

**REVIEW OF REGULATION
261/2004**

Final Report

Sections 1-8 and Appendix A

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Contents	Page
Executive Summary	1
Introduction	1
The operation and results of the Regulation	1
Complaints handling and enforcement	2
Unclear elements of the Regulation	3
Recommendations	4
1. INTRODUCTION	11
Background	11
The need for this study	11
The study team	12
This report	12
Document structure	12
2. OVERVIEW OF OUR APPROACH	14
Summary of objectives	14
Desk research	14
Stakeholder research	14
Air passenger survey	21
Legal review	21
3. COMPLIANCE BY AIRLINES WITH THE REGULATION	22
Introduction	22
Statistical evidence for cancellations, delay and denied boarding	22
Compliance of airline Conditions of Carriage	33
Airlines guidance to staff regarding the Regulation	38
Stakeholders' views on airline compliance with the Regulation	39
Actions airlines can take to avoid or minimise compliance	41
Evidence from our travel survey	43
Conclusions	46
4. ENFORCEMENT OF THE REGULATION	48
Introduction	48
Nature of the NEBs	48
Legal basis of enforcement	50
Complaints received	52
Resources available to NEBs	55

Enforcement procedures in Member States	59
Sanctions imposed by NEBs	64
Enforcement by passengers through civil courts	68
Stakeholders' views on the enforcement process	69
Conclusions	70
5. STAKEHOLDERS' VIEWS REGARDING THE REGULATION	72
Introduction	72
The principle of the Regulation	72
Detailed views on the Regulation	72
Information on the Regulation	80
Possible amendments to the Regulation	80
Conclusions	85
6. LEGAL REVIEW	87
Introduction	87
Elements of the Regulation requiring clarification	87
Possible extensions to the Regulation	92
7. CONCLUSIONS: THE OPERATION AND RESULTS OF THE REGULATION	95
The impact of the Regulation	95
Complaints handling and enforcement	95
Unclear elements of the Regulation	97
8. RECOMMENDATIONS	98
Introduction	98
Disclaimer	98
Member States to comply with their obligations under the existing Regulation	98
The legal basis of any amendments	100
The requirements of the Regulation	101
Complaints handling and enforcement	108
Publication of key performance indicators	113
Representation of consumers	116
Further report	116
Summary of recommendations	116

FIGURES

Figure 3.1	Trends in delays and 'cancellations' - Flights to/from UK	24
Figure 3.2	Delays at German airports, 2006	25
Figure 3.3	Trend in delay and cancellations for AEA Airlines - All Flights	25
Figure 3.4	Trend in average minutes delay on AEA Flights	26
Figure 3.5	Causes of delay on AEA flights by year	27
Figure 3.6	Primary departure delay causes, 2005	27
Figure 3.7	Average Delay Mins of Case Study Airlines and Other Main UK Operators, Flights to/from UK within EU, 2005	28
Figure 3.8	Proportion of flights departing within 15 mins of schedule and those with long delays, for case study airlines and other main UK operators, flights to/from UK within EU, 2005	29
Figure 3.9	Comparison of punctuality of AEA Operators, flights within EU, 2005	30
Figure 3.10	Comparison of proportion of scheduled flights operated, AEA operators, flights within EU, 2005	31
Figure 4.1	Nature of the NEB	49
Figure 4.2	Rate of complaints, by Member State	53
Figure 4.3	Types of complaints received	54
Figure 4.4	Validity of complaints (Denmark)	54
Figure 4.5	FTEs working on Regulation, by Member State	56
Figure 4.6	FTEs per million passengers, by Member State	57
Figure 4.7	Annual complaints per FTE	58
Figure 4.8	Summary of enforcement procedure	59

TABLES

Table 2.1	National Enforcement bodies
Table 2.2	Consultation: Airlines
Table 2.3	Consultation: Airline associations

Table 2.4 Consultation: Airport operators

Table 2.5 Consultation: Consumer representatives

Table 3.1 Approaches to the Regulation in conditions of carriage

Table 3.2 Incidents reported through staff travel survey

Table 4.1 Legal basis for enforcement and key dates

Table 4.2 Nature of rulings issued by NEBs

Table 4.3 Penalties for non-compliance

Table 8.1 Advantages and disadvantages of options

Table 8.2 Recommended amendments to requirements of Regulation

APPENDICES

A ENFORCEMENT PROCESSES IN MEMBER STATES

B CASE STUDIES

C QUESTION LISTS USED IN THE STAKEHOLDER CONSULTATION

EXECUTIVE SUMMARY

Introduction

1. Regulation 261/2004, which took effect in February 2005, introduced new rules on compensation for air passengers in the event of denied boarding, cancellations, long delays and involuntary downgrading. Depending on the circumstances, the Regulation requires airlines to:
 - provide passengers with assistance such as accommodation, refreshments and telephone calls;
 - offer re-routing and/or a refund of the ticket;
 - pay compensation of up to €600 per passenger; and
 - proactively inform passengers about their rights under the Regulation.
2. The Regulation also required Member States to set up National Enforcement Bodies (referred to in this report as NEBs) with the ability to impose dissuasive sanctions. The Regulation applies to all flights from and within the European Union (EU) plus, under most circumstances, flights to the EU operated by EU-registered carriers.
3. The main objective of the Regulation was to improve the situation of passengers if their journey was disrupted. It had been possible for airlines to leave passengers stranded at an airport far from the city and not provide any assistance such as accommodation or refreshments, even if no alternative flight was available for several days.
4. The Regulation was strongly opposed by many airlines, particularly some low cost airlines. The International Air Transport Association (IATA) and European Low Fares Airlines Association (ELFAA), representatives of the network and low cost carriers respectively, challenged the Regulation in the High Court of England and Wales, and the case was subsequently referred to the European Court of Justice (ECJ). However, the ECJ rejected the airlines' appeal in January 2006.
5. The Regulation requires the Commission to report to the Council and the Parliament on its operation and results, and if appropriate to bring forward new legislative proposals. In order to inform this report, the Commission asked Steer Davies Gleave to undertake an independent review of the Regulation. Our review has consisted primarily of in-depth discussions and consultation with stakeholders, including air carriers, NEBs and passenger representatives; we have also undertaken data analysis, a survey of passengers' experiences, and commissioned an independent legal review.

The operation and results of the Regulation

6. We sought to evaluate whether the introduction of the Regulation had had any effect on the level of cancellations, delays, denied boarding and downgrading. Our analysis was hampered by a lack of publicly available data, and although we asked air carriers to provide data, most were not willing to do so. Based on the information available, it appears that the Regulation has had little or no impact on the level of delays, cancellations or denied boarding, although as the Regulation requires airlines to seek volunteers in the event that some passengers have to be denied boarding, there may

have been some switch towards voluntary denied boarding. Overbooking may also be declining as fewer passengers are travelling with flexible tickets.

7. There is mixed evidence regarding the extent to which airlines have complied with the Regulation. Airlines stated that they were complying and we did find that most airlines had adjusted their terms and conditions of carriage to be compliant. However, with few exceptions, airlines were not willing to provide us with any further evidence which demonstrated their compliance. For example, we asked for the guidance notes provided to airline staff on how to handle incidents, but only one airline was willing to provide this, and this case showed significant non-compliance. One airline also provided us with its staff training material, which was compliant with the Regulation.
8. Therefore, we were reliant primarily on the views of stakeholders to assess whether airlines were complying with the Regulation. NEBs believed that airlines generally were complying but noted a number of exceptions, and in most cases recognised that they were only likely to be aware of non-compliance when passengers complained, which they would only do in a small proportion of cases. Consumer and passenger representatives pointed to a number of ways in which airlines were failing to comply. Our travel survey also showed that, in many of the cases where flights were disrupted, airlines failed to comply with some or all of their obligations.
9. Data from NEBs shows that most complaints about non-compliance related to cancellations (43%) and delays (49%) with relatively few complaints relating to denied boarding (8%). Data also shows that a significant proportion of complaints have been partly or wholly unfounded, because they related to events which were not breaches of the Regulation.
10. In our view, there are two reasons why the Regulation has had less impact in practice than might have been expected:
 - the text of the Regulation is unclear in many areas, which has allowed airlines to interpret it in a way that minimises their obligations; and
 - to date, enforcement of the Regulation has been ineffective in many Member States.

Complaints handling and enforcement

11. A few NEBs are handling complaints and enforcing the Regulation effectively. In our view, the NEBs for Belgium and Denmark represent best practice; these NEBs:
 - when they receive complaints which relate to events which are not within their own jurisdiction, refer the complaints to the appropriate NEB;
 - investigate all complaints which are within their jurisdiction, contacting the airline to request an explanation and where appropriate supporting evidence, and contacting airlines repeatedly if adequate information is not provided;
 - check explanations provided by airlines with other sources (such as airports), including where appropriate using flight operations inspectors to check whether a cancellation genuinely was for extraordinary circumstances which exempt carriers from paying compensation; and
 - issue a ruling on whether the airline should pay compensation.

12. However, in the majority of Member States, complaints handling and enforcement of the Regulation have been less effective. In part, this reflects the fact that the Regulation was only introduced 18 months before our review took place, and many NEBs had only been established relatively recently. However, there are a number of other reasons why this has not worked effectively to date:
- Despite receiving thousands of complaints, most NEBs have not imposed any sanctions for non-compliance, and where sanctions have been imposed, these have often not been paid by carriers as yet. In some Member States, the maximum sanctions allowable do not appear to be sufficient to incentivise airlines to comply with the Regulation.
 - Most NEBs do not have sufficient resources to investigate and rule on every complaint. Where NEBs cannot do this, passengers' only other option is to apply to the civil courts for redress. This process is usually expensive and slow, and given that the amounts involved are small, many passengers are likely to give up rather than attempt this.
 - Cross-border complaints, which we define as complaints where there is a difference between the Member State in which the passenger lives, the Member State in which the carrier is registered, and the Member State in which an incident occurred, are often not handled effectively.
13. Enforcement can be expected to improve in the future, as NEBs have now been set up in all Member States, sanctions for non-compliance have now been introduced in most Member States, and most Member States that have not yet introduced sanctions are in the process of doing so. However, the existence of sanctions is not in itself sufficient to ensure that airlines will comply with the Regulation. The Regulation requires that each Member State introduce sanctions which are effective, proportionate and dissuasive, but in our view, the maximum sanctions allowable under the laws of several Member States are insufficient to comply with this requirement.
14. There is in any case no obligation for Member States to undertake investigation and enforcement of individual complaints as effectively and in as much depth as states such as Denmark and Belgium do. We estimate that, in a state such as the UK with a large aviation market, this would require an agency with 30-40 full time staff and a budget of €5-10 million per year. In our view it is unrealistic to expect all Member States to undertake investigation and enforcement in this way.

Unclear elements of the Regulation

15. Even if enforcement improves, the other key issue will remain – the clarity of the text of the Regulation. The drafting of the Regulation is unclear in several areas, and this has given airlines scope to interpret the Regulation in the way that minimises their obligations, which may not be what is in the best interests of passengers or what policymakers had originally intended. Consumer representatives and NEBs highlighted a number of ways in which the lack of clarity in the text of the Regulation enables airlines to minimise the extent of their obligations.
16. Stakeholders raised issues with almost every Article in the Regulation, but the issues raised most frequently were:
- The Regulation exempts carriers from paying compensation for

cancellations in “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”, but the definition of extraordinary circumstances is unclear and as a result many airlines have adopted a very broad definition which includes almost every possible explanation for a cancellation.

- In the event of cancellations or denied boarding, airlines are required to re-route passengers under “comparable transport conditions”, but it is unclear what this means. In particular, it is unclear whether airlines are required to pay for re-routing via other carriers or via surface transport if this would be quicker than waiting for the next available seat on one of their own flights.
- The extent of the compensation and assistance requirements applying to EU airlines operating flights from non-EU airports to the EU are unclear. As a result, many carriers have been systematically paying lower amounts of compensation on flights into the EU.
- The provisions of the Regulation are less generous in the case of long delays than for cancellations. There is no definition of delay and the definition of a cancellation can be unclear, and as a result some passengers have objected that cancellations are being defined as long delays.

17. Stakeholders also drew our attention to a number of ways in which the Regulation, at least on the prevailing interpretation of the text, had failed to provide adequate protection for passengers. The most significant of these is that it does not protect passengers if a delay to one flight causes them to miss a connecting flight. Many airlines provide assistance and rerouting under these circumstances, but they are not obliged to do so and not all do.

18. Some stakeholders, including airline representatives and a minority of NEBs, suggested that it would not be appropriate to make changes to the Regulation at present. These stakeholders argued that the Regulation had only been in force for 18 months at the time of our review, and as discussed above, a number of NEBs had only started active enforcement more recently. Some suggested that the problem with lack of clarity should be addressed through publication of guidance on interpretation of the Regulation, although this would not be legally binding. However, many other stakeholders considered that the only way to resolve the issues that have arisen with the Regulation was an amended Regulation.

Recommendations

19. The Regulation appears not to be working consistently well in practice, primarily as a result of a number of key elements of the Regulation being unclear, and ineffective enforcement. We make a number of recommendations which are intended to address the problems that have arisen, by clarifying key elements of the Regulation, ensuring passengers receive appropriate assistance, improving complaints handling and enforcement, and improving the quality of information that is available to passengers and policymakers.

20. Most of the measures that we have proposed would require new legislation to make amendments to the Regulation and therefore we recommend that the Commission should propose a new Regulation to enact these. We have provided the Commission with draft text for a new Regulation. Although there are other means by which some clarifications to the Regulation could be made, such as an Interpretative

Communication issued by the Commission or through agreement amongst NEBs, this could not cover the same scope and, as it would not have equivalent legal value, would be likely to face challenge by airlines. This might also mean that it would have to take the most limited possible interpretation of passengers' rights under the existing Regulation, which would not be in passengers' best interests and might not be what policymakers had originally intended.

21. We also recommend that the Commission should undertake a further review of the Regulation in approximately two to three years.

Actions to encourage Member States to comply with their existing obligations

22. Some Member States do not appear to be complying with their existing obligations under the Regulation. Three States have not introduced sanctions into national law for non-compliance, and in two States, sanctions cannot be imposed for all breaches of the Regulation. However, these Member States were all in the process of bringing forward legislative proposals to address these issues.
23. The Regulation requires that sanctions for non-compliance be effective, proportionate and dissuasive. In our view, this means that the expected cost to an airline from non-compliance must exceed the expected cost of compliance. We have highlighted a number of Member States where the maximum sanctions that are allowed are too low to achieve this, either because the maximum sanction is lower than the possible cost of compliance in an individual case, or because the sanction is too low to persuade airlines to comply if we also take into account the probability that it would actually be applied in any individual case.
24. In our view, appropriate maximum penalties should be calculated taking into account the proportion of passengers affected by non-compliance that will complain, the proportion of valid complaints which would lead to a penalty, and the cost of compliance with the Regulation in each case. We estimate that the number of complaints to NEBs currently equates to 0.3% of the number of passenger journeys in which the Regulation creates obligations for airlines; and as airline compliance appears to be mixed, might therefore equate to 0.5-1% of cases in which the airline has not fully complied. The normal cost of compliance per passenger is low (often only around €5-10 for refreshments, and generally under €100) but in a small proportion of cases (particularly denied boarding on long haul flights) compliance costs might be €1,000 per passenger or higher. On this basis, appropriate maximum sanctions would be in the following range:
 - In Member States where the enforcement procedure was such that sanctions would usually be applied if a passenger complained to the NEB and this complaint was upheld, maximum penalties should be in the range €20-50,000 per passenger which complained. This is still much higher than the cost of compliance per passenger, because only a small proportion of passengers will complain to the NEB.
 - In Member States where sanctions are only likely to be imposed in cases of deliberate, flagrant and persistent non-compliance with the Regulation, and therefore sanctions would only be applied in a very small proportion of cases of non-compliance, penalties of €2-5 million should be available. This

reflects the fact that only a small proportion of passengers complain to NEBs, and even in these cases, penalties would only be imposed in a small proportion of cases.

25. We suggest that the Commission should take appropriate measures to encourage these Member States to comply with their obligations under the Regulation.

Amendments to the requirements of the Regulation

26. We have proposed a number of changes to the Regulation in order to:
- clarify elements of the Regulation which are unclear, particularly to address the issues highlighted by stakeholders in the course of the consultation process and raised in the independent legal review undertaken for this study; and
 - ensure that consumers rights are adequately protected in key areas which, at least on the best available interpretation of the existing Regulation, appear not to be covered.
27. We recommend that **some of the definitions in the Regulation should be clarified**, and that **definitions should be added for a number of key terms which are not currently defined**, including ‘passenger’, ‘class’ and ‘delay’. We suggest that the term cancellation should be defined to mean failure to operate a flight within 24 hours of the time scheduled, as a delay of more than this amount may often be very difficult to distinguish from a cancellation and is also likely to inconvenience passengers by just as much.
28. We recommend that the Regulation **should not be extended to cover flights to the EU operated by non-EU carriers**, as such an extra-territorial requirement might be impossible to enforce. However, we suggest that the requirements applying to flights to the EU operated by EU carriers should be clarified, to ensure that these carriers comply with the Regulation in full, except when operating flights from third countries such as the US and Brazil which have alternative regulations regarding compensation and assistance to passengers in the event of disruption.
29. We recommend that the term **extraordinary circumstances** should be defined within the main text of the Regulation, rather than within the Recitals as at present, but that there should not be any change to the definition. We have discussed alternative definitions at length with a number of stakeholders but there has been no consensus on a better definition. We accept that this means that, under most circumstances, airlines will continue not to pay compensation in the event of cancellations. This provision may have been subject to abuse by air carriers, but in our view this abuse should be addressed through more effective enforcement of the Regulation. We also recommend that, where passengers are denied boarding due to substitution of a smaller aircraft for technical reasons which could be considered extraordinary circumstances, airlines should also not have to pay compensation, but all other requirements should continue to apply.
30. We recommend that the Regulation should clarify that, in the event of denied boarding or cancellations, **rerouting via other carriers or surface transport is permissible** with the agreement of the passenger, and that airlines may be required to pay for this,

but only where this is reasonable in the circumstances. To avoid abuse, the Regulation will need to define what these circumstances are, and we suggest that this should be defined as where the delay to a passengers' journey would otherwise be very long (provisionally, 8-24 hours depending on flight length) *and* the alternative carrier offers a substantial time saving.

31. We recommend that the Regulation should be extended to provide protection for passengers in the event of **missed connections** due to delays, but that this protection should be limited to rerouting and appropriate care in the meantime. The Regulation already protects passengers in the event of missed connections due to flight cancellations or denied boarding and in our view it is inconsistent for this not to apply in cases of delays. We do not recommend that any compensation should be payable in the case of missed connections, although under some circumstances passengers may still have a claim against carriers under the Montreal Convention.
32. We have reviewed the **levels of compensation** and recommend that there should be no change. Airlines argued that compensation payments are excessive, particularly relative to the price of discounted economy tickets, but other stakeholders considered the levels appropriate or in some cases too low. We suggest that the levels of compensation should be adjusted every 5 years for inflation, using a mechanism similar to that provided for in the Montreal Convention, to avoid the real value of compensation being eroded over time. We do not recommend that there should be any compensation payable in the event of delay, although again passengers may be able to bring claims against carriers under the Montreal Convention.
33. We propose changes to the requirements governing **downgrading** to ensure that the amount of compensation paid to a passenger must at least equal the difference in ticket price, and to provide passengers with the right not to travel and receive a refund, rather than to be downgraded. We also recommend that the Regulation should clarify what proportion of a ticket has to be refunded in the event of downgrading on one sector of a multi-sector flight.
34. We recommend a minor change to the requirements on **provision of information to passengers**, to make this consistent with other Articles in the Regulation. We also suggest that the Regulation should clearly state that, **where a carrier fails to comply with the requirements on information provision, it is liable for reasonable costs** incurred by passengers as a consequence of this. This addresses a key issue raised by consumer representatives, that carriers may not provide information on rerouting options in the event of flight cancellations, and therefore passengers are left with no alternative but to buy a new ticket.
35. We recommend that a change be made to the assistance requirements in the Regulation to adopt a common period after which **refreshments must be provided**, regardless of flight length, and to clarify that it is the airline rather than the passenger that is responsible for arranging (and paying for) hotel accommodation, where appropriate. However, we also recommend that the Regulation should exempt carriers from the obligation to arrange assistance in exceptional cases where it is not possible for them to do this due to major disruption affecting a large number of passengers, for example the temporary closure of an airport. Carriers would still be liable for reasonable costs incurred by passengers in arranging these services themselves.

36. Finally, we propose a minor change to the requirements regarding **payment** of compensation or refunds, to allow payment by refund to the credit/debit card with which the ticket was purchased, and to adopt a common period within which payments have to be processed.
37. Our recommendations are summarised in the table below.

TABLE 1 RECOMMENDED AMENDMENTS TO REQUIREMENTS OF REGULATION

Issue	Recommendation
Definitions	<ul style="list-style-type: none"> • Clarification of key definitions • Add definitions of key terms which are not currently defined • Cancellations to be defined to include all cases where flight not operated within 24 hours of time scheduled
Scope	<ul style="list-style-type: none"> • Clarify application of Regulation to flights to the EU operated by EU carriers • No extension to flights to the EU operated by non EU carriers
Extraordinary circumstances	<ul style="list-style-type: none"> • Definition of extraordinary circumstances to be included in main text of Regulation • No change to definition of extraordinary circumstances • Airlines should not have to pay compensation where denied boarding occurs due to extraordinary circumstances
Rerouting	<ul style="list-style-type: none"> • Clarify that rerouting via other carriers or surface transport is permissible, but with the agreement of the passenger • Clarify circumstances in which airlines should be <i>required</i> to pay for rerouting via other carriers or surface transport
Missed connections	<ul style="list-style-type: none"> • Passengers should be provided with assistance and rerouting, but not compensation, in the event of missed connections due to delays
Refunds	<ul style="list-style-type: none"> • Allow compensation/refunds to be paid to credit/debit card • Standard period for payments to be made (14 days)
Assistance	<ul style="list-style-type: none"> • Refreshments to be provided after 2 hours delay, regardless of flight length • Clarify that carrier responsible for arranging hotel accommodation • Carrier exempt from obligation to arrange assistance where it makes reasonable efforts but not practical, however then liable for reasonable costs incurred by passengers
Downgrading	<ul style="list-style-type: none"> • Clarify proportion of ticket to be refunded for multi-sector trips • Compensation should at least equal difference in price of ticket • Passenger to have the right not to travel and accept refund
Compensation	<ul style="list-style-type: none"> • No change to level of compensation • Compensation to be reviewed for inflation every 5 years
Information provision	<ul style="list-style-type: none"> • Requirements on information provision to be consistent with other elements of the Regulation • Airlines to be liable for consequential costs if they fail to meet existing requirements on information provision

Improved complaints handling and enforcement

38. As discussed above, complaints handling and enforcement of the Regulation are not working adequately in all Member States. In order to improve this, we suggest that the most effective option would be to establish a central complaints handling and enforcement agency, but we also note that this might be unrealistic, primarily due to the cost involved. We estimate that such an agency would require several hundred staff and a budget of €30-60 million per year if it was to handle complaints and enforce the Regulation effectively.
39. We suggest that, as an alternative, measures should be taken to facilitate the existing complaints handling process, and in particular to improve the handling of cross-border complaints, including:
- NEBs should always refer complaints to the appropriate NEB where there is a prima facie case that the Regulation has been broken, as far as possible using an appropriate language, and all NEBs should accept complaints referred by other NEBs.
 - Airlines should be required to provide NEBs with details of a named employee or agent to contact in the event of any complaints.
 - The Commission should establish a website with a common complaints form which should provide accurate information on passengers' rights, help to discourage irrelevant complaints and automatically direct complaints to the appropriate NEB.
40. We recommend that, as well as providing NEBs with contact details for complaints, airlines with a significant number of operations in a Member State should be required to publish on their website contact details for passengers wishing to complain about infringements of the Regulation; and where the airline has a large number of operations in a Member State, it should be required to accept complaints in the main language of the Member State concerned. This is to address an issue raised by a number of consumer representatives, that some airlines appeared to make it as difficult as possible to complain about infringements of the Regulation.
41. A number of consumer representatives suggested that NEBs should have an obligation to investigate and rule on all complaints. However, we consider that such an obligation could impose excessive costs on NEBs. Nonetheless, the Commission may wish to consider promotion of alternative dispute resolution mechanisms, as a cheaper and simpler alternative to court proceedings. These mechanisms would not be specific to the transport sector, and would be introduced separately from any revision to this Regulation.

Better information for passengers and policymakers

42. A key issue is that, at present, consumers and policymakers do not have access to reliable information on the performance of different airlines. We propose that the Commission should publish a consumer report to provide passengers and policymakers with unbiased and reliable information on key performance metrics, and that European airlines should be required to provide the information for this report. The content of the report that we propose would be similar to the content of the

consumer report published by the US Department of Transportation. The report should be designed to ensure that comparisons between carriers are as fair as possible and we have made proposals as to how this can be achieved. The report could also include information on compliance costs.

43. In undertaking this study, we sought to collect a balance of views, covering passengers as well as airlines, airports, airline representatives and NEBs. However, we found that in most cases passengers are not well represented. We suggest that the Commission should take measures, separately from any amendment to the Regulation, to improve the representation of passengers, for example, by establishing and potentially funding a passenger representation council.

Conclusion

44. We consider that these changes would significantly improve the operation and enforcement of the Regulation and lead to better protection of consumers. At present, less than two years after the introduction of the Regulation, we do not think it is appropriate to recommend any significant extensions of the requirements of the Regulation, for example to introduce compensation payments for delays, or to harmonise compensation requirements between transport modes. However, the Commission may wish to keep these issues under review and consider them again in the future.

1. INTRODUCTION

Background

- 1.1 Regulation 261/2004, which took effect in February 2005, introduced new rules on compensation for air passengers in the event of denied boarding, cancellations, long delays and involuntary downgrading. Depending on the circumstances, the Regulation requires airlines to:
- provide passengers with assistance such as 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. The Regulation applies to all flights from and within the European Union (EU) plus, under most circumstances, flights to the EU operated by EU-registered carriers.
- 1.3 The main objective of the Regulation was to improve the situation of passengers if their journey was disrupted. It had been possible for airlines to leave passengers stranded at an airport far from the city and not provide any assistance such as accommodation or refreshments, even if no alternative flight was available for several days.
- 1.4 The Regulation was strongly opposed by many airlines, particularly some low cost airlines. The International Air Transport Association (IATA) and European Low Fares Airlines Association (ELFAA), representatives of the network and low cost carriers respectively, challenged the Regulation in the High Court of England and Wales, and the case was subsequently referred to the European Court of Justice (ECJ). However, the ECJ rejected the airlines' appeal in January 2006.

The need for this study

- 1.5 Although little statistical evidence is available, there is anecdotal evidence that airlines have not always complied with the Regulation. For example, there have been complaints that airlines have adopted a very wide definition of delays and stretched the definition of extraordinary circumstances for cancellations in order to avoid paying compensation. Both the European Commission and many NEBs have received a large number of complaints, and there have also been a number of civil court cases. This study examines evidence for whether airlines are complying with the Regulation and describes actions that some have taken to minimise the costs of compliance.
- 1.6 Despite this, few Member States have prosecuted airlines for non-compliance with the Regulation. A few NEBs have fined airlines, but on the basis of the information provided to us at the time our research was conducted, it appeared that no fine had been paid as yet. Most NEBs have not issued any penalties at all. It is possible that either the inherent nature of the enforcement regime that was established by the Regulation, or the procedures and practices for enforcement adopted by Member

States, could be inadequate to incentivise airlines to comply. In addition, it is possible that some Member States, even if they have created penalties in law for non-compliance by airlines, have in practice failed to comply with the requirement set out in the Regulation that the penalties for non-compliance should be dissuasive. This study reviews the enforcement procedures in each Member State and identifies factors which have limited the effectiveness of complaint handling and NEBs.

1.7 There have also been a number of complaints that some elements of the Regulation are unclear and that this has both created opportunities for airlines to avoid or minimise compliance, and also that this has made the Regulation difficult to enforce. Furthermore, the Regulation includes some requirements which, under certain exceptional circumstances, it may be impossible for airlines to comply with. This study identifies areas where the Regulation may be in need of clarification or amendment. It also examines the circumstances for which the Regulation might be strengthened, in order to improve consumer protection, for example:

- it does not protect passengers travelling to EU airports on non EU carriers; or
- depending on interpretation, it does not offer protection in the event of delays arising due to missed connections, even though this is one of the most significant causes of delay to passengers.

1.8 In addition, the level of compensation required has been reviewed. We also considered whether there are any elements of the Regulation which are unnecessary or excessively onerous.

The study team

1.9 The study has been undertaken by Steer Davies Gleave on behalf of the European Commission Directorate General for Energy and Transport. The team was provided with advice on legal issues related to the Regulation by Clyde & Co Beaumont & Son Aviation, but the conclusions of the study are the responsibility of Steer Davies Gleave alone.

This report

1.10 This report is the final report on the study. It takes into account discussions which we undertook with the Commission after submission of the Interim Report and additional information we have subsequently collected.

1.11 The research for this report was undertaken between September and December 2006, and the report was submitted to the Commission in January 2007.

Document structure

1.12 The rest of this document is structured as follows:

- Section 2 provides an overview of our approach;
- Section 3 summarises evidence for the extent to which airlines have complied with the Regulation;
- Section 4 outlines enforcement processes in Member States and identifies

issues which have limited the effectiveness of NEBs;

- Section 5 summarises the views of key stakeholders;
- Section 6 provides a review of legal issues associated with the Regulation;
- Section 7 summarises the conclusions of our analysis of the operation and results of the Regulation; and
- Section 8 sets out policy recommendations.

1.13 We provide the following information as appendices:

- Appendix A provides a brief summary of the enforcement processes in each of the 25 Member States.
- Appendix B describes in greater detail the enforcement process in the seven case study countries and the issues that have arisen with this.
- Appendix C provides the question lists which we used for our interviews and data gathering.

1.14 Appendices B and C are provided as separate documents.

2. OVERVIEW OF OUR APPROACH

Summary of objectives

2.1 The objective of this study is to assess the extent to which airlines are complying with the Regulation, investigate whether the enforcement process is working, and examine possible amendments to the Regulation. In order to do this, we have undertaken four main workstreams:

- desk research;
- interviews with key stakeholders;
- a survey of actual air journeys; and
- a legal review.

2.2 Our review covered all Member States. However, we selected seven Member States as case studies, in which we undertook more detailed research and analysis with regard to the enforcement of the Regulation. We explain below why we selected the case studies that we did.

Desk research

2.3 We undertook desk-based research to:

- collect evidence on the incidence of long delays, cancellations and denied boarding, and assess whether the introduction of the Regulation has had any effect; and
- review airlines' terms and conditions to evaluate whether these appeared to be compliant with the Regulation.

2.4 We reviewed terms and conditions for the largest 10 scheduled European airlines, measured by passenger numbers, plus the largest two European charter carriers and two non-EU airlines. These are the same carriers that we approached for interviews, and are listed below.

2.5 We found that, although there was a substantial amount of information readily available on delays, relatively little information was available for cancellations or denied boarding. In addition, we found that it was not possible to obtain detailed or consistent information on airlines' compliance with the Regulation through public sources. Therefore, we relied on stakeholders to provide much of the information in this study.

Stakeholder research

2.6 In part due to the limitations on the data which could be obtained through desk research, the most important element of the study was an extensive programme of stakeholder research, which included questionnaires, telephone interviews, face-to-face interviews and group workshops. The purpose of this was to:

- collect data;
- assess the extent to which airlines are complying with the Regulation;

- understand the enforcement process in each Member State; and
- discuss possible amendments to the Regulation.

2.7 In order to do this, we undertook consultation with the following stakeholder types:

- national enforcement bodies;
- airlines and airline representative associations;
- airport operators; and
- passenger/consumer representatives.

2.8 The questionnaires used are provided in appendix C.

National Enforcement Bodies

2.9 We contacted all the NEBs in all 25 Member States to obtain information on enforcement processes in each Member State and their views on how airlines were complying with the Regulation and possible changes to it. In most cases, we provided NEBs with a questionnaire, which we followed up with a telephone interview. We selected seven states as case studies, in which we undertook more detailed research including a face-to-face interview with the organisation.

2.10 The NEBs are listed in Table 2.1. All of the NEBs provided information for our study in some form. However, due to unforeseen circumstances we were unable to undertake the telephone interview for Slovenia.

TABLE 2.1 NATIONAL ENFORCEMENT BODIES

Country	Organisation
Austria	Bundesministerium für Verkehr, Innovation und Technologie
Belgium	Direction Générale 'Transport aérien'
Cyprus	Department of Civil Aviation
Czech Republic	Civil Aviation Authority
Denmark	Statens Luftfartsvæsen (CAA Denmark)
Estonia	Tarbijakaitseamet (Consumer Protection Board)
Finland	Civil Aviation Authority Consumer Ombudsman & Agency Consumer Complaint Board
France	DGAC, Direction de la régulation économique Bureau de la facilitation et des clients
Germany	Luftfahrt-Bundesamt (LBA)
Greece	Hellenic Civil Aviation Authority
Hungary	Enforcement: Polgári Légiközlekedési Hatóság (PLH) Complaints: Fogyasztóvédelmi Főfelügyelőség
Ireland	Commission for Aviation Regulation
Italy	ENAC
Latvia	Consumer Rights Protection Centre
Lithuania	Civil Aviation Administration
Luxembourg	Direction de la Consommation du Ministère de l'Economie et du Commerce extérieur
Malta	Department of Civil Aviation
Netherlands	Civil Aviation Authority Netherlands - Flight Operations Inspectorate
Poland	Civil Aviation Office
Portugal	INAC, Legal Regulations Department
Slovakia	Slovenská obchodná inšpekcia (Regional Slovak Trade Inspectorate) ústredný inšpektorát (Central Slovak Trade Inspectorate)
Slovenia	Traffic Inspectorate
Spain	Dirección General de Aviación Civil, Sección de Atención al Usuario
Sweden	Enforcement: Swedish Consumer Agency Complaints: National Board for Consumer Complaints
UK	Enforcement: UK CAA Complaints: UK Air Transport Users Council

2.11 As explained above, we selected seven countries as case studies, for which we would undertake more detailed research including a face-to-face interview with the NEBs.

2.12 The Commission asked us to undertake case studies in three countries where, at the time our study commenced, it was unclear on the nature or extent of the activity undertaken by the NEB. These countries were:

- Spain;
- Italy; and
- Greece.

2.13 To present a contrast to these, we undertook the other case studies in countries where the NEB is particularly active in their enforcement of the Regulation, or where the structure of the enforcement arrangements is unusual. For these reasons, we selected the following Member States:

- **UK**, due to the structure of a separate enforcement body (CAA) and complaints handling body (AUC) which is also the only organisation in the European Union dedicated to representing the interests of air passengers, and also as the UK is Europe's largest aviation market in terms of passenger numbers.
- **Denmark**, as we were informed by other stakeholders that the enforcement body (CAA Denmark) was particularly active, for example sending flight operations inspectors to check that cancellations genuinely were for the pressing safety reasons claimed by the airline.
- **Belgium**, for the same reason that we selected Denmark, in that we were informed by other stakeholders that the enforcement body was particularly rigorous.
- **Sweden**, as this is one of few countries (the others being Slovakia, Latvia, Finland and Estonia) where the body responsible for enforcing the Regulation is a general consumer protection authority rather than an aviation-specific body such as a Civil Aviation Authority.

2.14 The other NEBs provided us with written information and we undertook telephone interviews to enable them to expand on and where appropriate clarify their written responses. In addition, we arranged a workshop for the NEBs which took place at our offices in late November 2006, in order to provide them with an opportunity to discuss issues that had arisen with the operation and enforcement of the Regulation.

Airlines and airline associations

2.15 We contacted 14 airlines, including the top 10 European scheduled airlines (measured in terms of scheduled passenger numbers), the main two European charter airline groups, and a sample of two non-EU airlines selected because they had a large volume of operations to the EU. Our sample included three low cost carriers. All of the airlines that we contacted, with the exception of Austrian Airlines, provided input to our study in some form. In most cases, this was through a face-to-face interview, but in some cases written information was provided or information was provided through an airline association. In addition, a number of other carriers requested to input to our study and we accommodated these requests. Table 2.2 below lists the airline sample.

TABLE 2.2 CONSULTATION: AIRLINES

Airline	Reason for contacting	Type of participation
Air France KLM	Top 10 EU carrier	Face-to-face interview
Lufthansa	Top 10 EU carrier	Input through AEA
British Airways	Top 10 EU carrier	Input through AEA and telephone interview
Ryanair	Top 10 EU carrier	Face-to-face interview
easyJet	Top 10 EU carrier	Face-to-face interview
Iberia	Top 10 EU carrier	Face-to-face interview
Alitalia	Top 10 EU carrier	Input through AEA
SAS	Top 10 EU carrier	Face-to-face interview
Air Berlin	Top 10 EU carrier	Face-to-face interview
Austrian	Top 10 EU carrier	Did not participate
Thomsonfly / TUI	Largest EU charter carrier	Face-to-face interview
Condor / Thomas Cook	2nd largest EU charter carrier	Face-to-face interview
Delta Airlines	US carrier with most operations to Europe	Face-to-face interview
Emirates	Other non-European carrier with high volumes of operations to Europe	Written submission
Virgin Atlantic	Request by carrier	Face-to-face interview
First Choice Airlines	Request by carrier	Face-to-face interview
Continental Airlines	Request by carrier	Written submission

2.16 We also consulted with the five main associations representing airlines operating within the EU, listed in Table 2.3 below.

TABLE 2.3 CONSULTATION: 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

Airport operators

2.17 Although airport operators do not have specific obligations under the Regulation, we considered that it would be useful to interview a small sample of them in order to understand their views on how the Regulation has worked in practice and the extent to which airlines have complied, as airports may be in a better position to judge this than other stakeholders. It also appeared possible that some airlines may have contracted

airports to provide the assistance required under the Regulation. Therefore, we contacted ACI (Airports Council International) and three airport operators. All of these provided information for our study.

TABLE 2.4 CONSULTATION: AIRPORT OPERATORS

Organisation	Function
ACI Europe	European Airports Council International – representative body for most European airports
BAA	Operator of main London and Scottish airports, plus Budapest
AdR	Rome airports
AENA	All Spanish airports

Consumer organisations

- 2.18 Although airlines can be a well-organised and effective lobby, their passengers are not. The only organisation in Europe whose primary function is to represent air passengers is the UK's Air Transport Users Council, which, as well as representing passengers, also has a statutory function as the UK body which handles passenger complaints under the Regulation. Although there is a European Passengers Federation, this is in practice almost entirely dedicated to representing rail passengers.
- 2.19 Therefore, we approached general European consumer organisations, initially via the Bureau of European Consumer Councils (BEUC). We provided these organisations with a questionnaire and planned to undertake telephone interviews with a sample of them. The consumer organisations which we contacted are shown in Table 2.5 below.

TABLE 2.5 CONSULTATION: CONSUMER REPRESENTATIVES

Country	Organisation	Participation
Austria	Verein für Konsumenteninformation	Decided not to respond
Belgium	Test-Achats (Belgian Consumer Association)	Written responses plus telephone interview
Cyprus	Cyprus Consumers' Association	Decided not to respond
Czech Republic	Sdružení Obrany Spotřebitelů (Czech Consumers' Association)	Written responses plus telephone interview
Denmark	Danish Consumer Council	Decided not to respond
Estonia	Eesti Tarbijakaitse Liit (Estonian Consumer Union)	Decided not to respond
Finland	Suomen Kuluttajaliitto (Finnish Consumers' Association)	Written responses plus telephone interview
France	UFC – Que Choisir	Decided not to respond
Germany	Verbraucherzentrale Bundesverband (Vzbv) (Federation of German Consumer Organisations) Schlichtungsstelle Mobilität (Travel Arbitration Board)	Written responses plus telephone interviews
Greece	European Consumer Centre of Greece	Written response
Hungary	European Consumer Centre of Hungary (contained within National Association for Consumer Protection of Hungary)	Written responses plus telephone interview
Ireland	Consumers Association of Ireland ECC Dublin	Written responses plus telephone interview
Italy	Altroconsumo Legaconsumatori	Telephone interviews
Latvia	PIAA (National Association for Consumer Protection)	Decided not to respond
Lithuania	National Consumer Rights Protection Board	Written responses plus telephone interview
Luxembourg	ECC Luxembourg	Decided not to respond
Malta	Consumers' Association	Written response
Netherlands	Consumentenbond (Dutch Consumers' Association)	Written responses plus telephone interview
Poland	Federacja Konsumentów Gdańsk (Gdansk Consumer Federation)	Written responses plus telephone interview
Portugal	DECO (Portuguese Consumer Defence Association)	Written response
Slovakia	Združenie Slovenských Spotrebiteľov (Association of Slovak Consumers)	Written responses plus telephone interview
Slovenia	Zveza Potrošnikov Slovenije (Slovene Consumers' Association)	Decided not to respond
Spain	Organización de Consumidores y	Written responses plus

	Usuarios	telephone interview
Sweden	Swedish Consumers' Association	Decided not to respond
UK	Air Transport Users Council Which?	Face-to-face interview Written responses
EU	BEUC	Response received

- 2.20 We found that it was difficult to obtain responses from some of the consumer organisations. As shown above, a number of the organisations did not wish to participate in the study. Therefore, we also supplemented the information from consumer organisations with information from the ECC Network. We have taken into account information provided in the report on air passenger rights issued by the ECCs for Ireland and the UK on behalf of the ECC Network in October 2006, where this is relevant to the Regulation.

Air passenger survey

- 2.21 During the study period, we undertook a survey of air journeys made by our staff, in order to provide independent evidence of the extent to which airlines are complying with the Regulation. As the proportion of flights affected by long delays or cancellation is relatively low, this is not intended to produce statistically significant conclusions regarding compliance, but the objective was to provide evidence of airline behaviour that is well-documented.

Legal review

- 2.22 We also commissioned a review of legal issues associated with the Regulation and issues that might arise with possible changes to it. Our legal team also commented on detailed proposals for amending the text of the Regulation.

3. COMPLIANCE BY AIRLINES WITH THE REGULATION

Introduction

3.1 This section evaluates the extent to which the Regulation has affected airline behaviour, including the extent to which airlines have complied with the Regulation. This is based on a number of sources:

- analysis of statistical data for the incidence of cancellation, delay and denied boarding;
- review of airlines terms and conditions and also staff guidance and briefing documents where we have been given access to these;
- discussions with stakeholders including airlines but also NEBs and passenger representatives; and
- analysis of the results of the travel survey we undertook.

Statistical evidence for cancellations, delay and denied boarding

3.2 Article 17 of the Regulation requires the Commission, in its report to the Council and Parliament, to report on the level of cancellations, delay and denied boarding, and therefore we have researched data available on these issues. In our research, we were looking for:

- Number of incidents of cancellation, long delays or denied boarding;
- The level of impact of these incidents;
- Whether there is evidence of any impact of the Regulation on the incidence of cancellations and delays, or whether the Regulation has affected the classification of cancellations and delays;
- Information on the principal causes of these incidents; and
- The level of variation between airlines' performance.

3.3 We reviewed the websites of several organisations for potential data sources. In particular, we reviewed information available from the civil aviation authorities (CAA) of the UK, Germany, France (DGAC) and Spain; the Association of European Airlines (AEA), IATA, Eurocontrol (responsible for coordinating air traffic management across Europe), Airport Coordination Limited (ACL), flightstats.com and the German Airports Association (ADV). Of these organisations, we found that useful information was available from the UK CAA, ADV, AEA and Eurocontrol. Although individual airlines were generally not willing to provide statistical information, some were, and this is also reflected in this section.

3.4 It is not always easy to determine whether a flight has been delayed or cancelled. For example, a very long delay (of 24 hours) or a diversion cannot be distinguished in the UK CAA's statistics from a cancellation. It is possible that airlines may have a different approach to the classification of delays and cancellations for the purposes of determining the payment of compensation under the Regulation to that used in delay statistics collected by other parties. In addition, the most comparable cancellation data we have is provided from airlines via the AEA; there is no independent, definitive source of data available. Therefore, although this analysis should show the overall

trend in these incidents, we cannot be sure that the *level* of these incidents is equivalent to that used in determination of complaints under the Regulation.

- 3.5 There are no publicly available statistics on denied boarding for European carriers. We asked airlines to provide this but with a small number of exceptions they refused. AEA referred us to a general denied boarding figure for its members, which we understand had previously been provided to the Commission at the time the Regulation was being drafted. This analysis therefore focuses upon delays and cancellations, although as discussed later, this information is also not as extensive as we might have hoped.

Trend analysis

- 3.6 We have found no discernable evidence that the Regulation has had any effect in either changing the overall level of delays/cancellations, or changing the classification of cancellations to delays. In particular, the Commission has expressed a concern that airlines may be reclassifying cancellations as long delays, but if airlines were doing this, we would expect to see a drop in cancellations and corresponding increase in the number of long delays after the Regulation was introduced. There is no detectable evidence of such a trend, although as discussed above, we cannot guarantee that the classification of delays and cancellations used in these statistics is the same as that used by airlines when deciding what compensation to provide under the Regulation.

- 3.7 Figure 3.1 shows the trend in delays and cancellations using data published by the UK CAA, before and after the Regulation came into effect. There are several factors to be borne in mind when considering this graph:

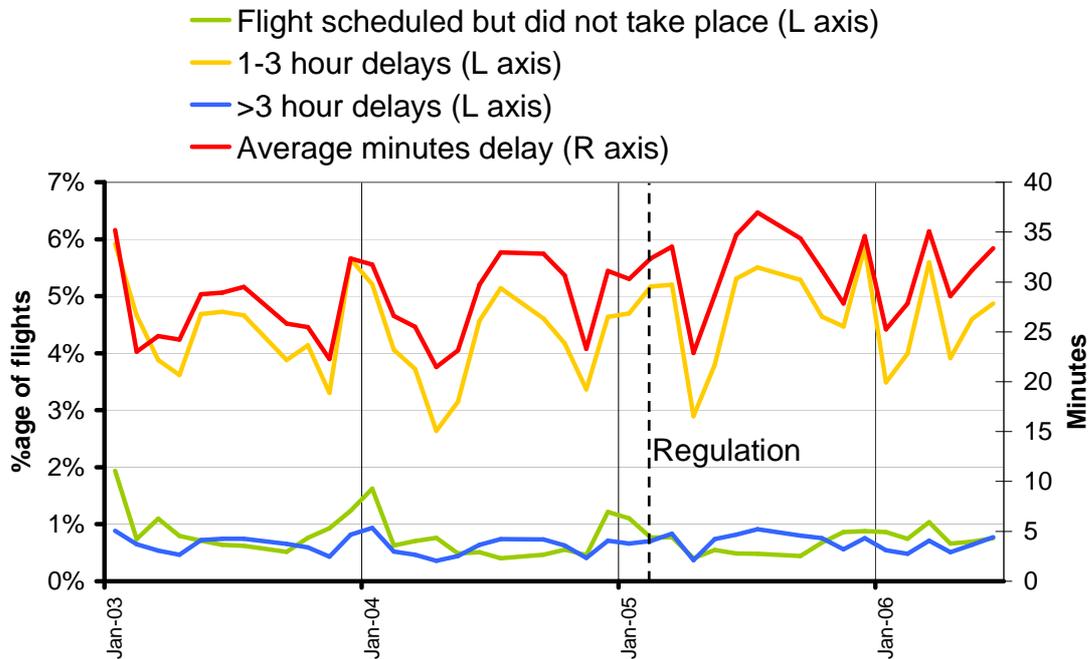
- It is based only on flights into or out of the UK.
- We have removed the values for August, as in recent years there have been a number of significant events which have caused major disruption to flights to/from the UK¹, and would therefore distort the overall trend. The values given for August are interpolated from those for July and September.
- We have used ‘flight scheduled but did not take place’ as a proxy for cancellations. However, this is not exactly equivalent to cancellations as there are other reasons why a flight might not have been recorded as having occurred. The UK CAA were unable to provide information on what proportion of these flights were cancellations.

- 3.8 The figure shows that consistently around 4% of flights are subject to delays of 1-3 hours, and around 0.6% of flights are subject to delays of more than 3 hours. A similar number of flights were not recorded as taking place. We talked to the CAA regarding data for delays over 2 hours and over 4/5 hours (to better reflect flights affected by the Regulation) but unfortunately their data is held in such a format that this was not possible to extract. However, using delays over 3 hours as a proxy for the flights that would be covered by the delay requirements of the Regulation, plus the cancelled

¹ These include the recent (2006) serious terror alert in the UK which led to upgrading of security procedures and significant disruptions, British Airways ‘Gate Gourmet’ dispute and associated strike action in 2005 and strike action by British Airways check-in staff in 2004

flights, this shows that around 1.5% of flights on average should be subject to the provisions of the Regulation regarding delay and cancellations. There is no evidence that the introduction of the Regulation has had any impact on any of these figures.

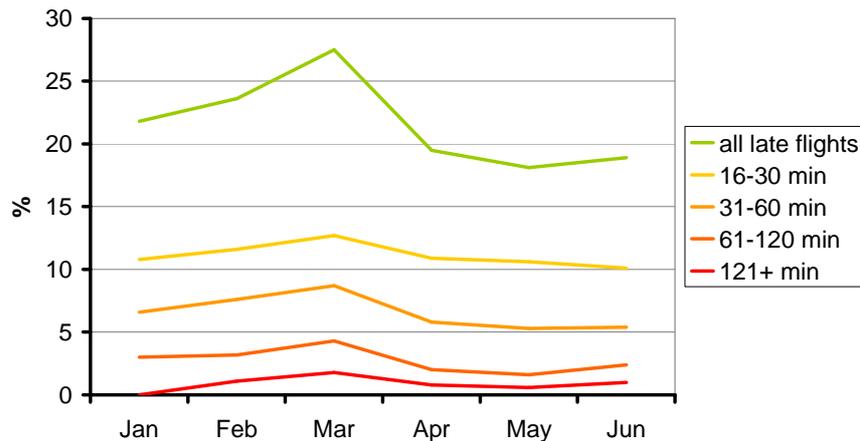
FIGURE 3.1 TRENDS IN DELAYS AND 'CANCELLATIONS' - FLIGHTS TO/FROM UK



Source: UK CAA

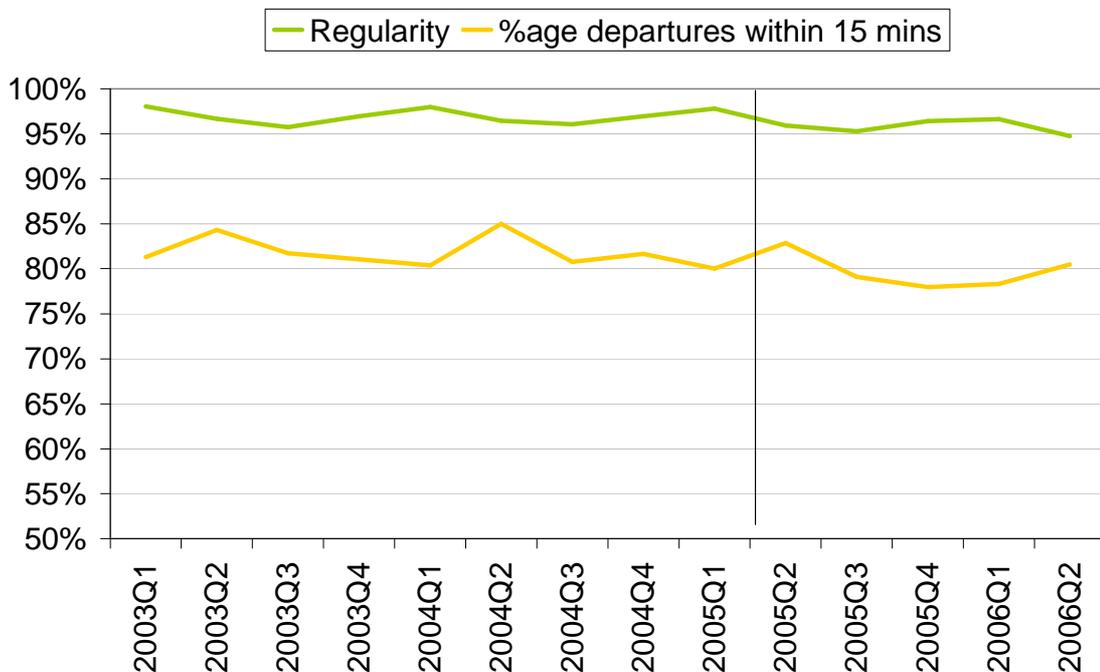
3.9 Figure 3.2 shows data from ADV for flights from German airports. This has slightly lower levels of long delay. The graph shows 3.6% of flights were delayed by 1 hour, on average over the first half of 2006, compared with 4.6% for flights to/from the UK; 0.9% of flights were delayed for 2 hours or more, thereby (depending on length) meaning that the airline would have to provide assistance under the Regulation. We requested data for a longer time series from ADV but this was not readily available and therefore it is not possible to use this data to test whether the introduction of the Regulation has had any effect on the level of delays in Germany.

FIGURE 3.2 DELAYS AT GERMAN AIRPORTS, 2006



3.10 Figure 3.3 shows data published by AEA, for all flights made by AEA airlines, for the punctuality and regularity of flights. The only punctuality data available from AEA is the proportion of flights operating within 15 minutes and therefore this does not directly reflect the types of delay that are covered by the Regulation. Regularity is defined as the number of actual departures as a proportion of scheduled departures. The difference between actual and scheduled departures is flights that are cancelled within 72 hours of the scheduled departure time; flights cancelled more than 72 hours in advance are not included. This data also shows little discernable impact from the introduction of the Regulation; if anything, the regularity of flights appears to have declined marginally, indicating a small increase in cancellations.

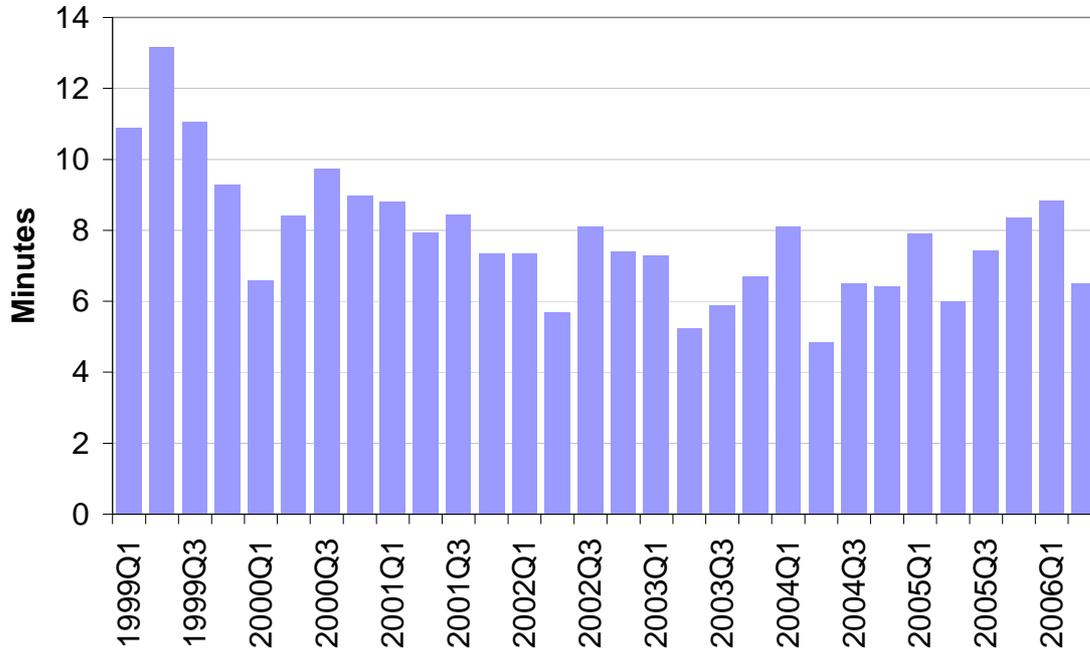
FIGURE 3.3 TREND IN DELAY AND CANCELLATIONS FOR AEA AIRLINES - ALL FLIGHTS



Source: AEA Consumer Report

3.11 Figure 3.4 shows average minutes delay to AEA flights over time. This also shows little evidence of any change after the introduction of the Regulation.

FIGURE 3.4 TREND IN AVERAGE MINUTES DELAY ON AEA FLIGHTS



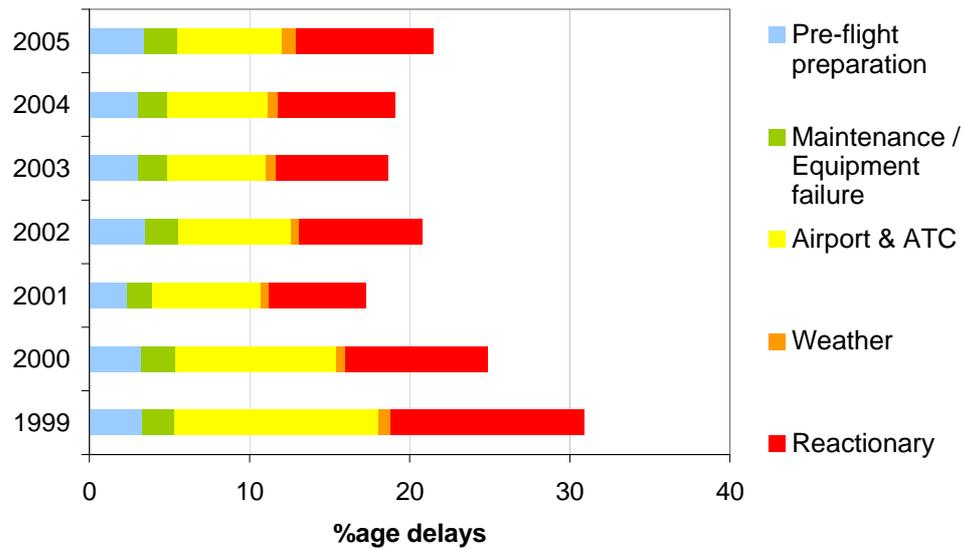
Source: AEA Punctuality Report

Causes of delay

3.12 AEA also provides figures for the causes of delay. There is no equivalent data available on the causes of cancellations, but we would expect these to be similar. This is the only statistical data that is readily available for the proportion of incidents that may be subject to the ‘extraordinary circumstances’ provisions of the Regulation.

3.13 Figure 3.5 shows the main causes for delay are knock-on effects of previous delays and airport or air traffic management problems. This data is not provided in enough detail to understand the proportion of flights that may be delayed due to ‘extraordinary circumstances’, but it does show that the main reason for falls in delay since 1999 have been due to improvements in airports and air traffic management. The type of incident which airlines might be least likely to classify as ‘extraordinary circumstances’ is pre-flight preparation, but this represents a small proportion of incidents and there is no evidence of any change in this further to the introduction of the Regulation.

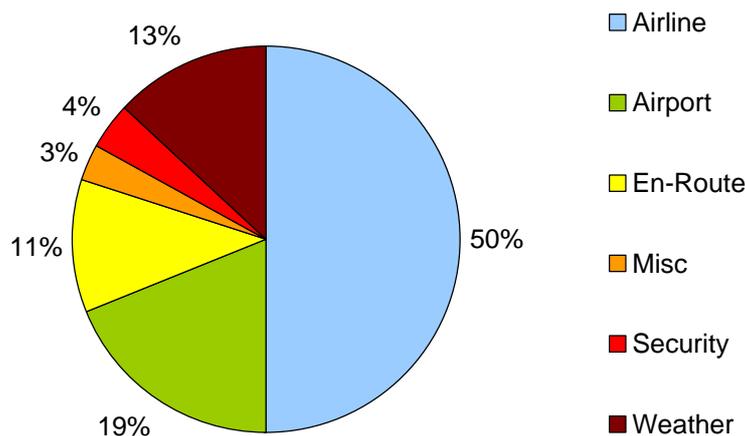
FIGURE 3.5 CAUSES OF DELAY ON AEA FLIGHTS BY YEAR



Source: AEA Punctuality Report

3.14 Eurocontrol also provides data on the causes of delays in their Annual Report for 2005. This shows that at present half of delays are caused by reasons outside the control of the airlines and therefore which would be classified by airlines as extraordinary circumstances. However, this data implies that airlines are responsible for half of departure delays, which is rather higher than implied by the AEA figures. This may be due to differences in classification.

FIGURE 3.6 PRIMARY DEPARTURE DELAY CAUSES, 2005

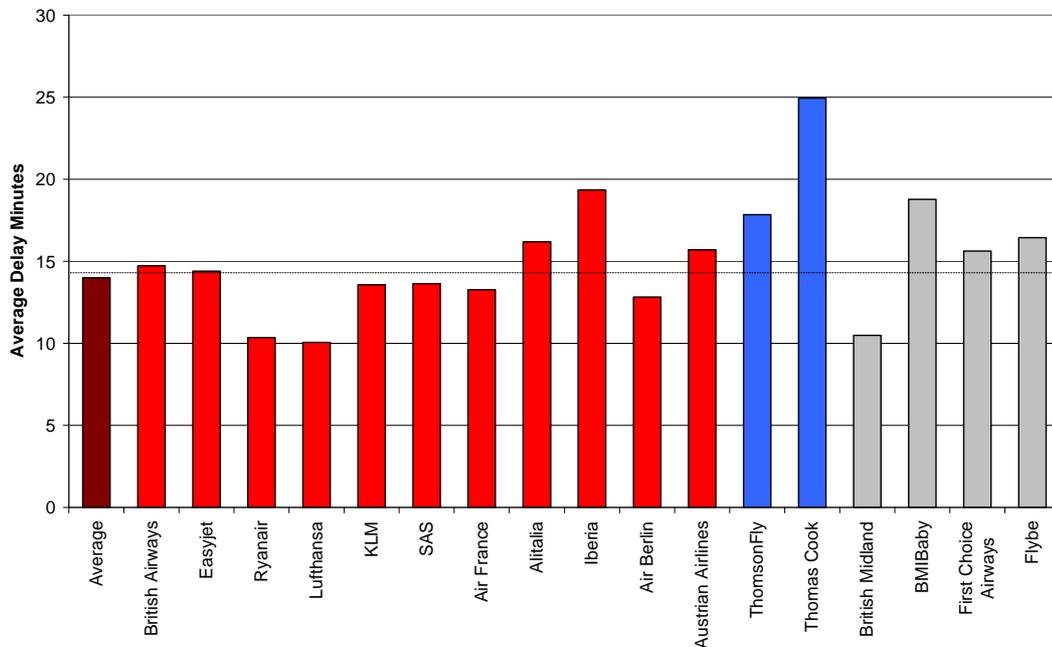


Source: eCODA Annual Report 2005

Propensity of delay and cancellations by individual airlines

- 3.15 UK CAA data provides detailed information on levels of delays by individual airline and origin/destination for all flights into and out of the UK. We have used this data to compare punctuality across the case study airlines operating into/out of UK, plus the other main UK-based operators. The analysis presented here is limited to flights within EU in 2005, although this analysis can be extended to other European and International flights into and out of UK.
- 3.16 Figure 3.7 shows average delay minutes of case study airlines and other main UK operators. Airlines providing primarily scheduled services are shown in red and airlines providing largely charter services are shown in blue. The figure shows that, on average, flights run 14 minutes late; some airlines including Ryanair and Lufthansa achieve lower average delays, but others, including Iberia and the charter operators, are significantly worse.

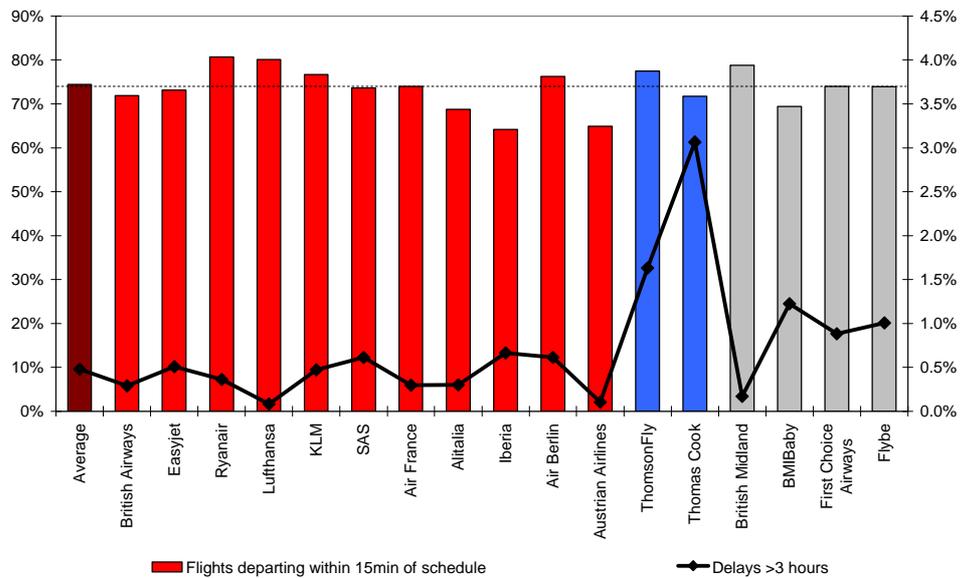
FIGURE 3.7 AVERAGE DELAY MINS OF CASE STUDY AIRLINES AND OTHER MAIN UK OPERATORS, FLIGHTS TO/FROM UK WITHIN EU, 2005



Source: UK CAA

3.17 Figure 3.8 shows the proportion of flights leaving within 15 minutes of schedule, and the proportion that are very late (> 3 hours). This shows that charter operators are generally much less punctual, with a much higher proportion of very long delays than most of the non-charter operators. Iberia has the worst punctuality record of all the scheduled operators

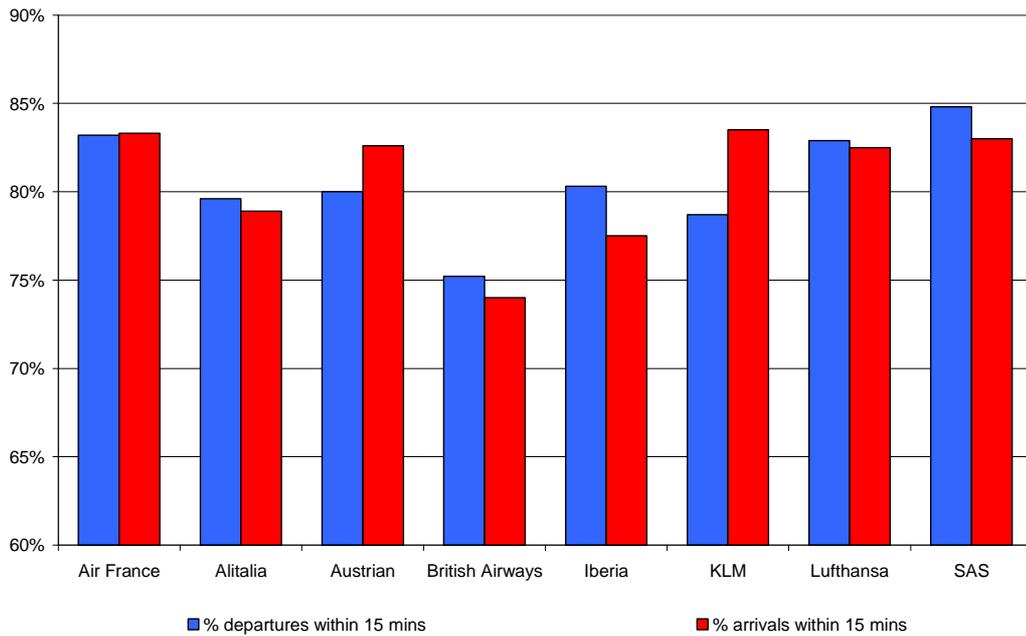
FIGURE 3.8 PROPORTION OF FLIGHTS DEPARTING WITHIN 15 MINS OF SCHEDULE AND THOSE WITH LONG DELAYS, FOR CASE STUDY AIRLINES AND OTHER MAIN UK OPERATORS, FLIGHTS TO/FROM UK WITHIN EU, 2005



Source: UK CAA

3.18 AEA also publish statistics on the proportion of AEA flights which departed or arrived within 15 minutes of schedule, and the ‘regularity’ of flights. Figure 3.9 shows the proportion of AEA flights which were delayed by more than 15 minutes by operator. This information suggests that of the major airlines that are members of AEA, British Airways had the worst punctuality record, followed by Alitalia. However, it should be noted that British Airways’ poor punctuality record during this period is likely to have been affected by the Gate Gourmet dispute, and associated strike action. SAS have the best punctuality record of these airlines.

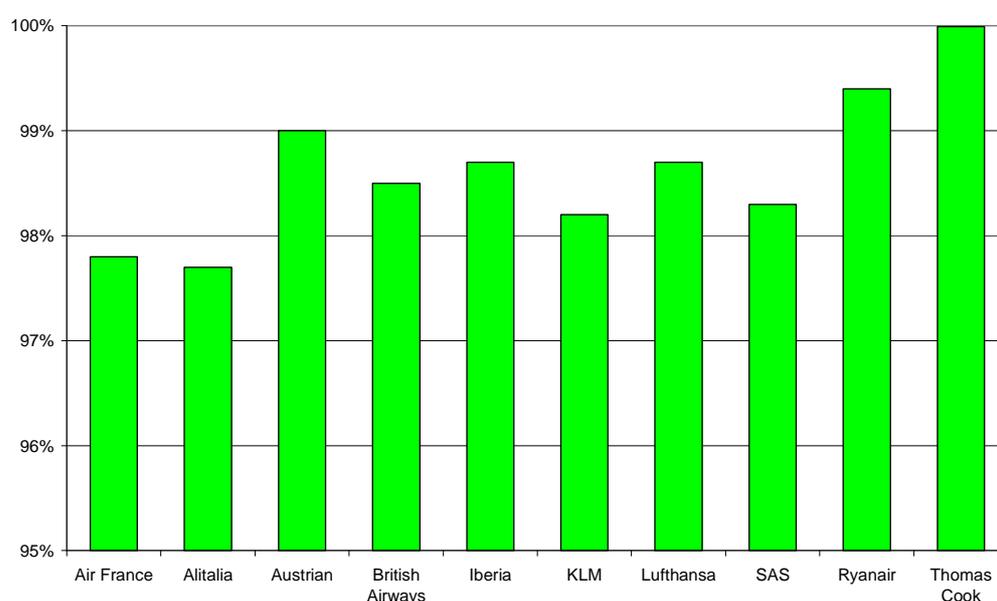
FIGURE 3.9 COMPARISON OF PUNCTUALITY OF AEA OPERATORS, FLIGHTS WITHIN EU, 2005



Source: AEA

- 3.19 Figure 3.10 shows the regularity of flights for AEA operators, meaning the proportion of scheduled flights which actually departed. We use the ‘regularity’ figure as a proxy for cancellations as there is no other figure available; one AEA member carrier did provide us with its cancellation statistics and it was equivalent to this. Note that we have also included Ryanair’s and Thomas Cook’s own statistics on cancellations in this chart for comparison; easyJet do not publish equivalent statistics. Of the case study airlines, Air France and Alitalia appear to have the highest number of cancellations, whilst Ryanair and Thomas Cook appears to have the fewest. This appears to demonstrate that charter airlines delay rather than cancel flights. However, we cannot verify that these statistics are entirely comparable, because Ryanair and Thomas Cook publish their own statistics.

FIGURE 3.10 COMPARISON OF PROPORTION OF SCHEDULED FLIGHTS OPERATED, AEA OPERATORS, FLIGHTS WITHIN EU, 2005



Sources: AEA, Ryanair, Thomas Cook

Denied boarding and downgrading

- 3.20 As explained above, no data on denied boarding or downgrading is published and therefore it is impossible for us to provide any statistically valid conclusions on the trends in these incidents. We asked all carriers contacted as part of our research what proportion of passengers were subject to denied boarding or downgrading, but with the exceptions identified below, they were unwilling to answer this question. The information that we can provide on denied boarding and downgrading is therefore limited.
- 3.21 AEA had previously provided a joint figure for denied boarding to the Commission, covering all its members, which indicated that 0.11% of scheduled passengers were denied boarding. AEA carriers informed us that the proportion of passengers being denied boarding had not changed significantly as a result of the introduction of the Regulation and referred us to this earlier figure.

- 3.22 We asked carriers whether the introduction of the Regulation had changed the incidence of denied boarding. Different carriers provided different responses:
- one major network carrier stated that although the proportion of passengers denied boarding had not changed as a result of the introduction of the Regulation, there had been a switch to voluntary denied boarding as a result of the requirement that airlines ask for volunteers;
 - another stated that there had been no such change;
 - various carriers stated that they had always sought volunteers in any case and therefore the introduction of this as a legal requirement had had no effect; and
 - some airlines stated that denied boarding was becoming less common as a result of better inventory management techniques and because fewer passengers were buying flexible tickets.
- 3.23 Only one European network carrier was willing to provide us with figure for denied boarding; this was higher than the AEA figure (0.21%) but covered both the incidence of denied boarding and downgrading on its flights. They stated that the majority of this denied boarding was ‘reactionary’ denied boarding, meaning that a passenger denied boarding for one flight would be given a seat on the next even if that meant a the passenger on the next flight was denied boarding. It is therefore not clear whether this figure is comparable to the AEA figure, although both types of denied boarding would count as denied boarding for the purposes of the Regulation. The carrier also informed us that downgrading was very unusual as it generally did not overbook business class; it should only occur if there is a change in the aircraft for technical reasons. They informed us that upgrading was much more common.
- 3.24 Low cost and charter airlines occasionally claim that they do not overbook flights. In practice, some low cost airlines admitted that they do overbook certain flights where they have a high rate of no-shows, but that they do this far less than the network carriers. This reflects the fact that low cost airline tickets are generally not flexible and passengers are not entitled to a refund if they do not travel. On occasions, passengers may still be denied boarding if, for example, it has been necessary to substitute a smaller aircraft or a shortage of cabin crew means that an aircraft is not permitted to operate with the expected number of passengers. Some charter airlines stated that travel agents and tour operators occasionally made mistakes with bookings resulting in overbooking, but that they never deliberately overbooked. Only one low cost airline provided us with figures for denied boarding: it stated that it had denied boarding to less than 0.001% of passengers during 2006.
- 3.25 Some non-European carriers also provided us with statistics for denied boarding and these figures were broadly in line with the limited statistics available from the European carriers.
- 3.26 As the US legal requirements for denied boarding are similar to those in the Regulation but have also been established for a longer period, for comparison we checked US DOT published figures for denied boarding for US carriers. These figures

show that, for the major network carriers, the number of passengers denied boarding is 0.1-0.2%, but only around 10% of these are denied boarding involuntarily (0.01-0.02%)². The former figure is consistent with the information we were able to collect in Europe and indicates that, with a regime similar to that in the Regulation, this is approximately the level of denied boarding that will occur. This also implies that, if the call for volunteers works successfully, it could reduce the number of passengers involuntarily denied boarding by around 90%; it is therefore surprising that one major carrier said that this provision had had no effect, and the only carrier that provided figures for the proportion of involuntary denied boarding put this at 30-40%. This might be taken to imply that this provision is not being applied properly, although it is also possible that the Regulation caused no change because the airlines were already requesting volunteers. It is unfortunate that European carriers were not willing to provide equivalently detailed data which would enable us to reach firmer conclusions in this regard.

Conclusions

- 3.27 Based on the limited data available, it appears that the Regulation has had no noticeable impact on the incidence of long delay, cancellation or denied boarding, although in some cases there may have been a switch from involuntary to voluntary denied boarding as a result of the requirement to call for volunteers. There is no evidence available to check what effect it may have had on the incidence of downgrading; as discussed in section 4 below, this represents a small proportion of the complaints received by NEBs.
- 3.28 There is little or no data available on denied boardings, and data specifically relating to cancellations is not easily available. In our interviews with stakeholders, we collected what data we could; while this data may not be comprehensive and in a consistent format, it may give us a better idea of the scale of the problem for cancellations and denied boarding. However, the data was not be robust enough to allow definitive conclusions to be drawn about the scale of this problem. In section 7 we discuss possible measures that the Commission might be able to take in order to improve the availability of information relating to these issues.

Compliance of airline Conditions of Carriage

- 3.29 The primary purpose of this analysis is to identify non-compliance or possible non-compliance with the Regulation in airlines' terms and conditions of carriage, which would occur if an airline states something that is contrary to the Regulation in the case of delay, cancellation or denied boarding. In addition to this, the analysis provided the opportunity to review the differences in approach of the airlines, to identify omissions with respect to the Regulation, and also to check how easy it is for passengers to identify their rights under the Regulation.

² Air Travel Consumer Report October 2006, Office of Aviation Enforcement and Proceedings, US Department of Transportation

Methodology

- 3.30 Investigation of airlines' terms and conditions covered the fourteen airlines identified in Table 2.2. Air France / KLM and Condor / Thomas Cook were investigated as separate entities, so this research covered sixteen airlines in total.
- 3.31 Terms and conditions were collected from the websites of each of the selected airlines, and examined against the Regulation. To find the terms and conditions we followed the online booking processes or, where necessary, other links on the website. It should be noted that this may not necessarily reflect the airlines' provisions under other booking channels. However, since the majority of bookings are now online, we hope that this will give a fair representation of airlines' overall approaches.

Overall approach adopted by airlines

- 3.32 In undertaking this analysis we found that one of four general approaches were taken by airlines in covering terms and conditions that relate to the Regulation:

- Cover most or all sections of the Regulation in detail;
- 'One-liner' – this tends to be a paragraph stating that airline will comply with the Regulations or 'all applicable laws', without giving any details. For example, Condor states in its Conditions of Carriage:

'Should delays or flight cancellations occur and should the statutory conditions be met, we will provide services and payments pursuant to European Community (EC) Regulation No. 261/2004.'

- Make no specific mention of the Regulations at all (but cover it through the wording of the terms and conditions); and
 - Documents written without special regard to European law.
- 3.33 Iberia is a unique case. It addresses the Regulation in a document called 'Passengers rights in the event of denied boarding, cancellation or long delay of flights', but appears not to publish any Conditions of Carriage. We were unable to find them on the website, they were not attached to e-tickets (even though these referred passengers to them) and the customer service helpline was unable to direct us to them.

TABLE 3.1 APPROACHES TO THE REGULATION IN CONDITIONS OF CARRIAGE

Approach	Airlines
Cover all/most of regulation in detail	Air Berlin, Alitalia, BA (Rights document), Iberia, KLM, SAS, easyJet
'One-liner'	Austrian, Condor, Lufthansa, Ryanair (Terms and Conditions), Thomas Cook
No mention at all	Air France, ThomsonFly
Not written for European law	Delta, Emirates
No terms and conditions available	Iberia

- 3.34 It should also be noted that neither British Airways nor Ryanair mention the Regulations in their Conditions of Carriage, the key document addressing airlines'

treatment of passengers, but refers to the Regulation in other conditions.

Non-compliance

3.35 We found very little evidence of explicit non-compliance with the Regulation in airlines' terms and conditions. We found only one explicit non-compliance and one implicit potential non-compliance.

3.36 The strongest case for non-compliance we have found is for Delta Airlines, in the terms and conditions provided when booking a flight from London to New York, under *Rule 95: Amenities / Services for Delayed Passengers*. Paragraph A under this rule states that:

The carrier will offer certain services to passengers whose transportation via DL has been involuntarily interrupted in excess of 4 hours by flight cancellation or delay under the following conditions.

3.37 Paragraph A goes on discuss provision of care in respect of meals, communications and hotel accommodation, which is consistent with the Regulation. However, *Exception 1* under *Rule 95* states:

The provisions in paragraph A above do not apply to passengers holding confirmed reservations on a flight which is delayed or cancelled because of Air Traffic Control or U.S. weather bureau observations or forecasts indicating that environmental conditions will be such that at the time of arrival or departure of the flight either the airport will be closed or that weather conditions will be less than minimum allowed for landing or takeoff as required by the Federal Aviation Administration. If an attempt is made to conduct the flight, all passengers will be informed that an attempt will be made. If the flight operates to the passenger's intended destination/stopover point/connection city or returns to the passenger's point of origin, no amenities will be provided.

3.38 This appears to state that care will not be provided under these circumstances, which is in breach of the Regulation. However, Delta Airlines' terms and conditions appear to be written only with regard to American law, and whilst they are mostly compliant with the Regulation, the above non-compliance seems to be a legacy of this. Delta also provides on its website a statement of passengers rights under Regulation 261/2004 which is compliant in this regard, although we found that this was impossible to reach by clicking links from the website and was not referred to during the booking process, and therefore this is unlikely to be particularly helpful for passengers.

3.39 The closest any of the European carriers we reviewed came to an explicit non-compliance was Ryanair. In the information provided to passengers with respect to the Regulation in their FAQs, which we were informed was also issued to passengers in the event of incidents³, it is implied that in the case of cancellations the rights to re-routing and care do not apply if passengers are informed of the cancellation more than

³ see <http://www.ryanair.com/site/FAQS/docs/EU261.pdf>

two weeks in advance, whereas in reality Article 5.1(c) states that passengers do not have the right to compensation under Article 7 only. In practical terms this is probably not an issue given that passengers are unlikely to require care if they are aware of the cancellation two weeks prior to the flight.

3.40 In addition, in its Terms and Conditions, Ryanair states that it will provide a written notice of passengers' rights under the Regulation, while in their Conditions of Carriage (which takes precedence over the Terms and Conditions) they advise passengers to ask for the relevant text. Under Article 14, there is a positive obligation on all carriers to actively inform passengers of their rights, so they should not have to ask for this. However, since the company could argue that they do not state that they will not give out notices, this also has to be regarded as an implicit non-compliance.

3.41 Most of the documents avoid any non-compliance with a paragraph stating that in the event that the applicable laws and the document differ, the applicable laws will prevail. Air France, for example, states:

'These Conditions of Carriage are applicable unless they are inconsistent with our Tariffs or applicable law, in which event such Tariffs or laws shall prevail.'

3.42 Whilst this means that the document would not, in legal terms, be regarded as non-compliant, one could regard this as implicitly non-compliant. Passengers reading it might be unaware of the rights omitted from the document, and assume a lower level of legal entitlement than they are due.

Common omissions

3.43 Omissions were much more common than non-compliances. Omissions do not provide evidence of non-compliance, but does show that the airline has missed an opportunity to demonstrate compliance. By examining the airlines' terms and conditions and conditions of carriage, we identified out several common areas which airlines failed to cover. The most common omissions were:

- Call for volunteers in case of denied boarding (8 of the 16 omitted this)
- Reimbursement or re-routing in case of denied boarding / cancellation (8)
- Offer of care in case of denied boarding / cancellation (8)
- If delay is more than 5 hours, the right to reimburse or return flight (8)
- Details of reimbursement/rerouting (9)
- Care details (9)
- Upgrading / downgrading (9)
- Priority for reduced mobility passengers (13)
- Information - notice at check-in, written notice in event of incident (11)

3.44 In looking at the number of airlines which do not address up/downgrading, it should be borne in mind that this section of the Regulation will not apply to carriers offering only one class of ticket, of which there are at least four.

Other issues

3.45 There were several other noteworthy issues in relation to individual airlines' terms and conditions:

- Iberia does not publish any Conditions of Carriage. We were unable to find them on the website, they were not attached to e-tickets purchased by our staff members, which explicitly stated that terms & conditions would be sent separately (they weren't), and the customer service helpline was unable to direct us to them. The Regulation is addressed in a document called 'Passengers rights in the event of denied boarding, cancellation or long delay of flights', but this is not found using the normal booking process and in fact is quite hard to locate: the passenger would have to look on the website under *Information for Shareholders and Investors*, then *Social Commitment*, then *To Our Customers*.
- Condor's conditions of carriage and BA's *Notification of Rights under Regulation EC 261/2004* entirely omit the issue of denied boarding.
- easyJet's documents do not mention the Regulation by name but from the level of detail given, their *Carrier's Regulations* is clearly tailored to cover the points of the Regulation.

Extraordinary circumstances

3.46 Of the sixteen airlines reviewed, eight do not define extraordinary circumstances. Those that do define it tend to quote the five reasons listed in the Recitals to the Regulation: bad weather, political instability, strikes, security risks, unexpected air safety deficiencies (EC 261/2004, Preamble 14). Some also include air traffic management and, in one case, airport congestion.

3.47 Delta and KLM give very detailed lists of circumstances outside their control. If extraordinary circumstances were to be defined in more detail, these lists could perhaps provide a contribution, but the list is quite long and may be wider than the Commission had envisaged. KLM defines extraordinary circumstances as:

'unusual and unforeseeable circumstances beyond the control of the passenger and/or Carrier, the consequences of which could not have been avoided even if all due care had been exercised, including but not limited to cases of political instability (wars, riots, airport closure, embargoes, seizure, hostilities, unsettled international conditions, government regulations), meteorological conditions incompatible with the operation of the flight concerned (floods, earthquakes, hurricanes, thick fog, severe storms, snow/runway iced cover), security risks (terrorist attacks, bomb alert, hijacking, requisitioning of aircraft or seats on the flight by government order, fire or explosions, sabotage), unexpected flight safety shortcomings (e.g. mechanical failure, defective or non-functioning airport facilities such as defective navigation systems, de-icing station, congested x-ray screening check points, breakdown in airport information systems), unexpected diversions as a consequence of illness/childbirth on board and/or unruly passenger(s), epidemics, strikes that affect the operation of Carrier, air traffic management decision in relation to a particular aircraft on a particular day that gives rise to a long delay or the cancellation of one or more flights by that aircraft.'

Ease of access to information on passenger rights

- 3.48 We surveyed the website of each airline, to check how prominently displayed the documents covering passenger rights were.
- 3.49 Fourteen of the sixteen websites had a small link to the documents on passenger rights at the bottom of each page. Eleven of the sixteen required customers to tick a box stating that they had read these documents. Of these, Austrian and Emirates asked for this confirmation on the screen after entering credit card details, effectively after the decision to purchase had been made. Of those not requiring this confirmation:
- Alitalia and SAS only required customers to have read the terms and conditions of purchase, and not the conditions of carriage.
 - As explained above, Iberia appears not to have a document on conditions of carriage.

Conclusions

- 3.50 Overall, we found that airlines' terms and conditions are broadly consistent with the regulation. However, the way that the regulation is covered by the airlines differs significantly, with some offering a 'catch all' statement about applicable laws, and others specifically addressing points of the Regulation in their terms & conditions.
- 3.51 One explicit non-compliance was found in Delta Airlines' Terms and Conditions, but since this is a US carrier that operates under its own laws in relation to the issues covered by the Regulation, and it also has a separate notice about rights under the Regulation, we do not consider this a significant non-compliance.
- 3.52 Of the European carriers, the closest any comes to non-compliance is Ryanair's Conditions of Carriage in which passengers, in the event of delay/cancellation, are advised to ask for their rights under the Regulation. However, since the company could argue it does not state that it will not give out these notices, this has to be regarded as an implicit non-compliance.

Airlines guidance to staff regarding the Regulation

- 3.53 We asked airlines whether they could provide us copies of the guidance that they provide to staff and third-party handling agents on the implementation of the Regulation. Only one airline provided us with this, and one other provided us with its training materials regarding the Regulation, on a confidential basis. Airlines provided a number of reasons why they were not willing to do this, which included references to confidentiality, the relevance of our request, and the fact that their staff manual was "too big".
- 3.54 The guidance which we were provided with showed a number of important areas in which the actions of the airline were non-compliant with the Regulation. However, it is impossible to say whether this is representative of other airlines; the training material we were provided by the one airline was fully compliant. The non-compliances which we identified with this guidance are:
- There is an exclusion for "extraordinary circumstances" in the case of delay

and denied boarding, whereas in fact this should only exclude the airline from paying compensation for cancellations.

- Passenger information notices are only provided in the event of delays if the passenger requests them.
- Telephone calls are also only provided on request, so the passenger has no means of knowing that they are entitled to these.
- Assistance is only provided for delays over 3 hours, although it should be noted that this particular carrier operates few flights of less than 1500km and therefore this is not a major non-compliance.

Stakeholders' views on airline compliance with the Regulation

3.55 Airlines stated that they were complying with the Regulation, although some stated that compliance could be impossible in extreme cases. For example, when an airport closes due to a strike, it is unlikely to be possible to find hotels for all of the passengers that are stranded. Some airlines also stated that it was difficult to provide assistance at very remote airports where facilities may not be available. As explained in detail below, two airlines stated that they did not pay compensation in the event of denied boarding when this could be attributed to “extraordinary circumstances”, which appears to be a breach of the Regulation, although one did not accept that this was non-compliant and the other had defined this event as a cancellation in order to avoid paying compensation. Another airline stated that providing assistance to passengers in the event of delays would almost always further delay the flight, and therefore they did not do so, but that this was consistent with the Regulation; an NEB confirmed that this airline adopted this policy.

3.56 Many airlines stressed that passengers had inaccurate perceptions about their rights under the Regulation, for example as a result of inaccurate press reporting and the information posters produced by the European Commission. They stated that many (in some cases most) of the complaints that they had received regarding the Regulation were invalid, for example because passengers were claiming compensation for delays. Airlines claimed that any perception of non-compliance reflected their incorrect assumptions about the extent of assistance and compensation that airlines are obliged to provide.

3.57 Most of the NEBs we interviewed agreed that airlines generally were complying with the Regulation, but many NEBs highlighted exceptions. Some also highlighted the fact that they were only aware of cases when passengers complained and therefore could not be sure of how compliant airlines were in general; as discussed in section 4 below, some NEBs conduct inspections at airports to check compliance, but not all do. The areas of non-compliance highlighted most often by NEBs were:

- especially low cost airlines and in the event of delays, failure to provide assistance;
- failure to provide written information on passengers rights in the event of denied boarding, cancellations and delays; and
- the exceptional circumstances provisions being used excessively in order to avoid paying compensation for cancellations.

3.58 However, the main issue highlighted by NEBs was that airlines took advantage of the

areas in which the Regulation was unclear to minimise their obligations. These areas are discussed in more detail below.

3.59 Some NEBs also considered that airlines had not initially complied with the Regulation, but had started to do so after the European Court of Justice upheld it, and Member States set up NEBs with the ability to impose sanctions.

3.60 In contrast, the airport operators that we interviewed were less sure that airlines were consistently complying with the Regulation. One thought that they generally were, but the other two that we interviewed did not:

- AdR (Rome airports) indicated that smaller airlines and low cost airlines did not provide passengers with the information that they are required to under the Regulation and also did not provide any assistance to passengers. It said that it was providing assistance to passengers on behalf of airlines that were failing to comply with their legal duty to do so.
- AENA (Spanish airports) considered that airlines were generally meeting the requirements for denied boarding but were rarely providing refreshments in the case of delays and almost never offered free telephone calls. AENA had also had a number of complaints from passengers that they had not been provided with information as required by the Regulation.

3.61 Consumer/passenger representatives were also more sceptical about the extent to which airlines were complying with the Regulation. Again, they highlighted the provision of written notices regarding passenger rights and assistance in the case of delays and cancellations as key areas in which airlines appeared not to be complying consistently with the Regulation. Many consumer organisations said that airlines repeatedly used the “extraordinary circumstances” exemption to avoid paying compensation for cancellations, even when the cancellation appeared to be the airline’s fault. One consumer organisation suggested that some airlines were deliberately misleading passengers about their rights under the Regulation, but where passengers took legal action, settling cases out of court to avoid clear case law being established.

3.62 Similar issues have been raised by the ECC Network.⁴ Particular issues raised include:

- airlines use the exceptional circumstances exemption very broadly, and it is impractical for consumers to challenge this;
- airlines often do not provide accommodation and refreshments, but tell passengers to keep receipts and claim afterwards; many do not claim, and even if they do, it can be difficult to get the airline to pay;
- airlines fail to provide rerouting if they do not have seats available on their own flights; and
- airlines fail to provide information that they should, and sometimes have no staff at airports to answer questions in the event of disruption.

⁴ See Air Passenger Rights: Consumer Complaints – A summary and analysis of consumer complaints reported to the European Consumer Network

- 3.63 Airlines, and some NEBs, also pointed out that in certain circumstances it is practically impossible to comply with the Regulation, particularly the requirements to provide assistance. For example, in the event of mass disruption, involving closure of an airport (for example due to air traffic management system failure or a security alert), potentially thousands of passengers are stranded. All hotels in the vicinity of the airport are likely to become full and it is possible that refreshment facilities in the airport will run out of supplies. One NEB stated that, under these circumstances, they required airlines to look for hotels away from the airport but still had to accept that at times it would be impossible to comply with the Regulation; under these circumstances they could not reasonably expect airlines to comply and would not consider imposition of sanctions.

Actions airlines can take to avoid or minimise compliance

- 3.64 Stakeholders drew our attention to a number of ways in which airlines could avoid or minimise their obligations under the Regulation. In some cases, airlines are complying with the text of the Regulation but not the spirit of the Regulation; this reflects the fact that the text allows for multiple interpretations in some areas.

Definition of extraordinary circumstances

- 3.65 Two main issues have arisen with the ‘extraordinary circumstances’:
- the definition of extraordinary circumstances can be quite wide; and
 - some airlines may apply this to rights other than compensation for cancellation.
- 3.66 It was clear from the stakeholder consultation that the definition of extraordinary circumstances being applied by many airlines is very wide and includes almost all cancellations. Several airlines explicitly told us that, as they would only cancel flights at short notice in extraordinary circumstances, they never needed to pay compensation for cancellations. Some network airlines admitted that they might cancel flights for other (commercial) reasons, but they claimed that they would only do this several weeks or months in advance of the flight, and therefore there would be no obligation to pay compensation under the Regulation. Other airlines, particularly low cost airlines, claimed that they never cancelled flights for commercial reasons and therefore that all cancellations were, by definition, extraordinary circumstances.
- 3.67 The main case where it is unclear whether extraordinary circumstances should apply is the case of flights cancelled for technical or operational reasons: some NEBs considered that not all technical problems could reasonably be considered extraordinary circumstances. However, the majority of NEBs do not have sufficient resources to check airline explanations. One non-European airline told us that it would not consider that technical problems with an aircraft would be extraordinary circumstances, but that European airlines almost always do not pay compensation under these circumstances.
- 3.68 Some airlines also claimed that they could use the extraordinary circumstances clause not to pay for assistance in the event of cancellations, and our staff travel survey also showed an example of a situation where an airline had done this. This is clearly a

breach of the Regulation.

Denied boarding due to 'extraordinary circumstances'

- 3.69 Passengers may be denied boarding, not due to overbooking, but because there is a technical problem with the aircraft (for example resulting in substitution of a smaller aircraft) or an operational issue (such as a lack of cabin crew). One airline told us that they defined this as a cancellation rather than denied boarding and defined the flight that was operated as re-routing the passengers from the cancelled flight, even if it had the same flight number. This interpretation of the Regulation had been approved by the NEB of the state in which the airline was based but appears to be an attempt to circumvent the fact that there is no extraordinary circumstances clause in Article 4 of the Regulation on denied boarding and therefore that compensation should be paid in all circumstances. Although this does appear to be inconsistent with the Regulation if the flight was operated with the same flight number, enforcement of the compensation requirement in this scenario might incentivise the airline to genuinely cancel the flight.
- 3.70 In one other case, an airline told us that it did not pay compensation where denied boarding was due to extraordinary circumstances. This is clearly a breach of the Regulation, although again enforcement of the Regulation in this regard might simply lead the airline to cancel the flight. However, other airlines stated that, when denied boarding occurred in these circumstances, they paid compensation as required by the Regulation.

Definition of delays and cancellations

- 3.71 Civil court cases regarding the Regulation have challenged the issue of whether very long delays are effectively cancellations, and the Commission has enquired whether airlines may be defining cancellations as very long delays in order to avoid payment of compensation. Airlines generally denied that this was the case and the analysis of delay and cancellation data showed no evidence that this was occurring, although as explained above, due to limitations on the data available, this is not conclusive. It should be noted that, as the 'extraordinary circumstances' clause is being interpreted in a way which means that airlines are almost never paying compensation for cancellations, under most circumstances there is in any case little incentive for airlines to do this.
- 3.72 Nonetheless, our interview programme showed that this may have happened in a few cases. The Italian NEB told us that they had identified one case where an airline had delayed one flight until the time of the next flight, and then cancelled the next flight. This meant that the passengers on the first flight were told there was a delay, and the passengers on the second flight were not told anything – they were accommodated at the same time as expected (they might have noticed that the flight number was different). We were told that it was impossible to check whether this happened systematically; the one case that they had identified was found by chance. An airport operator also stated that some flights appeared to be merged, although it did not have statistics available. Some charter airlines admitted that they occasionally "consolidated" flights which they appeared not to consider counted as cancellations; this is also evidence of the same thing.

Compensation on flights to the EU

- 3.73 Several NEBs stated that EU airlines were systematically paying lower compensation for denied boarding on flights to the EU from non-EU airports, and some airlines admitted this and stated that it was a reasonable interpretation of the Regulation. This reflects the fact that Article 3 of the Regulation is unclear on the requirements in these circumstances (as discussed in section 5 below).

Obligation to offer re-routing

- 3.74 In the event of denied boarding and cancellations, the Regulation obliges airlines to offer passengers a choice between a refund and re-routing. Some NEBs suggested that some airlines were in practice only offering a refund if they did not have an alternative flight available, and that it was very difficult to prove whether re-routing had actually been offered. Our staff travel survey also showed examples of cases where only a refund, not re-routing, was offered by the airline.

Definition of re-routing

- 3.75 The Regulation does not specify whether airlines should be willing to reroute passengers via other carriers or by surface transport if there is no alternative flight available. The network airlines generally have reciprocal agreements enabling them to re-route passengers via other carriers if necessary at a reasonable price, although they generally prefer to re-route passengers via their own flights. Low cost airlines do not have equivalent agreements and low cost airlines appeared to be unwilling to reroute via other carriers, although they acknowledged that this issue had been challenged in various court cases. Our staff travel survey also confirmed that some airlines were not willing to pay for re-routing via other carriers.

Evidence from our travel survey

- 3.76 We asked our staff to fill out a survey for each flight that they undertook (whether or not the flight was with one of the airlines in our sample shown in Table 2.2). At the time this report was drafted, we had been given surveys for 151 flights of which 14 involved incidents which would be covered by the Regulation. In all cases these were cancellations and long delays. Although this proportion is higher than the extent of delay and cancellation indicated by the statistical analysis above, this is probably because staff were more likely to fill out the survey for flights in which incidents occurred; in addition, some of these incidents occurred in the 2-3 months before the survey began.
- 3.77 A summary of the incidents shown to date is provided in Table 3.2 below. Of the nine cases, in four there was explicit non compliance by the airline, in at least two of which was a deliberate decision in response to a request. In six further cases the airline may have failed to comply but it is not possible to reach a definitive conclusion on the basis of the information that we have. In five cases the airlines complied fully with the Regulation.

TABLE 3.2 INCIDENTS REPORTED THROUGH STAFF TRAVEL SURVEY

Number	Airline	Type of incident	Extent of compliance
1	EU network carrier	Cancellation	Compliant
2	EU network carrier	Cancellation	Not compliant
3	Low cost carrier	Delay over 2 hours	Possible non-compliance
4	EU network carrier	Delay over 2 hours	Not compliant
5	EU network carrier	Delay over 2 hours	Compliant
6	Low cost carrier	Cancellation	Not compliant
7	Low cost carrier	Delay over 2 hours	Compliant
8	Low cost carrier	Delay over 2 hours	Not compliant
9	Low cost carrier	Cancellation	Not compliant
10	Non-EU carrier	Cancellation	Possible non-compliance
11	EU network carrier	Delay	Possible non-compliance
12	Non-EU carrier	Cancellation	Compliant
13	Non-EU carrier	Cancellation	Compliant
14	Non-EU carrier	Definition unclear	Possible non-compliance

3.78 The cases in which the airlines were clearly not compliant were:

2. **EU network carrier, cancellation:** A passenger was booked to fly to Barcelona during the strike by Iberia staff in Barcelona. The flight was cancelled and no compensation was offered, but we accept that this event was exceptional circumstances. The passenger was offered an alternative flight to Madrid but specifically refused onward transport from Madrid. The airline should have been willing to pay for bus or rail travel from Madrid, or to provide a space on one of its flights the following day.
4. **EU network carrier, delay over 2 hours:** A passenger was booked to fly from France to the UK, but the flight was 3 hours late. The passenger complained to the airline. Passengers made a large number of complaints and requests for assistance which were initially refused. The airline did not inform the passengers of their rights, and is thus non-compliant. The airline did eventually offer water to passengers but no other refreshments. As the airline did eventually provide something, it may have been compliant with Article 9, but this was minimal and it should not required repeated prompting to comply with its legal obligations.
6. **Low cost carrier, cancellation:** A passenger was booked on a Poland to UK flight which was cancelled due to snow. No staff were available for information, and on calling the airline, the passenger was told the next flight was likely to be several days later. The passenger booked a flight with another carrier the next day, and asked the original carrier for a refund of this flight and the hotel. The carrier disputed both claims on the grounds of extraordinary circumstances and because the passenger should not have booked a flight on another carrier without their agreement. We accept that it is unclear whether the

airline is obliged to pay for a flight on another carrier but it should still have paid for hotel accommodation and other assistance given that no other option was made available and is therefore not compliant; it also did not comply with the requirement to provide information.

8. **Low cost carrier, long delay:** A passenger was booked to fly from London to Spain. The flight was delayed by 2 hours 30 minutes. No information or assistance was offered and there were no airline staff present to request information from. The airline should have provided information and assistance. The passenger wrote to the airline to request a refund for the cost of refreshments, citing the requirement in the Regulation to provide refreshments in the event of delays over 2 hours, but had not received a reply by the time this report was drafted, five months later.
9. **Low cost carrier, cancellation:** The passenger was booked to fly from Italy to the UK but the flight was cancelled due to bad weather. The passenger rebooked an alternative flight with the same airline the following day and paid for hotel accommodation overnight and transfers to the hotel, as none of this was offered by the airline. The passenger subsequently contacted the carrier to claim these costs as they were entitled to do under the Regulation. The airline immediately wrote back to refuse, on the basis that the cancellation was due to extraordinary circumstances. This clearly does not exclude the airline from paying for accommodation or an alternative flight on the same airline. It suggested that the passenger should claim from his travel insurance. The passenger wrote to the airline again specifically citing its duties under the Regulation, but did not receive a response within two months. The passenger wrote again to the airline to inform them that he would sue if they did not pay compensation: at this point, the airline immediately refunded the cost of the flight, but it still ignored the claim for a refund of the cost of the hotel.

3.79 The cases in which the airlines may have been non-compliant, or were partially non-compliant, were:

3. **Low cost carrier, delay over 2 hours:** A France-UK flight was 2 hours 45 minutes late. Under the circumstances, the passenger considered that the airline might have been able to claim that it would have delayed the flight further to provide assistance.
10. **Non EU carrier, cancellation:** A passenger was booked on a flight from the UK to India, which was cancelled due to a technical fault. The airline offered re-routing on a flight the next morning, and provided a hotel and meals. The airline did not claim extraordinary circumstances, but did not offer compensation.
11. **EU network carrier, delay:** A flight was delayed for 3hrs 45mins by snow and subsequent staff shortages. The airline provided drinks and allowed passengers to turn on mobile phones, but did not provide food or inform passengers of their rights. The airline could argue that providing food would have further delayed takeoff.

14. **Non EU carrier, possible cancellation or denied boarding:** A passenger was booked on a flight marketed as a through flight with one stop from London to Rio de Janeiro via Sao Paulo (with the same flight number throughout). On arrival at Sao Paulo the passenger was informed that the onward flight had already departed. No explanation was provided and hence it was not possible to check if extraordinary circumstances would have applied. The passenger was offered re-routing, with 4 hours delay, but not compensation or assistance. It is unclear whether this event was a denied boarding or cancellation (to which the Regulation would apply) or only a missed connection. It is also unclear whether this event would be within the scope of the Regulation, as the flight (if defined by the flight number) was from an EU airport, but the second sector, on which the incident occurred, was not.
- 3.80 We also asked passengers whether airlines were displaying the required notices at check-in. The majority said that they were not doing so, but we found that this was stated for a number of airports where all desks do have the notices, provided by the airport operator. This indicates that the notices may not be effective given all the other security-related notices that have to be displayed at check-in. However, we did find that:
- Some airlines including easyJet are not showing the notice required in their online check-in procedure; this is a clear breach of the Regulation
 - The notices are not shown by EU airlines at Geneva airport. Although this is not within the EU, the Regulation does apply to flights from this airport and the notices should still be displayed.

Conclusions

- 3.81 The Regulation appears to have had a limited impact on airline behaviour. There is no evidence that it has had any impact on delays, cancellations or denied boarding. However, as there is limited publicly available statistical data, and most European airlines were not willing to provide us with any additional data, there must be some uncertainty about this conclusion. The limited figures which we do have available indicate that the level of denied boarding in Europe is similar to that in the US which has a similar regulatory regime for denied boarding, which indicates that this may be the level that network carriers will select given the scale of the penalties in the Regulation at present.
- 3.82 The information that is available implies that around 1% of flights are subject to delays of more than 2 hours, 1-2% of flights are subject to cancellation, and around 0.1% of passengers are subject to denied boarding. This implies that the Regulation creates obligations for carriers to provide compensation, assistance, rerouting and/or a refund for 2-3% of passengers.
- 3.83 Airlines asserted that they were complying with the Regulation, and in most cases they do appear to have brought their conditions of carriage into line with it. However, airlines were not willing to provide us with firm evidence of this, and where we were able to obtain other evidence, the implications of this were mixed. Only one airline was willing to provide us with a copy of the instructions it issues to staff on the implementation of the Regulation, and this contained significant non-compliances.

Most NEBs considered that airlines generally did comply, with some exceptions, but passenger/consumer representatives and airports, which are in a better position to check compliance, were more sceptical. Our staff travel survey also presented a mixed picture of the extent to which airlines are complying with the Regulation.

4. ENFORCEMENT OF THE REGULATION

Introduction

4.1 This section outlines complaints handling and enforcement procedures in Member States. It discusses:

- the nature of the NEB in each Member State;
- the legal basis of enforcement;
- the date since which the NEB has had enforcement powers;
- the complaints which have been received;
- the resources available to the NEB;
- the procedures adopted; and
- the sanctions that can be and have been applied.

4.2 It also outlines the views of stakeholders on the enforcement process and how passengers have enforced the Regulation themselves through the civil courts.

4.3 More details on the NEBs and processes in each Member State are given in Appendix A (covering all Member States) and Appendix B (which provides more detail for case study states).

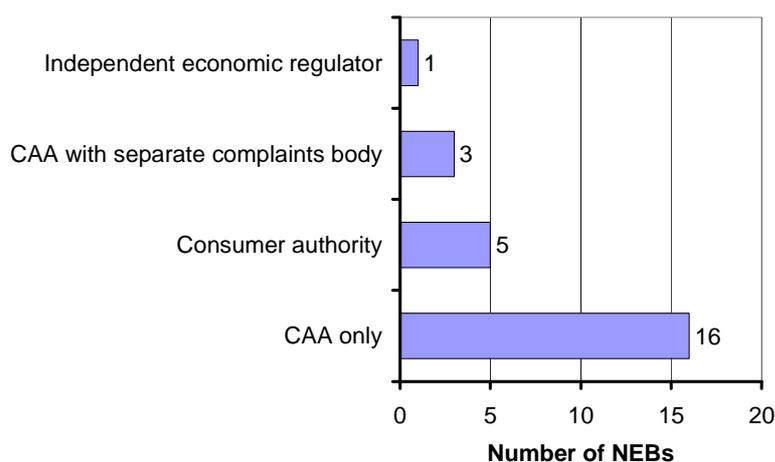
4.4 This section includes some statistical information, and figures which use these statistics to compare NEBs, for example in terms of the number of complaints they have received and the resources they have available. These statistics have been provided by NEBs, and as far as possible we have tried to ensure that this is comparable, but we cannot be sure that this will always be the case. Therefore, we suggest that the Commission should be cautious in interpreting these figures, and should take these into account alongside other information provided in this report.

Nature of the NEBs

4.5 In the majority of Member States, the organisation responsible for handling complaints and enforcement of the Regulation is the Civil Aviation Authority. However, different arrangements exist in a number of Member States:

- in Finland, Hungary, Sweden and the UK there is a separate organisation responsible for complaint handling;
- in Estonia, Latvia, Luxembourg, Slovakia and Sweden, the organisation responsible for the implementation of the Regulation is a general consumer authority and the Civil Aviation Authority is not involved; and
- in one Member State (Ireland), the organisation responsible for implementing the Regulation is an independent economic regulatory authority, with a remit that overlaps with that of Civil Aviation Authorities in some other states (particularly the UK), but without the safety-related regulatory role that a Civil Aviation Authority usually has.

4.6 The nature of the NEBs is summarised in Figure 4.1 below.

FIGURE 4.1 NATURE OF THE NEB

Source: SDG analysis

4.7 Sweden is the only Member State with separate complaints handling and enforcement bodies where the enforcement body is not the CAA. The Member States with complaints handling bodies that are separate from the CAA can be divided into two categories:

- In Finland and Hungary, the complaints handling body is a general consumer authority which functions as the main body responsible for implementing the Regulation. In these Member States, the consumer bodies function as a dispute resolution mechanism and the role of the CAA appears to be nominal.
- In the UK, the body responsible for handling complaints (the AUC – Air Transport Users Council) is a specific air passenger representative body. Its role is more limited, as it cannot function as a dispute resolution mechanism, and the CAA has a more extensive role in ensuring compliance with the Regulation.

4.8 As a further complication, in three Member States where a consumer authority has some or all of the responsibility for enforcement of the Regulation (Finland, Sweden and Hungary), this role is shared between more than one such authority.

Independence of NEBs

4.9 In almost all cases, the NEBs stated that they were independent from the aviation industry, but where the NEB was the CAA, it worked closely with the aviation industry on many issues and therefore there might be some informal links. In two Member States, it was acknowledged that the industry might have some indirect influence over the enforcement process:

- In Finland, complaints are ruled on by a Consumer Complaints Board which has both industry and consumer representatives.
- In the UK, the CAA is required to consult with the industry about its budget, including the resources allocated to the complaints handling body (the AUC); the AUC believed that this might give the airlines some scope to

influence the resources it had available.

- 4.10 The majority of NEBs were part of a government Ministry and therefore were not independent from government. Only the NEBs in Slovakia, Ireland and the UK were operationally independent from government, and in these cases, they still had to follow general guidance set by government. Some NEBs acknowledged that, in theory, it might be possible for airlines to influence their operations through lobbying of politicians, although they considered that this would not happen in practice.

Legal basis of enforcement

- 4.11 Table 4.1 explains the legal basis for enforcement in each Member State and key dates, including the dates since which NEBs have had enforcement powers and (where available) the dates when the NEB was set up. Several NEBs only obtained the power to impose sanctions quite recently. In some cases, even though the NEB has had legal power to impose sanctions for a longer period, it has only started active enforcement more recently, for example because it did not previously have enough staff; therefore, we have added other relevant dates here.

TABLE 4.1 LEGAL BASIS FOR ENFORCEMENT AND KEY DATES

Country	Law	Key dates
Austria	Amendment to Austrian Civil Aviation Law	1 July 2006
Belgium	Amendment to article 32 of Law of 27 June 1937	Passed 15 May 2006, came into force 25 May 2006
Cyprus	Aviation Law 2002 amended by Statutory Instrument 283/2005	16 June 2005
Czech Republic	Amendment to Aviation Act no. 49 1997	1 July 2006
Denmark	SLV designated as NEB for all infringements of EU law under the Danish Air Navigation Act	Pre-existing power
Estonia	Amendment to Aviation Act designates CPB as NEB	1 January 2005
France	Law for penalties not yet passed, but before Conseil d'État	-
Finland	Previous legislation implements all EU Regulations.	Pre-existing power
Germany	Amendment to Luftverkehrs-Zulassungs-Ordnung (Aircraft Licensing Act)	27 July 2005
Greece	Decision D1/D/49659/3247 designated Air Economic Sector of the Division of Air Transport Affairs as NEB	9 December 2004
Hungary	Previous legislation implements all EU Regulations.	Pre-existing power
Ireland	Statutory Instrument 274 established CAR as NEB Amendment to Aviation Act of 2001 granted enforcement powers.	31 May 2006 4 April 2006
Italy	Penalties enabled through Legislative Decree of 27 Jan 2006 NEB started to apply sanctions	Passed 27 Jan 2006, took effect 21 March 2006 July 2006
Latvia	Information not provided (requested)	
Lithuania	Previous legislation implements all EU law. Amendment of Government Decision Nr. 285 allows some penalties. Proposal to allow fines currently before parliament.	11 July 2006
Luxembourg	Previous legislation implements all EU Regulations.	Pre-existing powers
Malta	Subsidiary Legislation 232.09 defines enforcement regime Subsidiary Legislation 232.22 defines sanctions	17 February 2005 19 August 2005
Netherlands	Previous legislation implements all EU Regulations.	Pre-existing powers
Poland	Amendment to Aviation Act of 3 July 2002 established department for passenger rights	5 October 2005
Portugal	Previous legislation implements all EU Regulations.	Pre-existing powers
Slovakia	Previous legislation implements all EU Regulations.	Pre-existing powers
Slovenia	Aviation Act defines all aviation enforcement, including this Regulation	9 August 2006
Spain	DGAC designated as NEB under Royal Decree	Before Regulation took

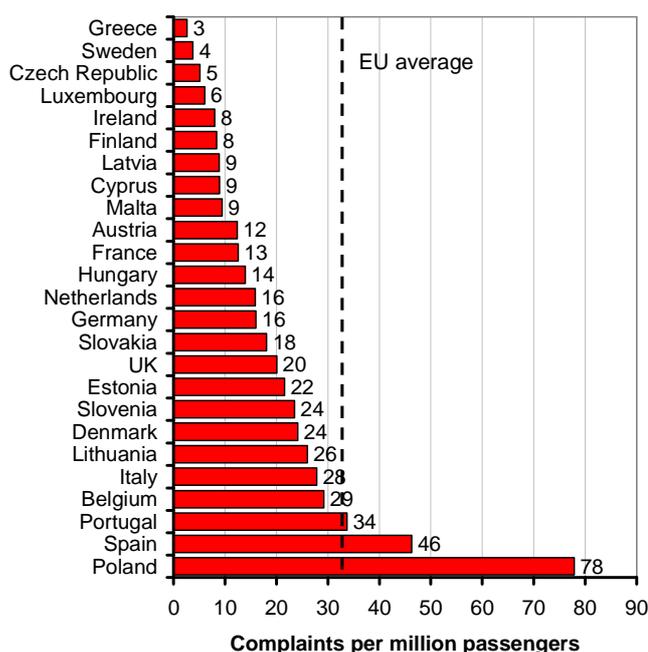
	1476/2004	effect
	Powers to impose sanctions under Law 21/2003	Pre-existing powers
	NEB took on sufficient staff to allow enforcement	April 2006
	Further amendments expected	2007
Sweden	Decree (2005:388) Changing the Decree (1994:1808) about Competent Authorities in the Civil Aviation Area appointed the Consumer Agency as NEB	1 July 2005
UK	Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005, Statutory Instrument number 975 (2005) designated CAA as NEB and established fine	23 April 2005

Complaints received

Complaints to NEBs

- 4.12 All 25 NEBs provided information on the number of complaints that they had received, of which 19 were able to divide these into the three main categories of complaints (cancellation, delay and denied boarding).
- 4.13 In total, these NEBs told us that they had received around 32,000 complaints under the Regulation since it came into force, equivalent to 44 complaints per million passengers departing from EU airports. The number of passengers which complain is probably 60-70 per million departing passengers if it is taken into account that some complaints cover more than one passenger. This is low in proportion to the number of trips for which the Regulation creates obligations: evidence evaluated in section 3 above implies that around 2-3% of passengers are affected by delays over 2 hours, cancellations or denied boarding. Even though airline compliance with the Regulation is mixed, the number of complaints received by NEBs equates to only 0.3% of the number of passengers affected by incidents covered by the Regulation and probably to only 0.5-1% of the number of passengers affected by airline non-compliance with the Regulation.
- 4.14 Figure 4.2 below shows that there has been very significant variation in the number of complaints between Member States, with the Polish NEB receiving 78 complaints per million passengers, compared to 3 for the Greek NEB. This figure shows the average rate of complaints since the Regulation came into force. **In many Member States, the number of complaints is increasing, and the current rate of complaints will therefore be higher than indicated in this figure.**

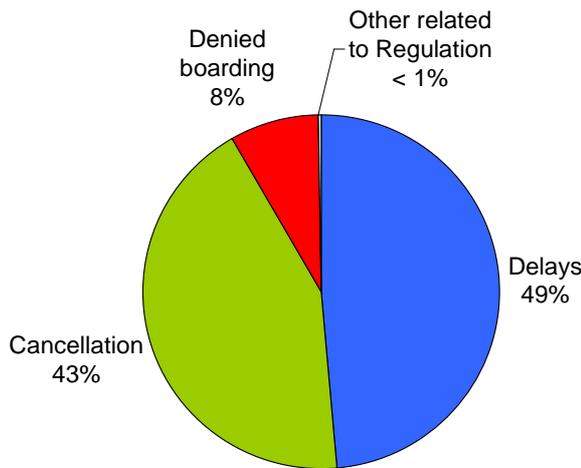
FIGURE 4.2 RATE OF COMPLAINTS, BY MEMBER STATE



Source: SDG analysis

- 4.15 The high figure for the Spanish NEB is particularly noteworthy as a high proportion of air travellers to/from Spain are holiday passengers from other Member States and therefore might be more likely to complain to the NEB of the state in which they are resident. We believe that this resulted in part from the problems experienced with Air Madrid, which were particularly severe in the months prior to our research. It is unclear why the rate of complaints in Poland would be so high.
- 4.16 In addition, some NEBs also have to process complaints that do not relate to the Regulation. Less than 40% of complaints received in Spain, and around 60% of complaints received in the UK, related to the Regulation. Other complaints related to issues such as lost luggage, the attitude of airline staff, and the consequential effects of delays. These are not included in the figures quoted above.
- 4.17 Figure 4.3 shows the types of complaints received by NEBs, for the NEBs that were able to provide a breakdown. Almost half of all complaints related to delays, and most of the remainder related to cancellations. Many NEBs were not able to distinguish complaints regarding other matters covered in the Regulation (such as downgrading or treatment of PRMs) from other complaints not related to the Regulation, and therefore the proportion of other complaints shown here may be a slight underestimate.

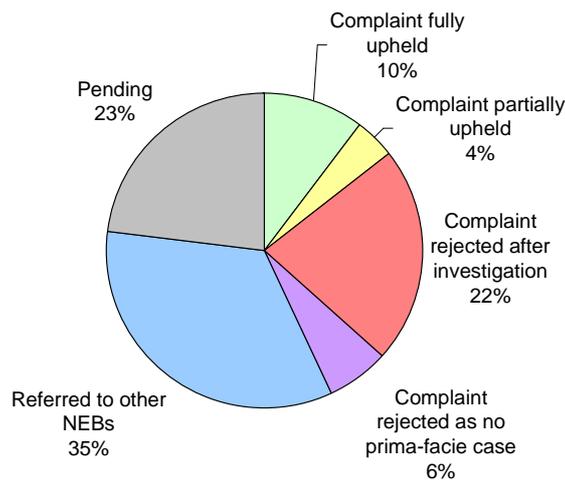
FIGURE 4.3 TYPES OF COMPLAINTS RECEIVED



Source: SDG analysis of data provided by NEBs

4.18 A proportion of complaints received by NEBs do not refer to genuine breaches of the Regulation, indicating that there may be some confusion amongst passengers about their rights under it. We asked NEBs whether they were able to provide statistics on the validity of complaints, and few were able to do so, but Figure 4.4 shows the figures for one NEB (Denmark). Of the complaints on which it had reached a final decision, 24% were fully upheld (10% of all complaints received) and 10% were partially upheld (4% of all complaints). 67% of complaints on which it had reached a final decision had been rejected either because there was no *prima facie* case of a breach of the Regulation, or after investigation.

FIGURE 4.4 VALIDITY OF COMPLAINTS (DENMARK)



Source: SLV

Complaints to airlines

4.19 The majority of complaints do not reach NEBs. For example, the Belgian NEB

informed us that for every complaint it received, Belgian airlines receive around 100 complaints. Other NEBs did not have information on the number of complaints received by airlines, and airlines refused to provide this information, citing commercial confidentiality. If this figure is representative, approximately 0.7% of European air passengers make complaints related to the Regulation. Most airlines stated that they handled complaints as quickly as possible and usually within 7-30 days, although many stated that there had been a significant increase in complaints after the introduction of the Regulation, and some admitted that they had not had enough staff to handle this increased volume within a reasonable timeframe. Our travel survey (discussed above) showed cases where airlines failed to respond within a reasonable timescale or in some cases at all to apparently valid complaints regarding the Regulation.

Complaints to other organisations

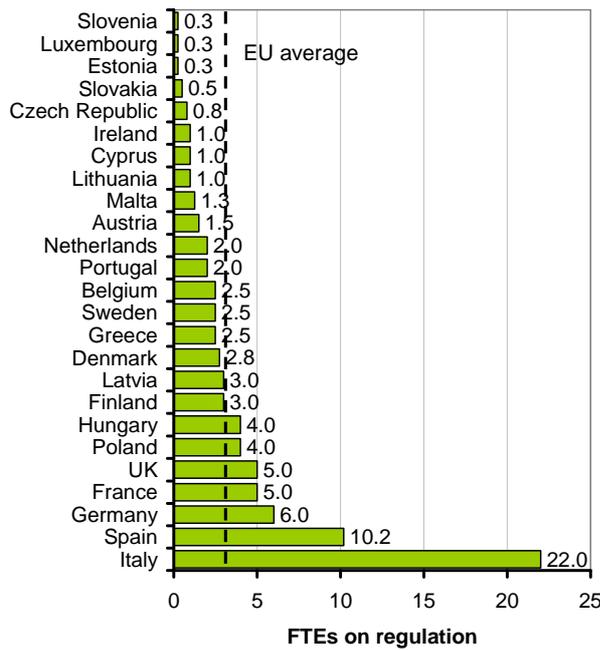
- 4.20 In addition, some passengers have used the ECC Network to help with complaints, or have complained directly to the European Commission, often where an NEB has failed to respond adequately. These organisations have been able to provide advice to passengers and may have been able to expedite the handling of complaints in some cases, but they have no statutory authority to deal with complaints.

Resources available to NEBs

Number of staff working on the Regulation

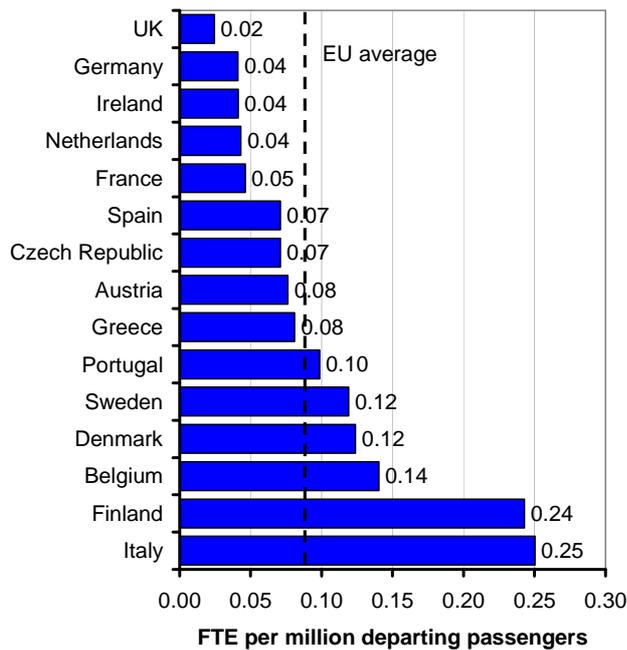
- 4.21 There was significant variation in the resources available to NEBs to handle these complaints. Figure 4.5 shows the number of staff working on enforcement of the Regulation, by Member State, expressed in terms of full time equivalents (FTEs). By some margin, the Italian NEB (ENAC) had more staff working on issues related to the Regulation than any other NEB: it estimated that the officers it had at each of the 40 Italian airports spent around 50% of their time on the Regulation, and in addition to this, had on average two FTEs in head office working on it.

FIGURE 4.5 FTES WORKING ON REGULATION, BY MEMBER STATE



Source: SDG analysis of data provided by NEBs

4.22 The comparison between the resources available to different NEBs is fairer if it also takes into account the number of air passengers to/from each Member State, and the number of complaints that have to be handled. Figure 4.6 compares the number of FTEs per million passengers. Some Member States with smaller aviation markets appeared to have a disproportionately high number of FTEs per million departing passengers, which we suspect may be due to the fact that there is a minimum practical size to an NEB; therefore, this figure only shows Member States with an aviation market of at least 10 million annual passengers.

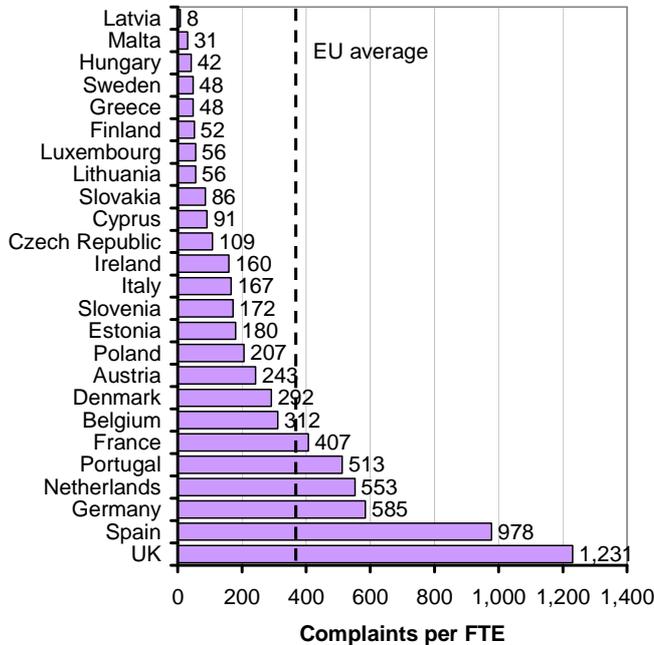
FIGURE 4.6 FTES PER MILLION PASSENGERS, BY MEMBER STATE

Source: SDG analysis of data provided by NEBs

- 4.23 This analysis shows significant variation in the number of staff available for enforcement of the Regulation; for example, there are more than 10 times as many FTEs working on enforcement of the Regulation, per million passengers, in Italy than in the UK. The NEBs in the Member States with the lowest numbers of staff available (Germany, Ireland, Netherlands and UK) all informed us that they did not have enough resources to handle complaints and/or enforce the Regulation. However, some of the NEBs with more resources available, including Belgium, also informed us that they needed more staff in order to fully implement the Regulation.

4.24 Taking into account the number of complaints received, the NEBs with the most significant resource issues appear to be Germany, Netherlands, Spain and UK (Figure 4.7). On average, each FTE in the UK NEB has to handle over 1,200 complaints per year, whereas each FTE in the Danish NEB has to handle only 292 and staff in many others have to handle less than 100.

FIGURE 4.7 ANNUAL COMPLAINTS PER FTE



Source: SDG analysis of data provided by NEBs

Types of staff

4.25 In addition to the *number* of staff available to NEBs, the *type* of staff available was also important. Many NEBs said that the complaints they received were often very complex, and it was not obvious whether a breach of the Regulation had occurred; they therefore needed staff with some legal qualifications to review complaints. In some NEBs, complaints are assessed by lawyers, and if an airline claims that an incident constitutes extraordinary circumstances, the incident is assessed by qualified technical staff, who review the flight log and other evidence to check whether the incident could have been avoided if reasonable measures had been taken. However, most NEBs do not have access to staff to undertake this assessment for all or in some cases any complaints.

Funding

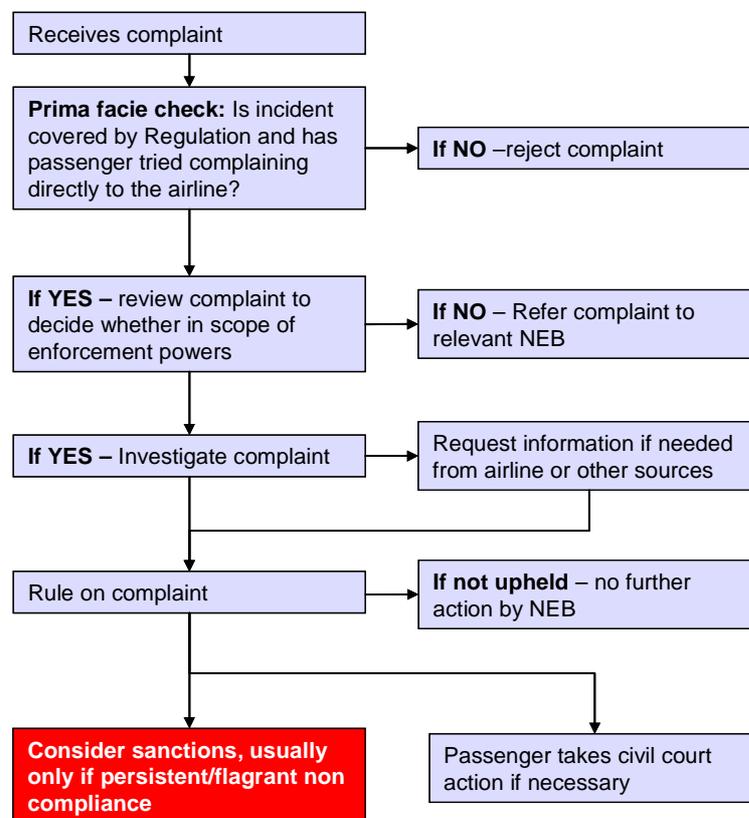
4.26 Most NEBs are funded entirely through general taxation. In seven Member States (Denmark, Finland, Germany, Greece, Hungary, Italy and the Netherlands) NEBs are funded in part through other sources, and in three Member States (Ireland, Portugal and the UK), the NEB is funded entirely through other sources. Other sources of revenue for NEBs included:

- levies on carriers registered in the Member State;
- levies on en-route charges, which therefore include foreign carriers;
- levies on airports;
- license fees; and
- fines issued for non-compliance with this or other regulations.

Enforcement procedures in Member States

4.27 The enforcement procedures vary between Member States, but there are common characteristics. A typical enforcement procedure is summarised in Figure 4.8 below; we describe the enforcement procedures in individual Member States in appendix A for non case study countries, and in greater detail in appendix B for the case studies.

FIGURE 4.8 SUMMARY OF ENFORCEMENT PROCEDURE



4.28 However, there are important variations between Member States. These variations include:

- the nature of any investigation into the complaint;
- how and whether the NEB evaluates any claim of ‘extraordinary circumstances’;
- whether the NEB actually makes a ruling on the complaint and whether this has any legal validity;
- whether complaints are referred to other NEBs, and when in the enforcement process this occurs; and
- whether any inspections are carried out to check compliance, independent of

the processing of complaints.

Nature of any investigation

4.29 Although there are substantial differences between NEBs, the process can broadly be classified as either an investigation process, a mediation process, or a formal dispute resolution process:

- **Investigation process:** Some NEBs undertake a formal investigation of some or all complaints. Belgium and Denmark appear to do this in most detail, but other countries, including Italy and Ireland, also undertake some investigation, checking key facts with staff at the airports. These investigations may result in a ruling which the airline has to follow, but (as explained below) in most Member States the NEB cannot issue binding rules.
- **Mediation process:** Other NEBs, such as UK, Netherlands, France and Spain, do not usually undertake an investigation but forward the consumers' complaints to the airline, possibly with some comments on whether there appears to have been a breach of the Regulation. They may also undertake further correspondence with the airline and/or the passenger depending on the response received. This can lead to a formal investigation process, were the airline to persistently fail to respond appropriately or if this showed evidence of serious non-compliance, but does not lead to any legally binding ruling.
- **Formal dispute resolution process:** In Member States where the primary enforcement body is a consumer authority (such as Sweden), the enforcement body functions as a dispute resolution process rather than an investigatory body. In these states, there may be a hearing in which each party is invited to state its views, or both parties may be invited to make submissions which a panel will rule on. This is more likely to lead to a legally binding ruling.

4.30 The differences in the enforcement process often reflect other characteristics of consumer or aviation legislation in the Member State. For example, many of the Scandinavian states have well-established consumer authorities with alternative dispute resolution processes as a user-friendly alternative to a court process, and these can be an effective way of dealing with complaints under the Regulation. A number of the new Member States have Inspectorates which perform a similar role. However, many other states do not have equivalent processes in other sectors and so have adopted a different approach to implementation of the Regulation.

Analysis of extraordinary circumstances

4.31 In particular, the depth of an analysis of whether a cancellation constitutes exceptional circumstances varies substantially. In Denmark and Belgium, there is an in-depth technical analysis if the airline claims that a flight was cancelled due to extraordinary circumstances. Specialist technical staff examine the flight log and other evidence to ensure that the circumstances were genuinely exceptional and unavoidable. If the airline refused to provide the detailed information necessary for this investigation, the NEB rules on the side of the passenger, consistent with the requirement in the Regulation for the airline to provide proof.

4.32 However, in other Member States, this analysis is less detailed:

- In some Member States (such as Sweden), an assessment is made as to whether the incident could have been avoided, but this is undertaken by non-technical staff. Airlines informed us that they did not have confidence in this process.
- In others (such as Spain), complaints handling staff may ask for specialist technical support to decide on individual cases, but the NEB said that it was not practical to do this in more than a minority of cases.
- In other Member States (such as the UK), the complaints handling body always accepts that a claim by the airline of technical or operational problems will be extraordinary circumstances and therefore that the airline will not have to pay compensation for cancellations in these cases.

Rulings on individual complaints

4.33 The powers NEBs have to take action on individual complaints is variable. Although NEB's may have the power to fine an airline, they rarely have the power to order it to pay compensation in an individual case. For example, in Italy, the NEB would issue a fine if the airline was not compliant, but if this was paid, the revenue would be retained by the state; there is no guarantee that the passenger would receive anything. In many Member States, failure on the part of airlines to provide a satisfactory response to reasonable complaints from passengers, including paying compensation if appropriate, could lead to a decision to impose fines, but again, this does not necessarily ensure that the airline pays in a particular case.

4.34 In several Member States, the NEB issues a ruling, which is not legally valid but which can be used by the passenger in a civil court as evidence that the airline has not complied with the Regulation; in these circumstances, the NEB's considered that airlines usually did comply with their rulings. In states where the complaints handling body acts as a mediation service, including the UK, it will not rule on individual complaints; if mediation fails, the passenger is free to pursue the matter in the civil courts, but has to do this without any assistance from the NEB.

4.35 Table 4.2 summarises the extent to which each NEB imposes rulings in individual cases.

TABLE 4.2 NATURE OF RULINGS ISSUED BY NEBS

Country	Nature of any ruling issued
Austria	Rules on individual cases, and can issue fines
Belgium	Not binding but can be used in civil court processes – airlines tend to follow
Cyprus	Process appears to be not well defined
Czech Republic	NEB can impose penalty if finds that airline is non-compliant
Denmark	Not binding but can be used in civil court processes – airlines tend to follow
Estonia	NEB requires airlines to comply with any decision within 1 month, and can appeal to county court if non-compliant. Airlines can also appeal to county court if they dispute the ruling.
Finland	Consumer complaints board makes rulings, not binding but airline would usually follow
France	NEB makes decisions on cases and can issue directions to airlines. Legal status of decisions untested.
Germany	NEB states that decisions are given for each case, and are not binding because not guaranteed to be accepted by courts. Consumer organisation states that NEB does not resolve individual complaints, and refers passengers to the civil court.
Greece	NEB issues written recommendation. If airline doesn't comply, can impose fine.
Hungary	Inspectorate (NEB) functions as a court – rulings apply directly
Ireland	NEB can issue direction to airline, failure to comply is an offence
Italy	NEB can issue fines but cannot force airlines to pay
Latvia	NEB can require airline to pay compensation
Lithuania	Rules on individual cases but cannot currently impose sanctions for non-compliance
Luxembourg	Rules on individual cases
Malta	NEB attempts to mediate, may sanction if airline does not comply
Netherlands	NEB only provides comments, does not rule on complaints
Poland	Decision given on infringement. Can impose fines if have evidence of non-compliance. Parties have right of appeal to administrative court.
Portugal	NEB attempts to mediate, but does not issue legally enforceable rulings
Slovakia	Rules on individual cases and can impose fines for non-compliance
Slovenia	Information not provided
Spain	NEB appears only to provide advice/mediation, not to rule on complaints
Sweden	Consumer complaints board makes rulings, not binding but airline would usually follow
UK	NEB only provides advice/mediation, does not rule on complaints

Handling of cross-border complaints

- 4.36 The Regulation only gives NEB's authority to impose sanctions regarding flights from the airports in their state and flights from outside the EU, but it does not specify what

action should be taken regarding other complaints. This is a particularly important issue, because failures by airlines to comply with the Regulation may create more difficulties for passengers if the incident does not occur in their home state. For example, if assistance is not provided after a cancellation:

- if the cancellation takes place in the passengers' home state, it is probably possible for them to go home and make any necessary re-routing arrangements themselves if the airline does not do so; but
- if the cancellation takes place elsewhere, passengers would need to find hotels until such time as the airline could re-route them, and they might have to arrange alternative transport themselves if the airline did not comply with this obligation.

4.37 There is some variation in whether NEBs refer complaints to other NEBs if they do not have enforcement power in the case. Many NEBs refer complaints to the other relevant NEB as a matter of course (including Austria, Belgium, Czech Republic, Denmark, Ireland, Italy, Netherlands, Portugal and Slovakia) but some never do (including Cyprus, Spain and UK) and some refer complaints in some cases but not consistently. France will refer complaints if they are in French, English or Spanish but will otherwise drop the complaint. There is also variation in *when* in the complaints handling process complaints are referred between NEBs; complaints can be referred either:

- immediately on receipt (as in Italy);
- immediately subject to some validation, for example to check that there is a *prima facie* case that the airline has not complied with the Regulation (as in Denmark or Belgium); or
- only if the airline is found to be non-compliant (as in Malta).

4.38 This variation has created difficulties. For example, in Sweden, the consumer complaints board (ARN) acts as an alternative dispute resolution mechanism, which it considers is equivalent to a court and therefore not subject to the constraint in Article 16 that enforcement action can only be taken regarding flights from airports within the state. However, airlines do not accept that it has authority in these cases. This variation also risks creating a situation where two NEBs rule (perhaps differently) on the same complaint: stakeholders informed us that in some cases passengers had complained to one NEB, and when they had not received the ruling that they wanted, they had then complained to another.

4.39 Several NEBs also pointed to difficulties with handling of complaints when they were referred to other NEBs. The main issues raised were:

- **Actions taken:** In general, NEBs did not check whether other NEBs took any action regarding complaints they had referred, but in some cases they had received feedback about this from passengers. A number of NEBs pointed out that the UK complaints handling body (the AUC) was refusing to handle any complaints from non-UK residents, which may be a breach of the Regulation. Some also noted that other NEBs (Spain was mentioned on several occasions) appeared not to take any action regarding internationally referred complaints.

- **Language:** Most NEBs which referred complaints to other NEBs stated that they provided a translation of the complaint, or at least a summary of relevant facts, in English or, where possible, the local language of the NEB they were referring the complaint to. Almost all NEBs said that they were able to handle complaints received in their local language and English, and several suggested that, as English is used as the standard language for other international aviation communications, it should be used for referred complaints. However, a number of NEBs complained that others referred complaints without translation (particularly France and Germany).

Inspections

- 4.40 Some NEBs undertake inspections at airports to check that the airlines are complying with the Regulation. This could take the form of either:
- inspections by NEB staff permanently based at the airports, as in Italy; and
 - inspections undertaken by staff based at NEB headquarters, as in Spain.
- 4.41 However, the extent of any inspections varies significantly. Some inspectors seek to check whether the airlines are complying with the Regulation when specific incidents such as cancellations occur, but this is generally only possible if the NEB has staff at the airport, as in Italy. In other cases, inspections are limited to ensuring that the required information is displayed, and some NEBs do not undertake inspections. In Italy and Spain, enforcement action can be undertaken on the basis of inspections, which means that the NEB does not have to wait to receive passenger complaints.

Sanctions imposed by NEBs

Ability to impose sanctions

- 4.42 Article 16 requires that sanctions for non-compliance with the Regulation must be **“effective, dissuasive and proportionate”**. Table 4.3 summarises the penalties that can be imposed for non-compliance with the Regulation. This shows that there is significant variation in the scale of the penalties that NEBs can impose. In Denmark, Hungary and the Netherlands, unlimited fines can be imposed for non-compliance. The highest defined maximum penalties are in Spain (€4.5 million), although in practice the penalty imposed in Spain has to be related to the amount that the airline could have saved through non-compliance, so any actual penalty would probably be well below this.
- 4.43 In contrast, in other Member States, the maximum penalties are much lower. In the most extreme case, Latvia, the maximum penalty is approximately €213, significantly less than the amount that an airline would typically have to pay as compensation in the event of denied boarding. In Estonia, Greece and Malta, the maximum penalty may also be lower than the cost of compliance in some cases.
- 4.44 In France, Lithuania and Luxembourg, we were informed that it was not possible for the NEBs to impose penalties at present (although legal processes to introduce sanctions were underway). These Member States therefore appear not to be compliant with Article 16 of the Regulation, which states that the NEB should be able to impose dissuasive penalties.

- 4.45 Of the Member States with larger aviation markets, the maximum fine is relatively low in the UK (£5,000, approximately €7,500) and a maximum fine of €7,500 will also apply in France soon. In states such as the UK and France where the maximum fine is moderate, we suggest that, in evaluating whether this is sufficient to comply with the requirements of Article 16 of the Regulation, the Commission should take into account other factors including the probability that a sanction might be imposed in a particular incidence of non-compliance. Given that the Regulation might require carriers to incur costs of over €1,000 per passenger in some cases, and the fine is unlikely to be applied except in a small proportion of cases (and has not been applied at all to date in the UK), carriers' financial position may be better if they do not comply with the Regulation. We make recommendations in section 8 below regarding the appropriate level of sanctions.

TABLE 4.3 PENALTIES FOR NON-COMPLIANCE

Member State	Penalties (€)		Notes
	Minimum	Maximum	
Austria	None	22,000	Criminal fine. Also up to 6 weeks imprisonment.
Belgium	200	4,000,000	Also up to 1 year imprisonment
Czech Republic	None	180,000	
Cyprus	None	8,500	
Denmark	None	No limit	
Estonia	None	639	First issue injunction, backed by potential fine
Finland	None	Related to turnover	First issue injunction, backed by potential fine. Fine determined by case law. NEB also publishes decision and 'blacklist' of carriers
France	n/a	n/a	Will soon have €7,500 fine for each infringement, with potential for doubling fine if offence repeated within a year
Germany	None	50,000 for non-cooperation	Can revoke traffic rights for non-EU airlines. Also have up to 25,000 per complaint for infringement, so potentially very large fines
Greece	1,000	3,000	Per passenger
Hungary	None	No limit	
Ireland	None	150,000	Maximum penalty €5,000 on summary conviction, €150,000 on indictment
Italy	333	50,000	Possible to impose multiple sanctions for an incident that is covered by more than one Article, so theoretical maximum higher
Latvia	None	215	
Lithuania	n/a	n/a	Proposal to allow CAA to impose fines currently before Parliament
Luxembourg	n/a	n/a	CAA expected to be allowed to impose fines by end 2006
Malta	None	2,300	
Netherlands	None	No limit	Two warnings required before fine can be imposed
Poland	0	25,000	
Portugal	250	250,000	
Slovakia	None	130,022	Maximum fine only possible for repeated breaches within one year
Slovenia			NEB was unable to provide information.
Spain	4,500	4,500,000	Amount of penalty usually has to be a multiple of the amount the airline has saved through non-compliance. Sanctions cannot be applied for all breaches of Regulation.
Sweden	None	45,000	Sanctions cannot be applied for all breaches of Regulation.

UK	None	7,500
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- 4.46 There is an important legal difference between the types of sanctions that can be applied in different Member States. In the majority, any sanctions issued for non-compliance with the Regulation would be an administrative penalty, usually issued by the CAA and subject to appeal to a civil court. However, in Austria, Belgium, Denmark, Ireland and the UK, penalties would be applied under criminal law and therefore a higher standard of proof would be necessary. In Belgium, the law also allows for the relevant airline staff to be imprisoned for a period of up to 1 year for non-compliance with the Regulation. Austria has the possibility of 6 weeks' imprisonment for serious infringement.
- 4.47 Some NEBs added that, if appropriate, they could take other actions against carriers. For example, if a non-EU carrier persistently cancelled flights due to technical problems, the authority could review whether it was a safe operator and therefore whether it should be permitted to operate to their state.
- 4.48 Two NEBs informed us that the provisions in their law did not allow application of sanctions for non-compliance with all aspects of the Regulation. In Spain and Sweden, no specific reference to the Regulation has been introduced into national law, and therefore the NEB could only apply sanctions under pre-existing legislation. In both Member States, this covers most but not all of the Regulation, and therefore these states are partially non-compliant with the requirements of Article 16. Other Member States also had no specific reference to the Regulation in their law, but had other provisions which allowed penalties to be imposed for all breaches of European aviation regulations.

Sanctions imposed in practice

- 4.49 Although most NEBs can impose sanctions, in practice very few have been imposed. Most of the sanctions that have been imposed have been in Italy, and as yet, no airline has paid a fine issued by the Italian NEB. The only other Member State with a large aviation market to have imposed sanctions is Spain, which has suspended the operating license of Air Madrid and is also in the process of considering sanctions against another carrier⁵. The investigation into Air Madrid which led to the suspension of its license covered both passenger rights (denied boarding, delays and cancellations) and maintenance issues, and the suspension of its license was imposed under Spanish law not the Regulation because, as explained above, sanctions for non-compliance with the Regulation have not been specifically introduced in Spanish law.
- 4.50 The number of penalties that has been imposed by each Member State is as follows:
- Italy – 63
 - Poland – 16

⁵ It should be noted that, the suspension of the operating license of Air Madrid was further to the suspension of services by the airline, which itself occurred after the NEB publicly threatened to suspend its license for non-compliance with an improvement plan.

- Hungary – 3
- Slovakia – 3
- Slovenia – 3
- Latvia – 1
- Spain – 1 (Air Madrid, sanction imposed under national law).

4.51 No other NEB has imposed any sanction on an airline, although the Consumer Complaints Board in Finland has published two rulings on cases where an airline has not complied; in Finland, publication appears to be the penalty, and it has been successful in both cases in persuading the airline to comply.

Enforcement by passengers through civil courts

4.52 In most Member States passengers must seek to obtain restitution through the civil courts if the airline does not respond adequately to the NEB. Most Member States have a small claims process which enables this to be done faster and at lower cost than through a conventional court process, but this also has some disadvantages. In particular, small claims processes do not establish any legal precedent and therefore cannot provide guidance on interpretation of the Regulation in future cases.

4.53 As local courts would usually be used, there is no single source of information even within individual Member States on the number of cases or the conclusions of these. NEBs were generally only aware of civil court cases when they had been provided copies of the ruling by either the complainant or the airline. Therefore, we were reliant on airlines to provide us with information on how many court cases they had faced; most were not willing to provide figures, but some airlines (on condition of anonymity) were willing to do so:

- One network carrier stated that it had faced 150 civil court cases. It told us that, in the majority of cases, the court had found that some payment needed to be made but less than was being demanded by the passenger.
- Another network carrier stated that it had only faced one court case. The passenger concerned had chosen not to complain to the relevant NEB but to go directly to court.
- Another network carrier stated that it had faced four court cases and won all of them. However, it also stated that it had received court summonses in 25 further cases which it had settled.
- Another carrier informed us that it had faced 8 civil court cases of which it had won 7 and settled one.

4.54 In addition, the German conciliation body for long distance travel (Schlichtungsstelle Mobilität) were aware of 60-80 cases in the small claims court in Germany, of which around half had already been ruled on and the remainder were pending.

4.55 This shows that there is significant variation in the number of civil court cases that there have been. Although it is not possible to reach statistically valid conclusions on the basis of information from four carriers, it is notable that the carrier which had faced a large number of court cases was based in a Member State where enforcement did not appear to be effective, whereas the (similar sized) carrier which had only faced

one was based in a Member State with highly effective enforcement. The fact that there has been a significant number of cases in Germany, where the NEB appears not to consistently take action on individual complaints, also implies that passengers are taking court action where enforcement is not effective.

Stakeholders' views on the enforcement process

- 4.56 Airlines generally claimed that they had had little contact to date with NEBs and therefore that they had few views in this area. Fines at the lower end of the scale, such as those available in the UK, were usually considered by airlines to be “proportionate and dissuasive” as required by the Regulation, although one airline considered even the UK level of sanctions to be disproportionate to the likely level of damage suffered by passengers. The main issues raised by airlines with regard to enforcement was:
- Airlines prefer to deal with NEBs that have relevant technical expertise, such as a Civil Aviation Authority, rather than a general consumer organisation which would not be able to evaluate the technical explanations provided by an airline.
 - Certain NEBs were forwarding all complaints to airlines without any filtering to ensure that there was actually a genuine claim under the Regulation. In these cases, airlines had to deal with a large volume of spurious complaints (for example, demanding compensation for delays).
 - Some airlines claimed that NEBs were issuing inaccurate rulings – for example, one claimed to have received fines from the Italian NEB for failure to provide assistance in the event of a delay, when the relevant flight had not actually been delayed.
- 4.57 The most significant issue raised by NEBs regarding the enforcement process was that many considered that they did not have sufficient staff available to undertake enforcement properly. As discussed in more detail above, resource problems could be due to both the number and type of staff available. NEBs emphasised that highly qualified staff were needed in order to handle complaints – both staff with some legal training to check whether there had actually been a breach of the Regulation in a specific case – and that staff with operational/technical expertise were needed to rule on whether a particular case constituted exceptional circumstances.
- 4.58 The other main issue raised by NEBs regarding the enforcement process related to complaints where the passenger was not resident in the Member State in which the incident occurred. These complaints appear not to be handled effectively at present, because not all NEBs refer these complaints to the appropriate NEB, and not all NEBs handle complaints referred by other NEBs.
- 4.59 A number of consumer organisations were also concerned that the enforcement process did not work well, for several reasons. The consumer organisation for Germany (VZBV) considered that the NEB in Germany was too weak, and that it was not willing to take action in individual cases to ensure that passengers obtained the rights provided by the Regulation. The Dutch Consumer Organisation had similar views, noting that it was very difficult for individual passengers to obtain their rights under the Regulation. Another consumer organisation was concerned that their NEB was too close to the national flag carrier, and was not willing to take action against it

despite the fact that it accounted for the majority of complaints. It suggested that enforcement should be undertaken at a European level to avoid any risks of favouritism towards particular carriers. The Gdansk Consumer Federation suggested that greater sanctions would need to be applied before airlines would change their behaviour.

4.60 Several other consumer organisations commented that enforcement of the Regulation was ineffective, for similar reasons. Most felt that the position of consumers continued to be very weak in any dispute with airlines, and that many NEBs did not take enough measures to ensure compliance with the Regulation or to ensure that individual passengers obtained their rights.

4.61 Similar issues were raised by the ECC Network, including:

- some NEBs do nothing if the airline does not respond to a letter, or refuses to pay, even if the airline appears to be in breach of the Regulation;
- some NEBs refuse to handle complaints from non-residents;
- NEBs often appear not to be able to take any action against airlines not registered in their Member State; and
- NEBs do not have enough resources to enforce the Regulation properly.

4.62 The ECC Network also suggested that NEBs should be required to investigate airline claims of “exceptional circumstances” in order to determine whether compensation should be paid.

Conclusions

4.63 There are significant differences in the enforcement process between Member States. The NEBs that appear to be most effective, such as those in Denmark and Belgium, use legally-trained staff to review each complaint and if appropriate also use technically-qualified staff to undertake a detailed assessment in each case in order to make an informed ruling on whether or not a complaint is valid. They also refer complaints to the appropriate NEB in another Member State if they do not have jurisdiction themselves. In these states, there are significant sanctions which could be applied, but this is considered unlikely to be necessary, because the process for ensuring that airlines comply in individual cases is so effective.

4.64 However, other NEBs are not able to undertake this type of enforcement because either they do not have enough staff or they do not have sufficient access to appropriately qualified staff. If a Member State such as the UK with a large aviation market was to handle complaints in the same way, the NEB would need to have 30-40 highly qualified staff working on complaints handling, far more than it does at present. There is substantial variation in the level of resources that NEBs have, and even some relatively well-resourced NEBs considered that they did not have enough resources to handle the number of complaints that they were receiving. In some Member States, the NEB does not appear to investigate complaints as a matter of course – and the Regulation does not appear to place any obligation on them to do so.

4.65 A particular problem at present relates to complaints about flights which were not from an airport located in the Member State in which the passenger is resident.

Passengers usually complain to the NEB of their home state, but NEBs do not have authority to impose penalties on airlines for flights to their Member State from other EU airports. Many (although not all) also interpret this to mean that they cannot investigate or rule on these complaints. Some NEBs refer these complaints to other NEBs, but not all do, and some NEBs either explicitly refuse to handle complaints referred from other NEBs or appear to take no action in practice.

- 4.66 Where the NEB does not take effective action on individual complaints, the position of consumers remains weak in any dispute with an airline. Some passengers have applied to the civil courts in order to obtain their rights, but this process is (to varying extents in different Member States) lengthy, difficult and expensive. As the airline is likely to have legal representation, but the passenger is unlikely to be able to afford this, the passenger is inherently at a disadvantage in this process; and in most cases, the civil court can only order that the airline pay what it should have paid in the first place. Therefore, individual legal action taken by passengers cannot be considered to be an adequate substitute for effective enforcement of the Regulation.
- 4.67 If NEBs do not take action on individual complaints, but nonetheless took effective enforcement action where there was evidence of repeated or flagrant breach of the Regulation, this might be sufficient to ensure compliance. However, most NEBs have not imposed any sanctions for non-compliance. In our view, there is insufficient incentive for airlines to comply with the Regulation in these Member States.
- 4.68 Article 16(3) of the Regulation requires Member States to introduce sanctions for non-compliance which are effective, proportionate and dissuasive. Three Member States have not introduced sanctions for any breaches of the Regulation and in two Member States, the law under which sanctions would be applied does not specifically relate to the Regulation and does not allow sanctions to be imposed for all possible breaches. In a number of other Member States, sanctions are not sufficient to incentivise airlines to comply, either because:
- the maximum penalty for non-compliance is lower than the expenditure which airlines might avoid through non-compliance; or
 - the penalty that airlines could reasonably expect to be applied in any individual case is lower than the expected cost saving from non-compliance, taking into account the probability that the penalty would actually be applied.
- 4.69 In our view a number of Member States have not complied with Article 16(3), either because they have not introduced sanctions, or because these are not sufficient to be effective and dissuasive.

5. STAKEHOLDERS' VIEWS REGARDING THE REGULATION

Introduction

- 5.1 This section sets out stakeholders' views regarding the Regulation. Stakeholders views regarding airlines compliance with the Regulation and the enforcement of the Regulation were discussed in sections 3 and 4 above.

The principle of the Regulation

- 5.2 Where they expressed opinions in general terms about the Regulation, stakeholders other than airlines supported it in principle. The majority of NEBs did not express general opinions about the Regulation and preferred to focus on specific issues. Some consumer representatives said that, although they supported the Regulation and that it was important to have standard minimum qualities of service, it did not go far enough, as it was too easy for airlines to avoid and did not provide adequate compensation in all circumstances. A few consumer representatives believed that the Regulation was complex and difficult to apply and the ECC Network advised that there was a great deal of confusion amongst passengers about the extent and nature of their rights.
- 5.3 In contrast, many airlines stated that the Regulation was unnecessary and excessively onerous, arguing that airlines were in a competitive market and therefore that customer service levels should be left to the market to determine. One airline claimed that airlines were the greatest innovators in terms of customer services and therefore that it should be unnecessary to regulate them. However, another airline stated that its analysis had shown that airlines did not face a sufficient commercial incentive to provide good customer service in the event of disruption, and this could be considered to support the case for regulation.
- 5.4 Several airlines suggested that the Commission should present statistical evidence to demonstrate that there was a need to act on the issues covered by the Regulation, although many of these carriers also refused to provide any such information, citing commercial confidentiality.

Detailed views on the Regulation

- 5.5 Some stakeholders raised issues with specific provisions of the Regulation. The most common issue raised was that elements of the Regulation are unclear: almost every stakeholder that we consulted with, including NEBs, airlines, airline representatives and airports, stressed that a key problem with the Regulation was that it was unclear on a number of key issues. Stakeholders expressed comments regarding many of the Articles of the Regulation, but the issues that were raised most often were:
- the definition of extraordinary circumstances;
 - requirements for re-routing and definition of “comparable transport conditions”;
 - the distinction between long delay and cancellations; and
 - application of the Regulation on flights from outside the EU.
- 5.6 There are a number of unfortunate consequences when the Regulation is unclear:

- Passenger expectations regarding the level of compensation and assistance that they should receive may be unreasonably increased, leading to unfounded complaints to airlines and NEBs, and disappointment when these are not upheld.
- Airlines are able to interpret the Regulation in the manner which suits them best, which may not be that which was originally intended or that which would be in the best interests of the passenger.
- It is difficult for NEBs to take any action. For example, it would be difficult to undertake a criminal prosecution for non-compliance when an airline could claim to be in compliance with at least one interpretation of the Regulation.

5.7 The rest of this section summarises the areas in which stakeholders had specific comments on sections of the Regulation and, in particular, areas in which they considered that the Regulation was unclear. This section draws heavily on the comments made by NEBs, which as a result of their day-to-day work on enforcement, were more likely to have detailed comments on individual Articles. The comments made by consumer representatives related more to the scope of the Regulation and possible extensions (discussed at the end of this section) and enforcement (discussed in section 4).

Recitals

5.8 Some stakeholders pointed out that Recital 14 appears to be inconsistent with the main body of the Regulation, because it implies that the extent of “extraordinary circumstances” is wider than it actually is. The European Court of Justice addressed this issue in its ruling on the Regulation⁶, ruling that there was some ambiguity in this case, but that the Articles themselves were clear and it was also established that the preamble to a Regulation could never be a basis for derogation from the actual requirements.

5.9 Some stakeholders, particularly airlines, claimed that Recital 14 permitted them not to pay compensation in the event that a passenger was denied boarding due to “extraordinary circumstances”. Taking into account the ruling of the ECJ, it is clear that this is not the case, but the text of the Regulation could be clarified in this regard.

5.10 Some stakeholders also suggested that the definition of extraordinary circumstances in Recitals 14 and 15 should be incorporated into the main text of the Regulation to make the legal status of the definition of extraordinary circumstances clearer.

Article 2: Definitions

5.11 One NEB suggested that the definition of a “ticket” in this Article should be extended to clarify which proportion of a flight should be reimbursed. This is particularly important for Article 10 (downgrading), as when this Article applies, the passenger is still likely to be making the journey, and therefore only part of the ticket price has to be reimbursed. Airlines also suggested that it could be difficult to calculate which

⁶ Judgement in case C-344/04, 10 January 2006, Paragraph 76

proportion of the ticket should be refunded.

- 5.12 A number of stakeholders commented that the definition of delay and cancellation was unclear: this is discussed below under ‘Delay’.

Article 3: Scope

- 5.13 Several NEBs stated that Article 3(1)(b), regarding the application of the Regulation to flights operated by EU carriers from third countries to EU airports, was unclear on the level of compensation and assistance that had to be provided. This Article states that the Regulation applies “unless they received benefits or compensation and were given assistance in that third country”. However, this could be interpreted as either:

- compensation and benefits have to be provided in the third country in accordance with its own national regulations, where a country has such regulations (for example the US and Brazil);
- compensation and benefits have to be provided in the third country that is at least equivalent to the level required in the Regulation; or
- *any* compensation provided in the third country is sufficient.

- 5.14 Several NEBs pointed out to us that some airlines were adopting the third of these interpretations, which is the least generous to passengers. Some airlines suggested that this was a reasonable interpretation of the Regulation.

- 5.15 One NEB also noted that it could be unclear which organisation had an obligation to the passenger with respect to flight-only seat sales on charter flights. These were not covered by the Package Travel Directive (90/314/EEC). However, in our view it is reasonably clear that this is the operating carrier and this issue was not raised by any of the charter carriers that we consulted with.

- 5.16 One NEB said that cases had arisen where airlines claimed that passengers did not have a confirmed reservation even though they had a ticket or an emailed receipt. This could arise in cases where the travel agent had not confirmed the booking and had overridden the computer reservation system to show that the reservation was confirmed. This issue could be dealt with by amending the Regulation to state “evidence of a confirmed booking”.

Article 4: Denied boarding

- 5.17 Some airlines claimed that Recital 14 provided sufficient basis not to pay compensation in the event that denied boarding was caused by “extraordinary circumstances”, for example if there is a technical fault with an aircraft which results in it being substituted with a smaller aircraft. As discussed above, the European Court of Justice ruling makes clear that this is not the case. However, one NEB stated that it had interpreted these events to be cancellations (even if the flight operated at the scheduled time with the same flight number) and therefore to be covered by Article 5 instead of Article 4, which allows for an exemption for extraordinary circumstances.

- 5.18 One NEB also suggested that Article 2(j) could be used not to pay compensation in this case, as it provides an exclusion “where there are reasonable grounds to deny

them boarding, such as reasons of health, **safety or security**"; an airline carrying passengers for which it did not have seats would be failing to comply with security regulations. However, it took the view that the word "them" meant that the issue had to be with the passengers themselves, not with the relative capacity of the aircraft. We agree with their interpretation but suggest that this could be clarified as it might be difficult to force airlines to accept this.

- 5.19 Airline representatives pointed out an apparent conflict between Article 4(3) and Article 7(3). Article 4(3) requires airlines to compensate passengers "immediately" in the event of denied boarding, implying that cash has to be paid at the airport, whereas Article 7(3) allows for payment by bank transfer, which is not immediate. Airlines informed us that it was not practical to hold large quantities of cash at the airport to enable immediate payment, and where NEBs expressed a view about this, they agreed. This issue could be clarified by removing the word "immediately" from Article 4(3) and replacing it with a specified deadline (7 days is used elsewhere in the Regulation, although many airlines believed that this was unrealistic).

Article 5: Cancellations

- 5.20 The issue of how extraordinary circumstances should be defined was raised by NEBs more often than any other issue. It was clear on the basis of the discussions we undertook with airlines that most airlines are currently attributing almost all cancellations to "extraordinary circumstances", on the basis of the causes listed in Recitals 14 and 15. Almost the only reason by which a cancellation would not be attributed to extraordinary circumstances by these airlines would be if it was a deliberate commercial decision by the carrier because a flight had a low load factor, and most airlines denied that these commercial cancellations ever occur, at least within the short notice periods envisaged in Article 5. In contrast, some of the non-EU airlines who input to our study did not consider that technical reasons constituted extraordinary circumstances, and our staff survey also showed an example of a non-EU airline paying full compensation for cancellation due to technical reasons.
- 5.21 NEBs pointed out that under certain circumstances, it is not clear whether a cancellation is genuinely due to extraordinary circumstances, particularly in the case of technical and weather-related causes. For example, a cancellation would appear not to be due to extraordinary circumstances if:
- the same technical fault had occurred repeatedly with an aircraft and had not been resolved; or
 - a flight is cancelled due to fog, but the aircraft could have been fitted with equipment that would enable it to operate in fog and the airport it was operating to was regularly subject to fog.
- 5.22 The ECC Network suggested that NEBs should be required to investigate cases in which airlines claimed exceptional circumstances. However, it would require significant resources for an NEB to investigate whether cases such as these are genuinely extraordinary circumstances or not. As discussed in section 4 above, many NEBs do not have resources available to undertake this level of detailed research, and it is unclear whether it is reasonable to expect them to have sufficient resources available to do this.

- 5.23 One airline stated that, at times, it “consolidates” flights. It stated that it was not clear whether this counted as a delay or a cancellation for the purposes of the Regulation. In our view, it is reasonably clear that this is a cancellation, although as discussed in section 3 above, it may be difficult for either passengers or NEBs to identify this.
- 5.24 Other issues that were raised by consultees with regard to this Article were:
- One NEB stated that there appeared to be a conflict between 5(1)(c) and 7(2). For example, in the case that a passenger is informed of a cancellation 7-14 days in advance and the flight is 1500-3500km, it is not clear whether the threshold at which compensation ceases to become payable is 4 hours delay as specified in Article 5(1)(c) or 3 hours delay as specified in Article 7(2)(a).
 - An airline representative stated that the meaning of this clause is different in the English and French versions of the Regulation.
 - Some NEBs suggested that the definition of extraordinary circumstances in Recitals 14 and 15 should be brought into the main body of the Regulation so that they had equivalent legal status.

Article 6: Delays

- 5.25 The main issue raised by NEBs with respect to this Article is whether, under some circumstances, a very long delay is effectively a cancellation. Most took the view that the current phrasing of the Regulation means that a delay, however long, is not a cancellation, although some considered that beyond a certain number of hours, it should be. At least one civil court has ruled that a delay of 24 hours is not a cancellation if the same number of flights operated as originally planned. Consumer organisations commented that very long delays would be considered by consumers to be, in effect, cancellations.
- 5.26 Some NEBs informed us that they were interpreting this Article to cover missed connections due to delays, where the passenger travels on a through ticket. This appears to be consistent with the spirit of the Regulation, but as discussed in section 6 below, our legal advisors have informed us that this is not correct, as the Article only refers to delay in the *departure* of the flight.
- 5.27 The assistance requirements under this Article appear to cause some confusion due to the wording. One NEB suggested that this could be clarified by specifying exactly what was required after a given delay, rather than referring to other Articles. Some stakeholders also suggested that some passengers were interpreting the right to a refund after 5 hours in Article 5(1)(iii) to mean that they were entitled to a refund even if they travelled. We understand that this is not the intention, but this could be clarified.
- 5.28 Some airlines also suggested that, whilst this is not unclear in the Regulation, harmonisation of the number of hours before refreshments were made available would make the Regulation easier to apply in practice.

Article 7: Compensation

- 5.29 Some NEBs stated that the amount of compensation payable was not clear in certain

circumstances involving connecting flights. If the first sector of a connecting flight is cancelled or the passenger is denied boarding, it is clear that the distance used in calculating the amount of compensation is the combined distance of the two flights, but if the problem occurs with the second flight, it is not clear whether the starting point for the calculation of the distance is the first airport or the connecting airport.

- 5.30 Several NEBs also suggested that this Article needed to specify how quickly the compensation should be paid. In other cases, where reference is made in the Regulation to payments, including Article 8(1)(a) and Article 10(2), there is a requirement that these payments are made within seven days, but this is not specified in this Article.
- 5.31 Several airlines suggested that it was unreasonable for Article 7(3) not to allow the compensation or refund to be paid as a credit to the passengers' credit card through which they would have purchased the ticket. They also commented that it was not feasible to make payments within 7 days as required.

Article 8: Right to reimbursement and re-routing

- 5.32 Other than the definition of exceptional circumstances, the issue raised most frequently by both NEBs and airlines was the appropriate definition of "comparable transport conditions" in Article 8. In particular, this is unclear on:
- whether airlines are *permitted* to re-route passengers via other airlines or surface transport; and
 - under what circumstances, if any, airlines are *obliged* to offer re-routing via other airlines or surface transport.
- 5.33 This is a particularly important issue for low cost carriers. IATA carriers generally have reciprocal agreements to handle each others' passengers in the event of disruption, but low cost carriers do not. Therefore, if they were to reroute passengers via other carriers in the event of a cancellation of a flight, they would only be able to buy tickets at the last-minute market rate, which would almost certainly be far more than the passengers paid in the first place. We were informed that there had been a number of civil court cases regarding this issue but, as these were through Small Claims courts, no clear precedent had emerged.
- 5.34 NEBs also pointed out a more minor, but nonetheless important, issue with Article 8(3). This requires airlines to provide onward transport if the alternative flight they provide is *to* a different airport; for example, if a passenger is booked on a flight Marseilles-Charles de Gaulle but is re-routed to Paris Orly instead, the airline clearly has to provide onward transport. However, if this occurs in reverse (the passenger is booked to travel from CDG but they are re-routed on an alternative flight from Orly) there appears to be no corresponding obligation on the airline to provide surface transport.
- 5.35 Charter carriers also informed us that it was unclear what amount was repayable if a passenger chose to cancel a package holiday due to a flight cancellation or a delay of more than 5 hours, as only the proportion of the cost associated with the flight would be refundable, but this was not separately identified. Some charter carriers have agreed

uniform cost rates for short and long haul travel which represent the amount that is to be refunded, but these amounts appeared to be low and it is not clear on what basis they were calculated.

5.36 ENAC, the Italian NEB, also informed us that there was an error in the Italian version of the Regulation, as this only referred to “flights” and therefore did not allow for other transport modes.

5.37 Some consumer representatives thought that airlines were re-routing passengers by bus as an alternative when flights were cancelled, even for quite long journeys (for example, 5-6 hours by bus). However, in our view this is a clear breach of the requirement to reroute under “comparable transport conditions” and therefore the Regulation should not need revision in this respect.

Article 9: Right to care

5.38 Both certain airlines and NEBs queried the quality and quantity of assistance that had to be provided in order to comply with the Regulation, particularly in terms of any refreshments. Some low cost carriers claimed that passengers had booked themselves into five star hotels and sought to reclaim the cost from the airline; although this appears unreasonable, it does not seem to conflict with the Regulation. In contrast, some airlines admitted that the only assistance that they would provide after a 2 hour delay would be one drink (possibly just of water), which may not be adequate.

5.39 The Regulation implies, but does not specifically state, that carriers are responsible for arranging hotel accommodation where required. Consumer organisations informed us that many carriers do not do so, and leave passengers to make claims subsequently (which they then often dispute). Consumers rights in this regard could be clarified.

5.40 Several airlines objected that, under certain circumstances, it was not possible to comply with this Article:

- As discussed above, in the event of major disruption involving closure of an airport, it is likely that most hotels in the area will become full.
- Some smaller airports do not have hotels nearby and refreshment facilities are limited.
- It may not be possible to provide a hotel to a passenger, for example if the airport hotel is ‘landside’ but he/she is not permitted to pass through immigration control (eg. if he/she is a citizen of a third country in transit at the airport and does not have a visa to enter the state).
- Many airports do not have fax or telex facilities available for public use. It is unclear whether passengers have to be offered one of these options or a choice between all of them.

Article 10: Upgrading and downgrading

5.41 The main issue raised with this Article was that, as discussed under Article 2 above, it is not always clear what proportion of the ticket price should be refunded when a ticket is for a multi-sector flight, such as a return, and the passenger is only downgraded on one sector. For example, if a passenger is downgraded on the outward

London-Frankfurt sector of a return flight London-Frankfurt-Singapore, this Article could be interpreted to require refund of *either*:

1. the whole return ticket London-Singapore;
2. the outward element of the ticket London-Singapore; or
3. the London-Frankfurt segment only.

5.42 In the case that option (3) applies, and also to an extent if option (2) applies, there may be difficulties in identifying the element of the fare that related to the flight. IATA prorate rules could be used but under some circumstances passengers might perceive these to be unjust.

5.43 Some charter airlines now offer a ‘premium’ class, usually with more spacious seats but often with little other difference. Passengers pay a fixed price per-sector upgrade fee to sit in this class. As the price of the flight is usually not explicit in the price of a package holiday, as discussed under Article 8 above, it may be difficult to identify how much should be refunded, and since the passenger will be dependent on the tour operator to specify this, they may perceive the results as being unjust.

5.44 It appears that the passenger has to accept downgrading, with the reimbursement specified in the Article. However, some passengers might prefer to refuse to travel; in that case, it is not clear what the passenger’s remedies are. Downgrading would not qualify as a “cancellation” as currently defined.

5.45 In the case of a long-haul flight, the carrier is obliged to reimburse the passenger 75% of the price of the ticket. However, it is quite possible that in some cases 75% will be less than the difference between the cost of a business class and restricted economy class ticket. Although the passenger still has a contractual claim against the airline for any additional difference, this is not so easy to enforce against the airline as a clear right for the whole difference.

Article 14: Provision of information to passengers

5.46 Although the Regulation itself is clear, airline representatives drew attention to an inconsistency between Article 14 and Article 6. Article 14 requires airlines to inform passengers about their rights after a delay of 2 hours, but for flights longer than 1,500km, passengers are not entitled to refreshments until the delay exceeds 3 or 4 hours. It is not obvious why passengers should be specifically informed of their rights before they have any entitlement under the Regulation.

5.47 The Italian NEB also pointed out that there was an inconsistency between the Italian and English versions of Article 14.2, as the word “affected” had a different meaning.

Article 16: Infringements

5.48 Several NEBs considered that there is an inconsistency between Article 16.2, which enables passengers to complain to any NEB, and Article 16.1, which limits NEB’s enforcement powers to flights from their Member State and to their Member State from non-EU countries. In our view, the Regulation is reasonably clear on this issue.

Some stakeholders considered that it was not clear in all circumstances what should count as enforcement for the purposes of Article 16.1: for example, investigation of a complaint (without imposition of penalties) or the operation of a dispute resolution process. Some airlines were also unclear whether “third country” in Article 16.1 meant only non-EU countries, although in our view Article 2 helps to explain this.

5.49 In addition, several stakeholders thought that there should be an obligation on NEBs to investigate complaints made under the Regulation. At present, there is no such obligation, but where NEBs do not take action on individual complaints, consumers are in a weak position in any dispute with an airline. Stakeholders views on the enforcement of the Regulation are discussed in more detail in section 4 above.

Information on the Regulation

5.50 Almost every airline we interviewed, and many of the NEBs, complained that information produced by the Commission regarding the Regulation had been inaccurate and confusing for passengers. They considered that this had led to inaccurate media reports particularly regarding the compensation requirements of the Regulation, and resulted in unreasonably raised passenger expectations. They argued that this contributed to the widespread perception that airlines were not complying with the Regulation and had also resulted in airlines having to process a large number of unfounded complaints.

5.51 Consumer representatives and the ECC Network said that airlines often also provided inaccurate information about passengers’ rights under the Regulation. Our travel survey also showed examples where this was the case.

Possible amendments to the Regulation

5.52 Many stakeholders, particularly consumer organisations and NEBs, considered that the Regulation should be amended to clarify the various points outlined above, and many also supported changes to improve enforcement. We also discussed with stakeholders whether any changes should be made to the requirements set out in Regulation. We asked in general whether any changes should be made, and also asked about the following specific issues:

- whether the Regulation should be extended to cover flights from airports outside the EU operated by a non-EU carrier, particularly where the passenger travels on a ticket sold by an EU carrier or if they were travelling on an inclusive tour operated by an EU-registered package holiday company;
- whether the amount of compensation set out in the Regulation was appropriate;
- whether compensation should be offered for long delays;
- whether the Regulation should provide for circumstances in which connections were missed; and
- whether the Regulation should provide for circumstances in which a flight is diverted to another airport.

5.53 In contrast, some stakeholders (particularly airlines) thought that no changes should be

made to the Regulation at present, even if they did not agree with all aspects of it. At the time of our interviews, the Regulation had only applied for around 18 months, and many Member States had only introduced penalties for non-compliance relatively recently. Therefore, they considered that it was too early to assess even whether the existing Regulation could be made to work, and that the Regulation should not be extended until this was determined. A number of stakeholder suggested that our review was being undertaken too early and that it would be better to undertake another review after the Regulation had been given time to work. Some suggested that, in the meantime, the Commission should publish (non legally binding) clarifications as to how the Regulation should be interpreted, without actually amending the text.

5.54 Of the possible changes we discussed with stakeholders, the area in which most stakeholders thought there was a strongest case for change was regarding the issue of missed connections, which several considered to be an important omission from the Regulation. Other issues that were raised by a number of stakeholders included:

- whether there should be some requirement on airlines to publish key performance metrics, such as cancellations and denied boarding; and
- whether the Regulation should specify the actions that should be taken by NEBs.

5.55 We discuss these issues in more detail below.

Application to non-EU carriers

5.56 With the exception of some consumer representatives, most other stakeholders thought that the Regulation should not be extended in this way. The issue raised most often was that the EU does not have the appropriate competence to legislate regarding incidents that take place by non-EU organisations outside the EU. Several stakeholders stated that they supported the EU when it objected to extra-territorial legislation passed by other countries, but that it followed that the EU should not introduce extra-territorial legislation. Some stakeholders, including some consumer representatives, stated that they would prefer the Regulation to be extended to cover non-EU operated flights but they doubted whether such a rule could be enforced.

5.57 Stakeholders, other than consumer representatives, also did not consider that codeshare flights to the EU operated by non-EU carriers should be covered by the Regulation. They believed that the only way to achieve this would be for the marketing carrier rather than the operating carrier to be made liable, as the Regulation could not be enforced against a non-EU operating carrier, but that this would not be consistent with the principle elsewhere in the Regulation that the operating carrier rather than the marketing carrier is responsible. However, one consumer representative organisation said that it was unfair that passengers travelling on flights operated by codeshare partners did not have the same rights.

The level of compensation

5.58 Opinions regarding the level of compensation varied by stakeholder type. NEBs generally thought that the level of compensation was reasonable, although a minority believed that it was disproportionately high for passengers travelling on very low

priced tickets and therefore that there ought to be some link to fares as well as to distance.

- 5.59 In contrast, airlines strongly expressed the view that the compensation requirements in the Regulation were excessive. Again, in particular they focussed on the level of compensation for passengers travelling on heavily discounted tickets, which they considered to be disproportionate relative to either the fare paid or the compensation payable for other modes of transport. However, one major airline argued that compensation for overbooking was too low, as unlike cancellations overbooking was a deliberate strategic decision by airlines and therefore compensation should be set at a level that deterred it.
- 5.60 Consumer representatives generally thought that the level of compensation provided in the Regulation was adequate, perceiving the key issue to be the difficulty in obtaining compensation rather than the level. However, one suggested that €600 compensation was not adequate for a long haul flight and another suggested that compensation for overbooking should be higher in order to eliminate the practice. Consumer representatives emphasised that the purpose of compensation should be to compensate passengers for the inconvenience suffered, and therefore it was irrelevant if compensation was higher than the amount of the ticket. Several consumer organisations pointed out that the compensation might be inadequate to cover the costs a passenger would incur if a holiday was cancelled as a result of a cancelled flight.
- 5.61 We also asked stakeholders whether compensation should be index-linked, to ensure that the level was not eroded by inflation. With the exception of airlines, most stated that they would support this, although several suggested that it should be subject to periodic review rather than automatic index linking, to ensure that the amount of compensation remained a round number. A number of airlines suggested that compensation should be index linked with fares, which would mean that it might decline, although some said that they would accept index-linking in the same way as the compensation units specified in the Montreal Convention (Special Drawing Rights) are index linked.

Compensation for delays

- 5.62 NEBs were divided on the issue of whether compensation should be introduced for long delays: of the NEBs that expressed an opinion to us about this, 13 supported this (often on the basis that, beyond a certain point, a delay should be considered to be a cancellation), 11 were against it and the remaining 5 did not express a definite opinion either way. Some considered that the Montreal Convention already offered passengers adequate protection for delays, and one argued that introduction of compensation could jeopardise safety. Several suggested that there should be a threshold beyond which a delay should be treated as a cancellation (suggestions ranged between 5 and 12 hours). One NEB informed us that some carriers already treated delays of more than 5 hours as a cancellation.
- 5.63 Consumer and passenger representatives generally agreed that there should be compensation for long delays, pointing to the fact that the consequences of delay could be more serious for the passenger than the consequences of cancellations. Some considered that the, at present, certain airlines were labelling cancellations as long

delays in order to minimise their obligations under the Regulation. However, one consumer organisation suggested that the Montreal Convention should be adequate to cover this, and another suggested that the objective could be achieved through amendments to the Conditions of Carriage rather than through a revised Regulation.

- 5.64 In most cases, airport representatives did not have any opinion on whether compensation should be introduced for delays, but the Spanish airport operator (AENA) suggested that delays of more than 12 hours should be treated as equivalent to cancellations for the purposes of the Regulation. Other consultees in Spain also pointed to long delays as a serious problem; this may reflect the severe problems that had been experienced by the airline Air Madrid in the months before our review, with many flights subject to delays of 12-48 hours, and reportedly very little assistance being provided to passengers.
- 5.65 Unsurprisingly, airlines and their representatives strongly opposed this suggestion. Several airlines stressed that airlines never intentionally delayed flights, or if they did, they would only do this when it was in customers best interests (eg. to wait for passengers from a connecting flight). Airlines emphasised that the majority of delays were caused by others, principally by air traffic management services, and that they already had a strong commercial incentive to ensure that their flights operated punctually.

Missed connections

- 5.66 Stakeholders expressed more support for extending the Regulation to explicitly cover the situation in which a connection is missed due to a late incoming flight, in order to ensure that the passenger was re-routed on the next available flight and if necessary offered assistance in the meantime. However, NEBs and airlines had different views on the *current* requirements of the Regulation in this regard:
- some interpreted it as not covering missed connections due to delays at all;
 - some interpreted it as covering missed connections if the incident causing the missed connection would in itself have been covered by the Regulation (such as a cancellation or a delay of more than 2 hours on a flight under 1,500km) but not if the incident causing the missed connection was a delay of under 2 hours; and
 - a small number interpreted it as already covering missed connections provided the passenger is travelling on a through ticket (one considered that this was effectively denied boarding because the passenger would have checked in for the flight).
- 5.67 The majority of NEBs thought that, if the Regulation was revised, it should be extended to explicitly cover missed connections. 17 NEBs informed us that they would support this change, and where NEBs did not support this, it was generally because they considered that the Regulation already covered missed connections. NEBs said that, although many airlines would already offer assistance in these circumstances, not all would, and as a result of this some passengers had been required to stay overnight in the airport terminal due to a delay which caused them to miss their connection. However, there was less agreement on whether the Regulation should be extended to cover this scenario regardless of whether both flights were operated by the

same carrier: some thought that it should also cover the scenario where the flights were operated by different carriers provided that the passenger was travelling with a through interline ticket; others thought this would be inappropriate; and some considered that this was already covered by IATA recommended practices.

5.68 Consumer representatives also thought that the Regulation should be extended to cover this situation: several considered that this was a major issue about which they had received a large number of complaints and that the Regulation currently offered inadequate consumer protection in these circumstances. Some airlines agreed, although the majority opposed any extension to the Regulation. Some airline representatives said that any extension of the Regulation to missed connections could discourage airlines from offering interline tickets, although as discussed above, this could be limited to missed connections when both flights are operated by the same carrier.

5.69 Most stakeholders agreed that any extension of the Regulation to cover missed connections should only apply where the passenger has a through ticket. Where passengers decide to buy two separate tickets, it was agreed that this should be at their own risk, as it was reasonable for airlines to make a commercial decision not to sell connecting tickets, or to charge extra for tickets with guaranteed connections.

Unscheduled diversions

5.70 A small majority of NEBs also believed that the Regulation should be extended to cover the situation where aircraft are diverted to a different airport. However, many opposed this, citing the fact that this would only occur due to exceptional circumstances; some NEBs that supported this change in principle stated that any extension of the Regulation in this area should be limited to the provision of care. Perhaps unsurprisingly, airlines opposed this change and most consumer representatives supported it, stating that some airlines (particularly low cost carriers) did not consistently provide either onward transport or assistance such as refreshments when aircraft were diverted to other airports. However, most stakeholders considered this to be a less important issue than the issue of missed connections, and few considered that it should be a priority.

Other issues raised by consultees

5.71 A number of consultees suggested that improved information disclosure should help consumers to make an informed choice between airlines. At present, information is not publicly available on denied boarding, diversions or missed connections. The AEA publishes some information on delay and cancellation for its members, and some delay data is available from other sources, but no other information is available. The US Department of Transport publishes a consumer report which provides much more statistical information than is available in Europe; some airlines stated that they would support equivalent information being available in Europe, although others strongly opposed this.

5.72 A number of NEBs suggested that the Regulation should specify which actions had to be taken by NEBs. At the moment, it states that passengers must be able to complain to any NEB, and that NEBs should be able to impose sanctions, but there is no

obligation on NEBs to investigate complaints. This was considered to have created a situation where one NEB (the UK AUC) was explicitly refusing to take any action on complaints referred by other NEBs, and some other NEBs appeared to be ignoring international complaints.

- 5.73 A further issue raised by some consultees is that it is difficult for passengers to contact airlines in order to make complaints, and that it can be difficult for NEBs or other organisations such as ECCs to make contacts with airlines or obtain any response. Our staff travel survey also showed an example of where a clear and well stated written claim from a passenger seeking to obtain his rights under the Regulation was simply ignored by the air carrier. It was suggested that airlines should be required to publish a single contact point for NEBs and possibly also for passengers.
- 5.74 Consumer representatives raised a number of other points about the Regulation, including:
- It appears inconsistent that the Regulation does not protect passengers when their baggage is damaged, delayed or lost by the airline, and it could be extended to cover this.
 - Airlines sometimes provide inaccurate information about flight delays and cancellations, or rerouting options, or there are no airline staff available to provide any information at all. Airlines then refuse to pay for rerouting arranged by the passenger, but the passenger had no alternative.
 - A notice about passengers' rights printed on tickets might be more useful than displaying a notice at check-in.

Conclusions

- 5.75 The issue raised most frequently by stakeholders was the lack of clarity in the drafting of the Regulation. The drafting had left a number of issues unclear, and created legal uncertainty; it had also given airlines scope to interpret the Regulation in the way that was most convenient for them. Almost every NEB that we interviewed considered that the lack of clarity in key elements of the Regulation was a significant problem. The issues that were raised most frequently were the definition of extraordinary circumstances, the requirements for re-routing particularly the definition of “comparable transport conditions”, the extent of compensation or assistance requirements for airlines operating flights from non-EU airports, and the distinction between long delays and cancellations.
- 5.76 Despite this lack of clarity, some stakeholders (particularly airlines) believed that it would not be appropriate to make changes to the Regulation at present. The Regulation had only been in force for 18 months at the time of our review, and as discussed in section 4 above, a number of NEBs had only started active enforcement more recently. Some suggested that the problem with lack of clarity should be addressed through publication of guidance on interpretation, although it was accepted that this would not be legally binding, and a number of NEBs considered that this would be insufficient.
- 5.77 If the Regulation was to be extended, the change that stakeholders would support most is the introduction of explicit requirements regarding missed connections, when

passengers travel on a through ticket. Most stakeholders, other than airlines, would also support a minor change to index-link the compensation amounts specified in the Regulation and many also supported a change to ensure that passengers were offered onward transport and assistance in the event of unscheduled diversion of aircraft. There was no consensus amongst stakeholders on other possible changes. In particular, the introduction of compensation for long delays, although favoured by most consumer/passenger representatives, would face very strong opposition from airlines, and NEBs were divided on the issue. In addition, stakeholders suggested a number of other measures which could improve the situation for passengers, including a requirement that airlines publish contact details for complaints, and publication of key performance metrics.

6. LEGAL REVIEW

Introduction

- 6.1 We asked our legal advisers, Clyde & Co Beaumont & Son Aviation, to advise us on elements of the Regulation which are unclear, and to suggest how these could be clarified. We also asked them to advise us on legal issues that could arise if any of the extensions to the Regulation, discussed in section 5 above, were made.
- 6.2 On the basis of this review and our other research, we have in conjunction with our legal team developed text for a revised Regulation which we have provided to the Commission.

Elements of the Regulation requiring clarification

- 6.3 There are a number of elements of the Regulation which are unclear or which could be interpreted in different ways. Where the Regulation is unclear, this provides an opportunity for airlines to select the interpretation that suits them best, and this may not be the interpretation that is in the best interests of the passenger, or what the Commission originally intended. Passengers are less likely to complain where an airline appears to have complied with at least an interpretation of the Regulation, and it is more difficult for an NEB to take action in these circumstances. Therefore, there would be benefit in clarifying any points that are unclear.
- 6.4 In conjunction with our legal advisers, we have identified the following elements which are unclear; several stakeholders also drew our attention to the same points:
- the definition of delay;
 - the extent of the benefits that have to be provided in a third country for an EU carrier not to have to provide benefits under the Regulation;
 - the rights of volunteers;
 - the definition of extraordinary circumstances;
 - the treatment of passengers subject to long delays;
 - the requirements on airlines to re-route passengers;
 - the extent of airlines obligations to provide meals and assistance;
 - the proportion of a ticket to be refunded in the event of downgrading; and
 - the definition of the final destination.

Definition of denied boarding, cancellation and delay

- 6.5 The terms “denied boarding” and “cancellation” are defined (in Article 2 (l) and (j)), but the term “delay” is not.
- 6.6 Denied boarding is defined in such a way that it includes non-carriage of a passenger not only because of insufficient capacity due to over booking, but also because, for example, the aircraft due to operate a flight becomes unserviceable and the only alternative aircraft available is smaller so that not all passengers can be accommodated, or if two flights have to be accommodated on one aircraft because there are technical problems, outside the airline’s control, with one of the aircraft. If

this situation is treated as denied boarding (as it is under the Regulation) then compensation is payable even if the reasons are entirely beyond the airline's control, whereas it would not be if the entire flight was cancelled.

- 6.7 Experience has shown that it is not always clear whether a flight has been cancelled or delayed – for example, particularly where the same flight number is used and/or passengers are accommodated on a flight which leaves quite a lot later than the originally scheduled flight. Some clarification might be provided by adding to the definition the words “and as a result the operation of fewer flights than scheduled”. In this way, where a carrier only operates flights, for example, on Monday, Wednesday and Friday, and the Monday flight does not operate but is put off till Tuesday, it will be clear that the flight is delayed rather than cancelled. Alternatively, cancellation could be defined as failure to operate a flight within a particular time after it was scheduled.

Flights by Community carriers from airports in third countries

- 6.8 Article 3 (1) (b) provides that the Regulation shall apply to passengers departing from an airport in a non-EU state to an airport in the EU on a flight operated by a Community carrier “unless they received benefits or compensation and were given assistance in that third country”. This leaves it unclear to what extent benefits/compensation/assistance must be given if this exception is to apply. We are aware of three possible interpretations which could be placed on this:

- benefits, assistance or compensation in accordance with any applicable local law (for example US law provides for this under some circumstances);
- benefits, assistance or compensation of value equivalent to or greater than that required under the Regulation for flights departing from EU airports; or
- *any* benefits, assistance or compensation, even if of value much lower than that required under the Regulation for flights departing from EU airports.

- 6.9 In our view, the first two interpretations could both be reasonable, but we were informed that some airlines have adopted the third. The Regulation could be clarified by amending it to make clear which interpretation was intended.

Rights of denied boarding volunteers

- 6.10 Article 4 (1) obliges airlines to call for volunteers to surrender their reservations in exchange for benefits to be agreed, but then goes on to say “Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph”. Article 8 provides for reimbursement and, when relevant, a return flight to the first point of departure, or re-routing.

- 6.11 If a passenger does not wish to volunteer for denied boarding, but is denied boarding, the passenger will be entitled to compensation and the Article 8 remedies. If a passenger agrees to volunteer and accept terms offered by the airline (i.e. travelling on a later flight and receiving some financial incentive for doing so) then the passenger will (voluntarily) have chosen re-routing, and it is unclear what the reference to additional assistance in accordance with Article 8 can mean. It appears that this clause is superfluous.

Extraordinary circumstances

- 6.12 Article 5 (3) provides that a carrier need not pay compensation in the event of cancellation if it can prove that the cancellation is caused by “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”. This term is not defined, although Recitals 14 and 15 give examples of extraordinary circumstances. The defence has been invoked quite frequently by airlines, and the question has arisen whether its scope is too wide or narrow and/or unclear. Consideration could be given to defining the term, in a non-exclusive way, rather than giving examples in the Recitals.

Passengers subject to long delay

- 6.13 Article 6 (1) (iii) provides that where a flight is to be delayed for at least 5 hours, the carrier must offer the passengers the assistance specified in Article 8 (1) (a) – i.e., reimbursement and, when relevant, a return flight to the first point of departure. Clearly, this means that if the passenger does not wish to travel on the delayed flight, the passenger is entitled to reimbursement and, where relevant, a return flight to the point of departure. However, it could also be read as meaning that a passenger who chooses to travel on the delayed flight is also entitled to reimbursement, which does not seem appropriate. This could be clarified by specifying in Article 6 (1) (iii) that the right only applies if the passenger decides not to travel.

Re-routing

- 6.14 Where re-routing has to be offered, the Regulation requires that this must be “under comparable transport conditions” and “at the earliest opportunity” (Article 8 (1) (b)). However, this leaves a number of issues unclear. The most significant issue in practice seems to be that it is unclear whether the carrier is obliged to book the passenger on a flight operated by another airline if it does not have a seat available. We are aware that, in practice, some airlines are interpreting this Article only to require provision of an alternative seat on the same airline, even if no such seat is available for several days.

- 6.15 In addition, the following points are open to various interpretations:

- Is re-routing by indirect flights acceptable?
- In the case of certain short-haul journeys, surface transport alternatives might be acceptable; should the airline be obliged to offer these, and could this be consistent with the Regulation?
- Should the carrier provide business class accommodation if that is all that is available for the immediate future?

- 6.16 In an attempt to remove some of these uncertainties, there seem to be two broad approaches:

- A more vague approach, providing that the carrier takes a reasonable approach to re-routing the passenger having regard to the schedules of its own and other carriers’ flights, the cost of re-routing the passenger on another carrier and the availability of indirect and/or surface alternatives.

- A more prescriptive approach. For example, the carrier could be obliged:
 - ♦ to re-route the passenger on another carrier where the carrier does not have a direct flight within a certain number of hours but another carrier does. For such purposes an approach such as that taken in Article 6(1) could be adopted – ie, that the specified period could differ according to the length of the flight
 - ♦ if no carrier has a flight within the specified period, then re-routing should be on the first flight thereafter, unless the carrier has its own flight within the specified period after the other carrier’s flight, in which case it is permitted to wait until then;
 - ♦ if there is no direct flight within a certain specified period, then the carrier must offer an indirect routing, and the passenger may either accept this or wait for the next direct flight.

6.17 The same issues arise with regard to the return flight to the first point of departure, required by Article 8(1)(a), and a similar approach could be taken here.

Meals/refreshments and hotels

6.18 In the event of temporary closure of a medium-large sized airport (20 million passengers per year) for operational or other reasons for a day, around 25,000 departing passengers would be stranded. Experience has shown that, in the case of such major disruption, such as the closure in 2006 of Barcelona airport due to a strike, all hotels in the vicinity quickly become full. There is no qualification of the obligation under the Regulation to provide hotel accommodation, and so it is not clear what should happen if there are no spaces available. In some cases hotel accommodation may be available, but only in expensive hotels and/or only at a considerable distance from the airport; the Regulation does not include any limits on the obligation to provide accommodation, but under some circumstances the transfer time might be such that this would not be worthwhile.

6.19 A similar issue applies with refreshments: at a very small airport, refreshment facilities may have limited supplies and opening hours. These can be exhausted in the event of significant disruption.

6.20 It is common practice, and generally accepted, for airlines to provide passengers with vouchers for meals and refreshments, but unclear whether they may do this for hotel accommodation or whether they are obliged to arrange the accommodation for passengers. This could be made clearer, for example, by adding after “hotel accommodation” the words “(to be arranged by the carrier)”.

Downgrading

6.21 Article 10 (2) provides that if a carrier downgrades a passenger it must reimburse a specified percentage of the price of the ticket, depending on the length of the flight. However, where a passenger is downgraded on one sector of a multi-sector flight, it is not clear what the price of the “ticket” to be reimbursed is – whether it is the ticket for only the relevant downgraded sector, to be ascertained in accordance with the applicable fare construction rules. This could be made clearer by adding the words “relating to the sector(s) on which the downgrading takes place”.

- 6.22 The Commission, in its answers to NEB’s questions regarding the Regulation, suggests that a practical solution for the airlines may be to issue separate tickets for each sector. However, this should not be necessary to identify the price of each sector, as IATA revenue allocation rules could be used as a proxy for this. In addition, if airlines issued separate tickets, connections would no longer be guaranteed, which would not be in passengers’ best interests.
- 6.23 We have been told that some airlines have claimed that downgrading from Premium Economy to Economy class on long haul flights is not downgrading as covered by the Regulation. Premium Economy is offered by some airlines including British Airways, Virgin Atlantic and many charter carriers. The difference between Premium Economy and Economy class in terms of both comfort and price is substantial, although there is often no difference in terms of other services, as passengers do not usually get offered better catering or lounge access, and on some airlines there may be no difference in the ‘booking class’ (i.e. the type of ticket). We have been advised that this issue is clear in the Regulation and that for airlines to make such a claim is a flagrant breach of the Regulation, but for the avoidance of doubt a definition of downgrading could be added. This could define the difference in class as being by virtue of different seats, seating configuration or other means of physical divide (such as a curtain), and/or based on the airlines’ own marketing.

Final destination/journey

- 6.24 The term “final destination” is relevant for the purposes of:
- The point to which re-routing is offered in the context of the carrier’s right to reduce compensation by 50% if the re-routed flight arrives within a specified time of the originally scheduled arrival time (Article 7 (2));
 - Identifying the point which an alternative flight must reach within two or four hours of the originally scheduled time of arrival in order for the carrier to be able to avoid the obligation to compensation (Article 5 (1) (c));
 - The re-routing obligation (which is to the “final destination”) (Article 8 (1) (b) and (c)).
- 6.25 In addition, the length of a “flight” is important for the purposes of calculating compensation, and it is calculated with reference to “the last destination to which the denial of boarding or cancellation will delay the passenger’s arrival after the scheduled time” (Article 7 (1)). Furthermore, where reimbursement is to be made, it must be of the full cost of the ticket “for the part or parts of the journey not made, and for the part or parts already made if...”, with, when relevant, a return flight to the “first point of departure” at the earliest opportunity (Article 8 (1) (a)).
- 6.26 These provisions, and the definition, are capable of causing some uncertainty, particularly in the case of multi-sector journeys involving separate tickets and/or a carrier which maintains that it is a point-to-point carrier only.
- 6.27 We suggest that it would assist clarity if “Final destination” were defined in Article 2 as the destination of the particular flight or, where the contract of carriage involves connecting flights, the destination of the last flight in the series of connecting flights, and Articles 7(1) and 8(1)(a) were amended to clarify how compensation or refunds

should be calculated.

Possible extensions to the Regulation

6.28 We have reviewed a number of options regarding possible extensions to or amendment of the Regulation. These are:

- extension of scope of enforcement powers of NEBs;
- provision of care in the event of diversion of an aircraft;
- provision of care in the event of missed connections;
- extension of the Regulation to flights from outside the EU operated by non-EU carriers.

Scope of enforcement powers

6.29 At present, under Article 16 (1) of the Regulation, NEBs can only take enforcement action regarding flights from their territory and flights from non-EU countries. This can create difficulties: passengers are more likely to complain to NEBs in the state in which they are resident, and this is easiest for them, but if the flight about which they are complaining was to that state from another EU state, the NEB does not have enforcement powers. This could be rectified by amending Article 16 (1) to give the NEB powers over all flights to/from the state, for example by amending the wording to state “as regards flights to or from airports situated on its territory”.

6.30 There appears to be some confusion regarding the ability of passengers to sue airlines for breaches of the Regulation in their own state. We were informed by an NEB that passengers could only sue an airline in a state in which the airline had an office, but we have been advised that in practice this is not the case. A passenger should be able to take legal action against an airline in the state in which they have bought the ticket, and the judgement should be enforceable throughout the EU as a result of established European legislation on recognition and enforcement of judgements.

Diversion of aircraft

6.31 In the event of an aircraft being unexpectedly diverted to an alternative airport, airlines conditions of carriage would usually (although not always) commit them to provide onward transport. However, this is not referred to in the Regulation and Article 6 (delays) only covers delays to departure of the aircraft. This has two consequences:

- passengers rights to onward travel are more difficult to enforce than they would be if specified in the Regulation and do not universally apply; and
- there is no obligation to provide passengers with refreshments or if appropriate hotel accommodation during this delay.

6.32 Our legal advice is that, in principle, there is no reason why the Regulation could not be extended to cover this issue.

Provision of care in the event of missed connections

6.33 Similarly, the definition of delay in the Regulation does not include circumstances where a connection is missed. For example, a passenger travelling from Brussels to

Singapore via Amsterdam might be delayed for 24 hours if the flight from Brussels to Amsterdam is delayed by a few minutes. The airline is probably contractually obliged to transfer the passenger to a later flight, but there is no obligation to provide refreshments or hotel accommodation, and we have been informed that some major European airlines do not do so.

6.34 We have been advised that, in principle, the Regulation could be extended to cover this, although the drafting of any such amendment would need to be clear in order to specify:

- **‘Point-to-point’ airlines:** Most low cost airlines do not advertise connecting flights and some specify in their terms and conditions that passengers should not book connecting flights; this enables them to reduce costs and hence ticket prices. In contrast, for other airlines such as Lufthansa and Air France KLM, connecting flights are a core part of their network business proposition. Any amendment would have to be clear whether any obligation only applied to flights booked as connecting flights.
- **Circumstances causing the delay:** Missed connections are often caused by the airport rather than the airline, for example because there is a long queue at security control. The Regulation should be clear on whether the airline is liable under these circumstances.
- **Missed connections at non-EU airports:** Any amendment would have to be clear as to whether it covered flights from the EU where the missed connection was at a non-EU airport – for example Paris to Bangkok where the journey is delayed by a missed connection at Dubai.
- **Inter-line connections:** The amendment would have to be clear which airline was responsible in the event of a missed ‘inter-line’ connection (between flights operated by different airlines).

Extension to flights to the EU operated by non-EU carriers

6.35 We have been asked by the Commission to assess whether the Regulation should be applied to flights into the EU operated by non-EU carriers. From the legal point of view, there are three areas which merit consideration:

- sovereignty/extra-territoriality;
- the Montreal convention; and
- enforcement.

6.36 If the Regulation was extended to cover these flights, it would be seeking to regulate non-Community carriers in respect of acts and events occurring outside the EU and in their own countries. For example, the Regulation would apply if Qantas denied boarding to a passenger at Sydney airport or cancelled a flight due to depart from Sydney airport, or where a flight was delayed in departing from Sydney airport by several hours. These are all acts and events which take place entirely within (in this example) Australia. In this way, an attempt to extend the Regulation to such acts and events can be distinguished from EU (and indeed US) regulations which appear to have extra-territorial effect (for example, on liability notices, passengers with reduced mobility, etc) but in fact apply, at least in part, to flights while in EU airspace. This is not, however, the case with the acts and events intended to be regulated in the present

context and such regulation might be held extra-territorial, and hence unenforceable, subject to the point made below.

- 6.37 However, the regulation of such events occurring outside the EU where the ticket was purchased in the EU would probably not be extra-territorial. It was so held in the US case of *CAB v Lufthansa* (AG 591 F 2d 951 (DC Cir, 1979), 15 Avi 17,528) with regard to US regulations regulating overbooking and denied boarding.
- 6.38 The Commission will also be aware that IATA challenged the Regulation on the grounds that (amongst other things) it was inconsistent with the provisions of the Montreal Convention 1999 on delay in that the Convention provides a defence to claims and a limit on liability for delay, whereas the Regulation provides neither. The European Court of Justice, in its judgment on 10 January 2006, held that there was no incompatibility, on the grounds that the Regulation and the Convention did not have overlapping scope. The ECJ's judgment is final for internal EU purposes, but it is possible that a non-EU court could come to a different conclusion. It is also possible that one or more non-EU states party to the Montreal Convention could bring proceedings in the International Court of Justice against the EU for infringing its treaty obligations towards its Montreal Convention partners.
- 6.39 While a passenger might bring a claim in an EU Member State, in some cases foreign nationals would find it difficult to do so in practice. Therefore, they would have to seek to enforce their rights under an extended Regulation in their home country, where there would be a possibility (whether for extra-territoriality or Montreal Convention reasons or otherwise) of the court refusing to recognise the Regulation.

7. CONCLUSIONS: THE OPERATION AND RESULTS OF THE REGULATION

The impact of the Regulation

- 7.1 We sought to evaluate whether the introduction of the Regulation had had any effect on the level of cancellations, delays, denied boarding and downgrading, and the conclusions of our analysis are set out in section 3. We found that there was limited publicly available information on cancellations and delays, and almost no information was available on denied boarding, downgrading, diversion of aircraft or any other issue which may create difficulties for passengers. We asked airlines to provide this information to facilitate our review, but most were not willing to do so, and even when they were, the information was not subject to any independent verification and we could not be sure that data from different sources was comparable. This inevitably creates uncertainty in any evaluation of the impact of the Regulation and limits the benefits from any assessment of the impact of any changes.
- 7.2 Based on the limited information available, it appears that the Regulation has had little or no impact on the level of delays, cancellations or denied boarding. However, the incidence of overbooking (and hence denied boarding) may be declining in any case, as fewer passengers are travelling using flexible tickets. It is therefore easier for air carriers to predict how many passengers will check in as planned.
- 7.3 The evidence on the extent to which airlines have complied with the Regulation is mixed. Airlines stated that they were complying and we did find that most airlines had adjusted their terms and conditions of carriage to be compliant. However, with few exceptions, airlines were not willing to provide us with any further information which demonstrated their compliance. For example, we asked for the guidance notes provided to airline staff on how to handle incidents, but only one airline was willing to provide this, and this case showed significant non-compliance. NEBs believed that airlines generally were complying with the Regulation but noted a number of exceptions, and in most cases recognised that they were only likely to be aware of non-compliance when passengers complained. Consumer representatives pointed to a number of ways in which airlines were failing to comply, and our travel survey also showed a number of examples where airlines had not complied with some or all of their obligations. A key issue is that airlines are seeking to minimise the extent of their obligations under the Regulation, for example by categorising almost all cancellations as extraordinary circumstances; in some cases this exploits elements of the Regulation which are unclear and in other cases relies on the fact that enforcement of the Regulation has been limited.
- 7.4 In our view, these two reasons account for why there has been difficulty with the Regulation in practice:
- ineffective enforcement in some Member States; and
 - the text of the Regulation is unclear in many areas.

Complaints handling and enforcement

- 7.5 As discussed in section 4, enforcement has not been effective in all Member States, for several reasons:

- **Timing:** When we undertook our research, the Regulation had only applied for around 18 months. Many NEBs had only started actively enforcing the Regulation quite recently. Some NEBs were not set up until some time after the Regulation was introduced, and laws allowing sanctions to be applied were often introduced quite recently.
- **Lack of sanctions:** A number of Member States, including France, still had not introduced the powers to impose sanctions, for some or all breaches of the Regulation at the time our review was undertaken. Few Member States have issued sanctions for non-compliance, and as far as we are aware no airline has paid any sanction.
- **Lack of resources:** Many NEBs do not always have sufficient resources, either in terms of the number of staff or the technical skills required, to investigate and rule on every complaint. Several NEBs were in the process of taking on additional staff but the number of complaints is also increasing, so it is unclear whether this will be sufficient.
- **Cross-border complaints:** Consumers will usually complain to the NEB of their home state, but this does not have jurisdiction if the flight was to that state from elsewhere in the EU. The NEB should refer this complaint to the appropriate NEB, but not all NEBs do so, and not all NEBs handle complaints referred to them from other NEBs; in addition, NEBs may face difficulties in taking enforcement action against carriers registered in other Member States. Considerable differences in the nature of the enforcement process in different Member States, and language issues, also hamper the handling of cross-border complaints.

7.6 Enforcement can be expected to improve, as NEBs have now been set up in all Member States, sanctions for non-compliance have now been introduced in most Member States, and most Member States that had not yet introduced sanctions were planning to do so shortly.

7.7 However, the existence of sanctions is not in itself sufficient to demonstrate that a Member State has complied with the requirement in Article 16(3) that sanctions should be “**effective and dissuasive**”. Sanctions might fail to meet this requirement if either:

- the maximum penalty was lower than the cost airlines might avoid through non-compliance; or
- the penalty that airlines could reasonably expect to be applied in any individual case was lower than the expected cost saving from non-compliance, taking into account the probability that the penalty would actually be applied.

7.8 There is in any case no obligation for Member States to undertake investigation and enforcement of individual complaints as effectively and in as much depth as some states (particularly Belgium and Denmark) do, and it may be difficult to persuade others to do so, because of the resources that would be required. We estimate that, in a state such as the UK with a large aviation market, this would require an agency with 30-40 full time staff and a budget of €5-10 million per year. In our view it is unrealistic to expect all Member States to undertake investigation and enforcement in this way.

Unclear elements of the Regulation

- 7.9 Even if enforcement improves, the other key issue will remain – the clarity of the text of the Regulation. The drafting of the Regulation is unclear in several areas, and this has given airlines scope to interpret the Regulation in the way that is most convenient for them – which may not be what is in the best interests of passengers or what policymakers had originally intended. As summarised in section 5, stakeholders raised issues with almost every Article in the Regulation, but the issues raised most frequently were:
- the definition of extraordinary circumstances;
 - the requirements for re-routing, particularly the definition of “comparable transport conditions” and whether airlines should be required to pay for re-routing on other carriers;
 - the extent of compensation or assistance requirements for airlines operating flights from non-EU airports; and
 - the distinction between long delays and cancellations.
- 7.10 A number of these issues were also raised in the independent legal review of the Regulation that was undertaken for this study and which is summarised in section 6.
- 7.11 Despite this lack of clarity, many stakeholders, including airline representatives and a minority of NEBs, suggested that it would not be appropriate to make changes to the Regulation at present. The Regulation had only been in force for 18 months at the time of our review, and as discussed, a number of NEBs had only started active enforcement more recently. Some suggested that the problem with lack of clarity should be addressed through publication of guidance on interpretation of the Regulation, although this would not be legally binding. However, many others suggested that the only way to resolve the issues that have arisen with the Regulation was an amended Regulation.

8. RECOMMENDATIONS

Introduction

8.1 This section sets out our recommendations. We discuss recommendations in the following categories:

- actions to persuade Member States to comply with their obligations under the existing Regulation;
- the potential legal basis of any clarifications of the Regulation;
- changes to, and clarifications of, the requirements of the Regulation;
- changes to the regime for enforcement of the Regulation;
- introduction of requirements regarding publication of key performance indicators for air carriers; and
- further analysis and reporting on the effect of the Regulation.

Disclaimer

8.2 This section of the report includes reference to detailed legislative proposals. Drafting of new legislation was not within the original scope of work agreed for this study and we have provided the Commission with a draft, at its request but on an indicative basis. The draft revisions to the Regulation have been reviewed by our legal advisers but we strongly recommend that the Commission should take its own independent legal advice.

Member States to comply with their obligations under the existing Regulation

8.3 The Commission has previously warned that it might undertake infringement proceedings against Member States which have not introduced into national law sanctions for non-compliance with the Regulation. Three Member States (France, Lithuania and Luxembourg) have not introduced sanctions for any breaches of the Regulation and in two Member States (Sweden and Spain), the law under which sanctions would be applied does not specifically relate to the Regulation and does not allow sanctions to be imposed for all possible breaches. The Commission could consider infringement proceedings against these five Member States, but all informed us that they were planning to introduce sanctions covering all breaches of the Regulation and in many cases the relevant legislative procedures were already underway. Therefore, there might be little benefit from undertaking infringement proceedings against these Member States.

8.4 However, as discussed in section 4, the mere existence of sanctions is not in itself sufficient to demonstrate that a Member State has complied with the requirement in Article 16(3) that sanctions should be “effective and dissuasive”. In our view, a Member State might fail to meet this requirement if either:

- the maximum penalty for non-compliance is lower than the expenditure which airlines might avoid through non-compliance; or
- the penalty that airlines could reasonably expect to be applied in any individual case is lower than the expected cost saving from non-compliance, taking into account the probability that the penalty would actually be

applied.

- 8.5 In a number of Member States, the maximum penalty for non-compliance appears to be too low, in comparison with the cost of compliance, to incentivise compliance. This is most clearly the case in Latvia and Estonia, but for some infringements could also be the case in Malta and Greece.
- 8.6 In our view, there are a number of other Member States in which the maximum penalty would be sufficient to incentivise compliance if it was likely to be applied in a significant proportion of cases in which there was a breach of the Regulation, but is insufficient taking into account the probability that it would actually be applied in any individual case. In our view, this is the case in the UK, where the maximum fine is £5,000 (€7,500), and will be the case in France if maximum sanctions at the same level are introduced, as planned. Given that the Regulation might require carriers to incur costs of over €1,000 *per passenger* in some cases and the fine is unlikely to be applied except in a small proportion of cases (and has not been applied at all to date in the UK), carriers' financial position may be better if they do not comply with the Regulation.
- 8.7 In our view, appropriate maximum penalties should be calculated taking into account the proportion of passengers affected by non-compliance that will complain, the proportion of valid complaints which would lead to a penalty, and the cost of compliance with the Regulation in each case. In section 4 above, we estimate that the number of complaints to NEBs equates to 0.3% of the number of passenger journeys in which the Regulation creates obligations for airlines; and as airline compliance appears to be mixed, might therefore cover 0.5-1% of cases in which an airline has not complied with the Regulation. The normal cost of compliance per passenger is low (often only around €5-10 for refreshments, and generally under €100) but in a small proportion of cases (particularly denied boarding on long haul flights) compliance costs might be €1,000 per passenger or higher. On this basis, appropriate maximum sanctions would be in the following range:
- In Member States where the enforcement procedure was such that sanctions would usually be applied if a passenger complained to the NEB and this complaint was upheld, maximum penalties should be in the range €20-50,000 per passenger which complained. This is still much higher than the cost of compliance per passenger, because only a small proportion of passengers will complain to the NEB.
 - In Member States where sanctions are only likely to be imposed in cases of deliberate, flagrant and persistent non-compliance with the Regulation, and therefore sanctions would only be applied in a very small proportion of cases of non-compliance, penalties of €2-5 million should be available. This reflects the fact that only a small proportion of passengers complain to NEBs, and even in these cases, penalties would only be imposed in a small proportion of cases.
- 8.8 Therefore, we suggest that the Commission should consider actions to persuade Member States to ensure that sanctions are effective and dissuasive as required by Article 16(3). In evaluating whether a Member State has complied with Article 16(3), the Commission should consider both the level of the potential sanction allowable under the laws of the Member State and also the probability that a sanction would

actually be applied, given the enforcement regime prevailing in that Member State. In our view a Member State would comply with Article 16(3) if the sanction typically imposed *per passenger affected* for an infringement of the Regulation, multiplied by the proportion of cases of non-compliance in which it would actually be imposed, exceeds the per passenger cost of compliance.

The legal basis of any amendments

Introduction

8.9 Many stakeholders requested clarification of key elements of the Regulation. The Commission has informed us that there are three legal means by which such clarification could be provided:

- **legislative measures** of some kind (including, but not restricted to, amendments to the text of the existing Regulation);
- an **Interpretative Communication**, to explain how the Commission considers that the Regulation should be interpreted; and
- **agreement by the NEBs**, either amongst themselves or with the Commission, to some charter or other document which would state how they would interpret and enforce the Regulation.

Analysis of available options

8.10 The advantages and disadvantages of these approaches are:

TABLE 8.1 ADVANTAGES AND DISADVANTAGES OF OPTIONS

Option	Advantages	Disadvantages
Legislation	<ul style="list-style-type: none"> • Allows the most extensive changes to the Regulation • Lower risk of legal challenge, provided legislation is consistent with Treaty and any international obligations 	<ul style="list-style-type: none"> • Requires approval of Council and Parliament • Potentially takes a long time (a year or longer) • Possibility of amendments which might introduce new difficulties
Interpretative Communication	<ul style="list-style-type: none"> • Can be introduced quickly 	<ul style="list-style-type: none"> • No legal status and hence not binding on airlines, passengers or NEBs • Potential scope would be limited
Agreement with or amongst NEBs	<ul style="list-style-type: none"> • Can be introduced more quickly than legislation • Facilitates a common approach amongst NEBs 	<ul style="list-style-type: none"> • Not legally binding • Would require unanimity • Limited scope

8.11 During our discussions with NEBs, it was apparent that it would be very difficult to achieve unanimity on how key elements of the Regulation should be interpreted, and therefore we suggest that the Commission should not pursue the option of an

agreement amongst NEBs on its own. This option might nonetheless be undertaken in conjunction with one of the other options: for example, an Interpretative Communication could be issued to clarify key elements of the Regulation, and an agreement could be made with and between the NEBs regarding enforcement procedures.

- 8.12 However, several NEBs also stated that an Interpretative Communication or an agreement between NEBs could have no legal status and therefore that they did not consider that this would be useful in addressing the various elements of the Regulation which are unclear. These NEBs tended to support the introduction of new legislation. Consumers also supported the introduction of new legislation, but most airlines did not.
- 8.13 In our view, a key issue is that any clarifications introduced through means other than an amended Regulation would have to take the most restrictive possible interpretation of the existing text, in order to avoid the possibility of legal challenges to the interpretation by air carriers. In addition, only new legislation would allow for the full range of changes that we propose: important changes supported by a clear majority of stakeholders, such as protection of passengers in the event of missed connections, can only be introduced through new legislation.

Recommendation

- 8.14 **We recommend that the Commission should propose new legislation in order to make the amendments to the Regulation that we set out below**, as the alternative options would not have sufficient legal weight to resolve the issues which have arisen with the Regulation. We also note that other important Regulations in the aviation sector, for example the Regulation establishing the European Aviation Safety Agency and the Regulation on allocation of airport slots, have been subject to amendment further to reviews, and therefore we do not consider that the legislative process should be considered to be an insurmountable hurdle. Nonetheless, we acknowledge that a number of the difficulties with the Regulation result from an amendments made during the previous conciliation process, and so there is a risk that any amendments made in the course of a legislative process might introduce more difficulties.

The requirements of the Regulation

- 8.15 This section explains the changes that we propose should be made to the Regulation. We discuss each of the main issues in turn. Our recommendations assume that an amended Regulation is introduced, as we suggest above, but we highlight areas which in our view could or could not be achieved through other means. Provisions relating to enforcement are discussed below.

Definitions

- 8.16 A number of stakeholders suggested that the definition of delay and cancellation be clarified, to determine whether very long delays are or are not cancellations. We suggest that a definition of delay is added to Article 2, and that the definition of cancellation is clarified. We have drafted definitions which seek to make clear that **either** a long delay is not a cancellation provided the same number of flights operate

as scheduled **or** which define a period within which a flight must operate, otherwise it would be defined as a cancellation. This issue is discussed in more detail in paragraph 8.29.

8.17 We also propose that a number of other relatively minor amendments should be made to the definitions:

- A definition of a passenger should be inserted. This is to clarify a number of issues raised by NEBs, including whether denial of boarding to a dog is covered by the Regulation.
- The definition of final destination should be clarified.
- Article 2(j) should be made consistent with Article 3(2) by defining that passengers have to present themselves for check-in not for boarding. Alternatively Article 3(2) could be adjusted to make this consistent with Article 2(j).
- A definition of class should be added, to clarify the requirements on upgrading and downgrading.
- A definition of a connecting flight should be added.

8.18 These amendments would all serve to clarify the Regulation. In principle these interpretations could be announced through an Interpretative Communication or agreed between NEBs, but this would not have equivalent legal weight.

Application to EU carriers on flights to the EU

8.19 At present, a number of EU carriers are systematically failing to pay the same rates of compensation on flights from outside the EU, including flights from countries which do not have any alternative regulations which mandate different levels of compensation. We recommend that Article 3(b) should be amended to make clear 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.

8.20 We have also provided the Commission with an alternative draft amendment to the Regulation which would ensure that benefits and compensation of value at least equivalent to that required by the Regulation would have to be provided in the third country even if there are separate legal requirements in the third country. This would provide passengers with more protection but could be difficult to apply in practice as it would result in two parallel sets of requirements applying in certain third countries.

8.21 In our view it might be possible to introduce this clarification through an Interpretative Communication or agreement between NEBs but NEBs indicated to us that this was unlikely to be adequate.

Application to non-EU carriers on flights to the EU

8.22 Few stakeholders supported the extension of the Regulation to flights operated by non-EU carriers to the EU, and many of those that did support this in principle stated that they believed any such requirement would be unenforceable. Our legal advisers also advised, as discussed in section 6, that there would be significant difficulties in

extending the Regulation to cover these flights. On this basis we recommend that the Regulation should not be extended to apply to flights to EU airports operated by non-EU carriers.

Extraordinary circumstances

- 8.23 We recommend that the definition of extraordinary circumstances currently included in the Recitals to the Regulation should be included in the main text of the Regulation, in order to give this equivalent legal weight.
- 8.24 We recommend that airlines should be exempted from paying compensation where denied boarding occurs due to the substitution of a smaller aircraft for reasons which would be defined as extraordinary circumstances. The absence of this exemption at present is inconsistent, and creates an incentive for airlines to cancel flights which could be operated with an aircraft smaller than planned.
- 8.25 We have considered whether technical problems with an aircraft and shortages of key staff can reasonably be considered to be extraordinary circumstances. We accept that, if these are allowable as extraordinary circumstances, airlines will rarely pay compensation for cancellations. In our view, technical problems with an aircraft are primarily the responsibility of the airline, and the level of staff and aircraft backup available is a commercial decision for the airline to take. As a result, these factors are wholly different from factors such as weather or security threats, which are usually outside the control of the airline, and so it would be reasonable for there not to be any exemption from payment of compensation when flights are cancelled for these reasons.
- 8.26 The main argument against this, raised by a number of stakeholders, is that an airline might operate a flight when it was unsafe to do so in order to avoid paying compensation. We find this argument unconvincing: if the safety regulatory regime is adequate, this should not occur, and we also note that the airlines that raised this argument also denied that they would make such a decision. Airlines also pointed out that it may be easier to resolve a technical or operational problem if this occurs at a major base rather than a remote airport.
- 8.27 However, the Regulation already limits extraordinary circumstances to circumstances which could not have been avoided even if all reasonable measures had been taken, and several NEBs confirmed that technical problems and staff shortages are not always considered to be extraordinary circumstances. We also expect that the European Court of Justice and national courts will, over time, establish case law which will assist airlines, passengers, courts, and NEBs in defining extraordinary circumstances, given the existing text of the Regulation. As a result of this, and the limited support amongst stakeholders for any change, we do not propose that any change should be made at present. However, we suggest that the Commission should consider this issue again if a further review of the Regulation is undertaken (as proposed below) and we have provided draft text which would limit the application of extraordinary circumstances in this way.
- 8.28 It would not be possible to make any of these changes without an amended Regulation being introduced. However, in the absence of an amended Regulation and prior to the

development of case law, the Commission or NEBs could publish (non-binding) guidance on what should be considered to be extraordinary circumstances.

Delays

- 8.29 When a delay is so long that the flight departs the subsequent day or later, it may be very difficult to distinguish in practice from a cancellation, and is likely to inconvenience passengers at least as much. We propose that cancellation should be defined to mean failure to operate a flight within 24 hours of the time scheduled. Delays over 24 hours are already defined as cancellations in most available statistics and we consider that passengers would generally consider such delay as effectively a cancellation. If the Commission decides not to accept this recommendation, as an alternative we suggest that it should be clarified that cancellation would then mean the operation of fewer flights than planned in total but with no reference to a time limit.
- 8.30 Article 6(1)(iii) has created some confusion, with some passengers considering that they are entitled to a refund if a delay exceeds 5 hours, even if they take the flight. We suggest that this Article should be amended to make clear that the refund is only payable if the passenger decides not to travel.
- 8.31 In our view, the first of these clarifications could only be introduced through an amendment to the Regulation. The second clarification could be introduced through an Interpretative Communication or through agreement amongst NEBs, but this might not have equivalent legal force.

Missed connections

- 8.32 Although NEBs and other stakeholders have adopted a range of interpretations of this, most consider that the current Regulation does not cover the issue of connections that are missed due to a delay to a flight, and we agree that this interpretation appears most reasonable.
- 8.33 We recommend that the Regulation should be extended to guarantee passengers appropriate assistance in the event of missed connections due to delays. This assistance should include rerouting and appropriate care in the meantime, but should not include compensation, as no compensation is payable in the event of delays. We have proposed additional text for Article 6 which would extend its scope to cover missed connections due to delays. Missed connections due to cancellations or denied boarding are already covered by the rerouting requirements in Article 8 and therefore do not need to be covered by the additional text. In our view this would be an extension to the scope of the Regulation and so could only be achieved through amendment to the Regulation.

Payment procedures

- 8.34 There is an inconsistency between different Articles of the Regulation regarding the period within which any payments to passengers have to be made. Article 4 implies that the airline should pay compensation for denied boarding on the spot, which implicitly means in cash. Other Articles state that any reimbursement has to be made within 7 days, but the Regulation appears to be inconsistent in that it does not specify

a time period within which compensation for cancellations has to be paid. We suggest that it is unrealistic to expect compensation to be paid on the spot, as this would require airlines to hold large amounts of cash at the airport, and suggest a uniform payment period should be applied for all compensation and reimbursements. A number of airlines have also suggested that it is not feasible to make payments within 7 days. We suggest that a uniform limit of 14 days would be reasonable.

- 8.35 Article 7(3), which lists the means by which airlines may pay compensation or make reimbursement to passengers, does not include the option of a credit to the credit or debit card with which the ticket was purchased. This is likely to be the most convenient option for the airline and to be at least equally convenient for the passenger. We suggest that this paragraph should be amended to allow for this means of payment.
- 8.36 In our view these changes could only be made through the introduction of an amended Regulation.

Amount of compensation payable

- 8.37 We do not propose that there should be any significant change to the amounts of compensation that can be paid. Although most airlines considered the amounts of compensation could be too high in comparison with ticket prices, some consumer representatives believed that compensation amounts could be too low, and other stakeholders generally believed that the amounts were reasonable. The compensation payment is intended to reflect the consequential costs that passengers may incur, such as lost hotel bookings, rather than the price of the ticket.
- 8.38 However, we suggest that the levels of compensation should be subject to review for inflation, to avoid the real value of the compensation payments being gradually eroded over time. We suggest that the level of compensation should be subject to review for inflation every 5 years, using a procedure similar to that set out in the Montreal Convention, and we have proposed a new Article 18 which would achieve this objective. In our view this change could only be made through the introduction of an amended Regulation.
- 8.39 We also propose a relatively minor change to clarify the start points and end points of the journey for the purpose of calculating the length of the trip and hence the amount of compensation payable under Article 7, where the journey involves connecting flights. We suggest that this should be the start of the first flight and the end of the last flight. In our view this clarification could be introduced through an Interpretative Communication or through agreement amongst NEBs, but this might not have equivalent legal force.

