

**EVALUATION OF REGULATION  
261/2004**

**Final report**

**Appendix A - Case studies**

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## 1. INTRODUCTION

1.1 This document provides the case studies which we have undertaken of the complaint handling and enforcement processes, and the procedures for passengers to obtain redress, in 15 Member States.

1.2 The case studies are based on:

- interviews with, and written submissions provided by, stakeholders listed in section 2 of the main report (the National Enforcement Bodies and, in many States, also airlines and consumer representatives)
- our analysis of documents, national laws and regulations applying in the case study States, where we have been able to obtain this information.

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



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## 2. DENMARK

### The National Enforcement Body

- 2.1 The National Enforcement Body (NEB) for Denmark is Statens Luftfartsvæsen (SLV), the Danish civil aviation authority. It is responsible for both enforcement and complaint handling.
- 2.2 SLV is a government enterprise which reports to the Ministry of Transport and Energy. It is the aviation regulator in Denmark, on the Faeroe Islands and in Greenland, with all civil aviation regulatory functions integrated within a single specialist body. Its functions include:
- safety regulation;
  - security regulation;
  - airspace regulation; and
  - economic and performance regulation.
- 2.3 The framework in which SLV operates is set out by the Danish Air Navigation Act, which authorises the Ministry of Transport and Energy to lay down specified regulations for civil aviation. This authority has been delegated to SLV, through the consolidated Air Navigation Act no. 731 of 21 June 2007.
- 2.4 SLV sets flight safety standards for civil aviation and supervises compliance with the standards for commercial and private operators in civil aviation. It aims to create a framework in which air traffic can operate as safely and efficiently as possible, for the benefit both of passengers and of society. It is formally independent of the airline industry, although by its nature it works closely with airlines.

#### *Resources available*

- 2.5 SLV stated that there are two members of staff within the legal department who work on the Regulation, who are able to call on the expertise of technical and operational colleagues when required. This is equivalent to 2 FTEs within the legal department, plus 0.5 FTE for technical and operational assistance and administrative support.

#### **Legal basis of complaint handling and enforcement**

- 2.6 The enforcement regime is defined in the Articles 31(a) and 149(11) of the Air Navigation Act (see 2.3). This sets out sanctions for breaches of the Regulation: potentially unlimited fines, or a prison sentence of up to 4 months. To impose a fine, SLV passes a case of repeated infringement to the Prosecution Service and recommends that they institute proceedings to impose a fine. Before a case is passed over, the carrier must have been given the opportunity to respond. The Prosecution Service then decides whether or not to start proceedings. If they do, the case is brought before a criminal court where the evidence is reviewed and a judge decides the level of any fine. There are no guidelines set out in law on what is an appropriate level to impose, and as no fines have yet been imposed the level at which they would be set is unknown. Any fines imposed are paid to the Prosecution Service, and non-payment is a criminal violation. Airlines may appeal any fines imposed, and would pay the fine

only after it had been confirmed; we requested information on the appeals process from SLV but as no procedure for imposing fines has yet been followed SLV was unable to provide it.

2.7 Any sanction could only be imposed through a criminal process, which may mean that the standard of evidence and proof required would be higher than for an equivalent administrative sanction. SLV did not believe that this would be a problem: its view was that the collated evaluations with which the airline had failed to comply would be sufficient evidence. There is no due diligence defence equivalent to that in the UK.

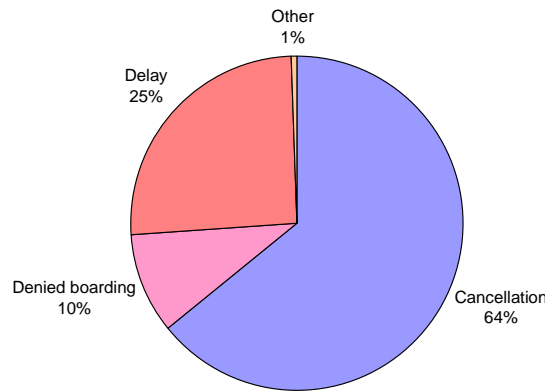
**Complaint and enforcement statistics**

*Complaints*

2.8 SLV received 319 complaints relating to the Regulation in 2008. This was 5% more than in 2007, but significantly less than in the initial period from February 2005 to the end of 2006, when SLV received 931 complaints (equivalent to 498 annually). The number of complaints has declined markedly in 2009, down to 164 complaints received by September (equivalent to 219 annually). This may partly be due to the decline in passenger traffic at Danish airports due to the economic situation.

2.9 As illustrated in Figure 2.1 below, the majority of the 166 valid complaints received by SLV in 2008 related to flight cancellations.

**FIGURE 2.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: DENMARK**



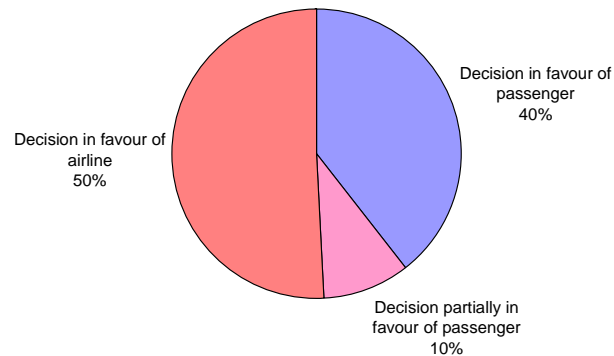
Source: SDG analysis of data provided by SLV

2.10 SLV handled 52% of the complaints that it received in 2008. Of the remaining complaints, 30% were passed to other NEBs and 18% were rejected as invalid under the Regulation (i.e. there was no *prima facie* case of non-compliance with the Regulation).

2.11 Figure 2.2 shows the results of the complaints which were taken up by SLV. In half of cases, the decision found in favour of the airline and the passenger did not receive any reimbursement. In 40% of cases, the decision found in favour of the passenger, who received the full value of their claim, and in 10% the carrier paid some amount to the

passenger. These results relate to cases in which the passenger provided the required information, and exclude 42 complaints where they did not.

**FIGURE 2.2 STATUS OF COMPLAINTS RECEIVED DURING 2008: DENMARK**



Source: SDG analysis of data provided by SLV

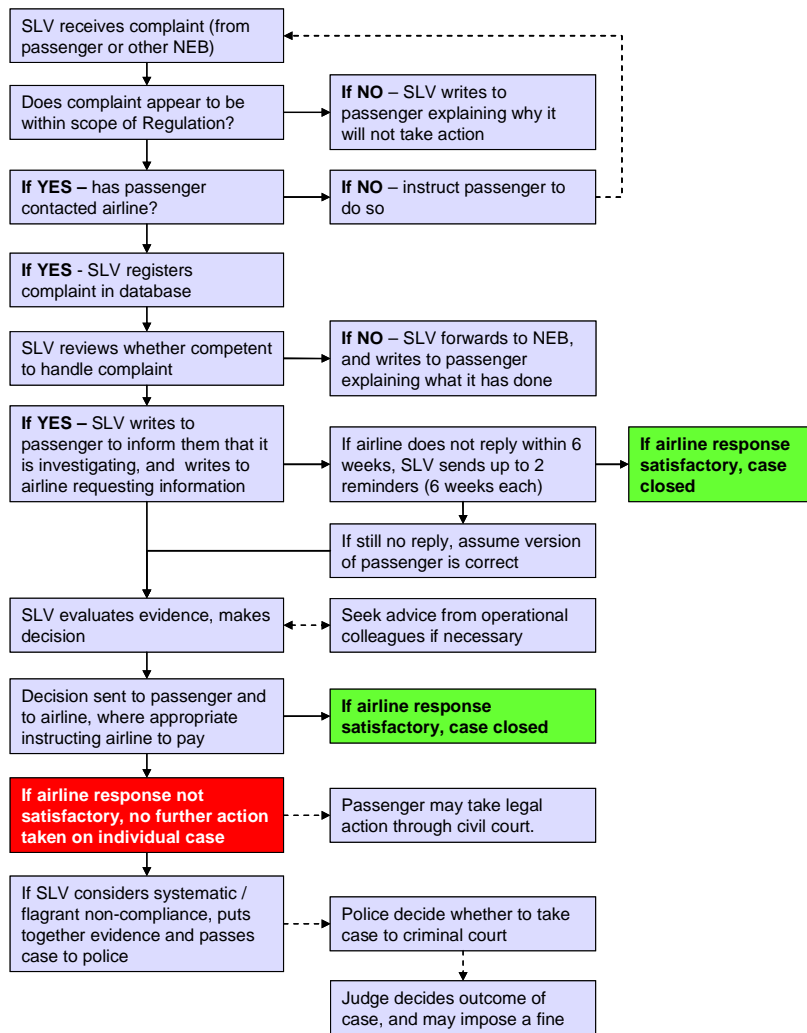
### *Enforcement*

- 2.12 There has been no prosecution in Denmark to date for non-compliance with the Regulation.

### **The complaint handling and enforcement process**

- 2.13 The SLV complaint handling and enforcement process is summarised in Figure 16.3 below.

**FIGURE 2.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: DENMARK**



2.14 The complaint handling process undertaken by SLV is very similar to the complaint handling process undertaken by NEBs in other Member States, but the analysis of complaints appears to be more thorough. Complaints are accepted and responded to in Danish and other Scandinavian languages, English, and sometimes German. In the event that an airline fails to comply with SLV’s evaluation, SLV has no powers to force an airline to pay the passenger, but may consider sanctions if there is evidence of systematic or flagrant non-compliance. So far airlines have always complied with SLV’s evaluations.

*Time taken to resolve complaints*

2.15 SLV informed us that complaints typically take 2 months to be resolved: the complaint is registered and sent to the airline immediately; the airline has 6 weeks to respond; SLV take 3-4 weeks to evaluate the evidence and make a decision. SLV has found that airlines need to be allowed 6 weeks to gather information, documentation and other required data. When the airline fails to respond, it may take more than 2 months to resolve the complaint; SLV said that the Danish airlines tend to respond within the timescales given, but it has had problems with low cost carriers. SLV did not have any statistics available on duration of investigations.



*Claims of extraordinary circumstances*

- 2.16 SLV investigates all claims of extraordinary circumstances, assessing for each case whether or not it is reasonable to expect an airline to pay compensation. It requests technical information from airlines, including at a minimum technical logs, but depending on the individual case may also request further additional information, including: technical logs, the minimum equipment list, meteorological logs, and ground-handling information (to prove e.g. provision of care or re-routing). SLV then examines the details of the case. It may consider, for example, the location where the incident occurred and the weather conditions at the location; if a spare part was required, what was it and could the airline reasonably have been expected to have such a part; if the airline did not have a spare plane, did it try to arrange the lease of another.
- 2.17 Since SLV was already assessing technical problems for whether they were unusual, and rejecting many as not being extraordinary, the recent ruling on technical problems by the ECJ has had less effect than in some other Member States. The main change has been that technical problems discovered during an aircraft's planned technical check are now never considered to be extraordinary circumstances. SLV has not re-opened old cases on its own initiative, but has done on passenger request.

