

**EVALUATION OF REGULATION  
261/2004**

**Final report**

**Main report**

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## EXECUTIVE SUMMARY

### Background

1. Regulation 261/2004 introduced new rules on compensation and assistance for air passengers in the event of denied boarding, cancellations, long delays and involuntary downgrading. In 2006, the European Commission contracted Steer Davies Gleave to undertake an independent review of its operation and results. The study found that there had been a number of difficulties, arising in particular from ineffective enforcement in a number of Member States, and the fact that the wording of some parts of the Regulation left room for interpretation.
2. In April 2007, the Commission issued a Communication to report on the Regulation, which concluded that a substantial improvement was required. It stated that there would be a period of stability during which no legislative changes would be made, in order to give Member States and air carriers the opportunity to improve the implementation of the Regulation. In the meantime, it identified that further work was required in a number of areas, including improved enforcement and clarification of key terms. The purpose of this study is to assess whether these measures have been successful in ensuring that passengers' rights are adequately protected, or whether other measures now need to be taken.
3. The research and interviews for this study were undertaken before the ruling of the European Court of Justice in the case *Sturgeon and Bock*, relating to the distinction between the treatment of cancellations and delays under the Regulation. This judgement has significant implications for the issues evaluated in this study. It was not possible to discuss this judgement with stakeholders within the timescale for this study, but we have taken it into account in developing our recommendations.

### Factual conclusions

4. This study has shown that the Commission and others have made significant efforts to address the problems with the operation of the Regulation identified at the time of our 2006-7 study. Many National Enforcement Bodies (NEBs) also now undertake significantly more activity in relation to the Regulation than they did: all now handle individual complaints<sup>1</sup>, and sanctions for non-compliance have been imposed in 14 Member States.
5. However, whilst these efforts have had some success, more has to be done to ensure that passengers' rights are properly protected. The following key problems remain:
  - the evidence available indicates that some carriers are still not consistently complying with the requirements of the Regulation or are interpreting the Regulation in a way which minimises their obligations;
  - as discussed in more detail below, in many Member States, enforcement is not effective enough to provide carriers with an economic incentive to comply;

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<sup>1</sup> Except Konsumentverket in Sweden, where complaints are handled by a non-NEB organisation.

- in several Member States, there is no mechanism available by which individual passengers can readily obtain redress from carriers;
  - although rulings by the European Court of Justice (ECJ) have addressed some of the issues in the Regulation that were unclear, a number of issues have not been addressed and
  - in some areas the rights granted by the Regulation can lead to different understandings (for example relating to long delay and cancellation) or do not address all the problems that passengers may face (such as missed connections due to delays).
6. Ineffective enforcement continues to be a key problem and, in our view, most of the Member States reviewed for this study have not unambiguously complied with the requirement in Article 16 to introduce sanctions which are effective, proportionate and dissuasive. Although we have identified a number of improvements that have been made to the enforcement process, a number of significant issues remain, including:
- Two States have not unambiguously complied with the requirement in Article 16 to introduce sanctions into national law.
  - Even where sanctions have been introduced into national law, they are not always applied: in nearly half of the Member States, no sanction has ever been imposed on a carrier for non-compliance.
  - In some States which have introduced sanctions into national law, the circumstances in which sanctions can be imposed are extremely limited and mean that sanctions cannot provide an economic incentive to comply with the Regulation in all cases.
  - Some Member States have difficulties in either imposing sanctions on carriers not based within the State, or cannot collect sanctions which are imposed. In some States, this is because of an explicit limitation in national law, but more often this is because of administrative requirements in national law which cannot be met if the carrier is not based within the State.
  - In many Member States, the maximum sanctions which can be applied are too low to provide carriers with an economic incentive to comply with the Regulation, taking into account that sanctions would only ever be imposed for a small proportion of infringements. In some States the maximum level of sanction is less than or equivalent to the costs that a carrier may avoid through non-compliance in some individual cases.
  - In some States, there are other legal or administrative problems, which mean that sanctions cannot be effective in providing an incentive to comply with the Regulation: for example, in Italy, whilst sanctions can be imposed the process to collect them is slow.
7. In addition, there are significant differences in the approach to enforcement in different Member States, which means that there is a risk that the single market for air transport is being distorted.
8. Several Member States are planning changes to national law and other improvements to the enforcement process which should further improve the situation in the future. However, it is not clear that this will be sufficient to address the issues that we have identified.



## Recommendations

9. We have made a number of recommendations, covering:

- improvements to the enforcement of the Regulation;
- other improvements to the operation of the Regulation which would not require any legislative changes; and
- possible changes to the requirements of the Regulation, if a decision is made to revise it.

### *Improvements to enforcement*

10. To date, virtually all enforcement activity has been in response to passenger complaints to NEBs. In many Member States, significant resources are devoted to handling complaints and in some cases mediating with carriers to achieve an acceptable resolution for the individual passenger. Whilst this is useful for the passenger concerned, few passengers impacted by infringements complain to NEBs, and therefore in the vast majority of cases, infringement has no consequence for the carrier other than that it avoids the costs associated with compliance.

11. In our view the focus on complaints does not reflect the requirements of the Regulation, which gives passengers the right to complain to any NEB, but explicitly places the onus on NEBs to take such measures that are necessary to ensure that passengers rights are respected. This could include effective handling of complaints but in itself this does not appear to be sufficient.

12. In 2007, National Enforcement Bodies agreed an active approach to monitoring compliance with the Regulation. However, little seemed to have been done in this sense. We suggest that the approach to enforcement should change, from a primarily reactive approach focussed on responding to complaints, to a pro-active approach placing the onus on carriers to demonstrate that they are complying, for example by:

- requiring carriers to provide evidence that they have complied with the Regulation;
- encourage Member States to verify, when monitoring carriers licensed in their State, that they have set up user-friendly procedures for the prompt settlement of disputes under consumer protection Regulations;
- encourage Member States to require carriers to provide copies of the agreements with airport managers or ground handlers which show the procedure to be applied in the case of an incident;
- carrying out frequent unannounced inspections of carriers' performance, in order to track their responses to cases of delays, cancellations and denied boarding, including whether they issue the notices required by Article 14(2), as well as their compliance with Article 14(1), the main scope of inspections at present;
- undertaking airport-based passenger surveys to monitor carriers' performance;
- undertaking audits of carriers' complaint handling processes to ensure that the responses that carriers provide to passengers are accurate (for example, that compensation is paid when claimed by a passenger who has a right to it); and
- in addition to investigating whether carriers' claims of extraordinary circumstances are valid, require carriers to show that their decisions as to whether

compensation is payable for cancellations or long delays are consistent with the interpretation set out by the ECJ in the *Wallentin-Hermann* case.

13. Where inspections or investigation of complaints identify that carriers are not complying with the Regulation, fines need to be sufficient to provide the carrier with an economic incentive to comply with the Regulation in future and to deter other carriers from not complying with it. If fines do not provide this incentive, it will be in the commercial interest of carriers not to comply with the Regulation. Carriers that do not comply will have lower operating costs than carriers that do comply, and therefore they will be able to offer lower fares, increase market share, and make greater profits.
14. In many Member States, introducing fines that provide an incentive to comply with the Regulation will require a change in national law, in order to:
  - increase the level of the maximum penalty that can be imposed so that it is sufficient to provide an economic incentive in all cases; and
  - remove restrictions on the imposition of sanctions which mean that they cannot function as an incentive, for example, difficulties in imposing sanctions on foreign carriers or in imposing sanctions where a carrier provides redress when the NEB intervenes.
15. We suggest that the Commission should ask every Member State to demonstrate that the level of fines defined in national law is sufficient to provide an economic incentive, in accordance with Article 16(3), taking into account the circumstances under which the State proposes to impose fines. This will vary between States in accordance with variations in national law. For example, in certain States there are difficulties in having civil penalties, which means enforcement must rely on criminal penalties, which are inevitably harder to impose; in principle this is not a problem but the level of the penalty when it is imposed must be correspondingly higher.
16. A further option would be to amend Regulation 1008/2008, to make compliance with consumer protection laws, including but not limited to this Regulation, a license condition. This would bring the EU into line with the US, where compliance with economic regulations, including those relating to passenger rights, is a license condition.
17. Enforcement could be further improved through full implementation by all Member States of the NEB-NEB agreement, and by improving the data on delays and cancellations of individual flights available to NEBs, and ideally the public through production of a Consumer Report similar to that produced by the US Department of Transportation. We suggest that the European Commission should work with Member States, NEBs and Eurocontrol to achieve this.

*Other improvements to the operation of the Regulation*

18. Some other minor initiatives could be taken which would improve the operation of the Regulation. We suggest that the Commission should:
  - encourage Member States to procure a harmonised online common complaints interface to handle and direct complaints automatically, in place of the standard complaint form, and provide information on how to complain to carriers;

- update the Question and Answer document to reflect recent case law; and
- continue with regular interaction and encouragement with NEBs, airline associations, and also the key airlines.

#### *Changes to the Regulation*

19. The Commission may be able to further clarify the Regulation through issuing further guidance, supplementing or possibly replacing the Q&A document, and the ECJ is likely to consider further cases which may lead to further clarification of the rights and obligations that the Regulation creates. In addition, the Commission and Member States may be able to further improve the operation of the Regulation. Nonetheless, in the interviews we undertook for this study, most stakeholders told us that the Regulation should be revised. These interviews were all conducted before the ruling of the Court of Justice in the case *Sturgeon and Bock*. As identified by the Court, the Regulation appears to provide different rights to passengers facing equivalent inconvenience due to delays and cancellations. The Court ruled, on the basis of the principle of equal treatment, that there is a right to compensation for delays longer than three hours, except where the delays are caused by circumstances which are sufficient to offer an exemption from payment of compensation under Article 5(3) (“extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”).
20. Whilst the ruling addresses one of the most important open questions in the Regulation, there are several others to which the same principle of equal treatment could be applied to justify revising the text. In our opinion, these issues can only be addressed properly by revising the text of the Regulation so that the rights and obligations it creates are explicit and consistent with the principle of equal treatment. We also recommend that the Regulation should be revised to address the other areas of the text which are unclear.
21. The most significant changes that we propose are:
  - Further to the *Sturgeon* judgement, passengers facing delays and cancellations should receive similar treatment. In particular, passengers should have equivalent right to benefits such as compensation, assistance and rerouting after the same periods, and should have equivalent rights if the delay or cancellation causes them to miss connecting flights.
  - Advance schedule changes, which are in effect delays notified in advance, should be explicitly treated in the same way as cancellations notified in advance.
  - The Commission should reflect on whether the circumstances under which airlines should be required to pay compensation for cancellations and delays should be limited to cases not due to force majeure.
  - The Article relating to downgrading should be revised to be consistent with the Article on denied boarding, as both generally arise from overbooking.
22. We also suggest a number of more minor changes, including that the total derogation for helicopter services should be replaced with an option for Member States to give total or partial derogations to certain limited types of service (including helicopters but also, for example, services with fixed wing aircraft taking off and landing on grass

runways or the sea), and various other adjustments to address elements of the Regulation which are unclear.

## 1. INTRODUCTION

### Background

- 1.1 Regulation 261/2004 introduced new rules on compensation and assistance for air passengers in the event of denied boarding, cancellations, long delays and involuntary downgrading. Depending on the circumstances, the Regulation requires air carriers to:
- provide passengers with assistance, such as hotel accommodation, refreshments and telephone calls;
  - offer re-routing and refunds;
  - pay compensation of up to €600 per passenger; and
  - proactively inform passengers about their rights under the Regulation.
- 1.2 The Regulation also required Member States to set up National Enforcement Bodies (NEBs) with the ability to impose dissuasive sanctions, and specifies that passengers have the right to complain to any NEB.
- 1.3 In 2006, the European Commission contracted Steer Davies Gleave to undertake an independent review of the operation and results of the Regulation. The study, which reported in 2007, found that there had been a number of difficulties, arising in particular from ineffective enforcement in a number of Member States, and the fact that the drafting of some parts of the Regulation was unclear.
- 1.4 In April 2007, the Commission issued a Communication<sup>2</sup> to report on the operation and results of the Regulation, as required by Article 17. This concluded that a substantial improvement in the operation of the Regulation was required. It stated that there would be a period of stability during which no legislative changes would be made, in order give Member States and air carriers the opportunity to improve the implementation of the Regulation. In the meantime, it identified that further work was required in a number of areas, including improved enforcement and clarification of key terms.

### The need for this study

- 1.5 The Communication issued in 2007 stated that if the efforts the Commission was planning to make to improve the operation of the Regulation did not produce a satisfactory result, it would have to consider amending the Regulation to ensure that passengers rights were fully respected.
- 1.6 Since 2007, there have been a number of developments which should have helped to improve the operation of the Regulation. These include:
- measures taken by the Commission, for example to facilitate voluntary agreements between NEBs and also between NEBs and airlines;
  - rulings issued by the European Court of Justice, clarifying the interpretation of

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<sup>2</sup> COM final 168 (2007)

- key Articles of the Regulation; and
  - other legal developments, such as the entry into force of the Regulation on consumer protection cooperation (Regulation 2006/2004).
- 1.7 The Commission intends to release a further Communication on the operation of the Regulation, and the extent to which this has been improved by the measures taken. In order to inform this Communication, it is necessary to undertake a new evaluation of the effectiveness of the enforcement of the Regulation and of the extent of compliance with it. This will identify whether the measures taken since 2007 have succeeded in improving the operation of the Regulation so that it now provides a high level of protection for passengers.
- 1.8 This study has been undertaken by Steer Davies Gleave. We have been supported on research in Poland, Slovak Republic and Hungary by Helios Technology Limited. The conclusions represent the views of Steer Davies Gleave alone.

**This report**

- 1.9 This report is the Final Report for the study. It reflects comments received from the Commission on the First Findings Report, which set out the factual conclusions from the study.
- 1.10 On the date that First Findings Report for this study was issued, the European Court of Justice issued its ruling in the case *Sturgeon and Bock*<sup>3</sup>, relating to the distinction between the treatment of cancellations and delays under the Regulation. This judgement has significant implications for the issues evaluated in this study. It was not possible to discuss this judgement with stakeholders within the timescale for this study, but we have taken it into account in developing our recommendations.
- 1.11 A limited amount of information has been redacted from the published version of this report.

**Structure of this document**

- 1.12 The rest of this report is structured as follows:
- Section 2 summarises the methodology used for this study;
  - Section 3 sets out how the Regulation is being applied by carriers;
  - Section 4 describes enforcement and complaint handling by NEBs;
  - Section 5 discusses alternative dispute resolution processes;
  - Section 6 sets out stakeholder views on possible policy measures;
  - Section 7 summarises the conclusions; and
  - Section 8 sets out our recommendations.
- 1.13 Case studies have been undertaken of complaint handling, enforcement and alternative dispute resolution processes in 15 Member States. These are provided in appendix A,

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<sup>3</sup> Joined Cases C 402/07 and C 432/07

which, due to its size, is provided as a separate document.

## **2. RESEARCH METHODOLOGY**

### **Introduction**

2.1 This section provides a summary of the research methodology used. It describes:

- the overall approach used;
- the selection of case studies;
- the scope of the desk research that has been undertaken; and
- the stakeholders that have participated in the study, and how they have provided inputs.

### **Overview of the approach**

2.2 The Commission requested us to collect evidence to address a number of questions, most of which can be categorised as either relating to:

- enforcement and complaint handling undertaken by National Enforcement Bodies (NEBs); and
- application of the Regulation by air carriers.

2.3 In order to address these questions, we developed a research methodology divided into two parts:

- case study research; and
- cross-EU interviews and analysis.

2.4 The rationale for this division is that enforcement and complaint procedures are specific to Member States and are therefore best evaluated through a case study approach. It was agreed to undertake case studies of complaint handling and enforcement in 15 Member States as part of this study. However, key airlines cover the whole of the EU (for example, the Irish-registered carrier Ryanair operates domestic flights in the UK, France, Spain and Italy) and therefore questions relating to the application of the Regulation by airline have been addressed through a cross-EU approach. Information from both elements of the research has been used for the conclusions, and will be used as the basis for the development of recommendations.

2.5 Both the case study and the cross-EU research use a mixture of stakeholder interviews and desk research. However, as there is limited published information available which addresses the issues that were raised by the Commission, we have been primarily reliant on stakeholder interviews.

### **Selection of case studies**

2.6 As noted above, it was agreed to undertake detailed case studies of complaint handling and enforcement in 15 Member States as part of this study. This section summarises how the case studies were selected. We have also collected some, more limited, data on complaint handling and enforcement in the other 12 Member States in order to be able to present the position on complaint handling and enforcement across the EU.



2.7 We undertook case studies in the eight Member States with the largest aviation markets, measured in terms of air passenger numbers (UK, Spain, Germany, Italy, France, Greece, Netherlands and Ireland). The other seven case studies were selected in order to ensure that the study covered:

- Member States where the Commission was aware of particular difficulties with enforcement, or where particular difficulties were identified in the study we undertook for the Commission in 2006-7;
- at least one State in which enforcement was previously identified as ‘best practice’;
- Member States in which the nature of the NEB is unusual, for example, to include States where complaint handling and/or enforcement is undertaken by a consumer protection authority rather than a civil aviation authority;
- a selection of new Member States; and
- States covering a wide geographical scope and variation in sizes.

2.8 The selection of States is summarised below.

**TABLE 2.1 SELECTION OF CASE STUDIES**

State	Rationale for selection
Denmark	Wide geographical spread; identified as example of best practice
France	Largest 8 States measured by passenger numbers
Germany	Largest 8 States measured by passenger numbers
Greece	Largest 8 States measured by passenger numbers
Hungary	New Member State with large air transport market, and unusual structure for NEB (consumer authority)
Ireland	Largest 8 States measured by passenger numbers
Italy	Largest 8 States measured by passenger numbers
Latvia	Issues previously identified with enforcement (low maximum fines)
Netherlands	Largest 8 States measured by passenger numbers
Poland	New Member State with large air transport market
Portugal	Wide geographical spread; issues identified with enforcement
Slovak Republic	New Member State with large air transport market; particular issues due to airline insolvency
Spain	Largest 8 States measured by passenger numbers
Sweden	Wide geographical spread; unusual structure for NEB (consumer authority/ADR)
UK	Largest 8 States measured by passenger numbers

#### Desk research

2.9 The following information has been collected and analysed through desk research:

- information from airline websites on airline complaint procedures;
- data for delays and cancellations, from national authorities and from airline associations; and

- data for NEB complaint procedures, from NEB websites.

2.10 We have also obtained and analysed a significant amount of supporting information provided by stakeholders:

- NEBs have provided data on passenger complaints, sanctions imposed and the legal basis for enforcement; and
- airlines have provided information on their policies and procedures relating to the Regulation, the number of complaints received, and on the cost of compliance with the Regulation.

### Stakeholder inputs

2.11 Relatively little information is publicly available relating to the issues that we have been asked to address, and therefore we have relied extensively on information and opinions provided by stakeholders. This section summarises the stakeholders which have contributed to the study, and how they have contributed. This is divided as follows:

- National Enforcement Bodies;
- airlines and airline representative associations;
- airport operators and their representative association;
- passenger/consumer representatives; and
- other relevant stakeholders, such as tour operators.

2.12 We would like to thank all of the stakeholders that contributed to the study.

### *National Enforcement Bodies*

2.13 We contacted the NEBs in all 27 Member States to obtain information on the complaint handling and enforcement processes in each Member State, and to understand their views on how airlines were complying with the Regulation and possible changes to it. In the 15 Member States selected as case studies, we undertook detailed face-to-face interviews with the NEBs, and reviewed the legislation, procedures and other relevant documents that applied. Several of these NEBs also provided us with written submissions which we have used. In the other 12 Member States, we provided the NEB with a questionnaire which was followed up with a telephone interview where necessary. The NEBs are listed in Table 2.2.

**TABLE 2.2 STAKEHOLDER INTERVIEWS: NATIONAL ENFORCEMENT BODIES**

Member State	Organisation	Form of input to study
Austria	Bundesministerium für Verkehr, Innovation und Technologie	Written response
Belgium	SPF Mobilité et Transports	Written response
Bulgaria	General Directorate Civil Aviation Administration, Ministry of Transport	Written response and telephone interview
Cyprus	Department of Civil Aviation	Written response and telephone interview
Czech Republic	Civil Aviation Authority	Written response and telephone interview

Denmark	Statens Luftfartsvæsen (CAA Denmark)	Face-to-face interview
Estonia	Tarbijakaitseamet (Consumer Protection Board)	Written response and telephone interview
Finland	Civil Aviation Authority	Written response and telephone interview
	Consumer Complaint Board	Partial written response
	Consumer Ombudsman & Agency	Written response
France	Direction Générale de l'Aviation Civile	Written response and face-to-face interview
Germany	Luftfahrt-Bundesamt (LBA)	Face-to-face interview
Greece	Hellenic Civil Aviation Authority	Face-to-face interview
Hungary	Hungarian Authority for Consumer Protection	Written response and face-to-face interview
	Hungarian Civil Aviation Authority	Input to HACP written response
Ireland	Commission for Aviation Regulation	Written response and face-to-face interview
Italy	ENAC	Written response and face-to-face interview
Latvia	Consumer Rights Protection Centre	Face-to-face interview
Lithuania	Civil Aviation Administration	Written response and telephone interview
Luxembourg	Direction de la Consommation du Ministère de l'Economie et du Commerce extérieur	Written response and telephone interview
Malta	Department of Civil Aviation	Written response and telephone interview
Netherlands	Civil Aviation Authority Netherlands - Flight Operations Inspectorate	Written response and face-to-face interview
Poland	Civil Aviation Office	Written response and face-to-face interview
Portugal	INAC, Legal Regulations Department	Written response and face-to-face interview
Romania	National Authority for Consumer Protection	Written response and telephone interview
Slovakia	Slovenská obchodná inšpekcia (Slovak Trade Inspectorate)	Face-to-face interview
	ústredný inšpektorát (Central Inspectorate)	
Slovenia	Directorate of Civil Aviation	Written response and telephone interview
Spain	Agencia Estatal de Seguridad Aérea	Written response and face-to-face interview
Sweden	Enforcement: Swedish Consumer Agency	Written submission and face-to-face interview (with both organisations)
	Complaints: National Board for Consumer Complaints	
UK	Enforcement: UK CAA	Written response and face-to-face interview
	Complaints: UK Air Transport Users Council	Written response and face-to-face interview

#### *Airlines and airline associations*

2.14 We consulted with airlines in order to obtain information on their application of the Regulation, and on the complaint handling and enforcement processes undertaken by NEBs. We sought to include in the study:

- One key airline with major operations in each case study State;
- At a minimum, the top 5 European airlines by passenger numbers (Air France-KLM, Lufthansa, British Airways, easyJet and Ryanair); and
- A mix of different airline types (legacy, low cost and charter), States of

registration, and sizes.

- 2.15 Table 2.3 lists the airlines we approached; it also lists the type of carrier and where in the case study States each carrier has a base. Some of the carriers we approached decided not to respond directly to us, but we did undertake interviews with two carriers who approached us directly requesting to participate. Several legacy carriers responded through their representative organisation, AEA, but were not able to provide individual responses to us.

**TABLE 2.3 STAKEHOLDER INTERVIEWS: AIRLINES**

Airline	Type of carrier	Bases in case study States	Type of participation
Aegean Airlines	Regional carrier	Greece	Face-to-face interview
Air France-KLM	Large legacy carrier	France, Netherlands	Telephone interview and input through AEA
Air Baltic	Regional carrier	Latvia	Face-to-face interview
Air Berlin	Large low cost carrier	Germany	Written response
Alitalia	Medium sized legacy carrier	Italy	Input through AEA only
BMI	Medium sized legacy carrier	UK	Written response
British Airways	Large legacy carrier	UK	Input through AEA only
Brussels Airways	Smaller legacy carrier	-	Written response
easyJet	Large low cost carrier	France, Germany, Spain, Italy, UK	Face-to-face interview
Isle of Scilly Skybus	Small regional carrier	UK	Face-to-face interview
Lufthansa	Large legacy carrier	Germany	Input through AEA only
Norwegian	Smaller low cost carrier	-	Face-to-face interview
Olympic Airlines	Legacy carrier	Greece	Did not respond
Ryanair	Large low cost carrier	Germany, Ireland, Italy, Portugal, Spain, Sweden, UK	Face-to-face interview
SAS	Medium sized legacy carrier	Denmark, Sweden	Face-to-face interview
TAP Air Portugal	Medium sized legacy carrier	Portugal	Face-to-face interview
TUI group	Various charter carriers	UK, Germany, France	Face-to-face interview
Wizz Air	Smaller low cost carrier	Hungary	Face-to-face interview

- 2.16 We also consulted with the five main associations representing airlines operating within the EU, listed in Table 2.4 below.

**TABLE 2.4 STAKEHOLDER INTERVIEWS: AIRLINE ASSOCIATIONS**

Organisation	Full name	Represents
IATA	International Air Transport Association*	All 'legacy' airlines
ELFAA	European Low Fares Airline Association	European low cost airlines
IACA	International Air Carrier Association	Leisure (charter) airlines
AEA	Association of European Airlines*	European legacy airlines

ERA	European Regional Airlines Association	European regional airlines
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\* A joint meeting was held with IATA and AEA

#### *Airport operators and associations*

- 2.17 We also approached one airport in each of the case study States, usually the main airport. The rationale for approaching the airport operator was that at certain airports, airport employees, particularly terminal managers, are in a good position to make an independent assessment of whether and how airlines operating to the airport are complying with the Regulation.
- 2.18 However, many of the airports we approached were not willing to respond or considered that they did not have any contribution to make; the airports that did contribute are listed in Table 2.5.

**TABLE 2.5 STAKEHOLDER INTERVIEWS: AIRPORTS**

State	Airport	Type of participation
Denmark	Københavns Lufthavne	Written response
France	Aéroports de Paris	Not able to obtain a response
Germany	Berlin Airports	Not willing to provide response
Greece	Athens International Airport	Written response
Hungary	Budapest Ferihegy International	Not able to obtain a response
Ireland	Dublin Airport Authority	Written response
Italy	Aeroporti di Roma	Not able to obtain a response
Latvia	Riga International Airport	Not able to obtain a response
Netherlands	Schiphol Group	Not able to obtain a response
Poland	Polish Airports State Enterprise	Written response
Portugal	ANA Aeroportos de Portugal	Written response
Slovakia	Airport Bratislava	Face-to-face interview
Spain	AENA	Written response
Sweden	LFV (Stockholm)	Not able to obtain a response
UK	BAA (London Heathrow)	Face-to-face interview

#### *Passenger and consumer representatives*

- 2.19 We also sought to involve one passenger or consumer association in each of the case study States plus Belgium, and we also had a written response from the European Passenger Federation (EPF). Not all of the consumer organisations that we contacted were able to respond.

**TABLE 2.6 STAKEHOLDER INTERVIEWS: CONSUMER ASSOCIATIONS**

State	Association name	Type of participation
EU	European Passenger Federation	Written response
Denmark	Forbrugerrådet – FR (Danish Consumer Council)	Written response

France	UFC - Que Choisir	Telephone interview
Germany	VZBV - Verbraucherzentrale Bundesverband	Written response and telephone interview
	Schlichtungsstelle Mobilität	Written response and telephone interview
Greece	Centre for the Protection of Consumers	Telephone interview
Hungary	OFE (consumer protection association)	Written response
Ireland	Consumers Association of Ireland	Did not respond
Italy	Assoutenti <sup>4</sup>	Telephone interview
Latvia	ECC Latvia	Written response
Netherlands	Association of Travellers	Written response
Poland	Polish National Consumer Association	Did not respond
Portugal	Associação Portuguesa para a Defesa do Consumidor	Written response
Slovakia	Association of Slovak Consumers	Face-to-face interview
Spain	FACUA	Written response
Sweden	Swedish Consumers Association	Face-to-face interview
UK	Which?	Face-to-face interview
Belgium	Test Achats	Face-to-face interview

#### *Other organisations*

2.20 The following other organisations have provided input to the study:

- EUClaim, a commercial organisation which handles passenger claims against airlines under the Regulation;
- ECTAA, the European Travel Agents and Tour Operators Association; and
- TUI Group Plc, one of the two largest holiday operators in the EU, which replied both on its own behalf and on behalf of the airlines it owns.

<sup>4</sup> In addition the report draws on published statements by other consumer organisations, but they have not directly participated in the study.

### 3. APPLICATION OF THE REGULATION BY AIRLINES

#### Introduction

3.1 This chapter examines the evidence we have collected on how airlines have applied the Regulation. It discusses:

- the frequency with which incidents covered by the Regulation occur;
- procedures put into place for handling complaints;
- the cost of complying with the Regulation;
- evidence regarding the extent to which airlines are complying with the Regulation, provided by airlines and other organisations; and
- stakeholder views on how and whether airlines are complying.

#### Statistical evidence for cancellations, delays and denied boarding

3.2 In principle, the introduction of the Regulation might have been expected to reduce the level of airline-caused delay and cancellations, by providing carriers with additional incentive to ensure reliable operations. In addition, there was a risk that it might have incentivised airlines to reclassify cancellations as long delays, because carriers' obligations in the event of long delays are less onerous. Our 2006-7 study for the Commission found no evidence of any such impact, but noted that it was relatively early to make this assessment. Therefore, we have updated the analysis of the level and causes of delays and cancellations.

3.3 Our analysis draws on data published by the UK Civil Aviation Authority (CAA), the French Civil Aviation Authority (DGAC), the Association of European Airlines (AEA) and the European Regional Airlines Association (ERA). We have also reviewed a number of other data sources including Eurocontrol eCODA data, but this was not useful for the analysis that we needed to undertake. The scope of the analysis that can be undertaken is, in any case, restricted by the fact that, in many parts of Europe, there is no published source of data on flight delays and cancellations.

