrees with those of the CMA's consumer research. However, it does not absolve businesses of their obligations to make their contract terms transparent, but rather it emphasises the need for businesses to think carefully about how to present information to consumers on contract terms in a way that engages them.

This point is borne out in the CAA's consumer research, which found that the likelihood of a consumer reading the terms and conditions is affected by the ease of the language used in the contract terms – survey participants who found the contract terms easy to read were over twice as likely to read them as those who found them difficult to read. It is also worth noting that the consumer research found that only a fifth of survey participants felt that airlines were pro-active in communicating their contract terms during the booking process.

The qualitative component of the CAA's consumer research allowed it to explore consumers' attitudes towards airline contract terms in more detail, and in particular consumers' views on the drivers of fairness in airline contract terms. Two elements²⁹ emerged from the discussions:

²⁹ In addition to the two elements covered here, many focus group participants felt that the cost of the flight was also a relevant consideration for fairness in certain circumstances. However, other participants felt that cost was irrelevant for whether or not a contract term was fair. However, it is

- First, in relation to contract terms that have an associated fee³⁰ or charge³¹, the focus group participants felt that it was unfair for the airline to profit from such fees and charges given that, in many cases, consumers could find themselves in the position of having to pay the fee or charge through no fault of their own or as the result of an honest mistake by themselves. The focus group participants felt that, in many cases, the level of the fee or charge appeared to be much greater than their (albeit subjective) view of the associated cost to the airline. The focus group participants felt that, if airlines were more transparent about the actual costs to their business then, even if this cost was higher than consumers' perceptions of it, the associated fees and charges would be more likely to be accepted and considered fair.
- Second, in relation to the transparency and prominence of contract terms, focus group participants said that they often did not read the contract terms document because it was usually too long and not written in plain English. Participants were of the view that, where contract terms information is presented in a clear and transparent way, it would make the terms themselves fairer and would allow consumers to make an informed decision about whether or not to purchase a ticket. This finding, as well as the similar finding from the CAA's quantitative survey, supports the CMA's position on the relationship between transparency and fairness.

The CAA's consumer research also sought to establish the relative fairness between a number of contract terms³² as expressed by individuals that had been affected by them in the past. As a proxy measure intended to reflect overall fairness, participants in the research were asked how fairly or unfairly the airline handled the situation based on the following qualitative measures: forewarning of the particular rule and / or charge during the booking process; the justification for why the rule existed and the level of any charge; and the cost incurred as a result of the charge.

important to stress that the legal protections for consumers against unfair contract terms set out in the CRA15 are not dependant on the price of the product or service.

³⁰ For example, a fee to claim back Air Passenger Duty in circumstances where the passenger has not travelled.

³¹ For example, to check in or print a boarding pass at the airport.

³² The contract terms tested were: changing or correcting a name on a booking/ticket and incurring a fee as a result; cancelling a flight but not being able to claim a refund; cancelling a flight and paying an administrative fee; paying a fee to print the boarding pass; paying an additional fee to guarantee sitting with others; the airline rescheduling the flight but not providing the right to claim a refund; the airline not providing the services (e.g. In-flight entertainment) or items (e.g. working headphones) that were advertised; and the return ticket being cancelled because the passenger missed their outbound flight.

In summary, none of the terms under consideration was generally felt by the research participants to be absolutely fair. The most unfair terms were felt to be:

- Having to pay to print a boarding pass at the airport. More survey participants rated this as 'not at all fair' across the three different measures of fairness than any other term.
- Having the return flight cancelled if the outbound flight is not used and the consumer does not contact the airline.
- Having to pay to choose a seat in advance of the day of the flight. Survey participants rated the justification provided by airlines for this term as being particularly unfair.

The terms which were felt to be unfair but not very unfair were:

- Not receiving a refund for a cancelled flight. From the survey results, this term was rated less negatively than most other terms, particularly with regards to the justification provided by airlines for having this term.
- Flight time changing by less than two hours and not having a right to a refund.
- Having to pay to change a name on a flight. This was also rated less negatively than most other terms, particularly with regards to the justification provided by airlines for having this term, although there was substantial negative sentiment in connection with the level of the charge.
- No compensation for additional services e.g. if in-flight entertainment not provided. In general, this was felt to be fairer for short-haul flights and less fair for long-haul flights. Although the forewarning given by airlines of this contract term and the justification for having the term was rated comparatively low by customers, the cost implications were not perceived as negatively.

