

**CARICOM COMPETITION
COMMISSION**



FLYING TO THE FUTURE

**A Report on the Consumer Side of
CSME's Air Transportation Industry**

November 2021

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EXECUTIVE SUMMARY

The 2020-2022 Strategic Plan of the CARICOM Competition Commission (Commission) commits the organisation to conducting a study on the competition and consumer protection aspects of the regional airline industry. This commitment was further reflected in the Commission's 2020 and 2021 Work Programmes.

This report represents the first phase of the study, which focuses on the consumer side of the regional air transportation market. Its specific aim is to provide insight into the issue of airline refunds for flights cancelled by airlines operating within the CARICOM Single Market and Economy (CSME) since the World Health Organisation announced the COVID-19 pandemic in March 2020. Although the issue of refunds for involuntary cancellations of flights might have existed before the pandemic, it has since become more relevant given the finances of many persons in the region who were affected by the pandemic and the uncertainty of when airline travel will return to normalcy.

In preparing this report, the staff of the Commission therefore relied on information collected through:

- (a) An online survey of airline customers, which had two aims: (1) to gain insights into their travel behaviour and factors influencing their preferred choices of airline services; and (2) to gather information on the experiences of airline customers with obtaining refunds from airlines for cancelled travel plans because of COVID-19. This report focuses on the preliminary information gathered on the latter aim.
- (b) Reviews of the COVID-19 policies and statements of regional airlines.
- (c) Reviews of the regulatory framework for consumer protection in the region to determine if they provide rights to refunds for airline customers affected by the pandemic. This involved in-depth analyses of national consumer protection statutes in the CSME Member States and the CARICOM Model Consumer Protection Bill.
- (d) Reviews of international best practices to identify enforcement and policy gaps in the regulatory framework for consumer protection in the region such as the policies of the International Air Transport Association (IATA) and the International Civil Aviation Organisation (ICAO), and airline regulations in the European Union.

The analysis conducted in the report suggests that the regulatory framework in some CSME Member States and within the CARICOM Model Consumer Protection Bill includes mechanisms for redress for airline customers who had their travel plans affected by COVID-19. However, it also found a need for CSME Member States to implement national consumer laws based on the CARICOM Model Consumer Protection Bill to facilitate an effective regulatory framework for airline customers. Further, knowledge deficits, where many air passengers sampled are unfamiliar with airline refund policies and compensation entitlements, were also noted.

Specific Goals of this Phase of the Airline Market Study

This first phase of the regional airline market study sought to achieve the following goals:

- (a) Collect preliminary information on airline customers' experiences with obtaining refunds from airlines for cancelled flights caused by the pandemic. This was to assess whether airlines are steering customers towards accepting travel vouchers instead of providing refunds for cancelled airline tickets. Using the data collected the Commission sought to determine whether knowledge of airline refund policies, the type of airline tickets purchased, and customers satisfaction with travel vouchers facilitate airlines' abilities to steer the passengers sampled towards accepting vouchers.
- (b) Recommend policies and initiatives to strengthen the consumer protection framework in the CSME as regards air passenger rights based on its review of international best practices and the regulatory framework for consumer protection in the CSME as regards air passenger rights and supported by the preliminary information collected.

Key Findings of the Report

Regarding efforts to better understand the experiences of passengers with getting refunds for their disrupted travel plans due to COVID-19 during the period March to June 2020, the report highlights the following preliminary findings:

- (a) **77%** of the affected airline customers sampled indicated they did not receive refunds for their cancelled flights. **63.8%** also stated they did not receive travel vouchers from the airlines.

The survey found that from those surveyed who purchased economy class tickets **79.6%** stated they did not receive refunds, while **100%** of those who purchased business class tickets stated they received refunds. Further hypothesis testing also revealed a statistically significant relationship between refund outcomes and the types of ticket purchased. Since the Commission did not drill down on the fare basis under which passengers purchased these economy tickets (e.g. flexible, semi-flexible, etc.), future research is needed to determine the role this factor plays in this funding.

- (b) The survey revealed that **74.6%** of the affected airline customers purchased tickets to travel with regional airlines. It also showed that these airline customers were less likely to receive refunds from regional airlines than extra-regional ones. **91.3%** of those who purchased tickets from regional airlines did not receive a refund, while **66.6%** of those who purchased tickets from extra-regional airlines received refunds. The Commission also found a high, statistically significant relationship between refund outcomes and the airline origin (i.e. regional or extra-regional airline). Further analysis also showed that the affected airline passengers surveyed were 25 times more likely to receive a refund from an extra-regional airline than a regional one.
- (c) As noted above the survey found that a significant number of respondents were unfamiliar with the airlines' refund policies before they purchased their tickets. **79.3%** of those who had their entire trips cancelled and **88.9%** of those who had part of their trips cancelled indicated they were unaware of the airlines' policies before purchasing

their tickets. The Commission also found no statistically significant association between refund outcomes and airline customers' knowledge of refund policies for the sample. This implies that regardless of whether airline passengers knew about the airline policies this did not increase their likelihood of receiving refunds.

- (d) The majority of affected customers surveyed did not receive any information from the airlines regarding compensation for the cancelled flights either by refunds or travel vouchers. **69.1%** of those surveyed who either had their entire or part of their trip cancelled revealed the airline did not communicate to them any information about refunds. **50%** of respondents who either had their entire or part of their trips cancelled stated they received no information from the airline about travel vouchers.
- (e) A significant percentage of respondents (**33.3%**) were indifferent to receiving travel vouchers from airlines for their cancelled flights, while **38%** were dissatisfied with this form of redress.

In the review of international best practices and the regulatory framework for consumer protection as regards air passenger rights, it was found that:

- (a) International agencies, like IATA and ICAO, offer policy statements which afford national authorities a wide latitude in their approach to issues relating to air passenger rights. However, they also stress that governments should strike an appropriate balance between consumer and business interests.
- (b) The EU's Regulation No. 261/2004 offers a direct and comprehensive approach to consumer protection regulation in the European Union air transport market. The regulation speaks to the obligations of airlines and rights of passengers as it pertains to refunds for cancelled flights. It provides international best practice the CSME Member States could consider.
- (c) The regulatory framework at both the national and regional levels diverge from international best practice as it relates to (a) redress mechanisms for airline customers in the event of service disruptions, (b) mechanisms to address information deficits of air passengers, and (c) the institutional frameworks (i.e. dedicated laws and consumer protection agencies for complaint resolution and enforcement) needed to protect airline customers.

Recommendations

The report recommends the following measures to address the gaps identified:

- a. **Full implementation of the CARICOM Model Consumer Protection Bill** at minimum, by CSME Member States to provide the necessary building blocks to further develop and implement initiatives for consumers in specific market contexts such as air transport.
- b. **Optimisation of inter-agency coordination at the national level in the air transport sector** between civil aviation agencies and consumer protection agencies

in the Member States, which may catalyse greater application of consumer policy perspectives in the economic regulation of air transport services.

- c. ***Optimisation of regional coordination of redress mechanisms for air passengers*** through a system of investigative cooperation among consumer protection agencies and/or civil aviation authorities in the CSME Member States. For such a system to be feasible, however, there must be a clear legal basis and sufficient institutional resources and commitment at the national level.

Way forward for the regional airline study

The Commission has already started the second phase of the regional airline study, which focuses on the competition dimension. However, to complete this phase of the study, the Commission will require information from the supply side of the market. This will only be possible with the support of the CSME Member States and airlines operating in the region.

PREFACE

In its 2020-2022 Strategic Plan “***A Roadmap for Future Growth and Development***”, the CARICOM Competition Commission identified as one of its three key strategic pillars as the *safeguarding competition and consumer welfare*. Coming out of the strategic goals under this pillar to strengthen the monitoring role of the Commission, the three year work plan identified the conduct of market studies in key priority areas.

Without a doubt, air transportation services are critical for development and sustainability of the CSME Member States. The facilitation of the movement of workers, cargo and short/long stay tourists cannot be overstated, as well as the facilitative role of stimulating economic activity throughout the region by supporting continued regional integration and cooperation. Accordingly, healthy competition and consumer protection frameworks in air passenger transportation markets are key to ensuring national and regional benefits from this market.

However, the need for an airline study became even more critical and relevant after the World Health Organisation announced the COVID-19 pandemic in March 2020. The announcement led CSME Member States and their main tourism source markets to implement border closure policies, which disrupted the travel plans of many airline passengers and raised concerns regarding refunds for cancelled trips.

The scope of the proposed airline study was narrowed to concentrate on the immediate needs of the region during the pandemic. Despite attempts to ensure both supply and demand sides of the market were assessed, there remained protracted difficulties in receiving critical data on the supply side of the market, which directly influenced the change in scope. It must be noted that whereas two airlines responded to the Commission’s survey, both were registered outside the CARICOM Single Market and Economy (CSME). From within the CSME, regional carriers did not supply the requested data, despite the efforts of the staff of the Commission and relevant Member States to obtain information from the regional airlines.

The challenges inherent in the established powers of the Commission, coupled by a lack of relevant enabling legislation in Member States, cannot be ignored. Within the current legal eco-system for competition and consumer protection, both the Commission and Member States are unable to compel information from businesses in the conduct of market studies. This naturally constrains the collection of information on the relevant markets and the ensuing competition analysis. As the first phase of a formal market study by the Commission since its inception, this report therefore provides a glimpse at a bitter reality. With or without a pandemic, this Region is still not yet legislatively equipped to protect its economic marketplace, reinforcing the dire need for the recognition of the critical importance of competition control and consumer protection both regionally and nationally and the need for a fully functional regulator.

It is hoped that the recommendations of this report will be implemented, but further, that the necessary steps will be taken to empower the Commission and Member States to fully participate in the strengthening of the regional marketplace. It is intended that this report be a helpful input to both future regulatory reviews and future consumer protection matters under the Revised Treaty of Chaguaramas (RTC) as it advocates for consumers pursuant to Articles 173(2) (f) and (h) and 186(1) (d) and (e) of the RTC. The Commission also remains committed

to undertaking a full competition assessment of the regional airline industry in the future with the support of the CSME Member States and the airlines operating in the region.

Sincere appreciation is extended to the national fair trade commissions, consumer authorities and members of the Commission's Steering Committee on competition and consumer matters during the COVID-19, for their assistance in distributing surveys for the Commission and in reviewing the drafts of this report and to all our stakeholders who assisted in the dissemination of the surveys.

The members of our case team, Rommell Hippolyte, Barry Headley and Marc Jones, are also commended on their flexibility on addressing the report given the challenges in data availability in the Region. To contact the team please write competition@ccc.sr.

Nievia Ramsundar
Executive Director
CARICOM Competition Commission



CHAPTER ONE: INTRODUCTION

Key statements

- The financial impact of COVID-19 on the regional airline industry raises some consumer concerns that motivated this phase of the airline market study.
- This report aims to provide a better understanding of the consumer side of the regional airline market. It sheds light on the experiences of airline customers trying to obtain refunds from airlines for cancelled flights due to COVID-19 and discusses the legal and policy framework for air passenger rights internationally and within the CSME.
- The analyses included in the report is based on preliminary information obtained from an airline customer survey conducted by the CARICOM Competition Commission (Commission) and research on the legal and policy frameworks for consumer protection and air passenger rights.

Context of this Report

- 1.1. The CARICOM Single Market and Economy (CSME) has not been left unscathed by the novel coronavirus (COVID-19) pandemic. By the end of August 2021, the region recorded 243,699 confirmed cases of the infection, while 5,673 persons succumbed to the virus.¹ Jamaica, Trinidad and Tobago and Suriname had accounted for 62.2% of the total confirmed cases of COVID-19 and 58.4% of the total deaths in the region due to the virus.
- 1.2. Since the early stages of the pandemic, border closures and travel restrictions remain key strategies employed by CSME Member States to combat the spread of the virus. These efforts when implemented have worked to some extent to control the rate of transmission since most cases of COVID-19 in the region were imported or visitor-related.
- 1.3. However, despite the importance of border restrictions and closures for safeguarding the regional public's health, these measures have negatively impacted the air transportation industry in the CSME. For airlines operating the region, border restrictions and closures result in less flights and revenues, while for airline customers it means the disruption of travel plans and the cancellation of their airline tickets.
- 1.4. The latter issue motivates the analysis entailed in this report. The Commission received information from several national consumer protection authorities in the region that regional airlines are not refunding their customers for tickets cancelled because of COVID-19. Moreover, the complaints suggest the airlines are instead steering customers toward the option of obtaining travel vouchers. One national consumer authority also informally requested the Commission's opinion on the issue.

¹ Estimates from John Hopkins University

- 1.5. The Commission notes that some jurisdictions condemn the practice of airlines not refunding their customers and steering them towards travel vouchers. In the European Union, airlines must provide a prompt refund to their customers when cancellations to scheduled flights occur and the customers choose not to accept the alternative offered by the carrier.² In the United States, the regulators also rejected calls from airlines to relax refund rules.³ As such, the information received regarding the non-payment of refunds from the national consumer authorities and the stance taken on the issue in the European Union and the United States, prompted the Commission to take a closer look at this consumer protection issue.
- 1.6. This report presents the Commission's research into the refund issue raised by the pandemic. The Commission notes that the issue of non-payment of refunds for cancelled flights that are not the fault of the consumer, may have existed prior to the pandemic. The pandemic may, however, have heightened the prevalence of this occurrence and its importance given the financial impact of the pandemic on consumers and their uncertainties surrounding the return of normal airline travel.

