

**Response of the Board of Airline Representatives in the UK (BAR UK)  
to the DfT's  
ATOL Reform consultation**

**Executive Summary**

- The proposed reforms fail to meet their objectives.
- Consumers will encounter more confusion, not less.
- ATOL Protection charges can be paid, sometimes twice, without offering consumers protection.
- The Flight Plus proposals impose onerous liabilities and could discourage their applicability.
- The Right to Fly/Specified Operator proposals would add more even more confusion to all parties, not just consumers, and are highly likely to prove unworkable.
- For utter clarity to consumers, only traditional packaged travel purchases should be provided with ATOL protection, and all other purchases should explicitly exclude ATOL protection.
- BAR UK formally objects any proposals to impose the ATOL-regime on direct airline sales.
- BAR UK is concerned that the proposed Flight Plus reforms may, inadvertently, include direct airline sales, despite the lack of any new primary legislation, and call on the DfT to rewrite the Regulation so that they are excluded.

**1. Introduction**

The Board of Airline Representatives in the UK (BAR UK) Ltd represents 86 scheduled airlines in the UK, and is pleased to have the opportunity to respond to this important consultation.

The stated aims and objectives of the consultation have been read and this response is made with them firmly in mind.

They can be summarised as:

- consumers being treated fairly and knowing their rights
- consumer law being fair and proportionate for consumers and business
- adding clarification to what can be deemed complex and unclear situations regarding whether or not travel protection is in place.
- solving the financial straits in which the Air Travel Trust Fund (ATTF) finds itself.

To achieve these, it is proposed to:

1. introduce into ATOL the category of Flight-Plus, with a range of conditions and exceptions
2. vary the application of ATOL regulation, and consumer protection, to 'Flight Only' sales
3. establish 'approved body' arrangements, with a range of conditions
4. require written agency agreements between ATOL-holders and their agents
5. possibly provide a moratorium for micro-businesses.

## **2. General response and comments**

### **2.1 Summary response**

It is disappointing to advise that these aims and objectives are generally failed by the proposed reforms. They add to the current confusion, rather than clear it.

It is also very apparent that the proposals to make changes to the ATOL regime are out of kilter with possible changes to the Package Travel Directive. This is unhelpful for the industry at large and for consumers.

### **2.2 The proposed reforms in general**

It is clear from the consultation document that there is a determination to move away from the original role of the ATOL (protecting package holidays) to expanding consumer protection to as many air travel sales as possible, regardless of content or purpose.

It is also clear that there is a determination to mandate ATOL protection on to consumers as widely as possible.

Those determinations have to be questioned and challenged:

- a) many consumers are either already protected as a result of purchases made with a credit card; why should they then be required to pay for something they do not want?  
*(please refer to Annex 1 for more details about the protection offered by credit card schemes)*
- b) other consumers are not bothered; the consultation document (paragraph 4.52) states '*many consumers are price-sensitive and not bothered about insolvency protection*'. They have the option of purchasing appropriate travel insurance if they so wish.

The methods by which holidays have been sold have radically changed over the years, and they will continue to do so. Many transactions now have no direct human interface. Indeed, it is possible to do everything using a mobile phone, including check-in and receipt of boarding card.

In some scenarios, consumers would still find matters confusing or with less protection being provided, even though an ATOL Protection Charge (APC) would have been collected at least once, possibly twice. The 'small print culture' would still be retained.

These comments are supported by the table below. It illustrates how the same purchases either have ATOL protection, none at all, or vary dependent on whether or not travel has commenced.