*Response issued to the passenger*

- 2.18 SLV provides individual evaluations for each passenger, which are non-binding. Each evaluation is an individual investigation based on the circumstances of the particular case, and is intended to be suitable for use as evidence in a court case. The evaluation sets out the passenger's complaint, the evidence provided by the airline, a summary of the relevant articles of the Regulation, and an explanation of the decision that SLV has made along with any amount owed by the airline to the passenger. If appropriate, it also writes separately to the airline to instruct them to pay what is owed. The decisions are based on what the passenger was entitled to, independent of what actually occurred: for example, if a passenger slept in the airport but was entitled to hotel accommodation, SLV's decision will include the cost of a hotel.
- 2.19 If an airline failed to comply with the evaluation, it could in theory be used by the passenger in a civil court case. However, if the airline had failed to provide information that was required, then the passenger would go to court with incomplete knowledge of the case and this would present a risk for the passenger. Therefore, to minimise the need for court actions, SLV focuses on dialogue and mediation with airlines, and airlines have complied with all decisions so far.

*Circumstances under which sanctions are imposed*

- 2.20 SLV's policy is to consider imposition of sanctions in the event of systematic non-compliance with the findings of its evaluations. So far airlines have complied with evaluations, and SLV has not seen a need to impose sanctions.
- 2.21 SLV informed us that in principle it would be able to impose fines on an airline which consistently violated the Regulation even if it always provided redress when a case was investigated.

*Imposition of sanctions on carriers not based in the Member State*

- 2.22 SLV informed us that imposing fines on non-national carriers would not present a problem, as any company operating within Denmark is responsible to Danish courts. SLV was unable to provide information on the process for providing notification of prosecution, as this was outside its experience. SLV may pass a case to the Prosecution Service regarding any airline. If the court imposes a fine, it is then the Prosecution Service's responsibility to inform the airline and collect the fine. However, as no sanctions have been imposed to date, this has not been tested in practice.

*Collection of sanctions*

- 2.23 Any fine would be collected by the Prosecution Service, then passed to the Treasury. Non-payment would be a criminal violation. SLV was unable to provide information on the powers available to the Prosecution Service to collect fines, as this was outside its experience.

*Publication of information*

- 2.24 SLV does not publish statistics on complaints received. Sanctions would not be published by SLV, but as they would be imposed through a public court any journalist would be able to report on them.

**Other activities undertaken by the NEB**

- 2.25 SLV has not so far believed it necessary to carry out inspections of airports, but will do if it becomes necessary. Where possible SLV maintains a dialogue with airlines. In particular, it has a very good relationship with SAS. SLV believes that good dialogue is the best route to a positive outcome for the passenger: since SLV has no method of legally requiring airlines to provide redress to passengers, it considers that a negotiated restitution is more beneficial than an evaluation against the airline which the passenger has to pursue themselves in court. SLV informed us that this approach has been successful so far, with all airlines paying the amounts set out in SLV decisions.

**Work with other organisations**

- 2.26 SLV forwards complaints to other NEBs if there is a prima facie case of non-compliance but the incident occurred in another Member State. Beyond the twice yearly joint meetings arranged by the Commission, it has some contact with other NEBs but handles most complaints internally. When handling difficult and complex cases it has occasionally sought guidance from the Commission, and will consider contacting other NEBs if appropriate.
- 2.27 SLV informed us that it has not needed to contact any ECCs, or to make any use of the CPC network.

### Alternative means for passengers to obtain redress

- 2.28 Passengers are also able to use the Consumer Complaints Board, however its decisions are not legally binding, and as SLV already undertakes some mediation with airlines, the Board would not provide much in addition to the SLV complaint handling process. Claims to the Board must be over 800 DKK (€107) in value, and the fee for the process is 160 DKK (€21). Complaints are handled through written correspondence only, and we were informed by the Danish Consumer Council that cases typically took 6 months to be heard; this is significantly longer than complaints submitted to SLV.
- 2.29 A small claims court procedure has recently been established in Denmark. It considers claims under 50,000 DKK (€6,690). The procedure is very similar to normal courts; however, neither party needs to be represented by a lawyer as the judge has a more active part in the case and will give the parties guidance when necessary. The cost is less than the normal courts, and since no lawyers are present the passenger could not be held liable for costs. As the procedure is new, no exact timescale can be given, but the intention is for the process to be quicker than a civil court case. The civil court is also available to passengers; however the legal costs of civil cases would be very expensive relative to the likely sums in dispute. Claims in both courts have a statute of limitations of 3-5 years, depending on the case.
- 2.30 The European small claims procedure does not apply in Denmark, as in accordance with Articles 1 and 2 of the 'Protocol on the position of Denmark' annexed to the Treaty, Denmark does not participate in this field of Community policy-making.

### Issues with complaint handling and enforcement in the Denmark

#### *The ability to impose dissuasive sanctions*

- 2.31 The key problem with the complaint handling and enforcement regime in Denmark is that SLV policy is to impose sanctions only when an airline consistently fails to comply with evaluations. This means that sanctions would not be imposed on airlines which consistently violate the Regulation but rectify any non-compliances on investigation by SLV. An airline with a policy of non-compliance except when investigated would only provide redress to passengers who brought complaints to SLV, which is likely to be a small proportion of passengers. If there is no sanction for such behaviour, there is no economic incentive to comply in all cases. The sanctions policy would therefore not be dissuasive.
- 2.32 A further issue is that sanctions would only be imposed under criminal law. The disadvantage is that the process appears to be lengthy: first a case is put together by SLV and passed to the Prosecution Service, who decide whether to prosecute; if they prosecute then a criminal case waits to be heard by a judge, who makes the final decision on whether to impose any fines and the level at which they are set. Although the fines would be imposed under criminal law and would therefore require a high standard of proof, SLV believes that the list of evaluations with which the airline had failed to comply would be sufficient. There is no due diligence defence, as in the UK.

2.33 A secondary issue is that to date no sanctions have been imposed, so the process for imposing sanctions on carriers has not yet been tested; there may therefore be difficulties which have not as yet come to light.

2.34 Counter to these problems, a strength of the regime is that the courts have unlimited fines available. This would allow any fines which were imposed to be set at a sufficiently high level to dissuade an individual non-compliant airline from violating the Regulation, also encouraging other airlines to comply.

*Ability to force airlines to compensate passengers*

2.35 Although SLV investigates cases and makes a decision setting out any amounts owed by the airline to the passenger, it has no legal power to force a carrier to pay. A carrier could be prosecuted if it consistently refused to comply with SLV decisions, but this does not help the passenger and the only option available to the passenger is to pursue a civil court case. To date this has not been a problem, as airlines have complied with all decisions; if an airline changed policy and refused to cooperate with decisions, this could become an issue.

**Conclusions**

2.36 Denmark has a very good system for handling complaints:

- all complaints are investigated, when necessary in some technical depth;
- SLV focuses on obtaining restitution for passengers, and passengers are kept informed of progress on the complaint;
- timescales for handling complaints are good relative to other NEBs, and SLV informed us that after some overloading in the initial years it is now sufficiently resourced;
- SLV has good relationships with key airlines and has been able to use these to speed up the handling of many cases; and
- although SLV decisions are not legally binding, to date they have all been complied with and this may be evidence that the threat of criminal sanctions is taken seriously by airlines.

2.37 The sanctions regime has advantages compared to some other States, particularly that unlimited fines are available and that SLV is able to impose sanctions on non-national carriers<sup>1</sup>. However, to date, no sanctions have been imposed. SLV's policy is only to impose sanctions on airlines which do not rectify non-compliances after investigation, which means that there is not a clear economic incentive to comply in all cases, and so the sanctions regime may not be dissuasive as required by Article 16(3). However, in principle, sanctions could be imposed on a carrier which consistently violated the Regulation even if it provided redress in the cases which were investigated.

*SWOT analysis*

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<sup>1</sup> Note that since no sanctions have been imposed to date, this has not been tested in practice.

2.38 A SWOT analysis of the complaint handling and enforcement processes in Denmark is provided below.

**TABLE 2.1 SWOT ANALYSIS: DENMARK**

Strengths	<ul style="list-style-type: none"> <li>• Adequate resources available to SLV to handle complaints</li> <li>• All complaints investigated</li> <li>• Technical/operational expertise available to SLV to investigate complaints</li> <li>• Complaints resolved in acceptable timescale</li> <li>• Evaluations sent to passengers are clear and thorough</li> <li>• Good relationships between SLV and some key airlines</li> <li>• All decisions complied with to date, despite being non-binding</li> <li>• Unlimited fines available</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Although in principle it is possible for SLV to impose sanctions for non-compliance if the airline rectifies the breach during investigation, SLV policy is to consider sanctions only for failure to comply with evaluations, and as such is not dissuasive</li> <li>• If an airline refuses to comply with a decision, SLV has no legal power to compel them to do so; however this has not been an issue to date</li> <li>• The alternative dispute resolution process offers little in addition to the NEB process and takes longer to resolve complaints</li> <li>• No inspections are carried out by SLV to verify compliance</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• The limitation on imposition of sanctions for violations which are rectified is a policy rather than legal issue, and therefore in principle could be resolved relatively easily</li> <li>• SLV could undertake inspections of airports</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• None identified</li> </ul>

### 3. FRANCE

#### **The National Enforcement Body**

- 3.1 In France, complaint handling and enforcement is the responsibility of DGAC, the French CAA, which has been designated to enforce the Regulation.
- 3.2 The DGAC is a government administration, part of the Ministry of Ecology and Sustainable Development. It is responsible for airspace policy and safety regulation. It also manages air traffic, defines and enforces regulations applicable to French airports and airlines. Part of the role of the DGAC is to enforce legislation relating to passenger rights. The DGAC is independent from the aviation industry although it does work closely with airlines on a day-to-day basis.

#### *Resources available*

- 3.3 The DGAC states that it has on average 5.5 FTEs staff working on issues relating to passenger rights, including the Regulation, but also baggage disputes, flight safety, PRM issues and others. The DGAC was unable to provide a better estimate of the exact FTE working specifically on the Regulation or a split of time spent on the Regulation; we understand there is no one who is specifically dedicated to this matter. When required, the passenger rights team can also draw on other specialist expertise within the DGAC.

#### **Legal basis of complaint handling and enforcement**

- 3.4 DGAC has been appointed as the French NEB, since the entry into force of the Regulation, but only the publication in May 2007 of a decree amending the French Civil Aviation Code has there been sufficient legal basis for enforcement<sup>2</sup>. Article 330-20 of the Civil Aviation Code, as amended by this Decree, entitles the Minister of Civil Aviation to impose sanctions on carriers for non-compliance with the Regulation, further to consultation with the Civil Aviation Administrative Commission (Commission Administrative de l'Aviation Civile - CAAC), an industry body made of DGAC, airlines airports and consumer representatives. DGAC is not able to impose sanctions itself.
- 3.5 Furthermore, internal changes made to DGAC in July 2008 (Order of 9 July 2008) have clarified which precise part of DGAC is officially responsible for handling passenger complaints.
- 3.6 There were no CAAC hearings before 2008, as it was difficult to find appropriate individuals to form the CAAC and in particular to find a President. The individuals need to have an appropriate professional profile but their role with CAAC is unpaid. Further delay can be anticipated when their mandate expires or if their role changes and they have to cease being members of the CAAC.

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<sup>2</sup> Decree 2007-863 of 14 May 2007, modifying various parts of the Civil Aviation Code – Article 6

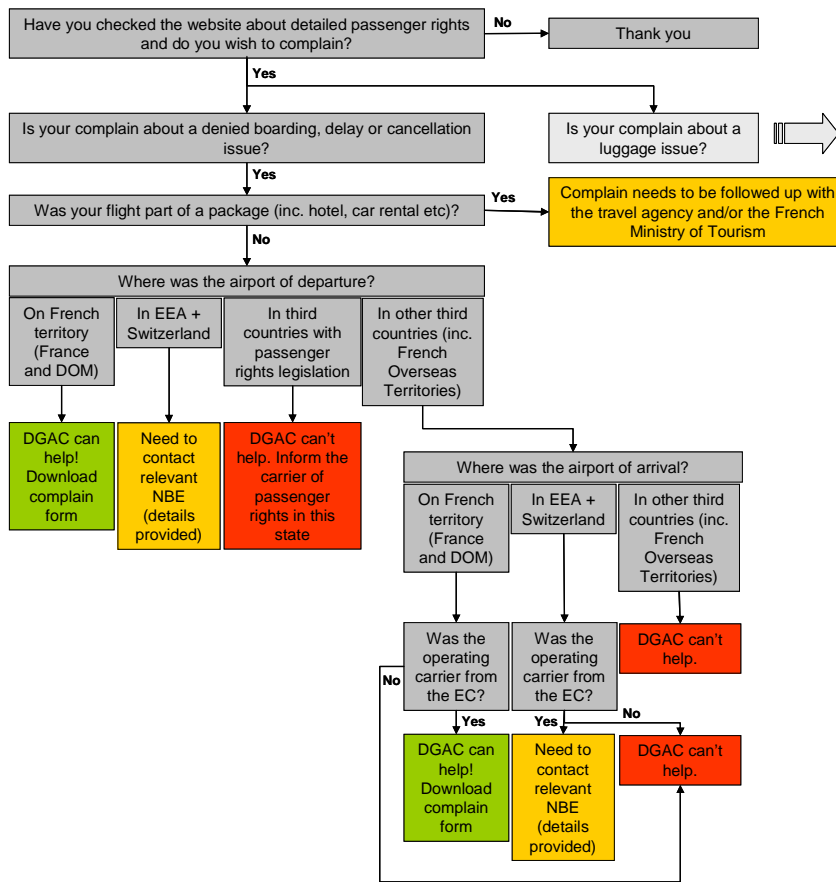
- 
- 3.7 Once DGAC is satisfied that the Regulation was breached, and after a discussion of the dossier with the CAAC, CAAC recommends sanctions to the Minister in charge of Civil Aviation who decides whether or not to follow the advice of the CAAC and also decides on the amount of the sanctions to be imposed.
- 3.8 The maximum level of sanction defined in the Civil Aviation Code is €7,500 per “failing”, however there is no definition of what a failing is. Hence in some cases sanctions have been imposed on a per passenger basis (but not to the maximum level) and in other cases per flight. The maximum amount can be doubled in the case of persistent behaviour within a year.

### **Complaint and enforcement statistics**

#### *Complaints*

- 3.9 In 2008, DGAC received approximately 4,000 complaints on all passenger rights issues and estimates that 80-90% relate to the Regulation. In 2009, the number of complaints seems to be stable, which could partly be due to the decline in passenger traffic at French airports due to the economic situation. DGAC only receives complaints from passengers who are aware of their rights and believes that most passengers will not complain.
- 3.10 No detailed statistics on complaint handling were provided by DGAC as it is moving its databases to a different IT platform and was unable to submit numbers in time for this report, but DGAC estimated that a vast majority of complaints cover flight cancellations, with 7% on denied boarding.
- 3.11 DGAC estimates that 90-95% of complaints it receives are correctly sent to it. On its website, DGAC provides a sorting tree so that the passenger can understand where their complaint should be directed to, and whether DGAC is competent.

FIGURE 3.1 DGAC SORTING TREE



Source: SDG analysis of data provided on DGAC website

*Enforcement*

3.12 DGAC stated that there has been two CAAC hearings since 2008 (since it has been possible to impose sanctions). The first hearing resulted in four sanctions being imposed on airlines (ranging from €800 to €22,500). The second hearing occurred in April 2009, but sanctions were only communicated to airlines in September, a delay that DGAC attributes to a legal issue, and information on these sanctions was not available. In the future DGAC believes this interval will be reduced. The next hearing of CAAC is scheduled for November 2009.

**The complaint handling and enforcement process**

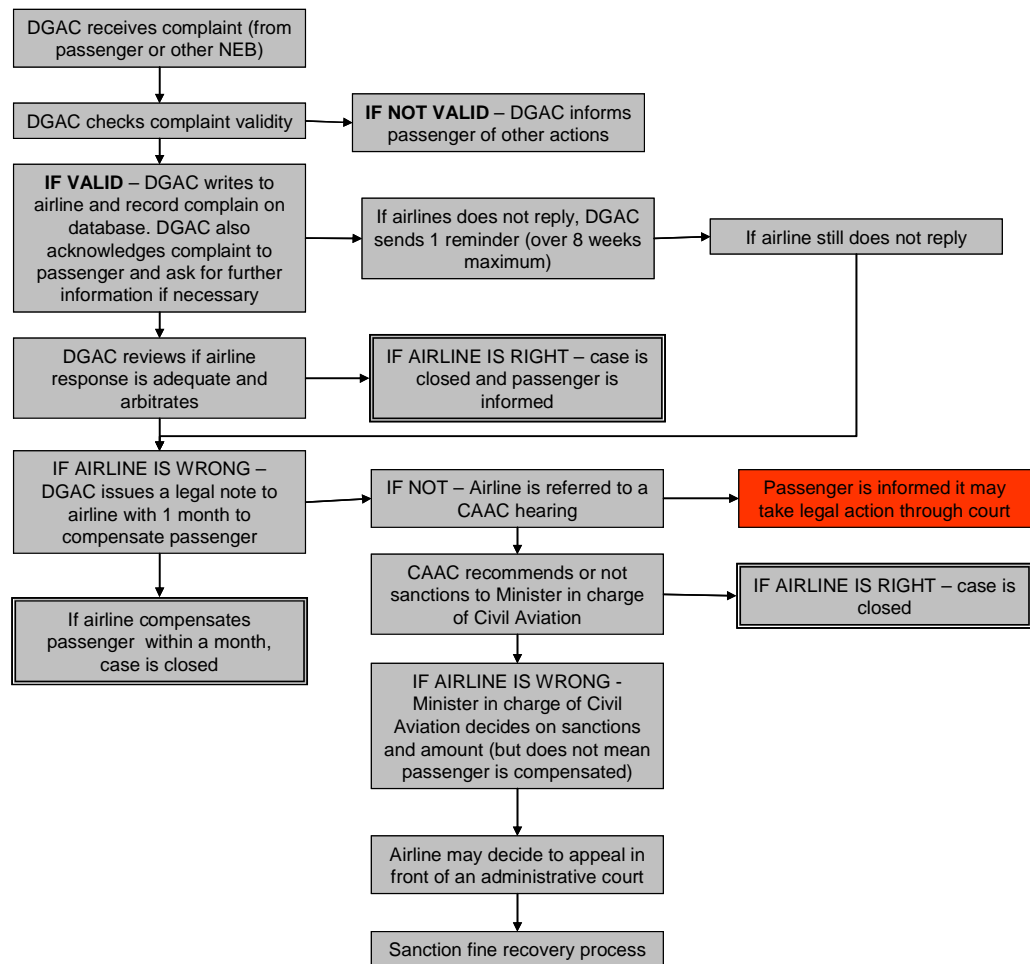
3.13 The French complaint handling and enforcement process is summarised in Figure 16.3 below. Complaint handling is undertaken by DGAC. Sanction handling is undertaken by CAAC and the Minister in charge of Civil Aviation and enforcement is undertaken by the Ministry of Finance.

3.14 The process starts when a passenger complains to DGAC. After investigation, DGAC decides whether the complaint is valid. If it does not believe that there has been an infringement, then the case is dropped and the passenger is informed.



- 3.15 If DGAC believes that there was an infringement, it issues a legal notice (“Procès Verbal de manquement”) in order to notify the airline to compensate the passenger within one month. If the airline compensates the passenger within the month, the case is closed. After the month, the airline is referred by DGAC to a CAAC hearing. This occurs even if the airline decides to compensate the passenger at the last minute before the hearing. At the CAAC hearing, the defendant airline is invited to justify its actions. Up to this point, all airlines referred to the CAAC attended or sent a representative.
- 3.16 DGAC stated that issuing the legal notice has proven a good tool, with more than 78% adequate response from the airlines in 2008.
- 3.17 DGAC and CAAC have no other powers to force the airline to pay compensation to the passenger. Therefore, if the carrier does not pay compensation in accordance with the ‘Procès Verbal’ notice, the only way for the passenger to claim compensation is via the courts.

**FIGURE 3.2 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: FRANCE**



- 3.18 DGAC believes that low-cost airlines in particular have been trying to avoid compensating passengers fully, for example in the case of cancellations offering to pay passenger accommodation costs but not offering the additional compensation stated in the Regulation.

*Time taken to resolve complaints*

- 3.19 DGAC was unable to inform us of the average length of the complaint handling process as it depends on case complexity, DGAC staff availability including interference from other passenger rights issues, as well as the time a passenger or an airline may take to come back to DGAC if more information was requested. It seems that the staffing resources of DGAC are not sufficient to avoid a backlog of complaints. We understand the process to be measured in months rather than weeks.
- 3.20 The process to impose sanctions is slow, partly because there are relatively few CAAC hearings. Since the CAAC role became effective there have only been two hearings, one in November 2008 and one in April 2009. The current process for imposing a sanction after CAAC has made a recommendation is also slow: in August 2009 for instance, the airlines that had been recommended for sanctions by the CAAC still had not been officially informed. DGAC believes these are teething problems which should be resolved soon.

*Claims of extraordinary circumstances*

- 3.21 Every time airlines claim extraordinary circumstances as justification for not paying compensation, DGAC will request details in order to assess if it believes the carrier's claim to be true or justified. If necessary, DGAC will check log books, weather reports or other technical reports from the airline for instance. This can involve significant effort, including use of operational/technical expertise within DGAC.
- 3.22 DGAC approach to extraordinary circumstances is to first of all encourage airlines in their safety duty. For instance if an airline cancels a flight for technical reasons linked to security or for meteorological reasons, then DGAC is likely to approve extraordinary circumstances for this particular flight. However, if subsequent flights (with or without the same aircraft) are cancelled or disrupted as a result of the cancellation of the original flight, DGAC will not accept claims of exceptional circumstances, as it believes the operator is failing in its duty to ensure adequate operational cover. This means that if an Air France Paris-Montpellier flight was cancelled due to a mechanical failure in Paris, DGAC would accept extraordinary circumstances (provided they were justified by the airline) for the outward flight but not the return Montpellier-Paris flight, even though this would inevitably be cancelled as a consequence.
- 3.23 In the case of denied boarding, DGAC also investigates where this is attributed to reasons other than overbooking (such as lack of adequate documentation or late arrival at check-in); however, DGAC finds that this can be difficult to prove.
- 3.24 The communication channels between DGAC and the airlines it most often requests details from are now well established. DGAC stated that it now almost always receives information when requested, regardless of the nationality or business model of the airline.
- 3.25 The consumer organisation UFC-Que choisir told us that they regretted that DGAC does not publish a list of what they see as exceptional circumstances.

*Response issued to the passenger*

- 3.26 When DGAC decides that there is a prima facie case of an infringement and therefore it will investigate a complaint, it informs the passenger that it is doing so. After review of the circumstances and discussion with the carrier, DGAC informs the passenger of the outcome, and of DGAC's own opinion of the case.
- 3.27 In the case of a negative outcome where a carrier refuses to compensate a passenger after DGAC mediation (before the case is referred to the CAAC by DGAC), DGAC informs the passenger that their only remaining possibility for compensation is the civil courts, and DGAC would be happy to be kept informed of the outcome. In this case DGAC provides the passenger with a copy of the correspondence between DGAC and the airline, as well as DGAC's own opinion of the case.
- 3.28 All communications with passengers are in French regardless of the language of initial contact from the passenger. We have been shown a copy of the standard letter sent to the passenger in the event of failure of the mediation between DGAC and the carrier. We found this to be written in rather complex legal French which it might be challenging for a non-native speaker to understand.

*Circumstances under which sanctions are imposed*

- 3.29 CAAC recommends sanctions where there is enough evidence as collected by DGAC that the carrier did not follow the Regulation. Cases are only referred to CAAC when the carrier does not compensate the passenger after the intervention of DGAC. The ultimate decision on imposition of sanctions is made by the Minister of Civil Aviation.

*Imposition of sanctions on carriers not based in the Member State*

- 3.30 There are no specific difficulties in France relating to imposition of sanctions on carriers not based in the Member State. The 'Procès Verbal' notice is usually sent by registered mail requiring a proof of delivery. For countries such as the UK where registered mail does not work in the same way as France (where the sender receives a copy of the proof of delivery), a copy is also sent directly to the airline by fax. This is considered sufficient and sanctions have been imposed on foreign carriers.

*Collection of sanctions*

- 3.31 Under French administrative rules, it is not part of DGAC's role to ensure the collection of sanctions. Once a sanction has been issued, it is recovered by a public accountant ('comptable public') working for the Ministry of Finance, which has access to a variety of tools to recover the fine. It is not normal practice for the accountant to inform DGAC on the recovery of the sanctions or the length of time taken. DGAC would only be informed of the outcome and date of the collection if the accountant was unable to recover the sanctions (for instance if the airline was unable to pay or no address could be found).
- 3.32 The process for collection of sanctions is the same for all airlines whether French, from other Member States or elsewhere.

*Publication of information*

- 3.33 DGAC does not publish statistics for complaints received or any other information about its action related to the Regulation.

**Other activities undertaken by the NEB**

- 3.34 DGAC does not undertake airport inspections in order to verify compliance with Articles 14(1) and 14(2).
- 3.35 DGAC believes it has an advisory role on the correct implementation of the Regulation. Thus, DGAC organises regular meetings with the airlines in order to remind them of their duties under the Regulation. In particular, there have been discussions about the interpretation of the Q&A document. In 2008 for instance, DGAC organised 6 meetings with the airlines (low-cost and charter included) and states that it is always happy to meet at a carrier's request in order to clarify their interpretation of the Regulation.

**Work with other organisations**

- 3.36 Complaints that should be handled by other European NEBs are forwarded by post by DGAC with a very succinct summary in English of the complaint.
- 3.37 DGAC does not work on a regular basis with the ECC Network or the CPC network, although some passenger complaints get forwarded to DGAC from the ECCs.
- 3.38 DGAC believes that the legitimacy of ECC centres as mediators with airlines is lower than the NEBs' appointed to enforce the Regulation. CPC Network is perceived by DGAC as being an unnecessarily complex network and as such is not used.

**Alternative means for passengers to obtain redress**

- 3.39 The French judicial system has a small claims track available, which is intended to be a quick way of resolving a dispute where the amount is less than €4,000. Claims can be brought to the "Juge de Proximité" within 2 years after the last exchange of letters with the airline. There are no charges payable to bring a claim through this system and the use of a lawyer is not compulsory.
- 3.40 There are a number of issues with the "Juge de Proximité" procedure in France:
- The 'Juges de Proximité' are part-time legal experts (lawyers, barristers, law professors, retired law experts, retired senior police officers, etc) appointed for 7 years. Both DGAC and airlines operating in France informed us that the judges do not always make their decisions in accordance with the Regulation, because they are not properly informed about what the Regulation requires. Decisions vary between individual judges and inaccurate decisions can subsequently be used as a precedent by other judges.
  - Despite the significant flaws in the system, under most circumstances it is not possible to appeal decisions. The only possible appeal would be a review in the Court of Cassation of the legal processes followed, rather than the outcome of the court. In this case a specially qualified lawyer needs to be employed at a minimum cost of €3,000.

- Claimants can be ordered to pay the legal costs of the airline if their case is dismissed, although according to the consumer organisation UFC-Que choisir this is rare.
  - UFC-Que choisir also stated that the burden of the proof in this court lies with the claimant, even though Article 5 states that it is for the carrier to prove extraordinary circumstances and that the passenger was informed of a cancellation. Due to the nature of the claims, the only proof usually available is from the airline or DGAC. Most passengers have no means of obtaining this directly from the airline, so the only evidence generally available in court is what has been provided by DGAC to the passenger.
- 3.41 For claims over €4,000 but less than €10,000, claimants need to go through the Tribunal d'Instance. Use of a lawyer is not compulsory and there are no charges payable. In this case, appeals are possible. The key problem is that there is currently a bottleneck in the French justice system particularly at the Tribunal d'Instance and Tribunal de Grande Instance levels.
- 3.42 There is no alternative dispute resolution process for air transport claims in France.

### **Issues with complaint handling and enforcement in France**

#### *The ability to impose dissuasive sanctions*

- 3.43 The sanctions currently imposed in France do not appear to be enough to be really dissuasive and encourage the carriers to fulfil their obligations under the Regulation. For example, some airlines which have already been sanctioned after the first and second CAAC hearings have also been referred to the third, which implies that fines to date have not been sufficiently dissuasive. Although one high sanction has been issued (€22,500), most have been much lower.

#### *The efficiency of the process*

- 3.44 The process in France for imposing sanctions is complex and slow. The length of the investigation is dependant to a large extent on the availability of DGAC staff, who have other duties to undertake. The small number of CAAC hearings (effectively twice a year) also slows the process. It is likely to be many months before an airline is found in breach of the Regulation by CAAC and gets informed of its sanction reduces the incentive for airlines to improve their behaviour.
- 3.45 Another important issue in the process lies with the Minister of Civil Aviation, who decides on the sanction and its level. The Minister has total discretion about what fine is issued and how much, and he/she does not have to justify these decisions. This does not guarantee fair treatment of airlines. In addition, as no information on sanctions imposed or the level of sanctions is made public, this system is not transparent.

#### *Ability of passengers to obtain redress*

- 3.46 DGAC does mediate with carriers on passengers behalf, and asks for justification for claims of exceptional circumstances. However, if the carrier does not pay compensation when requested, even if it is sanctioned by CAAC and the Minister of

Civil Aviation, the passenger who brought the claim will not be compensated without going to court.

- 3.47 UFC-Que Choisir highlighted that representation of air passengers in France is poor, and there is limited assistance available in bringing claims against airlines. Air passengers are supposed to be represented by FNAUT (Fédération Nationale des Associations d'Usagers de Transport), but this is largely geared towards rail. Air passengers can usually only try to resolve their complaint directly with the airline or with the courts and, in the case of this Regulation, through DGAC mediation.
- 3.48 DGAC is a government department and its role had not previously included taking a view on commercial disputes between airlines and passengers. The consumer organisation UFC-Que Choisir felt that DGAC was still unconformable with this and was possibly trying to stay as neutral as possible as it had to be in the past.

### **Conclusions**

- 3.49 The system of complaint handling undertaken in France has some strong points – in particular, DGAC does mediate with carriers on passengers behalf. However, there are a number of weaknesses, including the length and complexity of the process to impose sanctions, and the fact that DGAC does not appear to have sufficient resources to handle all complaints as effectively as possible.

### *SWOT analysis*

- 3.50 A SWOT analysis of the complaint handling and enforcement processes in France is provided below.

TABLE 3.1 SWOT ANALYSIS: FRANCE

Strengths	<ul style="list-style-type: none"> <li>• DGAC asks justifications for all claims of extraordinary circumstances</li> <li>• Technical/operational expertise available to DGAC to investigate complaints</li> <li>• The possibility to impose a sanction high enough to start being dissuasive, if imposed on a per-passenger basis.</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• The complaint handling process is slow and complex</li> <li>• The frequency at which sanctions can be imposed is not dissuasive</li> <li>• The resources available to DGAC to handle complaints does not appear adequate</li> <li>• Although sanctions are recommended by the CAAC, it is up to the Minister in charge of Civil Aviation to impose sanctions and decide their levels</li> <li>• In some cases carriers may be given a sanction, but there is no requirement to pay compensation to the passenger</li> <li>• No inspections are carried out by DGAC to verify compliance</li> <li>• No communication of the application of the Regulation is available to claimants or the general public</li> <li>• Significant weaknesses in Juge de Proximité system</li> <li>• No alternative dispute resolution process</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• It may be possible to impose higher sanctions if CAAC and the Minister of Civil Aviation decide to impose sanctions on a per-passenger basis</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• DGAC does not have sufficient resources to handle complaints under the Regulation as effectively as it could.</li> </ul>

## 4. GERMANY

### **The National Enforcement Body**

4.1 The National Enforcement Body for Germany is LBA (Luftfahrts-Bundesamt), which is the Civil Aviation Authority.

4.2 There is no separate body responsible for complaint handling. As discussed in more detail below, the Schlichtungsstelle Mobilität project was funded by the Ministry for Food, Agriculture and Consumer Protection and has been arbitrating between passengers and transport companies, when there are problems with a long distance trip. This has included handling of cases relating to Regulation 261/2004. However this project will terminate on 30 November 2009.

#### *Resources available*

4.3 LBA has a team of nine FTEs working on passenger rights. One of these is a lawyer (the head of the department) and the others are trained in public administration and communication.

### **Legal basis of complaint handling and enforcement**

4.4 There are several laws and regulations relating to enforcement:

- The Air Traffic Licensing Regulation (Luftverkehrszulassungsordnung), paragraph 63(d), defines LBA as the NEB, responsible for complaint handling and enforcement. Paragraph 108 defines that breaches of the Regulation are considered a misdemeanour (minor offence).
- The Air Traffic Law (Luftverkehrsgesetz), paragraph 58(1)(13), defines that breach of EU Regulations relating to air traffic is an offence. Paragraph 58(2) defines the fines applying for breach of these Regulations.
- The Law on Administrative Offences (Gesetz über Ordnungswidrigkeiten) defines the administrative process that must be followed in order to impose sanctions. It defines that the responsible authority, in this case LBA, can decide whether to impose penalties.

4.5 The maximum penalty for non-compliance with the Regulation is €25,000. In addition, the law allows for imposition of an additional fine in order to recover the economic advantage that the airline has obtained through non-compliance with the Regulation; however this has not been used to date.

4.6 The procedure is a mix between an administrative and a criminal procedure. The level of proof required is equivalent to that in a criminal case but the fine is imposed by LBA not by a court. LBA make the case for the fine to be imposed and provide the level of proof required. An airline can appeal to the courts.

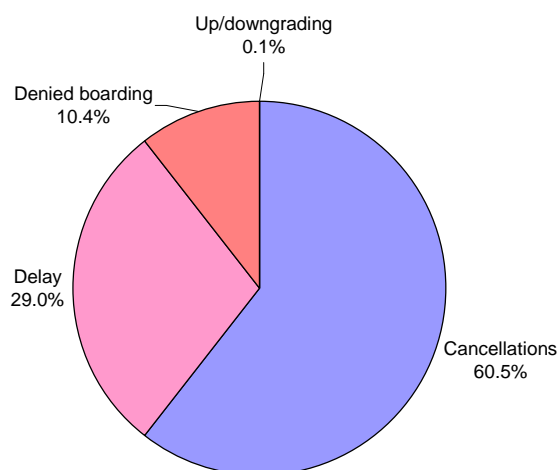
### **Complaint and enforcement statistics**

#### *Complaints*



- 4.7 The number of complaints received by LBA has increased steadily from 1,609 in 2005 to 3,968 in 2008. No information was available on the trend in complaints in 2009. The majority of complaints related to cancellations (Figure 4.1 below).

**FIGURE 4.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: GERMANY**



Source: LBA

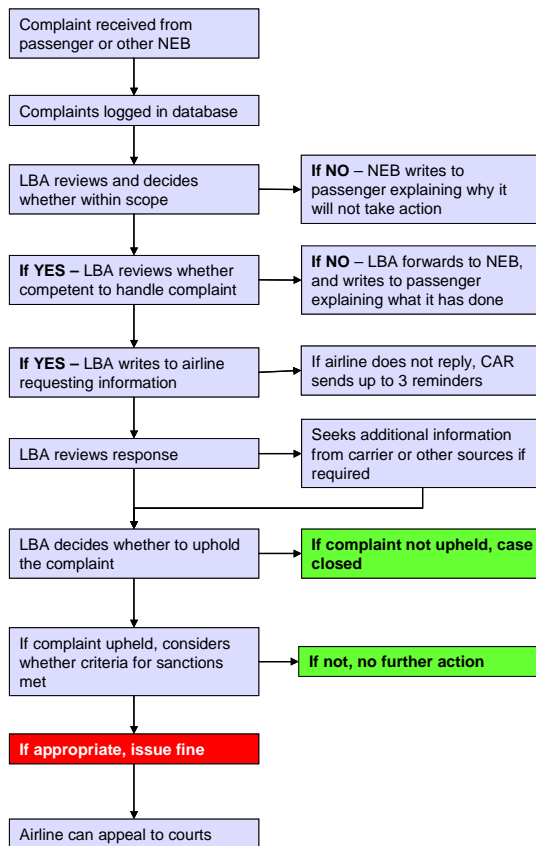
- 4.8 Similar numbers of complaints related to German carriers and other EU carriers. 18% of complaints in 2008 related to non-EU carriers.
- 4.9 No statistics were available for the outcome of complaints. However, it is notable that only in a small proportion of cases (84 out of 3,968) did LBA open a file which could lead to possible sanctions.

#### *Enforcement*

- 4.10 LBA imposed 22 fines in 2008 for non-compliance with the Regulation; of these, two were overturned on appeal and two were reduced. It was not able to provide us with any further information about the penalties which were imposed. We discuss in more detail below why LBA did not impose more fines.

#### **The complaint handling and enforcement process**

- 4.11 The complaint handling and enforcement process in Germany is shown in Figure 4.2 below.

**FIGURE 4.2 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: GERMANY**

4.12 LBA accepts complaints only via specific forms which it makes available on its website. The forms are designed in German and English and it informed us that it allows the forms to be written in either language, but that other languages can cause problems. LBA communicates with passengers in German or English.

4.13 LBA uses a bespoke database tool to store complaints, track progress, and automatically generate notification letters to passengers.

#### *Time taken to resolve complaints*

4.14 LBA informed us that it typically takes 3-4 months to resolve a case, although if the airline were to appeal to the courts, the case would take significantly longer. It acknowledged that cases had previously taken longer (up to one year) to resolve, because as it did not have sufficient resources to handle the number of complaints that were received.

4.15 A consumer organisation informed us that LBA typically takes one year or more to resolve complaints due to lack of resources.

#### *Claims of extraordinary circumstances*

4.16 LBA investigates every claim of extraordinary circumstances made by carriers and, being a civil aviation authority, has access to technical/operational expertise in order to do so. It has adopted a more restrictive interpretation of the ruling than some other NEBs. For example, it does not accept that a bird strike is extraordinary circumstance,

because although the airline probably could not have avoided the incident, it is within the normal operations of an airline.

- 4.17 LBA requires carriers to fill out a form justifying extraordinary circumstances. The form has to be signed by the person within the carrier legally responsible for handling complaints, and requires the carrier to provide very detailed information, which (depending on the circumstances claimed by the carrier) could need to be supported by:
- Minimum Equipment List and Configuration Deviation List;
  - statement of unscheduled and scheduled maintenance undertaken on the relevant device, component or system in the previous 3 months, supported by documentation;
  - technical log;
  - aircraft continuing airworthiness record; and
  - relevant excerpts from approach charts of the aerodromes in question, flight manual, flight log (journey log) and the documentation on flight and duty time limitations and rest requirements.
- 4.18 Airlines operating in Germany confirmed that the level of proof requested by LBA is significantly more onerous than that requested by some other NEBs. One airline complained that LBA made unreasonable demands as to the level of backup resources that they should have in order to meet the criteria in Article 5(3), including a suggestion that it should have one spare aircraft for every three in operation, which would impose unreasonable additional costs on airlines and lead to significantly higher fares for consumers.

*Response issued to the passenger*

- 4.19 LBA does provide an individual response to each passenger. It writes to inform them of the outcome of their investigation and this assessment could be used by the passenger as evidence in a court case. However, whilst it previously recommended that carriers pay in individual cases, it no longer does so.
- 4.20 However, LBA considers that it cannot become involved in deciding a dispute about a private contract between a passenger and a carrier. Therefore, it may consider imposing sanctions but it will not instruct an airline to pay compensation in an individual case. An airline may decide to pay when LBA becomes involved, but if it does not, the passenger would need to go to court if they wish to obtain redress. The court may follow LBA's opinion as to whether compensation is payable, but does not have to do so, and there have been cases where the court has adopted a different interpretation.

*Circumstances under which sanctions are imposed*

- 4.21 LBA does not have a written policy on when sanctions should be imposed. It informed us its initial policy was to impose a sanction where the airline has committed a repeated and/or significant breach of the Regulation, and it was more likely to impose sanctions on carriers about which it has received a large number of complaints. In other cases it informed airlines about where they should pay compensation.

4.22 LBA has now changed its policy to impose sanctions in all cases where there are infringements, provided that:

- the infringement is proven; and
- the infringement is not insignificant.

4.23 However, as discussed in more detail below, at present a further criteria is that it must be able to serve the notification on the carrier, and there are difficulties in doing this if the carrier is not based in Germany.

*Imposition of sanctions on carriers not based in the Member State*

4.24 At present, there can be problems in imposing sanctions on non-German EU carriers, because it is necessary to give a formal notification to a named person within the airline, and it can be difficult to do this if the airline does not have an office within Germany. It must be shown that the notification has been delivered, for the sanction to be imposed. There is no equivalent problem with non-EU carriers because they all have offices within Germany, as a condition of being given traffic rights. The problem is a general one with German law and is not specific either to LBA or to this Regulation.

4.25 LBA is investigating a number of options for addressing this, including that the German embassy in the State in which the carrier is registered passes the file to the government of the State, which in turn passes it to the NEB, which serves it on the carrier. LBA informed us that it is not possible for it to send the letter by courier or registered mail and therefore get a receipt, as under German law it has to be served in person on a named individual within the carrier.

*Collection of sanctions*

4.26 With the exception of one case for which an appeal is ongoing, all of the 20 fines imposed in 2008 have been paid (95%). If the carrier does not voluntarily pay a fine, enforcement can be undertaken on the basis of procedures set out in the Administrative Enforcement Act (VwVG).

*Publication of information*

4.27 LBA publishes details on the complaints it receives, but not about the sanctions it imposes. It informed us that it is considering publication of information on sanctions in the future so as to better inform passengers.

**Other activities undertaken by the NEB**

4.28 LBA's initial approach was to give informal advice to carriers, to recommend that they should pay in a particular case, as guidance for how enforcement would work in the future. In addition it has sent letters to carriers to encourage them to comply. However, unlike most other NEBs, LBA does not undertake inspections at airports to verify compliance with the Regulation.

**Work with other organisations**

- 4.29 Where LBA receives complaints which relate to incidents that occurred in other Member States, it forwards the complaint to the appropriate NEB. It informed us that it will provide a short summary in English but only where this is specifically requested by the NEB concerned. It also informed us that it does not publicise the fact that it is willing to do this and, as a result, it is rarely requested.
- 4.30 LBA has not used the CPC Network to date and does not believe that it needs to do so, as it already has good contacts with other NEBs. It has had some informal contacts with the German ECC, which it does invite to meetings.

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

#### *Mobility Arbitration Board*

- 4.31 The German Association of Transport Users (Verkehrsclub Deutschland or VCD) has developed a ‘Mobility Arbitration Board’ (Schlichtungsstelle Mobilität), as part of a project funded by the Federal Ministry of Food, Agriculture and Consumer Protection. This Arbitration Board was set up before Regulation 261/2004 came into effect, and covers all modes of transport. The objective was to provide passengers with a means of obtaining redress short of going to court.
- 4.32 It has been handling complaints relating to Regulation 261/2004 and it informed us that it had received 3,000 such complaints. However, it could only handle complaints where the carriers agreed to co-operate on a voluntary basis. It informed us that it had had good co-operation from foreign carriers but German airlines were not willing to co-operate. Where complaints were received relating to carriers which did not co-operate, the complaints were forwarded to the ECC.
- 4.33 However, government funding for this project will end on 30 November. After this date, the Board will be funded by transport companies and, to date, only rail companies have agreed to fund it. Therefore it appears likely that it will not be able to handle complaints from air passengers.

#### *The court system*

- 4.34 Germany does not have a small claims court system, although the court can decide at its discretion to adopt a simplified procedure if the value of the claim is less than €600. This would include some, but not all, claims under the Regulation. In addition, the European small claims procedure can be used for cases involving other Member States.<sup>3</sup> In addition, an airline operating in Germany informed us that many German consumers have litigation insurance, often bundled with bank accounts, and therefore even in the absence of a simplified court procedure for small claims, the civil courts do provide an alternative for German consumers.

### **Issues with complaint handling and enforcement in Germany**

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<sup>3</sup> Source: European Judicial Network

- 4.35 The biggest weakness with the complaint handling and enforcement system in Germany is that it is currently very difficult to impose sanctions on carriers that do not have an office in Germany. This is a significant limitation, as (in 2008) German carriers accounted for less than 40% of complaints submitted to LBA. This means that, by definition, the enforcement regime does not provide an economic incentive for non-German carriers to comply with the Regulation, and therefore, Germany is not compliant with Article 16(3) of the Regulation.
- 4.36 For German carriers, the enforcement regime does appear to be sufficient to meet the criteria in Article 16(3), taking into account the fact that
- the maximum sanction is €25,000 plus any economic advantage that the carrier has obtained from non-compliance;
  - every complaint and claim of extraordinary circumstances are investigated; and
  - sanctions are applied in every case where there is sufficient proof and a significant infringement is found.
- 4.37 LBA is adopting a narrower definition of extraordinary circumstances than some other NEBs. For example, it does not accept that incidents such as bird strikes are sufficient to exempt carriers from paying compensation, because although carriers could not have avoided them, it considers that these are part of the normal operations of an airline. Differences in the interpretation of extraordinary circumstances between different NEBs is a problem because it means that enforcement is inconsistent within the EU. However, in our view, the interpretation which has been adopted by LBA appears to be closer to that set out by the ECJ in *Wallentin-Hermann v. Alitalia*.
- 4.38 From the point of view of individual consumers, the fact that LBA does not require the carrier to pay compensation, mediate with the carrier, or otherwise provide assistance to individual passengers seeking redress means that it can be difficult for them to obtain their rights. This is made more difficult by the fact that there is no small claims court procedure in Germany, and although there is currently an ADR, it only covers some airlines and in any case it is unlikely to cover any airlines after November.
- 4.39 The fact that LBA communicates with other NEBs in German only (except where it has a specific request) and does not inform them that in principle it is willing to provide English translations, is unhelpful and is a breach of the NEB-NEB agreement. A number of other NEBs highlighted to us that they had particular difficulty with German language complaints.

### Conclusions

- 4.40 Overall the system of enforcement of the Regulation in Germany appears to be sufficient to meet the criteria in Article 16(3) where it covers transport by German carriers, but the problems with imposing sanctions on foreign carriers means that the regime does not fully meet these criteria. In addition, the particularly rigorous approach LBA is adopting to extraordinary circumstances could be considered a strength although as it differs from the approach of most other NEBs it results in inconsistency in enforcement between Member States.

- 4.41 The other key problem is that little assistance is provided to individual passengers seeking to obtain redress. LBA does not consider this to be part of its role, and as noted above, there is no simplified court procedure for small claims and the ADR procedure will no longer cover airlines by the time that this report is published. This means that it is difficult for individual passengers to obtain redress from carriers.

*SWOT analysis*

- 4.42 A SWOT analysis of complaint handling and enforcement in Germany is described in Table 4.1 below.

**TABLE 4.1 SWOT ANALYSIS: GERMANY**

Strengths	<ul style="list-style-type: none"> <li>• The law allows for the sanction to be increased to reflect the economic gain that the carrier has made through non-compliance</li> <li>• Sanctions applied in every case where an infringement identified, provided this is proven and the infringement is not insignificant</li> <li>• Rigorous analysis of claims of extraordinary circumstances in all cases</li> <li>• Technical, operational and legal expertise available to LBA</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Difficult to impose sanctions on carriers that do not have an office in Germany</li> <li>• LBA does not assist individual passengers in obtaining redress</li> <li>• No small claims court system – simplified court procedures can be used for claims under €600 but this is at the discretion of the court and in any case would not include all claims under the Regulation</li> <li>• Cases can take a long time to resolve</li> <li>• LBA does not usually provide a translation when it forwards complaints to other NEBs, in breach of the NEB-NEB agreement. Most other NEBs do not have the capability to handle complaints in German, so it is unclear what if anything is done with the complaints it forwards</li> <li>• No inspections undertaken</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• An ADR could be developed, possibly based on the existing Mobility Arbitration Board, which could be extended to cover claims against German airlines</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• The Mobility Arbitration Board's funding is to end on 30 November 2009, and after this, there will be no means other than a court procedure for passengers to obtain redress from carriers</li> </ul>

## 5. GREECE

### The National Enforcement Body

- 5.1 The National Enforcement Body in Greece is the Hellenic Civil Aviation Authority (HCAA), which is part of the Ministry of Transport and Communications. The overall mission of the organization is the development of the aviation system of Greece and provision of support and recommendations to the Minister of Transport and Communications for the formulation of general aviation policy.

#### *Resources available*

- 5.2 HCAA currently employs 2,671 staff with 3 FTEs working in the Air Transport Economics Section, which deals with complaint handling and enforcement. One of the employees within the section, in addition to other duties, works on issues relating to the Regulation and the other employees provide support and specialist expertise as and when required. None of the employees works full time on complaint handling and enforcement of the Regulation.

### Legal basis of complaint handling and enforcement

- 5.3 A Document of the HCAA Governor (D1/D/44137/2978/8-11-2004) designates the Air Transport Economics Section of the Air Transport and International Affairs Division (HCAA/D1/D) as the competent authority for complaints handling and enforcement under Article 16 of the Regulation. When the Air Transport Economics Section of HCAA decides to impose a fine, this is communicated to the Airport Managing Authority (also a part of HCAA), which is the authority responsible for issuing fines related to violations of the Regulation at public airports. For airports that are privately managed, a representative authority of the HCAA at the airport has the responsibility for issuing the fines. The only private commercial airport in Greece is the Athens International – Eleftherios Venizelos Airport, which is the largest airport in Greece in terms of volume of traffic.
- 5.4 The enforcement regime is defined in Decisions of the Minister of Transport and Communications,<sup>4</sup> which establish penalties for infringements of the Regulation. The sanctions are per passenger that complains, and per Article violated, and depend on which Articles are violated. The penalty values are set out below.

#### *For violations of Article 7*

- For all flights up to 1,500km a fine of €1,000 perpassenger that complains
- For EU flights over 1,500km and all other flights between 1,500km and 3,500km a fine of €2,000 per passenger that complains
- For all other flights outside the conditions in articles A and B above a fine of €3,000 per passenger that complains

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<sup>4</sup> The relevant decisions are: D1/D/44137/2978/8-11-2004 (designates the NEB), D1/D/13770/980/14-4-05 and D1/D/1333/148/16-1-07 (set out penalties), and D3/52598/7561/18-12-95 and D3/B/47159/9521/15-11-2001 (define penalties for non-monetary violations).



*For violations of Article 8*

- Lowest limit is €1,000 per passenger that complains
- Highest limit is €3,000 per passenger that complains

*For violations of Article 9*

- Lowest limit is €500 per passenger that complains
- Highest limit is €2,000 per passenger that complains

*For non-monetary violations*

5.5 These include violations such as failure to cooperate with administrative procedures, failure to request volunteers when denying boarding and failure to provide the information required under Article 14.

- Lowest limit is €500 per passenger that complains
- Highest limit is €50,000 per passenger that complains

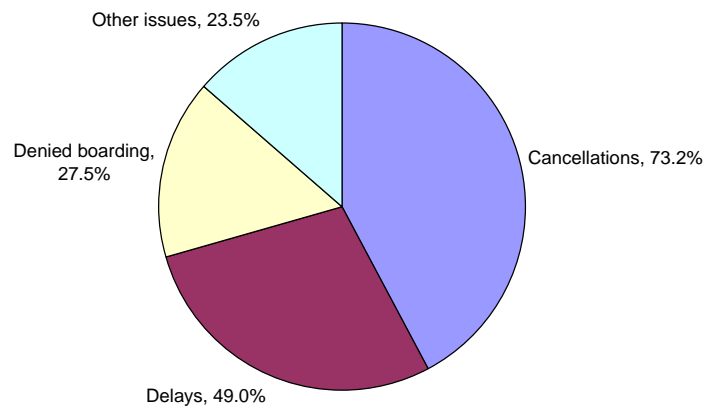
5.6 When an airline fails to respond HCAA considers that the airline does not have sufficient evidence or justification to contradict the claim. It therefore assumes that the allegation of violation made by the passenger is true, and can impose the fines set out above.

**Complaint and enforcement statistics***Complaints*

5.7 In 2008, 644 complaints were received by the NEB, of which 451 related to the Regulation. The total number of complaints was 18% higher than those in 2007. Of these 195 (43%) related to cancellations, of which 84 were claimed to be extraordinary circumstances.

5.8 However, HCAA did not have a full breakdown for 2008 of the complaints received – the only detailed data it had was for the period from the introduction of the Regulation to November 2006. As illustrated in Figure 5.1 below, the majority of complaints relating to the Regulation, during this period, concerned cancellations.

**FIGURE 5.1 TYPES OF COMPLAINTS RECEIVED BETWEEN FEBRUARY 2005 AND NOVEMBER 2006: GREECE**



5.9 76% of the complaints received in 2008 have been resolved. Although this figure includes decisions which found in favour of the airline, HCAA stated that the majority were in favour of the consumer. More detailed statistics were not available.

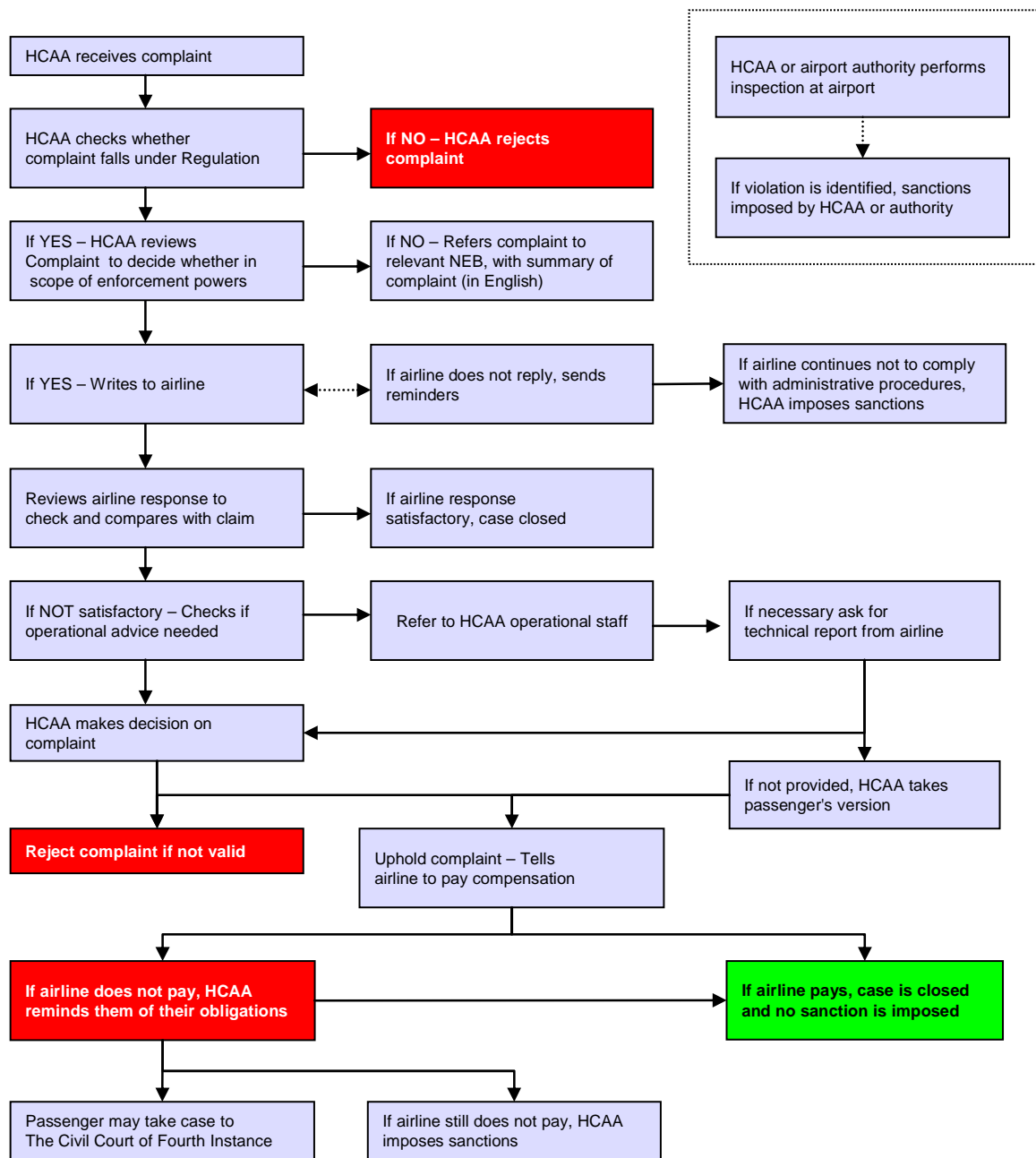
*Enforcement*

5.10 On average, 6 or 7 fines are imposed by HCAA per year although the details of the fines are confidential. Fines have been issued for various reasons, including: non-compliance with administrative procedures, lack of assistance, lack of compensation and lack of information. All fines have been paid in full, and all are imposed based on individual cases. The highest fine was imposed following a complaint by a large group of students.

**The complaint handling and enforcement process**

5.11 The Greek complaint handling and enforcement process is summarised in the following figure. Both complaint handling and enforcement is undertaken by HCAA.

**FIGURE 5.2 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: GREECE**



5.12 The complaint handling process undertaken by HCAA is similar to that undertaken by other NEBs. All complaints received are investigated by HCAA who keep a record of airlines to identify patterns of complaint types such as cancellations. A database system for registering complaints has been recently installed and will be used to register more information on complaints in the future. Complaints are accepted and responded to in both Greek and English.

5.13 An airline informed us that the complaint handling procedures are not managed well by HCAA. Their opinion was that most HCAA staff do not seem to have any real knowledge of the Regulation, with one or two exceptions. When a formal written request is made the process works well, but verbal complaints are often made with incomplete detail, and nevertheless the airline is found at fault with these as well as

with the majority of the complaints. An airline also informed us that HCAA does not appear to interact with any non-Greek NEBs, although it is not clear what evidence this view is based on.

5.14 The administrative process for imposing sanctions is described in the Decision of the Minister of Transport and Communications. If an investigation into a complaint or an inspection concludes that the Regulation was violated, a report to this effect is issued to the carrier, which has 8 days to submit any relevant observations or further information. Once the airline has replied, the HCAA has 7 days to impose a fine. It can also impose sanctions on airlines for non-response. When the Air Transport Economics Section of HCAA decides to impose a fine this is communicated to the Airport Managing Authority (public airports) or the HCAA representative (private airports), who are responsible for issuing the fine notice to the airline. In written communication with the airlines, HCAA reminds and warns the airline that in cases of non-compliance, the Ministerial Decision of sanctions will be activated.

5.15 The carrier has the right to appeal within 10 days of the issue of the fine, but must pay the fine immediately. If the appeal is successful the fine is reimbursed. The appeal is through the administrative court, and can take up to 1 year.

*Time taken to resolve complaints*

5.16 No detailed statistics are available but according to HCAA the typical length for resolving complaints is 3-5 months, depending on which airline is involved. During the investigation, HCAA can request more information from airlines. The response time of the airlines to requests for information varies from 1 to 4 months. HCAA can impose sanctions on airlines for non-response. These fines would be imposed according to the violation of the Regulation identified by HCAA and in line with the Ministerial Decision on penalty values.

*Claims of extraordinary circumstances*

5.17 Where airlines claim extraordinary circumstances as justification for not paying compensation, HCAA will always request details, and will challenge the circumstances if they appear vague or the justification is inadequate. For example, technical log books or weather reports are always requested and analysed to identify whether the carrier's claim is true. However, an airline informed us that it had doubts about whether the part of HCAA responsible for investigation of complaints had the technical/operational competence necessary to decide on claims of extraordinary circumstances.

*Response issued to the passenger*

5.18 HCAA send the passenger an individual response giving the result of the investigation and their conclusions. If an airline has violated the Regulation, they will inform it that it has to comply. If the airline does not comply, HCAA will impose fines. They may also advise the passenger to sue under the Montreal Convention, if appropriate.

*Circumstances under which sanctions are imposed*

- 5.19 The circumstances under which sanctions can be imposed on airlines are described in the Ministry of Transport and Communications Decision, which states that HCAA will always impose fines when an airline fails to comply with the Regulation. This can be as a result of investigations of complaints or following inspections of airports. HCAA informed us that exceptions can be made where the airline has an otherwise faultless record. In addition, fines can be imposed for failure to co-operate with an investigation.
- 5.20 However, if HCAA decides to impose a fine on an airline and the airline subsequently pays the passenger what is owed, the sanction process is stopped. This means that a sanction would never be imposed on a carrier that always complied with HCAA's decisions.

*Imposition of sanctions on carriers not based in the Member State*

- 5.21 Until recently, the legal process of serving a fine required that a representative of the airline in Greece accept the writ. As a result, HCAA has faced difficulties in imposing fines on non-national carriers that had not established an office in Greece. Although all non-national carriers have representatives in Greece, they may not be direct employees of the carrier and may not have been unwilling to accept writs on the carrier's behalf. On 23 May 2008, HCAA adopted a Regulation on airline representation, which requires a representation agreement for all non-national airlines with their local representatives. This came into force in summer 2009, and has allowed HCAA to impose financial penalties on all carriers. Please see paragraph 5.32 for more details of this Regulation.

*Collection of sanctions*

- 5.22 Fines are paid to HCAA in the first instance. If no payment is received from the airline company within the defined timeline, payment is collected through the tax services, and may risk bailiffs impounding property. The airline may appeal the fines, but must still pay the fines up front; if the appeal is successful the airline is reimbursed. So far, all fines imposed on Greek and foreign airlines have been paid in full.

*Publication of information*

- 5.23 At the end of the year HCAA sends a report to the press with information on complaint handling and sanctions imposed.

**Other activities undertaken by the NEB**

- 5.24 HCAA carry out 5-6 airport inspections per month, to ensure compliance with Article 14; these inspections may result in fines, if violations are identified.

**Work with other organisations**

- 5.25 In some cases HCAA informs the passenger of the contact details of the relevant NEB, in other cases HCAA will forward the case and relevant information with a translation. HCAA has previously worked with various NEBs from other countries when they had difficulties in obtaining responses from foreign airlines. For example, they have

worked closely with the Dutch NEB when they had difficulty obtaining responses from a Dutch carrier.

- 5.26 HCAA are aware that there were technical problems with the CPC network for a period, but understand that it is now functional. HCAA considers that it is too soon to say whether the CPC network has been useful.
- 5.27 HCAA has cooperated with the ECC on some cases, and have received some cases from ECC (and other consumer organisations). However they have not used the ECC for information-gathering, as some other NEBs have done.

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

- 5.28 Chapter 466 of the Code of Civil Procedure in Greece contains special provisions for small claims. If the value of the claim is below €1,500 the case falls within the jurisdiction of the District Court: there is no need for litigants to be represented by a lawyer, or for the use of special forms.
- 5.29 We were informed by HCAA that an application can be submitted to the civic court of the 4<sup>th</sup> instance as an alternative mean for obtaining redress. Claims can be brought within 5 years but the cost of bringing a case may exceed the cost of compensation disputed, and the process may take at least a year. According to information provided by a Greek consumer organisation, passengers do not use courts because of the time taken and because the expenses are always much higher than the potential compensation.
- 5.30 There is no other alternative dispute resolution process for air transport claims in Greece. However, the consumer council in Greece is independent and provides non-binding mediation at no cost.

#### **Issues with complaint handling and enforcement in Greece**

##### *The inability to impose sanctions on non-national carriers*

- 5.31 As described above, the legal process of serving a fine requires that a representative of the airline in Greece accepts the writ. As a result, it is easier to impose sanctions and fines on non-national airlines that have an office in Greece. HCAA has faced difficulties in imposing fines on those non-national carriers that do not have an office in Greece. Although all non-national carriers have representatives in Greece, they may not be direct employees of the carrier and may be unwilling to accept writs on the carrier's behalf.
- 5.32 HCAA has recently submitted a letter to the Director of Air Transport at DG-TREN. In this letter, they explain that many non-national airlines with services to Greece have violated national legislation regarding the operation of airports, and other community legislation (for example relating to slot allocation). Violations of this Regulation are not mentioned specifically in the letter, but HCAA has separately stated that fines imposed on non-national carriers have never been paid. HCAA raised this issue with the ground handling companies representing the carriers concerned. However, they refused to make the payments, stating that the agreements made with the carriers did not include any provisions for such payments to be made. According to HCAA's

letter, this issue has had a negative impact on the enforcement of air transport regulations in Greece and sent the wrong message to the aviation industry.

- 5.33 The inability to impose sanctions on all carriers would mean that Greece had not introduced effective sanctions as required by Article 16(3). In order to address this, a Regulation on ‘Airlines Representation’ was introduced in 2008, requiring all non-national airlines to have a representation agreement. Since it came into force in summer 2009, this has allowed HCAA to address all financial penalties through the representative of the carrier, and has improved their ability to extract payment from carriers. Under the new regulation, if an air carrier refuses to pay a fine for a violation the aircraft is not permitted to leave, and since it came into force three fines have been successfully imposed on and collected from non-national carriers. However, it is unclear whether this regulation is compliant with wider EU aviation law; this is discussed in the letter referred to above.

*Inability to impose dissuasive penalties*

- 5.34 Given the low proportion of passengers that are likely to complain to HCAA, the fines set out by law appear to be too low to be dissuasive as required by Article 16(3). For example, if an airline fails to pay €250 compensation for cancellation of a short haul flight, it can only be fined €1,000. This would only be dissuasive if at least one in four passengers who had suffered an infringement complained to HCAA.
- 5.35 A further problem with the sanctions regime in Greece is that it may not be possible to impose sanctions on airlines which consistently violate the Regulation but rectify any non-compliances on investigation by HCAA. An airline with a policy of non-compliance except when investigated would only provide redress to passengers who brought complaints to HCAA, which is likely to be a small proportion of passengers. If there is no sanction for such behaviour, there is no economic incentive to comply in all cases.