Scope of the Report

- 1.7. The report focuses on consumer protection issues and makes recommendations for consideration and implementation by CSME Member States that would strengthen the consumer protection framework for customers of regional airlines while promoting more efficient economic outcomes. Implementation would serve to improve economic and social welfare to the benefit of consumers, businesses, and governments.

Jurisdiction and Legal Framework to Conduct the Report

- 1.8. The Commission relies on Articles 173 and 186 of the Revised Treaty of Chaguaramas to conduct this report. Article 173 requires the Commission to support the Member States in promoting and protecting consumer welfare. It also mandates the Commission to develop and disseminate information about consumer protection policies.
- 1.9. Article 186 mandates the Commission to provide support to the Member States to enhance consumer protection and welfare. By doing so the Commission shall, among other activities, review commercial activities in the Member States relating to the supply of goods and services, conduct research and collect information on matters affecting consumers, and inform COTED of business conduct by enterprises that adversely affect consumer welfare.

2 See the statement by EU Transport Commissioner Adina Vălean on the Commission's Response to COVID-19 and its Effects on the Transport Sector at https://ec.europa.eu/commission/commissioners/2019-2024/valean/announcements/speech-commissioner-valean-commissions-response-covid-19-and-its-effect-transport-sector_en

3 See US Department of Transport Notice on Air Carrier Refund Requirements Given COVID-19 at <https://www.transportation.gov/briefing-room/us-department-transportation-issues-enforcement-notice-clarifying-air-carrier-refund>

- 1.10. Based on the foregoing, the Commission liaised with the national competition and national consumer authorities under the framework for cooperation established under the Commission's COVID-19 Steering Committee in April 2020.⁴

Methodology

- 1.11. Several approaches were used to assess the consumer concern raised above. These approaches include:
- (a) an online survey of airline customers;
 - (b) a review of studies conducted on the regional airline industry;
 - (c) reviews of the policies and statements of regional airlines;
 - (d) reviews of the regional and regulatory regimes for the airline industry; and
 - (e) reviews of the consumer protection laws in the region.
- 1.12. The Study also considered the recent literature on the intersection between behavioural economics and consumer protection. This was necessary as policy makers are becoming more interested in using the insights uncovered by behavioural sciences to enhance consumer protection legislation. For more information on these insights and how it relates to this study, see **Appendix 1**.

⁴ In April 2020, the Commission established a Steering Committee comprised of national competition and consumer protection authorities in the region to promote strategies for monitoring markets, competition and consumer protection advocacy and enforcement during the pandemic.



CHAPTER TWO: AIRLINE CUSTOMER EXPERIENCES DURING COVID

Key statements:

- Important preliminary findings of the survey of airline customer experiences with involuntary flight cancellations due to the pandemic include: (a) **66.7%** of respondents who had their entire trip cancelled by the airline were not given information about refunds; (b) **71.4%** of the respondents did not receive refunds for cancellations by the airlines; and (c) of those respondents who had part of their trip cancelled and were provided with travel vouchers by the airlines, **75%** reported being 'somewhat unsatisfied' or 'very unsatisfied' with being offered the voucher instead of a refund.
- In light of significant lack of knowledge of the sample about the airlines' refunds policies, they appear to be easily 'steered' towards accepting vouchers instead of refunds; but many were not satisfied with such an outcome. Consequently, there is an opportunity to improve consumer choice, and by extension welfare, in the air transport market by addressing the information asymmetries uncovered by the survey.

Introduction

- 2.1. This chapter of the report examines the experiences of CSME airline customers during the pandemic. It seeks to provide evidence that substantiates the information received by the Commission from national consumer protection authorities that airlines are: (a) not refunding their customers for cancelled tickets due to COVID-19, and; (b) steering affected customers to accept travel vouchers or accept the loss of the cancelled flights, by not providing sufficient information on the possibility of refund options. This is important because a review of the pandemic experiences of such consumers with flight cancellations may afford relevant insights for consumer protection policy as part of the enabling business environment for recovery of the air transport sector.

Methodology

- 2.2. The survey focused on three main factors that could allow airlines operating in the region to steer their customers to accept airline travel vouchers during the pandemic instead of refunds. These factors are:
 - (a) Customers' knowledge or awareness of the cancellation policies of the airlines. If customers are unaware of the cancellation/refund policies of the airlines, this would make it easier to steer customers towards travel vouchers.
 - (b) Customers' satisfaction with airline travel vouchers. It would be easier for airlines to steer their customers towards accepting travel vouchers if they are satisfied with or indifferent to this form of compensation.

(c) The type of tickets purchased by airline customers. In most cases the ability to receive a refund is directly linked to the type of airline ticket purchased by a customer. For example, purchasers of economy class tickets are less likely to receive refunds for cancelled airline tickets during the COVID-19 pandemic. This Study will test the hypothesis that the tickets purchased are associated with refund outcomes.

- 2.3. The approach taken by the Commission to collect information on the experiences of regional airline customers in obtaining refunds from airlines for their cancelled flights due to the pandemic. In doing so, the Commission sought to capture as many responses as possible of affected airline customers via an online airline customer survey. It is important to also note that the questions regarding refunds is part of a wider survey that sought to also collect information on the demand side of the regional airline market, which would feature in the competition assessment to be conducted in the second phase of the overall airline study.
- 2.4. The Commission distributed the online airline customer questionnaire via several methods. First, it used the snowball technique, where the staff of the Commission distributing the online questionnaire to persons via their private and business email contact lists, and social media networks, asking them to fill out the survey instrument and then forward it to their contacts to do the same. Second, the Commission requested the CARICOM Secretariat, other regional institutions and the national competition and consumer authorities to embed the questionnaire on the homepages of their websites. Third, the Commission requested its stakeholders to place the weblink to the questionnaire on their social media platforms to increase viewership.

Limitations of the Online Survey

- 2.5. The approaches outlined above amounts to a convenience sample. The sample is formed when the most attainable respondents from a population is selected. This non-probability sampling technique, therefore, does not rely upon a random process, which entails the population of regional air travellers is known. Additionally, given the regional scope of the survey, the timeline set for this first phase of the airline study, no funds available by the Commission for the survey, and the need for limited face-to-face interaction with potential respondents due to the pandemic, a convenient sample was deemed feasible.
- 2.6. However, there are disadvantages to using the online approach and the convenience sampling method. These disadvantages include:
- (a) Non-response biases because of uncertainty by potential respondents whether the invitations to take an online survey are computer viruses or malware. The probability of persons ignoring the invitations to take the online survey is also high given that internet users are sometimes bombarded with messages or junk email. Online surveys are also more likely to exclude the elderly or individuals without a significant internet presence, which could skew results.
 - (b) It is also harder to draw probability samples based on e-mail addresses or website visitations.

- 2.7. Because the survey relied on a convenient sample, the staff of the Commission made no inferences about the general population of regional airline customers affected by flight cancellations in this report. The staff of the Commission, therefore, treats the analysis of the information from the affected airline customers sampled as preliminary.⁵

Online Survey Responses

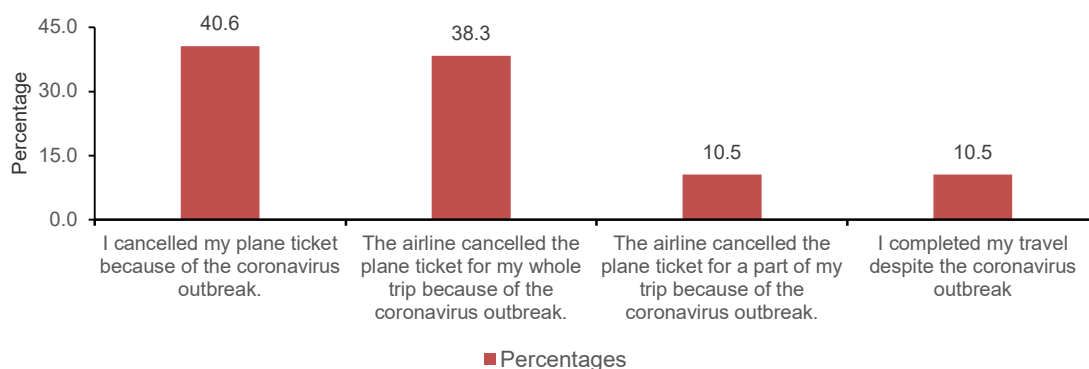
- 2.8. The online customer survey was available to the public from September to December 2020. However, since the pandemic is on-going, respondents were asked about their experiences with cancellations of travel plans made for the period March to June 2020. This period represents the first three months during and after the WHO announced the pandemic. Hence, it is likely travel plans would have been made prior to this period and without consideration to the pandemic.
- 2.9. In total, the Commission received 444 responses to its online airline customer survey, of which 139 indicated they had booked travel plans between March to June 2020. Moreover, almost half of those respondents who had travel plans between the specified period had their tickets cancelled by airlines due to the pandemic.
- 2.10. Based on the responses the following are some characteristics of the sample of respondents who had booked travel for the specified period:
- (a) Most of the respondents were female (63.6%)
 - (b) Most of the respondents were from Suriname, (20.4%), Trinidad and Tobago (18.5%), and Barbados (14.8%).
 - (c) Most of the respondents were within the 35-44 and 45-54 age categories.

Experiences of the sample with flight cancellations during COVID-19

- 2.11. As indicated above, of the 444 persons who responded to the Commission's online airline customer survey, 139 (31.3%) indicated they had booked airline tickets during the identified period. **Figure 1** shows that for respondents who booked tickets during the identified period, 40.6% cancelled their tickets themselves because of the pandemic, while 48.8% revealed that the airline cancelled the ticket for either their entire trip or part of the trip for the same reason (which in this report, is categorised as an "involuntary flight cancellation"). This chapter focuses on those affected respondents who experienced involuntary flight cancellations and their experiences with the airlines with which they booked tickets.

⁵ The Commission also included a section in its airline survey addressing refunds. The intention is to compare the findings of the two surveys once the information becomes available.

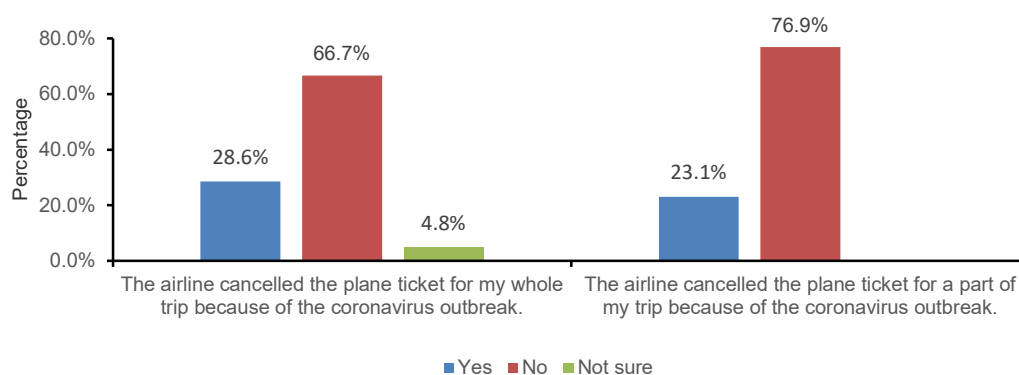
Figure 1: Respondents' actions after the WHO announced the pandemic



Awareness of airline refund policies

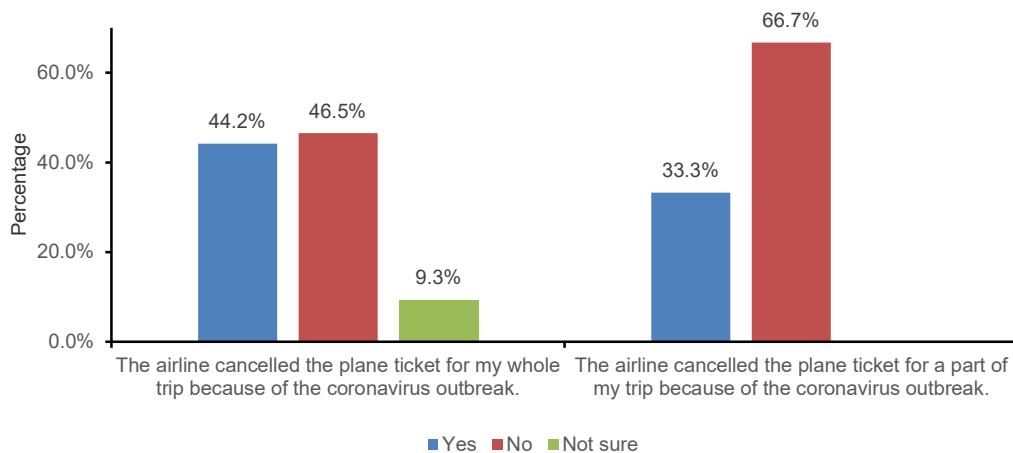
- 2.12. The Commission sought to find out from the affected respondents if, after having their trips cancelled, the airlines informed them about refunds. **Figure 2** illustrates that 66.7% of the airline customers surveyed stated that the airline did not communicate any information pertaining to refunds. 76.9% of those who had part of their trips cancelled stated they received no information about refunds from the airlines.

Figure 2: Percentage of affected respondents that were informed about refunds



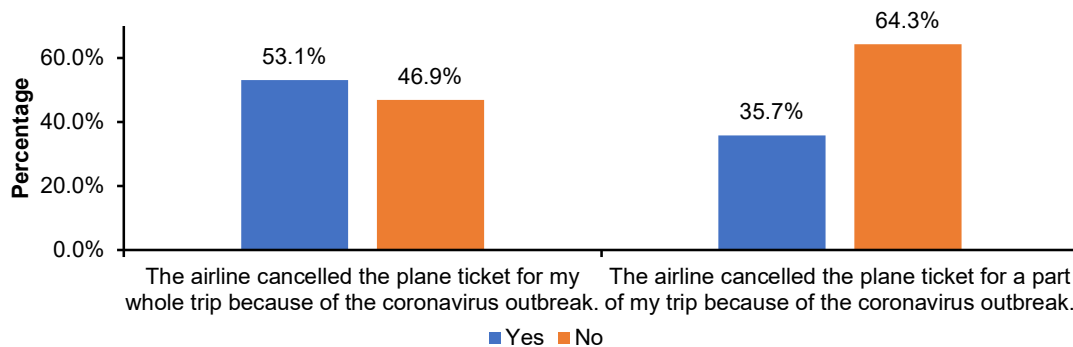
- 2.13. It is important to note that information deficits relating to travel vouchers were also observed from the survey. **Figure 3** shows that 46.5% of those airline customers who had their entire trip cancelled due to the pandemic, stated the airlines did not inform them about travel vouchers. 66.7% of airlines customers who had part of their trip cancelled were also unaware that receiving travel vouchers was possible.

Figure 3: Percentage of affected respondents that were informed about travel vouchers



- 2.14. The knowledge of the affected airline customers sampled of the refund policies of the airlines before they purchased their tickets is another issue considered. **Figure 4** shows that 46.9% of those with their entire tickets cancelled responded that they were unaware of the refund policies of the airlines before purchasing their ticket. This percentage increased to almost two-thirds (64.3%) for those who had tickets cancelled for part of their planned trips.

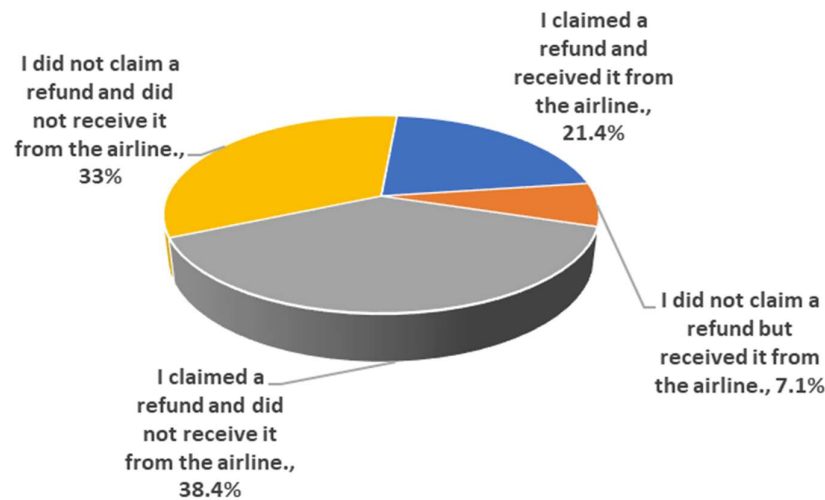
Figure 4: Affected respondents' level of awareness of airlines' refund policies



Experiences with refunds

- 2.15. The survey sought to determine if the affected airline customers in the sample received refunds from the airlines for their cancelled tickets. **Figure 5** reveals that 28.6% received refunds, most of which claimed for this form of redress (21.4%). Of the 71.4% who did not receive refunds, 33% did not claim it from the airline. Despite not receiving refunds, 58.5% of the affected airline customers also stated that they did not receive travel vouchers from the airlines.

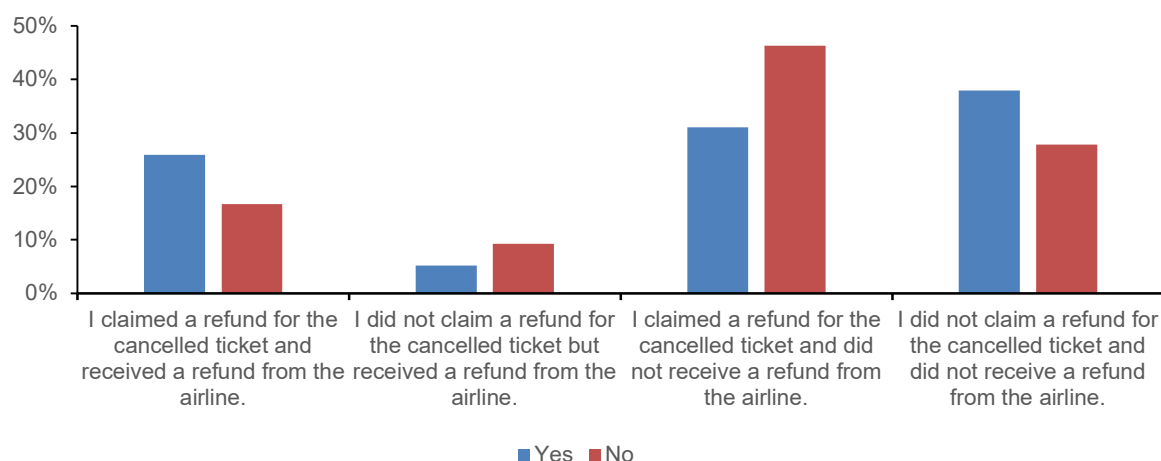
Figure 5: Results of whether affected airline customers received refunds from airlines



- 2.16. The report notes that 90.3% of the affected airline customers in the sample purchased economy class tickets. Further analysis of the data also revealed that 74.5% of those who purchased economy class ticket did not receive refunds. By comparison 100% of the business and first class ticket holders surveyed received refunds. This suggests that for the sample there is a possible association between the class of tickets purchased and refund outcomes. The Commission therefore formally tested and rejected the null hypothesis that refund outcomes and the class of tickets purchased are independent, providing evidence of a moderate, significant relationship between the two variables.⁶
- 2.17. The high percentage of unawareness of airline refund policies by the sample also prompted the assessment of whether there is a relationship between refund policy awareness and refund outcomes. **Figure 6** shows that the persons who stated they were aware of the refund policies received more refunds than those who were unaware the policies. Tests conducted, however, found no statistically significant relationship between the awareness of refund policies and refund outcomes. This implies that consumer awareness, by itself, does not necessarily determine or influence supplier conduct. The relevant point, however, is that the survey results imply the potential for improving consumer choice, and by extension welfare, in the relevant market and regulatory context by addressing information asymmetries.

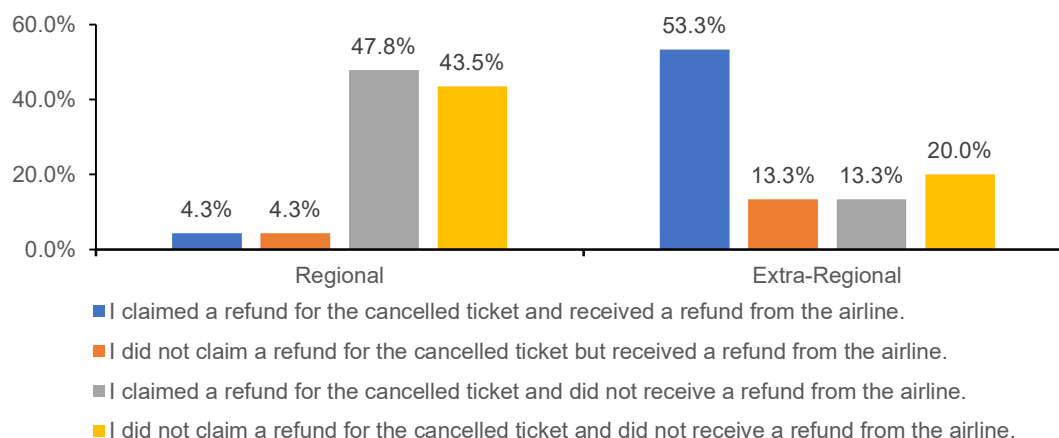
6 To test the hypothesis that refund outcomes and ticket classes are independent, the Commission conducted chi-square tests of association using a significance criterion of 5%. Since 75% of the cells had counts of less than 5 due to the high number of purchasers of economy class tickets, the result of the Likelihood Ratio was analysed. The Likelihood Ratio test reported a statistic of 21.704 with 9 degrees of freedom and a p-value of 0.01. Hence, we rejected the null hypothesis that the refund outcomes and ticket classes variables are independent. The Cramer's V, which measures the strength of the relationship is 0.266 (p-value of 0.005).

Figure 6: Refund outcomes by awareness of airline refund



- 2.18. Also examined was whether refund outcomes differed for customers who purchased tickets from regional and extra-regional airlines. **Figure 7** shows that for the sample, 91.3% of those who purchased tickets from regional airlines (e.g. Caribbean Airlines, LIAT and Suriname Airways) did not receive a refund. By comparison, 66.6% of those who purchased tickets from extra-regional airlines (e.g. KLM, American Airlines, Jet blue, etc.) received refunds. This suggests that the airline customers sampled were less likely to receive refunds from regional airlines than extra-regional ones.

Figure 7: Refund outcomes by regional or international airline



- 2.19. The Commission examined the relationship between refund outcomes and airline origins (i.e. regional or extra-regional) and found evidence this relationship is statistically significant.⁷ Moreover, a binary logistic model suggests that accounting for

⁷ The Chi-square test was used to examine the association between refund outcomes and airline origins (regional and extra-regional). Only 1 cell had a count of less than 5, so the Pearson Chi-square was interpreted. The test showed there was a significant relationship at the 5% level of between the two variables ($\chi^2 = 24.535$, $df = 3$, $p < 0.001$).

refund awareness and ticket class, the affected passengers sampled were 25 times more likely to receive a refund from extra-regional airlines than regional ones (see **Table 1**). In reviewing this finding, it is noted that 74.6% of the affected respondents stated they had booked flights with regional airlines. This could have accounted for the sampled displaying an increased likelihood of regional airlines not refunding their customers when compared to extra-regional airlines.

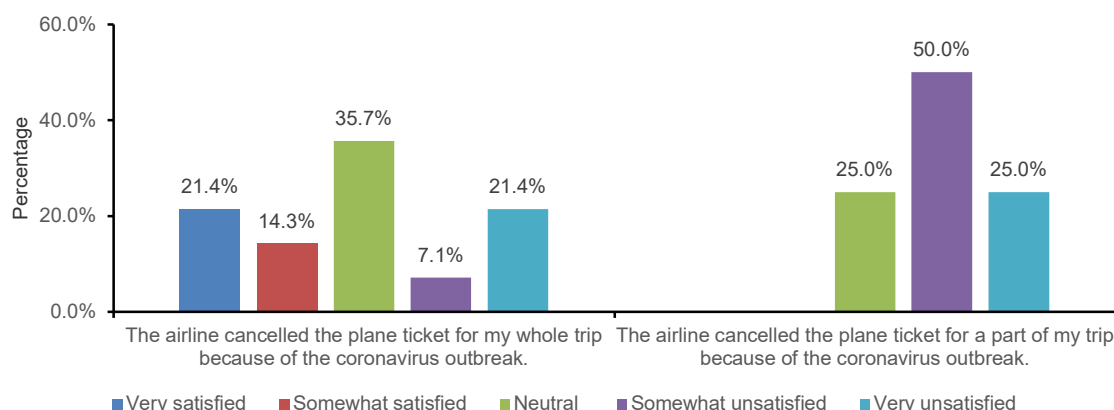
Table 1: Binary logistic model of airline refunds

Dependent variable: Refund	Beta	S.E.	Wald	df	Sig.	Exp(B)
Airline origin	3.224	0.848	14.455	1	0.000	25.137
Refund awareness	-0.345	0.807	0.183	1	0.669	0.708
Ticket type	1.702	0.871	3.823	1	0.051	5.487
Constant	-7.134	2.103	11.506	1	0.001	0.001
Diagnostics						
Nagelkerke R Square	0.493					
Model prediction accuracy (%)	86.7					
Hosmer and Lemeshow Test (Sig.)	0.270					

Satisfaction with travel vouchers

- 2.20. For those that received travel vouchers instead of refunds, the survey gathered information on their levels of satisfaction of receiving this form of redress. **Figure 8** indicates that a large percentage (35.7%) of those who had their entire trip cancelled were indifferent about receiving the voucher instead of a refund. The percentage of affected airline customers indifferent to the situation is greater than those unsatisfied with receiving vouchers (28.5%). The percentage of indifferent respondents was also the same as those satisfied with receiving the vouchers.

Figure 8: Level of satisfaction receiving vouchers instead of refunds



- 2.21. By comparison, the affected airline customers who had part of their travel plans disrupted by flight cancellations were less satisfied with the offer of travel vouchers than those who had their entire travel plans cancelled. None of the respondents

reported any level of satisfaction with that choice, while 75% reported being somewhat unsatisfied or very unsatisfied with being offered the voucher instead of a refund. Only 25% of that group reported being neutral on the subject.

Conclusion on the experiences of Airline customers

- 2.22. The preliminary results from the survey raise some concerns that subsequent sections of this report discuss in relation to passenger rights and consumer protection. Besides alluding to the sample of affected airline customers experiencing sub-optimal welfare outcomes due to flight cancellations during the pandemic, the survey revealed:
- (a) There may be issues concerning the sufficiency and timeliness of information provided by airlines to customers about their refund policies. This information deficit is particularly relevant to customer decision-making under uncertainty, such as during a pandemic.
 - (b) Given the sample's substantial degree of unfamiliarity with the airlines' refunds policies, they appeared to be easily "steered" towards accepting vouchers instead of refunds. The relatively high level of indifference from those who had their entire trips cancelled by the airlines reinforces this point.
 - (c) The information asymmetries and steer towards vouchers instead of refunds coincided with observed indifference or dissatisfaction by the sample with the redress they were able to obtain. The salient point is that, as the demand side of the market for air transport services is concerned, if these preliminary findings hold the policy discourse of this report should contend with the observed information deficits.



CHAPTER THREE: LEGAL FRAMEWORK FOR AIR PASSENGERS

Key statements:

- At the start of the pandemic regional airlines sought to steer customers away from requesting refunds by limiting their options for compensation in their public communications.
- The international legal and policy frameworks that exist do not contain controlling rules for air passenger rights when instances such as the pandemic arise. Official policy at the international level instead affords wide latitude to governments, while emphasizing that an appropriate balance should be struck between consumer and business interests.
- EU Regulation No. 261/2004 provides a comprehensive framework for air passenger rights that includes compensation for involuntary cancellations and obligations on air carriers to provide clear and simple information to their customers to minimise the risk of promoting messages that might bias the behaviour of customers in situations where airline liability may be at stake.
- There are limitations with utilising existing consumer protection legislation in the region. the consumer protection laws of some Member States and the proposed legislative regime under the CARICOM Model Consumer Protection Bill may afford recourse for airline customers who experience involuntary flight cancellations. This is based on a general obligation on suppliers to give refunds where they fail to provide the consumer with a contracted service or benefit.
- A gap analysis of the consumer regulatory framework in the CSME revealed gaps with respect to: (a) mechanisms for redress at the regional and national levels for airline customers when there are service disruptions, (b) initiatives to address information asymmetries through sufficient and timely consumer education and supplier transparency initiatives, and (c) the institutional frameworks needed to protect airline customers.
- Corrective measures to close the gaps could be either of two regulatory options: (1) a new 'CSME Air Passenger Rights Model Bill'; or (2) implement and optimise existing consumer policy arrangements. The report recommends the second option, which consists of three (3) strategic pillars: (a) full implementation of the CARICOM Model Consumer Protection Bill; (b) optimise inter-agency coordination at the national level in the air transport sector; and (c) optimise regional coordination of redress mechanisms for airline customers.

Regional Airlines Policies and COVID-19 Statements

- 3.1. The regional scheduled airline services conduct business with customers based on standard Conditions of Carriage ("Conditions"), which are the terms and conditions

that underpin their tickets for scheduled flights. General features of the refund arrangements under these standard term contracts include:

- (a) Available recourse for customers where the airline cancels the flight due to circumstances beyond its control. Such recourse usually includes: (i) rescheduling to a subsequent flight; and (ii) refunding the affected passenger.⁸
 - (b) Refunds are typically limited in scope, with the main limitation relating to whether whole or part of the ticket was used before the cancellation.
 - (c) Other limitations also involve conditionalities on the refund application, for example, the passenger must present proof of payment for the ticket.
 - (d) Some contracts do not state any time limit for the processing of refund applications.
- 3.2. Although the Conditions of Carriage are publicly accessible documents, the survey results discussed in the previous section suggest that a substantial number of customers may not have seen, or appreciated, the refund arrangements available under contract. Moreover, the airlines themselves developed and communicated specific COVID-19 travel policies.
- 3.3. Besides the legal function of these documents, they also provide information that may influence passenger expectations and decisions around their use of the services provided by the airlines (see **Appendix 1** for more information on this). Both documents are publicly available, in particular, the COVID-19 policies which were promoted through press releases and social media postings.
- 3.4. Immediately after the border closures and flight cancellations, the COVID-19 policies of the airlines commonly steered their customers towards rescheduling cancelled flights instead of applying for refunds. All the policies provided significant and detailed information about rescheduling, which was framed in terms of “*allowing passengers to rebook*” and “*granting waivers*” or vouchers. The information disclosed under the policies included the conditions for the exercise of rescheduling, the effect of rescheduling, which in most cases was to avoid the usual fees associated with rescheduling a flight, and specified time limits for the rescheduled flight to occur.
- 3.5. The policies, however, differed in their treatment of refunds. LIAT’s COVID-19 policy omitted an option to apply for a refund. CAL’s COVID-19 policy mentioned an option for a refund but limited this to the statement that “applicable fare rules apply”, thus placing the responsibility on their customers to conduct research about those rules. SLM’s COVID-19 policy provided information about the refund on offer, should its affected customers take that option and the time frame in which it would process a refund application.

8 Article 10 CAL’s Conditions of Carriage and Article 9 LIAT’s Conditions of Carriage. Note that SLM’s Conditions of Carriage differs from that of the other airlines in that for flights originating from Paramaribo, passengers are not entitled to a refund where they are given more than seven (7) days’ notice of a flight cancellation or schedule change prior to their planned departure date. The refund entitlement is triggered where they are not given the requisite seven day advanced notice.

- 3.6. Overall, while refunds for involuntary flight cancellations might have been available as a general matter of contract, the market reality is that the steer towards rescheduling was evident in other forms of communications during the pandemic, namely the COVID-19 specific policies, which were promoted to customers.

Legal and policy aspects of the international framework

- 3.7. This section considers the legal and policy aspects of the international framework for air passenger rights. Regarding the legal aspect, the primary sources of international law are (1) treaties, whether multilateral or bilateral; (2) international customs; and (3) general principles of law recognised by “civilised nations”.⁹ For the policy aspect, the section considers the relevant guidance from the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA), which are the main international organisations involved in aviation.

Legal aspects of the international framework

Multilateral Treaties

- 3.8. Multilateral treaties are an important source of law that contributes to the development of the international aviation industry.¹⁰ Some regulate public international law issues such as airspace sovereignty and the nationality of aircraft, and others regulate private international law issues, like airline liability.¹¹ Of interest are the latter and whether they address the specific concerns of this report.
- 3.9. Private international law aviation treaties, such as the Warsaw Convention, enjoy almost universal support in the international community.¹² They provide mandatory, exclusive, and uniform legal rules that regulate the general provision of air transport services, including on certain matters of air passenger rights.¹³ They reduce the risk of regulatory inconsistency which may arise in the provision of services across several countries, contributing to airline efficiency through cost reductions, market development by engendering consumer trust and confidence, and fostering growth and interconnectivity of air transport markets, including those in the CSME.
- 3.10. The report considered private international law treaties, like the Warsaw Convention, its protocols and the Montreal Convention. Although these treaties address air passenger rights in the context of liability for death and injury, they are not directly relevant to this report. They do not address such rights in the context of service disruptions, such as involuntary flight cancellations.

9 Article 38(1) of the Statute of the International Court of Justice, available at: <https://www.icj-cij.org/en/statute>

10 Bin Cheng, “A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)” [2004] 53(4) The International and Comparative Law Quarterly pp. 833-859

11 Fathi Zeroo, “The Role of International Conventions in Aviation Law” (Near East University, 2016) accessed at <https://www.researchgate.net/publication/314245546_The_Role_of_International_Conventions_in_Aviation_Law

12 Over 150 countries have ratified the Warsaw Convention.

13 Bin Cheng, “A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)” [2004] 53(4) The International and Comparative Law Quarterly pp. 833-859.

Bilateral Air Services Agreements

- 3.11. Bilateral air services agreements among states (BASAs) set out the regulatory framework under which airlines that are incorporated and/or operated in one state are granted economic rights to fly into and through another state.¹⁴ The regulatory framework under BASAs may include the rights of each state to designate one or more airlines, allowable routes that the airlines can service, the capacity they can offer and tariffs to be imposed.¹⁵
- 3.12. Although CSME Member States have had BASAs amongst themselves, since 1998 several Member States have agreed on a regional, and more liberalised, Caribbean Community (CARICOM MASA). The 1998 CARICOM MASA predated the Revised Treaty of Chaguaramas (“the Revised Treaty”), which was signed in 2001. The Member States revised the CARICOM MASA in 2018 to consider the deeper liberalisation and integration of markets required under the Revised Treaty. The 2018 CARICOM MASA while providing for fair competition, does not address consumer protection or air passenger rights.
- 3.13. Review of the legal aspects of the international framework for air passenger rights reveals that while there is limited recognition of the relevance of consumer protection, as seen in the rules governing liability for death or injury, there are no agreed international rules on consumer redress in the event of flight cancellations.

Policy aspects of the international framework

International Civil Aviation Organisation (ICAO)

- 3.14. ICAO is the global intergovernmental organisation established under the Chicago Convention¹⁶ to promote the safe and orderly development of international civil aviation throughout the world. ICAO is also involved in technical standard-setting for air transport, and a significant part of its work is providing policy development and advice to member state governments on economic matters.
- 3.15. As with most intergovernmental organisations, policy advice is developed in multinational fora. With ICAO, the Council – which is its second highest decision-making body – adopts official policy through council resolutions. Regarding consumer protection, the Council adopted in 2015 the “ICAO high-level, non-binding Core Principles on Consumer Protection” (“ICAO’s Core Principles”).¹⁷ While non-binding, ICAO’s Core Principles may indicate a minimum international policy consensus in this area.

14 The World Bank, [“Caribbean Air Transport: Strategic Options for Improved Services and Sector Performance”](#) (2006)

15 The World Bank, [“Caribbean Air Transport: Strategic Options for Improved Services and Sector Performance”](#) (2006)

16 The Convention on International Civil Aviation signed in Chicago in 1944.

17 ICAO, [“Policy and Guidance Material on the Economic Regulation of International Air Transport”](#) Doc 9587 Fourth Edition (2016)

- 3.16. Paragraph 1.2 of the Preamble to ICAO's Core Principles provides the general approach to consumer protection in air transport. In sum, the recommendation is not necessarily one of direct regulation in the first instance. Indeed, air passenger rights regimes may employ a mix of more 'free market' based approaches to include voluntary commitments and public education initiatives.¹⁸
- 3.17. Of relevance to this report, paragraph 3.2 of ICAO's Core Principles contemplates a range of responses to service disruptions, such as flight cancellations, that are not limited to providing refunds. These include rerouting, refund, care and/or compensation provided by relevant regulations or otherwise, and they may apply even if the flight cancellation is beyond an airline's control.¹⁹ It affords no priority to any response, whether by refunds or rescheduling or rerouting.

International Air Transport Association (IATA)

- 3.18. IATA is an incorporated trade association that represents the interests of the airlines. Whereas ICAO's membership comprises governments, IATA's membership comprises airlines that operate in over 100 countries. CSME-based airlines such as LIAT, Caribbean Airlines and Surinam Airways are IATA members.
- 3.19. IATA's mission is to facilitate cooperation to support airline activity and develop industry policy and standards. IATA focuses on, and publishes, technical standards to ensure safety, improve operational efficiency, and encourage environmental sustainability in the international airline industry. More recently IATA articulated positions (not standards) on several passenger issues which include: (i) delays, (ii) mishandled baggage, and (iii) ticket refunds.
- 3.20. IATA's position on cancellations and refunds,²⁰ like ICAO's, encourages national and regional consumer protection regimes to consider the impact of massive service disruptions. However, it differs from ICAO in that there is a limitation on the mandate for consumer redress such as refunds, re-routing and compensation to situations where the airline is at fault for the cancellation. IATA's position is that "*...governments should allow market forces to determine the care and assistance available to passengers.*"²¹ IATA's position also divergences from that under the EU air passenger rights framework, which provides for some redress even where the airline is not at fault.

18 In 2003, the Fifth Worldwide Air Transport Conference (ATConf/5) addressed consumer interests in the liberalisation process and reached some conclusions, one of which was that: "states need to strike the right balance between voluntary commitments and regulatory measures, whenever the government intervention is considered necessary to improve service quality. States should rely generally and initially on voluntary commitments undertaken by airlines (and service providers), and when voluntary commitments are not sufficient, consider regulatory measures".

19 ICAO, "[Policy and Guidance Material on the Economic Regulation of International Air Transport](#)" Doc 9587 Fourth Edition (2016).

20 IATA, "[Core Principles on Consumer Protection](#)".

21 IATA, "Core Principles on Consumer Protection" accessed at: <https://www.iata.org/en/policy/consumer-pax-rights/consumer-protection/> on December 9, 2020.

Conclusion on the international policy aspects

- 3.21. The research revealed no discernible “controlling rules” for consumer protection or air passenger rights in the event of flight cancellation when it reviewed the international policy aspects of the airline industry. Instead, official policy affords authorities wide latitude in their approach to these issues; stressing that any approach by governments should strike an appropriate balance between consumer and business interests. This suggests that national and/or regional initiatives, which may reflect national or regional priorities, drives standard-setting for air passenger rights.