## Inconsistencies of the proposed reforms

	Item	ATOL-protected?	Comment
1.	Standard package holiday	√	
2.	<i>Flight Plus bookings within proposed time frame</i>	√	<i>What ATOL certificate text would apply here?</i>
	<i>Flight Plus bookings outside of proposed time frame</i>	X	
3.	Flight-only (APC paid) – default before departure	X	Consumer pays for protection but receives none
	Flight-only (APC paid) – default after departure	√	
4.	<i>Flight only sales by ATOL- exempt agent</i>	<b>Who knows?</b>	<i>Would totally depend on each and every airline agreeing to 'specified operator' status. How would consumers know?</i>
5.	Use of ATOL Logo and ATOL Agent/Operator logo		Part of the problem of consumers believing ATOL protection is automatic
6.	<i>ATOL Certificate</i>	√	<i>It is not sufficient by itself. Consumers should also be specifically advised when purchases are not protected by ATOL.</i>
7.	<i>Flight only and package holidays to Common Travel Area destinations</i>	?	<i>Clarity required as the Republic of Ireland, Channel Isles and IoM are not part of UK</i>

For the sake of full clarity for consumers, and ease of understanding, a totally different approach is required.

The ATOL-protection default positions should be crystal clear, in that:

- a) inclusive package prices (which indeed still exist) would be automatically inclusive of ATOL protection.
- b) all other types of transactions to be exempt and consumers would be automatically exclusive of ATOL protection.

In this manner, adherence to the Package Travel Directive, and Regulations, would still apply, and the feature of ATOL protection then becomes a selling point.

### 2.3 ATOL branding

It might be said that ATOL branding has been too successful.

It is certainly recognised but also often comes with the presumption that all purchases made through an ATOL-registered entity carry ATOL protection.

In the event of ATOL reform, it is suggested branding be re-assessed along with what logo wording is used. It is suggested that the words 'ATOL available', or something similar, be considered.

## 2.4 Right to Fly providers and Specified Operators

### *Introductory remarks*

- a) *The CAA has clarified that ‘specified operators’, would be liable, on an unlimited basis, for the provision of flights for all customers who had paid for tickets to ‘right to fly providers’ or to the agents of the ‘right to fly providers’.*
  
- b) *Notwithstanding the comments that immediately follow, the tickets of BAR UK members are mainly distributed and sold under the auspices of the IATA BSP (Billing and Settlement Plan). This already offers degrees of consumer protection – please refer to Annex 2 for more details.*

There are over 150 airlines that serve the UK, and literally thousands of entities that could qualify for the status of ‘Right to Fly provider’. Confusion would prevail.

ATOL exemption, for the same agent, would apply for sales of tickets on some carriers who had elected to become a ‘specified operator’, but not for sales of tickets for those carriers who had opted not to become a ‘specified operator’. Consumers would expect an ATOL to be provided or not provided, not a miscellany of answers dependent on which airline’s ticketing authority was to be used.

It is also not clear from the draft regulation whether the specification of a carrier as a ‘specified operator’ would entitle all agents who sold tickets on that carrier to become ‘right to fly providers’ or whether this would depend on the details of the ticketing arrangements between each airline and each agent. Again, this does not lead to any greater clarity for consumers as to the level of protection offered to them.

The outcome is that this proposed reform is most unlikely to find favour with BAR UK members. They have indicated that the impacts of being a ‘Specified Operator’ are unacceptable due to the liabilities that would be incurred.

They would be liable, on an unlimited basis, for the carriage on flights for all customers who had paid for tickets to ‘Right to Fly providers’ or to the agents of the ‘Right to Fly providers’, even if they had not been paid.

Making airlines the insurers of last resort in this way is an unwarranted regulatory aspiration that is unfair and highly disproportionate.

**Conclusion:** the concept of Right to Fly Provider/Specified Operator appears unworkable, confusing, and open to abuse.

## 2.5 Flight Plus Intentions v Regulations

BAR UK has been made aware that the article by Peter Stewart, a partner at Field Fisher Waterhouse, in Travel Law Quarterly. In this, he describes the view that the ATOL regime can only include direct airline sales solely by primary legislation as a “fallacy” and insists “flight-plus, surprisingly and inadvertently, does include airlines”.