The CAA's approach to its review of airline contract terms

Having considered the relevant law in relation to contract terms, the findings of its consumer research, and its broader understanding of contract terms issues based on information gathered from passenger complaints, consumer groups, and the wider media, the CAA focussed its review on three areas:

- The broader, crosscutting issues that impact on the fairness of contract terms, namely transparency and prominence;
- The fairness of a number of specific contract terms that are typically included in airlines' conditions of carriage and which, in the CAA's view, have the greatest potential to be unfair and harmful for passengers. In each case, the CAA's assessment for fairness is based on the contract term specific to each airline³³ and based on the rules applicable to the most basic economy fare³⁴.
- The internal processes that the airlines have in place for overseeing their contract terms for fairness, including how they determine the levels of fees and charges linked to contract terms.

The CAA then engaged with the top fourteen airlines flying to and from the UK to seek improvements to their contract terms where relevant, both in terms of their transparency and fairness. The results of this work are covered in the following sections.

³³ The CAA's assessment was based on the extant conditions of carriage of each airline during the period 24 January 2019 to 1 March 2019.

³⁴ In the case of Thomas Cook, this is the airline's 'Economy Light' fare. This fare is less flexible than the airline's standard economy fare. It should be noted that the 'Economy Light' fare is not available on all the airline's routes and that it represents only a small minority of the airline's total seat sales.

Crosscutting issue: transparency of contract terms

As explained in the introduction to this report, for many decades it was standard industry practice for airlines to base their contract terms on a standard template developed by IATA. During the post-war years, which was a time when the air transport industry was growing and developing rapidly, it was logical for governments around the world to want to standardise and harmonise certain aspects of passenger air transport, including the contractual rights and obligations of airlines and passengers. Unfortunately, in the CAA's view, the IATA standard terms did not keep pace with progress in the industry following liberalisation, or with the accepted standards of consumer protection more broadly. For example, in many places the language used in the IATA standard terms is archaic or refers to archaic industry practices³⁵. In other standard terms legal jargon such as "prima facie" and "force majeure" is used. Although the IATA standard terms are no longer supported and maintained by IATA³⁶, many airlines still base their conditions of carriage on these standard terms.

The history and background of how airlines' conditions of carriage have developed is important context when it comes to assessing them for transparency. Clearly, the use of archaic language and legal jargon goes against the general principle of clarity and legibility in contractual language which underpins the CRA15's transparency requirement. In contrast, a number of airlines that we spoke to expressed the view that, as the contract for carriage and associated conditions of carriage represents a legal document, it is important that it is written in legal language. The CAA does not agree. As explained in the CMA's guidance, although it is desirable that terms are clear and precise for legal purposes, legal precision alone will not suffice to meet the transparency test. This is because the purpose of transparency is to ensure that the

³⁵ For example, the IATA standard terms refer to a 'flight coupon' and a 'passenger coupon' in connection with paper tickets. Although paper ticketing used to be standard industry practice many years ago, the use of paper tickets is now relatively limited. In this regard, it is not obvious to the CAA that even the most sophisticated aviation consumer would understand implications for them of the following term: "Except in the case of lost tickets, refunds will only be made on surrender to Carrier of the passenger coupon or passenger receipt and surrender of all unused flight coupons". The IATA standard terms make reference to archaic practices in other areas. For example, a section of the standard terms is reserved for terms relating to the "reconfirmation of reservations" – to the CAA's knowledge, airlines stopped requiring passengers to reconfirm their reservations many years ago.

³⁶ The IATA Recommended Practice setting out the standard contract terms (RP1724) was rescinded at the 35th Passenger Services Conferences of IATA (Dublin, October 2013).

average consumer is properly informed. According to the CMA, precise legal terminology does not generally assist consumers in their decision-making.

The requirement for transparency goes beyond the requirement for plainness and intelligibility of language. As set out in the CMA's guidance, contract terms should be drafted to ensure that consumers are put into a position where they can make an informed choice whether or not to enter into the contract. In this respect, passengers need to have a proper understanding of the conditions of carriage for sensible and practical purposes, and the airline contract should set out all obligations and rights in a clear and comprehensible way. As explained previously, the CMA's guidance goes on to state that businesses should not assume that consumers understand the detail of how a particular transaction or market operates.

In relation to this last point, there are a number of contract terms that are commonly used by airlines to protect their revenue but which, due to their historical origins in how airlines price their tickets, the average passenger would be unlikely to be familiar with. One such example is 'coupon sequence and use'. Notwithstanding the archaic language used in the IATA standard terms version of this contract term (e.g. use of the term "coupon" – see footnote 35), it is unlikely to be obvious to the average passenger that the substance of this (typically lengthy) contract term has the potential to impose a surprising and onerous obligation on them – specifically, in this case, that the passenger's ticket for their return flight will be cancelled automatically if they miss their outbound flight.