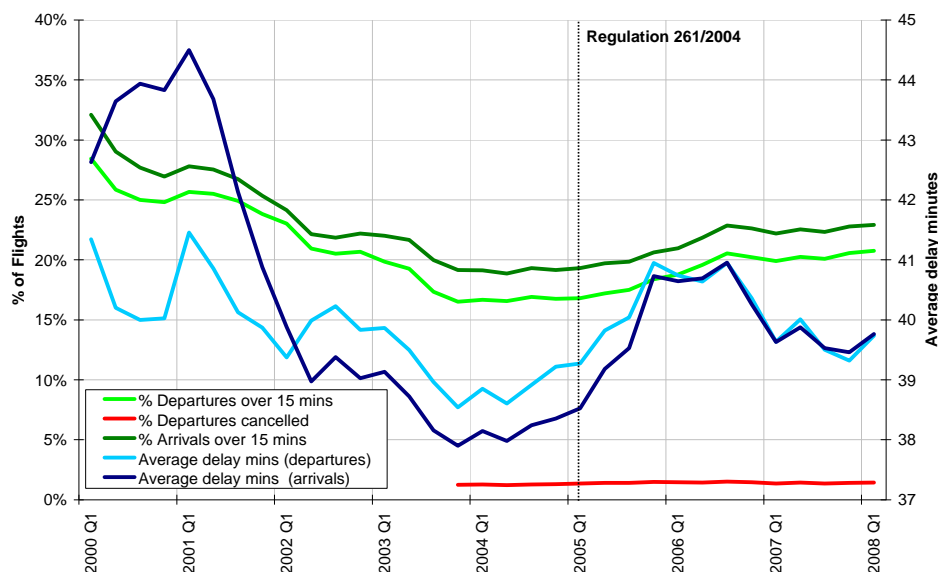
#### *Level of delays and cancellations*

3.4 The sources evaluated for this study indicate that the Regulation has had no impact on the frequency and severity of delays, or on the number of cancellations. In addition, there is no evidence for carriers' reclassifying cancellations as long delays. However, it is possible that carriers may use a different approach to categorisation for statistical purposes to that used when determining their obligations under the Regulation, and therefore it is not possible to derive a definitive conclusion from this analysis.

3.5 Figure 3.1 shows trends in delays and cancellations from data provided by AEA. This is based on data from AEA members, which are network airlines operating a mix of long-haul and short distance services. The data suggests that the Regulation has not had a significant impact on the percentage of flights delayed or cancelled, or the average delay minutes recorded for arrivals or departures. Unfortunately the AEA data does not provide any information on the number of long delays, so it cannot be used to estimate in how many cases carriers have an obligation to provide assistance to

passengers. The data shows around 1.4% of AEA airline flights are cancelled.

**FIGURE 3.1 TRENDS IN DELAYS AND CANCELLATIONS: AEA AIRLINES  
(QUARTERLY DATA; ANNUAL MOVING AVERAGE)**

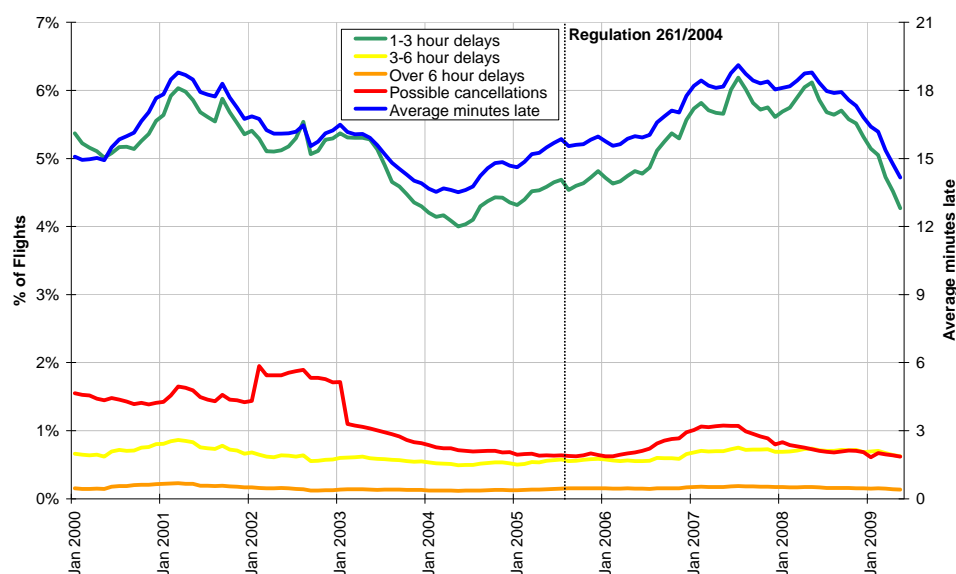


Source: SDG analysis of AEA data

- 3.6 The data suggests that, in the year following the implementation of the Regulation, delays increased, peaking in the third quarter of 2006. There has been no significant change in the proportion of flights cancelled and there is no evidence to suggest that airlines have re-classified cancellations as long delays.
- 3.7 Figure 3.2 (below) shows UK CAA data for delays and cancellations at 10 major UK airports. This shows similar trends to the AEA data but has the advantage of separately identifying long delays, and also being more up-to-date. The data shows a significant decline in long delays since mid 2008, when traffic volumes started to fall. This result is consistent with the opinion of stakeholders that the decline in air traffic caused by the economic situation has reduced the incidence of long delays and cancellations. In particular, there is no evidence of a re-classification of cancellations as long delays since the introduction of the Regulation.



**FIGURE 3.2 TRENDS IN DELAYS AND CANCELLATIONS: FLIGHTS TO / FROM UK AIRPORTS (MONTHLY DATA; ANNUAL MOVING AVERAGE)**

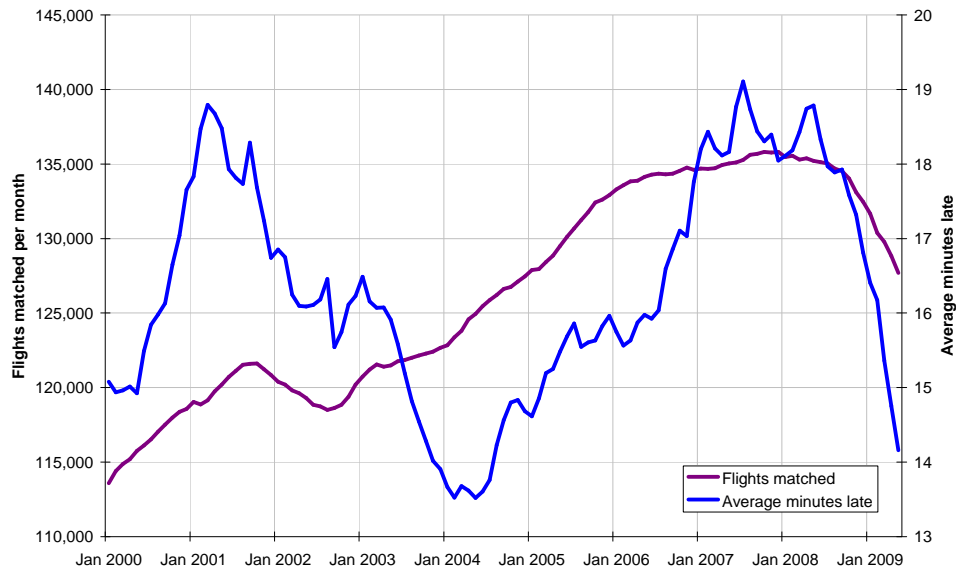


Source: SDG analysis of UK CAA data

- 3.8 CAA separately identifies delays of different lengths, although unfortunately it does not identify delays over 2 hours, which would be valuable in assessing for what proportion of flights obligations are created by the Regulation; it indicates 4.3% of flights are delayed by 1-3 hours and around 0.7% are delayed over 3 hours. The data includes a 'planned flights unmatched' category, which represents planned flights for which an air transport movement has not been found. This unmatched category is used here as a proxy for possible cancellations, but the actual level of cancellations is likely to be lower, as flights can fail to be matched for a number of reasons other than the cancellation of the flight.<sup>5</sup> For consistency with the AEA data, delayed flights are measured as a proportion of actual rather than scheduled flights.
- 3.9 Figure 3.3 compares flight delays to the number of flights operated at the airports in the sample, and clearly shows the link between recent declines in traffic volume and lower delays.

<sup>5</sup> The possible reasons given by CAA for a flight not matching are: diversion to another airport, cancellation, the flight was a short-haul flight which operated more than an hour earlier than scheduled, the actual flight took place in the following month, or an incorrectly reported item of data caused the flight not to match.

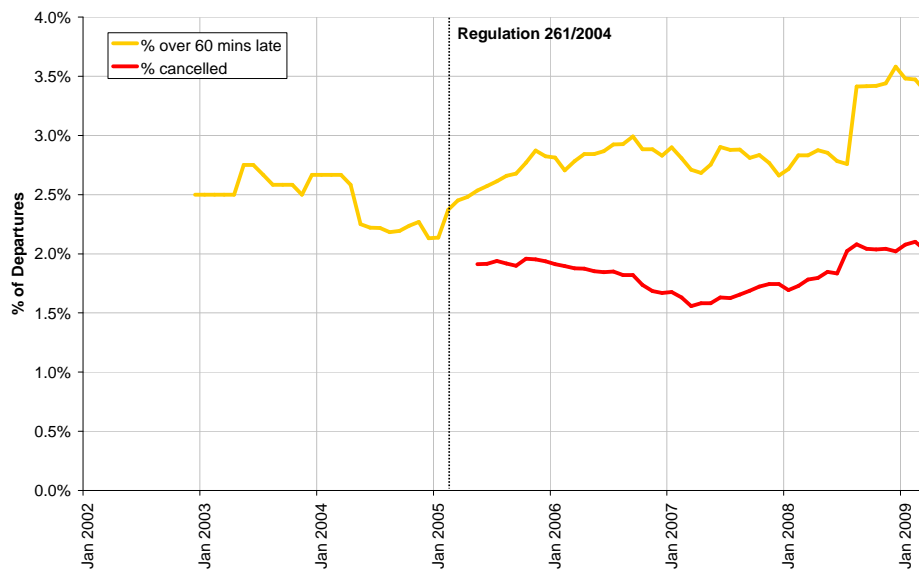
**FIGURE 3.3 AVERAGE MINUTES LATE VS TRAFFIC: FLIGHTS TO / FROM UK AIRPORTS (MONTHLY DATA; ANNUAL MOVING AVERAGE)**



Source: SDG analysis of UK CAA data

- 3.10 Figure 3.4 shows data provided by the European Regions Airline Association (ERA) for its members, which are generally smaller short-haul operators. The ERA data shows that, for these carriers, there has actually been some increase in the proportion of long delays since the Regulation took effect. The data shows that approximately 2.0% of ERA airline flights are cancelled and around 3.4% delayed over 1 hour.

**FIGURE 3.4 TRENDS IN DELAYS AND CANCELLATIONS: ERA AIRLINES (MONTHLY DATA; ANNUAL MOVING AVERAGE, DEPARTURES ONLY)**

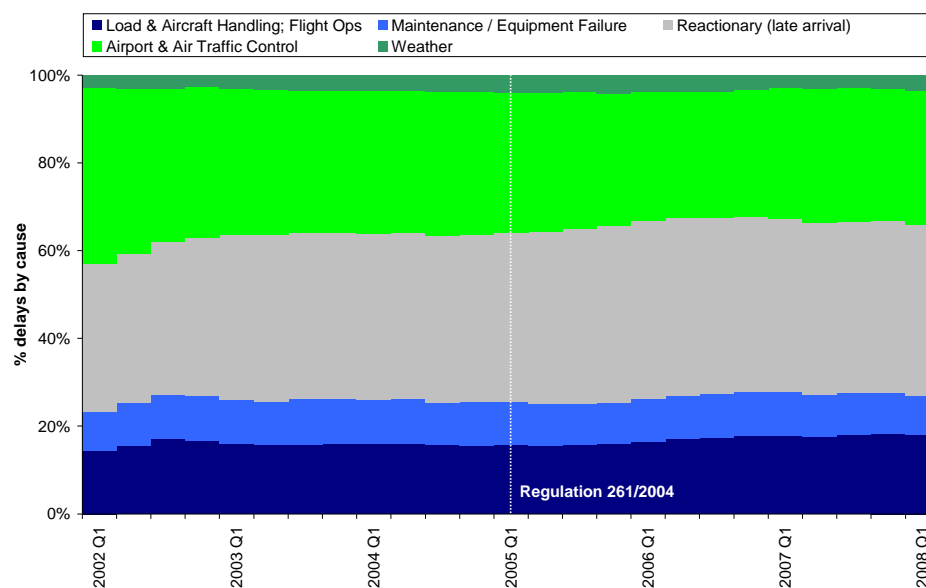


Source: SDG analysis of ERA data

*Causes of delays and cancellations*

- 3.11 We have also analysed data for the causes of delays and cancellations, in order to:
- identify whether the overall trends in delays and cancellations are impacted by factors which airlines cannot directly control, such as air traffic management constraints; and
  - assess the proportion of cases in which airlines could be exempt from paying compensation for cancellations under Article 5(3) of the Regulation.
- 3.12 DGAC, AEA and ERA provide data on the causes of delays, although none provide any data on the causes of cancellations. It would be reasonable to assume that flights would be cancelled for similar reasons although this would not always be the case. Overall, the data indicates that airlines are responsible for around 40% of delays, and there has been no consistent change in this since the introduction of the Regulation.
- 3.13 Figure 3.5 shows causes of delay for AEA departures delayed by more than 15 minutes. Again, this data has been smoothed to eliminate seasonality, specifically a higher rate of weather-related causes in the first and fourth quarters of every year. The data shows that airlines may be considered responsible for an average of 43% of primary delays (and presumably the same proportion of reactionary delays), and there has been not been a significant change in this since the Regulation took effect.

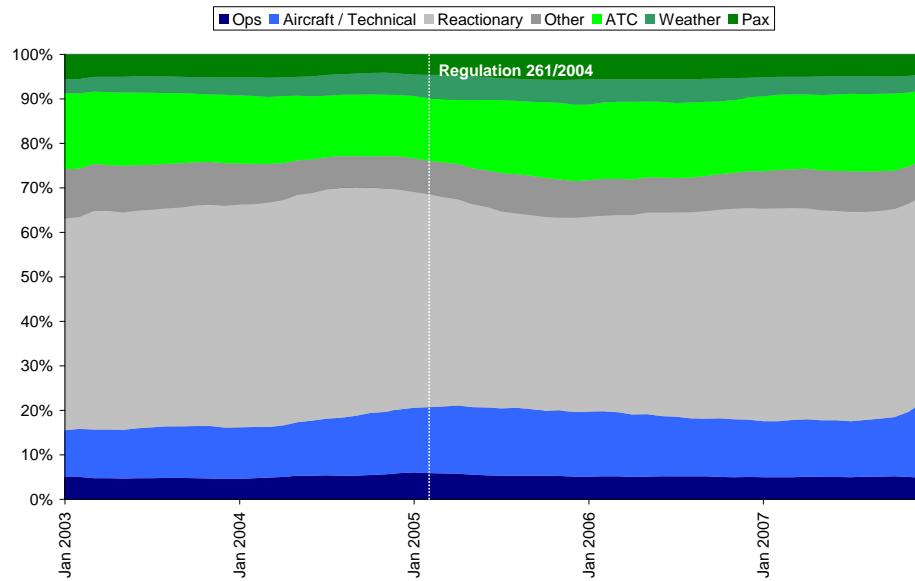
**FIGURE 3.5 CAUSES OF DELAY: AEA AIRLINES  
(QUARTERLY DATA; ANNUAL MOVING AVERAGE)**



Source: SDG analysis of AEA data

- 3.14 However, ERA data (for delays of 60 minutes or more), shown in Figure 3.6, does suggest a slight decrease in airline-related delays following the implementation of the Regulation. The ERA data indicates that, at the implementation of the Regulation in February 2005, airlines were responsible for around 46% of primary delays (this excludes the reactionary and 'other' categories). The moving average reduces to around 40% by late 2006, and increases again from August 2007 onwards.

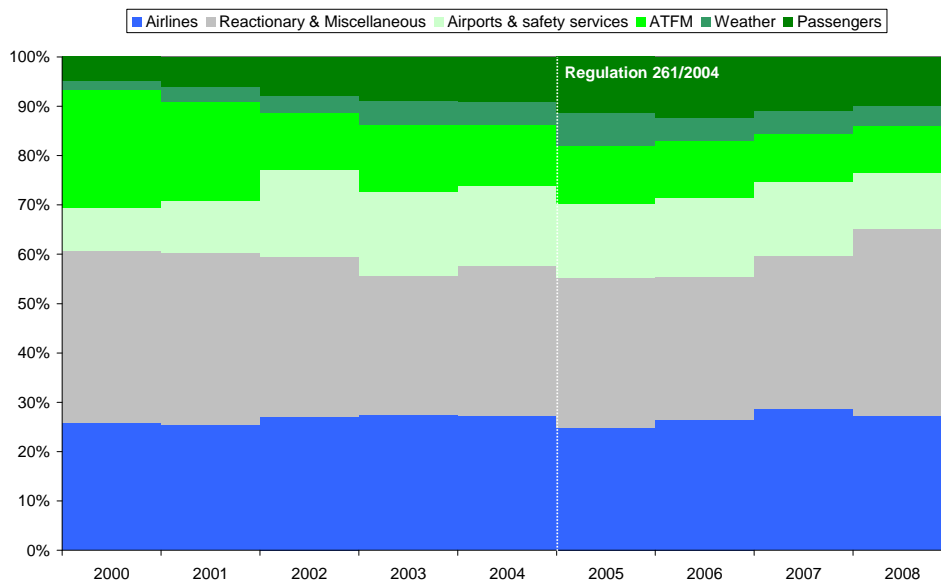
**FIGURE 3.6 CAUSES OF DELAY: ERA AIRLINES  
(MONTHLY DATA; ANNUAL MOVING AVERAGE)**



Source: SDG analysis of ERA data

3.15 DGAC, the French civil aviation authority, publishes data on the causes of delay for departures from 15 French airports. The data is published on an annual basis, and is shown in Figure 3.7. The data indicates that airlines are responsible for 36-44% of primary delays, with a slight increase in this proportion since the introduction of the Regulation. The main change visible is that there has been a gradual reduction in the proportion of delay attributed to air traffic management in France since 2000.

**FIGURE 3.7 CAUSES OF DELAY: DEPARTURES FROM FRENCH AIRPORTS  
(ANNUAL DATA)**

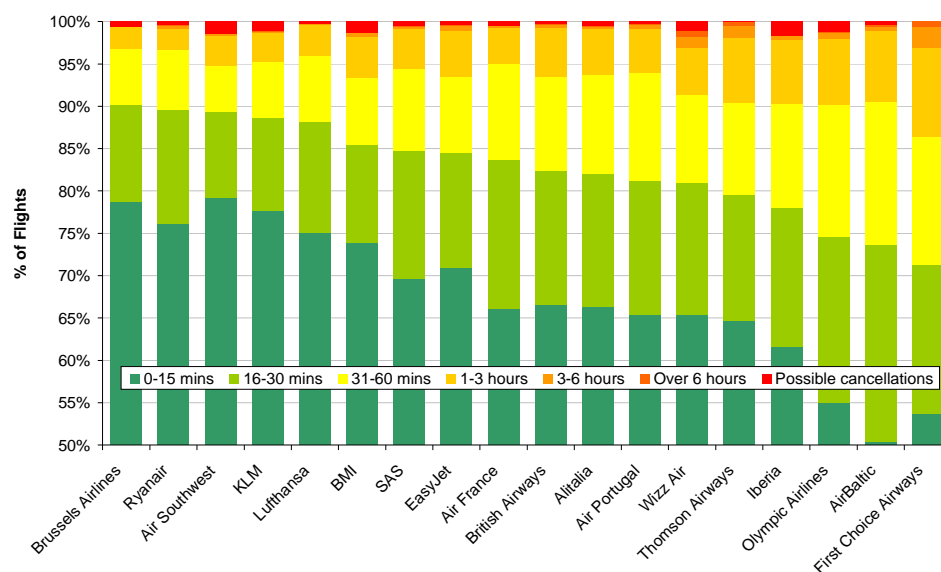


Source: SDG analysis of DGAC data

*Delays and cancellations by airline*

- 3.16 We have also undertaken analysis of the proportion of flights delayed by airline, in order to identify whether there are significant differences between different types of carrier (low cost, charter etc) which may lead to some having greater obligations than others under the Regulation. The analysis is limited to the airlines selected for inclusion in the study sample.
- 3.17 Although many of the sources reviewed for the study present airline-specific data, CAA data has been the most useful, being available for all of 2008, and covering almost all of the case study airlines. A limitation is that it is only based on flights to and from UK airports, which for some airlines may only form a small proportion of their overall operations; however this also means that the flights in the sample are all within a relatively similar operating environment.
- 3.18 Figure 3.8 shows CAA data for arrivals and departures at UK airports. As stated previously, 'planned flights unmatched' is used as a proxy for cancellations, but actual cancellations are likely to be somewhat lower.

**FIGURE 3.8 DELAYS AND CANCELLATIONS BY AIRLINE, FLIGHTS TO / FROM UK AIRPORTS, 2008**  
(SORTED BY ARRIVAL / DEPARTURE WITHIN 30 MINS OF SCHEDULE)



Source: SDG analysis of UK CAA data

- 3.19 The analysis shows significant variation in the proportion of different carriers' flights which are delayed. However, there is no consistent evidence of a trend for one type of operator to be more punctual than another. The two charter airlines in the sample had levels of punctuality that, overall, were not significantly worse than other carriers, but they did have a higher proportion of very long delays (over 3 hours), and almost no flights which may have been cancelled. This is consistent with information provided by the carriers, which is that they do not generally cancel flights.

*Analysis of information provided by airlines*

- 3.20 In addition to the publicly available data discussed above, from each airline we contacted we requested airline-specific data on punctuality and reliability. All airlines contacted either were not able to extract such data, or regarded it as too sensitive to release. As a result we were unable to compare public data against airline sources.
- 3.21 Two airlines were willing to provide us with figures for the proportion of passengers subject to denied boarding:
- one low cost airline provided these figures, but the numbers were negligible, as the airline does not usually overbook; and
  - one legacy carrier provided these figures, which were very low compared to the numbers impacted by delays and cancellations.

*Conclusions*

- 3.22 The data sources do not allow unambiguous conclusions to be drawn about the proportion of flights for which there are obligations created by the Regulation. However, the data available indicates that 1-2% of flights are cancelled and 2-3% are delayed by over 2 hours, implying that in total there are obligations created by the Regulation for around 4% of flights. It is possible that cancelled flights might have a below-average number of passengers, particularly where flights are cancelled for commercial reasons, and therefore this does not necessarily imply that there are obligations created for 4% of passenger journeys.
- 3.23 The sources evaluated for this study indicate that the Regulation has had no impact on the occurrence of long delays and cancellations:
- There is no evidence of any impact on the frequency and severity of delays, or on the number of cancellations.
  - There is no evidence (on the basis of the data we have seen) for carriers' reclassifying cancellations as long delays.
  - There is no evidence that the proportion of delays for which airlines are responsible has changed from the historical average of 40%.
- 3.24 In addition, analysis of punctuality data by airline shows no clear relationship between business model and on-time performance.
- 3.25 However, it should be noted that the scope of the analysis that can be undertaken is restricted by the fact that, in many parts of Europe, there is no published source of data on flight delays and cancellations. Some cross-European data is available from Eurocontrol, but this only provides delays over 1 hour, and is very limited compared (for example) to what is publicly available in the USA. If equivalently detailed was made publicly available in Europe, we would be able to analyse the issue in greater depth. This additional level of detail would also be useful to NEBs. Although Eurocontrol has data on individual flights this does not appear to be available to NEBs. If the data were published at the level of detail available in the US, NEBs would be able to make a number of checks on airlines' claims, for example checking whether delays and cancellations occurred as stated, and investigating the load factors

of cancelled flights to check for likely commercial cancellations.

### Complaints to airlines

- 3.26 Through interviews with airlines and analysis of airline websites, we have sought to understand the approaches airlines take to receiving and responding to passenger complaints. This section discusses the differences observed between the airlines studied.

#### *Information published by airlines on their complaints procedures*

- 3.27 To understand what barriers, if any, prevent passengers from making a complaint under the Regulation, we reviewed the websites of the airlines in the study's sample list. This review identified:
- whether it was readily possible to obtain information on how to complain;
  - through which channels the airline could be contacted regarding complaints (email, post, telephone etc);
  - any restrictions the carrier placed on complaints (for example, relating to the language in which complaints can be submitted); and
  - any information provided on how quickly the airline would respond.
- 3.28 A summary of our findings for each airline is presented in Table 3.1. Note that the airlines selected for inclusion in this section are based on our initial list of airlines, and differ from those we were ultimately able to contact.

**TABLE 3.1 SUMMARY OF AIRLINE COMPLAINT PROCEDURES**

Airline	Complaints procedure	Phone number	Online contact	Postal address	Any restrictions?	Speed of response
SN Brussels Airlines	Delay-specific complaint contact details	Yes - general	Online form - complaint-specific	Yes - general	None stated	Email on day of complaint, claim up to 4 weeks
Air France	Complaint contact details	Yes - general	Online form - complaint-specific	Yes - complaint-specific	None stated	None stated
Condor Flugdienst	Complaint contact details	Yes - general	Email address - complaint-specific	No	German and English only	None stated
Lufthansa	Complaint contact details	No	Email address - complaint-specific	Yes - complaint-specific	Complaints allowed in any language, responses from a choice of 14	None stated
Olympic Airways	General contact details	Yes - general	Email address - general	Yes - general	None stated	None stated
Wizz Air	General contact details	Yes - general, Premium rate	Online form - complaint-specific	Yes - general	Emails restricted to choice of 9 languages	Up to 30 days for response
Ryanair	Complaint contact details	No	No	Yes - complaint-specific	Mail/fax only, in English only	Up to 7 days for response
Alitalia	Complaint contact details	Yes - complaint-specific	No	Yes - complaint-specific	None stated	None stated
AirBaltic	General contact	No	No	Yes - complaint-	None stated	None stated

## Final Report

Airline	Complaints procedure	Phone number	Online contact	Postal address	Any restrictions?	Speed of response
	details			specific		
KLM	Complaint contact details	Yes - complaint-specific	Online form - complaint-specific	Yes - complaint-specific	None stated	None stated
TAP Portugal	General contact details	Yes - general	No	Yes - general	None stated	None stated
Iberia	Complaint contact details	No	Online form - complaint-specific	Yes - general	Accept complaints in almost all languages*	Average response time is 7 days*
SAS	Complaint contact details	No	Online form - complaint-specific	Yes - complaint-specific	English, Danish, Swedish or Norwegian only	Up to 14 days for response
Air Southwest	General contact details	Yes - general	Email address - complaint-specific	Yes - general	None stated	None stated
British Airways	Complaint contact details	Yes - complaint-specific	Online form - complaint-specific	Yes - complaint-specific	None stated	None stated
BMI	Complaint contact details	Yes - complaint-specific	Online form - complaint-specific	Yes - complaint-specific	None stated	None stated
easyJet	Complaint contact details - difficult to find	Yes - general	Online form - complaint-specific	No	Restricted to English, French, Italian, Spanish, German and Polish	None stated
Thomsonfly	Complaint contact details - difficult to find	Yes - general	No	Yes - complaint-specific	None stated	None stated

\*This information was provided by the airline at interview, and was not available on the website.

- 3.29 Of the 18 airlines in the sample list, 12 provided contact details which were specifically for complaints (often labelled as customer relations). Only one carrier provided contact details specifically for complaints regarding delays and cancellations. The reminder provided general contact details.
- 3.30 Most (13) of the carriers reviewed provided a phone number, however it is difficult to infer from this how easy it would be for a passenger to make a complaint as only four of these numbers were specifically for complaints. Most of the phone numbers were charged at national rates (€0.06-€0.14/minute). This level of charge is common among customer service telephone lines across different sectors, however it could be off-putting to a complaining passenger if they have to make multiple lengthy calls. Wizz Air charges a premium rate (£0.65/€0.76 per minute) to call customer services in English, and offers fifteen local numbers all but one of which is premium rate.
- 3.31 12 out of the 18 airlines provided an online contact direct to customer relations. Three quarters of these contacts were in the form of an online form rather than an email address, however, which would be slightly less convenient. Five of the airlines in the sample list did not provide any form of online contact. All but two of the airlines provided a postal address, and ten provided an address specifically for handling complaints. Ryanair only accepts complaints via mail or fax.
- 3.32 Although a lack of contact details is an immediate barrier to a passenger obtaining



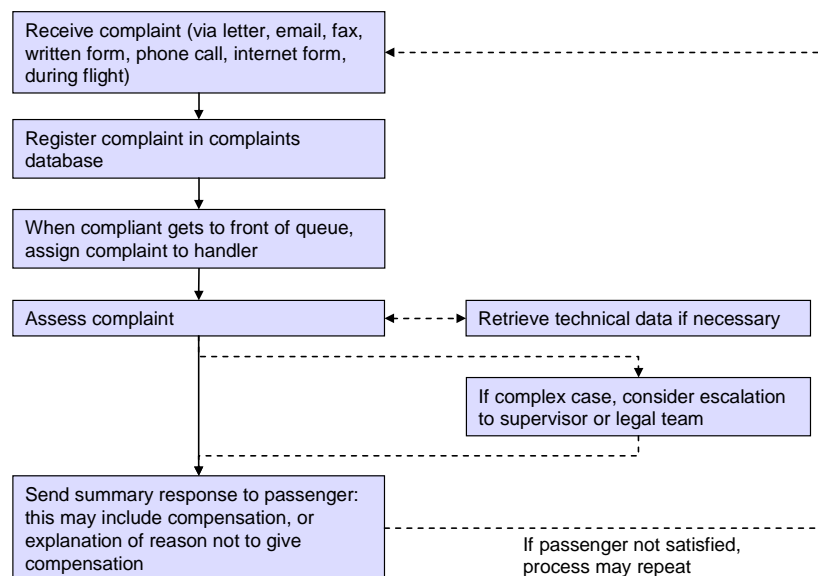
redress, additional restrictions can also be made by the airlines requirements on the form of the complaint. A number of airlines only accept complaints in a small number of languages: English only in the case of Ryanair, German or English only for Condor Flugdienst, and a choice of English or three Scandinavian languages for SAS. Most (12 out of 18) airlines in the sample do not state any restrictions on languages in which complaints may be received.

- 3.33 Most of the airlines in the sample do not give expected timescales for handling complaints. Of the four that do, the length of time varies considerably: Ryanair states it will provide a substantive written response within 7 days, while Wizz Air allows up to 30 days to respond. Any timescales given can only reflect the length of time for the airline's first response, as from the evidence given by NEBs we understand that reaching resolution of complaint may involve multiple responses from an airline, and therefore take much longer.

#### *Airline processes for handling complaints*

- 3.34 From each airline we contacted, we requested details of the procedures they used to handle complaints from passengers. This enabled us to identify good practice, and provides the counterpart to the NEB investigation procedures described below. Although the procedures varied by airline, we identified some areas of commonality. Figure 3.9 shows a typical complaint handling procedure.

**FIGURE 3.9 TYPICAL AIRLINE COMPLAINT HANDLING PROCESS**



- 3.35 Three of the carriers we interviewed stated that they contract out at least part of the complaint handling process. This outsourcing was implemented through several different approaches:
- One carrier informed us that the first stage of complaint handling is contracted out, and that if more detailed or complex information is required then the complaint is handled by the airline's own customer relations team. The legal department is called on where the complaint raises legal issues.
  - A second carrier contracts out more of the process, and stated that complaints are

only rarely escalated to the carrier's head office or legal team. The carrier informed us that this had no effect on the way in which the complaints were handled, as the contractor is given precise instructions and there is a team within head office managing the contract.