He is further quoted as writing that “There is no regulation which specifically states . . . that operators of an aircraft are excluded from the Flight-Plus provisions. It may be that the

architects of Flight-Plus believe airlines are excluded . . . [However] it is incontrovertible that airlines fall within flight-plus.”

If this interpretation is correct, then BAR UK strongly objects to this consequence, intended or not, Further, we call for the Regulations to be re-written so that it is utterly clear that direct airline sales are totally-excluded from any part of the ATOL regime until such time.

### **3. Specific responses to the questions of the consultation**

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

*A. No comment offered, except to say clarity of definition of the UK is required.*

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

*A. No comment offered.*

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

*A. No, BAR UK does not support the definition, and objects to the looseness of the definition that may, inadvertently, include direct airline sales.*

*The definition needs to re-drafted so that direct airline sales are explicitly excluded.*

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

*A. The liability proposals, which are new and extensive, could have the unintended effect of adversely affecting the stability of any number of small businesses. Effectively, the Regulations would transform them into de facto tour operators against their will.*

*That could have two effects: a) the expense of problem-solving and compensation could alter their profitability, and b) such entities may be inclined to purposefully operate outside of the time period of the Flight-Plus product, so as to prevent such liabilities.*

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

*A. No comment offered.*

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

*A. No comment offered regarding the concept. However, by itself, it would not prevent deliberate mis-selling and miscreants entering the market.*

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

*A. No comment offered.*

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

*A. Any exemptions are at direct odds with the intended objective of providing clarity and certainty to consumers. Should exemptions be granted, then the absence of an ATOL Certificate would not be enough to inform consumers that ATOL protection did not apply. A specific statement of non-ATOL protection should apply.*

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

*A. No. Like Q8 above, consumers would not have any clarity of what ATOL protection they enjoyed. None at all would exist should the failure occur prior to travel. This raises two questions:*

- 1) Why should consumers be charged for protection they will not receive?*
- 2) What precisely would the ATOL Certificate state?*

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

*A. BAR UK contends, in the strongest possible way, that this proposed reform is massively confusing, unfair, and subjects to airlines to disproportionate outcomes.*

*They would lead to unlimited liabilities for airlines, and mandate that they are insurers of last resort. That's untenable because:*

- a) Airlines have no control whatsoever about what trading arrangements their agents make with other travel intermediaries.*
- b) The proposed Agency Agreements between ATOL holders and their agents would not prevent dishonest trading, and could encourage it.*
- c) Airlines would suffer not just a loss of revenue on their own flights, but also be obliged to make payments over and above them to all other airlines that may be included in the booking.*
- d) Clarification is required as to whether the election to become a 'specified operator' then applies generally to all agents selling tickets for that carrier, or whether this merely allows agents who have specific ticketing arrangements with that carrier to classify as a 'right to fly provider'. Will airlines effectively be permitted to control*

*their risks under this regulation through specific arrangements with certain of its agents?*

- e) *The final regulations also need to be absolutely clear that the ‘right to fly’ for passengers refers only to the need for no further payment and is not intended to over-ride any existing legitimate contractual, safety or operational reasons that a passenger might be refused carriage on a flight.*

*Consumers would also find the situation confusing, so failing the ATOL reform objective of clarity.*

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

A. *The consultation document infers that the lack of an ATOL Certificate would automatically inform consumers that they had no protection – BAR UK strongly disagrees.*

*For the sake of utter clarity and certainty, consumers should be given either an ATOL Certificate, or a Statement of non-ATOL protection.*

*As stated elsewhere in this response, any branding with the current ATOL logo intuitively leads consumers to think they are protected. They need to be disenfranchised of that thought.*

**Q12: We also welcome comments on any other aspects of the draft regulations not mentioned above, including the proposed transitional arrangements.**