Rerouting

- 8.40 We suggest that the Regulation should make clear that airlines *may* reroute passengers via other carriers, via surface transport, and via an indirect flight, but that this should be subject to the agreement of the passenger. We also suggest that the Regulation should state the circumstances under which airlines should be *required* to reroute passengers via other carriers or surface transport, to avoid the circumstances in which

either an airline refuses a reasonable demand, or a passenger demands that an airline pay for rerouting where this is unreasonable, for example where:

- an airline refuses to pay for rerouting via another carriers even when it does not have a flight for several days, leaving passengers' stranded for a long period; or
- passengers, having purchased a low price ticket with a low fare airline, claim the costs of a full business class ticket on a network carrier (as this is the only ticket available immediately before departure), even though the original airline has a flight 2 hours later.

8.41 It is necessary to codify the circumstances in which it is reasonable for carriers to be required to pay for rerouting via other carriers or surface transport. We suggest that carriers should be obliged to pay for this where **both** of the following circumstances apply:

- the delay would otherwise be substantial – we have provisionally suggested 8-24 hours depending on the length of the flight; and
- rerouting via another carrier or surface transport offers a substantial time saving – we have suggested 4-12 hours, again depending on the length of the flight.

8.42 This would mean that, for a Barcelona-London flight (which is in the under 1,500km range), a carrier would have to pay for rerouting via another carrier if it cancelled a flight at 10:00 when the next flight was not until 18:00 only if the other airline had a flight that was before 14:00. We suggest that the time thresholds in this clause should be quite high, as in circumstances where the air carrier concerned did not have any agreement with the carrier operating the alternative flight, and therefore the alternative ticket had to be purchased at standard last-minute travel rates, this requirement could cause air carriers to incur substantial costs. It would also be necessary to allow for the possibility that the alternative flight might be earlier than the scheduled time, again up to a limit.

8.43 We also propose a minor change to make clear that, if the new flight is from another airport, the carrier must provide transport to that airport.

8.44 In our view these clarifications could be introduced through an Interpretative Communication or through agreement amongst NEBs, as it defines what it is reasonable for air carriers to do to comply with their existing obligations under the Regulation. However, this would not have equivalent legal force and, because under some limited circumstances this interpretation could result in air carriers (particularly low cost carriers) being required to incur substantial costs, this would be particularly likely to face legal challenge.

Reimbursement

8.45 We propose a minor amendment to Article 8(1) to clarify what proportion of the flight should be reimbursed in the event of a multi-sector journey. In our view this clarification does not necessarily require new legislation.

Assistance

- 8.46 A number of stakeholders suggested that it was irrational for the time after which passengers were provided with refreshments to vary by the length of flight, and some airlines considered this requirement difficult to apply in practice. We suggest that a common threshold be adopted, as passengers making longer journeys clearly do not take longer to become hungry or thirsty. We suggest that this threshold should be 2 hours. In addition, as it appears that airlines have often not been complying with the obligation to provide refreshments in the case of delays, we suggest that Article 6(1) should be amended to ensure that refreshments are provided if the flight is delayed, not only if the carrier *expects* it to be delayed.
- 8.47 The Regulation implies, but does not specify, that hotel accommodation where required should be arranged by the airline. We are aware that some airlines have left passengers to arrange this themselves and have not always refunded the costs. It may be difficult or impractical for passengers to arrange accommodation, and they may be unwilling to incur this cost without being sure that the airline will refund it. Therefore we suggest that Article 9 should make clear that it is the carrier's responsibility to arrange accommodation.
- 8.48 Airlines have pointed out that, in some circumstances, Article 9 creates obligations which it is impossible to fulfil. For example, if a large airport closes, leaving many thousands of passengers stranded, it is probably impossible for airlines to arrange accommodation for all of them. We propose that airlines should be excused from their obligation to arrange assistance under these circumstances but that they should still be liable for reasonable costs passengers incur in arranging this themselves.
- 8.49 In our view, these clarifications could only be achieved through new legislation.

Downgrading

- 8.50 Article 10 does not make clear what proportion of a ticket should be refunded in the event of downgrading, if the journey involves more than one sector. We propose that the Article should make clear that the refund should be limited to the sector on which the downgrading occurs. This clarification would not necessarily require new legislation.
- 8.51 Downgrading appears to prompt fewer complaints to NEBs than the other issues addressed by the Regulation, but passengers subject to downgrading are not always ensured appropriate compensation under the existing Regulation. We suggest that, if an amended Regulation were to be introduced, the Commission should use this opportunity to ensure that the Regulation adequately protects passengers in these circumstances. We have provided a draft amendment to Article 10(2) which would:
- ensure that, where the difference in price between the ticket in the higher and lower classes exceeds the amount of compensation specified, the passenger should be paid the higher amount; and
 - provide the passenger with the right not to travel and to receive a refund if they do not wish to accept downgrading.

Information to passengers

- 8.52 Article 14 is currently inconsistent with other elements of the Regulation because it requires passengers to be informed about their rights when a delay exceeds 2 hours, even when they are not entitled to assistance until 3-4 hours. It also does not require that passengers subject to downgrading are informed about their rights. We propose that Article 14 should be revised to be consistent with the rest of the Regulation.
- 8.53 Consumer organisations have raised cases where carriers have provided inaccurate information, particularly on rerouting options, or provide no information at all, which leads passengers to incur unnecessary costs which the carrier subsequently refuse to refund. Our travel survey also showed examples of cases such as this. The existing Regulation states that the carrier must provide information on alternative transport options, but does not specify what should happen when it does not do so. We suggest that, in order to address this issue, the Regulation clarifies that if a carrier fails to provide information that it is required to provide, or it provides inaccurate information (for example telling passengers a flight is cancelled when it is not), and as a result the passenger incurs reasonable costs of rerouting, overnight accommodation etc, the carrier should be liable for these costs.

Complaints handling and enforcement

Introduction

- 8.54 As discussed in section 7, ineffective enforcement of the Regulation is one of the two most significant problems that have been encountered. The main issues are that the sanctions which have been introduced by some Member States are not adequate, cross-border complaints are not handled effectively, and there is no obligation for NEBs to investigate or rule on individual complaints. The inadequacy of sanctions in some Member States can be addressed through infringement proceedings, as discussed above, and therefore we focus here on the handling of complaints.
- 8.55 In our view there are three main options to improve this:
- minor changes to facilitate the existing complaints handling process;
 - substantial changes within the existing framework, for example by changing the scope of NEBs powers; or
 - a new complaints handling framework which would replace that set out in the current Regulation.
- 8.56 We address first the issue of whether the existing complaints handling framework – reliant on NEBs designated by Member States, which are usually the Civil Aviation Authority – is appropriate. In our view there are two alternatives:
- the establishment of a central complaints handling agency (which could, but would not have to, also have responsibility for enforcement); and
 - allocation of responsibility for complaints handling to alternative organisations such as the ECC Network.

Central complaints handling and enforcement agency

- 8.57 If a central complaints handling agency were introduced, it could have a specified responsibility for handling and investigating complaints, and could also have powers to impose sanctions directly on airlines; alternatively, its role could be limited to complaints handling and investigation, in which case it would have to refer cases to national authorities for enforcement action where it considered that sanctions should be applied.
- 8.58 The establishment of such an agency would have several advantages, particularly in relation to cross-border complaints (where the Member State in which the incident occurred, in which the carrier is registered, or in which the passenger is resident, is different). It would provide a single point of contact for passengers and air carriers; allow a common approach to complaints handling, investigation and enforcement covering all Member States; avoid all of the difficulties which currently arise with cross-border complaints, including language issues, as it could allow for complaints to be handled in all official Community languages; and would be fully independent of air carriers and reduce the risk of accusations of favouritism towards particular carriers. In addition, the agency could be given equivalent responsibility related to passenger rights in other sectors, or for implementing other Regulations, such as that relating to passengers with reduced mobility.
- 8.59 The main disadvantages of establishing such an agency would be the cost involved and the time required to set up the agency. We estimate that, if such an agency were to replace the existing network of NEBs, it would require several hundred staff, and its annual operating costs would be in the range €30-60 million per year, if it was to handle complaints as effectively as those NEBs which we consider 'best practice'. Much of this expenditure is already incurred by NEBs, but nonetheless it might be difficult to obtain political agreement to establish a new centralised agency with this level of staffing and budget. The agency's staff would need to include a substantial number with the technical and operational experience necessary to rule on the technical aspects of complaints, and staff would also require legal training; at least some would need to be qualified lawyers. The most appropriate staff to undertake this role might be those currently working in NEBs. Experience from the European Aviation Safety Agency (EASA) also indicates that there could be difficulties in recruiting such specialised staff, in particular because the nature of the qualifications and experience required vary between the existing national bodies involved; partly as a result of this, the agency would take some time to establish.
- 8.60 In addition, although the establishment of a central agency would reduce the risk of accusations of favouritism towards particular carriers, it would not remove this possibility altogether. The risk would be minimised if the agency was operationally independent from the Commission.
- 8.61 In our view the introduction of a central complaints handling agency is likely to be the most effective way of enforcing the Regulation and ensuring that passengers rights are respected. However, given the significant associated operating costs and the fact that the NEB network already exists, the creation of such an agency might not be acceptable to policymakers. Therefore, we also discuss other options to improve the enforcement process.

Alternative organisation for handling complaints

- 8.62 The only alternative organisation which could handle complaints would be the ECC Network. In our view, ECCs do not have the appropriate resources or skills to rule on complaints or undertake enforcement, but could facilitate passengers by processing complaints, seeking to resolve issues with airlines, and directing complaints to the appropriate NEB, also providing translation where necessary. ECCs are already undertaking some of this role, but it is not well publicised and therefore only a small proportion of complaints are made through ECCs. We suggest that the ECCs should continue their current work assisting passengers to make complaints and that this role should be better publicised, for example by including contact details for ECCs on the information posters produced by the Commission and displayed at airports.
- 8.63 Where Member States have alternative dispute resolution mechanisms, particularly where use of these can be compulsory, these may be an effective and low cost alternative to court proceedings if passengers are not able to obtain their rights. We suggest that the Commission may wish to investigate these further and possibly promote these, but this would be independent from any changes to the Regulation.

Improving the handling of cross-border complaints

- 8.64 Cross-border complaints create difficulties because the responsibility for complaints handling, investigation and enforcement depends on where the incident occurred, but the NEB for the Member State in which the incident occurred is not necessarily best placed to handle all other aspects of the process. At least individually, different stages of the process might be better handled by different bodies:
- Passengers usually complain to the NEB in the Member State in which they live, and given language issues, this is always likely to be the easiest option for them. From the point of view of the passenger, complaints handling would therefore ideally be the responsibility of the Member State in which the passenger is resident.
 - It is easiest for NEB's to investigate complaints regarding incidents which took place in their Member State, due to the availability of information. Investigation would therefore ideally be the responsibility of the NEB for the Member State in which an alleged incident occurred.
 - It is easiest for NEB's to take enforcement action regarding airlines registered in their Member State, as the Member State authorities will also be responsible for the registration and certification of the carrier. Enforcement would therefore ideally be the responsibility of the NEB for the Member State in which a carrier was resident.
- 8.65 However, in our view it is not feasible for initial complaints handling, investigation and enforcement to be undertaken by different NEBs in different Member States. We also considered whether the current allocation of responsibility (based on the location of the incident concerned) is the best available. In our view the two alternatives would present problems at least equivalent to, and probably greater than, the current arrangement:
- Enforcement based on the state of residence of the passenger would lead to multiple NEBs investigating the same incident, creating more work for

airlines and NEBs, and potentially creating situations in which different NEBs made different rulings on the same complaint. In addition, it would make the investigation of complaints more difficult, because it would be harder for NEBs to check facts with airports, air traffic management services or other agencies.

- Enforcement based on the state of registration of the carrier might give rise to allegations that NEBs unfairly favoured airlines registered in their Member State, particularly any state-owned airlines, and could give a commercial advantage to carriers based in Member States in which enforcement was ineffective. In addition, it would make the investigation of complaints more difficult.

Obligation to investigate complaints

8.66 We have considered whether NEBs should have an obligation to investigate **all** complaints. The implementation of such an obligation would require substantial additional resources to be devoted to the investigation and handling of complaints, particularly in the larger Member States, where each NEB might require a budget for enforcement in the range €5-10 million per year to comply with this obligation. Such an obligation would appear unreasonable compared to the requirements applying to enforcement agencies in other sectors: these do not usually investigate all complaints that they receive, but take into account available resources, other priorities and general policy objectives.

8.67 In our view, if NEBs take enforcement action regarding some complaints, particularly where there is deliberate or flagrant disregard for the Regulation, and dissuasive penalties are imposed in these cases, this should be sufficient to incentivise compliance. Therefore we do not recommend that NEBs should have an obligation to investigate all complaints. However, as a number of stakeholders suggested that NEBs should have an obligation to investigate all complaints, we have provided the Commission with a draft of an amendment to the Regulation which would enact this. This change could only be achieved by legislation.

Incremental changes to improve complaints handling, particularly for cross-border complaints

8.68 A number of incremental changes could be made which would improve the complaints handling process, particularly cross-border complaints including:

- requirements for NEBs to refer complaints;
- publication of agreed contact points by which NEBs and (possibly) also passengers could contact airlines;
- agreement on which languages could be used for referred complaints; and
- provision by the Commission of a single website with a complaints form, which would automatically direct complaints to the correct NEB.

8.69 As discussed above, many NEBs refer complaints to other NEBs where appropriate, but not all do. NEB's could be required to refer complaints to the appropriate NEB where appropriate, which we consider means that there is a prima facie case that there may have been a breach of the Regulation and the passenger has already tried to resolve the issue directly with the airline, but without success. NEBs could also be

required to act on referred complaints in the same way as complaints received directly. This could be mandated through an amendment to the Regulation, and we have provided draft text for such an amendment, but it could also be achieved through an agreement amongst NEBs or between NEBs and the Commission.

- 8.70 When NEBs do refer complaints, language issues can arise. Many NEBs already provide a summary of the complaint in either the language of the Member State to which the complaint is being referred, or English, and in practice if NEBs do not do this, referral of complaints is likely to be ineffective. We do not believe it would be appropriate to legislate about this issue but suggest that it should be achieved through an agreement with or between NEBs.
- 8.71 A number of NEBs complained that they found it difficult to make contact with airlines based in other Member States. Carriers providing air services to a Member State could be required to provide the NEB with a person or agent to contact regarding complaints, and provide a telephone number, email address and postal address for this person or agent. This change would require legislation to be enforced and we provide draft text for an amendment to the Regulation.
- 8.72 In addition, some passengers representatives have complained that it is very difficult to contact certain airlines, and a similar requirement could be imposed regarding passengers' rights to contact airlines: airlines could be required to publish contact details for complaints in a prominent position on their website. As some consumer representatives suggested that some airlines deterred complaints by making passengers wait on hold for long periods on premium rate telephone numbers and only accepting complaints in particular languages, requirements could be added to this to answer calls within a reasonable period, or handle complaints in the main language of the Member State. If such a requirement was introduced, we would suggest that it should only need to apply to carriers providing scheduled services, as customers booking inclusive tours should find it easier to contact their tour operator. Any such requirements to publish contact details should only apply above a certain threshold in terms of number of seats provided.
- 8.73 A common complaint from consumer organisations (and some NEBs) relates to the provision of information by airlines. Since information provision by airlines is often poor, it could be helpful for passengers if reliable information was readily accessible from another source. For example, the Commission could produce a leaflet, to be distributed at airports, and set up a website to give an accurate and unambiguous description of passengers' . This could include a flow diagram, which would give passengers a clear, simple way of understanding the complaints process. It could also contain information useful to passengers which is not specifically related to the requirements of the Regulation, for example to suggest that passengers keep receipts if they wish to claim back expenses. An example of such a leaflet has been produced by the UK consumer organisation Which?.
- 8.74 We also recommend that the Commission should create a website with a common complaints form, which would provide clear information on rights under the Regulation and the information required in order to make a complaint; and then automatically direct the complaint to the appropriate NEBs. Use of the form would not be obligatory. The form could be designed to help filter out complaints that NEBs

cannot or will not take action on (for example, it could check that the passenger had first tried to resolve the issue directly the airline).

Summary of recommendations

- 8.75 In our view, the most effective measure, to ensure that complaints are processed, investigated and ruled on effectively, would be the establishment of a central complaints handling and enforcement agency. However, given the substantial cost and staffing which would be required, we understand that this may be unrealistic in the immediate future.
- 8.76 If the option of a central agency is not pursued, we would not recommend any other major changes to the enforcement arrangements set out in the Regulation. In particular, we do not recommend any change to the scope of the enforcement authority of NEBs, as all alternatives would create difficulties greater than those arising with the current allocation of authority, or that there should be an obligation on NEBs to investigate all complaints.
- 8.77 If the option of a central agency is not pursued, we suggest that incremental changes should be made, within the existing enforcement framework, in order to facilitate the handling of complaints, particularly cross-border complaints. We recommend that:
- NEBs should be required to refer complaints where appropriate after checking that there is a prima facie case that the Regulation may have been broken, and to handle referred complaints;
 - airlines operating in a Member States should be required to provide the NEB with an appropriate contact points;
 - NEBs referring complaints should provide a summary of the complaint translated into either the language of the Member State to which they are referring the complaint, or English; and
 - the Commission should establish a single internet site for complaints which would automatically direct the complaint to the appropriate NEB.
- 8.78 Of these changes, the requirement for NEBs to refer complaints could best be achieved by legislation, although it could also be achieved by an agreement amongst NEBs. The requirement that airlines provide appropriate contact details could only be achieved by legislation. The language used for referral of complaints would best be agreed between NEBs, and at this stage we would not recommend use of legislation to mandate this. Establishment of a single website for complaints could be enacted by the Commission and would not need legislation.

Publication of key performance indicators

Introduction

- 8.79 A key issue identified in this report, and discussed in detail in section 3, is that there is no obligation on European airlines to publish statistics covering key performance indicators such as the proportion of flights delayed or cancelled. This lack of information both hampers policymakers in any assessment of the appropriate measures to be taken, and means that consumers cannot make an informed choice between

carriers. In this regard, the situation in Europe compares badly to the US, where a detailed airline consumer report is published by the Department of Transportation.

- 8.80 Several NEBs told us that they considered publication of statistics, and ‘naming and shaming’ those performing badly, would have a powerful effect on airline behaviour.

Discussion of options

- 8.81 As explained above, our analysis of the level of delays, cancellations, denied boarding and downgrading which occur on flights to, from and within the EU is hampered by a lack of data. Limited information is available through AEA and some national bodies, but the amount of information available is variable and in most cases there is none. Airlines were in most cases not willing to provide information on a voluntary basis for this review, and even when they were willing to provide this, the figures are not subject to any auditing or necessarily comparable between carriers. If airlines were required to provide this information, it would:

- facilitate passengers in making an informed choice about which carrier to book travel with; and
- facilitate policymakers in deciding whether or how it is necessary to regulate airline behaviour, or penalise airlines under existing regulations.

- 8.82 We would suggest that such a report should include the following information, which is similar to that provided in the Airline Consumer Report published by the US Department of Transportation:

- delay on arrival, including the proportion of flights late by delay categories (on time, 15-60 minutes late, 1-2 hours late, 2-4 hours late and over 4 hours late);
- proportion of flights cancelled;
- proportion of passengers subject to denied boarding, divided into voluntary and involuntary;
- proportion of flights subject to unscheduled diversions;
- proportion of connecting passengers subject to missed connections;
- proportion of luggage delayed and lost; and
- depending on the issue raised below, the number of consumer complaints per million passengers.

- 8.83 We suggest that statistics for consumer complaints should include complaints to airlines themselves and to NEBs. This would allow for “naming and shaming” of carriers which generated a large number of complaints. However, figures for complaints made directly to airlines should only be included if the measure discussed above to facilitate passenger complaints is enacted – that is, that airlines should be required to clearly publish on their websites the contact points for making complaints. At present, it is much easier to complain to some airlines than to others, and it has been suggested by some stakeholders that some airlines conceal this information in order to minimise the number of complaints. Therefore, it would not be appropriate to compare complaints statistics at present.

- 8.84 Some airlines opposed publication of key performance indicators on the basis that the statistics might be misused, for example to create unfair comparisons between carriers. In particular, there are two areas in which unfair comparisons could be created:
- **Short versus long haul:** Long haul flights are more likely to suffer long delays than short haul flights. For example, a long haul flight might arrive late despite leaving on time because it faced a headwind throughout; this is unlikely to happen to a short haul flight. Comparisons of delays between carriers with different mixes of long and short haul operations are therefore inappropriate.
 - **Network versus point-to-point:** Some aspects of a point-to-point operation are not comparable to a network operation. In particular, luggage is much more likely to be delayed or lost for transfer flights than for direct flights.
- 8.85 In our opinion, these issues can be addressed relatively easily by providing data for delays and cancellations separately for intra-EU/other short haul flights and for long haul and, if the report was to include information on mishandled luggage, providing separate information for luggage lost for connecting and point-to-point passengers.
- 8.86 The introduction of this report would require legislation to give the Commission the statutory authority to publish the data and to require other parties to provide it. We suggest that airlines should be required to provide the data (as in the US) and that a mechanism is developed to verify the accuracy of this data. Alternatively, delay and cancellation data could be provided by airports (as in the UK).
- 8.87 We suggest that, to avoid excessive complexity, a published report should only include delay and cancellation data at an aggregate level by airline divided by short/long haul. However, we also suggest that more detailed information should be publicly available, on a route-by-route basis and ideally in spreadsheet form to facilitate analysis. We suggest that the form of report currently used by the UK CAA for delay data is helpful and this could be adopted on a Europe-wide basis. The published report could perhaps include this information for the top 25 European routes, measured in terms of passenger numbers.

Recommendations

- 8.88 We recommend that the Commission should introduce legislation to require European airlines to provide statistics in the areas set out above and should publish an annual report with this data. This legislation would not necessary form part of an amendment to Regulation 261/2004.
- 8.89 We recommend that the design of this report should be such that the comparisons made between carriers should be made on a fair basis as far as possible, and therefore it should include separate information for long haul and short haul flights, and (in the case of mishandled luggage) for connecting and point-to-point passengers. We also recommend that more detailed route-by-route data on delays and cancellations should be available publicly for download as required, although not included as part of a report.

Representation of consumers

- 8.90 In undertaking this study, we have sought to obtain a balance of views, covering passengers as well as airlines, airports, airline representatives and NEBs. However, the lack of adequate representation of passengers has proved a significant problem. We suggest that the Commission should consider measures to ensure that passengers are adequately represented in future, for example through establishing and potentially funding an independent passenger representative council.

Further report

- 8.91 This report has identified a number of significant issues in the operation of Regulation 261/2004, and we have suggested approaches to resolving these issues. However, as explained above, there are more radical options which might not be practical to introduce at present but could be considered in the future, such as the establishment of a central complaints handling/enforcement agency, or the harmonisation of care and compensation requirements between different types of incidents – which would principally mean the introduction of compensation for delays – and possibly also between transport modes (bus, rail and sea as well as air). If the measures we have proposed turn out not to be sufficient to resolve the issues which have arisen with the Regulation, it would be appropriate to consider other measures.
- 8.92 Therefore, we suggest that the Commission should undertake a further investigation of the operation and results of the Regulation in 2-3 years, and Article 17 of the Regulation should be revised in order to mandate this. It is difficult to predict now what issues are likely to arise during this period and therefore it is not appropriate for the revised Article to state which subjects should be covered by the review.

Summary of recommendations

- 8.93 We highlighted above that the Regulation appears not to be working well in practice, primarily as a result of a number of key elements of the Regulation being unclear, and ineffective enforcement. This section has set out a number of recommendations which are intended to address the problems that have arisen, by clarifying key elements of the Regulation, ensuring passengers receive appropriate treatment and where appropriate compensation, improving enforcement, and improving the quality of information that is available to passengers and policymakers.
- 8.94 We recommend that the Commission take appropriate measures to encourage Member States to introduce effective and dissuasive sanctions for non-compliance with the Regulation, where they have not already done so.
- 8.95 We propose a number of changes to the Regulation in order to clarify it, and ensure that consumers rights are adequately protected in key areas which appear not to be covered at present. These recommendations are summarised in Table 8.2 below.

TABLE 8.2 RECOMMENDED AMENDMENTS TO REQUIREMENTS OF REGULATION

Issue	Recommendation
Definitions	<ul style="list-style-type: none"> Clarification of key definitions

	<ul style="list-style-type: none"> • Add definitions of key terms which are not currently defined • Cancellations to be defined to include all cases where flight not operated within 24 hours of time scheduled
Scope	<ul style="list-style-type: none"> • Clarify application of Regulation to flights to the EU operated by EU carriers • No extension to flights to the EU operated by non EU carriers
Extraordinary circumstances	<ul style="list-style-type: none"> • Definition of extraordinary circumstances to be included in main text of Regulation • No change to definition of extraordinary circumstances • Airlines should not have to pay compensation where denied boarding occurs due to extraordinary circumstances
Rerouting	<ul style="list-style-type: none"> • Clarify that rerouting via other carriers or surface transport is permissible, but with the agreement of the passenger • Clarify circumstances in which airlines should be <i>required</i> to pay for rerouting via other carriers or surface transport
Missed connections	<ul style="list-style-type: none"> • Passengers should be provided with assistance and rerouting, but not compensation, in the event of missed connections due to delays
Refunds	<ul style="list-style-type: none"> • Allow compensation/refunds to be paid to credit/debit card • Standard period for payments to be made (14 days)
Assistance	<ul style="list-style-type: none"> • Refreshments to be provided after 2 hours delay, regardless of flight length • Clarify that carrier responsible for arranging hotel accommodation • Carrier exempt from obligation to arrange assistance where it makes reasonable efforts but not practical, however then liable for reasonable costs incurred by passengers
Downgrading	<ul style="list-style-type: none"> • Clarify proportion of ticket to be refunded for multi-sector trips • Compensation should at least equal difference in price of ticket • Passenger to have the right not to travel and accept refund
Compensation	<ul style="list-style-type: none"> • No change to level of compensation • Compensation to be reviewed for inflation every 5 years
Information provision	<ul style="list-style-type: none"> • Requirements on information provision to be consistent with other elements of the Regulation • Airlines to be liable for consequential costs if they fail to meet existing requirements on information provision

8.96 In order to improve enforcement, we have suggested that the best option would be to establish a central complaints handling and enforcement agency, but we also note that this may be unrealistic, primarily due to the cost involved. We suggest that, as an alternative, measures could be taken to facilitate the existing complaints handling process, including:

- NEBs should always refer complaints to the appropriate NEB where there is a prima facie case that the Regulation has been broken, as far as possible using an appropriate language, and should accept complaints referred from other NEBs;
- airlines should be required to provide NEBs with details of a named employee or agent to contact in the event of any complaints; and
- the Commission should establish a website with a common complaints form

which should provide accurate information on passengers' rights, help to discourage irrelevant complaints and automatically direct complaints to the appropriate NEB.

- 8.97 We recommend that, as well as providing NEBs with contact details for complaints, airlines with a significant number of operations in a Member State should be required to publish on their website contact details for passengers wishing to complain about infringements of the Regulation; and where the airline has a large number of operations, it should be required to accept complaints in the main language of the Member State concerned.
- 8.98 A key issue is that, at present, consumers and policymakers do not have access to reliable information on the performance of different airlines. We propose that the Commission should publish a consumer report to provide passengers and policymakers with unbiased and reliable information on key performance metrics. The content of the report that we propose would be similar to the content of the consumer report published by the US Department of Transportation. The report should be designed to ensure that comparisons between carriers are as fair as possible. We also recommend that the Commission should take measures to improve the representation of passengers.
- 8.99 Most of the measures that we have proposed would require new legislation to make amendments to the Regulation. Although some necessary clarifications could be attempted by other means, such as an Interpretative Communication issued by the Commission or through agreement amongst NEBs, this could not cover the same scope and, as it would not have equivalent legal weight, would be likely to face challenge by airlines. We also suggest that there should be a further review undertaken of the Regulation in 2-3 years.

APPENDIX A
ENFORCEMENT PROCESSES IN MEMBER STATES

A1. ENFORCEMENT PROCESSES IN MEMBER STATES

A1.1 This appendix summarises the enforcement process in each Member State, in particular, subject to the availability of information, highlighting:

- the structure of the NEB;
- how it is resourced and funded;
- any direct or indirect links between the NEB and the aviation industry;
- the enforcement process;
- any limitations on what complaints will be processed by the NEB;
- the number of complaints received; and
- the types of action undertaken.

Belgium

NEB	<i>Direction Générale Transport Aérien (DGTA)</i>
Nature of NEB	DGTA was formed out of an existing policy division and has no independent mandate to act. It must first seek a mandate from other divisions who must first prove a breach has occurred.
Funding	DGTA is a federal public service and is as such funded by general taxation. There is no cost involved for passengers who lodge a complaint.
Links with aviation industry	DGTA is independent of the industry, but maintains a close working relationship. DGTA is comfortable with this level of independence.
Resources	DGTA has around 170 employees, of which 7 work in the Policy Unit. In total ~2.5 FTE work on enforcement of Regulation (none full-time). Generally under-resourced; at least 2 more staff are required to address the workload. Policy staff have been assigned this role by default and are looking to force changes internally. Well-qualified multi-lingual staff are essential. At least 2 extra staff required when PRM regulation comes in.
Legislation	Sanctions defined by 15 May 2006 amendment of Article 32 of the Law of 27 June 1937 concerning the regulation of air navigation
Guidance from government	None, except Regulation itself and EU guidelines.
The enforcement process	<p>All complaints are received on a standardised form. All written complaints are answered within a reasonable period of time (within one month, sometimes more) depending on clarity and detail. The process is as follows:</p> <ul style="list-style-type: none"> - complaints outside the scope of the Regulation are rejected; - complaints outside jurisdiction are sent to the relevant NEB (with a short summary in English if necessary), and contact details are given to the passenger; - if the complaint is valid, DGTA writes to the airline for views on the complaint. Reminders are sent to unresponsive airlines. DGTA compares complainant's and airline's explanations and makes a decision. Documentary proof is requested from airlines to support their case. If this is unsatisfactory, then decision will go against airline. The decision-making process receives input from DGTA pilots and engineers (for technical advice, when required) and a complaints database has been developed in order to ensure the consistency of replies and decisions. <p>The passenger is informed of any decision (in fact and/or in law). If the airline's response is not satisfactory, it is then for the consumer to take action via a small claims court, where the DGTA's decision holds weight. Complaints referred from another NEB have the response copied to airlines and the other NEB, unless it is unfounded in which case no further action is taken.</p> <p>Enforcement action is only taken for flagrant or continued non-compliance (none so far).</p>
Types of sanction	Some combination of €200 - €4,000,000 fine and 8 day – 1 year prison sentence.
Maximum fine	€4,000,000
Number of complaints and actions taken	692 written complaints to date (781 non-written complaints). No prosecutions so far. Letters sent to airlines, other NEBs, requests to Aviation Inspectorate to review information requirements.
Cross-border complaints	Can currently handle complaints in 6-8 languages, either from flights from its territory or from third countries to its territory. Forwards other complaints to relevant NEB with English translation, and communicates NEB details to passenger.

Cyprus

NEB	Department of Civil Aviation (DCA)
Nature of NEB	Prime responsibility of DCA is provision of Air Traffic Services in Nicosia FIR and the supervision of aviation safety, aviation security, bilateral air services agreements, slot allocation and generally the regulation of air transport in Cyprus. DCA is part of the Ministry of Communication and Works.
Funding	General taxation
Links with aviation industry	None
Resources	DCA has 257 employees, of which 1 FTE work on the Regulation. DCA has in-house technical capabilities for examining technical faults.
Legislation	Aviation Law N. 213(I)/2002 amended by Statutory Instrument KDP 283/2005 (16 June 2005)
Guidance from government	None
The enforcement process	<p>Passengers first complain to the airline. If not satisfied they can then refer to the Department. DCA mainly handles complaints regarding national carriers. It has a good working relationship with these, so the process for handling complaints is relatively informal. They have contacts at the airlines and talk to them about any complaints. This has been effective so far.</p> <p>DCA investigates claims of technical problems with pilots or engineers from the safety section.</p> <p>Imposing a fine would require persistent refusal to cooperate from an airline.</p>
Types of sanction	Fines
Maximum fine	€8,500 (5,000 Cyprus £) per infringement/event
Number of complaints and actions taken	<p>Complaints received (up to early Oct 06): 91</p> <p>Of these: 74 delays, 14 cancellations, 3 denied boarding</p> <p>Prosecutions: 0 Civil court cases: 0</p>
Cross-border complaints	<p>DCA handles complaints in Greek or English. Willing to handle complaints in other languages, but this requires sending the complaint to the Public Information Office to get a translation and may take longer.</p> <p>Accept complaints on flights departing from Cyprus. They do not refer complaints to other NEBs.</p>

Czech Republic

NEB	Civil Aviation Authority (CAA)
Nature of NEB	CAA is an independent regulatory authority, responsible for economic and safety regulation as well as consumer protection.
Funding	General taxation
Links with aviation industry	No links
Resources	CAA has 166 employees, of which 0.8 FTE work on the Regulation. This employee has technical expertise. The enforcement of the Regulation is under-resourced.
Legislation	Aviation Act no. 49 of 1997, amended 1 July 2006, makes the CAA the responsible body, rather than the Ministry of Transport.
Guidance from government	None. The CAA was planning to write some internal procedural guidance by 1 January 2007.
The enforcement process	The Managing Act states what form administrative procedures should take and how long they should take. When a complaint is received, the CAA first contacts the meteorological office/airport to check details. Technical investigations can be performed if necessary. When some information has been gathered, they write a letter to representative of carrier, and wait for a response. Carriers have generally complied immediately. The average period for solving complaints is 30 days, and cannot exceed 30 days, according to the Managing Act which sets out the procedures to be followed.
Types of sanction	Fines.
Maximum fine	€180,000 (5 million Czech koruna)
Number of complaints and actions taken	Complaints received: 46 (since 1/7/2006) Prosecutions: 7 Penalties imposed: 0 Civil court cases: 0
Cross-border complaints	Handle all complaints within scope, and will refer complaints to other NEBs. Complaints generally in Czech and English, but no restrictions on what languages complaints handled in. They have a translation office.

Finland

NEB	<i>Ilmailuhallinto</i> (Civil Aviation Authority) <i>Kuluttajavirasto</i> (Consumer Agency) <i>Kuluttajavalituslautakunta</i> (Consumer Complaints Board, CCB)
Nature of NEB	Consumer Agency supervises marketing and contract terms of all businesses operating in Finland. CCB is an alternative dispute resolution body for all consumers. CAA role is minimal.
Funding	CAA funded by general taxation, airport operator fees, fees for certificates and licences. Consumer Agency and CCB completely funded by general taxation.
Links with aviation industry	CAA and Consumer Agency independent from industry, although CAA regulates and supervises the aviation industry. CCB has 2 members of the board representing industry (in this case both from travel agencies) and members from passenger representatives.
Resources	CAA has 130 employees, of which 1 FTE on Regulation (3 part-time). Consumer Agency has 97 employees, of which 2 part-time on Regulation (1 FTE). CCB has 30 employees, of which 5 work part-time on Regulation (1 FTE, approx).
Legislation	No new law was passed – the minister of justice informed the commission that the Consumer Agency and CCB would be able to deal with this in their normal roles. Aviation Act (1242/2005) was passed on 29 December 2005 stating that this regulation is one of the tasks for supervision by CAA.
Guidance from government	None.
The enforcement process	CCB is main complaint-handling body. Full complaints process is as follows: On receipt of a complaint, the Board corresponds between complainant and airline to establish versions of events and other information. CCB can request expert statement from CAA on technical matters. Decision iterated through board and made public. A decision typically takes 8 to 12 months, although in simple cases can be 3 to 6 months. However, CCB prefers to resolve cases through mediation without publishing anything, so that the case is resolved before reaching the end of the process above. Any published decisions are non-binding but have legal weight. Any airlines not complying with decisions appear on a published blacklist, and as a result airlines have complied in all known cases. Have only given max 8 decisions relating to regulation. The process is much like a civil court case, except that it is free for complainants and decision is non-binding. The Consumer Agency checks compliance of conditions of carriage. If it finds clear evidence of unfair contract terms or unlawful marketing it can apply to the Market Court for an injunction. The injunction is backed up by a fine (level linked to airline turnover).
Types of sanction	CCB: has no direct sanctions, but all decisions are public and there is a 'blacklist' of traders not complying with decisions. Airlines have complied in all known cases. The Consumer Agency can impose injunctions, supported by fines.
Maximum fine	Unlimited, but determined by case law and must be proportionate to company turnover.
Number of complaints and actions taken	Consumer Agency has received approximately 100 complaints. CCB received 50-60 complaints, of which ~15 settled without decision, 10 published decisions and ~30 pending.
Cross-border complaints	CAA supervises all airlines, which operate to, from or within Finland. Consumer Agency handles any reports from consumers to the Consumer Ombudsman. CCB only handles complaints from consumers. Officially they only accept complaints in Finnish and Swedish, but in practice handle complaints in other languages. Decisions only published in Finnish and Swedish. Refer complaints outside jurisdiction to relevant NEB.