- The third carrier contracted out customer relations to third party call centres, but which work under the direction of a supervisor from the airline.

3.36 One carrier informed us that it uses artificial intelligence software to speed up the process and reduce staff time required: simple customer contacts (such as queries about the luggage allowance) are filtered out and responded to automatically, while those that require individual attention are marked for agents to handle.

3.37 Airline stated response times to passengers were in general much shorter than those reported by NEBs and consumer organisations. Table 3.2 shows the timescales for responses to passengers stated by airlines.

**TABLE 3.2 AIRLINE COMPLAINT RESPONSE TIMESCALES**

Upper limit of stated timescale for response	Number of airlines
Within a week	4
Within two weeks	1
Within one month	3
Within two months	1

3.38 Due to the wide geographical coverage of some airlines, many stated that they could handle complaints in multiple languages:

- Some legacy carriers were often able to handle complaints in many languages, stating that they were able to handle complaints in the language of every country in which they had a sales office.
- Other carriers take the opposite approach, and will receive complaints only in one language. However, one informed us that although this was its public policy, it would in fact respond to complaints in other languages when it has the capability.

3.39 The response to the passenger may also be informed by commercial considerations: an airline informed us that, for frequent business travellers, it may provide services beyond that required by the Regulation, whereas a single-trip economy passenger would receive the minimum possible. This is consistent with views provided by another airline, which stated that it did not believe that it had a commercial incentive to provide a higher standard of customer service than the minimum required by law.

*Number of complaints received*

3.40 Although airlines were unwilling to provide information on their on-time performances, some were willing to share data on the number of complaints received that related to the Regulation. On the basis of the very limited information provided to us, and assuming that the carriers providing information were representative of other

carriers, there were around 1.0 million complaints to EU carriers in 2008, of which around 30% related to the issues covered by the Regulation; this compares to approximately 550 million journeys on flights from or within the EU<sup>6</sup> and approximately 22 million on flights which are either delayed over 2 hours or cancelled, on the basis of the estimates described in paragraph 3.24 above. The combined NEBs received approximately 28,000 complaints in total over a similar period; it is clear that NEBs only receive a small fraction of potential complaints.

- 3.41 Of the airlines that were unable to provide this information, some stated commercial sensitivity, but others informed us that did not have the figures. One major low cost carrier told us that they treat complaints as ‘customer contacts’, and do not distinguish them from other queries (such as queries regarding baggage allowance).

### **Cost of complying with the Regulation**

- 3.42 We also requested information from carriers on the cost of compliance with the Regulation. Not all of the costs attributed to handling delays and cancellations can be directly attributed to the Regulation, as many carriers already provided some assistance to passengers under these circumstances. Not all airlines were prepared to provide costs, but those that did gave a reasonably consistent picture: five airlines reported that costs were in the range of 0.1%-0.5% of turnover. However, a small regional airline operating services which are particularly likely to be impacted by poor weather estimated 10%. The airlines did not provide consistent information and so these figures are not directly comparable, but they are a guide to the likely level of cost incurred.
- 3.43 Most airlines had a common approach to handling the provision of assistance, making arrangements through either their staff or ground handling agents. However, one major airline had entirely contracted out provision of assistance to a third party. The reasons given by the airline were to reduce costs (the contractor is able to get bulk discounts on hotel rates) and reduce reliance on ground handlers, who may not have sufficient staff, contacts or capability to arrange accommodation in the event of a major incident. In the event of an incident occurring, the carrier’s operational control centre contacts the contractor who is then responsible for arranging assistance on the carrier’s behalf.

### **Evidence for airline compliance with the Regulation**

#### *Ground handling manuals*

- 3.44 At each meeting with airlines, we emphasised that part of the aim of the study was to gather concrete evidence regarding the implementation of the Regulation, and that any materials which they could provide in support of statements they made would be valuable. A number of airlines responded with confidential documents which we have been able to assess against the requirements in the Regulation. It should be noted that we would expect some self-selection bias and therefore the conclusions drawn here

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<sup>6</sup> Source: Energy and Transport in Figures (2007)

may not be reflected in other carriers.

- 3.45 We asked each airline for a copy of the section of its ground-handling manual which referred to responses to delays, cancellations and denied boarding. These set out the actions that airlines require their agents to take in response to delay incidents, describing the measures that are put into place for passengers. While the manuals provide evidence of an airline's intention to comply (or not to comply) with the Regulation, the experiences of NEBs and consumer organisations suggest that they may not always be adhered to in practice. We were also advised by an airline association that we should not rely fully on instructions given to ground handlers, as different airlines would handle incidents in different ways: for example, the operational control centre might make individual arrangements or give individual instructions in each case.
- 3.46 Only one third of the airlines that participated in the study were willing to provide this information. Where a document was provided, we checked it for compliance with the Regulation (Table 3.3). Of the six excerpts from ground handling manuals we received, we found that two were broadly compliant, although in one case this is dependent on interpretation of the Regulation (it stated that passengers should only be rerouted via other carriers' flights under exceptional circumstances).
- 3.47 Three had serious or multiple non-compliances:
- One carrier did not offer compensation for cancellations.
  - A second stated that compensation was not payable for denied boarding which had been caused by extraordinary circumstances, and failed to offer passengers the option of reimbursing their ticket instead of re-routing
  - One instructed its handlers to give passengers a list of local hotels and refund their costs, rather than organising the accommodation for them ('self-reliance'). It also specified very low values for the vouchers to be given for care.
- 3.48 In addition, one had minor non-compliances in its ground handling manual, including: stating that passengers travelling using frequent flyer miles were not to be paid denied boarding compensation; and only referring to denied boarding due to over sale (which could exclude denied boarding due to technical problems causing a reduction in aircraft capacity).

**TABLE 3.3 COMPLIANCE OF AIRLINE GROUND HANDLING MANUALS**

	Number of airlines
Participated in study	16
Provided ground handling manual	6
Manual is broadly compliant	2
Manual has minor non-compliances	1
Manual has serious / multiple non-compliances	3

*Notices required under Article 14(2)*

- 3.49 A number of airlines provided us with a copy of the information notices that they are

required under Article 14(2). With one exception, the notices we were provided with were compliant, although in some cases this depends on the interpretation of the Regulation. To the extent that there is a lack of clarity in the Regulation, airlines may attempt to use disputed terms to their advantage. For example:

- Some of the airlines state in their information notices that it will pay compensation for all cancellations “within the airline’s control” or use similar terms, rather than not pay compensation for cancellations due to “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”. While superficially similar, this is likely to exclude a higher proportion of cases than the criteria defined in the ECJ ruling in *Wallentin-Hermann*.
- Several stated that they would only provide re-routing via their own flights. Again, whether this is compliant depends on interpretation of the Regulation.

3.50 The one information notice which was not compliant stated that the carrier would not provide assistance in the case of delays which were not its responsibility.

3.51 Most of the information notices we were provided with did not provide contact details for the carriers’ customer services departments, and therefore if the carrier did not comply with the obligations stated in the notice it would not be immediately clear to the passenger how to pursue any claim, short of complaining to the NEB (and most NEBs would not accept a complaint if the passenger had not sought to complain to the carrier first). In addition, one of the notices did not specify what the amounts of compensation payable were, even though it did specify the distance bands.

3.52 In addition, one airline provided training materials they used with their staff. This document was fully compliant with the Regulation.

#### *Airline terms and conditions*

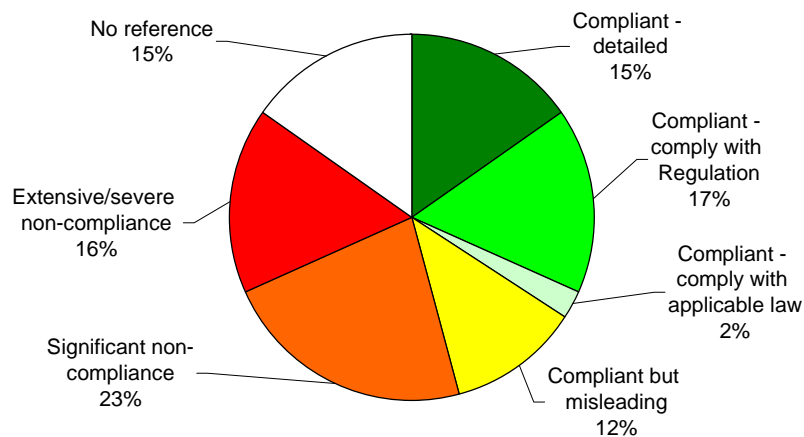
3.53 An area of evidence which could be looked at to establish the level of airline compliance is airlines’ terms and conditions. These would set out the airlines’ theoretical commitments to the passenger, although NEBs and consumer organisations have informed us that they are not always adhered to in practice.

3.54 The compliance of airlines terms and conditions with this Regulation (amongst others) was the subject of a study we undertook for the Commission in 2008, which reviewed the Conditions of Carriage of 85 carriers operating in the EU. Since this was undertaken relatively recently, we have not sought to replicate this work, but we summarise the relevant conclusions. It is however likely that some carriers will have changed their Conditions of Carriage since this study was undertaken, and therefore that the compliance of the Conditions with the Regulation could now have improved.

3.55 The research found that 39% of carriers’ Conditions were significantly non-compliant with the Regulation and a further 12% were misleading with regard to carriers’ obligations, in that they implied that the carrier would have fewer legal obligations than it actually would. This arose largely from how the carriers had adapted IATA’s recommended practice on Conditions of Carriage (RP1724), which predates the Regulation and as a result is not consistent with it. 15% described the carriers obligations in detail and broadly accurately, 17% had a general statement that in the

event of denied boarding, delay or cancellation, the carrier would comply with the Regulation, and 2% had a general statement that the carrier would comply with applicable law.

**FIGURE 3.10 COMPLIANCE OF CONDITIONS OF CARRIAGE WITH REGULATION 261/2004**



Source: Steer Davies Gleave study for European Commission on Conditions of Carriage and Preferential Tariff Schemes, 2008.

#### *Other airline evidence*

3.56 Several airlines provided us with additional evidence that they had complied with the Regulation.<sup>7</sup> This included:

- Invoices showing costs incurred re-routing passengers via other airlines.
- An incident report sheet from an airline, giving details of the incident that had occurred, what was provided to passengers, and a list of passenger signatures attesting that each had received what the airline stated was provided.
- One airline informed us that they only a very low proportion of complaints led to court cases, and that this was evidence of compliance. This rate might also be affected by passengers' perceptions of the court process.

#### *Evidence from other organisations*

3.57 As part of investigating compliance with the Regulation, NEBs and other organisations have undertaken their own analysis.

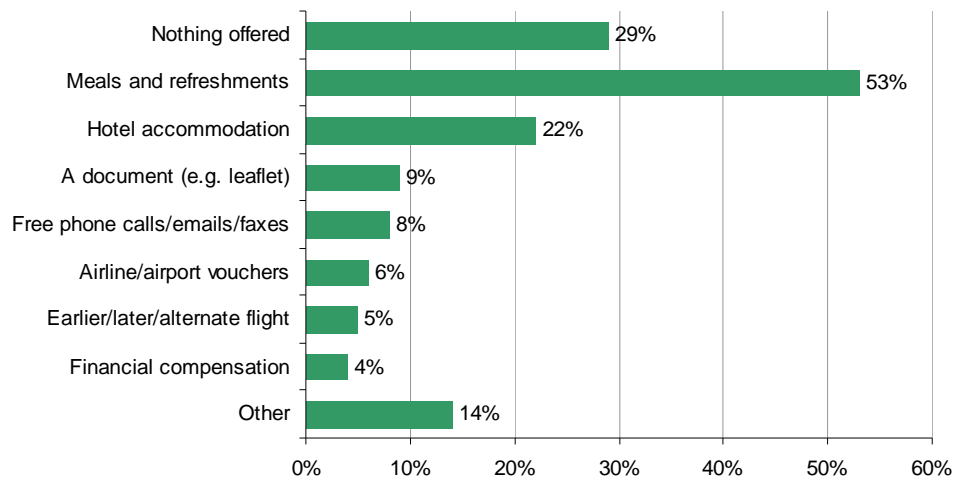
3.58 Some NEBs investigate all cases where the airline claims extraordinary circumstances. Only one NEB (the Hungarian CAA) was able to provide us with detailed results of this investigation: the claim of extraordinary circumstances was upheld by the CAA in only 37% of cases.

3.59 The UK consumer organisation Which? undertook a survey of its members over 12

<sup>7</sup> Note that this section discusses evidence of compliance in multiple cases, rather than individual cases; for a discussion of evidence provided in support of particular claims (e.g. technical logs) please see section 4.

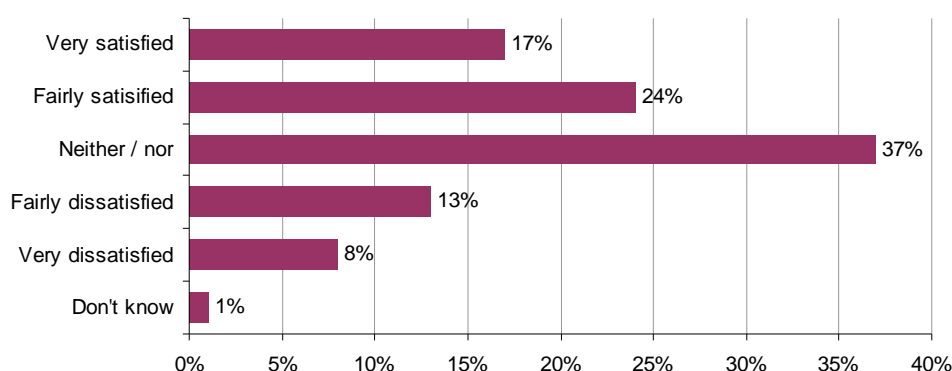
months from 2007 to 2008, asking them whether they had experienced delay. The survey shows 6% of passengers experiencing an incident which would be covered by the Regulation, based on a sample size of 29,845 respondents. The survey asked those passengers who had suffered a delay of over 2 hours or a cancellation what compensation or assistance was provided (Figure 3.11 below).

**FIGURE 3.11 PUNCTUALITY SURVEY RESULTS – PROVISION OF COMPENSATION**



Source: Which?

- 3.60 Under Article 14(2), all of these passengers should have received an information notice and the majority (those on all cancelled flights, all delayed flights of less than 1,500km, and some delayed flights of over 1,500km) should have received refreshments and telephone calls. However, 29% were given nothing; only 9% were provided with a document explaining their rights, only 53% received refreshments, and only 8% were offered phone calls or emails. This implies that carriers committed a minor infringement of the Regulation in at least 92% of cases, and that there was a more significant breach of the Regulation (failure to provide refreshments) in 30-40% of cases, the exact figure being uncertain without knowing the proportion of delayed passengers using flights of over 1,500km and the exact length of the delays.
- 3.61 In addition, Which? asked their members about how satisfied they were with the handling of delay (Figure 1.14). This showed that 41% of delayed respondents (out of 9,822) were satisfied with how the delay had been handled. This includes passengers who were delayed for lengths of time too short to be covered by the Regulation.

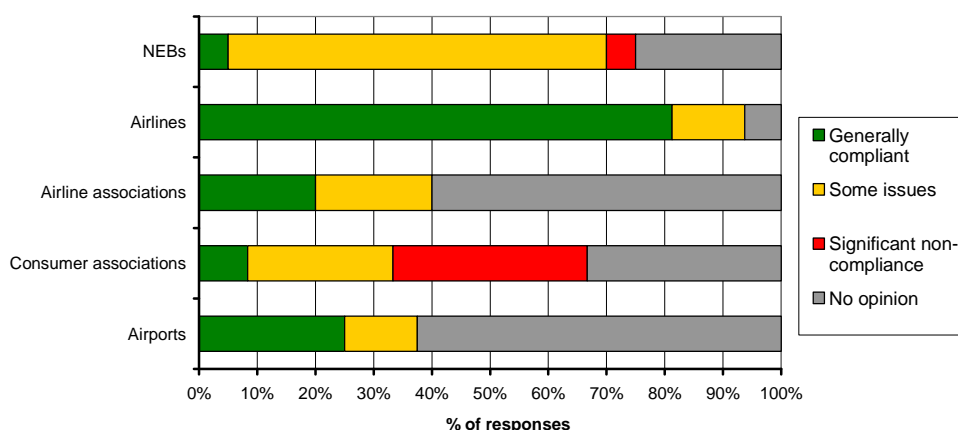
**FIGURE 3.12 PUNCTUALITY SURVEY RESULTS – SATISFACTION WITH HANDLING**

Source: Which?

- 3.62 A third stakeholder which provided information on compliance was EUclaim. It collects detailed data on flights, such as scheduled and operated flight times. It believes it can identify incidences where there are discrepancies between its data and the statement an airline has made to a passenger – for example, that a carrier has claimed that an aircraft had technical problems whilst it was actually operating an additional chartered flight. However, EUclaim's statistics also show that the large majority of initial claims it receives from passengers are not valid, indicating that passengers may have exaggerated expectations of their rights under the Regulation.

#### Stakeholder views on compliance

- 3.63 We asked all stakeholders about the extent to which they considered airlines were complying with the Regulations. Views varied considerably, depending on whether or not the organisation was an airline. Figure 3.13 summarises the views expressed by each type of stakeholder. Over 80% of airlines thought that they were generally compliant with the Regulation, compared to less than 10% of NEBs and consumer organisations. 36% of consumer organisations we spoke to identified significant or widespread failures to comply with the Regulation.

**FIGURE 3.13 STAKEHOLDER VIEWS OF COMPLIANCE**



3.64 The following section discusses the views of different groups of stakeholders.

*Airlines*

3.65 Most airlines viewed their own actions as compliant with the Regulation: out of sixteen airlines contacted, thirteen described approaches which were broadly compliant, and two were partially compliant. However, in many cases airlines' views that they were compliant with the Regulation depended on their interpretation of it:

- Two carriers admitted that compensation for cancellations would only be paid on a passenger's specific request.
- A tour operator informed us that all non-operated flights were long delays (even if the delay was several days in length): even if the "delayed" flight used a different flight number, it would not be considered a cancellation, because its passengers would be using the same tickets. This would also apply if passengers on two smaller flights were regrouped onto one larger plane.
- An airline association informed us that its members were compliant with its interpretation of the clause on re-routing, namely that re-routing does not have to be via other carriers.

3.66 However, a number of carriers stated that some *other* carriers were infringing the Regulation; this view was particularly expressed towards low cost carriers. One legacy carrier suggested that enforcement did not focus sufficiently on low cost carriers because of the difficulties involved – for example because their head offices might be outside the country.

3.67 Several airlines noted situations where compliance was difficult: at small airports where the ground handling company is not prepared to arrange hotel accommodation, and following a major incident. It can also be difficult for an airline to provide evidence that it has complied, for example if a passenger who lives close to the airport leaves before assistance can be provided.

3.68 We also interviewed all of the major airline associations. Most did not express an opinion on whether or how carriers' were complying with the Regulation, but two informed us that there were areas where they disputed the Commission's interpretation of what was required. One association stated that some its member carriers found the requirement to provide information notices difficult to comply with.

*Tour operator and travel agent association (ECTAA)*

3.69 ECTAA (the association of European Travel Agents) noted that re-routing via other carriers is often refused, and that a number of carriers do not offer the choice of re-routing in the case of cancellations announced more than two weeks prior to departure, either denying all obligations or offering refunding, but not the choice of re-routing. This is not satisfactory for passengers and tour operators, in particular when they cannot find alternative transport at comparable conditions during high season and have booked other travel arrangements which they will have to cancel or modify at their expense. ECTAA members had seen problems with payment of compensation: carriers failing to pay, only paying as a result of formal complaints, and only paying via a voucher for future flights on the airline.

3.70 ECTAA reported problems as occurring most often with low cost and non-EU carriers.

*NEBs*

3.71 Most NEBs believed that there were some issues with airline compliance, and identified a number of frequently occurring problems:

- **‘Self-reliance’:** By this we mean the carrier reimbursing the passengers costs of care, if subsequently claimed, rather than providing the care itself. Many NEBs viewed this as a problem, and several informed us that some carriers were doing this extensively. This was especially prevalent on low cost carriers, where the use of third party ground handling agents could make it more difficult for passengers to obtain care. Sometimes costs are only reimbursed after investigation and instruction by the NEB. Conversely, one NEB reported that when requested to reimburse costs, carriers usually paid, and one NEB said that it was surprised by the extent to which some carriers were willing to accept passengers’ claims for expenses.
- **Re-routing only on their own flights:** Many NEBs reported that some carriers will only re-route passengers via their own flights, and will not consider using other carriers. This is particularly reported for low cost carriers, who argue that their business model (particularly the use of secondary airports) may hinder rerouting via other carriers.
- **Re-routing not offered at all, only reimbursement:** One NEB informed us that it had had a number of recent complaints that airlines were not offering re-routing when cancelling flights in advance, and only refunding the ticket price. This could result in significant cost to the passenger.
- **Failure to provide information:** Violations of Article 14 were very commonly reported by NEBs. Compliance with Article 14(1) was generally good, but that with Article 14(2) was seen as weaker.
- **Unjustified claims of extraordinary circumstances:** This was reported by a number of NEBs. The Hungarian CAA found that such claims were justified in only 37% of cases.
- **Classifying cancellations as long delays:** A number of NEBs reported that this approach is commonly used by some carriers to minimise their responsibilities under the Regulation.
- **Inadequate assistance provided:** Some carriers offer refreshments which are not sufficient to meet the criteria in Article 9(1)(a). For example, one carrier offers a voucher for all delays of 2-5 hours which, at certain European airports, would only be sufficient to cover the cost of a small bottle of water<sup>8</sup>.

*Consumer organisations*

3.72 Only one consumer organisation believed that airlines were mostly complying with the Regulation, while two believed compliance was only partial. Three of the consumer organisations believed that airlines were not consistently infringing the

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<sup>8</sup> For example at Amsterdam Schiphol airport the minimum price we could find in airside shops for a small bottle of water, typically priced at around €1 outside, is €3.50. In contrast at some other airports there is competition between airside retailers resulting in much lower prices.

Regulation, citing failures to spontaneously pay passengers compensation for cancellations, and in some cases failing to provide compensation when asked.

#### *Airports*

3.73 Most airports surveyed did not express an opinion on airline compliance with the Regulation. Two did express (slightly conflicting) views:

- A terminal manager for BAA, the main UK airport operator, stated that airline compliance at his airport (London Heathrow) had significantly improved and that, for example, the airport had not recently been required to care for any groups of stranded passengers.
- AENA, the Spanish airport operator, stated that airlines operating at its airports were consistently failing to provide meals, refreshments and telephone calls/emails as required by Article 9, and that there was widespread failure to inform passengers of their rights as required by Article 14(2).

#### **Conclusions**

3.74 There is no evidence that the introduction of the Regulation has had any impact on the level of delays or cancellations. It is not possible to draw conclusions about trends in denied boarding as little information is released by carriers. Overall it is difficult to draw conclusions about carriers' performance of carriers, as very little information is released, and the information released by different carriers is not consistent. Although Eurocontrol has detailed data on flight delays, it only releases this data at a highly aggregated level, which makes it impossible to assess the performance of individual carriers.

3.75 It is also difficult to obtain clear evidence on whether airlines are applying the Regulation properly, as few airlines are willing to share this information; as a result, it is necessary to rely largely on stakeholders' opinions and other limited, largely anecdotal evidence. Although some stakeholders considered that airline compliance with the Regulation has improved, most evidence that is available indicates that some airlines are not consistently complying with the Regulation:

- Most carriers were not willing to provide the parts of their ground handling manuals, which should indicate their policy on handling of delays, cancellations and denied boarding. Of those that were provided, half were significantly non-compliant.
- The survey undertaken by Which? indicates that airlines commit a minor, technical infringement of the Regulation in over 90% of cases in which they have obligations under it, and commit a significant infringement in 30-40% of cases.
- Most stakeholders, other than airlines, consider that carriers are not consistently complying with the Regulation.

3.76 There is also some evidence that consumers misunderstand their rights under the Regulation and may believe airlines are non-compliant as a result. However, even excluding the views of consumer associations, most evidence indicates that airlines are not universally complying.

3.77 The data indicates that only a very small proportion of passengers complain to either

airlines or NEBs. As discussed in paragraph 3.40 above, the Regulation creates obligations for carriers relating to about 4% of flights (which, if delayed/cancelled flights have equivalent numbers of passengers to other flights, equates to 22 million passengers per year); but only around 0.05% of passengers complain to carriers, and 0.005% complain to NEBs. This implies that there is one complaint to an NEB for approximately every 800 passengers on flights for which the Regulation creates obligations.

## 4. ENFORCEMENT AND COMPLAINT HANDLING BY NEBS

### Introduction

4.1 This section summarises the complaint handling and enforcement process undertaken by National Enforcement Bodies (NEBs). We set out the following information:

- we provide an overview of the NEBs, describing the type of organisations they are and the resources they have available;
- we set out the legal basis for complaint handling and enforcement;
- we summarise statistics for the number of complaints received, the nature of the complaints, and the outcomes, and for sanctions that have been issued;
- we describe in detail the process for complaint handling and enforcement in each State, and outline a number of common issues and difficulties; and
- we provide an overview of other activities undertaken by NEBs in relation to the Regulation, such as inspections undertaken at airports.

4.2 Most of the information within this section is provided for the NEBs in all Member States. The detailed information relating to the complaint handling and enforcement process has been collected for the case study States only. Further detail on complaint handling and enforcement in the 15 case study States is provided in Appendix A.

4.3 In most cases, this document is based on detailed information provided by all relevant stakeholders. However, in the case of Portugal, we have a number of outstanding questions to the NEB, INAC, to which we have not been able to obtain unambiguous responses. In particular, the information we have been provided with relating to the circumstances under which sanctions may be imposed appears to be contradictory. We have sought to clarify this issue but without success within the timescale for the study.

### Overview of the NEBs

4.4 Most of the NEBs are Civil Aviation Authorities. In the States where the NEB is not a CAA, it is generally a statutory consumer authority. In some Member States, another organisation undertakes part or all of the complaint handling and enforcement function. In Belgium, whilst there are two NEBs, both are part of the same government ministry (the Federal Public Service for Mobility and Transport). In Finland, there are three complaint handling/enforcement bodies. In Sweden, there is a separate body responsible for complaint handling but it is not designated as an NEB.

4.5 Table 4.1 lists the NEBs, the nature of the organisation, and where there is more than one NEB in a State, the role of each organisation. The table is divided into case study and non-case study States.

**TABLE 4.1 ENFORCEMENT BODIES**

State	Enforcement Body	Nature of organisation	Role
Denmark	Statens Luftfartsvæsen (SLV)	CAA	-
France	Direction Générale de l'Aviation Civile (DGAC)	CAA	-
Germany	Luftfahrts-Bundesamt (LBA)	CAA	-

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Greece	Hellenic Civil Aviation Authority (HCAA)	CAA	-
Hungary	Hungarian Authority for Consumer Protection (HACP)	Consumer protection authority	Complaint handling and enforcement
	National Transport Authority Directorate for Aviation	CAA	Supervision of airlines, assistance to HACP where required e.g. evaluation of extraordinary circumstances
Ireland	Commission for Aviation Regulation	Independent economic regulator	-
Italy	Ente Nazionale Aviazione Civile (ENAC)	CAA	-
Latvia	Consumer Rights Protection Centre	Consumer protection authority	-
Netherlands	Transport and Water Management Inspectorate (IVW)	CAA	-
Poland	Civil Aviation Office (CAO) Commission on Passengers' Rights	CAA	-
Portugal	National Institute for Civil Aviation (INAC)	CAA	-
Slovak Republic	Slovak Trade Inspectorate	Consumer protection authority	-
Spain	Agencia Estatal de Seguridad Aérea (AESA)	CAA	-
Sweden	Konsumentverket (KV)	Consumer protection authority	Enforcement
	Allmänna reklamationsnämndens (ARN) <sup>9</sup>	Alternative dispute resolution body	Complaints handling, dispute resolution
UK	Air Transport Users Council	Air passenger representative agency	Complaints handling
	UK Civil Aviation Authority	CAA	Enforcement
Austria	Federal Ministry of Transport, Innovation and Technology	CAA	-
Belgium <sup>10</sup>	Directorate-General Air Transport	CAA	Enforcement and sanctions
	External Communications Cell	Public authority	Complaints handling
Bulgaria	Directorate General, Civil Aviation Administration <sup>11</sup>	CAA	-

<sup>9</sup> Not designated as an NEB

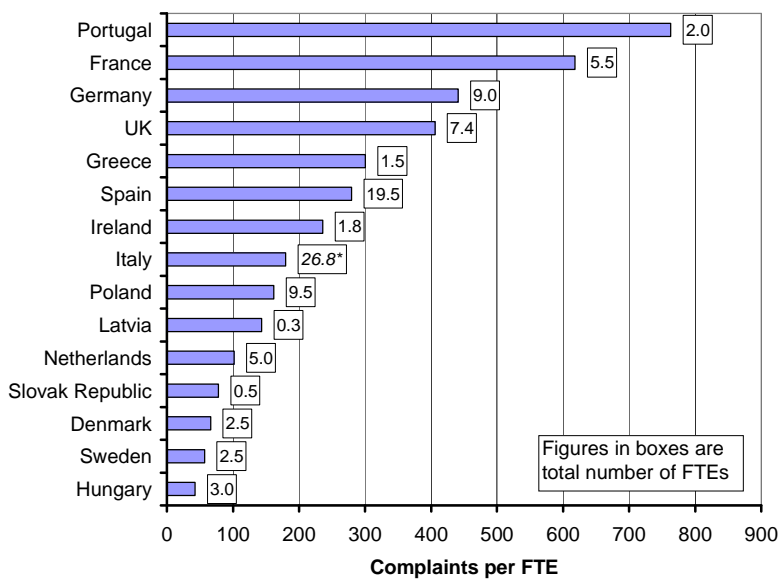
<sup>10</sup> Both NEBs in Belgium are part of the same organisation (the Federal Public Service for Mobility and Transport)

<sup>11</sup> Assisted with complaints handling by the Commission of Trade and Consumers Protection, which is an agency of the Ministry of Economics, but this is not classified as an NEB. Initial complaints go to the NEB.

Cyprus	Department of Civil Aviation	CAA	-
Czech Republic	CAA – Legal department	CAA	-
Estonia	Consumer Protection Board	Consumer protection authority	-
Finland	Consumer Ombudsman & Agency	Consumer protection authority	Enforcement of collective consumer interest
	Consumer Disputes Board	Alternative dispute resolution body	Complaint handling/dispute resolution (leisure travellers only)
	Finnish Civil Aviation Authority	CAA	Enforcement, handling of complaints by business passengers, support to Consumers Dispute Board
Lithuania	Civil Aviation Administration	CAA	-
Luxembourg	Directorate of Civil Aviation	CAA	-
Malta	Department of Civil Aviation	CAA	-
Romania	National Authority for Consumer Protection (NACP)	Consumer protection authority	-
Slovenia	Directorate of Civil Aviation Aviation Inspectorate	CAA	-

#### *Resources available to NEBs*

- 4.6 A key issue identified in our 2006-7 study into the operation and results of the Regulation was that many NEBs did not have sufficient resources available to handle all of the complaints that they received. In some States, the NEB considers that they now have sufficient resources, but lack of resources is still a problem in several NEBs. In particular, the NEBs for France, Italy, Spain and Portugal stated that they did not have sufficient resources to handle the complaints that they received within the timescales set out in the NEB-NEB agreement.
- 4.7 There continue to be significant differences in the number of staff handling complaints and working on enforcement in the different NEBs. In Portugal there is one FTE for every 763 complaints received per year, whereas in Hungary there is one FTE for every 42 complaints (Figure 4.1 below).

**FIGURE 4.1 NUMBER OF COMPLAINTS HANDLED PER YEAR, PER FTE**

\* Estimate, based on assumption that airport-based staff spend 25% of time dealing with issues related to the Regulation

4.8 A further problem is that, in order to investigate and rule on claims of extraordinary circumstances by carriers, it is necessary for NEBs to have access to staff with technical/operational expertise. Whilst this is available in most NEBs, it is not available in all:

- **Sweden:** Complaints are handled by an alternative dispute resolution system. This does not have access to technical or operational experts.
- **UK:** The AUC, which handles complaints, does not have access to technical expertise, although the CAA does investigate a small proportion of cases, and it does have this expertise.
- **Ireland:** The NEB is CAR, an economic regulatory authority. It can draw on expertise within the Irish Aviation Authority (the CAA) but this is not a statutory function of the IAA and therefore is provided on a goodwill basis.
- **Portugal:** Complaints are handled by INAC, the CAA, but the part of INAC which handles complaints does not have access to specialist technical expertise.

4.9 This problem is particularly significant for the NEBs that are not civil aviation authorities. However, this does not apply to all such NEBs: in Hungary complaints are handled by a general consumer authority, the Hungarian Authority for Consumer Protection, but the CAA is used where required for investigations, particularly of claims of extraordinary circumstances.

### Legal basis for complaint handling and enforcement

#### *Overview of relevant legislation*

4.10 All of the case study States have complied with the obligation set out in Article 16 to introduce sanctions into national law, with the exception of Sweden and Spain:

- **Spain:** Enforcement relies on a law which predates the Regulation and hence



does not refer explicitly to it, but requires carriers to “undertake their functions and carry out the activities for which they are responsible with respect to passengers’ rights, without discriminating on the basis of place of birth, race, gender, religion, opinion or any other personal or social condition”. It is unclear whether this is a sufficient legal basis for the imposition of sanctions and, although the NEB is using it to impose sanctions, these are being challenged by carriers.

- **Sweden:** Sanctions have been introduced into national law but only for infringement of Article 14. No other penalties can be imposed. Where an airline does not comply with a requirement to pay compensation to a passenger that complains, the only penalty is that the name of the airline is published on a list in a magazine.

4.11 In several Member States, enforcement is dependent on more than one law – for example, the law defining how the NEB must operate and the procedure for imposing sanctions may differ from the law introducing sanctions. Table 4.2 below summarises the relevant legislation in the case study States. More detailed information is provided in the case studies in appendix A.

**TABLE 4.2 RELEVANT NATIONAL LEGISLATION**

State	Summary of relevant legislation
Denmark	<ul style="list-style-type: none"> <li>• Air Navigation Act, Articles 31(a) and 149(11): defines sanctions</li> </ul>
France	<ul style="list-style-type: none"> <li>• Article 330-20 of the Civil Aviation Code, as amended by Decree 2007-863 of 14 May 2007: gives the Minister of Civil Aviation the power to impose sanctions</li> </ul>
Germany	<ul style="list-style-type: none"> <li>• Air Traffic Licensing Regulation (Luftverkehrszulassungsordnung): defines LBA as the NEB and that breaches of the Regulation are considered an offence.</li> <li>• Air Traffic Law (Luftverkehrsgesetz): defines that breach of EU Regulations relating to air traffic is an offence, and defines the fines applying</li> <li>• Law on Administrative Offences (Gesetz über Ordnungswidrigkeiten): defines the administrative process that must be followed in order to impose sanctions.</li> </ul>
Greece	<ul style="list-style-type: none"> <li>• Decisions of Minister and Transport Communications: D1/D/44137/2978/8-11-2004 (designates the NEB), D1/D/13770/980/14-4-05 and D1/D/1333/148/16-1-07 (sets out penalties), and D3/52598/7561/18-12-95 and D3/B/47159/9521/15-11-2001 (penalties for non-monetary violations)</li> </ul>
Hungary	<ul style="list-style-type: none"> <li>• Government Decree 25/1999, as amended by Government Decree 33/2005 to reflect the Regulation: legal basis for enforcement by HACP</li> <li>• Article 47/C of the Act CLV of 1997: legal basis for imposition of sanctions by HACP:</li> </ul>
Ireland	<ul style="list-style-type: none"> <li>• Section 45(a) of the Aviation Regulation Act 2001 as inserted by the Aviation Act 2006: basis for enforcement and sanctions:</li> </ul>
Italy	<ul style="list-style-type: none"> <li>• Legislative Decree 69/2006 of 27 January 2006: defines process to be followed by ENAC and fines that can be imposed</li> </ul>
Latvia	<ul style="list-style-type: none"> <li>• Administrations Violations Code</li> </ul>
Netherlands	<ul style="list-style-type: none"> <li>• Resolution to set up the Transport and Water Management Inspectorate (Instellingsbesluit Inspectie Verkeer en Waterstaat), Article 2, paragraph 1, item d: sets up the NEB</li> <li>• Civil Aviation Act (Wet luchtvaart), Article 11.15, section b, item 1: defines circumstance under which sanctions may be imposed</li> <li>• General Administrative Law Act (Algemene wet bestuursrecht), chapter 4 (process to impose sanctions) and chapter 5 (level of fines).</li> </ul>

Poland	<ul style="list-style-type: none"> <li>Aviation Act (Articles 205a, 205b, 209a, 209b): requires fines to be imposed</li> <li>Administrative Procedure Code: defines procedures to be followed</li> </ul>
Portugal	<ul style="list-style-type: none"> <li>Joint Order 357/2006: designates NEB</li> <li>Decree Law 209/2005: defines level of fines which can be imposed for each infringement</li> <li>Decree Law 10/2004: defines standard scale of fines</li> </ul>
Slovak Republic	<ul style="list-style-type: none"> <li>Act No 128/2002 (State Inspections Act): defines powers of NEB to conduct inspections, impose preventative measures, and impose sanctions</li> <li>Act No 250/2007 on Consumer Protection: provides legal framework for NEB's consumer protection activities</li> </ul>
Spain	<ul style="list-style-type: none"> <li>Aviation Security Law (Law 21/2003): basis for enforcement and sanctions</li> <li>Royal Decree 28/2009: defines inspection regime</li> <li>Law on Public Administrations and Administrative Procedures (Law 30/1992): defines operation procedures for the NEB</li> <li>Regulation on Procedures for the Imposition of Sanctions (Royal Decree 1398/1993)</li> </ul>
Sweden	<ul style="list-style-type: none"> <li>Swedish Aviation Act, Chapter 9, Section 11: designates the NEB</li> <li>Marketing Practices Act: allows sanctions to be imposed (relating to Article 14 only)</li> </ul>
UK	<ul style="list-style-type: none"> <li>Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations, Statutory Instrument number 975 (2005): defines penalties and designates NEBs.</li> <li>Enterprise Act 2002: defines civil powers for NEB, including to apply for an injunction ('stop now order') and power to seek binding undertakings</li> </ul>
Austria	<ul style="list-style-type: none"> <li>Austrian Civil Aviation Law</li> </ul>
Belgium	<ul style="list-style-type: none"> <li>Articles 32 and 45-51 of Law of 27 June 1937</li> </ul>
Bulgaria	<ul style="list-style-type: none"> <li>Civil Aviation Act, Art. 16b</li> </ul>
Cyprus	<ul style="list-style-type: none"> <li>Law 213(I)/2002 (Civil Aviation Law)</li> </ul>
Czech Republic	<ul style="list-style-type: none"> <li>The Civil Aviation Act (number 49/1997): introduced sanctions</li> <li>The Administrative Code (number 500/2004): administrative process to impose sanctions</li> </ul>
Estonia	<ul style="list-style-type: none"> <li>Aviation Act of Estonia, Article 584 - Compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights</li> </ul>
Finland	<ul style="list-style-type: none"> <li>Finnish Aviation Act (1242/2005) - Section 153 (Conditional fines and conditional orders of execution)</li> <li>Consumer Protection Act (Chapter 2 Section 20 and Chapter 3 Section 4): basis for enforcement by consumer authority</li> </ul>
Lithuania	<ul style="list-style-type: none"> <li>Paragraph 2 of Article 70 of the Act of Aviation No. VIII-2066 (O.J. 2000, No. 94-2918; 2005, No. 31-971): designates CAA as NEB</li> <li>Code of Administrative Violations: defines penalties</li> </ul>
Luxembourg	<ul style="list-style-type: none"> <li>Law of 23 April 2008 in relation to the identification and sanction of violations of consumer rights, Article 9</li> </ul>
Malta	<ul style="list-style-type: none"> <li>Legal Notice 63 of 2005, as amended by Legal Notices 13 and 411 of 2007.</li> <li>Legal Notice 297 of 2005, as amended by Legal Notice 411 of 2007.</li> <li>Legal Notice 205 of 2007, as amended by Legal Notice 411 of 2007</li> </ul>
Romania	<ul style="list-style-type: none"> <li>Government Decision no. 1912/2006: designates NEB and introduces sanctions</li> </ul>
Slovenia	<ul style="list-style-type: none"> <li>General Offences Act</li> </ul>

*Sanctions allowed in national law*

- 4.12 There are significant differences between the States in the maximum sanctions that can be imposed under national law for infringements of the Regulation (Table 4.3). The highest defined maximum sanctions are in Hungary (over €7 million) but in Netherlands, Sweden, Finland and Denmark unlimited fines can be imposed, and in Cyprus the maximum fine is 10% of the turnover of the carrier.
- 4.13 However, in many States, sanctions are low, and in some States maximum sanctions are close to or below the costs that a carrier may in some circumstances avoid through non-compliance with the Regulation. In these States, the sanctions regime cannot be considered to comply with the requirement in Article 16(3) for dissuasive sanctions to be introduced by Member States, because even if a sanction was imposed for every infringement of the Regulation, the regime of sanctions would not provide an economic incentive to comply with the Regulation in every case.
- 4.14 Maximum sanctions are particularly low (less than €1,000) in Estonia, Latvia, Lithuania, Poland and Romania. Of these States, in Latvia and Poland, sanctions can be imposed per passenger that complains, and therefore in theory the total sanction could be higher if multiple passengers complained about an incident. However, in Estonia, Lithuania and Romania, sanctions would be applied per offence, not per passenger, and therefore if a carrier infringed the Regulation with regard to every passenger on an aircraft, the maximum sanction could be far less than the cost avoided by the carrier.

**TABLE 4.3 MAXIMUM FINES**

State	Maximum sanction (€)	Explanation/notes
Denmark	Unlimited	In addition up to 4 months imprisonment
France	7,500	Maximum sanction 'per failing', which is not defined. Has been imposed on a per-passenger basis to give a higher total sanction. Can be doubled if repeated within a year.
Germany	25,000	Additional fines can be imposed to recover the economic advantage that the carrier has obtained from infringement
Greece	500-3,000	Maximum depends on nature of infringement
Hungary	7,272,727	Minimum sanction €54. In addition penalty of up to €3,636 for failure to co-operate as required with an investigation
Ireland	150,000	Maximum €5,000 if the case is heard in a District Court
Italy	5,000-50,000	Maximum depends on Article infringed and reduced by two thirds if paid within 60 days. Minimum fines of €1,000-10,000.
Latvia	999	Fine can be applied per passenger that complains. In addition fines of up to €14,300 can be imposed for failure to provide information requested by NEB
Netherlands	Unlimited but proportionate	Law states that sanction should be in reasonable proportion to the amount of loss and to the severity of the violation
Poland	589-1,131	Maximum depends on Article infringed. Fines are cumulative per Article and per passenger that complains, so maximum could be a multiple of this. Minimum fines €47-235.

Portugal	3,000-250,000	The maximum and minimum fines depend on the infringement ('light', 'serious' or 'very serious'), the size of the company, and whether the infringement was intentional or negligent. Minimum fine €350-4,500.
Slovak Republic	3,319-66,000	Depending on how infringement is identified, and whether it is repeated
Spain	4,500,000	For most infringements maximum would be €4,500
Sweden	Unlimited but proportionate	Covers Article 14 only
UK	5,750	
Austria	22,000	
Belgium	4,000,000	In addition up to 2 years imprisonment if a criminal prosecution
Bulgaria	5,000	Per passenger that complains
Cyprus	8,543 or 10% of air carrier's annual turnover	
Czech Republic	200,000	
Estonia	640	Per offence not per passenger
Finland	Unlimited	Unlimited if imposed by Finnish Consumer Agency under Consumer Protection Act
Lithuania	869	Minimum sanction €289. Per case, not per passenger.
Luxembourg	50,000	Minimum sanction €251. Per case not per passenger.
Malta	2,329	Applies per complaint. If a group of passengers submits one complaint only one sanction can be imposed, but if multiple passengers complain separately, multiple sanctions can be imposed.
Romania	600	Per offence, not per passenger
Slovenia	33,333	Per offence, not per passenger.

### Statistics for complaint handling and enforcement

#### *Complaints received*

- 4.15 Most, but not all, NEBs were able to provide a breakdown of the complaints that they received in 2008. In total around 28,000 complaints were received by the NEBs although this is approximate as a few NEBs could not provide precise figures, either at all, or for the year 2008. Of the complaints for which the topic was known, 57% related to cancellations, 33% to delays and 10% to denied boarding. Less than 1% related to downgrading. Although the UK is the largest aviation market in Europe, the largest number of complaints to an NEB was in Spain.

**TABLE 4.4 COMPLAINTS RECEIVED IN 2008 (EXCEPT WHERE STATED)**

State	Cancellations	Delay	Denied boarding	Downgrading	Other	Total	Notes
Denmark	106	42	16	0	1	165	
France	No breakdown available					3,400	Approximate

Germany	2,399	1,151	414	4	0	3,968	
Greece	195	No full breakdown available			256	451	
Hungary	93	30	4	0	0	127	
Ireland	304	70	20	2	17	413	
Italy	2,205	1,681	322	5	598	4,811	Failure to provide assistance or information classified as 'Other'
Latvia	25	11	6	1	0	43	Figures for 2009 YTD
Netherlands	287	156	64	0	0	507	
Poland	816	142	78	0	502	1,538	Not all of the 'other' are complaints
Portugal	373	0	0	0	1,153	1,526	
Slovak Republic	37	0	0	0	2	39	Excludes complaints re foreign carriers
Spain	2,285	2,320	843	1	0	5,449	
Sweden	No breakdown available					142	Approximate
UK	2,053	683	254	13	0	3,003	
Austria	500	400	0	0	100	1,000	Figures are approximate
Belgium	138	53	20	0	0	211	Figures for 2009 YTD
Bulgaria	No breakdown available					83	Figures are for 1/5/2008-1/5/2009.
Cyprus	23	50	8	0	16	115	Breakdown covers closed complaints only
Czech Republic	75	34	11	2	20	142	
Estonia	17	6	0	0	1	24	
Finland	106	15	6	0	0	127	
Lithuania	31	19	9	0	0	59	Breakdown approximate
Luxembourg	18	8	0	0	0	26	Complaints for which NEB competent only
Malta	9	5	1	0	0	15	
Romania	23	No breakdown available			347	370	Other includes complaints not related to Regulation
Slovenia	No breakdown available but 'almost all' cancellations					18	
Total	12,136	6,876	2,076	28	6,656	27,772	Total approximate

#### *Outcome of complaints*

- 4.16 Unfortunately, many NEBs do not have exact figures for the outcome of complaints, and where there are figures, the approach to categorisation used by NEBs differs and therefore the figures are not comparable. Where possible on the basis of data provided, we have estimated both:

- the proportion of complaints submitted during 2008 which have been resolved; (where disaggregation is available, we consider as resolved cases which could not be processed, for example because the carrier was insolvent); and
- of those complaints which were resolved, the proportion which were resolved either partly or fully in favour of the passenger.

4.17 A significant proportion of the complaints submitted during 2008 still had not been resolved at the time the research for our study was undertaken in summer 2009 (Table 4.4). The proportion was particularly high in Italy where only 60% of complaints were resolved: we were informed that the main reasons complaints were not resolved were that the complaint had not been processed by the NEB (due to lack of resources), or no reply had been received from the carrier.

4.18 The analysis also shows significant variations in the proportion of resolved complaints which were upheld, ranging from 6% in Slovenia to 92% in Austria. This conclusion is consistent with comments from both NEBs and airlines that different NEBs would rule in different ways on the same complaint.

**TABLE 4.5 OUTCOME OF COMPLAINTS RECEIVED IN 2008, WHERE AVAILABLE**

State	Proportion of submitted complaints resolved	Proportion of resolved complaints fully or partially in favour of passenger
Denmark	87%	34%
Germany	n/a	The vast majority did not lead to sanctions, implying complaint either not significant or not proven
Greece	n/a	The majority of complaints were resolved in favour of consumer, but no figures available
Hungary	100%	20%
Ireland	63%	67%
Italy	60%	The vast majority of complaints did not lead to sanctions, implying not valid
Latvia	72%	41%
Netherlands	83%	29%
Slovak Republic	n/a	72%
Spain	90%	n/a
Sweden	n/a	74%
UK	90%	32%
Austria	100%	90%
Bulgaria	77%	31%
Cyprus	84%	92%
Czech Republic	11%	n/a
Estonia	92%	42%
Luxembourg	33%	n/a
Malta	53%	38%
Slovenia	100%	6%

*Sanctions applied*

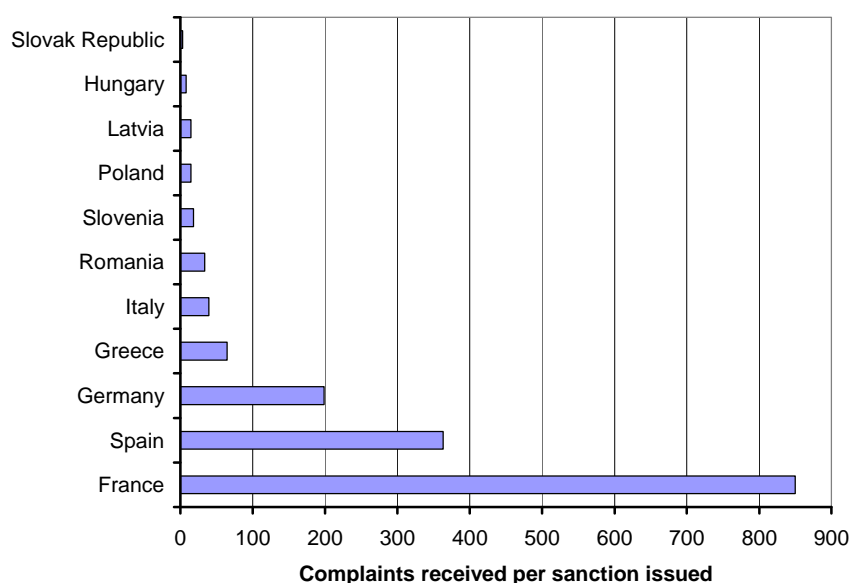
- 4.19 12 Member States imposed sanctions in 2008, and in total around 320 sanctions were imposed. One further State (Netherlands) has imposed sanctions for the first time in 2009 and one (Lithuania) had imposed sanctions before 2008 but did not do so during the year. In total 14 States have imposed sanctions to date (Table 4.6).

**TABLE 4.6 SANCTIONS IMPOSED IN 2008**

State	Sanctions imposed in 2008	Sanctions imposed to date	Explanation/notes
Denmark	0	0	-
France	4	4	Fines ranged from €800 to €22,500
Germany	20	n/a	-
Greece	7	n/a	-
Hungary	16	34	Maximum fine issued was €5,515
Ireland	0	0	-
Italy	122	452	Figures to date refer to 2006-8 only
Latvia	3	10	All fines appealed to administrative court, which has 2-3 year waiting list
Netherlands	0	3	Details of penalties imposed confidential
Poland	105	250	-
Portugal	n/a	10	-
Slovak Republic	14	n/a	Sanction only imposed on Slovakian carriers
Spain	15	30	Most fines €4,500 but one €135,000
Sweden	0	0	-
UK	0	0	-
Austria	0	0	-
Belgium	0	0	-
Bulgaria	0	0	-
Cyprus	0	0	-
Czech Republic	0	0	-
Estonia	0	0	-
Finland	0	0	-
Lithuania	0	1	-
Luxembourg	0	0	-
Malta	0	0	-
Romania	11	n/a	A further 4 sanctions have been levied in 2009 to date
Slovenia	1	n/a	Sanction was a warning with payment of procedural costs. Exact value not known.

4.20 Of the sanctions issued in 2008, 68% were issued in Italy or Poland. There are significant differences in the rate at which NEBs impose sanctions, compared to the number of complaints (Figure 4.2 below). In Slovakia, there was 1 sanction issued for every 3 complaints received, whereas in Spain and France there were 363 and 850 (respectively) complaints for every sanction issued. Portugal was not able to give precise figures for the number of sanctions imposed. In the other 14 Member States, no sanctions were issued in 2008 despite a total of 5,914 complaints being received by the relevant NEBs. Of the States in which no sanctions were issued, the largest number of complaints received was in the UK.

**FIGURE 4.2 COMPLAINTS RECEIVED PER SANCTION ISSUED, 2008**



Source: NEB data, SDG analysis

### The complaint handling and enforcement process

#### Overview of the process

4.21 The complaint handling process is broadly similar in each NEB:

- complaints are recorded in a database system;
- most undertake an initial filter of the complaints, to remove those that are not related to the Regulation or where there is no *prima facie* case of an infringement;
- with few exceptions, complaints relating to flights departing from other States are forwarded to the NEB of the State which is competent to handle the complaint;
- airlines are contacted to request information and/or justification for their actions; in particular, most request evidence of extraordinary circumstances if these may apply; and
- a decision is made on the complaint.

4.22 The complaint handling process is very different from this in Sweden (see box below). Otherwise, the main differences between the processes in different Member States are in the following areas, which are discussed in more detail below:



- the extent of any investigation of extraordinary circumstances;
- the nature of the ruling or decision issued to the passenger, in particular whether the carrier is instructed to pay compensation if this is appropriate;
- under what circumstances the investigation of the complaint may lead to sanctions;
- the process by which sanctions may be imposed and collected; and
- the extent to which information on the process is published.

#### **The complaint handling process in Sweden**

The NEBs in most of the 15 case study States follow a broadly similar approach to complaint handling. The main exception to this is Sweden, where complaints are handled by an alternative dispute resolution body, Allmänna reklamationsnämndens (ARN). ARN is not designated as an NEB, and does not consider that it should follow the NEB-NEB agreement, but no other organisation is designated in Sweden to handle complaints except with regard to Article 14 and therefore ARN is the only authority to which passengers can complain.

ARN gathers evidence and then makes a decision in each case, through a formal written decision. Its recommendations are not binding but overall in the travel sector 85% are complied with (no more precise figures were available relating to complaints under the Regulation). Where the company does not comply with a recommendation its name is published on a list in a magazine, but there is no other sanction.

The dispute is usually settled at a meeting with the department under which the matter falls. The chairperson is formally a judge. ARN has no technical/operational expertise<sup>12</sup> and therefore cannot analyse cases of extraordinary circumstances. It decides these on the basis of the information submitted and does challenge claims. Several airlines operating in Sweden told us that they believed ARN did not have sufficient technical competence to decide these cases.

ARN will accept any complaint with sufficient connection to Sweden. It decides what meets this criterion on a case-by-case basis – contributing factors are whether the incident occurred in Sweden, the place of registration of the carrier, and the place of residence/citizenship of the passenger. It has informed us that it would handle all complaints relating to incidents occurring in Sweden.

ARN will only accept and respond to claims which are in Swedish, have a minimum value of 1000 SEK (€96) per passenger, and which are submitted within 6 months of a carrier's first rejection of a complaint.

#### *Languages in which complaints can be handled*

- 4.23 Language issues were cited as a key problem by NEBs, consumer organisations and airlines. Many of the examples of correspondence from NEBs to consumers that we

<sup>12</sup> ARN does not agree with this interpretation – it considers that the members of the meeting at which cases are settled, who are nominated by various consumer, travel and airline organizations, have specialist knowledge about matters relating to the Regulation and therefore that it has sufficient technical expertise.

have been provided with in the course of the study were drafted in relatively complex legal language, which is likely to be challenging for non-native speakers to understand.

4.24 Most NEBs are able to handle and reply to complaints written in the national language and English, but in many cases NEBs were not able to handle complaints in other Community languages. Not all NEBs meet even this standard:

- the NEB for France will handle complaints written in French, English or Spanish but only replies to passengers in French; and
- ARN, which, although not designated as an NEB, handles individual passenger complaints in Sweden, will only handle complaints written in Swedish.

4.25 In addition the UK NEB only replies in English. The languages in which NEBs can receive complaints, and respond to passengers, are shown below.

**TABLE 4.7 LANGUAGES IN WHICH COMPLAINTS ARE HANDLED**

State	Languages in which complaints may be written	Languages in which the NEB will reply to the passenger
Denmark	Danish, other Scandinavian languages, English; sometimes also German	Danish, other Scandinavian languages, English; sometimes also German
France	French, English, Spanish	French only
Germany	German, English	German, English
Greece	Greek, English	Greek, English
Hungary	Hungarian, English, German, Spanish	Hungarian, English
Ireland	English, Spanish	English, Spanish
Italy	Italian, English, French, Spanish	Italian, English, French, Spanish
Latvia	Latvian, English	Latvian, English
Netherlands	Dutch, English; sometimes also French and German	Dutch, English; sometimes also French and German
Poland	Polish, English, German, French	Polish, informal translation to English provided
Portugal	Portuguese, Spanish, English and French	Portuguese, Spanish, English and French
Slovak Republic	Slovak, Czech, English	Slovak, Czech, English
Spain	Spanish, English	Spanish, English
Sweden	Complaints to ARN: Swedish only <sup>13</sup>	Complaints to ARN: Swedish only
UK	All major languages (professionally translated into English)	English only

4.26 Communications with airlines are often in the national language only. Several air carriers cited this as causing them difficulties, as they would not have staff which speak the languages of all of the States in which they operate, and penalties could be

<sup>13</sup> ARN has informed us that it does accept complaints in other Scandinavian languages and English, but its website nonetheless specifies that it only accepts complaints in Swedish.

imposed as a result of a misunderstanding of a letter from an NEB. Several airlines and an airline association suggested to us that it would facilitate complaint handling and enforcement if communications with international airlines were in English, as English is used for all communications between international airlines; they suggested it would be reasonable to expect them to operate in the national language if they operated domestic flights within a State, but not if they only operated international flights.

#### *Time taken*

4.27 The NEB-NEB agreement specifies that NEBs will complete the complaint handling procedure in:

- 3-4 months for clear cases;
- 6 months for more complex cases; and
- longer where legal action is required.

4.28 Although most NEBs do take several months to resolve most complaints, most claim to be meeting the timescales in this agreement (Table 4.8 below). However, in some States consumer organisations suggested that NEBs were taking longer than this to respond to passengers. The complaint handling process appears to be particularly slow in France, Italy and Portugal; the NEBs for these States cite lack of resources as a key issue.

**TABLE 4.8 TIME TAKEN TO COMPLETE HANDLE COMPLAINTS**

State	Average time taken	Explanation/Notes
Denmark	2 months	Dependent on time taken by airline to respond
France	No data available but months not weeks	Constrained by resources and availability
Germany	3-4 months, longer if an airline appeals	Consumer organisation suggested time taken was longer than this (1 year or more)
Greece	3-5 months	
Hungary	2 months	Excluding time for any appeal by the carrier
Ireland	Depends on complexity, varies from a few weeks to 6 months	Constrained by carriers taking time to respond, and limited NEB resources
Italy	In principle 4-6 months, but can be longer	Can be longer due to airlines taking time to respond, or appeals process
Latvia	2-3 months	Requirement in Latvian law not to exceed 4 months (extendable to 6). Excludes time for appeals.
Netherlands	3-6 months	Can take longer if airlines fail to respond
Poland	3 months	Longer for complex cases, for example where technical investigation is required
Portugal	6 months	Complex cases may take up to a year. Constrained by resources, which lengthens time and means there is a backlog of cases
Slovak Republic	2 months	
Spain	Approximately 3-4 months	No detailed figures available

Sweden	Approximately 3-4 months	No detailed figures available
UK	2-6 months or longer	Initial review occurs after 7-8 weeks; cases can be resolved quickly after this but can be delays due to slow responses from airlines

- 4.29 The UK NEB (the AUC) has undertaken a survey of passengers whose complaints it forwarded to other NEBs. Only 40% of passengers that replied to the survey had received any response from the NEB to which the complaint was forwarded after 3 months. The performance of the NEBs for France, Austria, Italy and Portugal was shown as particularly poor. This indicates that a significant number of NEBs are not meeting the timescales for responding to complaints set out in the agreement.

*Extraordinary circumstances*

- 4.30 The NEB-NEB agreement facilitated by the Commission states that NEBs should investigate claims of extraordinary circumstances by carriers in order to establish whether these are reasonable. However, it also states that where carriers provide detailed information to support claims, it is sufficient to investigate a proportion of cases.
- 4.31 Most NEBs stated that they investigated all claims by airlines of extraordinary circumstances, but the nature of these investigations, and the information required, varies significantly between NEBs. The NEB for Germany (LBA) requires carriers to fill out a very detailed form justifying any claim of extraordinary circumstances. The form has to be signed by the person within the carrier legally responsible for handling complaints, and requires (depending on the circumstances claimed by the carrier) provision of:
- Minimum Equipment List and Configuration Deviation List;
  - statement of unscheduled and scheduled maintenance undertaken on the relevant device, component or system in the previous 3 months, supported by documentation;
  - technical log;
  - aircraft continuing airworthiness record; and
  - relevant excerpts from approach charts of the aerodromes in question, flight manual, flight log (journey log) and the documentation on flight and duty time limitations and rest requirements.
- 4.32 Airlines highlighted that the information required by LBA was more detailed than that requested by other NEBs, which would often accept more limited information (such as a copy of a log book or weather report). This difference appears to arise partly from the fact that LBA has adopted a more restrictive interpretation of extraordinary circumstances than many other NEBs.
- 4.33 Although most NEBs do investigate all claims (albeit to differing degrees of detail), key exceptions are the UK, Sweden and Portugal:
- **UK:** The CAA investigates a minimum of four claims of extraordinary circumstances per annum. The complaint handling body, the AUC, requests details and challenges the circumstances if they appear vague or the justification

is inadequate, but it will not investigate whether the carrier's claim is true, for example by checking log books or weather reports. This appears to be inconsistent with the NEB-NEB agreement, which stated that where airlines provide inadequate explanation, all cases have to be investigated.

- **Portugal:** As with the AUC in the UK, the INAC staff in the complaints handling teams may challenge inadequate explanations from carriers but do not investigate any cases to establish whether or not the airline claims are true. It is not possible for them to draw on technical/operational staff to do this. This is also a breach of the NEB-NEB agreement.
- **Sweden:** ARN does not undertake technical investigations of any claims of extraordinary circumstances, but makes decisions on the basis of the information provided by the carrier. In the event the carrier does not provide sufficient information, ARN rules in favour of the passenger, but it has no means of verifying whether claims by carriers are true or evaluating technical information provided by carriers. As noted above, ARN is not designated an NEB and therefore does not consider itself bound by the agreement, but no other organisation in Sweden is handling complaints in accordance with the agreement.

4.34 Table 4.9 summarises the policy adopted by NEBs on investigation of extraordinary circumstances.

**TABLE 4.9 INVESTIGATION OF CLAIMS OF EXTRAORDINARY CIRCUMSTANCES**

State	Claims investigated	Explanation/Notes
Denmark	All	Technical log always requested; additional information may be requested depending on individual case
France	All	Requests log books, weather/technical reports etc
Germany	All	Carriers required to fill out detailed form and provide substantial evidence to support any such claim
Greece	All	Log books etc requested. However airlines operating in Greece expressed doubts about technical capability of team doing this.
Hungary	All	Investigations carried out by Hungarian CAA. Airline claims only supported in 37% of cases.
Ireland	All	CAR itself does not have technical/operational expertise – however the IAA does provide assistance on a goodwill basis, resources permitting
Italy	All	The complaint handling procedure requires ENAC to request proof from airline in every case
Latvia	All	May include review of log books or weather reports, and the responsible captain/engineer giving evidence to justify claim
Netherlands	All	Also checks evidence available from other sources, eg. the airport
Poland	All	All cases investigated by technical or operational departments in CAO, depending on the nature of the claim
Portugal	Claims challenged, but not investigated	Claims challenged if they appear vague/inappropriate but none investigated to check whether they are actually true
Slovak Republic	In principle all, but none as yet	NEB only has power to investigate complaints about national carriers. To date it has had no claims of extraordinary circumstances about these carriers.
Spain	All but subject to	All claims investigated, although due to lack of staff with

	limitations	appropriate technical skills some cases have been delayed. Consumer organisations suggest NEB reliant on airline statements.
Sweden	None	ARN asks for justification and challenges claims, but does not undertake technical investigation
UK	AUC challenges claims. Minimum of 4 cases per year investigated by CAA	Very low proportion of cases investigated by CAA. The complaint handling body (AUC) can challenge claims by airlines where these appear unreasonable but does not have the power or expertise to investigate whether they are true.

### *Responses issued to passengers*

- 4.35 Virtually all of the NEBs in the case study States provide passengers that complain with an individual response. However, the nature of this response varies significantly, based on the extent to which the NEB assists the passenger in obtaining redress. The main exception is Slovakia, where the NEB publishes its decisions on its website but does not send this to the passenger or provide them with any explanation.
- 4.36 Some NEBs, including those for the UK, France and Ireland, provide passengers with some assistance in obtaining compensation from carriers, and may mediate with the airline in order to reach an acceptable solution. This may be more effective in States such as France where failure to co-operate may lead to sanctions. However, many NEBs consider that they cannot become involved in a private contractual dispute and therefore, even if they notify the passenger that the complaint has been upheld and a sanction imposed, they do not oblige the carrier to provide redress. NEBs told us that the carrier will often reconsider its position and voluntarily pay when they become involved, but if it does not do so, the passenger would usually have to go to court in order to obtain redress. Table 4.10 summarise the responses issued to the passenger and whether the NEB assists the passenger in obtaining redress from the carrier.

**TABLE 4.10 RESPONSES ISSUED TO PASSENGERS**

State	Nature of response issued	Assistance provided in obtaining redress?
Denmark	Non-binding individual evaluation provided to each passenger. Intended to be suitable for use in a court case if required. If appropriate SLV also writes to the airline to instruct it to pay compensation.	Yes – SLV seeks to find a solution for each passenger. It could prosecute the carrier if it did not comply with its rulings (to date, all have complied).
France	Individual response provided by DGAC summarising the conclusions of the investigation and its opinion on the case	Partial - DGAC mediates with the airline and can refer it to CAAC if it does not pay. However, if the airline still does not agree to pay, it has no means of forcing it to do so
Germany	LBA informs passenger of the outcome of their investigation. This could be used by the passenger as evidence in court although it is not a binding decision.	No – airline may decide to provide redress when LBA becomes involved, but if not passenger would need to go to court
Greece	Individual response giving the result of the investigation and their conclusions	Yes – response tells carrier that they have to pay compensation, if it does not, a sanction can be imposed
Hungary	HACP notifies the claimant about the outcome of the proceeding through a formal letter	Very limited – The response from HACP could be used by the passenger in court, but it does not oblige the carrier to provide redress

Ireland	CAR writes to each passenger to summarise conclusions and whether further steps will be taken	Yes – when CAR upholds a complaint it instructs carrier to provide redress; if it does not do so, can issue Direction
Italy	ENAC writes to each complainant to inform them of its conclusions	No – ENAC does not consider this part of its role
Latvia	Individual, legally binding decision provided to each passenger	Yes – decision states what airline owes, it is required to pay, and (for Latvian carriers only) sanctions can be imposed if the carrier does not pay
Netherlands	Formal decision issued to both passenger and carrier. Not legally binding, but non-compliance may lead to a fine.	Yes – IVW negotiate with airline to obtain best response for passenger, and can threaten large fines where airlines fail to comply
Poland	Formal decision issued to both passenger and carrier	CAO cannot force carriers to provide redress, although they may be encouraged to do so as it does not impose sanctions if they do
Portugal	Individual response summarising correspondence with airline and reasons for decision. Intended to set out evidence for a court claim.	Partial – INAC does some mediation with airlines to obtain redress, but cannot force airlines to pay. It could impose sanctions for failure to do so.
Slovak Republic	None - decision published on NEB website	No – SOI can fine, but cannot force carriers to pay passengers
Spain	Individual response, including response from carrier and AESA's view on it	No - AESA cannot become involved in individual dispute – airline may decide to pay but if not passenger will have to go to court
Sweden	ARN issues non-binding recommendation. However, it is not designated as an NEB and no such response is provided by the designated NEB.	Partial – ARN is an alternative dispute resolution body, but it has no means of enforcing its decisions
UK	AUC provides individual response, includes correspondence with airline and AUC view – although AUC cannot investigate extraordinary circumstances so does not cover this	Partial - AUC mediates with airline, but if the airline does not agree to pay, it has no means of forcing it to do so

#### *Circumstances in which sanctions may be imposed*

- 4.37 There are also significant differences between the States as to whether and when sanctions are imposed.
- 4.38 Some NEBs, including Italy, Poland and Hungary, always impose sanctions in the case that an infringement is found, even if it is a minor or technical infringement which does not significantly inconvenience passengers. Germany also applies sanctions whenever an infringement is identified, although it has to be proven to the same standard of evidence required for criminal cases, and it does not impose sanctions if the infringement is ‘not significant’.
- 4.39 In contrast, in other States, the policy is to impose sanctions far less frequently:
- In several States including France, Ireland, Netherlands, Latvia, Denmark and Greece, a sanction would only be imposed where a carrier fails to provide the passenger with redress when required to do so by the NEB. In some States this is

a legal constraint (if the carrier provides redress there is no outstanding infringement and so sanctions cannot be imposed); in others it is the policy of the NEB.

- Spain applies sanctions when there is a repeated infringement which causes significant harm to passengers.
- The UK will only consider prosecution of a carrier if there is flagrant and systematic infringement of the Regulation which can be proven to a criminal standard of evidence, despite the due diligence defence available in UK law; and in Ireland a carrier can only be prosecuted if it is possible to prove non-compliance with a Direction to rectify an infringement, after the carrier has had the possibility of contesting this Direction.

4.40 These differences in policy are reflected in significant differences in the ratio of the number of complaints to the number of sanctions (discussed above).

4.41 In States where sanctions are only imposed when a carrier does not comply with a requirement to provide redress to an individual passenger or group of passengers, carriers have a strong incentive to provide redress in the case concerned, but there is no incentive to comply in any other cases. It would be possible for a carrier to infringe the Regulation consistently but avoid any sanction by providing redress to the small proportion of passengers that complain to the NEB. As a result of this, the Netherlands is considering changing national law to allow imposition of punitive fines to dissuade airlines from future infringements of the Regulation. There is a proposal for a law to impose punitive administrative fines pending in the Tweede Kamer (House of Representatives) and the NEB informed us that this is likely to be passed in mid-2010.

4.42 The policies of the case study States on imposition of sanctions are shown in Table 4.11 below.

**TABLE 4.11 POLICY ON IMPOSITION OF SANCTIONS**

State	Policy on imposition of sanctions	Explanation/Notes
Denmark	Only in the event of systematic failure to comply with requirement by SLV to provide redress to a passenger	This is the policy of SLV, not a legal constraint – if a carrier consistently infringed the Regulation but provided redress when passengers complained, it would still in principle be possible to prosecute the carrier.
France	Carrier referred to CAAC for sanction if it does not pay when requested by DGAC. Ultimate decision made by the Minister responsible for Civil Aviation on the advice of CAAC.	Cases would only be considered by CAAC if referred by DGAC
Germany	Applied in every case of an infringement provided proven to standard of evidence required, and not insignificant	This replaced previous policy of only applying a sanctions in cases of repeated/severe infringements
Greece	In theory, for every infringement – however in practice not applied if airline pays compensation when required by NEB. Fines also imposed for non-compliance with investigations.	
Hungary	Applied in every case of an infringement and for non co-operation with the	Fines for non co-operation can be imposed even where there was no infringement found



complaint handling process		
Ireland	CAR would consider prosecuting if a carrier did not comply with a Direction.	CAR can consider issuing a Direction if issue identified during an inspection or if a carrier does not rectify a case when required to do so
Italy	Applied in every case of an infringement	Nonetheless number of fines applied low in comparison to number of complaints (2.5%)
Latvia	At discretion of NEB - imposed in cases where an airline does not pay compensation when instructed, and can be if other infringements found	Fines can be imposed for failure to provide information as well as infringement of Regulation. These fines are significantly higher than those available for infringements.
Netherlands	May be applied where a carrier does not provide redress when requested by IVW	Sanctions are currently reparatory only. A proposal to introduce punitive sanctions into national law is pending in the parliament
Poland	Applied in every case of an infringement	In practice not applied if carrier compensates passenger before ruling made
Portugal	Policy unclear/contradictory. In addition, resource constraints mean that the NEB is unable to impose sanctions in all the cases where it would wish to do so.	We have sought further information on this from the NEB but this had not been provided by the time this report was submitted
Slovak Republic	Applied in every case of an infringement confirmed at on-site inspection	Not possible to carry out inspection or impose sanction on non-national airlines
Spain	Applied where there is a repeated infringement and causes significant harm to passengers interests	
Sweden	'One strike and out' policy.	But covers Article 14 only.
UK	CAA to consider prosecution in cases of "flagrant or systematic non-compliance".	In addition, standard of evidence required for criminal prosecution, and 'due diligence defence' means that it must be proved that senior management of carrier had intended not to comply

- 4.43 A number of NEBs commented that the significant differences in the policy on imposition of sanctions could distort competition between carriers, and might prompt carriers to move services out of States which adopted a more rigorous approach to enforcement.

#### *Process to impose sanctions*

- 4.44 In most Member States, the process to impose sanctions is an administrative procedure undertaken by the NEB, and the decision to impose sanctions is made by the NEB alone. Carriers, and in some cases also passengers, can appeal to the courts.

- 4.45 The exceptions to this are the following States:

- In Germany, the procedure is similar to the administrative procedures applying in other States, but the standard of evidence required is equivalent to that in criminal cases.
- In Slovakia, the procedure is also similar to the administrative procedures in other States, but with the key difference that an on-site inspection is required before a sanction can be issued. A consequence of this is that sanctions cannot be imposed

on carriers that are not based in Slovakia.

- In Denmark, Ireland, Malta and the UK, sanctions are imposed under criminal law and therefore a criminal prosecution is required.
- In France, cases are referred by the NEB (DGAC) to an administrative commission (the CAAC) that meets twice per year. This makes a recommendation to the Minister of Civil Aviation, who takes the ultimate decision about whether a sanction should be imposed, and the level.
- In Sweden, the sanction would be imposed by the Consumer Ombudsman. He is also the Director-General of the NEB (KV), but is formally independent of KV when deciding on sanctions.
- In Belgium, sanctions can be imposed under criminal law but administrative fines to an equivalent level also available.

4.46 No sanction has been imposed to date in the Member States where a criminal prosecution would be required. This reflects the difficulty of imposing these sanctions. It has been recognised in the UK that a criminal prosecution may not be an appropriate means of dealing with regulatory infringements (not specifically infringements of this Regulation). A review published in 2005 identified that “regulatory penalties do not take the economic value of a breach into consideration and it is quite often in a business’s interest to pay the fine rather than comply” and that “if penalties do not reflect the advantage gained by a company in breaking the law, dishonest businesses are given further incentive to breach regulations, and undercut honest companies”<sup>14</sup>.

4.47 In 2006, a review was undertaken of how to improve regulatory compliance by businesses in the UK<sup>15</sup>, which recommended that regulatory bodies should be given the ability to impose civil financial penalties, partly in order to ensure that there was an economic incentive to comply with regulation. This was implemented by the UK government in the Regulatory Enforcement and Sanctions Act 2008 (Chapter 13). However, although this covers other transport regulators, it does not as yet cover the CAA.

#### *Application of sanctions to carriers based in other Member States*

4.48 A number of NEBs face difficulties in applying sanctions to carriers that are not based in their State. This arises because national law either:

- does not permit application of sanctions to carriers not based in the State; or
- requires administrative steps to be taken in order to impose a sanction, which are either difficult or impossible to take if the carrier is not based in, or does not have an office in, the State concerned.

4.49 In addition, as discussed in more detail below, some NEBs that can in principle impose sanctions on airlines based outside the State have difficulties in collection of the sanctions.

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<sup>14</sup> Reducing administrative burdens: effective inspection and enforcement, Philip Hampton for HM Treasury, March 2005

<sup>15</sup> Regulatory Justice: Making Sanctions Effective (The Macrory Review)

- 4.50 The problem is particularly significant in relation to carriers based in other EU Member States, as opposed to non-EU carriers. In many Member States where sanctions are imposed through an administrative process, national law requires a notification of a sanction, or the process to start imposition of a sanction, to be served at a registered office of the carrier, or on a specific office-holder within the carrier. Non-EU (long haul) carriers will usually have an office in the each of the States to which they operate, and this can be a condition of the bilateral Air Services Agreements which permit their operation, but there are no such requirements on EU carriers which are free to operate any services within the Union.
- 4.51 Table 4.12 summarises problems with application of sanctions to carriers not based in the Member State. In addition, some Member States have problems with collection of sanctions from foreign carriers; this is discussed below.

**TABLE 4.12 ISSUES WITH APPLICATION OF SANCTIONS TO CARRIERS NOT BASED IN THE STATE**

State	Whether it is possible to impose sanctions	Explanation/Notes
Denmark	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. As sanctions could only be imposed through a criminal process, this would be undertaken by the criminal courts system not the NEB.
France	Yes	Sanctions have been imposed on foreign carriers without any difficulties. Notification can be sent by registered mail, and by fax if it is not possible to obtain a receipt from the registered mail.
Germany	Problematic for non-German EU carriers	Sanctions must be served on a named person within the airline, which can be difficult if the carrier does not have an office in Germany. All non-EU carriers operating in Germany are required to have a German office but this may be a problem with non-German EU carriers.
Greece	Yes, but until summer 2009 problematic for foreign carriers	Until recently, the legal process of serving a fine required that a representative of the airline in Greece accept the writ. As a result, HCAA has faced difficulties in imposing fines on non-national carriers that had not established an office in Greece. In summer 2009 a Regulation came into force on airline representation, which requires a representation agreement for all non-national airlines. This allows HCAA to impose financial penalties on all carriers.
Hungary	Yes	In principle sanctions can be imposed on foreign carriers although to date only a small number have been, and all of the carriers concerned had offices in Hungary. The process has not therefore been tested with regard to other foreign carriers.
Ireland	Yes in principle	Notification of a Direction can be served at the carrier's registered office, which does not have to be within the State. Various mechanisms are permitted to serve a Direction where this office is outside the State, although this process has not yet been tested.
Italy	Yes but slower / more complex	ENAC uses the process set out in Regulation 1393/2007 to serve notifications on carriers which do not have offices in Italy, but this is slow/complex. This has been short-cut in some cases by the Italian embassy/consulate in the State serving the notification directly.
Latvia	No	The Latvian Administrative Violations Code only allows for sanctions to be imposed on 'legal persons'. This is defined as including foreign

		individuals but not foreign companies.
Netherlands	Yes	IVW must prove that the company being fined has been notified, for example by proving receipt of the letter setting out the fine. The law states that if IVW can prove it has sent the fine, it is up to the other party to prove it has not received it.
Poland	Yes	Notifications are sent by registered mail or courier to the head office of the carrier – there is no limitation provided a receipt is obtained. A receipt from a courier company is considered sufficient.
Portugal	Yes	No specific constraints on imposing sanctions. Procedure equivalent to that for national carriers.
Slovak Republic	No	NEB has to undertake inspections on-site before imposing sanctions, and it cannot do this for non-national carriers. Complaints are referred to NEB for the State in which the carrier is registered – however this NEB will not have power to impose sanctions.
Spain	Yes	Notifications are sent by registered mail – there is no limitation provided a receipt is obtained. However collection of sanctions is problematic if carrier does not have an office in Spain (see below).
Sweden	Possible but not imposed in practice	The NEB said that it was theoretically possible to impose sanctions on non-national carriers, but it believed that this was not the most efficient way of doing so – if it believed a sanction should be imposed, it would make a request of the NEB for the State in which the carrier was registered.
UK	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. As sanctions could only be imposed through a criminal process, this would be undertaken by the criminal courts system not the NEB.

#### *Collection of sanctions*

- 4.52 Although some Member States have imposed significant numbers of sanctions, the proportion of these sanctions which have actually been paid by carriers varies from zero to 100% (Table 4.13).
- 4.53 The most serious problem in any large State is in Italy, where only 20% of sanctions imposed to date have been collected. This is because sanctions have only been imposed in the last 3 years, and collection of sanctions is slow, due to:
- the appeal process, which is slow and can be deliberately extended by a carrier seeking to delay/avoid payment of sanctions, such that the appeal may not be complete for 5-7 years; and
  - the process undertaken by the agency responsible for collection of fines (the Italian Tax Office) is very slow and takes a minimum of one year.
- 4.54 These are general problems with the administrative processes in Italy, and are not specific either to this Regulation or to airlines, but the inherent nature of the air transport industry, where companies enter and exit the market relatively frequently, exacerbates the problem.
- 4.55 Another State with significant problems in collection of sanctions is Spain. Collection of sanctions is the responsibility of the state tax/customs agency. In the event that the company does not pay, it can withdraw the money directly from the carrier's bank

accounts in Spain. However, this is not possible where a carrier does not have a registered entity in Spain and hence a fiscal identification code, and this would include most low cost carriers based in other Member States. Therefore where these companies do not pay sanctions voluntarily, there may be difficulties in forcing payment.

**TABLE 4.13 COLLECTION OF SANCTIONS**

State	Proportion paid	Explanation/notes	Powers to collect sanctions
Denmark	N/A	No sanctions imposed	Fines collected by the Prosecution Service, then passed to the Treasury. Non-payment would be a criminal offence.
France	Not known	DGAC does not have figures for sanctions collected	Fines collected recovered by a public accountant ("comptable public") working for the Ministry of Finance
Germany	95%	Of 20 sanctions imposed in 2008 all but one paid (this excludes two sanctions not upheld at appeal)	If fine not paid, can be collected following procedure in Administrative Enforcement Act (VwVG)
Greece	100%	Even if airline appeals, it must pay the sanction up-front	If carrier does not pay, enforcement of fine undertaken by tax service. Has power to use bailiffs to impound property.
Hungary	80%	All fines that are due for payment have been paid – the remaining 20% are those subject to appeal or for which the payment period has not expired	Collection is the responsibility of the Hungarian tax authority.
Ireland	N/A	No sanctions imposed	Collection would be the responsibility of the court imposing the fine.
Italy	20%	Remaining sanctions unpaid due to slow collection process, or because appeal process (which can take 5-7 years) is ongoing	Collection is the responsibility of the Italian Tax Office
Latvia	0%	All sanctions appealed, appeals have not yet been heard and the cases may take up to 2-3 years	Collection is the responsibility of CPRC, passed to bailiffs if fine unpaid
Netherlands	0%	None of the three sanctions imposed so far have been paid. However, in one case carrier became insolvent, in another the sanction ceased to apply as the carrier complied.	Collection undertaken by IVW Finance Department
Poland	94%	The only unpaid sanctions relate to companies that are insolvent	Collection undertaken by Ministry of Finance or Tax Office
Portugal	Not known	INAC's complaints handling department not aware whether sanctions paid	If carrier does not pay initially, case passed to General Prosecutor
Slovak Republic	Not known	No information available to NEB as to whether sanctions paid	If carrier does not pay voluntarily, executor appointed to collect the sanction.
Spain	31%	Low proportion of fines paid as have	Collection responsibility of State

		only been imposed since 2008	tax/customs agency. Problematic if carrier does not have registered entity in Spain.
Sweden	N/A	No sanctions imposed	Collection responsibility of Legal, Financial and Administrative Services Agency (Kammarkollegiet)
UK	N/A	No sanctions imposed	Collection would be the responsibility of the court imposing the fine.

*Publication of information on complaints and sanctions*

- 4.56 Approximately half of the NEBs for case study States publish information on the complaints received and/or the sanctions imposed. With few exceptions, the information published on complaints received is not airline-specific and therefore cannot provide consumers with any assistance when deciding which carrier to travel with. The UK AUC previously published details of the number of complaints received per airline, but has ceased to do so, as it believed that comparisons made on the basis of this information could be unrepresentative.
- 4.57 In States where sanctions would be imposed through a criminal court process, any process to impose sanctions would be public. In principle, the bad publicity that a carrier might receive as a result of this process should serve as an additional incentive to comply with the Regulation, on top of any fine which might be imposed. However, these are also often the States where no sanctions have been imposed.
- 4.58 In Sweden, the main sanction that can be imposed for non-compliance with the Regulation and failure to provide redress when required by ARN is the publication of the name of the carrier on a list in a magazine. However, a large number of carriers operating in Sweden are currently on this list, some for multiple cases, and therefore this does not seem to be an effective incentive.

**TABLE 4.14 PUBLICATION OF INFORMATION**

State	Complaints	Enforcement
Denmark	No information published	N/A – no sanctions have been imposed Any sanctions would be imposed through a criminal court process, which would be public
France	No information published	
Germany	Number of complaints published, but not airline-specific information	Not published at present, however, LBA is considering publishing details of fines in the future, in order to better inform passengers
Greece	Annual report published, includes number of complaints and cases resolved	The annual report states that sanctions have been imposed, but does not provide details such as name of carrier or level of sanction
Hungary	No information on complaints published	All binding decisions, including decisions to impose sanctions, are published
Ireland	Annual report provides details of the complaints received. It also provides some summary information on the number of complaints per airline although this is only divided into Ryanair,	N/A – no sanctions have been imposed Any sanctions would be imposed through a criminal court process, which would be public

Aer Lingus, and other.		
Italy	No information published	
Latvia	No information published	Usually not published, except where an important case whose outcome relates to the general interest of consumers
Netherlands	Summary of complaints published only	Not published as NEB advised that this could be challenged by airlines. Proposed amendment to national law currently under consideration would require all details of sanctions to be published.
Poland	No information published	
Portugal	No information published	
Slovak Republic	All decisions published on SOI's website	
Spain	Generally no information published, however, details have been made public on occasions by Ministers or other senior officials in response to questions in Parliament	
Sweden	All cases considered by ARN, and decisions, publicly available	All enforcement procedures opened by KV would be published List of carriers not complying with ARN decisions published in a magazine.
UK	AUC publishes total number of complaints but it no longer publishes airline-specific figures.	N/A – no sanctions have been imposed Any sanctions would be imposed through a criminal court process, which would be public

### Co-operation between NEBs and with other organisations

4.59 Most of the NEBs now forward complaints to other NEBs when they receive complaints that are not within their jurisdiction. The only exceptions we have identified are:

- **Poland:** The NEB handles complaints and imposes sanctions for events which occurred at airports in other Member States, where the carrier is registered in Poland (complaints about other carriers are still forwarded to the appropriate NEB). This scope of enforcement goes further than Article 16(1) although, as the wording of this Article is permissive rather than restrictive, it is unclear whether it is non-compliant with the Regulation. However, it is non-compliant with the NEB-NEB agreement which states that the NEB can enlarge complaint handling to all complaints submitted by residents, but does not appear to permit enlargement to cover all complaints submitted relating to national carriers. A risk inherent in this approach is that two NEBs may rule on complaints relating to the same incident, and therefore potentially reach contradictory conclusions.
- **Sweden:** ARN, which handles all complaints other than those relating to compliance with Article 14, does not forward these to other NEBs. This is not consistent with the NEB-NEB agreement although as noted above ARN is not designated as an NEB. In addition ARN may handle complaints relating to Swedish carriers even if the incident occurred abroad, particularly if the complainant is a Swedish resident/citizen.

4.60 A further problem relates to the Slovak NEB, which does not have powers to investigate complaints about non-national airlines, and therefore forwards all complaints about non-national airlines to the NEB for the State in which the carrier is

registered<sup>16</sup>. Since under Article 16 this NEB will not have the authority to impose sanctions on the carrier, it appears that nothing is done with these complaints.

4.61 A number of NEBs stated that they had problems dealing with forwarded complaints that were in other languages. Most NEBs provide a summary translation into English when forwarding complaints, although in some cases these translations can be minimal. One exception is the German NEB which does not provide a translation except where specifically requested by the NEB receiving the complaint; as it does not inform other NEBs that it is willing to do this, few request it. This appears to be non-compliant with the NEB-NEB agreement.

4.62 As discussed above (4.29), the UK AUC has undertaken a survey of passengers whose complaints had been forwarded to other NEBs, which showed that a majority of passengers had not received any response after 3 months. This indicates that there is still a problem with the handling of forwarded complaints.

#### *ECC network*

4.63 The majority of the NEBs reported that they had some, generally informal, contact with the ECC for their Member State. ECCs often forward complaints to the relevant NEB, and some NEBs forward complaints to ECCs where these do not relate to the Regulation (for example, complaints about lost or damaged luggage). Some NEBs, for example Italy, had developed information documents on passenger rights jointly with the ECC. However, NEBs are not actively using ECCs to obtain data to be used in the imposition of sanctions, as envisaged by the NEB-NEB agreement.

4.64 One difficulty cited is that ECCs operate on the basis of the State in which the service provider is registered, whereas NEBs operate on the basis of where an incident occurred.

#### *CPC network*

4.65 Little use has been made of the CPC Network. Several NEBs cited technical difficulties with the system that has been set up as a reason why they had not used it, or said that the system was excessively complicated to use. Several also suggested that it was not clear that this was of assistance in enforcement of this Regulation, as NEBs already have good contacts with each other, in part through the meetings arranged by the Commission.

4.66 The NEB for Ireland stated that it had received a number of requests via the CPC Network that it undertake enforcement action against an Irish airline for incidents which did not take place in Ireland. This appears to be an inappropriate use of this network, as the Irish NEB is not competent to undertake enforcement for incidents which do not occur in Ireland.

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<sup>16</sup> The Swedish NEB Konsumentverket would take a similar approach, where it would impose a sanction for violation of Article 14 on a non-national carrier by passing it via the CPC network to the carrier's NEB. It believes that Regulation 2006/2004 gives the other NEB the competency to impose fines.



- 4.67 Two NEBs (Slovak Republic and Sweden) stated that, instead of issuing a sanction on a foreign carrier for an incident that occurred in their States, they had or would make a request for enforcement action via the CPC Network to the NEB in the State in which the carrier was registered. This does not seem to be consistent with Article 16(1) which States that NEBs should be competent to enforce the Regulation with regard to flights from airports on their territory, not flights by carriers registered in their State.

#### Other activities undertaken by NEBs

- 4.68 Most NEBs undertake inspections to verify compliance with Article 14 (provision of information). In a few Member States, the scope of the inspection includes compliance with other Articles of the Regulation, although this is subject to an incident occurring whilst the NEB staff are at the airport. The level of detail at which the inspections are conducted varies between States: many NEBs check only for information notices at check-in and for incidents which are covered by the Regulation, while some check additional points such as the level of training of airline and ground-handling staff.
- 4.69 The number of inspections undertaken in Italy is far higher than in any other State, because the NEB has staff based at every airport and part of their role is the enforcement of the Regulation. In addition, staff in some NEBs undertake reactive inspections in the event of a major incident occurring, or the NEB requires carriers to provide evidence of what it has done to meet the requirements of the Regulation.
- 4.70 However, two of the largest States (Germany and France) do not undertake any inspections. The scope of these inspections is summarised in Table 4.15 below.

**TABLE 4.15 INSPECTIONS UNDERTAKEN BY NEBS**

State	Inspections undertaken in 2008	Scope of inspections	Notes
Denmark	None		No inspections undertaken
France	None		No inspections undertaken
Germany	None		No inspections undertaken
Greece	"5-6 per month"	Article 14 only	
Hungary	'Occasional'	Article 14 only	
Ireland	11	Mostly Article 14	Inspectors verify compliance with other Articles if an incident occurs when they are at the airport
Italy	2,157	Detailed, covering full scope of Regulation	High number possible due to staff permanently based at airports
Latvia	1	Mostly Article 14	Inspectors verify compliance with other Articles if an incident occurs when they are at the airport, however rare as Riga airport small
Netherlands	10	Mostly Article 14	In addition IVW undertakes inspections in response to major incidents at Schiphol, as its staff are located nearby (7 minutes journey)
Poland	18	Article 14 only	
Portugal	1	Mostly Article 14	Also checks staff knowledge of the Regulation

(both airlines and ground handling staff)			
Slovak Republic	'Several'	Article 14 only	Precise figures not available
Spain	140	Mostly Article 14	Inspectors verify compliance with other Articles if an incident occurs when they are at the airport
Sweden	None	Article 14 only	Also checks staff knowledge of the Regulation (both airlines and ground handling staff). Inspections undertaken in 2006 and 2007, and expected to be undertaken in 2010.
UK	31 in 2007 and 2008	Article 14 only	In addition during periods of heavy disruption carriers have been required to show evidence of what they have done to comply

- 4.71 In addition, most NEBs have undertaken meetings with carriers in order to encourage compliance with the Regulation, and in some cases to improve procedures for handling complaints.

#### **Stakeholders views on complaint handling and enforcement**

- 4.72 A significant number of stakeholders, including NEBs, airlines and consumer representatives, expressed concern about inconsistent approaches to complaint handling and enforcement by different NEBs. In particular, it was argued that:

- different NEBs may rule in different ways about equivalent complaints, particularly if the airline claims exemption from payment of compensation for cancellations on grounds of extraordinary circumstances; and
- differences in the approach to enforcement adopted by NEBs could distort the single market, by providing carriers with an incentive to base their operations in States with a less rigorous approach to enforcement.

- 4.73 The other issue frequently raised by stakeholders was that certain NEBs did not have the technical competence to decide on complex claims, in particular, whether extraordinary circumstances applied. This applied primarily to the NEBs which were not civil aviation authorities, but with some exceptions:

- in Hungary, the NEB is not a CAA but the CAA is used to decide on cases of extraordinary circumstances or other issues requiring technical/operational expertise; and
- in some other States, even if the NEB is a CAA, the staff that undertake complaint handling and enforcement may not have technical/operational expertise.

- 4.74 In particular, the Commission has asked us to evaluate whether the Q&A document and NEB-NEB/airline agreements that it facilitated have improved the operation of the Regulation, and we address these issues below.

#### *Differences in interpretation between NEBs*

- 4.75 This report has already described in detail a number of areas in which the approach to enforcement differs between Member States and the NEBs. A further issue is that the interpretation of the Regulation varies between NEBs, and therefore it is possible that

a complaint that might be rejected by one NEB would be upheld by another.

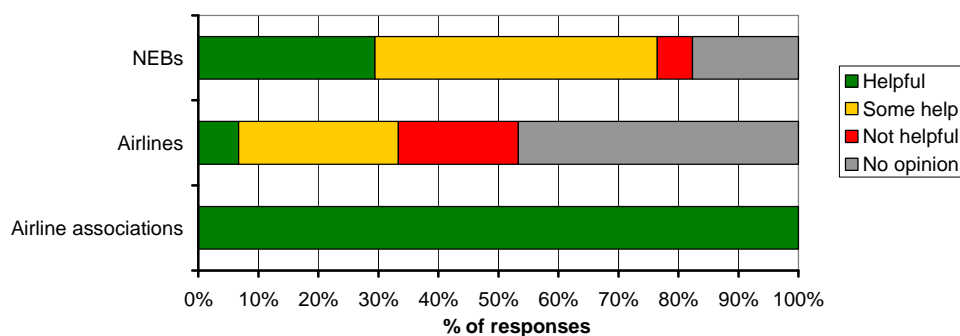
- 4.76 The most common and significant example of inconsistent interpretations amongst NEBs relates to claims by carriers of exemption from payment of compensation for cancellation, due to extraordinary circumstances. Some, such as LBA and IVW, adopt a very rigorous approach likely to lead to rejection of a high proportion of claims: for these NEBs, the circumstances must be extraordinary and everything reasonable must have been done to avoid them; a bird strike might not meet these criteria because, whilst undeniably outside the control of the carrier, it is a regular occurrence in airline operations. Others consider it sufficient to show that operation of the flight concerned could have been unsafe.
- 4.77 Both NEBs and airlines drew our attention to areas where some NEBs adopt a different interpretation to others. For example:
- DGAC (France) may approve extraordinary circumstances for a particular flight. but if subsequent flights (with or without the same aircraft) are cancelled or disrupted as a result of the cancellation of the original flight, it will not accept claims of extraordinary circumstances, as it believes the operator is failing in its duty to ensure adequate operational cover<sup>17</sup>. This means that if an Air France Paris-Montpellier flight was cancelled due to a mechanical failure in Paris, DGAC would accept extraordinary circumstances (provided they were justified) for this flight but not the return Montpellier-Paris flight, even though this would probably be cancelled as a direct consequence. Other NEBs would accept that the cancellation of one flight for extraordinary circumstances could legitimately lead to the cancellation of others.
  - CAR (Ireland) considers that the requirement in Article 14(2) to provide information must be read in the context of the requirement in Article 14(1), and therefore the information only had to be available at check-in or the boarding gate if a passenger requests it; this is not consistent with our interpretation or even that of several carriers.

#### *NEB-NEB and NEB-airline agreements*

- 4.78 The majority of NEBs considered that the agreements had been of some assistance, but a number of reservations were expressed. Whilst the airline associations which had been involved in the development of the agreements considered them to be very helpful, this view was not shared by the airlines themselves (Figure 4.3 below)

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<sup>17</sup> Some airlines view such interpretations as discriminatory towards smaller carriers.

**FIGURE 4.3 STAKEHOLDERS VIEWS ON NEB-NEB/AIRLINE AGREEMENTS**

4.79 Key issues raised about both documents were that:

- they are not legally binding, and therefore some NEBs and airlines do not follow them;
- their non-binding status can be confusing to passengers, who may believe that since they are published by the Commission, they **are** legally binding;
- in the opinion of some stakeholders, they are not agreements, because they were imposed by the Commission without the agreement of all parties concerned; and
- some airlines also said that an agreement was reached with the airline associations without the airlines themselves being consulted, and therefore they did not feel bound by them.

4.80 The positive comments on the NEB-NEB agreements were that it had improved complaint handling by NEBs so that, for example, most were now handling individual complaints and forwarding complaints to other NEBs where appropriate. The main negative comments raised were:

- several NEBs do not provide English translations when forwarding complaints, as specified in the agreement;
- it is not possible for NEBs to comply with the timescales set out in the agreement, because airlines may not respond sufficiently quickly, and also due to lack of resources in NEBs, particularly during busy periods (such as at the time of an airline insolvency); and
- one NEB said that the agreement should not have been published, because airlines had used part 6.1 to claim that they should not have to provide as much information as requested by NEBs to support claims of extraordinary circumstances.

4.81 NEBs considered that the NEB-airline agreement had facilitated complaint handling by improving contacts with airlines and providing a clear procedure. However, several also pointed out that not all airlines had provided contact details, and that even where contact points had been provided, these were not always updated. This reduced how useful the list was.

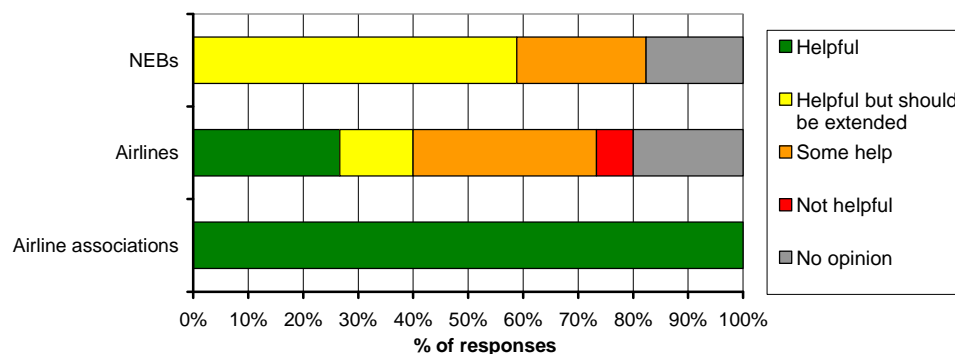
4.82 It was suggested that the NEB-NEB agreement could be extended to cover cross-border assistance with enforcement and application of sanctions. However, NEBs already have a number of obligations in this regard as bodies designated under Regulation 2006/2004, and it is not clear to us what additional obligations could be

required. There were no other suggestions for significant amendment to the agreements.

#### Q&A document

- 4.83 The majority of NEBs considered that the Q&A document had been helpful, but that it should be updated and extended (Figure 4.4 below). As with the NEB-NEB/airline agreements, there was a disparity between the views of the airline associations, which all thought the Q&A document was very helpful, and the airlines themselves, which were more sceptical.

**FIGURE 4.4 STAKEHOLDERS VIEWS ON Q&A DOCUMENT**



- 4.84 Many of the issues that NEBs considered should be added to the document were the same as the issues that they considered to be unclear about the Regulation, discussed above. Particular issues that were raised in relation to the document were:

- whether self-reliance is acceptable for assistance;
- whether passengers can arrange their own rerouting and reclaim this cost from the carrier;
- explanation of circumstances which should be considered to exempt carriers from payment of compensation for cancellations; and
- explanation of what should be considered to be a confirmed reservation.

- 4.85 It was also suggested that the document should include a discussion of the implications of relevant ECJ rulings, particularly that in *Wallentin-Hermann*.

- 4.86 The key negative issues stakeholders raised were:

- The Q&A document has no legal status, and as a result, it cannot be relied on in rulings. On some of the most controversial issues, the document has to note that the airlines have a different opinion.
- The Q&A document was agreed through discussions with airline associations. Some airlines expressed the view that it would be better if large airlines were directly represented in any future discussions, as they may have better awareness of the operational issues that arise in application of the Regulation.

**Conclusions***Enforcement*

- 4.87 Article 16(1) requires each Member States to designate an enforcement body responsible for flights from airports on its territory and flights from third countries to these airports, and requires this body where appropriate to take measures to ensure that passengers rights are respected. Article 16(3) requires sanctions for infringements to be effective, proportionate and dissuasive, which we understand as meaning that sanctions should create an economic incentive for carriers to comply with the Regulation. This must mean that the expected cost of infringement should be greater than the cost of compliance.
- 4.88 For the case study States, we have sought to evaluate whether the operation of the enforcement procedure is sufficient to comply with these requirements. This focuses, in particular, on:
- whether sanctions can be imposed by the NEB for all infringements of the Regulation; and
  - whether the level of sanctions, and the wider approach to enforcement, are sufficient to provide carriers with an economic incentive to comply with the Regulation.
- 4.89 Table 4.16 summarises our conclusions on the extent to which the enforcement regime in each of the case States meets these requirements. In our opinion, in most of the case study States it does not, despite significant improvements in the enforcement activity undertaken by NEBs since the time of our previous study. This is due to a combination of:
- difficulties in either imposing or collecting sanctions in relation to carriers not based in the State, meaning that sanctions cannot provide an incentive for these carriers to comply with the Regulation;
  - policy or legal impediments to imposition of sanctions, which means that the sanctions regime cannot provide an incentive; and
  - sanctions which are too low to provide an economic incentive for carriers to comply with the Regulation, taking into account that only a very small proportion of passengers impacted by an infringement are likely to complain to the NEB (see 3.77).
- 4.90 It should be noted that at least four of the States were progressing measures to address at least some of the problems identified. At the time of our research, Germany was evaluating options for imposition of sanctions on carriers registered outside the State; Greece had introduced a Regulation on airline representation which should allow it to impose sanctions on foreign carriers; the Netherlands is considering the introduction of punitive sanctions; and the UK is considering civil penalties as an alternative to a criminal enforcement regime. More detail is provided in the case studies (appendix A).
- 4.91 In most cases the problems we have identified do not arise from failings by the NEB, but from wider legal or administrative issues in the State concerned. For example, in Italy, the key problem is the difficulty of collecting sanctions, due to the slow judicial process; this is not specific either to airlines or to this Regulation. Sanctions are easier

to apply, and therefore can act as a greater incentive, in States where there is an administrative sanctions regime, but there are legal difficulties with this in some Member States (for example Ireland) which mean that it is not possible to have such a regime.

**TABLE 4.16 CONCLUSIONS: STATES' COMPLIANCE WITH ARTICLE 16**

State	Summary	Notes
Denmark	Unclear/ borderline	Sanctions would only be imposed if a carrier failed to pay compensation when required to by the NEB. Therefore it is not clear that this provides carriers with a financial incentive to comply with Regulation.
France	Unclear/ borderline	Some, but very few, sanctions imposed, and maximum sanction is low. Sanctions would only be imposed if a carrier failed to provide redress when required by the NEB.
Germany	Unclear/ borderline	At the time of research, problems with imposition of sanctions on carriers based in other EU States and therefore sanctions regime does not provide an incentive to comply for these carriers. If this is resolved, enforcement regime will be compliant.
Greece	Unclear/ borderline	Until summer 2009 not possible to impose sanctions on foreign carriers. In principle this is resolved by Regulation on airline representation, but it is unclear whether this infringes wider EU aviation law. In addition, sanctions not imposed when a carrier provides redress when the NEB becomes involved, so does not provide a wider incentive.
Hungary	Compliant	Sanctions regularly imposed on the basis of thorough investigation, and levels sufficient to be dissuasive
Ireland	Unclear/ borderline	Sanctions can only be imposed for an infringement of a Direction. Since this means that carriers would always have the opportunity to rectify an incident before a sanction was imposed, not clear it provides general incentive to comply.
Italy	Not compliant	Currently difficult to collect sanctions. As a result sanctions do not provide incentive to comply.
Latvia	Not compliant	Maximum sanctions very low, and can only be imposed on Latvian carriers
Netherlands	Unclear/ borderline	Sanctions can only be imposed for infringements not rectified when required by the NEB. Since this means that carriers would always have the opportunity to rectify an incident before a sanction was imposed, not clear it provides general incentive to comply.
Poland	Not compliant	Although sanctions applied regularly, maximum fines are too low to provide an economic incentive to comply with the Regulation
Portugal	Not compliant	Unclear under what circumstances sanctions may be imposed. No claims of extraordinary circumstances investigated by the NEB. The NEB also does not have sufficient resources to impose sanctions in all cases where it wishes to do so.
Slovak Republic	Not compliant	Not able to handle complaints or impose sanctions in relation to infringements committed by foreign carriers
Spain	Not compliant	No specific reference to the Regulation introduced into national law and therefore the legal status of enforcement is subject to challenge. Also, problems with enforcement of payment of sanctions for carriers not based in Spain.
Sweden	Not compliant	Not possible to impose sanctions except for infringement of Article 14, and sanctions would not be imposed on non-national carriers

UK	Not compliant	The need for a criminal prosecution (with criminal standards of evidence) and the availability of a due diligence defence to carriers means that it is difficult to impose sanctions. Even in these cases, the maximum level of sanctions would be low (€5,750) and therefore cannot provide an economic incentive to comply.
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### *Complaint handling*

4.92 Although the Regulation states that passengers must be able to complain to any NEB, there is no specific requirement as to how the NEB should handle these complaints. However, the (non-binding) NEB-NEB agreement contains a number of requirements, including:

- the NEB to be competent to handle complaints relating to incidents which occur on its territory;
- transfer of complaints to the relevant NEB, with a summary in English;
- evaluation of all claims of extraordinary circumstances if the airline does not provide a proper justification, and a proportion if it does;
- ruling to be communicated to passenger and airline; and
- compliance with various timescales.

4.93 Most NEBs comply with this agreement, although there are a number of exceptions:

- the UK NEB does not evaluate all claims of extraordinary circumstances where the carrier does not provide proper justification;
- the German NEB does not provide a summary translation to English when forwarding complaints to other NEBs, except where specifically asked, and as it does not inform NEBs it will provide this when asked, few request it;
- the Polish NEB handles complaints relating to Polish carriers – and imposes sanctions – even if the incident did not occur in Poland;
- the Swedish NEB does not handle complaints except in regard to Article 14 (ARN, which handles other complaints, is not designated as an NEB and does not follow the NEB-NEB agreement at all); and
- the Slovak NEB is not competent to handle complaints relating to foreign carriers even where the incident occurred in the Slovak Republic.

4.94 The NEB-NEB agreement also states that NEBs should undertake active monitoring of carriers. Whilst (as noted above) many NEBs undertake inspections at airports, in most cases these are limited to evaluation of compliance with Article 14(1). Active monitoring could also include, for example, undertaking analysis to identify repetitive patterns of cancellations, and monitoring or auditing of carriers' approaches and systems for compliance with the Regulation.

4.95 In addition, although this is not required by the agreement, several NEBs mediate with carriers in order to obtain a satisfactory outcome for the passenger; and in some cases, the NEBs take measures to encourage airlines to pay compensation when a complaint is upheld - for example by imposing fines if the airline does not pay when required. However, many of the NEBs do not see it as part of their role to provide assistance to individual passengers: carriers may decide to pay voluntarily when the NEB becomes involved, but if they do not, the passenger would have no alternative but to go to court



if they wished to obtain redress.

- 4.96 Table 4.17 summarises for each NEB whether individual passengers are assisted in obtaining redress, and where they are, our opinion of the effectiveness of this, from the perspective of the passenger.

**TABLE 4.17 CONCLUSIONS: NATURE AND EFFECTIVENESS OF COMPLAINT HANDLING**

State	Individual passengers assisted	Effectiveness	Notes
Denmark	Yes	Good	Individual rulings on complaints, detailed investigation, fines may be imposed if carrier does not pay compensation when required so strong incentive (no fines imposed to date).
France	Yes	Some issues	DGAC mediates on behalf of passengers and investigates claims of extraordinary circumstances; carriers can be referred for sanctions if they do not comply. However, constrained by resources; also communicates with passengers in French only.
Germany	No	n/a	LBA undertakes detailed investigations but does not see it as its role to assist individual passengers in obtaining redress.
Greece	Yes	Some issues	All complaints investigated and carriers required to pay compensation where infringements found. Fines can be imposed where carriers do not comply. However, effectiveness is disputed by consumer organisations.
Hungary	No	n/a	HACP undertakes detailed investigations but does not see it as its role to assist individual passengers in obtaining redress.
Ireland	Yes	Good	All cases investigated, and where infringements found, carrier can be required to provide redress through issue of a Direction (and subsequent sanctions if not complied with).
Italy	No	n/a	ENAC undertakes investigation of complaints but does not see it as its role to assist individual passengers in obtaining redress.
Latvia	Yes	Some issues	All complaints investigated and carriers required to pay compensation where infringements found; fines can be imposed where carriers do not comply but only for Latvian carriers.
Netherlands	Yes	Good	All complaints, and all claims of extraordinary circumstances, investigated by NEB. If a carrier does not comply with an instruction to provide redress, a fine may be imposed (and have been imposed in the past).
Poland	No	n/a	CAO undertakes investigation of complaints but does not see it as its role to assist individual passengers in obtaining redress
Portugal	Yes	Significant issues	INAC does handle individual passenger complaints but it does not investigate claims of extraordinary circumstances and it does not have sufficient resources available to handle all complaints within a reasonable timescale.
Slovak Republic	Yes	Significant issues	Complaints related to domestic carriers investigated thoroughly, but complaints relating to foreign carriers not investigated. The largest carrier now operating in the State is foreign based.
Spain	No	n/a	AESA undertakes investigation of complaints but does not see it as its role to assist individual passengers in obtaining redress
Sweden	Yes	Significant	Complaints handled by ARN, but it does not have the capability

		issues	to undertake technical investigations of claims of extraordinary circumstances, and has no means of enforcing its decisions.
UK	Yes	Some issues	AUC does mediate on behalf of passengers and challenges extraordinary circumstances claims, but no powers to investigate or enforce decisions

*Measures taken to improve the enforcement of the Regulation*

4.97 The measures that have been taken by the Commission to improve the operation of the Regulation, including the NEB-NEB/airline agreements and the Q&A document, have addressed some of the problems with the enforcement of the Regulation that we had identified previously. However, these documents do not address all of the issues. In particular:

- some NEBs and airlines do not comply with the NEB-NEB/airline agreements;
- the NEB-NEB agreement does not address the issue of different NEBs adopting inconsistent approaches to enforcement; and
- the Q&A document does not resolve some of the most problematic issues with the Regulation, such as the distinction between delays and cancellations.

4.98 These problems arise from the fact that the documents have no legal status and this limits their scope – in particular, these documents cannot require States to adopt particular approaches to enforcement, or a particular interpretation of the Regulation to be used.

## 5. ALTERNATIVE PROCESSES FOR PASSENGERS TO CLAIM

### Introduction

5.1 In addition to complaints made to NEBs, many passengers have used other measures in order to obtain redress:

- alternative dispute resolution (mediation) processes;
- court cases; and
- commercial services such as EUClaim and TransINDEMNITÉ.

5.2 This section describes these alternative dispute resolution processes, which provide an alternative for passengers to pursuing claims through NEBs. However, the extent to which they may be of assistance to passengers varies significantly between the case study States.

### Alternative dispute resolution

5.3 In several Member States, there are alternative dispute resolution or mediation procedures which can handle claims relating to the Regulation:

- **Germany:** The ‘Mobility Arbitration Board’ has to date handled 3,000 complaints relating to the Regulation. However, it can only handle complaints where the carriers agree to co-operate on a voluntary basis. It informed us that it had had good co-operation from foreign carriers but German airlines were not willing to co-operate. Government funding for this project will end on 30 November 2009 and it will then only handle complaints relating to companies that have agreed to fund it (airlines have not agreed to do so).
- **Netherlands:** The Air Travel Disputes Commission was established on 1 July 2009 to handle complaints regarding this Regulation and Regulation 1107/2006, and airline blacklist legislation. It gathers evidence by written submission, and can call upon technical and operational experts to help decide a case. Pursuing a case costs the passenger €50, which is refunded if the passenger wins. The decisions of the Commission are binding, and there are mechanisms in place to compel payment by the airline. The process is only available for airlines which are members of the association of airlines operating in the Netherlands (BARIN); several major European airlines operating in the Netherlands are not members. BARIN also part-funds the system, with the government funding the rest. At time of writing, no cases had been heard.
- **Portugal:** There are a number of Arbitration Centres in Portugal, administered at the county level. The process involves mediation and conciliation, followed if necessary by arbitration, where a judge decides the case in a simplified procedure. The process is free to the passenger, but the airline cannot be compelled to participate and decisions are not binding.
- **Sweden:** ARN is not designated as an NEB but performs the complaint handling role in Sweden, and is a free-to-use ADR system. It can handle all complaints – including where carriers refuse to cooperate – but has no powers to enforce decisions. Failures to cooperate with ARN decisions are published as part of a blacklist in a magazine, which has an effect on some carriers, but no effect on others.

5.4 In several other States, for example the UK, there is a mediation procedure available

as an alternative to a civil court case, but use of this is voluntary and there is no evidence that these procedures are used for claims under the Regulation.

5.5 Overall, alternative dispute resolution procedures have to date been of limited assistance to passengers seeking to obtain their rights under the Regulation. The main problems are:

- in most States there is no ADR system handling claims relating to the Regulation;
- in most of the States where there is an ADR, carriers are not required to use the system, and the ADR has no means to enforce its decisions; and
- ADRs do not always have sufficient expertise available to handle cases relating to the Regulation, in particular to decide on claims of extraordinary circumstances.

5.6 The ADR in the Netherlands may be of more assistance to passengers in the future. Key advantages of this system over other ADRs are that it does have access to technical expertise to enable it to decide cases of extraordinary circumstances, and it can compel carriers to pay. However, there are a number of other issues with the system – in particular, it does not apply to all carriers operating in the Netherlands – and as it is relatively new, it has not heard and decided on any cases as yet. It is therefore too early to judge how effective it will be.

#### **Civil court claims**

5.7 A number of passengers have used the civil courts to obtain compensation from airlines under the Regulation. Member States do not collect detailed statistics on the issues covered by civil court cases, and therefore it is not possible to estimate how many such cases there have been relating to the Regulation.

5.8 Most Member States have some type of simplified court procedure for small claims, which may allow compensation claims to be made at lower cost, without a lawyer, and without the risk of being held liable for the legal costs incurred by the airline. However, both airlines and consumer organisations highlighted that there can be significant difficulties with these procedures:

- **Arbitrary judgements:** The judge in small claims cases may have minimal experience in, or understanding of, the requirements of the Regulation and therefore rulings can be arbitrary. This was highlighted by both airlines and consumer organisations as a particular problem in France, where small claims cases are decided by ‘Juges de Proximité’, who are part-time legal experts (lawyers, barristers, law professors, retired senior police officers, etc); decisions vary between individual judges and inaccurate decisions can subsequently be used as a precedent by other judges.
- **Limit on amount claimed:** Most States have a limit on the amount that can be claimed through a simplified procedure. In some States, this is sufficiently high to include most claims under the Regulation; for example, in France, the limit is €4,000 and in the UK €5,750. However, in many States, the limit would exclude a significant proportion of claims under the Regulation: for example, the limit on the procedure is €900 in Spain, and in Italy a lawyer is required for claims over €516, significantly increasing costs. In Sweden, claims must be above a minimum value per passenger (€96) to be heard.
- **Time taken and difficulty:** Claims can be very slow. For example, in Italy, even

small claims generally take over two years, despite the fact that appeals are not possible in most circumstances. Consumer organisations also comment that cases are difficult and time consuming for consumers to undertake.

- **Cost:** The simplified procedure for small claims significantly reduces costs, but these can still be significant. For example, in the UK, the minimum fee, applied to all claims under €345, is €63. This means that the fee could be a significant proportion of the amount claimed. Although the consumer would be able to claim this back from the airline if they won the case, the risk of losing this amount could be a deterrent to pursuing a claim.
- **Enforcement of an order:** A court may give an order that an airline pays compensation, but it may be difficult to enforce the order, particularly if the airline is based in another Member State. For example, in the UK, consumer representatives told us that there have been cases where airlines have not paid when instructed to do so by the court, and significant costs and further effort has to be incurred by passengers who wish to enforce the court order.
- **Availability:** Several Member States, including Germany and Hungary, do not have a small claims procedure and therefore passengers have to use the regular court procedure unless the claim is cross-border and the European small claims procedure can be used.

5.9 Airlines also cited problems with simplified procedures for small claims. Several said that the direct financial and time costs of defending small claims often exceeded the cost of paying the claim, and therefore even if they considered the claim to be invalid, they would often pay. Airlines also commented that the procedures in some Member States could be arbitrary, due to lack of understanding of the Regulation and of the air transport industry by the judges deciding claims; in particular, judges do not have the expertise required to evaluate whether a technical or operational problem amounts to extraordinary circumstances. This view was shared by many consumer representatives. Airlines also argued that courts in some Member States were biased in favour of the consumer.

5.10 Passengers can also use the European small claims procedure set up by Regulation 861/2007 for cross-border claims (except for claims involving Denmark, where the Regulation does not apply). This Regulation had only recently taken effect when our research was undertaken and was not widely cited by stakeholders. The State-specific small claims procedures and issues with them are summarised in Table 5.1 below.

**TABLE 5.1 SMALL CLAIMS PROCEDURES**

State	Small claims procedures	Issues with procedure
Denmark	Small claims court procedure for claims under €6,700, with low fee and no lawyers present.	European small claims procedure does not apply
France	Claims under €4,000 can be brought to the 'Juge de Proximité'. There are no charges payable and a lawyer is not compulsory.	Decisions can be arbitrary due to lack of expertise, cannot be appealed, and the burden of proof is with the passenger.
Germany	No small claims procedure although court may decide to adopt a simplified procedure if claim under €600	
Greece	Simplified procedure for claims under €1,500 – no lawyer required	Simplified procedure not widely used

Hungary	No small claims procedure	
Ireland	Small claims procedure with low fee (€15) for claims up to €2,000	ECC considers the system is “hugely time-consuming and expensive for the consumer”
Italy	Simplified procedure for claims under €2,582, heard by a Justice of the Peace. Lawyer not required for claims under €516.	System slow (at least two years) and, if the claim is for over €516 and hence a lawyer is required, expensive.
Latvia	No small claims procedure	
Netherlands	Small claims procedure for claims under €5,000, with fee €70-€100. Lawyer not required, judge decides what costs claimant is liable for.	Only established 1 September 2009, so not tested yet. Costs are at discretion of the judge; this uncertainty may be off-putting to passengers.
Poland	Simplified court procedure for consumer claims. Fees low.	
Portugal	Justices of the Peace have a fee of €35, and may be binding under some circumstances.	Arbitration is non-binding, and requires company to agree both to participate and to abide by the decision.
Slovak Republic	No small claims procedure, but mediation is facilitated by consumer organisations	Mediation is non-binding, and consumer awareness in this area is poor
Spain	Simplified procedure for claims under €900. No lawyer required and no risk of award of costs.	Procedure not available for claims under €900
Sweden	Small claims procedure for claims under €2,000, heard at a municipal court. Claimant must pay a fee of 350 SEK (€34), and may risk costs (limited to ~2500 SEK, €240).	Costs could potentially be larger than the value of the claim. Consumer organisation states that Cases take months to be heard, and that it is not popular with passengers.
UK	Simplified procedure (small claims track) for claims under €5,750. Fees lower than regular court, no lawyer required, and usually no risk of award of costs	Fees relatively high (minimum €63 for all claims under €345). Consumer organisations state procedure is difficult/time consuming.

- 5.11 In addition, some consumers have litigation insurance, in some Member States because this is bundled with bank accounts. For these consumers, use of litigation is more attractive, because they do not directly incur costs for legal representation. The difficulties of using the civil courts for claims under the Regulation are therefore reduced for these passengers.

#### Commercial claim services

- 5.12 EUClaim is a commercial claims service operating in the Netherlands, UK and Ireland. It makes claims on behalf of passengers and covers its costs by retaining a proportion of any compensation obtained. Another organisation, TransINDEMNITÉ, now handles complaints from passengers in France.
- 5.13 EUClaim collects data from a number of sources including timetable data, aviation authorities, airport websites, meteorological agencies, and aircraft (ADS-B/ACARS transmissions). It is able to put these sources of data together, in order to identify what happens to a particular flight or aircraft. It can trace flights and identify the scheduled time of arrival/departure, the actual time of arrival/departure, which aircraft operated the flight, whether there were significant problems at the airport(s) concerned (such as bad weather) and other relevant issues. It informed us that, in some cases, it has been

able to use this data to show that airline claims of extraordinary circumstances are inaccurate, for example because its aircraft were all in use operating other flights, and the airline had contracted to operate a charter flight that it did not have aircraft available to operate without cancelling a scheduled flight.

- 5.14 Airlines have criticised commercial claims services on the basis that they believe they do not have access to reliable information, and also because it is a commercial organisation providing a service which should be provided by the NEBs. Airlines also argued that the fact that several have settled claims with commercial services should not be taken to imply that the claims were justified, as carriers would often settle claims as the cost was lower than the cost of contesting them.
- 5.15 EUClaim is in a stronger position to contest claims than individual passengers, as a result of the information it has access to and because, as a specialist organisation, it has greater expertise in the Regulation and the industry than an individual passenger is likely to have. Although NEBs may in principle provide a similar service free of charge, as discussed in section 3 above, the extent to which NEBs assist passengers with individual complaints and challenge explanations from carriers is variable. Therefore, commercial services such as EUClaim and TransINDEMNITÉ potentially provide a valuable additional service to passengers.
- 5.16 However, there are also a number of limitations:
- commercial organisations such as EUClaim and TransINDEMNITÉ can only fund themselves by levying commission on any amounts refunded to passengers, which reduces the amount passengers can potentially receive;
  - the fact that these services are, and any other commercial services would be, funded through commission may also limit the cases that can be handled to those where there is a possibility of obtaining significant payments from carriers (which may exclude, for example, claims only for costs of assistance); and
  - at present, these services are only available to residents of a small proportion of Member States.

### Conclusions

- 5.17 Given the limited effectiveness of some of the NEBs, and that many focus on enforcement rather than assisting passengers with individual claims, it is not surprising that passengers have used alternative processes to obtain redress, usually simplified procedures for small claims in the civil courts.
- 5.18 However, these have a number of important weaknesses: the procedures can be slow, expensive and in some cases arbitrary, and in several Member States, there are no such processes or the maximum claim that can be made is set at a level which excludes some claims under the Regulation. These issues are not specific to the Regulation: similar issues would apply in other consumer claims against airlines (for example claims relating to luggage, delay or injury under the Montreal Convention). Similar issues may also apply to consumer claims in some other sectors although the technical complexity of the air transport sector means that it is likely to be particularly problematic.

- 5.19 There are no statistics available for court claims against carriers, but given the difficulties passengers face in making claims, it is not surprising that airlines report that the number of cases is very small in proportion to the number of complaints. Some medium sized airlines told us they had had no court cases at all, and the only airline which provided figures stated that the number of court cases was equivalent to 0.2% of the number of complaints it received.
- 5.20 ADR systems provide an alternative for passengers in a small number of States, but these also have significant weaknesses, and in most States they are not available. This means there is a gap in the market for companies to assist passengers obtaining redress: commercial organisations such as EUClaim may be able to fill this gap, but to date this is only available to residents of a small proportion of States, and it is unclear whether the business model can be expanded to cover a higher proportion of passenger claims.



## 6. STAKEHOLDER VIEWS ON POLICY ISSUES

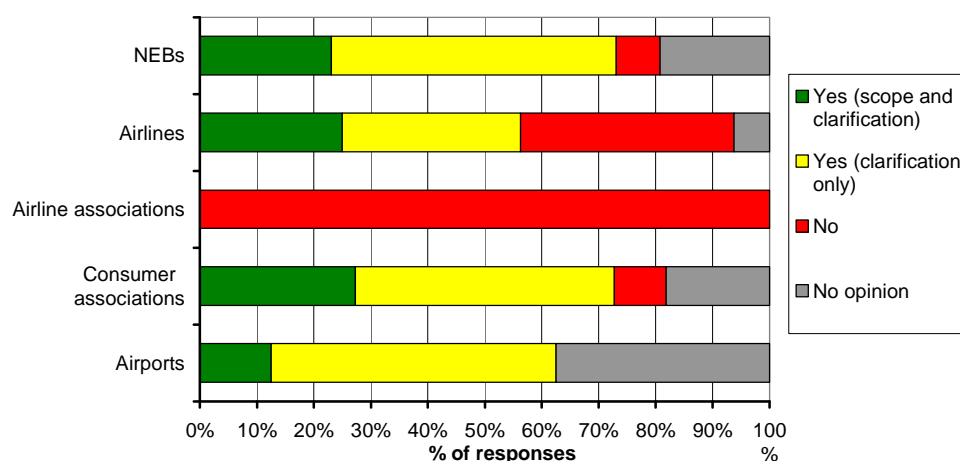
### Introduction

- 6.1 This section summarises views expressed by stakeholders in the course of our consultation exercise on key policy issues, including whether any changes should be made to the scope or content of the Regulation, and what any changes should be.
- 6.2 Stakeholders also expressed views on the application of the Regulation by carriers, and the complaint handling and enforcement process. These views are summarised in section 3 and 4 above.
- 6.3 As discussed in section 1, our discussions with stakeholders were completed before the ECJ's ruling in the case *Sturgeon and Bock*<sup>18</sup>, and therefore this summary of stakeholders views should be read in this context.

### Whether changes should be made to the Regulation

- 6.4 We asked all of the stakeholders that we interviewed whether they considered that any changes should be made to the Regulation, and if they should, whether these should be to clarify the text only, or to change the scope. There were significantly different opinions amongst different stakeholders. A large majority of NEBs still believe that the Regulation should be revised, although in most cases, only to clarify it. This view was shared by a clear majority of consumer representatives and a small majority of airlines.

**FIGURE 6.1 STAKEHOLDERS VIEWS: WHETHER THE REGULATION SHOULD BE CHANGED**



- 6.5 However, some of the airlines which contributed directly to the study and all of their representative associations opposed any change being made to the Regulation. Some stated that this was because the Regulation was now working well, but the main reason was that they considered that any political process could result in changes

<sup>18</sup> Joined cases C 402/07 and C 432/07

being made which resulted in the Regulation being more onerous. There was also a concern that, if there was to be a further conciliation process, this could result in further unclear drafting. It was suggested that the conciliation process, whilst appropriate for reaching political agreement, does not ensure that the text of legislation is well drafted, and this is particularly problematic in a sector as technically complex as air transport.

### **The content and drafting of the Regulation**

- 6.6 We outline below some of the main detailed issues that have been raised by stakeholders, starting with issues relating to what is and is not covered by the scope of the Regulation, followed by the two issues raised most often by stakeholders – the distinction between delay and cancellation, and extraordinary circumstances, and then the detailed comments received on the text.
- 6.7 We found that the issues raised by stakeholders had not changed significantly since the study of the Regulation we undertook in 2006-7. So as not to duplicate previous work, we focus primarily on the issues identified which were different, or where events (such as ECJ rulings) have changed the context for the operation and interpretation of the Regulation.

#### *Scope of the Regulation*

- 6.8 Although the majority of stakeholders did not propose any change to the scope of the Regulation, some stakeholders argued that there were important omissions which should be addressed in order to ensure that passengers' rights were properly protected:
- **Missed connections:** Passengers who miss connecting flights due to cancellations are explicitly protected by the Regulation, but passengers who miss connections due to delays are not protected – at least on most interpretations of the Regulation. Whilst the carrier may have a contractual obligation to reroute the passenger to their final destination there is no obligation to provide care, for example if the passenger is delayed overnight. Certain NEBs consider that these passengers can be treated as having been denied boarding.
  - **Unscheduled diversions of flights:** Whilst this is not a common issue and would almost certainly be outside the control of the carrier, it is not addressed by the Regulation. The carrier may have a contractual obligation to transfer the passenger to his/her final destination but there would be no obligation to provide care.
  - **Lost luggage:** This issue is addressed by the Montreal Convention, incorporated into Community law by Regulation 889/2002, but it is much more difficult for passengers to make claims under the Convention as this would require use of the civil courts. Several consumer organisations suggested that the Regulation should be extended to cover this.
  - **Significant changes to schedules in advance:** These would not be considered as delays or cancellations, and although in principle this issue may be addressed indirectly by the Unfair Contract Terms Directive, again passengers would need to use the civil courts to make any claims.
  - **Carrier insolvency:** Since the liability for compliance with the Regulation is with the operating air carrier, it offers no protection to passengers whose flights are cancelled due to the insolvency of a carrier or a suspension of its operations.

Some consumer organisations and NEBs said that the scope of the Regulation should be extended to cover this.

- **Drinking water:** It was suggested that airlines should be required to offer drinking water on board the aircraft free of charge, particularly given that passengers cannot take their own bottles of water through airport security.

6.9 However, several NEBs specifically requested that the Regulation should not be extended to cover lost luggage, because of the potential cost and difficulty associated with complaint handling and enforcement. Airline associations argued that any changes should be subject to an impact assessment.

6.10 The minority of airlines that argued for changes to the scope of the Regulation argued for reduction in their obligations, which they considered to be excessively onerous given ticket prices paid by some passengers. Several airlines, as well as some consumer representatives, suggested that the obligations should be harmonised for airlines, rail and bus operators on equivalent distance trips. In addition, some carriers argued that they should not have to pay for assistance to passengers in the event of delays and cancellations that were outside their control.

#### *Treatment of long delays and cancellations*

6.11 The distinction between delay and cancellation was raised most frequently by stakeholders as a matter of definition, but inconsistency in the rights available to different passengers was also identified by a number of stakeholders, particularly consumer organisations but also including a number of NEBs. The issue raised was similar to that raised by the Advocate-General in *Sturgeon and Bock*: under some circumstances, two consumers suffering equivalent delays to their journeys are treated differently depending on whether the delay arises from a cancellation or not.

6.12 The potential discrepancy is increased if a narrow reading of Article 5(3) on extraordinary circumstances is adopted, and in particular if a narrow interpretation of the judgement by the Court in *Wallentin-Hermann* is adopted, as by certain NEBs, which would entitle passengers to receive compensation even for some events which are outside the control of the carrier (this issue is discussed in more detail below). In contrast, if a flight is delayed there is no entitlement to compensation under the Regulation even if the delay was within the carrier's control.

6.13 This inconsistency has given rise to a number of disputes as to the definition of delays and cancellations. At one extreme, an airline informed us that cancellations could only be a commercial decision to operate fewer flights (which would almost always be made more than 14 days in advance) and as a result, it considers that its flights are not cancelled even if the delay is several days, the flight is ultimately operated with a different flight number, or fewer flights are operated than scheduled (due to merger of flights), provided the passengers ultimately travel using the same ticket. In contrast, another airline informed us that it would usually consider a flight to be cancelled if it was delayed over 5 hours.

6.14 Most stakeholders suggested addressing the lack of clarity this through amendment to Article 2 to introduce a definition for delay and modify the definition for cancellation. This could be achieved by, for example, adding a time threshold at which a delay

could be considered to be a cancellation, by definition of a cancellation as meaning the operation of fewer flights than scheduled, or by reference to some or all of the factors cited by the Advocate-General: “change of air carrier, change of aircraft, change of flight number, change of airport of departure or arrival, giving baggage back to passengers, new check-in for passengers, new seating assignment, allocation of all passengers to one or more other aircrafts, issuing new boarding passes, and the fact that the flight is described as ‘cancelled’ by the pilot (or other air carrier staff) or on the departures board”. However, this would not address the issue of inconsistent treatment of passengers facing delays and cancellations, which could only be addressed by amendment to the Regulation.

- 6.15 The ECJ’s ruling in the case *Sturgeon and Bock* addresses some of these issues, but also raises some new issues, which we discuss in section 8 below.

*Extraordinary circumstances*

- 6.16 Although this issue has been addressed by the Court in *Wallentin-Hermann*, many stakeholders believe that the term is still unclear, both in relation to what circumstances can be considered extraordinary, and what type of ‘reasonable measures’ a carrier would have to take in order to meet the criteria for exemption from payment of compensation. As a result, both airlines and several NEBs informed us that different NEBs still adopt significantly different interpretations of this, in part depending on their reading of the judgement.
- 6.17 The judgement covered a case in which a problem was identified in routine maintenance well in advance of the scheduled operation of a flight, and some stakeholders (particularly airlines) argue that it cannot not be read as relating to technical problems identified at the last minute, which are by definition harder for the carrier to address, and might be a more common occurrence.
- 6.18 Some NEBs consider it sufficient for a carrier to demonstrate that operation of a particular flight would have been unsafe for reasons outside its control. In contrast, others (for example LBA) consider that, based on the judgement of the Court, the derogation in Article 5(3) cannot be considered to cover all events outside the control of the carrier. In particular, LBA argued that cancellation of a flight due to a bird strike does not meet the criteria established by the Court, because whilst indisputably outside the control of the carrier, it is an event which occurs regularly in air operations and therefore arguably is not extraordinary. Similarly, it has been ruled that a ground handler’s truck colliding with an aircraft is not sufficient to exempt a carrier from payment of compensation, even though the aircraft clearly could not be used.
- 6.19 As noted above, if a narrow reading of the derogation from payment of compensation is used, there is greater inconsistency between the treatment of delays and cancellations. A passenger whose flight was cancelled for reasons outside the control of the carrier might receive compensation, but a passenger whose flight was delayed – even if for a longer period, and for reasons within the control of the carrier – would not.
- 6.20 Although some NEBs believed that the ECJ ruling had been helpful in harmonising the approach adopted to this issue, some expressed a concern that it increased their

workload, because they now have to make a judgement about whether a technical problem can be considered extraordinary, rather than merely whether it had occurred and provided sufficient safety justification for the cancellation of the flight.

#### *Article 2: Definitions*

- 6.21 The issues raised most frequently by stakeholders, particularly NEBs, were the absence of definition of certain key terms, particularly any distinction between delay and cancellation (discussed above). In addition, some other terms requiring clarification were identified:
- **Article 2(g):** The issue was raised as to whether a reservation should be defined as including both the outward and return journey, where an airline either sells or prices the two sectors separately, as most low cost airlines now do. Even if In addition the issues was raised as to whether a reservation should be deemed to include sequential but separately purchased tickets.
  - **Article 2(j):** This defines denied boarding as excluding circumstances where there are reasonable grounds, such as safety or security reasons. This is still causing problems as some carriers may claim that this covers circumstances in which a smaller aircraft is used due to technical problems which would have made operation of the flight with the original aircraft unsafe.
- 6.22 In addition, several stakeholders suggested that further terms needed to be defined, such as ‘flight’ and ‘departure’; these issues were broadly the same as those raised at the time of our 2006-7 study.

#### *Article 3 : Scope*

- 6.23 **Article 3(1)(b)**, in relation to the obligations of EU carriers when operating flights from non-EU airports, was identified as a significant issue in our previous study and was also raised by a number of stakeholders on this occasion. It was noted that, whilst the issue is addressed in the Commission’s Question and Answer document, this is not legally binding and notes that the airlines do not agree with the interpretation given; therefore, it is not possible to rely on this document for enforcement purposes.
- 6.24 Three stakeholders expressed views on **Article 3(4)**, which limits the scope of the Regulation to **services operated with fixed wing aircraft**. These comments all related partly to the one example in the EU of a commercial helicopter service operating in competition with a regular airline service (services operated to/from the Isles of Scilly, in the UK).
- 6.25 The airline asked for the exemption in Article 2(4) to be extended: due to difficult operating conditions (one of the airports has a grass runway) and the inability for very small aircraft to operate in bad weather, this airline occurs disproportionate compliance costs, which it estimated as being up to 10% of turnover. A rigorous interpretation of the extraordinary circumstances exemption could significantly increase these costs, as it could be argued that bad weather which occurred regularly does not exempt the carrier from paying compensation for cancellations. It is unclear that this would be in consumers’ interests as it would lead to significantly higher fares and distort competition with the helicopter. The AUC and a consumer organisation proposed that the exemption for helicopters should be removed.

- 6.26 The issue of unfair competition with helicopters, and disproportionate compliance costs, could be addressed either by deleting this exemption, or by replacing it with a wider exemption for services with certain operational characteristics (such as size of aircraft and/or operations from specific types of airports), which could also be made conditional, for example on a derogation being granted by the State(s) concerned.

*Article 4: Denied boarding*

- 6.27 The main issue raised with regard to this Article was whether it covered denied boarding due to aircraft downsizing (discussed above). Other issues which were raised included the apparent conflict between the timescale for payment of compensation stated in this Article ('immediately') with the timescale of 7 days stated elsewhere.
- 6.28 A further issue raised is that the trend to internet check-in is making it increasingly impractical to comply with **Article 4(1)**, requiring carriers to ask for volunteers before denying boarding. Some carriers allow online check-in several days or weeks in advance of the flight, and therefore it is not uncommon for passengers to check-in online and subsequently decide not to travel. As most passengers have non-refundable tickets, there is then no incentive for them to tell the carrier. As a result, the carrier may not be aware how many passengers intend to travel until the passengers finish arriving at the boarding gate, by which point, some may already have boarded the aircraft.

*Article 5: Cancellations*

- 6.29 The main issues with respect to cancellations were the definition of delay or cancellation and extraordinary circumstances (discussed above). Several stakeholders also commented on **Article 5(1)(c)**, relating to exemption from payment of compensation for cancellations, with one arguing that the blanket exemption from paying compensation for cancellations notified more than 14 days in advance was unfair to the passenger who might still suffer significant inconvenience as a result of the cancellation.
- 6.30 A further issue is whether this Article requires carriers to offer compensation to passengers, or merely gives passengers the right to claim compensation. Some carriers admitted that they would only pay compensation where it was claimed by passengers, although others stated that they would pay it to all eligible passengers. It is notable that the Article uses different wording to refer to assistance and compensation: it states passengers shall "be offered assistance", but shall "have the right to compensation".

*Article 6: Delay*

- 6.31 The main issue raised was the lack of compensation for long delays and the more limited scope of assistance – for example, it was argued that passengers should be offered rerouting. In addition, the differing time thresholds for assistance were raised. However, it was not argued that the Article is unclear.

*Article 7: Compensation*

- 6.32 Some issues were raised about this Article, but most were the same as the issues addressed in our previous study. The only new issue was that a number of

stakeholders said that there was no unique source of data for calculation of great circle distances and that this should be clarified.

*Article 8: Reimbursement and rerouting*

- 6.33 **Article 8(1)(a)** requires carriers to offer reimbursement within seven days. One NEB said that it was not clear whether this was seven days of the date of the flight, or seven days from the point at which the passenger had complained.
- 6.34 **Article 8(1)(b)** continues to be a significant source of difficulty, due to confusion over:
- whether rerouting via other carriers is required; and
  - the meaning of the term ‘comparable transport conditions’.
- 6.35 The Commission considers the term this Article to require rerouting on the first flight regardless of what carrier operates the flight. In contrast, some airlines interpret it as meaning that rerouting should only be on the first flight operated by the same carrier, and some NEBs stated that in the absence of a court ruling otherwise, they could not rule differently. An issue raised by some smaller carriers was that a requirement to reroute via any carrier could distort competition. IATA carriers can reroute via each others’ services at pre-agreed rates which are much lower than last minute fares available to the general public; in contrast a low cost airline would have to pay the full price. One low cost airline had said that it had sought to establish a reciprocal rerouting agreement with a legacy carrier, but the legacy carrier had refused.
- 6.36 In addition, several NEBs requested clarification of the term ‘comparable transport conditions’, in particular to clarify whether rerouting via surface transport was acceptable, and whether this restricted carriers’ obligations (for example it could be considered to mean that a low cost carrier would not have to provide rerouting via a network carrier as this is not comparable).
- 6.37 **Article 8(3)** was raised by a number of stakeholders, because of the inconsistency in that, where a passenger is rerouted on a flight to another airport, the carrier has to provide onward transport, but if the passenger is rerouting on a flight from another airport, there is no obligation to provide transport to this airport.

*Article 9: Right to care*

- 6.38 The key issue with regard to this Article is whether care has to be actively offered by carriers. Several stakeholders said that some carriers did not offer the required assistance but would reimburse passengers who claimed with receipts afterwards. In our opinion, the words “shall be offered” make this reasonably clear, but for the avoidance of any doubt, if the Regulation was amended, this could be clarified.
- 6.39 Several NEBs stated that it was unclear what exactly carriers were required to provide passengers by **Article 9(1)(a)**, which states that carriers should provide “meals and refreshments in a reasonable relation to the waiting time”.
- 6.40 A number of stakeholders said that the requirement in **Article 9(2)** to offer phone

calls, faxes, emails or telexes was anachronistic given that virtually all passengers have their own mobile phones, and could be impractical to implement in the event of cancellation of one or multiple flights. As a result, it was ignored by carriers.

*Article 10: Downgrading*

6.41 The main issue raised with regard to this Article is that it is not clear what amount has to be reimbursed in the event of downgrading:

- whether it is the price for the sector of the journey on which the passenger is downgraded, or the entire price of the ticket; and
- whether the amount to be refunded is the gross amount the passenger pays for the ticket, or the net revenue obtained by the airline (after taxes and any markup added by a travel agent).

6.42 One stakeholder also argued that carriers should have an obligation to pay compensation for downgrading, in addition to the refund. This would be intended to be a deterrent to downgrading, which is often likely to be a result of a commercial decision made by the carrier to overbook a premium cabin. The current Regulation does not deter this practice.

*Article 14: Provision of information*

6.43 Several stakeholders said that **Article 14(2)** was unclear as to whether the information had to be actively offered by carriers in the event of a long delay, cancellation, or denied boarding. An NEB considered that this Article had to be read in the context of the requirement in Article 14(1), and therefore the information only had to be available at check-in if a passenger requests it. Several airlines said it was not practical to have sufficient leaflets available at all airports to issue one to each passenger in the event of cancellation of flights.

**Conclusions**

6.44 Most stakeholders accept that the Commission and others have made significant efforts to improve how the Regulation works. Nonetheless, a clear majority of stakeholders still believe that the Regulation should be changed, in particular to address the parts of the text which seem to be unclear.

6.45 The two main issues which were raised by stakeholders were the distinction between delay and cancellation (both in regards to the inconsistency and to the definition of each event) and the exemption on payment of compensation for cancellations in ‘extraordinary circumstances’. Although this issue was addressed in the ECJ ruling in *Wallentin-Hermann v. Alitalia*, many stakeholders believe that this has not been sufficient, partly because it related to quite specific circumstances of a technical problem discovered in routine maintenance. In addition, many NEBs consider that the ruling has made their task more difficult, because they now have to consider whether a technical problem is sufficient to meet the criteria set out by the ECJ, not only whether it occurred.



## 7. SUMMARY OF FACTUAL CONCLUSIONS

### Introduction

- 7.1 This section sets out the factual conclusions from the study. It does not take into account the ruling of the ECJ in the case *Sturgeon and Bock*, which was issued after the analysis and factual conclusions for this study were finalised. However, we discuss this ruling in the context of our recommendations (section 8 below).

### Application of the Regulation by carriers

- 7.2 There is no evidence that the introduction of the Regulation has had any impact on the level of delays or cancellations. It is not possible to draw conclusions about trends in denied boarding as little information is released by carriers. Overall it is difficult to draw conclusions about the performance of carriers in these areas, as very little information is released, and the information released by different carriers is not consistent and hence cannot be compared.
- 7.3 The evidence still indicates that 1-2% of flights are cancelled and 2-3% of flights are subject to delays of 2 hours or more. If there were similar numbers of passengers on delayed and cancelled flights as other flights, this would mean that the Regulation creates obligations for carriers relating to about 4% of all air journeys (approximately 22 million passenger journeys per year), although it is possible that the numbers of passengers on cancelled flights could be lower (particularly if flights were cancelled for commercial reasons, due to low volumes). The proportion of passengers that complain is very low: around 0.05% of passengers submit complaints to carriers, and 0.005% complain to NEBs.
- 7.4 It is difficult to obtain clear evidence on whether airlines are applying the Regulation properly, as few airlines are willing to share this information; as a result, it is necessary to rely largely on stakeholder opinions and limited, largely anecdotal evidence. Although some stakeholders considered that airline compliance with the Regulation has improved since the time of the study that we undertook in 2006-7, most evidence that is available indicates that some airlines are still not consistently complying with all of the requirements of the Regulation:
- Most carriers were not willing to provide the parts of their ground handling manuals, which should indicate their procedures relating to handling of delays, cancellations and denied boarding. Of those that were provided, half were significantly non-compliant with the Regulation.
  - A survey of air passengers undertaken by the UK consumer organisation Which? indicates that airlines commit a minor, technical infringement of the Regulation in over 90% of cases in which they have obligations under it, by failing to provide passengers with the information required by Article 14(2), and carriers commit a more significant infringement in 30-40% of cases, by failing to provide refreshments when required to do so.
  - Most stakeholders, other than airlines, consider that carriers are not consistently complying with the Regulation. Even some airlines informed us that *other* airlines are not consistently complying with the Regulation.
  - The evaluation we undertook in 2008 of carriers' Conditions of Carriage showed

that 39% were significant non-compliant with the Regulation and a further 12% misleading about carriers' obligations.

- 7.5 There is also some evidence that consumers misunderstand their rights under the Regulation and may believe airlines are non-compliant as a result. However, even excluding the views of consumer associations, most evidence indicates that some airlines are not consistently complying, or are interpreting the Regulation in a way which minimises their obligations.

#### **Complaint handling and enforcement by NEBs**

- 7.6 There has been a significant improvement in complaint handling and enforcement of the Regulation by NEBs. 14 Member States have now imposed fines on carriers for non-compliance, and the scope of complaint handling and enforcement activity has been enhanced in several States.

- 7.7 Nonetheless, there are still significant problems. In our view, few of the case study States are unambiguously complying with the requirement of Article 16 to introduce dissuasive sanctions for infringement of the Regulation. The main reasons for this are:

- Two States have not complied with the requirement in Article 16 to introduce sanctions into national law: in Sweden sanctions can only be imposed for infringement of Article 14, and in Spain, whilst sanctions have been imposed, the legal basis for these sanctions is unclear because no explicit reference to the Regulation has been introduced into national law.
- Even where sanctions have been introduced into national law, they are not always applied. In nearly half of the Member States (including the UK), no sanction has ever been imposed on a carrier for non-compliance, and several States (including France and the Netherlands) have only recently started to impose sanctions.
- In some States which have introduced sanctions into national law, the circumstances in which sanctions can be imposed are extremely limited. In the UK, the combination of the need for a criminal prosecution and 'due diligence' defence available to carriers in national law means that it is virtually impossible to impose sanctions. In Ireland, sanctions can only be imposed if a carrier does not comply with a 'Direction' instructing it to provide redress, and several other NEBs only impose sanctions on carriers that do not provide redress when required to do so. Under these circumstances sanctions cannot provide an economic incentive to comply with the Regulation in all cases.
- Some Member States have difficulties in either imposing sanctions on carriers not based within the State, or cannot collect sanctions which are imposed. In some States, this is because of an explicit limitation in national law (Latvian law only allows sanctions to be imposed on legal persons, which it does not recognise foreign companies as being), but more often this is because of administrative requirements in national law which cannot be met if the carrier is not based within the State; for example, in Slovakia, the NEB is required to conduct an inspection on the premises of a carrier before imposing a sanction.
- In many Member States, the maximum sanctions which can be applied are too low to provide carriers with an economic incentive to comply with the Regulation, taking into account that sanctions would only ever be imposed for a small proportion of infringements. In some States (including Estonia, Latvia, Lithuania, Poland and Romania) the maximum level of sanction is less than or equivalent to the costs that the carrier may avoid through non-compliance in

some individual cases.

- In some States, there are other legal or administrative problems, which mean that sanctions cannot be effective in providing an incentive to comply with the Regulation: for example, in Italy, it is difficult to collect sanctions which are imposed, due to the slow appeals process and issues with the Tax Office, the agency responsible for collection.

7.8 In most cases, the problems we have identified arise from issues with national law or general administrative processes, rather than from failings by NEBs. Similar issues often apply in other sectors, although the nature of the air transport industry (which is international and subject to a high degree of market churn) means that the problems may impact enforcement in the air transport sector more than in other market sectors.

7.9 Some States are taking measures to address these problems. For example:

- Germany is examining options to allow it to serve notifications of sanctions on carriers based outside the State. If it did this, in our view enforcement in Germany would be sufficient to meet the requirements of Article 16.
- Greece has recently introduced a Regulation on airline representation which should in principle allow sanctions to be imposed on foreign carriers. However, this may be challenged on the grounds that it is inconsistent with Regulation 1008/2008, which states that Community carriers are entitled to operate intra-Community services and this cannot be subject to any permit or authorisation.
- The UK has considered introducing administrative sanctions, which would be easier to impose than criminal sanctions, and is evaluating other enforcement options permitted by the 2002 Enterprise Act, such as civil injunctions against carriers.
- The Netherlands is considering changing national law to allow punitive sanctions to be applied. The NEB expected that this change would be made in 2010.

7.10 A further issue is that there are significant differences in the approach to enforcement in different States, which could be considered to distort the single market for air transport. Although in a few cases these differences are unavoidable (for example, for constitutional reasons, Ireland cannot adopt a regime of administrative sanctions), in many cases these arise from different approaches to enforcement either in national law or by NEBs. In particular, different NEBs may reach different conclusions on the basis of equivalent complaints, either because of different degrees of investigation (some investigate all claims of extraordinary circumstances, some do not investigate any), or due to differences in interpretation of the Regulation.

7.11 In addition, whilst NEBs in all Member States now handle complaints, there are also a number of problems with complaint handling. Most NEBs comply with the minimum standards set out in the NEB-NEB agreement but there are a number of exceptions. The more significant issues are:

- the Swedish NEB does not handle complaints except in regard to Article 14;
- the organisation in Sweden which handles other complaints, ARN, is not designated as an NEB and does not follow the NEB-NEB agreement at all; in particular, whilst it does challenge claims of extraordinary circumstances and ask for evidence, it does not have the capability to undertake a technical investigation; and

- the UK complaint handling body, the AUC, has no powers to require carriers to provide proof of their claims and as a consequence cannot properly evaluate claims of extraordinary circumstances where the carrier does not voluntarily provide proper justification;
- the Portuguese NEB does not investigate any claims of extraordinary circumstances;
- the Polish NEB handles complaints relating to Polish carriers – and imposes sanctions – even if the incident did not occur in Poland; and
- the Slovak NEB is not competent to handle complaints relating to foreign carriers even where the incident occurred in the Slovak Republic.

7.12 In addition, the NEB-NEB agreement states that the NEBs should undertake active monitoring of carriers. Whilst many NEBs undertake inspections at airports, in most cases these are limited to evaluation of compliance with Article 14(1). Active monitoring could also include, for example, undertaking analysis to identify repetitive patterns of cancellations, verifying that carriers licensed by their State have set up user-friendly, procedures for the prompt settlement of disputes under consumer protection legislation; requiring carriers to provide copies of the agreements with airport managers or ground handlers which show the procedure to be applied in the case of an incident, and monitoring or auditing of carriers' approaches and systems for compliance with the Regulation.

7.13 There is no obligation for NEBs to assist individual passengers in obtaining redress from carriers. A number of NEBs do mediate with carriers on passengers' behalf, and some (such as Ireland, Denmark and Greece) instruct carriers to provide redress where they find an infringement. However, many other NEBs (including those for Germany, Italy, Spain, Poland and Hungary) do not consider it to be part of their role to assist individual passengers. The carrier may decide to compensate the passenger when the NEB becomes involved in a case, but if it does not, the passenger would have to go to court in order to obtain redress. Even if a sanction was imposed on the carrier for infringement of the Regulation, this would not require it to provide redress.

#### **Alternative means for passengers to obtain redress**

7.14 Several NEBs focus on enforcement rather than assisting passengers with individual claims; where NEBs do issue opinions on complaints, these usually only state whether the Regulation has been respected without quantifying the rights passengers are entitled to, and are in any case not binding for air carriers; and since not all of the NEBs that do assist passengers are as effective as those which represent 'best practice', it is not surprising that passengers have used alternative processes to obtain redress. In most cases, passengers have used simplified procedures for small claims in the civil courts.

7.15 However, these have a number of important weaknesses: the procedures can be slow, difficult for passengers to understand, expensive and in some cases arbitrary, and in several Member States, there are no such processes or the maximum claim that can be made is set at a level which excludes some claims under the Regulation. These issues are not specific to the Regulation: similar issues would apply in other consumer claims against airlines (for example claims relating to luggage, delay or injury under the Montreal Convention). Similar issues may also apply to consumer claims in some

other sectors although the technical complexity of the air transport sector means that the simplified civil court processes are particularly unsuitable for hearing claims.

- 7.16 There are no statistics available for court claims against carriers, but given the difficulties passengers face in making claims, it is not surprising that airlines report that the number of cases is very small in proportion to the number of complaints. Some medium sized airlines told us they had had no court cases at all, and the only airline which provided figures stated that the number of court cases was equivalent to 0.2% of the number of complaints it received.
- 7.17 ADR systems provide an alternative for passengers in a small number of States, but these also have significant weaknesses. Key issues are that:
- in most States there is no ADR system;
  - where there is an ADR, use of the system is generally voluntary, and airlines often do not agree to participate;
  - ADR's may not have the specialist expertise required to evaluate claims under the Regulation; and
  - in most cases the ADR has no means of enforcing its decisions.
- 7.18 The Netherlands has recently introduced an ADR system which addresses some, but not all, of these problems. It has the technical expertise necessary to evaluate complaints, and can force carriers to pay, but it does not cover all airlines operating in the Netherlands. At present, it is too early to assess how effective it will be in assisting passengers in obtaining their rights, as it has not finalised any cases. A weakness of the system is that there is a fee of €50 to use it, although this is refunded if the passenger wins.
- 7.19 The limitations of the civil courts, ADRs and NEBs mean there is a gap in the market for companies to assist passengers obtaining redress. Commercial organisations such as EUclaim and TransINDEMNITÉ may be able to fill this gap, but to date this is only available to residents of a small proportion of States, and it is unclear whether its business model can be expanded to cover a higher proportion of passenger claims. In addition, the fact that it is funded through commissions limits the potential payment that passengers receive.

#### **Stakeholder views on the Regulation**

- 7.20 Most stakeholders accept that the Commission and others have made significant efforts to improve how the Regulation works, with measures such as the NEB-NEB agreement and the Q&A document. However, a clear majority of stakeholders still believe that the Regulation should be changed, in particular to address the parts of the text which are unclear. The Q&A document is considered to have been helpful but not sufficient, because it has no legal basis and therefore cannot be relied on for enforcement; in addition, in some areas it notes that airlines have a different opinion. Although this is necessary because the document has no legal status, it does make the document less useful for any passenger seeking to understand their rights under the Regulation.
- 7.21 The only stakeholder group that strongly opposed changes being made to the

Regulation was the airline representative associations. At least in part, their concern not to change the Regulation seems to arise from a concern that any legislative process would result in a Regulation that was more onerous for carriers. The view that the Regulation should not be changed was not shared by the majority of the carriers that contributed directly to the study, although it should be noted that only a minority of EU carriers contributed individually.

- 7.22 The two main issues which were raised by stakeholders were the distinction between delay and cancellation (both in regards to the inconsistency of passenger treatment and to the definition of each event) and the exemption on payment of compensation for cancellations in ‘extraordinary circumstances’. Although this issue was addressed in the ECJ ruling in *Wallentin-Hermann v. Alitalia*, some stakeholders believe that this has not been sufficient, partly because it related to quite specific circumstances of a technical problem discovered in routine maintenance. In addition, many NEBs consider that the ruling has created additional obligations for them because they now have to consider whether a technical problem is sufficient to meet the criteria set out by the ECJ, not only whether it occurred.

### Conclusions

- 7.23 This study has shown that the Commission and others have made significant efforts to address the problems with the operation of the Regulation identified at the time of our 2006-7 study. Many NEBs also now undertake significantly more activity in relation to the Regulation than they did: all now handle individual complaints<sup>19</sup>, and sanctions for non-compliance have been imposed in 14 Member States.
- 7.24 However, whilst these efforts have had some success, they have not to date been sufficient to ensure that passengers’ rights are properly protected. The following key problems remain:
- in many Member States, enforcement is not effective enough to provide carriers with an economic incentive to comply with the Regulation;
  - in several Member States, there is no mechanism available by which individual passengers can readily obtain redress from carriers;
  - although ECJ rulings have addressed some of the issues in the Regulation that are unclear, a number of issues have not been addressed, and the issue of exemption of payment for compensation for cancellations in the case of extraordinary circumstances continues to cause difficulties for NEBs and passengers despite the ECJ ruling; and
  - in some areas the rights granted by the Regulation are either still not clear (for example rights relating to long delays and cancellation not covered explicitly in the ECJ’s judgement in *Sturgeon and Bock*) or do not address all the problems that passengers may face (such as missed connections due to delays).
- 7.25 In addition, the significant differences in the approach to enforcement in different States mean that there is a risk that the single market for air transport is being

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<sup>19</sup> Except Konsumentverket in Sweden, where complaints are handled by a non-NEB organisation.

distorted.

**8. RECOMMENDATIONS****Overview**

- 8.1 The key problem identified by our research is that the Regulation is still not being applied fully by some air carriers, and there is little incentive for them to do so, as, despite significant improvements in the quantity and quality of complaint handling and enforcement activity undertaken by NEBs, in many States enforcement is still ineffective. This section sets out our recommendations relating to how to improve the operation and enforcement of the Regulation.
- 8.2 After the completion of the stakeholder interviews and the development of the factual conclusions from the study, the European Court of Justice issued its ruling in the case *Sturgeon and Bock*. The ruling raises a number of issues in relation to the potential for different interpretations of the text of the Regulation and how this can be addressed. A political decision now needs to be made as to whether the Regulation should be changed, to address the areas in which the text is unclear and the omissions from what it covers.
- 8.3 Whether or not the Regulation is changed, this does not address the problem of the failure to enforce it effectively, and in any case, the process to revise the Regulation would take some time. This means that measures need to be developed to improve the operation of the Regulation in the short and medium term, and this will require actions to be taken by Member States, particularly the National Enforcement Bodies, and the Commission. This section sets out our proposals both to improve the operation of the Regulation, and to revise the text.

**Measures to improve enforcement**

- 8.4 As identified in section 4, in our view many Member States have failed to comply with the requirement in Article 16(1) to take measures to ensure that the rights of passengers defined by the Regulation are respected. In addition, many States have failed to comply with the requirement in Article 16(3) to introduce dissuasive sanctions.
- 8.5 The key problem is that enforcement does not provide an economic incentive to comply with the Regulation, because fines are rarely imposed (partly due to legal or administrative constraints in some Member States, such as difficulties imposing fines on foreign carriers), and the fines that are imposed are too low in proportion to the cost of carriers' obligations under the Regulation. Some carriers do not believe that they have a commercial incentive to provide compensation and assistance to passengers in the event of disruption to their journeys, and therefore only the possibility of the imposition of penalties can provide this incentive. Since, in most Member States, penalties do not provide this incentive, systematic infringement of the Regulation and/or interpretation of the Regulation in a way to minimise their obligations could be in carriers' best commercial interests. This means that Member States are not taking sufficient measures to ensure that passengers' rights are respected as specified in Article 16(1).



*Changes to the approach to enforcement*

- 8.6 To date, in most Member States, virtually all enforcement activity by NEBs has been in response to passenger complaints. In many Member States, significant resources are devoted by NEBs to handling complaints and in some cases mediating with carriers to achieve an acceptable resolution for the individual passenger. Whilst this is useful for the passenger concerned, few passengers impacted by infringements of the Regulation complain to NEBs. If they did, NEBs would not be able to handle the volume of complaints that they would receive without a significant increase in their resources, which it is probably unrealistic in the current fiscal environment.
- 8.7 Since most infringements do not lead to complaints to NEBs, there is no consequence for the carrier other than that it avoids the costs associated with compliance. Even where a passenger complains to an NEB, in most Member States the most that can happen is that the carrier may be asked to pay compensation to the passenger that complained, or provide other redress which it should have paid in the first place. There is usually no obligation to provide redress to the other passengers on the flight concerned. Only if the carrier still refuses to provide redress to the individual complainant is there any risk of a fine being imposed. This does not provide an economic incentive to comply with the Regulation in other cases.
- 8.8 In our view this focus on complaints does not reflect the requirements of the Regulation, which gives passengers the right to complain to any NEB, but explicitly places the onus on NEBs to take such measures that are necessary to ensure that passengers rights are respected. Although this could include effective handling of complaints, for the reasons described above, in itself this does not appear to be sufficient.
- 8.9 We suggest that the approach to enforcement should change, from a primarily reactive approach focussed on responding to complaints, to a pro-active approach. NEBs should place the onus on carriers to demonstrate that they are complying with the Regulation. Instead of focussing primarily on investigating and responding to complaints, NEBs should:
- require carriers to prove that they have complied with the Regulation – for example, that they are providing refreshments as required for those flights delayed longer than the thresholds specified in Article 6, for example by requiring carriers to provide copies of the agreements with airport managers or ground handlers which show the procedure to be applied in the case of an incident;
  - carry out frequent unannounced inspections of carriers' performance, in order to track their responses to cases of delays, cancellations and denied boarding, including whether they issue the notices required by Article 14(2), as well as their compliance with Article 14(1), which is the main scope of inspections at present;
  - undertake airport-based surveys of passengers to identify the performance of carriers, with additional inspections of carriers' performance to be undertaken where surveys identify that there are issues with the performance of specific carriers;
  - undertake audits of carriers' complaint handling processes to ensure that the responses that carriers provide to passengers are accurate (for example, that compensation is paid when claimed by a passenger who has a right to it); and

- in addition to investigating whether carriers' claims of extraordinary circumstances are valid, require carriers to show that their decisions as to whether compensation is payable for cancellations or long delays are consistent with the interpretation set out by the ECJ in the *Wallentin-Hermann* case.
- 8.10 In addition, Member States could require carriers to keep appropriate records of what compensation and assistance had been provided to passengers, which could be checked by NEBs. The absence of such evidence being retained by the carriers could be used as evidence to support the imposition of penalties. It is possible that in some Member States the introduction of such a requirement would require a change to national law.
- 8.11 Particular emphasis should be placed by NEBs on ensuring that carriers issue the notices required under Article 14(2) in cases of delay and cancellation, that these notices are consistent with the Regulation, that they specify how, where and when to complain to the carrier if their rights are not respected, and that they are written in simple language that a typical passenger can understand. Although many NEBs already undertake inspections to ensure that these notices are available, inspections generally do not identify whether they are actually issued when they should be, and the limited evidence available indicates that often they are not. If these notices were issued, passengers would be fully informed of their rights.
- 8.12 The Commission may be able to achieve these changes to the enforcement process through co-operation with NEBs, for example, by amending the NEB-NEB agreement to include new minimum standards. This might need to be supported by encouragement to Member States to comply with their obligations under Articles 16(1) and 16(3). The Commission should reflect on the extent to which it is possible to do this without amending the Regulation. We note in this context that the wording of the equivalent Article of Regulation 1107/2006 appears to be stronger.

*Compliance with consumer protection laws to be a license condition*

- 8.13 We suggest that Regulation 1008/2008 could be amended to make compliance with consumer protection laws a license condition for Community carriers. This would include compliance with Regulation 889/2002 (which implemented the Montreal Convention into European law) and 1107/2006 (on the rights of passengers with reduced mobility), as well as this Regulation. National licensing authorities (which are often, but not always, the same organisations as the NEBs) would then need to ensure that carriers had appropriate policies and procedures for compliance. This would bring the EU into line with the US, where compliance with economic regulations, including those relating to passenger rights, is a license condition.

*Changes to penalties for non-compliance*

- 8.14 Where inspections or investigation of complaints identify that carriers are not complying with the Regulation, fines need to be sufficient to provide the carrier with an economic incentive to comply with the Regulation in future and to deter other carriers from not complying with it. If fines do not provide this incentive, it will be in the commercial interest of carriers not to comply with the Regulation. Carriers that do not comply will have lower operating costs than carriers that do comply, and therefore

they will be able to offer lower fares, increase market share, and make greater profits, leading to an unfair distortion of competition.

- 8.15 In many Member States, introducing fines that provide an incentive to comply with the Regulation will require a change in national law, in order to:
- increase the level of the maximum penalty that can be imposed so that it is sufficient to provide an economic incentive in all cases; and
  - remove restrictions on the imposition of sanctions which mean that they cannot function as an incentive, for example, difficulties in imposing sanctions on foreign carriers or in imposing sanctions where a carrier provides redress when the NEB intervenes.
- 8.16 We suggest that the Commission should request that every Member State demonstrate that the level of fines defined in national law is sufficient to provide an economic incentive to comply with the Regulation, in accordance with their obligations under Article 16(3), taking into account the circumstances under which the State proposes to impose fines. This will vary between States in accordance with variations in national law. For example, in certain States there are difficulties in having civil (administrative) penalties, which means enforcement must rely on criminal penalties, which are inevitably harder to impose; in principle this is not a problem but the level of the penalty when it is imposed must be correspondingly higher.
- 8.17 In order to demonstrate that sanctions provide an economic incentive, States must demonstrate that the fines meets this condition:
- $$\text{Penalty} > \frac{\text{Cost avoided through non-compliance}}{\text{Proportion of infringements for which a fine is imposed}}$$
- 8.18 For example, if a State estimates that it will be able to identify 0.1% of infringements through either its complaint handling or inspections, and that it will be able to impose a fine in 10% of these cases, and that the typical cost avoided by an infringement is €100, the level of the fine must be at least  $100 / (0.001 * 0.1)$ , which is €1 million, to provide an economic incentive.
- 8.19 We also suggest that each State should be asked to demonstrate that it can apply sanctions for all infringements of the Regulation that occur on its territory. Where a State is not able to do this, sanctions cannot be considered effective or dissuasive as required by Article 16(3). Whilst most Member States should be able to demonstrate this, several cannot at present, either due to:
- in most cases, restrictions on imposition of sanctions on foreign carriers;
  - in the case of Sweden, inability to impose sanctions except for infringements Article 14; and
  - in the case of Spain, concern about whether there is sufficient legal basis for sanctions on the basis of the existing law.
- 8.20 Member States could be assisted when making these changes by a document discussing the legal approaches taken in different States to the issues identified. We believe our report can provide this assistance although the Commission would need to

balance the benefits of placing this in the public domain with the risks arising from publicising the weaknesses in the enforcement system.

*Improve data available to NEBs*

- 8.21 At present, one of the problems that NEBs face is that they do not always have data available on delays and cancellations or the alleged cause, either of individual flights, or in aggregate across carriers and/or routes. As a result, NEBs are reliant on information provided by carriers, which can be difficult to validate.
- 8.22 Detailed disaggregate data is collected by Eurocontrol, but is not available either publicly or to NEBs, except at a summary (non airline specific) level. This contrasts with the situation in the US, where detailed data by airline is published by the Department of Transportation. We suggest that the Commission could request Eurocontrol to make disaggregate data on individual flights and the performance of individual airlines available, at a minimum to NEBs in order to assist with enforcement, and ideally to the wider public, to enable production of a Consumer Report with airline-specific performance information, similar to that produced by the US DOT. NEBs and/or Eurocontrol could provide data on a regular basis to the Commission which could publish it.

*Full implementation of NEB-NEB agreement*

- 8.23 We have identified above a number of cases where NEBs have not fully implemented the NEB-NEB agreement. In particular, whilst the elements of the agreement relating to complaint handling are implemented in most Member States, few NEBs undertake ‘active monitoring’ of compliance with the Regulation.
- 8.24 We suggest that the Commission should encourage Member States to ensure that NEBs fully implement the agreement, and that they have both the powers necessary under national law, and the resources, to do so. Where the agreement is not fully implemented, the Commission should ask States to demonstrate how enforcement is nonetheless compliant with the requirements of Article 16.

**Other improvements which can be made without amending the Regulation**

- 8.25 Some minor initiatives could be taken by the Commission which would improve the operation of the Regulation. Whilst these would not transform the results of the Regulation or airline compliance with it, they should have a limited positive impact. The initiatives that we propose are:

- development of an online common complaint interface;
- extension of the Question and Answer document; and
- further interactions with NEBs and airlines, as well as airline associations.

*Online common complaint interface*

- 8.26 Several Member States have already developed their own online complaint form. We suggest that the Commission should encourage and facilitate Member States to procure the development of an online harmonised complaint interface, and maintain a

website for this, in order to facilitate passenger complaints and in particular to facilitate the handling of cross-border complaints. The complaint interface could also provide information to assist passengers wishing to submit complaints to air carriers. This interface should:

- work in as many EU languages as possible;
- provide information on how to complain to each individual air carrier operating in the EU, the formats and languages in which the carriers will accept complaints, and the timescales within which the passenger should complain and expect a response from the carrier;
- be designed to ask passengers the appropriate questions in relation to their specific case only, on the basis of their response to previous questions (for example, if the passenger complains about delay, the website should not need to ask the passenger questions about re-routing);
- as far as possible, ask questions with a pre-determined choice of answers (for example by using tick boxes or drop-down lists), so that the answer can be automatically translated into the language appropriate for the NEB receiving the complaint;
- automatically direct complaints to the appropriate NEB, with information entered by the complainant in response to questions to be automatically provided in the correct format for the NEB, and where information is entered in response to questions with a pre-determined choice of answers, automatically translate;
- where appropriate, advise passengers that there is no prima facie case of an infringement (so on the basis of the information entered, it appears that the carrier has fully complied with the Regulation);
- where there is a prima facie case of an infringement, produce output in the appropriate format and structure for each NEB: for example, where it is required either by NEBs or the national law of a Member State that complaints are in paper format and signed by the passenger, the system should output the complaint in a format which passengers can print, sign, and then post;
- inform passengers what other evidence or information they should provide, where appropriate; and
- where NEBs accept complaints electronically, the system should be able to automatically forward complaints to the NEB.

- 8.27 Since the output of the interface should be accepted by all NEBs as valid complaints, the team developing this interface should co-operate closely with NEBs to ensure that their requirements for complaints are met.

*Question and answer document*

- 8.28 We suggest that the question and answer document produced by the Commission should be updated to take account of the impact of the latest rulings by the European Court of Justice, in particular the rulings in the case *Wallentin-Hermann* and *Sturgeon and Bock*, and that it should be maintained as a live document in the future.

*Further interaction with airlines and NEBs*

- 8.29 The Commission has already held a number of meetings with airline associations and NEBs to facilitate improved enforcement of the Regulation. It should continue to

organise these meetings and a number of stakeholders suggested that they should take place more frequently, so as to provide NEBs with an opportunity to share best practice. In addition, as it may be challenging to address more complex issues at meetings which all NEBs attend, it may be helpful to organise sub-groups of NEBs to work on particularly difficult issues.

- 8.30 Some airlines informed us that they did not feel that their views were adequately represented at these meetings by the airline associations. Whilst this is primarily an issue for the airlines and associations to address between themselves, we suggest that a small number of the largest airlines should also be invited to meetings if associations are invited to attend.

### **Changes to the Regulation**

- 8.31 The Commission may be able to further clarify the Regulation through issuing further guidance, supplementing or possibly replacing the Q&A document, and the ECJ is likely to consider further cases which may lead to further clarification of the rights and obligations that the Regulation creates. In addition, the Commission and Member States may be able to further improve the operation of the Regulation. Nonetheless, most stakeholders believe that the Regulation should be revised.
- 8.32 We have taken into account comments from stakeholders during the interviews that we undertook for this study. These interviews were all conducted before the ruling of the Court of Justice in the case *Sturgeon and Bock*. This raises very substantial issues with regard to the interpretation of the Regulation and the rights that it grants to passengers. As identified by the Court, the Regulation appears to provide different rights to passengers facing equivalent inconvenience due to delays and cancellations. The Court ruled on the basis of the principle of equal treatment that there is a right to compensation for delays longer than three hours, except where the delays are caused by circumstances which are sufficient to offer an exemption from payment of compensation under Article 5(3) (“extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”).
- 8.33 Whilst the ruling addresses one of the most important issues with the Regulation, there are several others (discussed below) to application of the same principle of equal treatment could be applied to justify an alternative interpretation of the text. In our opinion, these issues can only be addressed properly by revising the text of the Regulation so that the rights and obligations it creates are explicit and consistent with the principle of equal treatment. We also recommend that the Regulation should be revised to address the other areas of the text which are unclear.
- 8.34 It is likely that many stakeholders would have had strong views on how to address the issues that the *Sturgeon and Bock* ruling raises. As we have not been able to discuss these with stakeholders, the proposals for how to address this are therefore based solely on our analysis of how to make the Regulation explicitly consistent with the principle of equal treatment. The Commission should therefore consult stakeholders again on any changes it proposes.

### *Delays and cancellations*

- 8.35 Although the ruling is clear with regard to compensation, it does not address a number of other apparent differences between the treatment of passengers facing delays and cancellations. The same principle of equal treatment could be applied to argue that the rights and obligations described in the Regulation should be interpreted in a way which is equivalent. Therefore, unless or until there are further rulings by the ECJ, it is now unclear what rights passengers have under these circumstances. In particular, it is unclear:
- whether and under what circumstances passengers whose flights are delayed should be permitted to obtain a refund if they do not want to travel – all passengers with cancelled flights have this right, whereas delayed passengers only have this right after five hours delay;
  - whether and under what circumstances passengers whose flights are delayed have the right to re-routing via alternative flights if this allows them to arrive at their destination earlier – all passengers whose flights are cancelled have the right to re-routing at the earliest opportunity;
  - whether passengers whose flights are delayed, and as a consequence miss connecting flights, have the right to be re-routed to their final destination via a new flight, as passengers who miss connections due to cancellations do; and
  - under what circumstances passengers facing delays are entitled to provision of refreshments, telephone calls etc – passengers facing cancellations are entitled to this however short the delay, whereas passengers facing delays have to wait for 2-4 hours depending on the length of the flight.
- 8.36 In addition, some variation in the right to compensation explicitly remains, albeit one that applies to a very small number of passengers. A passenger arriving at the airport to be informed that their flight was delayed between 2 and 3 hours would not be entitled to compensation whereas a passenger whose flight was cancelled and was offered re-routing on an alternative flight departing 2-3 hours later *would* be entitled to compensation.
- 8.37 We have considered how the Regulation, from our point of view, might be revised to make these issues explicit and consistent, and avoid the risks of confusion for passengers and difficulties with the imposition of penalties. The changes we propose are those which seems to us the minimum necessary to address this, without making further changes to the rights set out under the Regulation. We propose that the Regulation should be revised as follows:
- Passengers facing delays, schedule changes (discussed below) and cancellations informed less than 14 days in advance should have a right to compensation if the conditions in Article 5(1)(c) are not met. The Commission should reflect as to whether Article 5(1)(c)(iii) should be amended so that the common period of departure delay after which compensation is payable is 3 hours (as the Court has found in the case of delays) instead of 2 hours (as for cancellations now).
  - Passengers who miss connecting flights as a result of either a delay or a cancellation should be entitled to re-routing to their final destination, and to the provision of assistance during any waiting period at a connecting point, provided they have purchased both flights together as part of the same reservation.
  - Passengers facing delays, schedule changes or cancellations should have the right to a refund if they decide not to travel, but carriers will not have to offer this to

passengers offered re-routing (or where the flight operates if it is delayed) in accordance with the time conditions specified in Article 5(1)(c).

- Passengers facing either delays or cancellations should have the right to assistance such as refreshments where the delay to their departure exceeds 2 hours, regardless of the length of the flight or whether the delay to their journey results from a delay or a cancellation.

8.38 These changes should be implemented by replacing Articles 5 and 6 with one integrated Article, covering delays, cancellations and (as discussed below) advance schedule changes.

*Advance schedule changes*

8.39 The Regulation makes an explicit distinction between cancellations notified in advance and cancellations notified at the last minute, and reduces the obligations for carriers if the cancellation is notified in advance. However, there is no equivalent distinction for delays or changes to schedule notified in advance, and if a flight is to operate later than scheduled, it is unclear whether this is a delay or a schedule change, which carriers may argue are not covered by the Regulation.

8.40 In addition, as the right to compensation for delays identified by the Court does not appear to be conditional on not being informed of the delay in advance, passengers with delays notified in advance might be entitled to compensation, whereas passengers facing cancellations notified in advance are not. This could also be considered to violate the principle of equal treatment.

8.41 Therefore we suggest that the new integrated Article covering delays and cancellations should also cover advance schedule changes, and should state that the right to compensation does not apply if the delay or schedule change is notified in advance. The time conditions would be equivalent to those for advance notification of cancellations, for consistency with the principle of equal treatment.

*Circumstances in which compensation for delays and cancellations payable*

8.42 The combined effect of the ruling of the Court in *Sturgeon and Bock* and the ruling in the case *Wallentin-Hermann* means that carriers will have to pay compensation to a higher number of passengers than they have done in the past. The Court has determined that Article 5(3) means that, to avoid paying compensation, a cancellation must be:

- caused by extraordinary circumstances not inherent in the normal exercise of the activity of the air carrier concerned; **and**
- caused by circumstances which could not have been avoided even if all reasonable measures had been taken.

8.43 The ruling in *Sturgeon and Bock* means that these same criteria apply to delays over 3 hours as well as cancellations.

8.44 The Court made clear that these conditions have to be met separately. It follows from this that (for example) compensation could still be payable if a cancellation was caused by bad weather, if this bad weather was a regular event at the airport



concerned, because this would meet the second criteria but not the first. An NEB has held that compensation would be payable for a cancellation caused by a bird strike, again because this meets the second criteria but not the first. This means that the circumstances in which carriers can avoid paying compensation are very limited, although these will depend on a given NEB or Court's interpretation. It is not clear to us that it is in the best interests of passengers for compensation to be payable for delays or cancellations that are not the responsibility of the carrier, as the effect of this – if it was consistently complied with – would be to raise the operating costs of carriers and hence increase ticket prices. We suggest that the Commission should reflect on changing the Regulation so that compensation would not be payable in case of cancellations or delays due to force majeure. This would require revision to Article 5(3) (or whichever Article it is if the changes proposed above were made) to delete the word “extraordinary”. The recitals to the Regulation would also need to be changed to reflect this.

#### *Obligation to offer compensation*

- 8.45 The Regulation currently states that carriers must immediately pay compensation to passengers who are denied boarding and offer assistance to passengers whose flights are cancelled, but only that these passengers have the right to compensation. This should be strengthened to make clear whether the carrier is obliged to offer compensation to passengers where it is payable. This should be achieved by amending Article 5(1)(c) and any equivalent term added to Article 6.

#### *Downgrading*

- 8.46 The Regulation is much less generous to passengers facing downgrading than passengers facing denial of boarding and does not even guarantee the return of the full supplement that the passenger may have paid. Both are likely to be caused by overbooking, which is a deliberate commercial decision of the carrier which the Regulation seeks to deter but not entirely prohibit. Again, it could be argued that this is not consistent with the principle of equal treatment. Whilst downgrading affects a small proportion of passengers, the sums of money involved in any claim under this Article are likely to be high.

- 8.47 Therefore, we suggest that Article 10 should be amended so that:

- if a carrier cannot offer a passenger with a confirmed reservation a seat in the class for which he/she booked or a higher class, this should be treated as denial of boarding under Article 4 and the carrier should make equivalent offers to the passenger including re-routing, provision of accommodation and refreshments until the subsequent flight, and payment of compensation; and
- an additional offer that the carrier may make to the passenger is transport in a lower class, in which case, in addition to the flat-rate compensation which would always be payable as for any other case of denied boarding, the carrier should refund the difference in price.

#### *Derogation for helicopter services*

- 8.48 We propose that the derogation for helicopter services should be removed as this distorts competition with fixed wing air services. However, under some circumstances

the cost of complying would be very high for some services to small airfields operated with small aircraft including helicopters. To date, the Regulation has not been enforced effectively and this has not been a significant problem, but if it was in the future, it could create substantial costs for operators of some services, which would be reflected in higher ticket prices for passengers.

8.49 Therefore we propose that the automatic total derogation for helicopter services should be replaced with a right for Member States to offer partial or total derogations to certain specific types of services where compliance with the obligations of the Regulation is impractical or disproportionately expensive. The circumstances under which this derogation could be granted must be limited and in particular, the derogation should not cover services which compete with services that would not be eligible for derogation, such as, low cost carrier services with full-sized aircraft which operate to poorly equipped tertiary airfields.

8.50 The Commission should consult as to the precise circumstances under which States could be permitted, at their discretion, to offer derogations. These could include:

- services operated with helicopters;
- services to airfields without paved runways, such as services with seaplanes, and flights to airports with grass runways; and
- other flights where due to the nature of the aircraft used or airports served the cost of complying with the obligations of the Regulation are considered disproportionate, provided the service is operated with small aircraft (indicatively, up to 20 seats) and over a short distance (up to 200km) and where one or both airports have very low traffic volumes (up to 250,000 passengers per year).

8.51 It is possible that a service operating between two Member States could meet the criteria, in which case a derogation should be available if agreed by both States.

#### *Other minor amendments*

8.52 We believe that the amendments proposed above would address the most important issues with the Regulation and some of the areas in which it is unclear. NEBs have also requested a number of minor amendments primarily for clarification. These are very similar to the amendments suggested to us for, and recommended by, our 2006-7 study for the Commission on the operation and results of the Regulation and the rationale for the changes is discussed in chapter 7 of the final report for that study. We do not discuss these in detail, so as not to duplicate previous work, but the amendments we would propose are summarised in Table 3.2 below.

**TABLE 8.1 OTHER AMENDMENTS FOR CLARIFICATION AND CONSISTENCY**

Article	Amendment
2	Add definitions of 'delay', 'cancellation', 'flight', 'passenger' and 'class'
3	Amend Article 3(b) to clarify that the Regulation applies in full to flights to EU airports from third countries operated by EU carriers, unless the third country has alternative requirements for benefits and compensation, and these are complied with

4, 7 and 10	<p>Refunds and compensation to be payable within 14 days of incident</p> <p>Refunds may be paid by crediting the card with which the passenger purchased the ticket</p>
8	<p>Re-routing to be permitted via surface transport and other carriers with the agreement of the passenger</p> <p>Where rerouting is <u>from</u> an alternative airport, carrier to pay for transfer</p>

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