A. *A number of queries arise that DfT/CAA may wish to take into consideration.*

- i. *Consultation document – para 4.17. This calls for a cancellation and re-booking of travel arrangements in the event that there is a voluntary desire to enjoy ATOL protection of Flight-Plus. As such cancellations could lead to cancellation/rebooking fees, and the distinct possibility of increased prices, why not adopt a pragmatic approach and simply capture the APC?*
- ii. *Consultation document – para 4.26. It is inferred that 2 ATOLs would be in use, yet liability for any element within Flight-Plus falls to the Flight-Plus arranger. Apart from bolstering the funds of the ATTF, it is difficult to understand what benefits ensue to consumers or agents.*
- iii. *Consultation document – para 4.31 Might this not need to clarify that the provisions of para 4.21 would therefore not apply to agents using an Approved Body?*
- iv. *Consultation document – para 4.34/35 With reference to these paras, and also to Regulation 30, is any additional clarity required in respect of Flight Only purchases, and those of Flight-Plus?*
- v. *Clarity is required in respect of two Regulations: 13(2) and 20(1). As they read, they are difficult to understand.*

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

A. *No comment offered.*

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

*A. No, and it may be impossible to implement in practice.*

*As stated earlier in this document, there is an intention to re-assess the Package Travel Directive.*

*Then is the time for the industry to totally re-assess the ATOL regime, which is consistently shown to be out-dated.*

**Q15: What information do you have that would allow the Department to complete an Impact Assessment on the two options? For example how many holidays are currently purchased on an agent for the consumer basis? How many airlines might be affected, and what volume of package and Flight-Plus they sell?**

*A. No comment offered.*

**Q16: What are your views on the arguments for or against reforming the way refunds and repatriations are currently organised? What advantages and what barriers do you envisage?**

*A. No comment offered.*

**Q17: Do you have any views on what options might be considered in more depth by the Department and CAA?**

*A. No comment offered.*

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

*A. No comment offered. Airline responses to any PTD reform are likely to be handled centrally by global and European airline associations.*

## Annex 1

### The credit card schemes: the cardholder guarantee

When consumers (the cardholders) buy their tickets with a credit card (directly from an airline, through an agent or on the Internet), they are equally protected if the airline stops operating between the moment they have paid their bill to the card issuer and the day of departure.

Indeed, the cardholder will in this case file a claim for “services not rendered” to the card issuer who will reimburse the cardholder if the claim is filed under the applying conditions (for instance cardholders have a limited time for filing claims). The issuer then raises a chargeback to the “acquirer” (the bank of the carrier).

A highly condensed illustration of the chargeback conditions of MasterCard and Visa is attached; they are binding for all MasterCard and Visa members, issuers and acquirers<sup>1</sup>.

At this stage, the cardholder and the card issuer have their money back.<sup>2</sup>

What happens later is between the acquirer and the airline since the acquirer is now also trying to get his money back. In view of this, the acquirer either applies credit cards “holdbacks” (meaning it postpones paying the card transactions to the airline by – for instance - the average time between the date of the card transaction (the date of the sale) and the date the flight is taken) - in which case it will still have the money - or be in possession of a security deposit by the carrier. Holdbacks are obviously the result of a competitive negotiation between the airline and the acquirer but importantly they are a way for the acquirer to cover his risk and are not directly related to cardholder’s claims.

However, holdbacks or security deposits have a cost for airlines and it should be well understood that airlines already pay a much higher cost than most other merchants for accepting credit card payments. IATA has however no information about these costs which are the result of a commercial negotiation between the acquirer and the airline. Each acquirer will price the risk at per its own assessment.

**In conclusion, airlines already pay for the guarantee that is offered to the cardholders to be reimbursed in case of airline bankruptcy. Imposing upon airlines any additional insurance protection plan would mean that they would pay twice** as it is highly unlikely that the card schemes would drop the cardholder guarantee they offer as part of their private contract rules.

<sup>1</sup> Check for the following Reasons Codes (RC): 30 & 53 for Visa – 4853 & 4859 for MasterCard

<sup>2</sup> Note that an issuer may also decide to satisfy a claim for a good customer even if he does no longer have a chargeback right, for example if the cardholder files his complaint too late. In that case, the issuer reimburses the cardholder out of his own pocket.