In order to assess the fourteen airlines' conditions of carriage for transparency, the CAA commissioned a review by the Plain English Campaign. The first review was commissioned prior to the CAA starting its bilateral work with the airlines in the project and was based on the airlines' conditions of carriage in place at that time. The Plain English Campaign assessed the conditions of carriage of British Airways to be the clearest of the fourteen airlines in the project, giving them an overall clarity rating of 'very good' ('excellent' was the highest possible rating, although no airline achieved this). Flybe and Jet2 were the next best, with each receiving a 'good' rating. Aer Lingus³⁷, easyJet and Emirates each received an 'average' rating. Of the remaining airlines, Lufthansa, Norwegian, Ryanair, TUI and Virgin each received a 'poor' rating. Finally, KLM, Thomas Cook and Wizz Air each received a 'very poor' rating, with Air France receiving the worst rating of all the airlines of 'terrible'.

The CAA shared these findings with each of the airlines as part of its ongoing bilateral work on the contract terms project. Over the course of the project, a number of airlines reviewed and overhauled their entire conditions of carriage, in part to achieve

³⁷ Aer Lingus has recently confirmed to the CAA that it has undertaken a comprehensive analysis of its conditions of carriage and that a revised set of contract terms will be published on 1 July 2019.

greater transparency. The CAA subsequently commissioned the Plain English Campaign to do a further review of the new conditions of carriage of these airlines. The CAA is pleased to report that both Thomas Cook and Virgin improved their overall clarity ratings and received an updated rating from the Plain English Campaign of 'average'. TUI improved its overall clarity rating and received an updated rating of 'good'. Ryanair has recently informed the CAA that, having worked with the Plain English Campaign to review its contract terms, a new set of contract terms are now live on its website. Unfortunately, Ryanair has not yet received an updated rating from the Plain English Campaign and so we are unable to report on that here.

It is disappointing that almost half of the fourteen airlines in the project, namely Air France, KLM, Lufthansa, Norwegian, and Wizz Air, achieved an overall clarity rating from the Plain English Campaign of only 'poor' or worse. It is also disappointing that, having received their initial transparency ratings in April 2018, these airlines have not acted on the feedback provided and revised their conditions of carriage to make them more transparent (although Norwegian and Wizz Air have each committed to the CAA to undertake a fundamental review in the near future). As such, these airlines fall below the CAA's expectations in terms of transparency. The CAA recommends that these airlines review their conditions of carriage in order to increase the standard of transparency of their contract terms.

As set out in the previous section on the relevant law, one of the two requirements of the CRA15 for a contract term to be compliant is that the term must be transparent. As explained in the CMA's guidance, for terms to be transparent they must be written in plain and intelligible language and be legible. Given the findings of the Plain English Campaign's review, the CAA considers that the conditions of carriage of these airlines, and in particular those of Air France, KLM, and Wizz Air, are at risk of failing the transparency test in the CRA15. Although this would not automatically make any particular contract term unfair, this lack of transparency could provide the basis for a legal challenge, including from individual passengers (although this would depend on the specific facts in each case).

Crosscutting issue: prominence of surprising, significant or onerous contract terms

In relation to prominence, as explained in the section above on the relevant law, the fairness test incorporates the concept of 'good faith' which, as explained by the CMA in its guidance, embodies a general principle of 'fair and open dealing' and relates to how contracts are drafted and presented. In order to achieve the openness required by good faith, the CMA's view is that appropriate prominence should be given to terms which might operate disadvantageously to the consumer. In the CMA's view, if potentially disadvantageous terms are in any way concealed³⁸, they may become a trap for the consumer. In relation to this last point, the CMA's view is that this is particularly true for complex pricing terms or terms which involve potentially surprising, significant or onerous obligations being imposed on the consumer in the future (for instance, on the occurrence of a future event where there is some element of uncertainty as to whether the event will occur).

Airlines' conditions of carriage typically contain a number of terms which, in the CAA's view, have the potential to impose surprising, significant or onerous obligations on the passenger in situations where an uncertain future event comes to pass. This is true even in cases where the event in question occurs through no fault of the passenger or as the result of them making an honest mistake. For example, as described previously, failing to take the outbound flight of a return journey can lead to a passenger's ticket for the return flight being cancelled automatically. As another example, many airlines' conditions of carriage restrict the ability of passengers to transfer their ticket to another person in the event that they cannot take their flight, even where the reason is outside of the passenger's control, such as due a serious illness. In addition, passengers that find themselves having to cancel their flight are typically only able to recover a small amount from the airline (sometimes only Air Passenger Duty) to cover their loss even though the airline may be able to re-sell that seat to another passenger, thereby potentially doubling their revenue for that seat.

Given this, as part of the CAA's bilateral work with the fourteen airlines in the project, the CAA has considered how to give greater prominence to the contract terms that have the potential to impose surprising, significant or onerous obligations on

³⁸ On this point, particularly in longer contracts (such as, in the CAA's view, airline conditions of carriage), the CMA's view is that it should not be assumed that consumers will necessarily be able themselves to identify terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention.