

REVIEW OF REGULATION 261/2004

Final Report

Appendix B: Case studies

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1. BELGIUM

Enforcement body

- 1.1 The Belgian National Enforcement body is the Direction Générale Transport Aérien (Civil Aviation Authority), which is part of the Service Public Fédéral Mobilité et Transports (Ministry of Transport). We refer to it hereafter as DGTA. It functions as part of the government and therefore is not independent from it. It is independent from the aviation industry although the nature of the organisation means that it does work closely with the industry on a number of issues.

Funding

- 1.2 As DGTA is part of the Ministry of Transport, it is funded through general taxation. There is no levy on passengers or airlines and there is no charge for passengers who make complaints under the Regulation. Except by direct lobbying of the government, there should be no opportunity for airlines to influence the level of resources available for enforcement.

Resources available

- 1.3 DGTA in total has 170 staff, of which 7 work in the Policy Unit, which is responsible for enforcement of the Regulation. On average 2.5 full time equivalents within this unit work on enforcement. In addition to these staff, the unit will ask DGTA's operational experts for advice on technical issues when required – for example, if there is dispute as to whether a cancellation was genuinely due to extraordinary circumstances.
- 1.4 Compared to some other NEBs and given the size of the Belgian aviation market, DGTA is quite well resourced. Nonetheless, it considers that it does not have adequate resources to enforce the Regulation. Its staff estimated that it would need an additional 2 FTEs (bringing the total to 4.5 FTEs) for enforcement to work properly. It also noted that relatively highly qualified staff are needed to handle complaints, due to the complexity of the Regulation and the nature of the complaints that it receives; staff undertaking complaints handling would usually need to have a university degree. This means that staff costs are relatively high.

Enforcement process

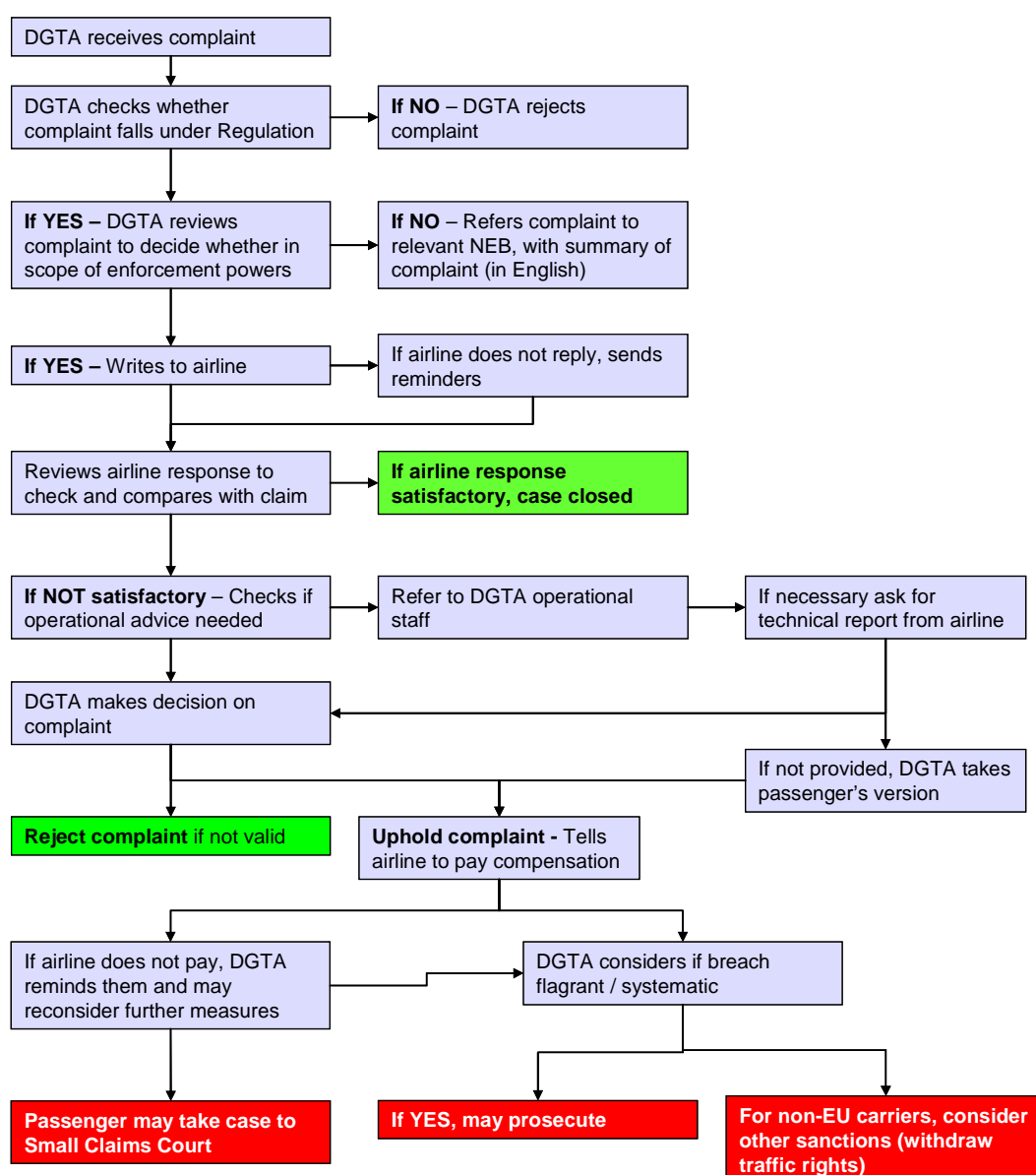
Legislation

- 1.5 The DGTA was designated as the enforcement body, and penalties for non-compliance with the Regulation were introduced, through an amendment to article 32 of the Law of 27 June 1937, which in turn amended the Law of 16 November 1919, on regulation of aviation. The amendment was published in the Belgian Official Journal on 15 May 2005 and came into force on 25 May 2006. This means that, for a period of 15 months, Belgium was not compliant with the requirement in Article 16 of the Regulation for there to be dissuasive sanctions.
- 1.6 However, under this law, penalties for non-compliance with the Regulation are severe. The law allows for a fine of between €200 and €4 million, plus between 8 days and 1

year imprisonment. The relatively wide range in penalties reflects the fact that there could be significant variation in the severity of any non-compliance. In addition, in the case of non-EU airlines, DGTA may be able to take other actions in the event of systematic non-compliance, including withdrawal of traffic rights. For example, if an airline is persistently cancelling flights due to technical problems with aircraft, this could be taken to mean that their aircraft maintenance is not adequate and therefore that it should be refused permission to operate on safety grounds.

Complaints process

- 1.7 Passengers complain directly to DGTA. They are encouraged to use a form that is available on DGTA's website, as this facilitates the processing of the complaint, but they may also complain in writing. After an initial review as to whether there is a *prima facie* case that the complaint is valid, it will either take action on the complaint or refer it to another NEB if it does not have enforcement powers regarding that flight.
- 1.8 DGTA investigates complaints carefully. It will seek advice from DGTA operational staff or from the airport to check whether the claims made by an airline are true, and in the event of any doubt, it will request a technical report from the airline, for example to demonstrate that a cancellation genuinely was for extraordinary circumstances that could not have been avoided even if all reasonable steps had been taken. In some cases, it has asked airlines to provide the maintenance log for aircraft, to ensure that the problem could not have been predicted (for example because it had occurred before). It considers that this is reasonable because any safety-related incident has to be carefully documented by the airline. Airlines occasionally refuse to provide the technical information requested by DGTA, but in these cases, it rules in favour of the passenger. The fact that the passenger then has a ruling from DGTA that the airline should pay compensation is likely to be beneficial to the passenger in any civil court case.
- 1.9 DGTA also collects other information where this is necessary in order to rule on a particular claim. For example, where a passenger has claimed that they were denied boarding but the airline claims that the passenger did not arrive on time at check-in, it has verified this through checking the passenger's car park receipt.
- 1.10 The enforcement process is described in Figure 1.1 below.

FIGURE 1.1 ENFORCEMENT PROCESS: BELGIUM

Limitations on enforcement

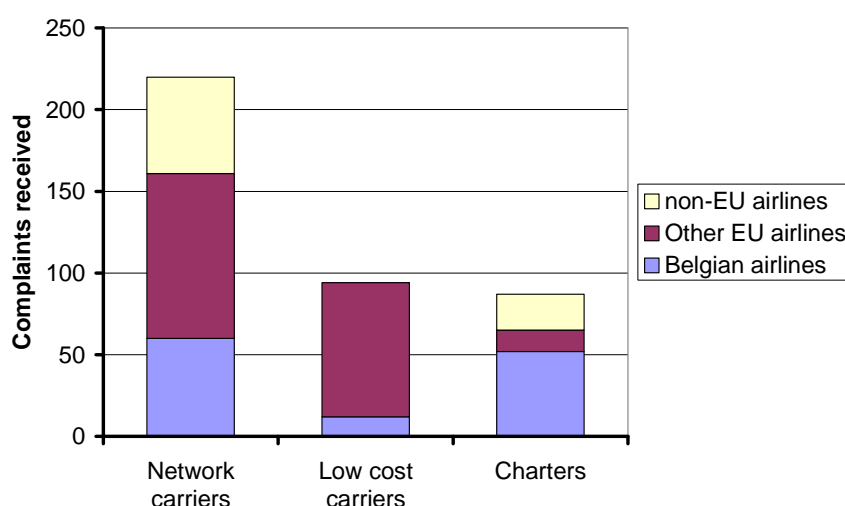
- 1.11 DGTA complies with the Regulation in that it accepts complaints regardless of the nationality or place of residence of the passenger. It noted that it has received complaints in a number of languages and, unlike other NEBs, it has staff with knowledge of a number of European languages so it can deal with these.
- 1.12 However, consistent with Article 16 (1) of the Regulation, DGTA can only take action about flights from Belgian airports and flights from non-EU airports to Belgian airports. In cases of flights from other EU airports, it refers the complaint to the relevant NEB, accompanied by a summary of the complaint; this is usually provided in English but is provided in the local language if DGTA has a member of staff able to translate it into this language. However, DGTA has no way of checking whether a complaint referred to another NEB is actually acted on.

- 1.13 DGTA also noted that they found it more difficult to enforce the Regulation with regard to carriers that are not based in Belgium – particularly if, for example, the carrier does not reply to its letters. It has sent letters to other NEBs when airlines based in their state have not responded to it, and this has helped on occasions, but not always.

Enforcement to date

- 1.14 By August 2006, DGTA had received 692 written complaints, but a number of these related to issues not covered by the Regulation, such as lost luggage, taxes/charges or the behaviour of airline staff. Of the complaints it received, it needed to take action in 401 cases. The details of the complaints for which it needed to take action are shown in shown in Figure 1.2 below.

FIGURE 1.2 COMPLAINTS ACTED ON BY DGTA



- 1.15 Network carriers account for the majority of complaints that have been handled by DGTA. 23% of all complaints were made about low cost carriers, which is approximately in line with the proportion of passengers using flights to/from Belgium that used low cost carriers in 2005 (21%). No information is available about the types of complaints that were received.
- 1.16 DGTA is not aware of any passengers that have needed to take a complaint to the Belgian civil courts. However, it does not collect data on this and therefore cannot be sure that there have been no such actions.

Issues arising with enforcement in Belgium

- 1.17 For the first 15 months after the Regulation was introduced, Belgium was not compliant with the requirement in Article 16 of the Regulation that sanctions be introduced for non-compliance. However, it has complied with this requirement since May 2006.
- 1.18 In our view, enforcement of the Regulation in Belgium is working well compared to other Member States. However, DGTA pointed out two main issues:

- it does not have sufficient resources; and
 - some aspects of the Regulation are unclear, which can make enforcement more difficult.
- 1.19 DGTA's enforcement process is quite thorough and includes the request and evaluation of technical reports from airlines in order to substantiate claims. However, this requires considerable time to be spent on enforcement of the Regulation by staff with appropriate technical training, in addition to the core team responsible for enforcement. NEBs in other Member States might not have sufficient resources to undertake this level of detailed work.
- 1.20 DGTA also highlighted a number of ways in which the Regulation was unclear and noted that this made enforcement more difficult. It has taken particular interpretations in some areas: for example, it considers that there is no obligation on airlines to re-route passengers on flights operated by other carriers.
- 1.21 A further issue arises with complaints where the departure of the flight was in another Member State or the passenger are based in another Member State. In many respects, DGTA represents "best practice" in this area: not only does it comply with the requirement of the Regulation to accept complaints without discrimination based on the nationality of the complainant, but it will also handle complaints in languages other than French and Flemish, and when a complaint regards a flight from another Member State, it refers it to the relevant NEB, accompanied by a translation of the complaint or at least a summary of the complaint in English. However, difficulties still arise:
- it has no means of checking that the NEB to which it refers the complaint actually does anything, and it is aware of cases in which they have not; and
 - it is harder (although not impossible) for it to take action against an airline based in another Member State.

2. DENMARK

Enforcement body

- 2.1 The Danish National Enforcement body is SLV, the Danish CAA, an agency of the Ministry for Transport. The Regulation is enforced by the legal department. Its main functions cover laws regarding safety and security – this is the only passenger rights legislation they are responsible for. Given that their main role is the inspection of airlines, they are independent from the aviation industry, although the nature of the organisation means that it does work closely with the industry on a number of issues.

Funding

- 2.2 SLV is primarily funded through a levy on airlines, both Danish registered airlines and the foreign airlines through a levy on en-route charges. A small proportion of revenue is provided through the central government budget, funded through general taxation.

Resources available

- 2.3 Compared with other NEBs, and given the size of the Danish aviation market, SLV is well resourced, and they consider themselves to have adequate resources to enforce the Regulation. One member of staff works full time on the enforcement of this Regulation, whilst overall 2.5-3 FTEs work on enforcement. They bring in other staff when necessary to handle the volume of complaints, for example after the summer holiday period. Most of the staff handling complaints are lawyers, but they also have access to technical staff (engineers, pilots etc) to investigate cases, and there does not appear to be any issue with them using the technical staff to conduct detailed investigation.

Enforcement process

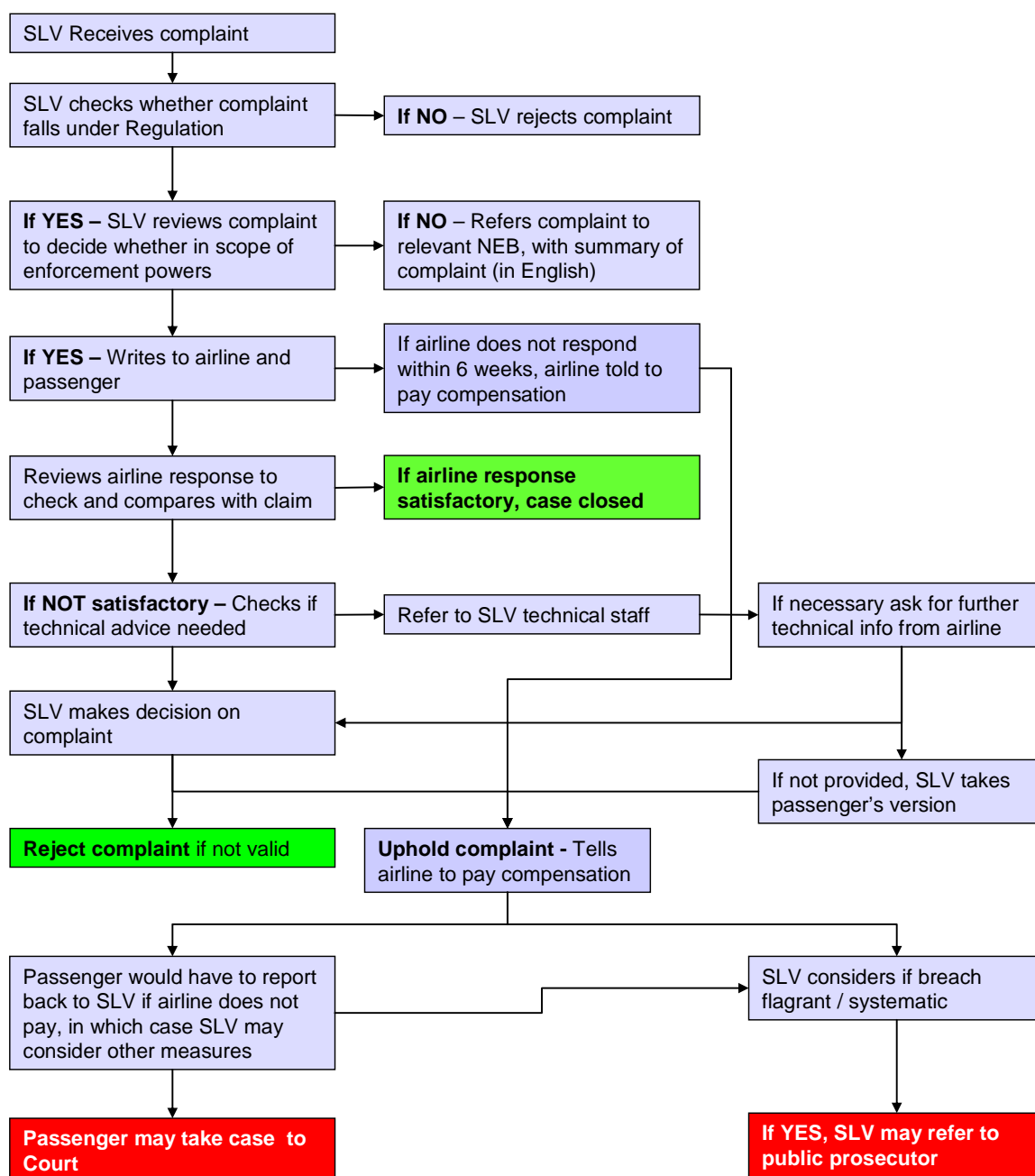
Legislation

- 2.4 SLV is designated as the enforcement body under the Danish Air Navigation Act. Whilst this does not refer to the Regulation specifically, it states that all infringements of EU aviation legislation can be punished. In the case of systematic non-compliance with the Regulation, SLV could propose a fine which would then be decided on by the courts.
- 2.5 The maximum fine is unlimited and it would be a criminal sanction, therefore non-compliance would have to be proven beyond reasonable doubt.

Complaints process

- 2.6 Passengers complain directly to SLV. After an initial review as to whether there is a *prima facie* case that the complaint is valid, it will either take action on the complaint or refer it to another NEB if it does not have enforcement powers regarding that flight, in which case the complaint is translated into English and passed on to the relevant NEB.

- 2.7 SLV investigates complaints very thoroughly. When a complaint is received an acknowledgement is sent to the complainant and a letter is sent to the airline, after which the airline has 6 weeks to respond. Where an airline claims extraordinary circumstances, a flight log is requested to prove the claim. If no response is provided they will automatically rule in favour of the claimant due to the requirement to prove that extraordinary circumstances existed and even if all reasonable measures had been taken could not have been avoided.
- 2.8 Where a flight log is provided, a technical expert within SLV is asked to check the airline's explanation, which is done on the merits of each case. Examples of the types of checks undertaken are:
- Where an aircraft needed a spare part, they check whether this spare part *should* have been available to the given company if the company was at a base airport, and if it wasn't available they would usually rule against the airline. If the airline was not at base then this may be accepted as a reasonable explanation.
 - If an airline claims staff sickness, they would check that the level of spare cover provided was sufficient relative to the 'normal' level of sickness in the given month. Therefore, if the sickness was in, say, February, the airline would be expected to have more spare cover as levels of sickness are higher then.
 - If equipment was missing or not working, then they would check the minimum equipment list for the given aircraft to ensure that it was actually required for the flight to be undertaken.
- 2.9 The enforcement process is described in Figure 1.1 below.

FIGURE 2.1 ENFORCEMENT PROCESS: DENMARK

- 2.10 SLV say that they have a good network of contacts with the airlines, and have managed to establish contacts with some of the larger foreign operators such as Easyjet. In virtually all cases, they believe that airlines are complying with their decisions. They had some concerns that certain airlines were not responding to their letters asking for information on the incident, in particular Air France and British Airways. However they have no evidence that, once they have asked airlines to pay compensation, they have not complied with this.

Limitations on enforcement

- 2.11 SLV complies with the Regulation in that it accepts complaints regardless of the nationality or place of residence of the passengers. However, consistent with Article

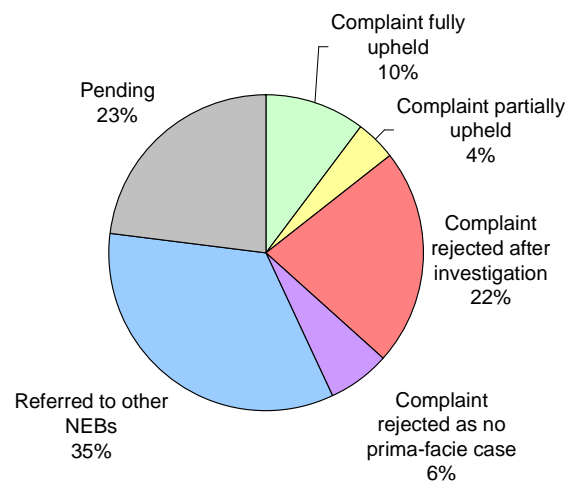
16(1) of the Regulation, SLV can only take action about flights from Danish airports and flights from non-EU airports to Danish airports.

- 2.12 SLV will handle complaints in Danish, Swedish, Norwegian or English, and SLV will always refer complaints to the relevant NEBs where appropriate, translating the complaint into English if it is written in any of the Scandinavian languages listed above. However, SLC is concerned that, when it has sent complaints to other NEBs, they have not been acted upon, and indeed they have written correspondence from the UK AUC which states that the AUC will not take up individual complaints from passengers living outside the UK. This is an example of where there it is unclear what constitutes *enforcement* and where jurisdiction lies for resolving individual passenger disputes.

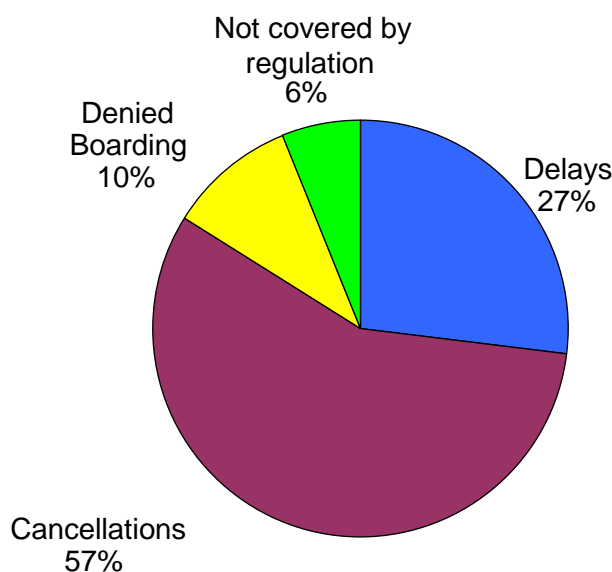
Enforcement to date

- 2.13 Between February 2005 and November 2006, SLV received 856 complaints. Figure 2.2 below summarises the outcomes of these complaints.

FIGURE 2.2 VALIDITY OF COMPLAINTS



- 2.14 The majority of complaints received by SLV have not been upheld. It has rejected 53 complaints in which there was no *prima facie* case of non-compliance, and 192 after investigation. 87 complaints have been upheld fully and 36 partially. Some of complaints were upheld because the airline did not respond to the request for the flight log or other information to allow SLV to determine whether a case amounted to extraordinary circumstances, and therefore the proportion of complaints which related to genuine breaches of the Regulation may be lower.
- 2.15 The following chart shows a breakdown of the reasons for complaint, for all 856 complaints received since February 2005.

FIGURE 2.3 TYPES OF COMPLAINTS RECEIVED BY SLV

- 2.16 SLV considers that airlines are generally paying compensation when it requests that they do so. It is aware of one airline which has refused to pay compensation, but the passenger has not taken the airline to court as the compensation is only €125. Unlike many other Member States, Denmark does not have a small claims court process and therefore it is relatively difficult for passengers to obtain restitution through the civil courts.
- 2.17 They are also aware of one civil case, which has been referred to the European Court of Justice for a ruling on the definition of exceptional circumstances. The complainant is a lawyer and chose not to complain through SLV.

Issues arising with enforcement in Denmark

- 2.18 In our view, enforcement of the Regulation in Denmark represents close to best practice. SLV reviews cases thoroughly, has access to technical expertise when required, and has sufficient resources to deal with the workload. SLV appears to strike a reasonable balance between consumer protection and reasonable expectations of the industry. However, this is facilitated by the relatively small size of the Danish aviation market and the technical resources that are available to SLV. It is possible for SLV to enforce the Regulation to a high standard, but NEBs in other Member States with larger aviation markets might struggle to undertake this level of detailed work.
- 2.19 We note that, under some circumstances, SLV appears to take quite a strict interpretation of exceptional circumstances, for example requiring airlines to have appropriate levels of cover relative to the 'expected' levels of sickness in a given month. However, overall the balance appears to be appropriate and the main airline operating in Denmark, SAS, had confidence in SLV's process.

- 2.20 The only difficulty with the enforcement process in Denmark is that SLV cannot *require* airlines to pay compensation, and therefore the passenger only obtains restitution if the airline decides to comply with SLV's request. At present, SLV believes that airlines are usually paying compensation when it requests that they do so, but in at least one case, an airline has not. The fact that Denmark does not have a small claims court process means that it would be slow and expensive for a passenger to make a claim through the civil courts. However, SLV does provide the passengers with a ruling on the complaint, which would carry significant weight in any court process.

3. GREECE

Enforcement body

- 3.1 The Greek National Enforcement body is the Hellenic Civil Aviation Authority (HCAA), an agency of the Ministry for Transport. The Regulation is enforced by the Air Economic Sector of the Air Transport & International Agreements division, who were designated as the National Enforcement Body by the Greek Parliament under document 1D/496953274 on 9 December 2004.
- 3.2 The Air Economic Sector's main functions are enforcing this Regulation, and granting / suspending licenses. Given that the main role of HCAA is the safety regulation and inspection of airlines, they are independent from the aviation industry, although the nature of the organisation means that it does work closely with the industry on a number of issues.

Funding

- 3.3 HCAA is primarily funded through general taxation, although some of the funding for the Airport Authorities section of HCAA comes through airport charges.

Resources available

- 3.4 Four members of staff work within the Air Economic Sector, of which three work partly on the Regulation – two professional staff one of whom has a legal background, and the other an economist, plus one administrative position. For the three staff members, around half of their time is spent working on the Regulation. In addition, representatives of the two main Airport Authorities (Athens and Salonika) work on complaints handling and enforcing the regulation 'on the ground'. The Athens representative works with the Regulation full time, and the other around 25% of their time. In total, they estimated that around 2.5 FTEs work on the Regulation.
- 3.5 Being a Civil Aviation Authority there is access to technical staff (eg. engineers) to help with investigation, although the impression was given that in most cases technical staff were not used. It was not clear whether this was out of choice on the part of the department's staff, or whether they were unable to get sufficient access to these staff. However, employees of the Air Economic Sector have undergone SAFA (Safety Assessment of Foreign Aircraft) training, and therefore have some knowledge of these matters.
- 3.6 Overall, they did not feel that they had sufficient dedicated resources to adequately enforce this regulation, given their other responsibilities. They have therefore put a proposal to the Governor of HCAA for the establishment of a dedicated consumer department within HCAA, which would have a minimum of 2 dedicated full time staff.

Enforcement process

Legislation

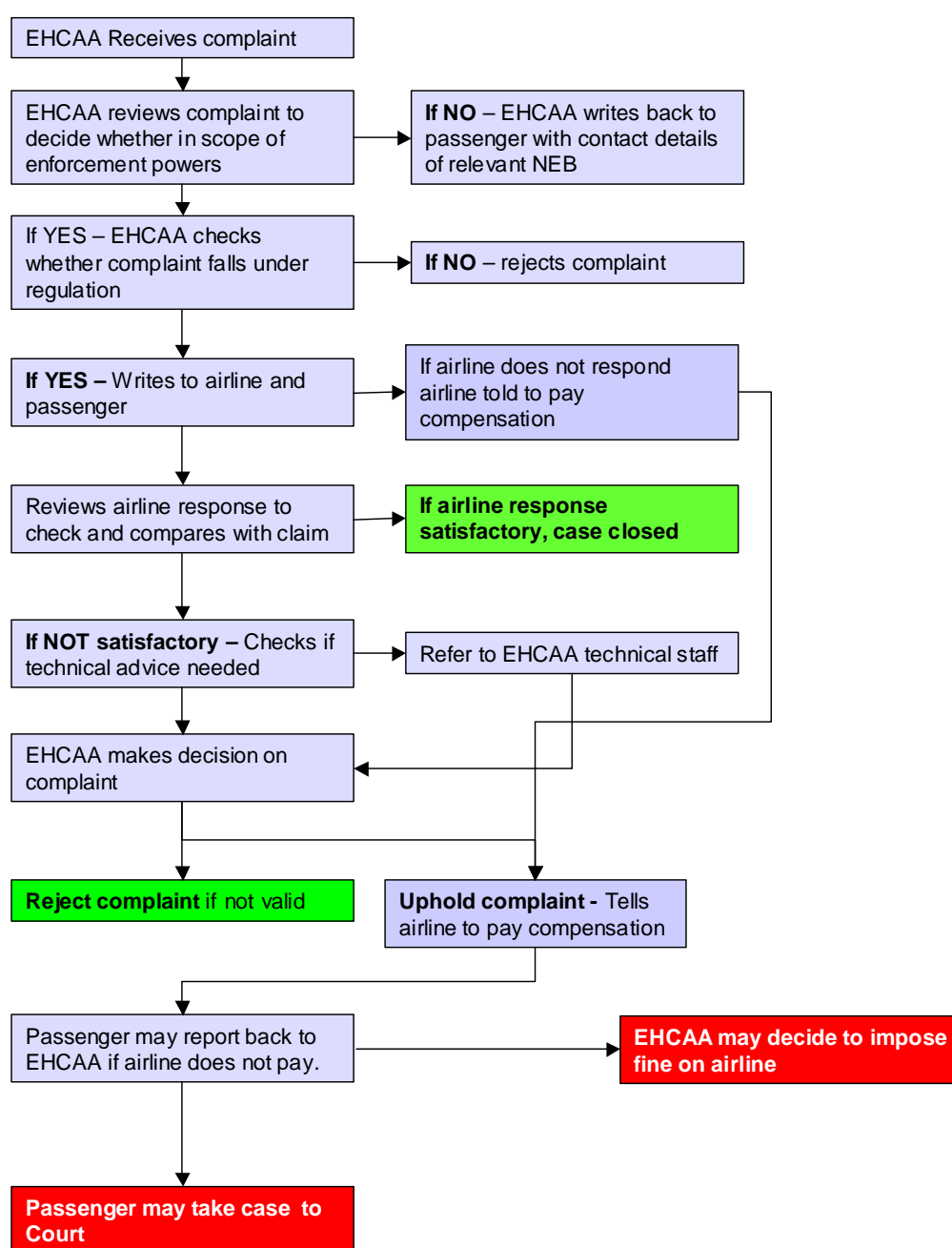
- 3.7 HCAA is designated as the enforcement body under decision D1/D/49659/3247/09.12.2004. Their role at present is mostly limited to complaints handling, and they investigate individual complaints and make recommendations for airlines to pay compensation where they are found to be in breach of the regulation. Whilst airlines are not legally obliged to act upon their recommendations, in most cases they do so.
- 3.8 Based on decision D1/D/13770/980/20.04.2005, for non-compliance with the Regulation in respect of denied boarding, cancellation or delays, the fines are as follows:
- a) For flights up to 1,500km the fine is set to €1,000 per passenger.
 - b) For all flights within the EU greater than 1,500km and for all other flights of 1,500 to 3,000km the fine is set to €2,000 per passenger.
 - c) For all other types of flights that are not covered in a or b the fine is €3,000 per passenger.
- 3.9 Therefore, the maximum fine it can impose is €3,000, which it interprets as being a fine per individual breach of the regulation, rather than a fine for systematic non-compliance.
- 3.10 The process by which such fines can be levied is currently very complicated therefore no airline has been sanctioned as yet, however an amendment to the legislation is currently pending which means that HCAA will be able to impose such fines more easily in the future. The way the Department see this working is that if airlines do not compensate passengers when HCAA has asked them to, they will be fined for each individual recommendation that the airline has failed to act upon.

Complaints process

- 3.11 Passengers complain directly to HCAA. If the complaint is not within HCAA's jurisdiction, they will write back to passengers providing them with the contact details of the relevant enforcement body, rather than forward the complaint themselves. After an initial review as to whether there is a *prima facie* case that the complaint is valid, they will open an investigation into the complaint.
- 3.12 When an investigation is opened, a letter is sent to the airline requesting relevant details of the incident, and in some cases to the passenger asking for further information. In some cases the airport or airport authority is also contacted to provide further information. Where an airline claims extraordinary circumstances, a further technical information, which could include a flight log, is requested to prove the claim.
- 3.13 Where technical information is provided, the investigator will usually review this in the first instance, and if further technical assistance is required, then they will try to get assistance from technical colleagues. However, in most cases the investigator will review the information themselves. Cases are reviewed on an individual basis, but

over time precedents have been set which has allowed them to make consistent decisions. Overall, the process takes around 1-2 months on average.

- 3.14 When a decision is made, a letter is sent to both the airline and the customer, recommending that either the airline pays compensation or re-imbursement of expenses, or informing the passenger that their complaint has been rejected. Whilst the recommendations are not legally binding in most cases they are accepted.
- 3.15 If an airline does not accept the recommendations and pay compensation, or fails to cooperate at all, HCAA may attempt to invoke a fine of up to €3,000, although the procedures for doing this at the moment are so complicated that no such fine has been charged, even though the enforcement body would like to have done so in some cases.
- 3.16 In cases where the airline does not pay, passengers may go to court but this is an expensive procedure and the HCAA is not aware of any such cases.
- 3.17 The enforcement process is described in Figure 1.1 below.

FIGURE 3.1 ENFORCEMENT PROCESS: GREECE

Limitations on enforcement

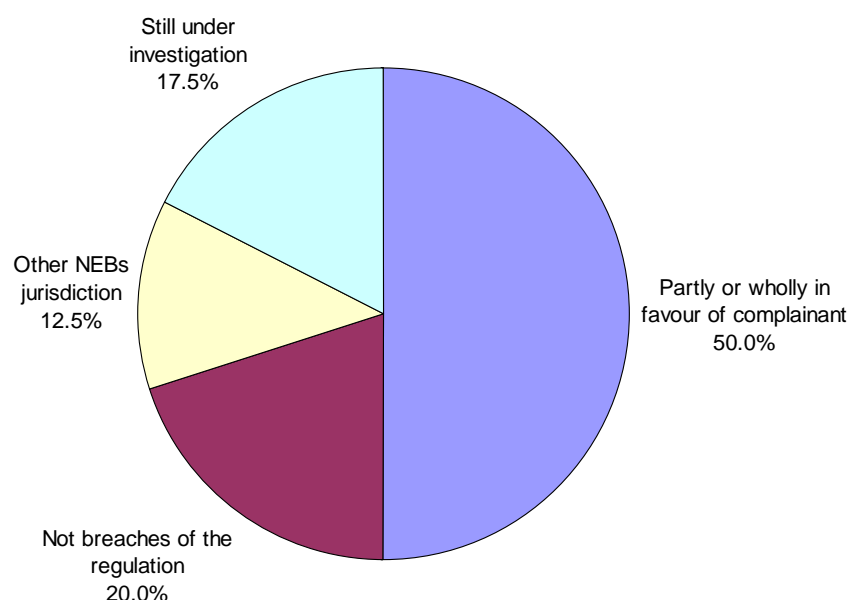
- 3.18 HCAA complies with the Regulation in that it accepts complaints regardless of the nationality or place of residence of the passengers. The three members of staff can (between them) speak Greek, English, German, Italian and Spanish, and can therefore easily handle complaints in any of these languages, but they also claim that they would translate a complaint in any European language. They do not, however, refer complaints to other NEBs when the incident is outside their jurisdiction, instead writing back to the passenger with contact details of the relevant NEB. It is not clear in Article 16 of the Regulation whether this is a breach of the Regulation.

- 3.19 Investigation of complaints and enforcement is limited to flights from Greek airports and flights from non-EU airports to Greek airports, which is consistent with Article 16(1) of the regulation.
- 3.20 As discussed above, the current legislation makes it difficult for HCAA to actually fine airlines under the Regulation, but steps are being taken to address this.

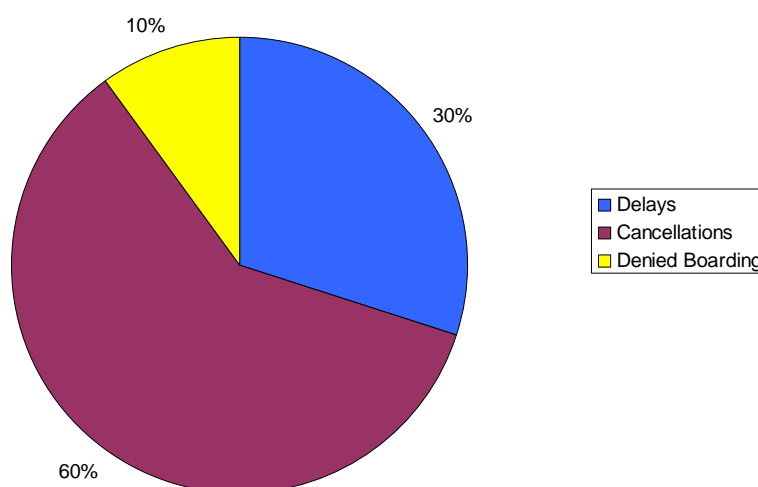
Enforcement to date

- 3.21 HCAA has only recently started to implement a system for collecting statistics on the complaints that it handles, however they were able to provide some estimates. Since the Regulation came into force, they have handled around 150 complaints. Note that this statistic only covers complaints handled by the Air Economic Sector, and does not cover those handled by the Airport Authorities, for which no data is available.
- 3.22 Figure 2.2 below summarises the outcomes of these complaints.

FIGURE 3.2 VALIDITY OF COMPLAINTS



- 3.23 Compared to other NEBs, a large proportion of claims appear to have been upheld - around 70% of cases that have actually been resolved have been found in favour of the claimant. This is rather surprising given that most NEBs have informed us that a significant proportion of cases do not even pass the *prima facie* test.
- 3.24 The following chart shows an estimated breakdown of the reasons for complaint, for all complaints received since the Regulation came into force.

FIGURE 3.3 TYPES OF COMPLAINTS RECEIVED BY HCAA

- 3.25 HCAA considers that airlines are generally paying compensation when it requests that they do so. It is aware of one UK-based low cost airline which has on a number of occasions not cooperated with its investigations nor paid compensation when asked to do so.

Issues arising with enforcement in Greece

- 3.26 It appears that on the whole HCAA provides a reasonably effective system for complaints handling in relation to the Regulation, with some exceptions. The key issues appear to be around resources, as they do not believe that their current staff levels or structure are sufficient to handle this Regulation, and they also gave the impression that technical staff are not regularly used to investigate cases of 'extraordinary circumstances' due to technical reasons, instead using their own experience and judgement to rule on such cases. Compared with other NEBs, a surprisingly large number of cases appear to have ruled in the passengers' favour, which suggests that in most cases where airlines claim 'Extraordinary circumstances', the HCAA rejects the airlines' explanation.
- 3.27 There currently appear to be some more fundamental issues with regards to enforcement, as the HCAA have yet to fine an airline under this regulation even though they claim they would like to have done so. However, they believe that current changes to the Regulation will make it easier for them to fine airlines. The level of the maximum fine is not high at €3,000, however their interpretation that the fine will be applied on an individual case-by-case basis (ie. Potentially for each passenger affected) means that there is the potential for some significant fines being levied in the future. However, given that under current laws they cannot *require* airlines to pay individual passengers compensation, one can only assume that they may face similar difficulties in requiring airlines to pay fines, even once they are able to charge these fines. This may particularly be the case with non-Greek airlines.
- 3.28 Correspondence with ECC Greece indicates that concerns with enforcement in Greece may be well-founded. It is their view that HCAA should be 'stricter and more

efficient' in enforcing the Regulation, particularly given that no sanctions have yet been applied (although the change in legislation discussed earlier may address this issue). They also believe that the HCAA should further investigate cases of 'extraordinary circumstances' due to technical problems, as passengers seem to have started questioning whether this is always the actual cause of the delays or cancellations. They believe that the HCAA should collect more proof of the actual causes of such situations and the actual offers to the passengers in order to make sure that the Regulation is applied efficiently. It should be noted, however, that the HCAA appears to have ruled in the passengers favour in a high proportion of cases that have been investigated, therefore more thorough investigation may actually work against the passengers interest.

4. ITALY

Enforcement body

- 4.1 The Italian National Enforcement body is the Ente Nazionale Aviazione Civile (Italian Civil Aviation Authority), which was established on 25 July 1997 by Legislative Decree number 250/97. We refer to it hereafter as ENAC, which comprises, in a single body, competences formerly carried out by three distinct entities: the Direzione Generale dell'Aviazione Civile (Directorate General of Civil Aviation), Registro Aeronautico Italiano (Italian Airworthiness Authority) and Ente Nazionale Gente dell'Aria (National Body for Airmen). The chairman of ENAC is appointed through Presidential Decree, while the 6 board members are appointed through a Prime Ministerial Decree, all of them following the advice of the Ministry for Transport. ENAC is independent from the aviation industry although the nature of the organisation means that it does work closely with the industry on a number of issues; they are Safety and Security; Passenger Rights; Environment; and Development.

Funding

- 4.2 ENAC is mainly funded through general taxation but there is also a specific Safety and Security fee for airline certification that is only applied to Italian carriers and to carriers based in states which are not members of ICAO (such as Taiwan). There is no charge for passengers who make complaints under the Regulation. Except through direct lobbying of the government, there are no opportunities for airlines to influence the level of resources available for enforcement.

Resources available

- 4.3 ENAC has in total 1,100 staff, of which the staff working on the Regulation comprise:
- in the central office, two full time staff plus one staff member two days a week and one other staff member one day per month work; and
 - at each of the (40) Italian airports, there is a full time member of staff responsible for ensuring regulations are adhered to; these 40 staff members spend a significant proportion of their time on passenger rights.
- 4.4 ENAC were unable to estimate how many FTEs were working on the Regulation, but assuming that this represents around 25% of the time of the airport staff, it would have around 12 FTEs. ENAC said that in general it had sufficient staff to enforce the Regulation, but that the staff at the busiest airports, such as Malpensa, had many other tasks to do and therefore could not spend as much time as necessary working on enforcement.

Enforcement process

Legislation

- 4.5 ENAC is the designated national enforcement body for Italy, and penalties for non-compliance with the Regulation were introduced, through Legislative Decree 27th January 2006, enacted on 21st March 2006. This means that, for a period of 13 months, Italy was not compliant with the requirement in Article 16 of the Regulation for there

to be an enforcement regime. ENAC only started to impose penalties for non-compliance in July 2006.

- 4.6 The law allows for administrative fines of between €2,500 and €50,000 to be imposed for each incident of non compliance with the Regulation. However for multiple infringements can be substantially higher, for example AirOne has been fined between €150,000 and €450,000, which is the highest fine issued to date by ENAC. In addition, as airlines could often breach more than one Article of the Regulation in a single incident (for example, both the requirements on delays and information), it is possible that multiple fines could be imposed. The relatively wide range in penalties reflects the variation in the severity of any non-compliance. It is however worth noting that no airline to date has paid any fines.
- 4.7 The system of penalties identified by the Legislative Decree 69/06 is listed in the table below.

TABLE 4.1 PENALTIES UNDER ITALIAN LAW

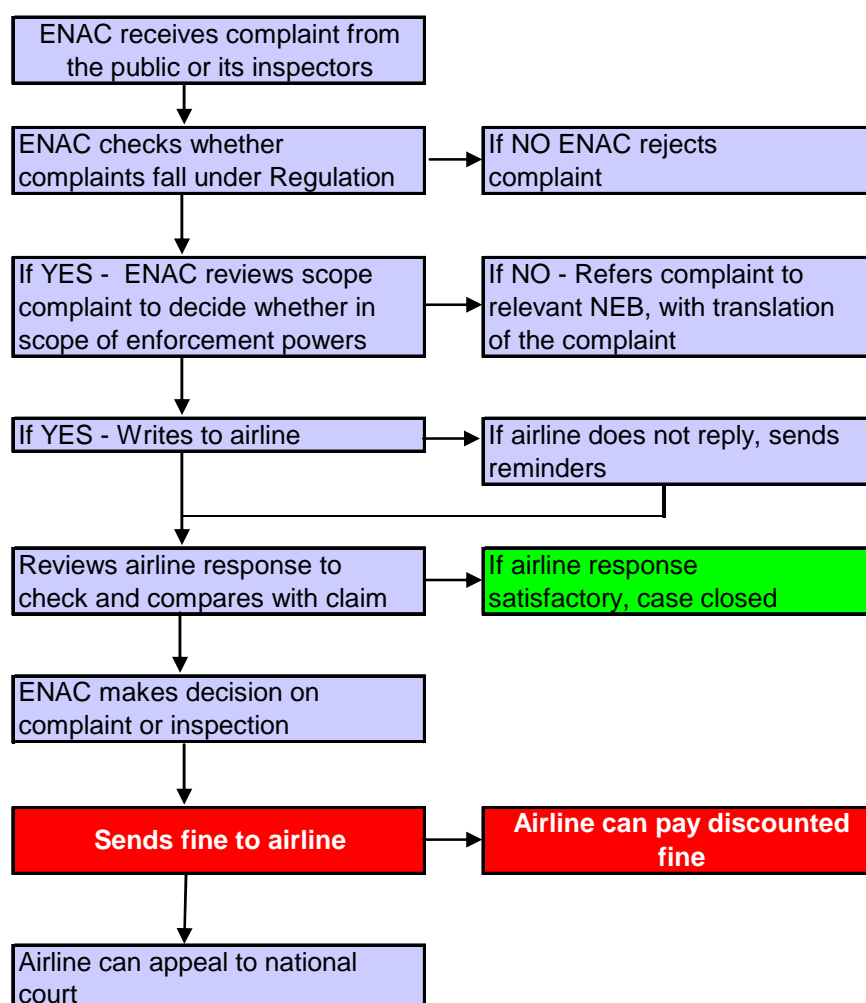
Penalties	Minimum (€)	Maximum (€)	Reduced (€)
Denied Boarding	10,000	50,000	16,666.67
Flight cancellations	10,000	50,000	16,666.67
Delay	2,500	10,000	3,333.33
Upgrade/downgrade	1,000	5,000	1,666.67
Lack of priority and assistance to the disabled or to unaccompanied children	10,000	50,000	16,666.67
Provision of information	2,500	10,000	3,333.33

Complaints process

- 4.8 In order to guarantee the quality of services offered to consumers and the protection of passenger rights ENAC has issued a Passengers Charter and Charter of Airport Standard Services. The former is a practical guide gathering in one document the rules and regulations in force at national, European Union and International level illustrating the forms of protection available to passengers in case of problems with their journeys. The latter, sets out the minimum quality standards airport operators are bound to comply with in carrying out their relevant services: in this regard, airport managers must satisfy 54 parameters in order to guarantee a high level of service quality to the passenger.
- 4.9 Both documents include a detailed description of the claims handling procedure and process. A form is also available on ENAC's website. Passengers have firstly to complain with the carriers and subsequently report their complaint to ENAC.
- 4.10 Complaints can be submitted from ENAC's website. ENAC has set up a database and an information management system on which, each day, it logs complaints and then decides how they will be processed:

- if the flight originated from an Italian airport, the complaint is forwarded to the ENAC airport representative to deal with;
 - if the flight originated in another Member State, the complaint is forwarded to the relevant NEB in the other Member State; or
 - if the flight was to an Italian airport from outside the EU, the complaint is processed by ENAC's head office.
- 4.11 The relevant staff member within the airport checks the airport log to verify whether there was an infringement of the Regulation. He/she then writes to the airline for further details and sets out the fine that will be imposed if the situation was not caused by *force majeure*. If the airline states that an incident occurred due to technical problems, ENAC investigates the matter: it considers that it is necessary to distinguish between a technical fault, which it would accept as extraordinary circumstances, and an operational problem such as the crew arrive late, which it would not.
- 4.12 If the airline sets out the reasons for the problem and they fall under ENAC's acceptable *force majeure* parameters the matter does not proceed, but if there are no such reasons then ENAC imposes the relevant fines. An airline then has the option of:
- paying the fine immediately, in which case it receives a discount of two thirds;
 - seeking a meeting in order to resolve the issue; or
 - challenging the fine in court.
- 4.13 The enforcement process is described in Figure 1.1 below.

FIGURE 4.1 ENFORCEMENT PROCESS: ITALY



- 4.14 ENAC's staff at the Italian airports are able to undertake inspections and may initiate the enforcement process themselves if they can see that an airline is not complying with the Regulation. This means that an airline may receive fines even without a complaint from a passenger.

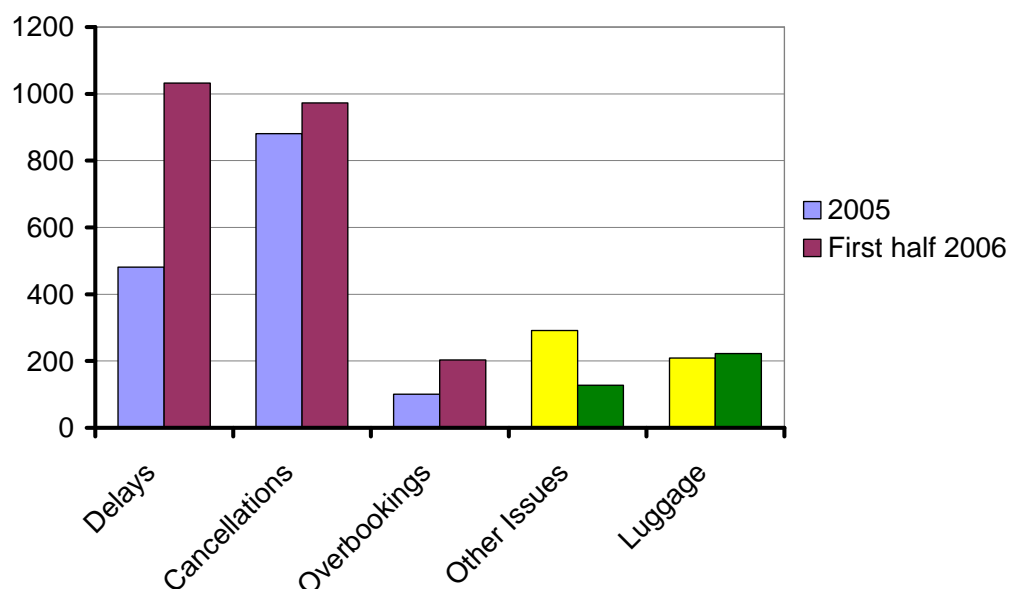
Limitations on enforcement

- 4.15 ENAC complies with the Regulation in that it accepts complaints regardless of the nationality or place of residence of the passenger. However, as stated above and consistent with Article 16 (1) of the Regulation, ENAC can only take action about flights from Italian airports and flights from non-EU airports to Italian airports. In cases of flights from other EU airports, it refers the complaint to the relevant NEB.
- 4.16 However, some other NEBs stated that they had referred complaints to ENAC and that no action appeared to be taken. ENAC denied that this would have happened.

Enforcement to date

- 4.17 In the first semester of the year 2006, ENAC received 2,557 complaints, 23.2% more than the total number of complaints received during the previous year. The details of the complaints for which it needed to take action on are shown in Figure 1.2 below.

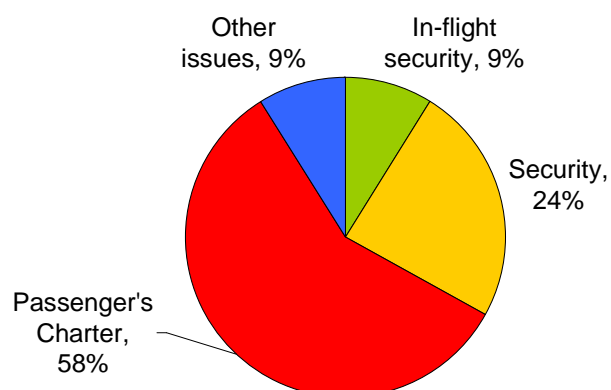
FIGURE 4.2 COMPLAINTS ACTED ON BY ENAC



- 4.18 According to ENAC, enforcement of the Regulation in Italy is working well, but is still in its initial stages. It considers that this is demonstrated by the substantial increase in the enquiries it has received from passengers and the number of complaints that it has received:

- the total number of access to the Internet Web Site of the Passenger's Charter of ENAC was 122,316 of which 43,103 registered between January and September;
- 13,268 is the number of visits made to ENAC's complaints and information free number Web Page;
- 5,372 the phone calls received between 1st July and 7th September 2006, 58% of which concerning the Passenger's Charter.

- 4.19 ENAC believes that this shows that air passengers are increasingly aware of their rights and that ENAC is putting much effort in making the Regulation work well in practice. We were informed by the consumer associations that, during the same period, they had registered a decrease in the number of complaints.

FIGURE 4.3 PHONE CALL CATEGORIES

- 4.20 Following the above complaints and independent inspections by ENAC staff, 63 fines have been issued to airlines since the enactment of the Legislative Decree 69/2006. The largest fine that has been issued was to Air One (€450,000, reduced to €150,000 if it pays within the specified time). However, it is important to note that no airline has paid one of these fine to date.
- 4.21 One airline informed us that it had received letters from ENAC informing it that it was being fined for late operation of a given flight, but that it had checked its records and found that the flight was not late. ENAC said that this was not possible because fines would not be issued without checking the airport log to ensure that the incident occurred.

Issues arising with enforcement in Italy

- 4.22 For the first 13 months after the Regulation was introduced, Italy was not compliant with the requirement in Article 16 of the Regulation that sanctions be introduced for non-compliance. However, it has complied with this requirement since 21 March 2006.
- 4.23 ENAC emphasised that the key advantages of its approach to enforcement are that it has a very comprehensive electronic complaints database, and that it has an established network of staff in the 40 Italian airports which provide it with the ability to gather information relating to the compliance by airlines with the Regulation. Its staff at the airports are able to check on the spot whether airlines are complying with their obligation to, for example, provide assistance in the event of long delays or cancellations. This means that it does not need to wait for a passenger to complain in order to take enforcement action, and also has the advantage that information provided by its own staff is more likely to be accurate.
- 4.24 According to ENAC, for flights originating from Italy, there have been and continue to be teething problems, especially in that airlines are often not providing assistance in the event of missed connections. However, it thinks that airlines are complying with the Regulation in most cases, and therefore that the Regulation works well in practice despite some difficulties in the mechanism that links together passengers (including

passenger organizations), airlines, airports and enforcement bodies. Nonetheless, it highlighted a number of ways in which the Regulation is unclear, which made enforcement more difficult; these are described in section 6 of this report.

5. SPAIN

Enforcement body

- 5.1 The Spanish National Enforcement Body is Dirección General de Aviación Civil (Civil Aviation Authority), which is part of Ministerio de Fomento (Ministry of Public Works). We refer to it hereafter as DGAC. It is part of the government and therefore it is not independent. However, it is independent from the aviation industry although, in common with most other NEBs, the nature of the organisation means that it does work closely with the industry on a number of issues.
- 5.2 Most of the staff involved in enforcement of the Regulation are not actually civil servants employed by the Ministry of Public Works, but are consultants working for the company Servicios y Estudios para la Navegación Aérea y la Seguridad Aeronáutica, S.A. (SENASA). This is a technical service agency, incorporated in Madrid in February 1991 by Royal Decree to take over the training responsibilities previously discharged by the Spanish DGAC. It has recently taken over activities regarding the aviation security law, including handling of passenger complaints and supervision of compliance with the Regulation.

Funding

- 5.3 As DGAC is part of the Ministry of Public Works it is funded primarily through general taxation. It also imposes charges for certain services it provides to the aviation industry such as awarding, sanctioning, validating or renewing aviation licences, titles and qualifications. There is no levy on passengers and there is no charge for passengers who make complaints under the Regulation. Except by direct lobbying of the government, there should be no opportunity for airlines to influence the level of resources available for enforcement.

Resources available

- 5.4 There are 17 staff working on issues related to the Regulation:
- Customer services department: 8 administrative assistants and 1 technician
 - Inspection: 4 technicians
 - Sanction dossiers: 2 administrative assistants, 1 technician and a government employee
- 5.5 However, these staff only spend a proportion of their time on issues related to the Regulation. The SENASA staff estimate that they spend around 60% of their time handling complaints, so on average there are 10 full time equivalents working on the Regulation. In addition to these staff, SENASA will ask DGAC's operational experts for advice on technical issues when required – for example, if there is dispute as to whether a cancellation was genuinely due to extraordinary circumstances. The main difficulty created by the fact that the staff are not employees of the Ministry is that the SENASA staff cannot apply sanctions directly to airlines; it needs to obtain authorisation from the Ministry.

- 5.6 Compared to some other NEBs, DGAC is now quite well resourced. However, this is relatively recent: until April 2006, when the SENASA staff were brought in to run the complaints-handling process, it was accepted that there were insufficient staff available to run the system. Despite the increase in the number of staff, it still considers that it does not have adequate resources to handle the increasing number of complaints since the implementation of the Regulation. During 2007, it is envisaged that the Ministry of Public Works will set up a special department for Transport Quality, which will be responsible for issues related to the Regulation. This would be within the recently created Air Security State Agency. However, the exact nature of this body is currently not defined.

Enforcement process

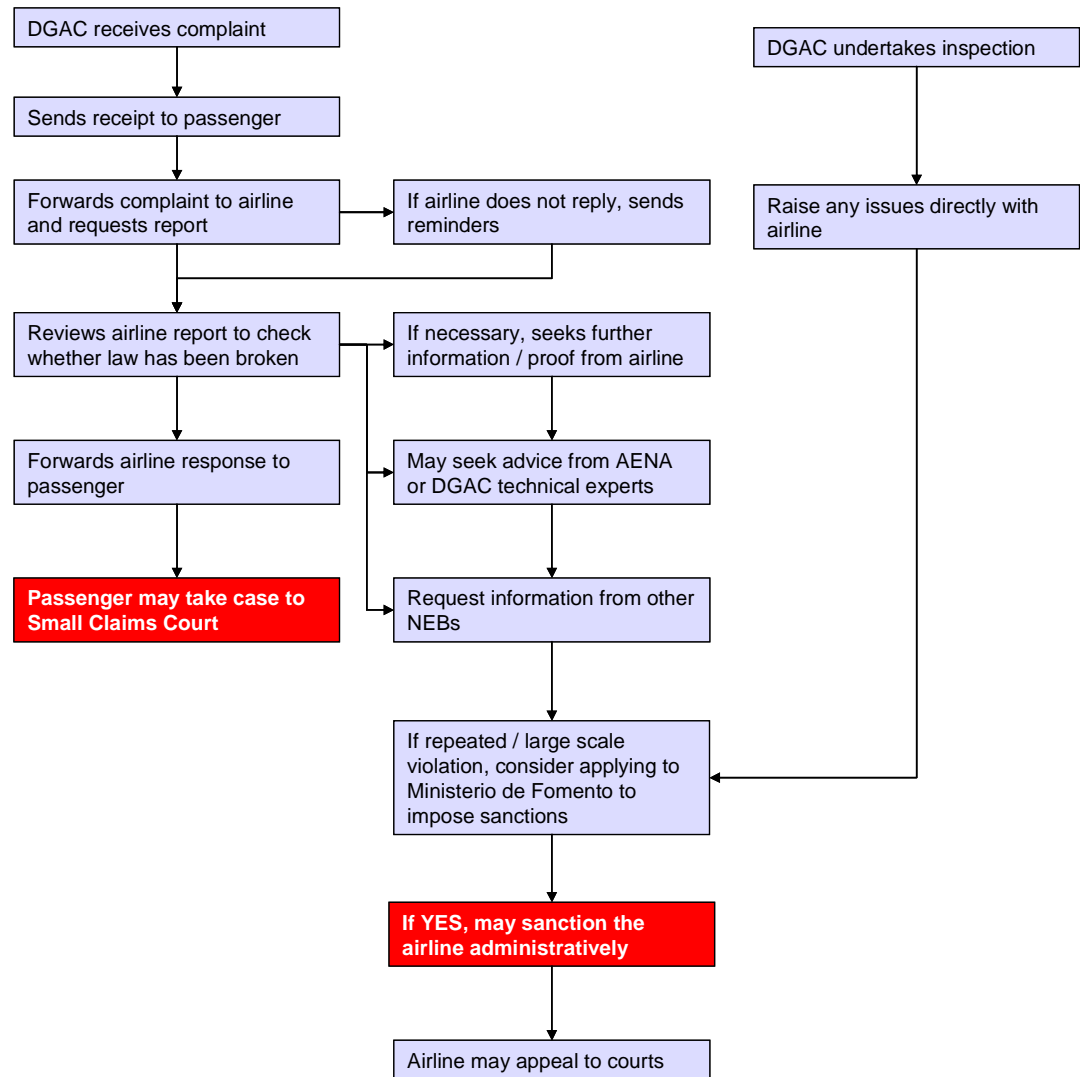
Legislation

- 5.7 DGAC was designated as the enforcement body under Royal Decree 1476/2004 (18 June 2004). However, this Decree did not introduce specific penalties for non-compliance: DGAC already had powers to impose sanctions for certain offences including unjustifiable delays, cancellations and non-provision of information under Law 21/2003 (7 July 2003) on Aeronautical Security.
- 5.8 The maximum penalties for non-compliance with the requirements of Law 21/2003 are severe: the law allows for a fine of between €4,500 and €4.5 million, depending on the offence, the relatively wide range in penalties reflecting the fact that there could be significant variation in the severity of any non-compliance. However, as the law also states that fines are limited to 2-3 times the amount that the airline has benefited by not complying with the provisions of this law, where it is possible to identify this amount, the fines would usually be at the lowest end of the scale. Penalties are administrative rather than criminal and are imposed directly by DGAC, airlines may appeal the DGAC fines to the (civil) courts.
- 5.9 As discussed in more detail below, Law 21/2003 predates the Regulation and not all of the requirements of the Regulation are reflected within it. Therefore, Spain appears to be partially non-compliant with the requirement of the Regulation to introduce dissuasive penalties for non-compliance. Spain intends to introduce further amendments to Law 21/2003 during 2007 which will be specifically related to the Regulation.

Complaints process

- 5.10 Passengers complain directly to DGAC. In the future, they will be encouraged to use a form that will be available on DGAC's website, as this will facilitate the processing of the complaint, but for the time being they can send complaints by email, fax or mail. All complaints are recorded in a database and kept in a digital format (scanned in case of fax or mail). When it receives a complaint regarding an airline, DGAC sends the complaint on to the airline and requests a response; note that, as the enforcement process is not specific to Regulation 261/2004, the complaint is not checked to ensure that it refers to a breach of the Regulation. The passenger is sent a confirmation that their complaint is under investigation.

- 5.11 Depending on the nature of the complaint and the response received from the airline, DGAC may request more information from DGAC technical experts or from AENA, the airports and air traffic control operator. It may also request information from other NEBs if the event took place outside Spain. However, it appears that in most cases it simply replies to the passenger with details of the airlines' response and their rights in the case. The passenger is able to pursue the case through the small claims court if they wish to do so, but DGAC would have no further involvement.
- 5.12 In cases of repeated or very severe violations of the law by an airline, DGAC may apply sanctions. These cannot be applied by the SENASA staff working on application of the Regulation but must be agreed by the Ministry of Public Works. As explained above, penalties are administrative and therefore do not need to be applied by the courts, but an airline could appeal to the courts.
- 5.13 In addition to acting on passenger complaints, DGAC undertakes airport inspections to check compliance, for example that passenger information is being provided and that airlines are handling PRMs appropriately. DGAC expects to undertake 600 inspections during 2006. In theory, DGAC has to provide advance notice of its inspections, but in practice it can sometimes undertake inspections without warning.
- 5.14 The enforcement process is described in Figure 1.1 below.

FIGURE 5.1 ENFORCEMENT PROCESS: SPAIN

Limitations on enforcement

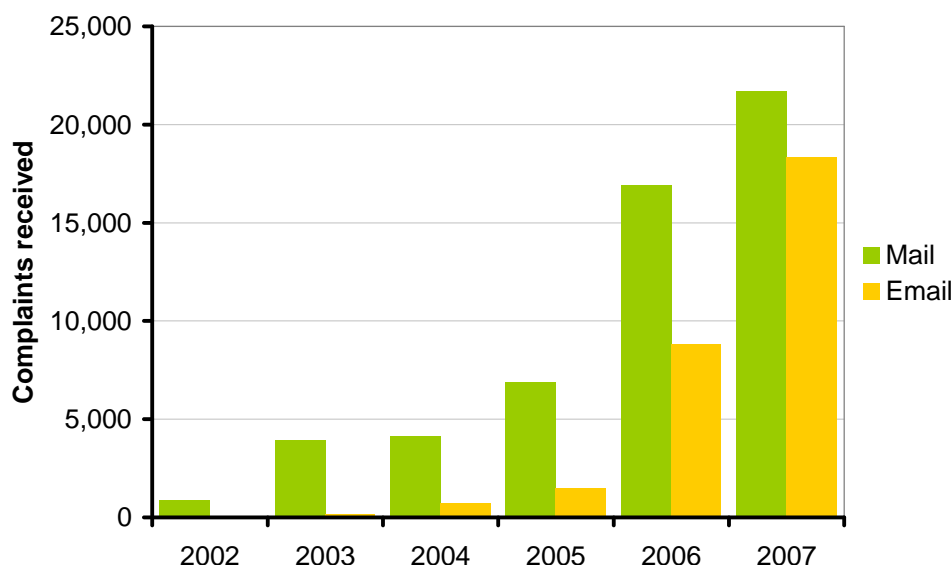
- 5.15 DGAC informed us that it complies with the Regulation in that it accepts complaints from citizens of all Member States. However, this can lead to language difficulties: it is able to process complaints provided in Spanish and English, but has received complaints forwarded from the French and German NEBs without English translation. At a minimum, it suggests that NEBs should provide a summary of a complaint in English.
- 5.16 In practice DGAC is as far as possible handling complaints received regarding Spanish carriers even if the flight is from another EU country to Spain.

Enforcement to date

- 5.17 Since the Regulation 261/2004 came into force in February 2005, the number of complaints received by DGAC has increased considerably. According to their figures, there was an increase of 71.14% between 2004 and 2005, which meant the handling of 8,396 complaints in 2005. A further increase of 206.75% is forecast with respect to

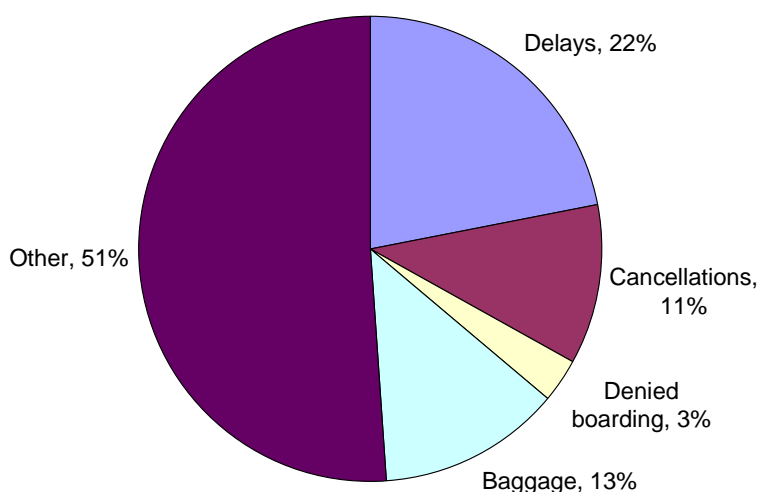
2005, which will amount to 25,755 complaints in 2006. The evolution of the number of complaints received, both via email or mail, is shown in Figure 1.2 below.

FIGURE 5.2 COMPLAINTS RECEIVED BY DGAC (2002-2007)



5.18 A number of the complaints received by DGAC are related to issues not covered by the Regulation, such as lost luggage, taxes/charges or the behaviour of airline staff. Also, a significant number of the complaints received relate to the consequences of cancellations / delays, and therefore are covered by the Montreal Convention, not by the Regulation. The details of the complaints by July 2006 are shown in Figure 1.2 below.

FIGURE 5.3 TYPES OF COMPLAINTS RECEIVED BY DGAC (UP TO 7/2006)



5.19 No fines have been issued as yet for non-compliance with the provisions of the elements of the Aviation Security Law related to the Regulation. However, DGAC has started the process to impose fines on two carriers:

- Iberia, for the events of 28 July 2006 in which its staff at Barcelona airport blockaded the runway, leading to a large number of delays and cancellations affecting all airlines using the airport.
- Air Madrid, for persistent very long delays (12-24 hours) and cancellations of flights, often without provision of appropriate assistance. The delays and cancellations appear to have arisen because the airline scheduled more flights than could be operated reliably with its fleet.

Issues arising with enforcement in Spain

- 5.20 The main issue arising with the enforcement process in Spain is that the only law under which sanctions for non-compliance with the Regulation can be imposed is the 2003 Aviation Security Law. This covers a number of the same issues as the Regulation but does not refer directly to it, and some of the specific rights included in the Regulation (such as the right to hotel accommodation and refreshments) are not included within this law. Therefore, it would appear to be impossible to prosecute an airline in Spain for non-compliance with these aspects of the Regulation, and on this basis Spain appears not to be fully compliant with the requirement in Article 16 of the Regulation that sanctions be introduced. In addition, the fact that the penalties under the Law are generally limited to a maximum of 2-3 times the cost saving that the airline has made in a particular case through non-compliance means that this may not be sufficient to comply with the requirement that the sanctions for non-compliance must be dissuasive. However, this depends on the interpretation of the law in practice.
- 5.21 It also appears that, until relatively recently, DGAC did not have sufficient resources to handle complaints received under the Regulation and in particular this may have meant that it was not able to handle international complaints. Other NEBs have complained that no action appeared to be taken when they referred complaints to Spain. In common with other NEBs, DGAC still considers that it does not have sufficient resources to handle the volume of complaints, but the situation has improved since SENASA staff were brought in to manage the complaints handling process in April 2006. However, it is too early to determine whether this improvement in the resources available for complaints handling is likely to have been sufficient to incentivise compliance.
- 5.22 As explained above, fines are only being considered at present in two rather extreme cases. The Spanish enforcement procedure appears to rely largely on passengers taking cases through the small claims court, and there have been a large number of court cases regarding the Regulation in Spain. As it is likely that, in the majority of cases, passengers will not bring court cases, this may also limit the incentives for carriers to comply with the Regulation.
- 5.23 However, a positive element of the Spanish enforcement procedure is that it now carries out airport inspections and interviews, sometimes unannounced, in order to ensure that airlines comply with the Regulation. This type of proactive measure is important so that the enforcement does not rely entirely on passenger complaints.

6. SWEDEN

Enforcement body

- 6.1 Responsibilities for enforcement fall between the Swedish Consumer Agency/Consumer Ombudsman (referred to hereafter as the Agency) and the National Board for Consumer Complaints (Allmänna reklamationsnämnden - referred to hereafter as ARN). The Agency provides the Swedish public with consumer affairs assistance, acting in the collective interest of consumers, but does not in general resolve individual consumer disputes, instead focusing on inspection of contract terms, and cases of multiple breaches of terms and conditions or regulations. Resolving individual disputes is the job of ARN, which is an Alternative Dispute Resolution agency which handles consumer complaints across all consumer industries, and impartially adjudicates on claims for consumer compensation. Whilst it has no legal powers of enforcement, its recommendations are generally considered as *de facto* legal adjudications, and in the vast majority of cases these are accepted and acted upon by industry.
- 6.2 Both organisations are funded through general taxation, and have existed for some time as part of Sweden's consumer protection framework. The regulation falls under their natural jurisdiction, and was therefore added to their responsibilities within this framework. There are no formal links with the airline industry, although informal links exist through the Agency's contacts with airline representatives on matters of interpretation of particular aspects of regulation, advice given to airlines on terms and conditions and industry briefing sessions within conferences and trade fairs. Part of ARN's process for resolving disputes includes a formal session of The Board, which includes 2 impartial representatives of the airline industry. The Swedish CAA has no role at all in the enforcement of the Regulation.

Resources available

- 6.3 The Agency has 170 full time employees. Two legally trained employees work on issues related to, amongst other things, transport and the package travel industry, and around 50% of one FTE works on the Regulation. In addition, The Consumer Europe department, included in the ECC network, works with cases relating to the Regulation approximately equivalent to 50% of one FTE.
- 6.4 ARN employs 9 people in the Travel department of its secretariat who investigate with complaints from the public, including those relating to this Regulation. Dealing with cases relating to the Regulation takes the equivalent of 1.5 – 2 full time staff, although the cases are divided equally among the staff. In addition, when ARN holds a Board session to resolve a dispute, other resources are required, including four sector representatives (two from an organisation representing consumer interests and an equal number representing airline interests), a legal officer and a chairman, who must be a lawyer with previous experience as a judge.

Enforcement process

Legislation

- 6.5 On 1st July 2005, *Decree (2005:388) Changing the Decree (1994:1808) about Competent Authorities in the Civil Aviation Area* appointed the Consumer Agency as supervisory authority of the Regulation (EC) 261/2004.
- 6.6 The powers which the Agency works under are enshrined in the Consumer Contract Terms Act, which gives the Agency, through the Consumer Ombudsman, the authority to make an application in the Swedish Market Court for the prohibition of an unfair contract term in breach of the Regulation. An unfair contract term does not necessarily have to be within a given airline's terms and conditions, but could be demonstrated through evidence of consistent breaches of the Regulation by a given airline.
- 6.7 An airline found to be practicing an unfair contract term may be prohibited from using such a term in the future, and the prohibition would be made subject to a fine. The maximum fine under such a prohibition is SK400,000 (around €45,000). In extreme cases, if an organisation is found to have repeatedly and systematically violated consumer regulations, then a 'Market Disturbance' fine may be levied, with a maximum fine of SK5,000,000 (around €550,000).
- 6.8 Further legislation is required to give The Agency powers to enforce Article 14 of the Regulation, which requires airlines to inform passengers about their rights. This is because the Contract Terms Act only covers 'marketing' information provided before/during the purchase of goods and services, and in Swedish law the provision of information *after* the act of purchasing is not covered by this, therefore the provision of information requirement in Article 14 is not currently covered. An amendment to the Aviation Act is imminent which will specifically classify the provision of information under this Regulation as being part of 'marketing' information, which will mean that the Agency is able to enforce this Article.

Complaints process

- 6.9 Passengers normally complain directly to ARN. They are encouraged to use a form that is available on ARN's website, as this facilitates the processing of the complaint, but they may also complain in writing. Some passengers complain to the Agency, who, after an initial assessment of whether the complaint is covered by the Regulation, will pass the complaint on to ARN for investigation and/or the NEB with jurisdiction for where the incident took place.
- 6.10 ARN investigates complaints thoroughly, and seeks detailed representation from both the complainant and the airline. In cases where airlines dispute a claim for compensation due to extraordinary circumstances, they request detailed information such as technical reports from the airline in order to substantiate their claim. Relative to virtually all other NEBs consulted, they apply a challenging standard to the definition of 'all reasonable measures' in the case of extraordinary circumstances. This is particularly the case on cancellations due to technical reasons, whereby airlines are asked to provide sufficient documentary evidence to show that all reasonable

measures had been taken to avoid the technical problem, even in the case of unusual technical problems. The standard of information required is:

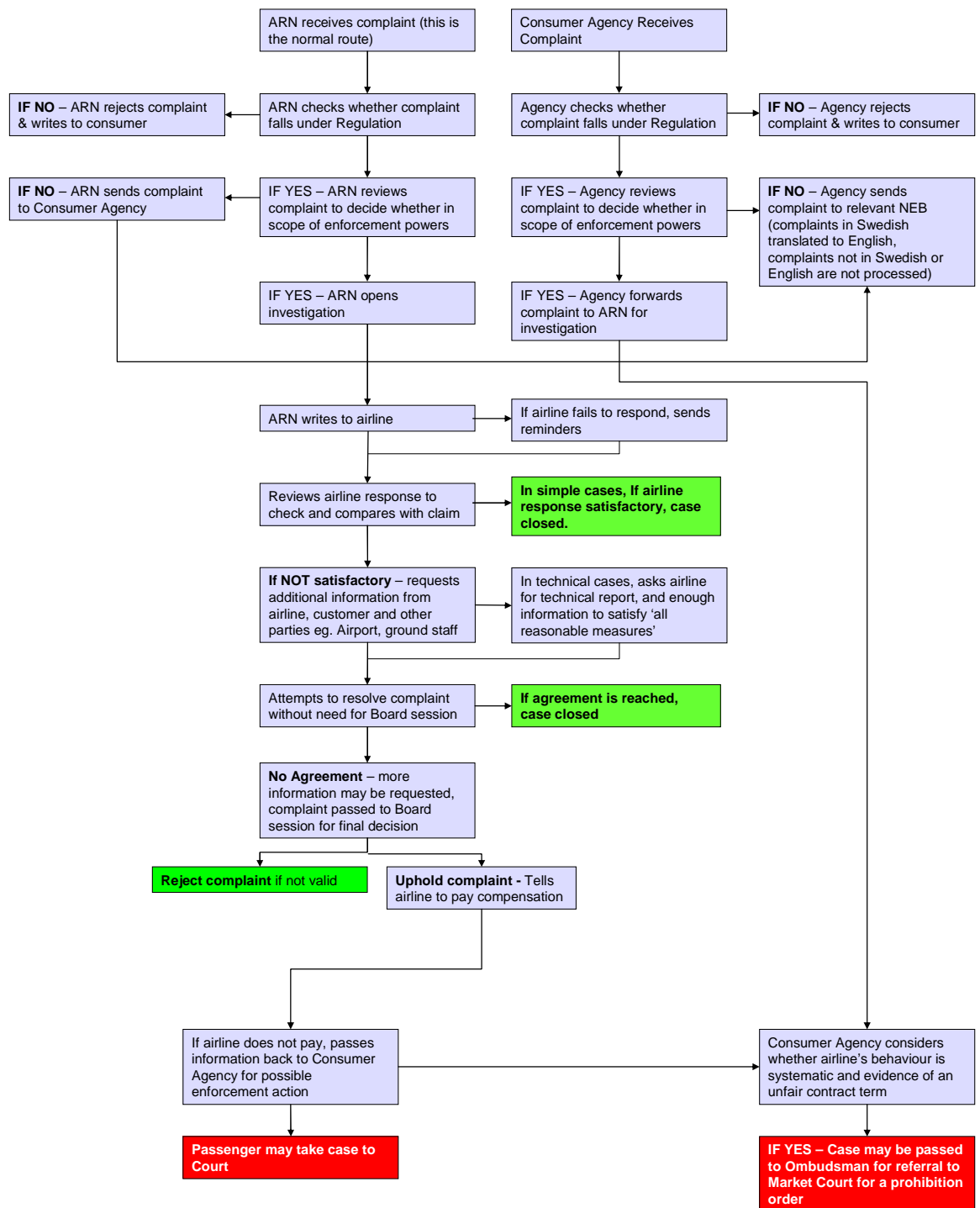
- What was the technical problem;
- Why did it occur;
- Which maintenance procedures are undertaken to avoid such occurrences;
- Why did such procedures fail to avoid the technical problem in this instance;
- What did the company do to avoid the need for cancellation once the technical problem had occurred.

6.11 However, ARN has little access to technical expertise to advise on such matters. Where an airline does not, in ARN's view, provide sufficient evidence that all reasonable measures had been taken, then they will generally rule in the passenger's favour.

6.12 In straightforward cases ARN tries to resolve disputes between passengers and airlines without having to go to a full Board session. However if a full Board session is required, then the information collected on the case is presented within a formal session, comprising four sector representatives (two from an organisation representing consumer interests and an equal number representing airline interests), a legal officer and a chairman. None of the parties to the dispute are present at the hearing, with the Board deciding upon recommendation, which, whilst not legally binding, carry significant weight and are accepted in over 90% of cases. If the airline decides not to follow the Board's recommendation, then the consumer can take the case to an ordinary court.

6.13 The enforcement process is described in Figure 1.1 below.

FIGURE 6.1 ENFORCEMENT PROCESS: SWEDEN



Limitations on enforcement

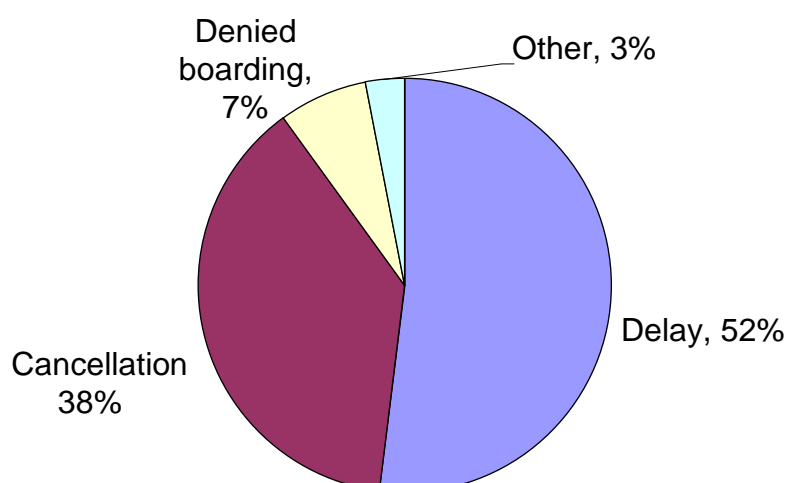
- 6.14 Providing the complaint is written in Swedish or English, both the Consumer Agency and ARN will accept complaints regardless of the nationality or place of residence of the passenger. However, the Consumer Agency does not accept complaints which are not in English or Swedish. If the incident does not fall within ARN's jurisdiction, but is within the jurisdiction of another Nordic NEB, the complaint will be forwarded to the relevant NEB, provided it is written in Swedish. If the complaint is written in

English, ARN will forward the complaint to any relevant NEB, but ARN will not translate a complaint into English (or any other language).

- 6.15 Consistent with Article 16 (1) of the Regulation, the Consumer Agency can only take action about flights from Swedish airports and flights from non-EU airports to Swedish airports.
- 6.16 ARN takes a different view of jurisdiction when it comes to settling individual disputes. They are currently involved in a dispute with SAS over their handling of a number of complaints for flights which originated in Denmark, where they argue that whilst the jurisdiction for *enforcement* would be in Denmark, the restrictions on jurisdiction do not apply in the case of resolving individual disputes, as they believe that the principle of Alternative Dispute Resolution is that it provides an alternative to, for example, a small claims court, where such jurisdiction issues do not apply. It is our understanding that the individual complaints relate to Swedish citizens using SAS to fly from Denmark to Sweden. SAS's view is that ARN are not the competent body for dealing with these particular complaints, and are therefore currently refusing to comply with any rulings.
- 6.17 The Consumer Agency currently does not have the power to enforce Article 14 of the Regulation (provision of information), although an amendment to The Aviation Act is imminent which will allow the Agency to fully control compliance with the rules of the Regulation.

Enforcement to date

- 6.18 To date, ARN has received 223 written complaints with reference to the regulation, of which 104 were found in the first instance to be outside the scope of the regulation. Of the remaining 119 which were investigated, 41 were withdrawn before reaching a Board session, and of the 78 which have gone to a full session, 43 (55%) have been found in favour of the claimant, and 35 against.
- 6.19 The following chart shows a breakdown of the reasons for complaint, for all complaints received up to February 2006.

FIGURE 6.2 TYPES OF COMPLAINTS RECEIVED BY ARN

6.20 97% of complaints received by ARN are from Swedish nationals, however the Consumer Agency is more likely to receive complaints from foreign nationals as the primary designated NEB. They estimate that around one-third of the complaints they receive are from foreign nationals, and they are unable to deal with around 10-15% of these as they are in a language other than English or Swedish.

6.21 The Consumer Agency has not prosecuted any airline as a result of the Regulation.

Issues arising with enforcement in Sweden

6.22 Sweden is not fully compliant with the Regulation as it cannot currently enforce Article 14 of the Regulation under its own laws, but this will be resolved shortly.

6.23 In our view, enforcement of the Regulation in Sweden is working well compared to most other Member States, primarily because they have incorporated the regulation into their already very thorough arrangements for consumer protection.

6.24 The key issue that has arisen with the Swedish enforcement arrangements is the lack of any input from aviation technical experts when ruling on technical or operational issues. Whilst the Board sessions involve two representatives of the aviation industry, there is little or no technical resource available to investigate a complaint. This makes it difficult to rule on claims of extraordinary circumstances due to technical grounds. ARN argued that the airlines are given the opportunity to provide sufficient information to prove that all reasonable measures had been taken to prevent cancellations occurring, including evidence that they have processes in place which would prevent such issues. However, airlines considered that ARN was not able to correctly interpret some of the information that they provided.

6.25 In addition, the issue of jurisdiction in relation to Alternative Dispute Resolution bodies such as ARN is causing problems, as it is unclear as to whether this constitutes 'enforcement' under Article 16. One airline is refusing to accept that ARN has jurisdiction if the flight was not from a Swedish airport, and therefore is ignoring

rulings made by ARN in favour of Swedish citizens with respect to these flights. This is an important example of the lack of clarity in the regulation over jurisdiction, and also what actually constitutes ‘enforcement’ (for example, whether resolution of individual complaints constitute ‘enforcement’). Whilst it is clear that the Consumer Agency cannot take any enforcement action in the form of a prohibition order, it is not so clear whether the Alternative Dispute Resolution function of the ARN can act on this matter, particularly given that the NEB in the country of origin would also be able to handle these individual complaints.

- 6.26 Overall, however, the process for resolving disputes appears to provide passengers with a system which will thoroughly investigate their complaints, and provides an outcome which is accepted in the vast majority of cases.

7. UNITED KINGDOM

Enforcement body

- 7.1 The UK has separate bodies responsible for complaint handling and enforcement:
- The Air Transport Users Council (AUC) handles complaints from passengers; and
 - The Civil Aviation Authority (CAA) is responsible for enforcement.
- 7.2 The CAA is a publicly-owned corporation, which functions as an independent regulatory authority responsible for economic regulation, airspace policy and safety regulation as well as consumer protection. It has a general duty to further the reasonable interests of the users of air transport services. The CAA is formally independent from the aviation industry although it does work closely with airlines on a day-to-day basis.
- 7.3 The primary purpose of the Air Transport Users Council (AUC) is to represent UK air passengers. It comprises a council of volunteer consumer representatives, supported by a salaried secretariat. Its role is defined in a Memorandum of Understanding with CAA, which states that it is independent from both the government and the CAA. However, it does work closely with the CAA and shares offices with it; the CAA also appoints its Chairman.

Funding

- 7.4 The CAA is funded through charges on the airlines it regulates. It levies charges on both UK-registered airlines and on other airlines using UK airspace. This system is different to that used by the aviation regulatory authorities in most other Member States, which are generally funded by government.
- 7.5 The AUC is funded by CAA. As the CAA is required to consult airlines about its charges (including the element allocated to the AUC), airlines may be able to influence the resources available for the complaints handling body, albeit indirectly.

Resources available

- 7.6 The CAA's Consumer Protection Group (CPG) includes 3-4 staff who work on issues related to the Regulation. However, they only spend a proportion of their time on issues related to the Regulation, and therefore on average CAA has 1 FTE working on this.
- 7.7 The AUC has nine staff. Approximately 5-6 staff are involved in handling complaints and these staff spend around 75% of their time dealing with issues related to the Regulation, so on average AUC has 4 FTEs working on the Regulation. As discussed below, the complaint handling process is currently slow because the resources available to the AUC to process complaints have not increased by as much as the increase in the number of complaints. The AUC informed us that they had recently been given permission to recruit one additional member of staff for complaints handling purposes and that this would improve the situation.

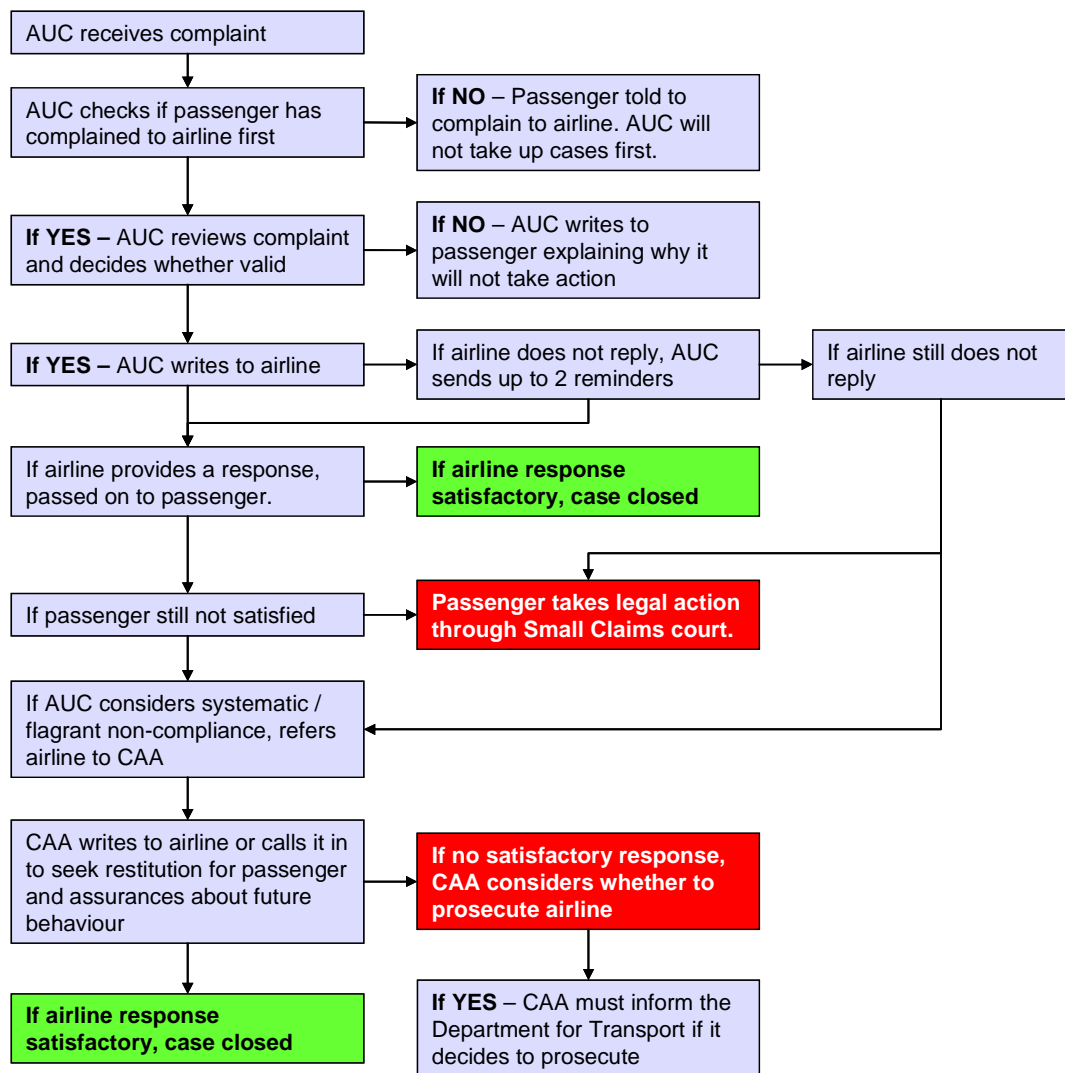
Enforcement process

Legislation

- 7.8 Prior to the introduction of the Regulation, the UK's Department for Transport (DfT) consulted with the aviation industry about the form of the enforcement process. As a result of this consultation, the enforcement process was made less onerous, in two regards:
- The DfT dropped a proposed requirement that airlines be required to keep records on the compensation and assistance provided to passengers, on the basis that this would be an unnecessary burden on airlines.
 - The regulations were amended to allow for a “due diligence defence”, which means that the airline cannot be convicted of a breach of the Regulation if it can show that it took all reasonable steps to avoid breaching the Regulation. This is only a defence to a criminal prosecution; it is not a defence against a claim for compensation by a passenger in the civil courts.
- 7.9 The enforcement regime is defined in the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005, Statutory Instrument number 975 (2005), which designate the CAA as the UK's National Enforcement Body and establish a maximum fine of £5,000 for each case of non-compliance.

Complaints process

- 7.10 Passengers complain to the AUC, which evaluates the complaint and writes to the airline on behalf of the passenger if it believes that the complaint may be valid. If the airline does not respond or the passenger is not satisfied with this response, the passenger would usually be encouraged to take legal action through the Small Claims track of the civil courts. The AUC may refer the case to the CAA if it considers that the airline is systematically and flagrantly failing to comply with the Regulation. The CAA then seeks to obtain restitution for the passenger and assurances from the airline about future behaviour, and may consider prosecuting an airline if it is unable to obtain this.
- 7.11 The enforcement process is described in Figure 1.1 below. The process is currently quite slow because the AUC does not have sufficient resources to handle the number of complaints that it is receiving: it currently takes the AUC up to 3 months to contact the passenger after it has received a response to a complaint from the airline.

FIGURE 7.1 ENFORCEMENT PROCESS: UK

Limitations on enforcement

- 7.12 The AUC has a policy only to process complaints received from UK residents. Where it receives a complaint from residents of other Member States, it writes back to the complainant with information on the Regulation and the details of the enforcement body in their Member State. This procedure is not compliant with Article 16 (2) of the Regulation, which states that passengers may complain to the NEB in any Member State.
- 7.13 In addition, under Article 16 (1) of the Regulation, the CAA can only take action about flights from UK airports and flights from non-EU airports to the UK. This is also a limitation on enforcement, because a number of complaints received have been about airlines' treatment of passengers returning to the UK from other EU Member States.

Enforcement to date

- 7.14 Since the Regulation came into force, the AUC has received 10,083 written complaints of which 6,154 related to the Regulation. Just over half of the written complaints related to cancellations, and most of the remainder related to delays; only around 5% related to denied boarding. In addition, the AUC has received 9,342 telephone enquiries of which 2,687 related to the Regulation.
- 7.15 The AUC has referred 18 cases to the CAA of which, to date, 11 have been resolved and 7 remain outstanding. The CAA informed us that it had not proved necessary to prosecute to date, but that it would be willing to prosecute airlines if this was necessary.
- 7.16 We have been informed by airlines that a number of passengers have taken action in the Small Claims Court, and some of these cases have attracted press coverage. However, no central record is kept of these cases and therefore it is not possible to estimate how many cases there have been. Based on information provided to us by airlines, we would estimate that there may have been 50-100 such cases. Airlines informed us that they had won the majority of cases, although press reports indicate that in some cases airlines have not contested cases.

Issues arising with enforcement in the UK

- 7.17 In our view, there are three main issues with the enforcement process in the UK:
- the complaints handling process is currently slow, as the AUC's resources are limited;
 - by relying primarily on passengers to take action through the civil courts, the process may not be sufficient to dissuade airlines from non-compliance with the Regulation; and
 - the limitations on the scope of the enforcement process means some complaints do not get processed adequately and may also mean that the UK is in breach of Article 16 of the Regulation.
- 7.18 The first issue may soon be mitigated, as the AUC has recently had permission to take on additional staff. However, it will still be under-resourced compared to many other NEBs, given the size of its aviation market, and it is difficult to see how enforcement can work adequately given the level of resources. The other two issues will remain.
- 7.19 The UK's enforcement process is designed to ensure that passengers receive appropriate compensation in the event of a genuine breach of the Regulation by airlines. However, in the majority of cases where the airline does not provide a satisfactory response, passengers are left to take action themselves through the small claims track of the civil courts. Although the small claims track is faster and lower cost than the conventional court process, it still takes several months and considerable effort on the part of the passenger pursuing the complaint. In addition, the most that the airline can be required to pay is the amount that they should have paid under the Regulation plus the court fee, which is likely to be around €100-200, depending on the amount of the claim. The small claims court cannot make any orders for the recovery of legal costs, and as a result, most passengers taking action through the courts are

likely to lack legal representation. In addition, if the airline is not based in the UK, any judgement could be difficult for the passenger to enforce, even though in principle the judgement should be recognised by other EU Member States.

- 7.20 In principle, an airline can also be prosecuted for non-compliance with the Regulation, but this has not occurred to date and would be quite difficult in practice. The CAA would need to be able to prove beyond reasonable doubt that the airline had failed to comply with the Regulation and also that it had not taken reasonable steps to comply with it. Even if this was proved, the maximum fine that could apply would be £5,000 (€7,500), and under UK law, in common with any other defendant in a criminal case, an airline would automatically receive a 33% discount if it pled guilty to the offence, leaving the maximum penalty as £3,333 (€5,000). To date, despite over 6,000 complaints being received by the AUC, a number of actions in the civil courts, and 18 cases referred to the CAA for systematic/flagrant non-compliance, no such prosecution has been commenced.
- 7.21 In our view, it is reasonable for penalties only to be applied in relatively rare cases, and this probably inevitable in states where the penalties for breaches of the Regulation are criminal rather than administrative, and therefore a criminal prosecution (with associated standards of proof) is required. However, if Member States adopt this approach, the potential penalty should be significant in order to ensure that airlines have a clear incentive to comply with the Regulation. In this context, the maximum fine of £5,000 allowed under UK law is rather low, given that the chance of prosecution in any individual case is very small, and that the amount the airline could save through non-compliance with the Regulation could in some cases exceed €1,000 per passenger. Therefore, in our view it is unclear that the level of penalties in the UK is sufficient to be “dissuasive” as required by the Regulation.
- 7.22 In addition, the limitations on the scope of enforcement also reduce the effectiveness of the process. The AUC will only handle complaints received from UK residents (which may be a breach of the Treaty) and the CAA will only take enforcement action regarding flights from UK airports (which is consistent with the Regulation). This means that the UK enforcement process does not protect non-UK residents taking flights from the UK or UK residents taking flights from other EU airports. In addition, the UK authorities also informed us that, although other NEBs did not appear to have an explicit policy of refusing to accept complaints from non residents, in practice some appeared to ignore complaints they received from UK residents about flights from their territory. If true, this may be even worse than the UK process, by which non residents do at least receive a response and information on an alternative NEB to contact. However, several other NEBs specifically complained that the UK was not complying with the Regulation, as it refused to handle complaints from residents of other EU states.
- 7.23 We understand that the Commission is in the process of launching infringement proceedings against the UK regarding the AUC’s refusal to accept complaints from non-UK residents. This may resolve this part of the problem, but the other issues regarding cross-border complaints will remain.

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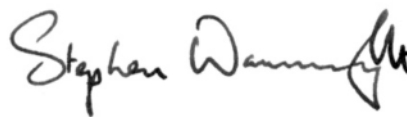
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