The EU Framework for Air Passenger Rights

- 3.22. This section examines the consumer protection regime that exists in the air transport market in the European Union (EU). The EU was selected because it is an example of a liberalised and integrated regional single market for air transport services. This is reminiscent of the stated objective of the 2018 CARICOM Multilateral Air Services Agreement.²² The EU’s air passenger rights regulation, examined below, also inspired similar regulation in Canada²³ and the United Kingdom.²⁴
- 3.23. The EU’s regional single market for air transport service is regulated in the main by Council Regulation (EC) No. 261/2004. This regulation establishes common rules on compensation and assistance to passengers when denied boarding and for cancellations or long flight delays.
- 3.24. These common rules are necessary “*to ensure a well-balanced development*”²⁵ of the EU market during and after liberalisation, including appropriate protections to safeguard consumer welfare in the more competitive market environment, post-liberalisation. This section reviews Regulation No. 261/2004, including case law from the European Court of Justice (“ECJ”) which not only refines facets of the regulation but also highlights its practical application.
- 3.25. It is important to note that the consumer protection regime that applies in the EU air transport market also encompasses several other regulations beyond Regulation No.261/2004. Although not directly relevant to this report, these other regulations include the Unfair Commercial Practices Directive (2005/29/EC of the European Parliament and of the Council of 11 May 2005).

22 The Preamble reads in part: “Committee to the establish of a single market for air transport services consistent with their obligations under the Revised Treaty, which requires the establish of a framework within the Community for the liberal exchange of route, traffic and other air transport rights in the context of traffic requirements, the promotion of healthy competition and growth in the air transport sector and improved efficiency and quality of air transport services for consumers.”

23 See, the Canadian Transport Authority’s Air Passenger Protections Regulations, 2018.

24 See, UK Civil Aviation Authority’s Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations, 2005.

25 See the predecessor to Regulation No. 261/2004, that is, Council Regulation (EEC) No. 295/1991 which in its preamble states: “whereas common action in the field of the protection of the interests of air transport users is required, in order to ensure a well-balanced development in the light of the radically changing environment in which air carriers have to operate.”

Scope of Regulation No. 261/2004

- 3.26. Regulation No. 261/2004 addresses denied boarding; cancellation; and long delay of flights. The regulation defines each of these circumstances but not the concept of a “flight”. The ECJ however defined a “flight” within the regulation to mean “*an air transport operation, being as it were a ‘unit’ of such transport, performed by an air carrier which fixes its itinerary.*”²⁶ In other words, a flight is a discrete air transport operation that is fixed according to an itinerary. Thus, the itinerary is an essential element of the concept of a flight under the regulation, as a flight is operated in accordance with the carrier’s pre-arranged planning.²⁷ The Court explained that from the perspective of the passenger, his journey from origin to destination could comprise several “flights” so defined.
- 3.27. “Cancellation” within the regulation means the “*non-operation of a flight which was previously planned and on which at least one place was reserved.*”²⁸ The ECJ interpreted “cancellation” to cover not only situations where the aircraft did not take off as planned, but also situations where it took off but, for whatever reason, must return to the airport of departure or arrive at a different airport from that scheduled.²⁹ This is consistent with the concept of “flight” as an air transport operation performed according to a pre-arranged plan (that is, an “itinerary”); thus if the plan is not followed, the “flight” is cancelled for the purposes of the regulation.
- 3.28. Article 3 of the regulation outlines its scope. Article 3(1)(a) covers passengers departing from airports within EU territory or arriving at an airport within EU territory by means of a Community carrier, provided that they are individuals travelling with fares that are available to the general public. In this regard, a “Community carrier” within the meaning of the regulation is an airline with a valid operating licence granted by an EU member state in accordance with applicable EU regulations on the licencing of airlines. Article 3(1)(b), applies to passengers leaving from an airport in a third country for an airport within the territory of a member state flying with a community carrier, unless the passengers received “*benefits or compensation and were given assistance in that third country.*”
- 3.29. Both limbs of Article 3(1) indicate that the applicability of the regulation coincides with the traditional bases for the assertion of state jurisdiction under public international law, that is, territoriality (sub-paragraph 1(a) and nationality (sub-paragraph 1(b)). It is clear that notwithstanding the transnational nature of the market for air transport services, EU policy makers did not opt for extra-territorial application of the regulation. Consequently, the regulation will not apply to passengers flying from a non-member country to a member state on a non-Community carrier.

26 Case C-173/07 Emirates Airlines – Direktion für Deutschland v Diether Schenkel, Judgment Delivered July 10, 2008, at paras 40 – 41.

27 Joined Cases C-402/07 and C-432/07 Christopher Sturgeon and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA, Judgment Delivered November 19, 2009, at para 30.

28 Article 2, Regulation No. 261/2004.

29 Case C-83/10 Aurora Sousa Rodríguez and Others v Air France SA, Judgment Delivered October 13, 2011, at para 35.

- 3.30. Moreover, passengers who: (a) travel free of charge or at a reduced fare not available directly or indirectly to the public (for instance airline, travel agent or tour operator employees) or (b) are denied boarding for reasons of health or safety or for not having valid travel documents cannot avail themselves of the protection granted by the Regulation.
- 3.31. In specific instances of denied boarding, long delays or cancellations, the applicability of the regulation will depend not only on satisfying the Article 3(1) criteria, but additionally, will be triggered where a passenger “*has a confirmed reservation on the flight concerned and...present themselves for check-in...at the time indicated...or if no time is indicated – not later than 45 minutes before the published departure time.*” Based on this requirement, passengers cannot claim the benefit of the regulation where they reserve but do not show up at the airport.

Airline obligations and passenger rights in cancellation cases

- 3.32. For flight cancellations, Article 5 stipulates the primary obligations of airlines and rights of passengers as: reimbursement (refund) or re-routing; care and assistance; and compensation in specified circumstances.³⁰ The rights or obligations to a *refund or re-routing* and to care and assistance are ‘strict’ in that they do not depend on whether the cause of the cancellation was within the airline’s control. The measures must be offered once there is a flight cancellation. By contrast, the right or obligation to *compensation* depends on whether the cause of the cancellation was within the airline’s control; the adequacy of advanced notice of cancellation provided by the airline; and the offer of alternative flights. A brief summary of the provisions for each right/obligation follows.

Refund or re-routing

- 3.33. Consistent with the policy rationale in Recitals 12 and 13 of the Regulation, for cancelled flights the right to a refund or to be re-routed is a choice to be made by passengers. These two choices are outlined in Article 8(1) of the regulation. For journeys which comprise multiple flights, the right or obligation to a refund may extend to flights already performed by the airline, if due to the cancellation of a subsequent flight, the overall purpose of the journey, from the passenger’s perspective, is frustrated.
- 3.34. Where the passenger chooses to be refunded, the airline is obligated to make payment within seven (7) days, and to do so by specified methods under the regulation which include, “...*by cash, electronic bank transfer, bank orders or bank cheques...*” Refunds in the form of travel vouchers or deferred tickets must be “...*with the signed agreement of the passenger.*”

Care and assistance

- 3.35. The care and assistance offered by an airline, under Article 9, is an obligation to provide meals, hotel accommodations, transport to the hotel, and communication

30 See Recitals 12 and 13 of Article 5 of the regulation.

services (telephone calls, emails, etc) while the passenger is being re-routed in accordance with Article 8.

Compensation

- 3.36. As mentioned earlier, the right or obligation to compensation is not automatic and depends on the specific facts in question. There is no right or obligation to compensation if the airline gives advanced notice of a flight cancellation according to the various notice periods stipulated under Article 5(1)(c).³¹
- 3.37. However, if the airline does not give advanced notice pursuant to Article 5(1)(c), for example, where a flight is suddenly cancelled, then the right or obligation to compensation will arise unless the airline can rely on the “*extraordinary circumstance*” exemption under Article 5(3). The airline must also show it took “*reasonable measures*” to avoid the extraordinary circumstance in question.
- 3.38. The regulation does not define the concepts of “extraordinary circumstances” and “reasonable measures”. In addition to the examples cited in the recitals of the Regulation, the ECJ’s jurisprudence also clarifies that as a general matter an extraordinary circumstance is “...*an event which...is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.*”³²
- 3.39. It is also not every event that qualifies as an extraordinary circumstance which will trigger the Article 5(3) exemption from the duty to compensate where it arises. As that provision states, the extraordinary circumstance must be one the airline could not avoid even if it took all reasonable measures. Consequently, where an airline cancels a flight without giving passengers sufficient advance notice in terms of Article 5(1)(c), it will only avoid paying compensation if it can demonstrate that the cancellation was due to an abnormal event beyond its control, and that reasonable measures could not have avoided that outcome.

Other relevant provisions

- 3.40. Apart from core rights or obligations in the event of flight cancellation, there are other provisions of the regulation that promote its effectiveness. The Article 14 obligation of airlines to inform passengers of their rights is critical given the earlier discussion of information asymmetries in the market. It is not a general obligation that affords airlines much discretion for implementation but is very specific on the content of the information they must provide to passengers. Article 14(1) and Article 14(2) require airlines to provide clear and simple information to passengers to minimise the risk of promoting messages that might bias the behaviour of customers in situations where

31 The notice periods are: (i) No compensation is due if the airline gives notice at least 2 weeks before the scheduled time of departure; (ii) No compensation is due if the airline gives notice between 2 weeks and 7 days before the scheduled time of departure and they offer passengers re-routing under specified circumstances; (iii) No compensation is due if the airline gives notice less than 7 days before the scheduled time of departure and they offer passengers re-routing under stricter specified circumstances.

32 Case C-549/07 Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA, Judgment Delivered on December 22, 2008, at para 23.

airline liability may be at stake. The regulation also places the onus on airlines to supply passengers with information that prompts or behaviourally nudges them to act on their rights. This is critical where the level of consumer sophistication with the product and applicable regulatory framework, may be low.

- 3.41. Another important provision of Regulation No. 261/2004 is the Article 13 right of redress. The article provides that where airlines meet their obligations under the regulation, in particular paying compensation, nothing restricts their right to seek compensation from any person, including third parties under applicable law. The provision is in the nature of a “savings clause”, and its clear import is to preserve the right of airlines to reclaim costs incurred as a result of their obligations under the regulation. This considers the financial implications of the rights or obligations afforded by the regulation.
- 3.42. Lastly, Article 16 requires EU member states to designate enforcement bodies to take measures necessary to protect consumers. The provision further affords passengers an individual and direct right to access those enforcement bodies by way of complaint and requires the member states to ensure that “*effective, proportionate and dissuasive*” sanctions are available for airline infringement of the regulation. Some observe that “...it would be naïve to think airlines would comply with EU provisions without efficient sanctioning mechanisms that highlight infringements and constitute a deterrent to future occurrences.”³³
- 3.43. Article 16 also does not require member states to establish a body with exclusive competence to administer the regulation, as the establishment of such bodies could be costly. Some EU member states have therefore vested competence in either their civil aviation authority or consumer protection agency, while others have established independent bodies.³⁴ This feature of the institutional arrangements under the regulation is interesting as it reflects the policy imperative of national implementation of regional standards.

Conclusion on the EU Airline Regulations

- 3.44. The review offered brief insights into the EU air passenger rights regime. Regulation No. 261/2004 reflects the approach of direct and comprehensive consumer protection regulation in an air transport market. The Regulation could be a relevant model in considering policy responses to the issues outlined in this report for the CSME. The next section reviews whether, and if so how, the regulatory framework that exists both nationally and regionally in the CSME addresses consumer protection issues, with specific reference to flight cancellations in the air transport market.

Consumer Protection Legislation in the CSME

- 3.45. **Table 2** summarises the state of play in the Member States regarding consumer protection legislation. It shows that 9 Member States have enacted dedicated consumer protection legislation, while 3 have not yet done so. All Member States

33 Francesco Rossi Dal Pozzo, *EU Legal Framework for Safeguarding Air Passenger Rights* (Springer International Publishing Switzerland 2015) at p 185.

34 *ibid*, at page 185 – 186.

exhibit a patchwork of sector-specific legislation to promote consumer interests in certain transactional contexts.

Table 2: Summary of consumer legislation in the Member States

Member State	Dedicated Consumer Protection Legislation ^a	Sample of other laws relevant to consumers ^b
Antigua & Barbuda	<ul style="list-style-type: none"> • Consumer Protection & Safety Act 	<ul style="list-style-type: none"> • Sale of Goods Act • Supply of Goods & Services (Implied Terms) Act • Unfair Contract Terms Act
Barbados	<ul style="list-style-type: none"> • Consumer Protection Act • Consumer Guarantees Act 	<ul style="list-style-type: none"> • Bills of Sale Act • Fair Trading Commission Act • Control of Standards Act • Weights & Measures Act
Belize	N/A	<ul style="list-style-type: none"> • Sale of Goods Act • Hire Purchase Act • Public Utilities Act
Dominica	N/A	<ul style="list-style-type: none"> • Supply Control Act • Standards Act • Noxious & Dangerous Substances Act
Grenada	<ul style="list-style-type: none"> • Consumer Protection Act 	<ul style="list-style-type: none"> • Food Safety Act • Price Control Act • Hire Purchase Act
Guyana	<ul style="list-style-type: none"> • Consumer Affairs Act 	<ul style="list-style-type: none"> • Guyana National Bureau of Standards Act • Food & Drug Act • Weights & Measures Act
Jamaica	<ul style="list-style-type: none"> • Consumer Protection Act 	<ul style="list-style-type: none"> • Security Interest in Personal Property Act • Electronic Transactions Act • Hire Purchase Act
Saint Kitts & Nevis	<ul style="list-style-type: none"> • Consumer Affairs Act 	<ul style="list-style-type: none"> • Consumer Credit Act • Telecommunications Act • Sale of Goods Act
Saint Lucia	<ul style="list-style-type: none"> • Consumer Protection Act 	<ul style="list-style-type: none"> • Distribution & Prices of Goods Act • Telecommunications Act • Metrology Act
Saint Vincent and the Grenadines	<ul style="list-style-type: none"> • Consumer Protection Act 	<ul style="list-style-type: none"> • Supplies Control Act • Electronic Transactions Act • Sale of Goods Act
Suriname	N/A	<ul style="list-style-type: none"> • Economic Offences Law • Technical Regulations on Labelling, Food Hygiene and Safety • Law on Electronic Legal Transactions
Trinidad & Tobago	<ul style="list-style-type: none"> • Consumer Protection & Safety Act 	<ul style="list-style-type: none"> • Unfair Contract Terms Act • Electronic Transactions Act • Sale of Goods Act

Notes:

^a “Dedicated Consumer Protection Legislation” means a single legislative enactment of general applicability across markets or economic sectors that provides legal and institutional arrangements for the benefit of consumers.

^b “Other Laws Relevant to Consumers” includes legal instruments with provisions that may be interpreted for the benefit of consumers in specific sectors or transactional contexts.

3.46. This report utilised as its sample the regulatory frameworks in Trinidad and Tobago, Jamaica, Guyana, and Barbados as well as the overall position of those CSME

Member States in the Eastern Caribbean. It also considered the regional state of play in terms of the CARICOM Consumer Protection Model Bill.

Consumer Protection Legislation in the Member States

- 3.47. **Table 3** compares the dedicated consumer protection statutes of Trinidad and Tobago, Jamaica, Guyana and Barbados. Generally, the statutes are similar in that they all apply to goods and services. The statutes also apply to all industries within the Member States, as no express sectoral exclusions of their applicability appear in the various legislative texts.³⁵ Given their broad coverage, consumer issues in markets for air transportation services are within the remit of the dedicated consumer laws of the Member States discussed below.

Table 3: Comparison of the consumer protection law of Trinidad and Tobago and Jamaica

<i>Member State</i>	<i>Barbados</i>	<i>Guyana</i>	<i>Jamaica</i>	<i>Trinidad and Tobago</i>
<i>Consumer Legislation</i>	(i) Consumer Protection Act (2002) (ii) Consumer Guarantees Act (2001)	Consumer Act (2011)	Affairs Consumer Protection (2005)	Act Consumer Protection and Safety Act (1985)
<i>Legislation Type</i>	Second generation	Second generation	Second generation	First generation
<i>Individual redress</i>			Yes	No
<i>Scope</i>	Goods and services	Goods and services	Goods and services	Goods and services
<i>Market Exemptions</i>			No	No

- 3.48. However, the major difference in the consumer laws is in their legislative nature and redress mechanisms. Trinidad and Tobago's consumer protection law belongs to the first generation of consumer legislation in the CSME, which features limited intervention in markets and no direct redress mechanisms available to individual consumers.³⁶ If consumer trade practices adversely affect the economic interests of

35 Although it is observed that section 2(3) of the Barbadian Consumer Protection Act, 2002 effectively exempts employment contracts from the statute's application to the supply of services. While the other statutes that were reviewed did not contain this exemption, there may be consensus that consumer legislation does not apply to the supply of labour.

36 Generally, 'first generation consumer legislation' originated in market environments that were characterized by heavy regulation, such as price control, subsidies and tariffs, and pervasive state involvement in commercial enterprise. It is recognized that notwithstanding subsequent liberalization and privatization over the years, some Member States have not yet reformed their consumer law in accordance with evolving market realities.

consumers in Trinidad and Tobago, the Director of Consumer Guidance may advise the Minister to make an Order under Section 16 to prevent or modify the offending consumer trade practice. The Order is enforceable through criminal sanctions, so enforcement of the legislation is the responsibility of the state authorities, for example, a prosecutor.

- 3.49. By comparison, Jamaica's consumer protection law is an early example of second-generation consumer legislation in the region. It features a more interventionist approach to ensuring that consumer welfare is not sacrificed in the pursuit of greater gains for suppliers.³⁷ For example, Section 46 requires a provider to offer a full or partial refund, and compensation if warranted, where a consumer should receive a benefit from a paid service and does not get it through no fault of his or her own.
- 3.50. A consumer in Jamaica may have recourse to the individual redress mechanism under the Consumer Protection Act, 2005 if a provider does not comply with a Section 46 obligation. Individual access to redress would be through a complaint to the Consumer Affairs Commission (CAC) under Section 7 of the legislation, which could exercise its powers of investigation under Sections 10 – 12. The CAC may facilitate mediation between the provider and consumer, and where this is unsuccessful refer the matter to the Consumer Protection Tribunal for adjudication under section 44(2). The Tribunal may exercise extensive remedial powers under section 44B(2), which includes the power to order payment of a refund with interest.
- 3.51. Guyana's consumer protection law is another example of second generation consumer legislation. It is in the mould of the CARICOM Model Consumer Protection Bill as examined in the next section. It therefore exhibits many of the features of the Model Bill such as substantive consumer rights and supplier duties. The Guyanese counterpart to the refund obligation where there is a failure to provide a contracted service is Section 29 of the Consumer Affairs Act, 2011. Of note, is the redress mechanism which shares some similarities with the institutional arrangements examined in relation to Jamaica and Trinidad and Tobago. Like Jamaica, consumers in Guyana have individual access to redress by way of complaint to the consumer protection authority under the law, which can both investigate and mediate disputes. Like Trinidad and Tobago, however, enforcement is primarily criminal in nature with the consumer protection authority as prosecutor of alleged breaches in the courts.
- 3.52. The consumer protection framework in Barbados also differs from that in other Member States as it comprises a pair of dedicated consumer protection statutes, namely: (i) the Consumer Protection Act, 2002; and (ii) the Consumer Guarantees Act, 2002. Moreover, the institutional arrangements vary between those laws, as the first-mentioned statute relies on a centralized authority model as typified under the Model Bill and the laws of Member States such as Guyana and Jamaica;³⁸ while the second mentioned statute relies on a decentralised private enforcement model whereby

37 'Second generation consumer legislation' can be found in market environments that are characterized by liberalization and privatization, that is, where in the main prices and quantities of consumer goods and services are not regulated, and rivalry among private enterprise is intense

38 The centralized authority is the Barbados Fair Trading Commission as established under the Fair Trading Commission Act, which by affords it competence to enforce consumer protection laws.

consumers may resolve disputes through a specialised dispute resolution mechanism³⁹

- 3.53. Cumulatively, these legal and institutional arrangements afford consumers in Barbados similar safeguards as seen with second generation consumer legislation in the region. By virtue of Sections 30, 33 and 38 of the Consumer Guarantees Act, redress for failure to perform a contracted service could be available with a range of remedies to include refunds and compensation. These provisions could be utilised in the context of an involuntary flight cancellation, where the failure to provide the flight may be interpreted as a breach of the guarantee of merchantable performance of a service under Section 30.
- 3.54. Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Christopher and Nevis, St. Lucia and St. Vincent and the Grenadines are parties to the Revised Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union, 2010. Those Member States pursue an economic union characterised by common financial and commercial policies, for example, in competition.
- 3.55. Although the OECS Authority has legislative competence to enact in certain areas laws that are directly effective in those Member States,⁴⁰ consumer protection is not one of the areas of competence. Those Member States, therefore, retain their sovereign competence to enact national laws in the area of consumer protection. The result is that while nearly all CSME Member States in the Eastern Caribbean have consumer laws, there is significant variation in terms of first and second generation consumer legislation. For example, the consumer law in Antigua and Barbuda is first generation and is similar to that discussed in relation to Trinidad and Tobago, while the law in St. Lucia is second generation and is enacted in the mould of the Model Bill.
- 3.56. The differences in the legislative types and redress mechanisms are important for airline customers seeking refunds for involuntary flight cancellations due to the pandemic. This report concludes that in those Member States with first generation consumer legislation, it remains possible to utilise the mechanism under those earlier statutes to make an Order which prescribes obligations for airlines and rights to passengers for flight cancellations. However, the first generation legislation does not enable the creation of positive rights that directly inure to the benefit of individual consumers, for example, the right to cancel the supply of a good or service. Redress would also be difficult as enforcement usually resides with a criminal prosecutor and not the consumer or an agency on his behalf, which in turn, suggests that refunds would be difficult to obtain under such an approach.
- 3.57. In those Member States with second generation consumer legislation, legal provisions such as Section 46 of the Jamaican Consumer Protection Act or Sections 30, 33 and 38 of the Barbadian Consumer Guarantee Act may be relevant for airline customers as those provisions could ground a general obligation by an airline to offer refunds for a flight cancellation not attributed to the conduct of passengers.

39 Under the Consumer Guarantees Act, a consumer has the option to seek redress either through the general courts of Barbados or the specialized 'Consumer Claims Tribunal' established under Part VII of the Act. For Tribunal proceedings, a consumer may be represented by the Public Counsel, which is a statutory functionary under the Utilities Regulation Act.

40 Articles 8.10 and 14.1 of the Revised Treaty of Basseterre.

- 3.58. The legal basis for utilising Section 46 and its counterparts in this context would be that an airline provides a distinct benefit to customers, for example transportation in accordance with the contract of carriage; and that benefit was not provided when the flight was cancelled by the airline. While it is possible to ‘contract out’ of Section 46 in Jamaica, the statute constrains that approach by requiring such an exclusion to satisfy the statutory test of reasonableness under Section 43. Notably, the Barbadian Consumer Guarantee Act forecloses this approach with a prohibition on ‘contracting out’ of the guarantees in consumer transactions.⁴¹
- 3.59. However, two considerations are relevant to utilising existing consumer laws as suggested; first, enforcement may be limited if the airline is incorporated or registered outside of the jurisdiction. This is the natural result of the usual territorial scope of legislation. Second, notwithstanding the self-initiation powers of the consumer protection authorities, much will depend on the awareness of passengers about the potential for redress under the law, and their willingness to co-operate with agency investigations. In this regard, the airline policy during the pandemic of promoting the rescheduling of cancelled flights instead of refunding passengers must be noted.

Other Relevant Legislation in the Member States

- 3.60. Besides the dedicated consumer protection laws, the relevant regulatory framework in the Member States includes other legislation aimed at protecting consumers, which include Sale of Goods Acts, Unfair Contract Terms Acts, and Electronic Transactions Acts. These statutes apply to consumers in specific contexts. For example, Sale of Goods Acts primarily apply to transactions involving goods, instead of services.
- 3.61. Regarding markets for air transportation services, the electronic transactions legislation of the Member States is relevant. A significant number of airline customers bought tickets online which were cancelled by the airlines due to the pandemic. In Jamaica, Section 30 of the Electronic Transaction Act, 2007 requires suppliers in electronic transactions to provide a refund to consumers where they cannot supply the contracted goods or service within an agreed, specified time. This could further supplement the redress available under Section 46 of the Consumer Protection Act, 2005, at least for those air passengers who purchased their tickets online. This is also enforceable by way of individual complaint to the CAC.⁴²
- 3.62. However, in Trinidad and Tobago, the Electronic Transaction Act (2011) was partially proclaimed in January 2012. This means only those provisions that address the use of electronic documents and electronic signatures for certain electronic transactions, and the storage of information in electronic form, are in force.⁴³ Part VIII of the legislation that addresses consumer protection has not been proclaimed and is not in force.⁴⁴ Hence, for practical purposes, the legislation does not offer comprehensive consumer protection in terms of substantive rights and redress for consumers in the Member State.

41 Section 50 of the Consumer Guarantee Act.

42 Section 32 of the CPA.

43 Hamel-Smith & Co, “Enforceability of Electronic Signatures” (*Hamel-Smith's Website*, April 17, 2020) <<http://trinidadlaw.com/electronic-signatures/>> accessed 12 January 2021

44 Section 1(2) of the Electronic Transactions Act, 2011.

- 3.63. In Guyana, while there is a draft bill on electronic transactions, as at the date of this report there is no legislation in force.⁴⁵ Barbados has the Electronic Transactions Act 2001, but unlike its counterparts in other Member States, this statute does not contain e-commerce protections for consumers. Antigua and Barbuda, St. Vincent and the Grenadines, Dominica, Grenada, Montserrat, St. Kitts and Nevis and St. Lucia all have electronic transactions legislation.⁴⁶ The most recent of which, is the Electronic Transactions Act 2015 of Saint Vincent and the Grenadines. Although the Vincentian legislation contains e-commerce protections for consumers, it does not have an equivalent to Section 30 of the Jamaican statute discussed above.

Aviation Legislation in the Member States

- 3.64. Several statutes underpin the highly regulated air transportation markets in the Member States. This report reviewed the Civil Aviation Acts across the region and found that they primarily concern technical matters related to air navigation and aircraft safety. They also address economic matters relating to licensing regulations for aerodromes and aircraft. Generally, the Civil Aviation Acts of the Member States do not address consumer protection in air transportation markets.⁴⁷

CARICOM Model Consumer Protection Bill

- 3.65. The Model Bill proposes a legal framework that consolidates the key rights and duties of both consumers and suppliers concerning the provision of goods and services. It also proposes institutional and administrative arrangements for the monitoring, investigation and redress of violations of those rights and duties; with such arrangements being like those under the Jamaican Consumer Protection Act (CPA), to include an independent division or agency and a specialised tribunal. One of the stated objectives of the Model Bill is “...to promote and advance the social and economic welfare of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible.”⁴⁸
- 3.66. The Model Bill applies to both goods and services, with several provisions that could be useful in consumer agreements⁴⁹ for services.⁵⁰ Clause 131 of the Model Bill, if

45 Kaieteur news, 'Gov't moves to finalize Electronic Communications and Transactions Bill' (October 9, 2020) <<https://www.kaieteurnewsonline.com/2020/10/09/govt-moves-to-finalize-electronic-communications-and-transactions-bill/>> accessed May 15 2021

46 Bartlett Morgan, 'List of E-Commerce Laws in the Caribbean' (*Bartlett D Morgan - Digital Law and Policy in the Caribbean*, April 10, 2020) <<https://www.bartlettmorgan.com/2020/04/10/list-of-e-commerce-laws-in-the-caribbean/>> accessed May 15 2021

47 Although this should *not* be read to mean that inter-agency cooperation on consumer protection issues is thereby excluded by the legislative mandate under the Civil Aviation Acts. On a purposive reading of the legislation, such cooperation could be permissible under the economic regulation provisions.

48 Clause 3, Model Bill

49 Regarding a consumer agreement, Clause 2 of the Model Bill defines “consumer agreement” to mean “any written, oral or implied agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment.”

50 Concerning services, Clause 2 of the Model Bill defines services to mean “a service of any description which is made available to users and includes, but is not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging (or both), housing construction, entertainment, amusement or the purveying

enacted, could offer consumers redress for the non-provision of contracted services, which is similar in effect to section 46 of the Jamaican CPA. A relevant difference between Section 46 of the Jamaican CPA and Clause 131 of the Model Bill is the even more constrained ability of a supplier to exclude the obligation to refund under the Model Bill than the Jamaican CPA.⁵¹ Therefore, obligations to offer refunds could arise under a national legislative provision based on Clause 131 of the Model Bill for flight cancellations that are not attributed to the conduct of passengers.

- 3.67. While airline customers could enjoy protection under the Model Bill, like its national counterparts in Jamaica, Saint Lucia, Grenada, Saint Vincent and the Grenadines and Guyana, concerns around cross-border redress abound. The Model Bill does not mandate legal or institutional arrangements to resolve cross-border consumer complaints, which would involve more than one Member State.⁵² The absence of any provision for extraterritorial effect, at least for distance contracts, or even provisions that allow pre-emption of foreign law or choice of forum contractual clauses is notable.
- 3.68. While having no such legal provisions may be relevant, the report notes that Clause 122 of the Model Bill recognises that Member States may enter into an agreement to assist each other regarding distance selling contracts through information sharing, redress, sanctions or otherwise. The language of the provision does not *mandate* formal investigative cooperation among the Member States, but its inclusion demonstrates that CSME policymakers recognised the need for cross-border redress in consumer protection, at least for distance or e-commerce. In doing so, Clause 122 may afford a legal basis to address the concern with cross-border redress if Member States so decide.

Conclusion on the Consumer Protection Framework in the CSME

- 3.69. The regulatory framework in the CSME, both nationally in some Member States and regionally, may afford some protection for air passengers in the event of flight cancellations. Although there is no dedicated air passenger regulation in the mould of the EU, this protection forms part of the general consumer protection regime available in all markets and sectors of Member State economy. As noted above, this could be enhanced, and proposals to that end will be considered in a subsequent section.

of news or other information” and “does not include the rendering of any service free of charge or under a contract of personal service or employment services”

51 Under Section 46(3) of the Jamaican CPA, contracts may exclude the statutory obligation to refund and/or compensate, subject to satisfying a test of reasonableness under the law. Clause 131(3) of the Model Bill similarly allows exclusions to the statutory obligation but limits this to the supplier’s entitlement to receive part payment of unpaid fees where the consumer receives only a partial benefit. While the possibility that this might be a drafting error cannot be discounted, the effect would be to limit the ability under the Model Bill to exclude the general refund obligation under the clause by contract.

52 This is unsurprising because while Article 184(j) requires Member States to promote consumer interests by providing “adequate and effective redress”, Article 185 which prescribes the content of harmonized consumer legislation does not require any provision for cross-border or extraterritorial enforcement of consumer redress mechanisms among Member States. This is interesting since the consumer policy prescriptions under RTC are made in the context of the goal of establishing a single regional market, where cross-border consumer issues are at least foreseeable, if not inevitable.

Gap analysis

- 3.70. A gap analysis was conducted comparing the desired and current regulatory frameworks for consumer protection in air transport markets (see Table 4). By identifying the gaps between the current and desired states, the report can develop and highlight necessary policy initiatives to enhance safeguards for airline customer across the region.
- 3.71. **Table 4** shows that when compared to international best practices (i.e. the EU regulatory framework, [IATA](#) and [ICAO](#) policy positions) gaps that hamper the region's ability to secure the rights of airline customers exist. These gaps relate to (a) mechanisms for redress at the regional or national levels for airline customers when there are service disruptions, (b) to address information asymmetries through sufficient and timely consumer education and supplier transparency initiatives, and (c) the institutional frameworks needed to protect airline customers.

Table 4: Summary of the Gap analysis

DESIRED STATE	CURRENT STATE	GAP IDENTIFIED	CORRECTIVE MEASURES
Express legal provisions for redress (refunds, re-routing, etc.) for airline customers in the event of involuntary flight cancellations by the airlines (either in specific air passenger rights legislation or in general consumer protection legislation).	No express redress specific to airline customers in the event of involuntary flight cancellation. But note that purposive application of general redress provisions under consumer legislation may be possible where legislation permits, though <i>not</i> an optimal solution..	YES	Full implementation of the CARICOM Model Consumer Protection Bill. Harmonized legal protections for consumers modelled on clause 131 of the Model Bill will provide the necessary building blocks to further develop and implement initiatives for consumers in specific market contexts such as air transport.
Mandated consumer education on available redress in the event of involuntary flight cancellation, pursuant to express regulation (either in specific air passenger rights legislation or in general consumer protection legislation).	No express legislative mandate for provision of such information in the context of air transport services.	YES	Optimise inter-agency coordination at the national level in the air transport sector. Specifically, coordination between consumer protection and civil aviation agencies to raise awareness of airline customers about their rights under airline contracts of carriage and applicable consumer protection legislation. Implement mandatory measures on airlines to provide their customers with more neutrally framed information on their rights.
Mandated disclosure by airlines of relevant, timely and <i>behaviourally neutral</i> information to their customers about existing rights under contractual arrangements with airlines, in particular, the General Conditions of Carriage and airline refund policies.			
Effective access to redress by way of institutional arrangements for enforcement in the Member States of redress for airline customers.	Some Member States do not have the necessary institutional arrangements to ensure effective redress.	YES	Full operationalisation of consumer agencies as provided under the law.
At the regional level, the harmonization of consumer rights and obligations across national markets to ensure regulatory consistency.	Absence of harmonization of rights and obligations relevant to airline customers across the CSME.	YES	Member States that have not yet enacted the Model Bill should do so in the near term to promote consumer confidence and thus economic recovery after the pandemic. This will promote a 'balanced regulatory approach' in the CSME whereby similar rights and obligations are accessible across the Member States.
At the regional level, coordination of cross-border redress mechanisms to mitigate the risk of non-enforcement or under-enforcement that could arise from airline conduct that is likely to be in breach of consumer protections for their customers.	Absence of regional mechanisms to address cross-border consumer protection issues.	YES	Implement a system of investigative cooperation among consumer protection agencies and/or civil aviation authorities in the various Member States. This should be underpinned by: (1) legislative provisions in national laws; (2) regional cooperation agreements among the national agencies/authorities; and (3) sufficient institutional commitment and resources.

- 3.72. Corrective measures are therefore needed to close these gaps. These measures include the implementing national consumer protection laws in the region, inter-agency cooperation between consumer protection and civil aviation authorities and strengthening of the institutional capacity of national consumer protection authorities in the region to investigate, mediate, and seek redress for airline customers within reasonable limits. The following section builds on these corrective measures and offers recommendations on the appropriate policy framework for the region to enhance air passenger rights.



CHAPTER FOUR: RECOMMENDATIONS

Key messages

The following measures are recommended to address the gaps identified:

- a. *Full implementation of the CARICOM Model Consumer Protection Bill* by CSME Member States to provide the necessary building blocks to further develop and implement initiatives for consumers in specific market contexts such as air transport.
- b. *Optimisation of inter-agency coordination at the national level in the air transport sector* between civil aviation agencies and consumer protection agencies in the Member States, which may catalyse greater application of consumer policy perspectives in the economic regulation of air transport services.
- c. *Optimisation of regional coordination of redress mechanisms for air passengers* through a system of investigative cooperation among consumer protection agencies and/or civil aviation authorities in the CSME Member States. For such a system to be feasible, however, there must be a clear legal basis and sufficient institutional resources and commitment at the national level.

Introduction

- 4.1. The previous section identified gaps in the consumer regulatory framework in the CSME and proposed corrective measures. For effectiveness, the proposed corrective measures should be pursued as part of a coherent policy response. The critical question, therefore, is what is the basis for this policy response? More specifically, should the corrective measures be pursued through reliance on free market mechanisms or on policy intervention through regulation by the state (i.e. “regulatory option”)?
- 4.2. Generally, free market mechanisms (such as signalling by competing firms through advertising) are preferred on the assumption that markets self-correct at a lower cost to the society than would be incurred under a regulatory solution implemented by the state. In the context of air transport, this assumption finds expression in the IATA policy statement that “...market forces should be allowed to determine additional standards of service levels.” This assumption, however, treats markets as inherently characterised by effective competition among firms that provides relevant information to consumers so that they can choose one product over another, and in so doing, make welfare maximising decisions.
- 4.3. This is a strong assumption, which may not hold under all socio-economic conditions. It has been observed that, for several historical socio-economic reasons, markets in the CSME generally do not default to effective competition as assumed by traditional

economic theory.⁵³ Moreover, the degree of market development, and therefore the intensity of competition, is not homogenous across the regional market, with significant variation across the several national markets. Indeed, the Revised Treaty of Chaguaramas, 2001 recognizes this reality through its dichotomy of 'More Developed Countries' and 'Less Developed Countries'.⁵⁴

- 4.4. Consequently, exclusive reliance on free market mechanisms to address market imperfections that reduce consumer welfare (such as information asymmetries) may not be the best approach in the CSME context. There is a clear policy basis for recommending a regulatory solution as the issues identified in this report may not be adequately addressed by free market mechanisms alone.
- 4.5. In that context, two regulatory options were considered that could enhance protections for airline customers in the CSME. These options are: (1) a new CSME air passenger rights legislation; and (2) implement and optimise existing consumer policy arrangements. Both options are discussed below, although this report concludes that the second option – implement and optimise existing consumer policy arrangements – is the recommended option.

Policy Discussion

- 4.6. The first option, the development of a CSME air passenger rights legislation, would be a dedicated regulation that protects customers in their dealings with airlines, like flight cancellations caused by service disruptions. It would be similar to the EU Air Passenger Rights Regulation examined in this report but customised to fit CSME realities. This option would move the region in line with the European Union, Canada and the United Kingdom, all of which have enacted specialised air passenger protections, whether as primary or secondary legislation.
- 4.7. There is no supra-national Community organisation in the CSME with legislative competence to enact such protections regionally. Since Member States have not ceded their sovereignty under the CSME legal system, the proposed regulation should take the form of a "CSME Air Passenger Rights Model Bill", which could inform subsequent national legislation if the Member States do decide.
- 4.8. General principles derived from the earlier review of the international legal and policy frameworks, which should inform the design of such model regulation could include: (i) proportionality; (ii) supplier transparency; (iii) reimbursement principle; (iv) effectiveness; and (v) legality. Briefly, the effectiveness principle underpins and reinforces the other principles such as supplier transparency and the reimbursement principle. In this regard, effectiveness would require that the proposed model regulation facilitate the enhancement of consumer welfare in air transport markets.
- 4.9. To that end, information provision measures should be specific and designed to consider relevant insights from behavioural economics. Where appropriate, refund provisions should be designed to mandate processes or procedures that result in the least administrative burden on both passengers and airlines. There should also be

53 Taimoon Stewart, "Competition Regimes in the Caribbean Community and Sub-Saharan Africa: A Comparison" [2020] 1 African Journal of International Economic Law 84-159.

54 Article 4, Revised Treaty of Chaguaramas, 2001.

effective national and regional enforcement mechanisms to ensure airline compliance. In terms of drafting considerations, the EU's Regulation No. 261/2004 and the ECJ's jurisprudence in the application of that law could afford relevant guidance.

- 4.10. Once Member States settle the policy issues and the proposed model regulation drafted, implementation may involve both national and regional stakeholder consultations and approval via competent Community Organs and Bodies. Afterwards, national legislatures in the Member States may decide whether to enact specialised air passenger legislation based on the model bill. Considering these processes, it is not within the remit of this report to propose timelines for implementation of this option.
- 4.11. The second option contemplates full implementation of the CARICOM Model Consumer Protection Bill across the region along with institutional initiatives aimed at applying the benefits of the legislation in the air transport market. This would be consistent with existing consumer policy plans and strategies being considered and agreed upon at the regional level.
- 4.12. The second option consists of three (3) proposals for strategic action. They are:
 - a. *Full implementation of the CARICOM Model Consumer Protection Bill* - This would require either *de novo* enactment of the Model Bill or harmonization of existing legislation with the Model Bill. Moreover, operationalization of the institutional arrangements under the enactment would be necessary.