## **Annex 2**

### **The IATA BSP protection**

#### **1. The IATA Agency Programme**

The IATA Agency Programme creates an industry-standard set of relationships that enables tens of thousands of retail agents to represent and sell the services of hundreds of IATA member airlines anywhere in the world for sale of air transport and related products to and from any destination in the world. The main elements of the programme are objective agency accreditation criteria and Billing and Settlement Plans (BSPs) that provide airlines and agents important economies of scale in issuing tickets and processing payments.

#### **2. Billing and Settlement Plan (BSP)**

IATA has been providing settlement systems services to the travel industry since 1971. IATA's Billing & Settlement Plans (BSPs) provide the interface between the airlines and agents. The BSP is an efficient and cost-effective system that simplifies the selling, reporting and remitting procedures of IATA Accredited Agents. Today, IATA's 87 BSPs covering 160 countries and territories handle over US\$ 191 billion in industry sales and process over 400 million transactions annually. A BSP is the central point through which data and funds flow between travel agents and airlines.

Agents make one single payment to the BSP (remittance), covering sales on all BSP Airlines. The BSP makes one consolidated payment to each airline, covering sales made by all agents in the country.

#### **3. What happens when a BSP airline stops operating?**

When an airline participating in a BSP ceases all operations, either temporarily or permanently, due to financial or other reasons, or where the BSP airline becomes subject to bankruptcy, moratorium of debt, re-organisation to related proceedings, or defaults on a material obligation under the BSP, or when official notification is received of a blacklisting of an airline participating in a BSP by a government regulator, IATA suspends the airline from the BSP.

In accordance with the applicable resolution and procedures, IATA immediately instructs the agents to stop issuing tickets and refunds on behalf of the airline. Agents are instructed to settle outstanding billings directly with the airline concerned or to IATA. In the first option, where Agents are instructed to settle outstanding billings directly with the airline concerned all agencies and their customers deal with the reimbursement requests directly with the airline.

In the second option for the benefit of the integrity of the settlement system, IATA manages the airline's funds under its control and where appropriate opens a central bank account where the withheld money from all BSPs involved in the suspension are placed. Where IATA was able to negotiate and reach a refund agreement with the airline (or the appointed administrator), the non-flown tickets are evaluated by the airline (or the appointed administrator) and the approved refunds then can be reimbursed to the agencies who then reimburse their customers.

This system has been used successfully in the following cases: Air Senegal, Aloha Airlines, East Star Airlines, Euromanx, EOS, MAT Macedonian Airlines, Quantum Air, Silverjet, Swazi Express.

In the cases where IATA was unable to negotiate and reach a refund agreement with the airline, the funds are released after the applicable Courts' ruling on the matter is issued.

**The IATA interlining mechanism protection**

The IATA scheme has another feature that protects passengers: the interlining system. By this, travel agents are able to issue tickets involving more than one airline (these tickets have several coupons: one for each segment of the trip). However, these multi-coupon tickets are issued by one airline on behalf of all airlines participating in the journey (provided that the issuing airline has entered into the MITA (Multilateral Interline Traffic Agreement: <http://www.iata.org/workgroups/mita.htm>) with the other airlines. The issuing airline (through the BSP system described above) receives the money from the agent and, importantly, retains the money until such time as passengers fly. The carrying airline after 'lifting' the flight coupon then bills (through the IATA Clearing House) the issuing carrier for the service provided.

Should the carrying airline become insolvent the issuing airline will have retained the money and will be able to settle with the purchaser. If the passenger is stranded, it will also be possible to find another airline participating in the MITA agreement to fly the passenger back from where he is stranded

Should it be the issuing airline that becomes insolvent the lifting airline should still accept the passenger and attempt to settle via the IATA Clearing House (this provided the lifting airline did not withdraw its MITA agreement prior to the ticket issue date). If the passenger is stranded, other airlines will often assist with return transportation.