France

NEB	Direction Générale de l'Aviation Civile (DGAC)
Nature of NEB	DGAC is one of the divisions of the French Department for Transport, and is responsible for economic and safety regulation.
Funding	State budget
Links with aviation industry	None
Resources	DGAC employs around 10,000 people in total, with 4 people full-time and 2 part-time managers working on this Regulation (5 FTE). They consider that they are over-stretched, given the number of complaints.
Legislation	The law defining penalties has not yet been passed by the French government.
Guidance from government	None
The enforcement process	<p>Acknowledgement is sent to passenger. Then initial assessment of claim is made, and if the Regulation does not apply the passenger is informed of this, and of any other relevant laws.</p> <p>If the claim appears sound, the passenger's data is checked and the airline is contacted, being asked either to compensate the passenger, or to justify its refusal. DGAC may get information from airports, or check airlines' information by light technical investigation. Several letters may be exchanged.</p> <p>DGAC does not require responses within a set timeframe, so duration of claims is very variable. Certain companies, not so inclined to compensate their passengers, delay their response to the maximum or make delaying responses at first.</p>
Types of sanction	None so far, but law is being introduced which will allow fines. Have called some airlines to DGAC's offices for discussions.
Maximum fine	When law introduced, €7,500 for each infringement, and €15,000 in case of repeated infringement within same year.
Number of complaints and actions taken	<p>Complaints received: 2,700</p> <p>Relating to Regulation: 2,034 (of which: 729 cancellations, 1,071 delays, 234 denied boarding)</p> <p>Prosecutions: 0 Civil court cases: 0</p>
Cross-border complaints	<p>DGAC accepts complaints in French, English and Spanish. Complaints in other languages are discarded.</p> <p>They do refer claims to other NEBs. They have tried to establish contacts with other NEBs, but with little success.</p>

Germany

NEB	Luftfahrt-Bundesamtes (LBA)
Nature of NEB	The LBA is the aeronautical authority in the Federal republic of Germany. LBA is responsible for the implementation of Regulation (EC) No 261/2004 within Germany and therefore has the task to receive customer complaints.
Funding	LBA is funded through taxes. Furthermore it raises money through charging applicants for flights and/or landing.
Links with aviation industry	There is active exchange of both, information and experience, between the aviation industry and LBA. However, the aviation industry is not a member of an LBA board.
Resources	6 FTE are occupied with the Regulation, while LBA has 390 employees in total. This is a little stretched. These do not have technical capabilities but can refer to technical section if necessary.
Legislation	Luftverkehrs-Zulassungs-Ordnung of 1964 is the practical implementation of the Regulation in German national law.
Guidance from government	None
The enforcement process	<p>LBA initially evaluates whether there is an infringement. Where there is no apparent infringement or the LBA is not the competent body, it stops the complaint process or passes the complaint to the relevant NEB. Correspondence with the airline is processed until a final assessment of the case can be undertaken. During that final assessment, a decision is made on whether there was an infringement. The passenger is informed about the final results. Duration of the whole process depends on the individual case.</p> <p>If an expert opinion on a technical problem is required, they have a good working relationship with the maintenance division (also with German weather service and airports). The investigating officer passes the statement of the airline to experts, who check it, and may ask the airline for supporting documents (logbooks, technical reports, liability reports). They go by experts decision. Decisions are non-binding and not guaranteed to be accepted by courts.</p> <p>The consumer organisation Schlichtungsstelle Mobilität believes that LBA does not resolve individual consumer complaints, it explicitly informs passengers that it does not enforce the private claims of passengers, and passengers are referred to the civil court.</p>
Types of sanction	Fines can be imposed for infringements, while traffic rights for non-EU airlines can be revoked. These fines give LBA the potential to exert a lot of pressure on airlines. However, the fines can be challenged in court, so would be used as a last resort after serious systematic infringements and discussions with the airline.
Maximum fine	€50,000 (when carrier refuses cooperation), or €25,000 (per complaint where there is an infringement).
Number of complaints and actions taken	<p>Complaints received so far in 2006: 1,539 (of which: 858 cancellations, 537 delays, 194 denied boarding)</p> <p>Prosecutions: 0 Civil court cases: 60-80</p>
Cross-border complaints	<p>LBA handles all incoming complaints according to section 16 of the regulation. They will refer complaints, when not in jurisdiction, and have been referred complaints by other NEBs.</p> <p>There are no restrictions on what languages complaints are received in – they try to translate all.</p>

Greece

NEB	Hellenic Civil Aviation Authority (HCAA)
Nature of NEB	HCAA is a Civil Service under the Ministry of Transport and Communications, directed by its Governor and Deputy Governors. Its mission is the organization, development and control of the country's air transport infrastructure, as well as the preparation of proposals to the Minister of Transport and Communications concerning overall policy formulation in air transport.
Funding	State budget, with a small proportion from route charges.
Links with aviation industry	Informal links have been developed with airline representatives, but formal links are set with airport authorities (all airports are of public status apart from Athens International Airport – AIA).
Resources	HCAA employs approximately 3,000 people, while the economic sector employs 4 people full-time, 3 of which work partly on the enforcement of the Regulation. There are also an employee at the AIA working only on the enforcement of the regulation and another employee at the International Airport of Macedonia (Salonika) partly involved in handling complaints on site. In total 2.5 FTE work on enforcement of the Regulation. HCAA informed us that this is not sufficient. The complaints handling section has applied for funding for a new independent office, of 3 full-time employees working on enforcement and complaints-handling, without licensing duties.
Legislation	Decision D1/D/49659/3247/09.12.2004 designated the Air Economic Sector of the Division of Air Transport Affairs as NEB. Decision D1/D/13770/980/20.04.2005 defined the applicable penalties.
Guidance from government	None
The enforcement process	Complaints are initially checked as to whether they refer to an actual breach of the regulation. HCAA then requires additional information for clarification from the airline and the airport authorities, which may take from 0.5 to 2 months. Cases where a flight was cancelled due to technical deficiencies may be difficult to investigate, since the air carrier does not always provide adequate information, which is something that might create suspicion against the carrier. Cancellations or delays due to "Operational reasons" or "shortage of employees" are not considered to be exceptional circumstances and therefore the passenger is entitled to compensation based on the Regulation. Once the NEB has concluded its investigation, it then notifies both the passenger and the airline of the outcome with a written recommendation. In case the airline does not comply with the regulation, the NEB would then impose a fine to the airline.
Types of sanction	Fines from €1,000 to €3,000 per passenger for infringements of articles 7,8, or 9. Expecting an amendment to the fine procedure.
Maximum fine	€3,000 per passenger
Number of complaints and actions taken	Complaints received since February 2005: 150 Of which 120 related to genuine breaches of the Regulation (of which 30% delays, 60% cancellations, 10% denied boarding) Prosecutions: 0 Civil court cases: 0
Cross-border complaints	HCAA accepts all complaints referring to incidents on outbound flights from Greek airports, regardless of the passenger's nationality. Can be problems with translating complaints which lead to a lengthened complaints procedure.

Hungary

NEB	Hungarian Civil Aviation Authority (CAA) - enforcement Inspectorate for Consumer Protection (national and county bodies) – complaint handling
Nature of NEB	CAA is an independent regulatory authority, responsible for economic and safety regulation as well as consumer protection. Responsible for ensuring the compliance of airlines' General Conditions when the Regulation was introduced. Inspectorates are responsible for general consumer protection, including passenger rights. They comprise two county Inspectorates and the General Inspectorate.
Funding	The CAA is financed by licensing fees e.g. for pilots or airlines. County Inspectorates are part of the Ministry of Local Government and Regional Development, while General Inspectorate is part of the Ministry of Social Affairs and Labour. Inspectorates are state-funded, and also by fines (15-20% go to Inspectorate).
Links with aviation industry	The CAA supervises various aviation activities, including: licensing, certification, registration of aircrafts, audits. The Inspectorates have no links with the aviation industry.
Resources	CAA has 74 employees in total. Two work on enforcement of the Regulation (1 FTE). County and General Inspectorates together have 166 employees. Of these, 6 work part-time on the enforcement of the Regulation, or 3 FTE. This is enough staff.
Legislation	Consumer Protection Act (Act Nr.CLV.1997) General Provisions of the Administrative Procedures of Authorities (Act Nr.CXL.2004) introduced 1 November 2004 Amendment of Government Decree Nr.25/1999 on air passenger transport appointed CAA and Inspectorates as NEBs.
Guidance from government	None.
The enforcement process	County inspectorates investigate complaints by holding hearings, giving an opportunity for both parties to be heard by the authority. If new facts come up or there are still unclear points, the authority can investigate further e.g. by referring to the Civil Aviation Authority to decide cases of extraordinary circumstances, by looking through daily reports and logbooks. So far they have found that of claimed extraordinary circumstances, 60% are subsequently judged false. Investigations not requiring a request to the CAA take about 30 days. Those with such a request take between 30 and 60 days. The time limit for investigations is 30 days, which can be extended to 60 days if necessary.
Types of sanction	Fines.
Maximum fine	Unlimited. Largest fine so far imposed was around €1,100 (300,000 Forint).
Number of complaints and actions taken	Complaints received: 168, of which relating to the Regulation: 117 (75 on delays, 58 on cancellations, 2 on denied boarding, 33 on other issues) Prosecutions: 3 airlines fined, with 2 of these decisions confirmed on appeal. Civil court cases: 0
Cross-border complaints	The Inspectorates accept all complaints covered by the Regulation. The General Inspectorate has an international section, so can accept complaints in Hungarian, English, French, Spanish. When complaints have been referred from other NEBs, any language problems have been overcome. Refer complaints outside jurisdiction to relevant NEB. When handling a complaint about airlines based abroad, the Inspectorate sends letters to the airline, and if necessary passes it to the relevant NEB.

Ireland

NEB	Commission for Civil Aviation Regulation (CAR)
Nature of NEB	The Civil Aviation Authority is an independent regulatory authority, responsible for economic and safety regulation, licensing and slot allocation. Enforcement of the Regulation is CAR's only consumer rights role.
Funding	Funded by (i) levy on regulated companies (based on the CAR's operating costs) and (ii) licence and compliance fees from airlines, ground-handlers, and travel trade sector.
Links with aviation industry	CAR has no formal / informal links with the aviation industry. CAR is the designated State Regulator for the aviation sector. The organisation is headed by a Commissioner and has no Board of Directors.
Resources	One staff member is assigned to work on the Regulation on a full time basis with clerical support when needed. The overall current number of posts in the CAR is 20. Currently not sufficient. Imminent re-structuring will result in 2 FTEs working on the regulation. The main issue is lack of direct access to technical expertise.
Legislation	Originally the regulation was drafted within SI274 in 2005 – however these powers were not sufficient. Subsequent amendment to The Aviation Act of 2001 on 4 April 2006 granted enforcement power under Section 45(a).
Guidance from government	None.
The enforcement process	<p>Communications received from passengers are broadly categorised under the following:</p> <ul style="list-style-type: none"> - possible infringement – files opened and cases investigated by the CAR - outside the jurisdiction - refer the passenger to relevant NEB - not yet submitted to airline - refer the passenger to the airline for initial response. - non-Regulation issues - refer the passenger to the appropriate body if one exists - compliance by airline - provide information relating to their rights but deem no further action necessary <p>Where a complaint is investigated, a letter is sent to the airline for information relating to their compliance. In case of reimbursement of expenses a request that the payment is processed is also sent. In case of payment of compensation, this is also addressed at the complaint notification stage.</p> <p>Depending upon the information provided, further correspondence with the airline may be required e.g. proof of extraordinary circumstances if claimed. Investigation finishes with a final response to the passenger, outlining: passenger's entitlements; information received from carrier; and any areas of non-compliance. Any payments will be made directly by the air carrier. The process takes 2 months on average.</p>
Types of sanction	From April 2006, CAR may issue a direction to comply with or cease infringing Regulation and comply with any instructions in the direction in the case of systematic non-compliance, within 14 days. Non compliance with a direction is an offence, punishable by fine of up to €5,000 on summary conviction and €150,000 on conviction on indictment. The CAR must apply to the Court to have these fines applied.
Maximum fine	€150,000
Number of complaints and actions taken	<p>Receive 100-120 enquiries per month, most of which unrelated to the regulation. 290 case files have been opened since they started working on this on 31 May 2006.</p> <p>From Jan 2006 - Sept 2006 number of case files opened: 160</p> <p>Of these: 56 delays, 85 cancellations and 13 to denied boarding.</p>
Cross-border complaints	All flights departing from Ireland (regardless of nationality), and complaints relating to Community carrier flights into Ireland from third countries. Complaints outside their jurisdiction referred to relevant NEB.

Italy

NEB	<i>Entente Nazionale d'Aviation Civile</i> (ENAC)
Nature of NEB	Civil aviation authority with roles in: safety and security; passenger rights; environment; and development. Under supervision of Ministry of Transport and Infrastructure.
Funding	General taxation, but also specific Safety and Security fee for airline certification (only for Italian carriers and carriers not from ICAO states).
Links with aviation industry	No links. Board members are politicians.
Resources	Total staff is about 1,100. 2 work full-time on passenger rights, around 40 part-time (22 FTE). Major airports may be slightly under-resourced.
Legislation	Presidential Decree 69 of 27 January 2006, enacted on 21 March 2006.
Guidance from government	None
The enforcement process	<p>ENAC has set up a database and an information management system that, on a daily basis, logs complaints and then processes them, that is, it either:</p> <ul style="list-style-type: none"> - deals centrally with the complaint, eg. if it relates to complaint at a non-EU airport - if complaint relates to an incident at an Italian airport, sends it to the relevant airport - refers to another NEB <p>After a check with the log book to confirm whether or not there was an infringement, the relevant staff member within the airport then writes to the airline for further details. They try to enforce a 30 day limit for airlines to respond but have no powers to do this. Airlines usually do reply (especially since the ECJ ruling). Then:</p> <ul style="list-style-type: none"> - If airline response is OK, they take no further action. - If airline states "technical problems" ENAC demands proof. Necessary to distinguish between technical faults and operational problems (eg. because the crew arrived late) – the latter is not exceptional circumstances. - If airline claims incident did not occur, check against airport log. <p>If airline response not adequate, write to the airline to impose a fine, provided the event has not occurred due to <i>force majeure</i>. This is an administrative not a criminal penalty. Airlines can either pay (in which case they get a 2/3 discount), seek a meeting to resolve the issue, or challenge in court.</p> <p>May also issue fines without complaints based on inspections by their staff at airports.</p>
Types of sanction	Fines
Maximum fine	€50,000
Number of complaints and actions taken	Between 1 January 2006 and 30 September 2006 received: 2557 complaints 1032 delays, 973 cancellations, 203 denied boarding, 349 other Fines issued: 63
Cross-border complaints	Only handles complaints for flights originating from Italy and flights from outside the EU. Complaints about flights from elsewhere within the EU are forwarded directly to relevant other NEB. ENAC handles complaints in Italian or English.

Latvia

NEB	Consumer Rights Protection Centre (CRPC)
Nature of NEB	The CRPC is responsible for monitoring, ensuring compliance with, handling complaints on and providing legal assistance with consumer rights. It is supervised by the Ministry of Economics.
Funding	The CRPC is a budgetary institution funded by central government from general taxation.
Links with aviation industry	The CRPC is independent of the airline industry.
Resources	Of 51 employees at CRPC, 5 work on enforcement of the Regulation, equivalent to 3 full-time employees.
Legislation	Lavian Codex of Administrative Offences (7 December 1984). It is not currently possible for the CRPC to impose penalties on carriers based outside Latvia. The Latvian government is currently considering a commercial law which would allow prosecution of companies based outside of Latvia (including airlines).
Guidance from government	No such guidance.
The enforcement process	On receipt of a complaint from the passenger, the Centre requires an explanation of the passenger's complaint from the airline, and a response on whether the airline is going to comply with the passenger demands. The Centre then appraises all the evidence and documents provided by both parties, and may demand that the airline pays the compensation or use other powers under the Regulation to ask for the compensation.
Types of sanction	Fines.
Maximum fine	The maximum fine the Centre can impose on an airline is approx €215 (150 Lats), for failing to provide information to passengers or evidence to the Centre. The maximum fine imposed so far is approx €70 (50 Lats).
Number of complaints and actions taken	Complaints received by the Centre: 30, 25 of which relating to genuine breaches of the Regulation. 2 on delays, 6 on cancellations, 7 on denied boarding, 10 other. Prosecutions: 1 for failing to provide the Centre with evidence of extraordinary circumstances, and not providing passengers with required information. Airline fined 50Lats, and is contesting the fine. The Centre does not have jurisdiction over other airlines and cannot prosecute them. Civil court actions: 0.
Cross-border complaints	The Centre handles complaints from Latvian citizens in all cases, and from citizens of foreign countries flying with airlines based in Latvia where the incident occurs in Latvia. However, it cannot take any action regarding non-Latvian airlines. To date, no problems with complaints in other languages.

Luxembourg

NEB	Consumer Directorate Section of Ministry of Economic Affairs
Nature of NEB	Responsible for consumer protection. Wide range of tasks including aviation regulation as small part.
Funding	General taxation, via budget from Ministry of Economic Affairs.
Links with aviation industry	None
Resources	11 employees in total, of which 1 part-time on enforcement of the Regulation (0.25 FTE).
Legislation	No new law required. The Consumer Directorate has the right to enforce all EU Regulations relating to consumers through pre-existing legislation.
Guidance from government	None.
The enforcement process	Once a complaint is received they contact the airline and collect all necessary information to take a decision. Any evidence of claims e.g. meteorological conditions, logbooks is collected, and claims assessed. The time the procedure takes depends on how quickly information needed to draw a conclusion arrives, but generally it takes between one and two months.
Types of sanction	None (proposals to allow fines should be in effect by end of year).
Maximum fine	N/A
Number of complaints and actions taken	14 complaints, from which 2 breaches. Of these: 7 delays, 5 cancellations, 2 denied boarding. Prosecutions: 0.
Cross-border complaints	Handle all the complaints concerning flights departing from Luxembourg. Other complaints referred to the NEB of the Member State where the concerned flight departed. In principle, accept complaints in all languages (so far received in German, English, Spanish and French, without problems).

Malta

NEB	Department of Civil Aviation (DCA)
Nature of NEB	The DCA a government department, responsible for economic and safety regulation as well as consumer protection.
Funding	The DCA is funded by the Ministry for Competitiveness and Communication.
Links with aviation industry	There are no links between the Department of Civil Aviation and industry other than regulator-customer.
Resources	One official works full time on handling and investigating complaints. Two other senior Department officials and a legal advisor are also available to provide technical/legal assistance.
Legislation	Subsidiary Legislations 232.09, 232.22
Guidance from government	The only guidance is that provided by the Commission itself.
The enforcement process	<p>When complaints are received:</p> <ul style="list-style-type: none"> (i) it is ensured that the complainant has sent the airline a complaint/claim (ii) an investigation on the complaint is carried out (involving confirming the facts of the scheduled flight, contacting the airline for details of compliance) (iii) an attempt is made to reconcile the airline and passenger if former does not initially agree to the passenger's claim provided it appears that the passenger's claim is justified (iv) inform the airline and passenger of conclusions and close the case if complaint is solved or dropped, and otherwise take enforcement action directly in the case of Maltese carriers or refer to the State of the Operator <p>This process takes at least 8 weeks..</p>
Types of sanction	Fines.
Maximum fine	The DCA may impose a fine of up to approx €2,300 (ML1,000).
Number of complaints and actions taken	<p>Complaints received by DCA so far: 38 referring to the Regulation (17 upheld). Of these: 24 delays, 9 cancellations, 4 denied boarding, 2 others.</p> <p>Prosecutions: 0</p> <p>Civil court actions: 0.</p>
Cross-border complaints	Complaints that are handled/investigated are those concerning Malta arriving/departing flights and other flights performed by Maltese operators. Complaints by Maltese passengers on flights performed outside Malta are referred to the State where the complaint originated or to the State of the Operator as the case may be.

Netherlands

NEB	Civil Aviation Authority (CAA-NL)
Nature of NEB	The CAA is part of the Department of Transport, responsible for economic and safety regulation as well as consumer protection.
Funding	The CAA-NL is partly financed by its own revenues (e.g. licence fees) but the larger part of funding comes from central government, through general taxation.
Links with aviation industry	There are no links between CAA and industry other than regulator-customer.
Resources	Of approximately 160 employees in the CAA-NL, two are currently employed full-time on enforcement of the Regulation, supported by one legal advisor. For full resourcing four people would be needed. Possibly another post with the introduction of Passengers with Reduced Mobility regulation (July 2008).
Legislation	Civil Aviation Act (Wet Luchtvaart) and the General Administrative Law Act (Algemene wet Bestuursrecht)
Guidance from government	The only guidance is that provided by the Commission itself, and any decisions taken by the European Court of Justice.
The enforcement process	<p>If a complaint is within the scope of the Regulation, it is registered. The complaint is then dispatched to the relevant carrier, which is responsible for resolving the complaint (taking into account the remarks of the CAA-NL) and has to inform the CAA-NL on how they handled the complaint.</p> <p>By forwarding the complaint, with remarks, to the airlines CAA-NL, also tries to mediate between the passengers and the airlines. If the passenger remains unsatisfied with the way the airline has handled the complaint, he/she is entitled to take the air carrier to the competent (civil law) court in order to obtain his/her rights.</p> <p>The main role of CAA-NL in enforcing the Regulation is to deal with any air carrier that as matter of policy fails to comply or where the CAA-NL identifies a particular trend developing by an air carrier in terms of non-compliance. CAA-NL always tries to persuade the airline to comply but the ultimate means is to take legal action.</p>
Types of sanction	CAA-NL can impose administrative sanctions for non-compliance. Prior to fine CAA has to give two levels of warning, and continued non-compliance leads to a fine. Can also impose a fine for future violations, e.g. whenever an airline fails to give out information it is fined a certain amount.
Maximum fine	No limit on fine.
Number of complaints and actions taken	<p>Complaints received: 1,377, 1,282 genuinely relating to Regulation</p> <p>Taken forward for investigation: 1105</p> <p>Of which: delays 303, cancellations 699, denied boarding 103</p> <p>Prosecutions: 0 Warnings: 1 Civil court actions: 0</p>
Cross-border complaints	<p>As a general guideline CAA-NL only handles complaints in Dutch and English. In practise, as a matter of considerateness and courtesy, complaints in French and German will also be handled.</p> <p>CAA-NL handles complaints from passengers from all flights leaving Dutch territory and passengers from all flights with Dutch airlines or flights coming in from third countries on EU carriers; CAA-NL does not distinguish between different nationalities, place of residence or contracting. Complaints outside jurisdiction referred to relevant NEB.</p> <p>CAA-NL has had some issues with airlines based outside of the Netherlands. They contact them directly and if there is no response, they then contact NEB of that country.</p>

Poland

NEB	Commission of Passenger's Rights (CPR), appointed by President of Civil Aviation Office (CAO).
Nature of NEB	CPR is part of the CAO, and a government authority on the basis of the Aviation Act. CPR investigates passenger's complaints, make decisions and state infringement or non-infringement of the Regulation, and can impose fines on infringing airlines.
Funding	State budget
Links with aviation industry	Civil Aviation Office controls the carriers and is independent from the airlines and from the airports. There are no airline representatives on the Board.
Resources	Around 250 staff at CAO, and 4 FTE at the CPR. They expect to employ one more soon.
Legislation	Amendment on 5 Oct 2005 of Aviation Act of the 3 July 2002 (Journal of Law no 130 item 1112 with amendments), and the Administrative Procedure Code.
Guidance from government	None. CPR organised information campaign in Poland, preparing leaflets and posters in Polish and English and distributing them to handling agents at all Polish airports.
The enforcement process	CPR investigates according to the Administrative Procedure Code. Both parties are informed of the investigation. The investigation may require proof, either technical or weather. Can request meeting for information between airline and CAO expert. Expert decides whether extraordinary circumstances apply, based on e.g. logbook or schedule plan. If airline fails to provide supporting evidence within 2 weeks then CPR can find against them (rarely occurs in practice). For weather, use META document or a website. Problems with airlines without representatives in Poland can lead to duration over 3 months. Also required by law to have confirmation by post that documents are received, which presents further problems when dealing with airlines based abroad. CPR can impose fines if it has proof that the airline has not complied. Airlines have right to appeal to the administrative court.
Types of sanction	Fines for different infringements, as described in described in Aviation Act in art. 205c: 1) failing to call for volunteers – €1,000 to €2,500 (Art 4.1); 2) failing to pay damages – € 1 000 to € 20 000 (Art 7); 3) neglecting to refund or re-route – €5,000 to €20,000 (Art 8); 4) failing to provide care - €1,000 to €10,000 (Art 9); 5) failing to refund if passenger travelled by lower class – €1,000 to €5,000 (Art 10); 6) failing to inform passengers of rights – €5,000 to €25,000 (Art 14).
Maximum fine	€25,000
Number of complaints and actions taken	Complaints received up to September 06: 1,052 Based on the Regulation: 827 For 2006, 33% delays, 59% cancellations, 8% denied boarding. Fines imposed: 16 fines of €1,000
Cross-border complaints	CPR handles all complaints under Art 16, without limits based on nationality, residency or the airlines. Also handles complaints against Polish licensed airlines when the disruption occurred in EU country. Both refer and accept complaints. Don't refer complaints about foreign airlines. Accepts complaints written in Polish, English, German, French languages. Otherwise, they communicate in English (assuming complaint is within scope). Obligated by law to translate all complaints into Polish. Letters and decisions are required to be in Polish. The most important parts of decisions are unofficially translated into English along with a short explanation in an English letter.

Portugal

NEB	Instituto Nacional de Aviação Civil (INAC)
Nature of NEB	INAC is a government department, responsible for economic and safety regulation as well as consumer protection. It is under the supervision of the Ministry of Public Works, Transport and Communication.
Funding	INAC is funded by: a security charge levied to passengers, fees charged for the licensing and certification of airlines, handlers, aeronautical personnel (crew and cabin), and penalties applied to companies and passengers infringing Portuguese law.
Links with aviation industry	There are no links between INAC and the aviation industry.
Resources	Of 208 persons employed by INAC in total, one works on enforcement full time. There are three other people on a 75%, 10% and 5% basis, equivalent to 2 FTE. Resources currently stretched, but INAC believe one more full-time post would be sufficient.
Legislation	INAC uses already existent laws to prosecute infringements. INAC has been in its current form since 1998. Prior to that it was the Directorate General of Civil Aviation.
Guidance from government	The only guidance is that provided by the Commission itself.
The enforcement process	<p>Complaints are accepted in many media (letter, fax, e-mail, INAC complaint form). Receipt of the complaint is acknowledged, and the passengers is informed of the complaint-handling process. A copy of the complaint is sent to the airline/Portuguese airports involved asking for comments, and verification of delays and/or cancellations takes place on INAC's database of flights. This cross-checks information with the traffic forms filed by the airlines.</p> <p>INAC analyses the complaints according to the Regulation and the airline's response, and makes a decision. If non-compliance is considered to have occurred, a letter is sent to the airline informing what procedure should be taken. The passenger is informed of the decision.</p> <p>There is no average time established for the conclusion of a complaint.</p>
Types of sanction	Fines. Policy of sending official letters to airlines has so far been successful.
Maximum fine	Under previous law, INAC can impose light, heavy or very heavy fines (depending on the size of the company committing the infringement) for infringement of any regulation. Heavy penalties vary from minimum €250 to maximum €10,000, while very heavy penalties vary from €1,000 to maximum €250,000.
Number of complaints and actions taken	<p>Complaints received from 17 February 2005 to 31 July 2006:</p> <p>Total 3,000 of which based on the Regulation: 1,025</p> <p>Of which: 609 delays, 284 cancellations, 132 denied boarding</p> <p>As many cases remain unresolved, statistics on number of genuine breaches of the Regulation are not yet available.</p> <p>Prosecutions: 0. Civil court cases: 0.</p>
Cross-border complaints	INAC handles, exclusively, complaints relating to incidents occurring in Portuguese airports. They accept all complaints regardless of the nationality of the passengers or the airlines but complaints must be written either in Portuguese or in English (although they have handled complaints in French and Spanish). When referred complaints in other languages by other NEBs, they request them to be translated into English. Refer complaints outside jurisdiction to relevant NEB.

Slovakia

NEB	Slovakian Trade Inspectorate
Nature of NEB	The Slovak Trade Inspection is both the Consumer Protection Authority and the Market Monitoring Authority. It enforces 20 Acts related to this issue and therefore the enforcement of this Regulation is only one of the many other roles.
Funding	Funded from the state budget.
Links with aviation industry	None.
Resources	328 employees, of which 2 people work part-time on the regulation (0.5 FTE).
Legislation	Act No. 128/2002 Coll. on state control of internal market and Act no 634 from 1992 on Consumer Protection.
Guidance from government	None, however have prepared internal guidance.
The enforcement process	<p>Complaints arrive into regional or HQ inspectorate, where they decide if the Regulation applies, and pass it to inspectors if necessary. Inspectors can ask airline at place of incident for documents/relevant evidence e.g. of cancellation in logbook. After investigation, the inspector signs minutes of investigation, and can take action if evidence is not provided within 5 days.</p> <p>It takes from 1 week to 6 weeks depending on the completeness of documentation (if the consumer failed to provide all necessary documentation they have to wait for them to do so). In some cases we wait to gather several similar complaints and we handle them at one time.</p>
Types of sanction	The act on the internal market allows such actions as: forcing carrier to provide documents about case, or evidence/facts on case (if miss the deadline for this can enforce penalties)
Maximum fine	Maximum penalty is €52,000 (2 million Slovak crowns), but if breach is repeated within one year can be raised to €130,000 (Sk5million).
Number of complaints and actions taken	43 complaints so far. Of these: 21 delay, 20 cancellation, 2 denied boarding. 3 considered genuine breaches, and fines imposed (€2,600, €1,300 and €520).
Cross-border complaints	All complaints about an alleged infringement of the Regulation regardless of their nationality are handled. Complaints are accepted in German, English, Hungarian (although attempt to handle all languages). To some extent there are limits where foreign airlines do not have representation in Slovakia (particularly low - fares carriers). Refer complaints outside jurisdiction to relevant NEB.

Slovenia

NEB	Directorate of Civil Aviation, Aviation Inspection section
Nature of NEB	As well as the role of NEB, Aviation Inspection section is responsible for many tasks, including: supervision of international regulations, operations of air carriers, licensed personnel, radio-navigation devices for air navigation, aircraft crew, air navigation service personnel, airport services, aerodrome, safety and security, etc.
Funding	General taxation
Links with aviation industry	None
Resources	Aviation Inspection section has 4 employees, of which 1 works part-time on enforcement of the Regulation.
Legislation	General Offences Act and the General Administrative Procedure Act (amendments), Regulation EC 261/04 and Regulation on sanctions for non-performance of the Regulation EC 261/04.
Guidance from government	None
The enforcement process	NEB was unable to give details.
Types of sanction	Warnings can be issued, followed by fines.
Maximum fine	NEB was unable to give details.
Number of complaints and actions taken	So far 43 complaints, of which 60% were infringements.
Cross-border complaints	The General Offences Act restricts the implementation of the Regulation to air carriers established and registered in the Republic of Slovenia.

Spain

NEB	DGAC (Dirección General Aviación Civil)
Nature of NEB	DGAC is part of the Ministry of Public Works (Ministerio de Fomento)
Funding	DGAC is funded primarily through general taxation, plus some revenue from license fees (etc).
Links with aviation industry	There are no formal links with the aviation industry.
Resources	17 staff now working on enforcement of the Regulation (10 FTEs) Staff are employed by SENASA not DGAC. Prior to April 2006, when SENASA staff were brought in, there were not sufficient staff available to handle complaints under the Regulation.
Legislation	DGAC designated as the NEB under Royal Decree 1476/2004 (18 June 2004) There is power to impose sanctions under Law 21/2003 (7 July 2003) on Aeronautical Security, but this is not specific to the Regulation and does not cover all clauses.
Guidance from government	None
The enforcement process	DGAC forwards complaints to airlines and requests a report from the airline on the incident. It reviews this report to check whether there has been any breach of the Aviation Security Law and requests additional information if necessary. It then forwards the report to the passenger. It may consider imposing sanctions if there are repeated/large scale violations but it does not have the power to order airlines to pay compensation in an individual case.
Types of sanction	Administrative penalties.
Maximum fine	€4.5 million
Number of complaints and actions taken	DGAC withdrew the operating license of Air Madrid in December 2006. This case involved safety violations as well as passenger rights. In addition, at the time of our interview, DGAC was considering sanctions against another carrier.
Cross-border complaints	DGAC does not currently refer complaints to other NEBs although it may request information from them. DGAC states that it handles complaints referred to it, but other NEBs said that complaints referred to it had not been acted on.

Sweden

NEB	<i>Konsumentverket</i> (Swedish Consumer Agency) <i>Allmänna Reklamationsnämnden</i> (ARN, National Board for Consumer Complaints)
Nature of NEB	Consumer Agency is a Consumer Protection Authority under the Swedish Government. Provides consumer affairs assistance to public, acts in the collective interest of consumers but in general does not resolve individual consumer disputes. ARN resolves individual consumer complaints and impartially adjudicates on claims for consumer compensation.
Funding	General taxation only.
Links with aviation industry	No formal links. Through consultations, there are informal links between the Agency and industry. In cases where a Board session is held to resolve a dispute, two impartial airline representatives are used to put forward the industry perspective in the hearing.
Resources	Agency has around 170 employees, of which 2 part-time work on enforcement (1 FTE). ARN employs 9 people in travel dept. Enforcement takes 1.5-2 FTE, with other resources when necessary.
Legislation	Decree (2005:388) Changing the Decree (1994:1808) about Competent Authorities in the Civil Aviation Area appointed the Consumer Agency as NEB, on 1 July 2005.
Guidance from government	None other than information from the Commission.
The enforcement process	Consumer Agency inspects contract terms of the airlines and where there is non-compliance may request a prohibition in the Market Court. When a complaint is received by either Consumer Agency or ARN: <ul style="list-style-type: none"> - checked to see if Regulation applies – if not, rejected; - checked to see if within scope – if not, referred to relevant NEB. Consumer Agency refers any complaints in scope to ARN. In some cases ARN may take up cases for flights not originating in Denmark (see Cross-border complaints, below). - ARN opens investigation. This involves writing to the airline, reviewing responses and comparing them with the claim. Simple cases may be closed here. If responses not satisfactory, request additional information (from airlines, customer, airport, ground staff), possibly including technical report, and information to satisfy 'all reasonable measures'. - If agreement reached, case closed. Otherwise, may request more information, and pass complaint to a Board session for a final decision. If complaint upheld and airline refuses to comply, ARN refers to Consumer Agency for possible enforcement action, and passenger may take case to court. ARN recommendations are generally considered as <i>de facto</i> legal adjudications.
Types of sanction	If a contract term is judged unfair, removal can be made subject to a fine (up to €45,000) and repeated violations can trigger a 'market disturbance' fine (up to €550,000).
Maximum fine	€550,000
Number of complaints and actions taken	Complaints received to date: 223 Of which investigated: 119 Of which: 62 delays, 45 cancellations, 8 denied boarding, 4 other Prosecutions: 0 Civil court cases: 0
Cross-border complaints	Consumer Agency only takes action on flights from Swedish airports and flights from non-EU airports to Swedish airports. ARN argue that this is jurisdiction for <i>enforcement</i> , not dispute resolution and so accept complaints which could potentially go through a small claims court under different systems. Will only process complaints in English or Swedish, and will not translate any complaints. Any complaints to Consumer Agency immediately forwarded to relevant NEB.

United Kingdom

NEB	UK Civil Aviation Authority (enforcement) UK Air Transport Users Council (AUC) (complaints handling)
Nature of NEB	The Civil Aviation Authority is an independent regulatory authority, responsible for economic and safety regulation as well as consumer protection. The AUC is an independent government agency. Its role is defined in a Memorandum of Understanding, which states that it is independent from both government and the CAA.
Funding	CAA is funded through levies on UK registered airlines and air traffic management services. AUC is funded by CAA.
Links with aviation industry	Both the CAA and AUC are formally independent from the aviation industry. CAA is required to consult airlines about its charges (including the element allocated to the AUC), so airlines may be able to influence the resources available for the complaints handling body indirectly.
Resources	CAA: 3-4 staff work approximately 25% of time on the Regulation (1 FTEs) AUC: 5-6 staff work approximately 75% of time on the Regulation (4 FTEs) The AUC considers that it does not currently have sufficient resources to handle complaints received under the Regulation within a reasonable timeframe. However, it has recently been given permission to recruit 1 additional FTE and this may resolve the situation.
Legislation	The enforcement regime is defined under Statutory Instrument 2005 no. 975
Guidance from government	The CAA has received guidance from the UK government to adopt "light touch" regulation. This is taken to mean that it should not launch "unnecessary" prosecutions.
The enforcement process	The formal enforcement procedure was set out in a Memorandum of Understanding between the Department for Transport and CAA. Passengers complain to the AUC. If AUC believes that there may have been a breach of the Regulation, they contact the airline and try to obtain restitution for the passenger. If this is not forthcoming, and they believe that there has been systematic/flagrant breach of the Regulation, they refer the case to CAA. Otherwise, the passenger may attempt to obtain restitution through the civil courts. If the case is referred to CAA, it may contact the airline, either by letter or to arrange a meeting. They seek to clarify the position regarding the complaint, attempt to obtain restitution for the passenger, and obtain guarantees about future behaviour. If this is not forthcoming they could undertake a prosecution.
Types of sanction	Fines.
Maximum fine	Approx €7,500 (£5,000) for each breach of the Regulation.
Number of complaints and actions taken	Complaints received by AUC: 10,083 written complaints of which 6,154 relate to the main issues covered by the Regulation Complaints referred to CAA: 18, of which 11 resolved and 7 outstanding Prosecutions: 0 Civil court actions: Press reports indicate that there have been several civil court actions but there is no consolidated source of information on these cases.
Cross-border complaints	The AUC will only accept complaints from UK residents, although when complaints from non-UK residents are received, it does reply and provide information. It does not forward complaints outside its jurisdiction to the appropriate NEB. In accordance with the Regulation, the CAA can only take action regarding flights from the UK or from non-EU countries

CONTROL SHEET

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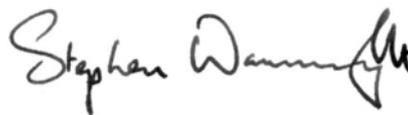
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