The importance of full implementation of the Model Consumer Protection Bill throughout the CSME is that harmonised legal protections for consumers, in particular protections modelled on clause 131 of the Model Bill and harmonised institutional access will provide the necessary building blocks to further develop and implement initiatives for consumers in specific market contexts such as air transport.
 - b. *Optimise inter-agency coordination at the national level in the air transport sector* - A key initiative will be to improve coordination between civil aviation agencies and consumer protection agencies in the Member States, which may catalyse greater application of consumer policy perspectives in the economic regulation of air transport services. In the United Kingdom, the Civil Aviation Authority (CAA) and the Competition & Markets Authority (CMA) do coordinate on consumer protection. The CAA and the CMA have produced joint guidance for the travel industry on the key consumer protection regulations that set out the requirements in relation to the transparent provision of price and other information.⁵⁵ There are also precedents of similar inter-agency coordination in the CSME.⁵⁶

55 <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/Consumer-protection-law/>

56 One precedent in the CSME for this kind of institutional cooperation can be found in Jamaica in relation to the development and implementation of the "Banking Code of Conduct on Customer Related Matters", which aims to improve financial literacy among consumers in the banking sector. Although the Code is implemented by the Bank of Jamaica under the Banking Services Act, it was developed in consultation with the Consumer Affairs Commission and the Jamaica Bankers Association. Source: Jamaica Observer, "Code of conduct coming for all deposit-taking institutions" (*Jamaica Observer*,

Considering the specific concern of this report with redress for involuntary flight cancellations, a relevant area for inter-agency coordination would be consumer education initiatives to raise the awareness of airline customers about their rights under contracts of carriage and applicable consumer protection legislation. In addition, the agencies could coordinate on the development and implementation of mandatory supplier transparency mechanisms. The discussion of the airline policy during the pandemic of steering passengers towards rescheduling (without providing actionable information on refunds) indicates the importance of the way information is framed to passengers and processed by them. The implementation, therefore, of measures on the part of airlines to provide passengers with more neutrally framed information on their rights would be appropriate. This, for example, could include a requirement that airlines in their customer messaging should present all available options and emphasize consumer choice.

A clear advantage of consumer education initiatives and supplier transparency mechanisms is that these types of policy intervention empower airline customers with relevant knowledge while leaving intact their economic freedom to decide how to respond to flight cancellations. The proposed initiatives are therefore likely to be a less intrusive (and less costly) policy intervention in the air transport market when compared to other types of intervention such as imposing a legal obligation to reimburse/refund as contemplated under the first option of a dedicated air passenger rights legislation.⁵⁷ It will be critical for the effective design of these initiatives around information provision that they should be appropriately informed by behavioural insights.

- c. *Optimise regional coordination of redress mechanisms for airline customers* – In light of the gap identified with respect to coordination of cross-border redress for airline customers, this report recommends that the modality for optimising such regional coordination would be a system of investigative cooperation among consumer protection agencies and/or civil aviation authorities in the various Member States. For such a system to be feasible, however, there must be a clear legal basis and sufficient institutional resources and commitment at the national and regional levels.

Of importance for this strategic pillar would be either enactment or amendment of legislative provisions in the Member States to incorporate a regional agreement on the jurisdiction and specific powers of the national agencies/authorities to investigate and sanction breaches of consumer protection law that occur in other Member States.

January 27, 2016) <http://www.jamaicaobserver.com/news/Code-of-conduct-coming-for-all-deposit-taking-institutions_49919> accessed February 12, 2021

57 Mark Ledbury et al, 'Understanding Policy Options' (The UK Home Office, 2006) <<https://silو.ips/download/understanding-policy-options>> accessed 01 May 2021

- 4.13. These initiatives aim to address the gaps identified and are mutually reinforcing. In terms of policy sequencing, Member States that have implemented the Model Consumer Protection Bill could proceed with optimizing their institutional arrangements under pillars two and three, while Member States that have not yet implemented the Model Consumer Protection Bill focus on their legislative processes, and then catch up when they can do so.
- 4.14. A SWOT analysis was used to assess the options considered and **Table 5** presents the results. In conclusion, Option 2 - Implement & Optimise Existing Consumer Policy Arrangements is the recommended option for policy intervention to create and enhance protections for airline customers in the CSME for the following reasons:
- a. The option could be implemented in the short to medium-term because it builds on existing consumer policy plans and strategies agreed upon at the regional level by Community Organs such as the Council for Trade and Economic Development (COTED). For example, the CARICOM Model Consumer Protection Bill has been approved for implementation by the Member States. The implementation of the proposed strategic pillars could be managed using appropriate administrative arrangements, which could include an agreed regional implementation body such as a steering committee.
 - b. The option might be cheaper as the region has already invested resources to develop the CARICOM Model Consumer Protection Bill. Resources would have to be sourced to facilitate the first option, which is to develop a dedicated air passenger rights regulation for the region.
 - c. The option would facilitate the full implementation of the Model Consumer Protection Bill and improve the general state of consumer protection across the CSME. In this regard, a more sophisticated consumer culture built upon market trust and confidence that is enabled by a harmonized legal and institutional framework will be an important step towards the recovery of the air transport sector.

Table 5: SWOT analysis of the options

	Strengths	Weaknesses	Opportunities	Threats
Option 1 New CSME Air Passenger Rights Legislation	<ul style="list-style-type: none"> The initiative would be designed with the air transport market in mind. 	<ul style="list-style-type: none"> The initiative is “greenfield” and thus susceptible to lengthy policy approval and legislative drafting processes. 	<ul style="list-style-type: none"> If implemented, the CSME’s position on air passenger rights would be consistent with international best practices. 	<ul style="list-style-type: none"> Lack of support from critical stakeholders (Community Organs, Member States, etc) could stymie the initiative.
Option 2 Implement & Optimize Existing Consumer Policy Arrangements	<ul style="list-style-type: none"> The initiative builds on existing consumer policy plans and strategies that enjoy critical stakeholder approval. 	<ul style="list-style-type: none"> Policy sequencing and timing issues loom large as some Member States have not yet enacted consumer legislation. 	<ul style="list-style-type: none"> The initiative has the potential to improve the general state of consumer protection across the CSME. 	<ul style="list-style-type: none"> The initiative depends on multiple components/pillars which increases implementation risk.

Way Forward

- 4.15. Given the proposed recommendations of this report, the Commission considers it useful to also emphasise the need to complete the competition dimension of the airline study. This would ensure the Commission provides balanced recommendations on the overall strengthening of the regulatory framework for airline industry to promote its efficient operation.
- 4.16. It is important to note that the competition dimension, which is the second phase of the airline study has begun. Already the Commission has examined:
- The features of the industry, which includes an examination of the airlines operating in the region.
 - Demand side considerations for the competition assessment. This involved an analysis of the factors that influence airline customers’ preferred choice of airlines, and the switching behaviour of airline customers.
 - Entry barriers into intra-CSME Markets. This involved: (a) a review of the studies completed in the region in the airline industry; and (b) a review of the 2018 CARICOM MASA to determine if its provisions could impede effective competition in airline markets in the region, using the OECD competition assessment toolkit.

(d) Competition enforcement framework for the industry by examining the competition provisions in the 2018 CARICOM MASA.

4.17. Most of the remaining work in the second phase will be dedicated to obtaining additional supply side information needed for the competition assessment. The Commission expects the assistance of the CSME Member States and other regional institutions in gathering the needed data from the airlines, airport authorities and travel agents, in this effort. However, to ensure that information remains available within the policy space and to generate discussion and feedback amongst the relevant stakeholders, the Commission will publish policy briefs on some of the areas completed.

APPENDIX 1: INFORMATION, CONSUMER CHOICE AND WELFARE

Overall, the survey results suggest that at least some passengers in CARICOM may have experienced suboptimal welfare outcomes in the context of the available choice sets.⁵⁸ The steer towards rescheduling using vouchers instead of applying for refunds, as evident from the framing of the airlines' Covid 19 policies, may have had an effect on the choices made by passengers. This is so notwithstanding the fact that as a formal matter of contract, the airlines' General Conditions of Carriage provided for refunds where the airline cancels the flight. As there was no coercion or duress involved in the choice sets, one issue could be in relation to the assumption of rationalism in the passenger decision-making process. It is here that insights from behavioural economics may be relevant in considering the surveyed experience.

It is uncontroversial to state that consumer decision-making may be influenced by various cognitive biases.⁵⁹ There are at least three such cognitive biases that could be relevant in the circumstances that are of concern to this study. These are: (i) bounded rationality,⁶⁰ (ii) self-serving bias,⁶¹ and (iii) endowment effect.⁶² While the possibility of other relevant cognitive biases is not foreclosed; this could be the subject of future research in the field.

Bounded rationality refers to the fact that people are generally limited in their computational capacities, understanding, memory and other cognitive abilities. The average consumer is limited in their capacity and desire to search for, and process, all information that may be relevant to a particular decision in the market. This may be particularly applicable if the information is technical in nature, for example the legal terms in the airlines' General Conditions of Carriage. Faced with bounded rationality, consumers may make decisions that do *not* maximize their welfare. In relation to a product or service, for example, they may settle for a choice presented by the firm without evaluating other, potentially more welfare maximizing choices that could be available to them.⁶³ The assumption that they are rational, and as such will search and review all relevant information may not hold, and consumers may report lack of awareness, even though information is relatively available.

Given the choice sets offered in the context of the cancelled flights, particularly in which relevant information on refunds appeared in the technical legal terms of the General Conditions of Carriage, as opposed to the much more publicized Covid 19 policies, it is not surprising that significant numbers of passengers either opted to reschedule or settled for incurring the loss of the cancelled flights instead of searching for the relevant information on how to obtain refunds.

According to behavioural theory, people may also assess risk in a different way than would be rationally expected. Instead of rationally considering that adverse contingencies could occur and taking that into account in their decision-making, consumers may be overoptimistic about future contingencies.⁶⁴ They may even make self-serving assessments, which do not correlate with realistic risk assessments. Thus, for example, given the choice between rescheduling and applying for a

⁵⁸ "Choice sets", or more formally, "choice architectures" refer to "the context in which choices are presented, the alternatives that are provided, the presentation of various options, etc." see Hanneke Luth, *Behavioural Economics in Consumer Policy* (Erasmus Universiteit Rotterdam 2010) p 76.

⁵⁹ Judith Mehta, *Behavioural Economics in Competition and Consumer Policy* (University of East Anglia 2013) p. 30

⁶⁰ Hanneke Luth, *Behavioural Economics in Consumer Policy* (Erasmus Universiteit Rotterdam 2010) p. 49

⁶¹ *ibid*

⁶² *ibid*

⁶³ Morten Haviid, *Behavioural Remedies in Final Consumer Markets: Theory and Evidence* (University of East Anglia 2013) p. 87

⁶⁴ Hanneke Luth, *Behavioural Economics in Consumer Policy* (Erasmus Universiteit Rotterdam 2010) p. 52

refund, some passengers may choose the former in the optimistic belief that the rescheduled flight will retain its utility to them at some future point in time, even if this may not in fact be the case.

Another cognitive bias which may be relevant is the endowment effect. This describes the fact that people may attribute greater value to things they already own than to things that are not (yet) in their possession. This bias, however, may not correspond with welfare maximizing decisions because the future thing foregone may in fact prove to be of higher value. In the context of this study, for air passengers faced with flight cancellations the decision to reschedule an existing ticket as opposed to taking the chance of applying for a refund may be explained by this cognitive bias.

In addition to those cognitive biases, the manner in which the airlines' Covid 19 policies and other communications to passengers were framed is also critical.⁶⁵ The framing of airline messaging around pandemic-induced flight cancellations may have played into known cognitive biases in effecting the steer towards rescheduling instead of refunding. It is observed, in this regard, that all the policies were framed in terms of "allowing passengers to rebook", "to keep their flights" and that the airlines were "granting waivers".

This was an interesting way to frame the message, given the entitlement to refunds under the airlines' General Conditions of Carriage or applicable consumer protection legislation. As noted, many consumers prefer loss aversion over taking risk and this framing of the option to reschedule as avoiding a loss from an unforeseen event capitalizes on the self-serving bias and endowment effect discussed above. Moreover, the insufficient information on refunds presented in the policies taps into bounded rationality as well.

Having regard to the foregoing behavioural insights, which are supported by the survey results, policy initiatives are needed to address the effect of the steer so that there may be a better balance between consumer and corporate welfare in the market.⁶⁶ As Luth (2010) observes, "policy makers are becoming more and more interested in using the insights uncovered by behavioural sciences to enhance consumer protection legislation."⁶⁷

⁶⁵ Morten Haviid, *Behavioural Remedies in Final Consumer Markets: Theory and Evidence* (University of East Anglia 2013) p. 89

⁶⁶ This would be where consumer welfare is maximized while allowing business to recoup costs (which includes sufficient reward for risk), which usually indicates an efficient market allocation of goods and services.

⁶⁷ Hanneke Luth, *Behavioural Economics in Consumer Policy* (Erasmus Universiteit Rotterdam 2010) p. 65

APPENDIX 2 – REFERENCES

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