*Ability of consumers to obtain redress*

- 5.36 As discussed above, in cases when airlines do not provide a response or provide an unsatisfactory response, HCAA has no power to compel airlines to respond – although the fact that the carrier avoids imposition of a sanction by paying compensation as required should encourage them to do so. If they do not, the passenger is advised that they should go to court if they wish to obtain redress. The court process recommended by HCAA is very expensive and slow, and consumers are reluctant to use it. There is no alternative dispute resolution process, and although there is a small claims procedure it is not well known. Some passengers seek the mediation of the consumer organisations but others take no further action. No detailed statistics are available to quantify such passenger actions.
- 5.37 HCAA does take up all cases for further investigation and pursue the resolution of cases when a violation of the Regulation by the airline is identified. Although no detailed statistics are available, HCAA reports that in 2008 the 76% of the total cases have been resolved and the majority of them have been resolved for the benefit of the consumers. On the other hand, the consumer organisation does not believe HCAA carries out adequate investigations, or pays sufficient attention to the protection of

consumers. They believe that most of the decisions made by HCAA are the favour of airlines. The airlines have reported that HCAA carried out investigations only with the benefit of the consumers in mind and that the majority of the cases are resolved for the benefit of consumers. As such, it is difficult to establish which view is correct.

*Stakeholder views*

- 5.38 According to both the airline and consumer organisation interviewed, HCAA's complaints handling is not satisfactory. The airline claims that HCAA always makes decision in favour of the passengers, while the consumer organisation claims the opposite. Because of these conflicting views, it has hard to identify whether this is a problem or not, but there is certainly an issue with stakeholder perception.

**Conclusions**

- 5.39 HCAA has an established complaints procedure, investigates all complaints including claims of extraordinary circumstances, and provides an individual response to the passenger which, where appropriate, instructs the carrier to pay compensation, with fines likely to be imposed if it does not. However, there are a number of issues with the sanctions regime:
- maximum fines are low;
  - fines are not imposed on carriers which provide redress when the NEB becomes involved; and
  - there are practical difficulties in imposing fines on carriers that do not have offices in Greece, although this has in principle been addressed by legislation introduced in 2008.

*SWOT analysis*

- 5.40 A SWOT analysis of the complaint handling and enforcement processes in the Greece is provided below.



TABLE 5.1 SWOT ANALYSIS: GREECE

Strengths	<ul style="list-style-type: none"> <li>• Adequate resources available to HCAA to handle complaints</li> <li>• Technical/operational expertise available to HCAA to investigate complaints</li> <li>• Inspections are carried out by HCAA to verify compliance</li> <li>• Sanctions have been successfully imposed and collected</li> <li>• Sanctions can be imposed if infringements identified by inspections</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• It has been very difficult to impose sanctions for non-compliance on non-national carriers</li> <li>• The fines available are low, and we do not consider them to be dissuasive</li> <li>• It may not be possible to impose sanctions for non-compliance if the airline rectifies the breach during investigation; this would lead to a lack of dissuasive sanctions</li> <li>• The complaint handling process is slow</li> <li>• In most cases, if a carrier does not respond adequately, the passenger is advised to go to court if they wish to obtain redress – the case will not be taken up by HCAA</li> <li>• No alternative dispute resolution process</li> <li>• Civil court system expensive, slow and complex for consumers</li> <li>• Small claims court procedure is at best not widely known</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• Airline representation law should allow HCAA to impose fines on non-national carriers</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• Conflicting views of stakeholders regarding the quality of the complaint handling procedures could lead to non-compliance and disputes</li> <li>• Not clear that airline representation law consistent with other EU law</li> </ul>

## 6. HUNGARY

### The National Enforcement Body

6.1 Hungary has two enforcement bodies:

- The Hungarian Authority for Consumer Protection (HACP), which is responsible dealing with the complaints and launching the proceedings; and
- The National Transport Authority Directorate for Aviation, i.e. the Civil Aviation Authority (CAA), which supervises the airlines and investigates the technical details of each case if asked by the HACP.

6.2 The HACP is a statutory consumer protection authority, responsible for investigation of complaints submitted by consumers in various industries including air transport. Unlike in some other Member States such as the UK where the authority responsible for complaint handling does not have an enforcement role, HACP has the right to impose a sanction on a service provider if there is an infringement of relevant legislation. Therefore, in practice HACP is the main body in Hungary responsible for enforcement of the Regulation.

6.3 The CAA is responsible for economic regulation of the air transport sector, and airspace policy. Its functions include supervision of compliance with the Commercial Code by air carriers, which would also involve infringements of the General Conditions of Carriage. The main role of the CAA in the enforcement of the Regulation is to support the HACP with provision of technical expertise whenever this is necessary, usually in connection with the investigation of extraordinary circumstances.

#### *Resources available*

6.4 The HACP has 2 FTEs assigned to the issues of the Regulation, while the CAA has 1 FTE working on it. Technical and operational expertise is provided by the CAA.

#### **Legal basis of complaint handling and enforcement**

6.5 The legal basis for the enforcement by the HACP is laid out in Government Decree, 25/1999, as amended by Government Decree 33/2005 to reflect the Regulation. The legal basis for enforcement by the CAA is Act XCVII of 1995.

6.6 The legal basis for the imposition of sanctions by HACP is Article 47/C of the Act CLV of 1997, which gives HACP the right to impose civil penalties. The maximum penalty for breach of the Regulation is set for 2,000,000,000 HUF (€7,272,727<sup>5</sup>) per case/complaint, while the minimum penalty in this context is 15,000 HUF (€54) per case/complaint. HACP said that this should be considered as a maximum amount that could theoretically be applied rather than an amount it was likely to apply in any individual case. Any case that directly relates to the Regulation is the responsibility of the HACP and therefore this is the basis on which sanctions would be imposed.

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<sup>5</sup> The exchange rate used for the conversion in this document is € 1 = 275 HUF.

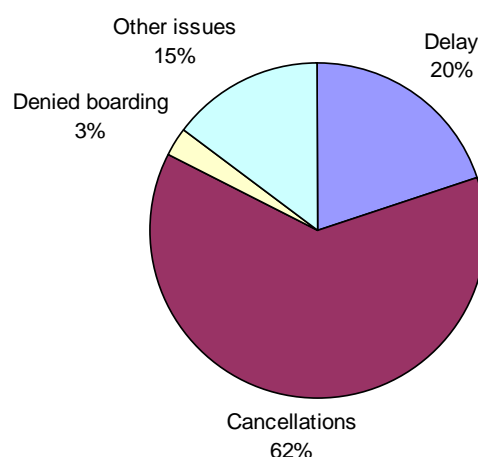
- 6.7 The legal and administrative process which must be followed in the complaint handling/enforcement process is described in Act CXL 2004 on General administrative procedures. Specifically, Section 61 of this Act gives HACP the right to impose sanctions for non-compliance with the administrative procedures, as well as any sanction for violation of the Regulation (this is referred to as an ‘administrative penalty’). This penalty can be imposed if the carrier does not comply with the rules of the administration procedure in a particular complaint handling process; most often this would mean delays or non-responsiveness to queries of the Authority – for example if the carrier fails to provide requested information, documents within a specified period). This penalty ranges from 50,000 HUF to 1,000,000 HUF (€181 to €3,636).
- 6.8 CAA also has the power to impose civil penalties on airlines, on the basis of Article 66/A of the Act XCVII of 1995. The maximum penalty that can be imposed is 3,000,000 HUF (€11,500). However, the above applies to cases that do not fall under the scope of the Regulation – penalties imposed under this Act would be for other infringements.

### Complaint and enforcement statistics

#### Complaints

- 6.9 The number of complaints made relating to non-compliance with the Regulation is lower in Hungary than in many other Member States, but is increasing rapidly. HACP received 127 complaints in 2008 related to the Regulation, more than 9 times as many as in 2007 (14 complaints), and in the first part of 2009, it had already received 82 complaints, indicating that the number is continuing to increase. As illustrated in Figure 6.1 below, the vast majority of valid complaints received by HACP related to cancellations.

**FIGURE 6.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: HUNGARY**



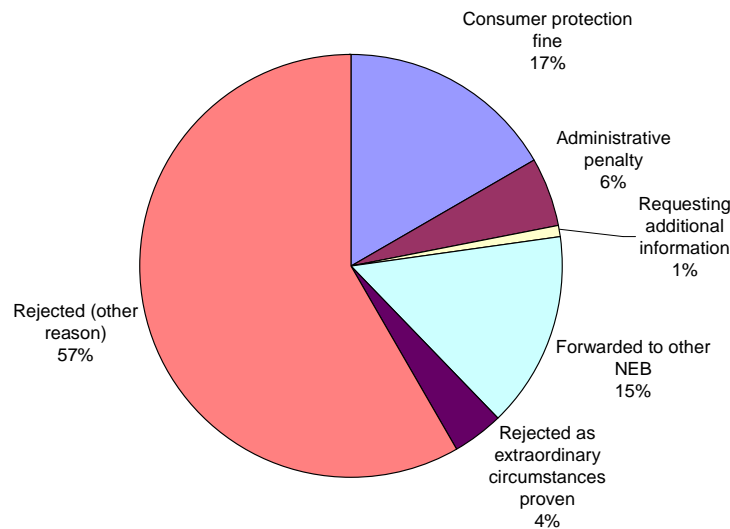
Source: Analysis of data provided by HACP

- 6.10 HACP policy is to accept all complaints and then decide in the course of the proceeding whether the complaint falls under the Regulation, and if it does, HACP

decides whether the complaint is in the scope of its enforcement powers. In 2008, there were 22 complaints classified as other received by the HACP in addition to the complaints falling under the Regulation<sup>6</sup>.

6.11 Figure 6.2 shows the outcome of the complaints relating to the Regulation received by HACP in 2008. In nearly 61% of cases (and 75% of cases not forwarded to another NEB) the complaint was not upheld, although only in a small number of cases was this because a claim of extraordinary circumstances was upheld. A consumer protection fine was imposed for infringement of the Regulation in 17% of cases, and an administrative fine imposed for failure to co-operate with the enforcement process in 6%.

**FIGURE 6.2 STATUS OF COMPLAINTS RECEIVED DURING 2008: HUNGARY**



Source: Analysis of data provided by HACP

*Enforcement*

6.12 HACP told us that 31 consumer protection fines had been issued for non-compliance with the Regulation, and 3 administrative penalties had been issued. Please note there is an apparent difference in the number of penalties in 2008 with the data used for Figure 6.2 above. HACP told us that this was due to different categorisation of data: the data for the outcome of complaints is dated according to the date of the complaint, data for penalties is dated according to when the penalty was issued.

<sup>6</sup> Note that the 22 cases not related to the Regulation are not included in these figures. These complaints are also excluded from the analysis in section 1.12.

**TABLE 6.1 HUNGARY: PENALTIES ISSUED**

	2006	2007	2008	2009 to date
Consumer protection fines	4	7	16	4
<i>Total amount (HUF)</i>	<i>1,400,000</i>	<i>1,650,000</i>	<i>4,605,000</i>	<i>350,000</i>
Administrative penalties	-	-	-	3
<i>Total amount (HUF)</i>				<i>150,000</i>

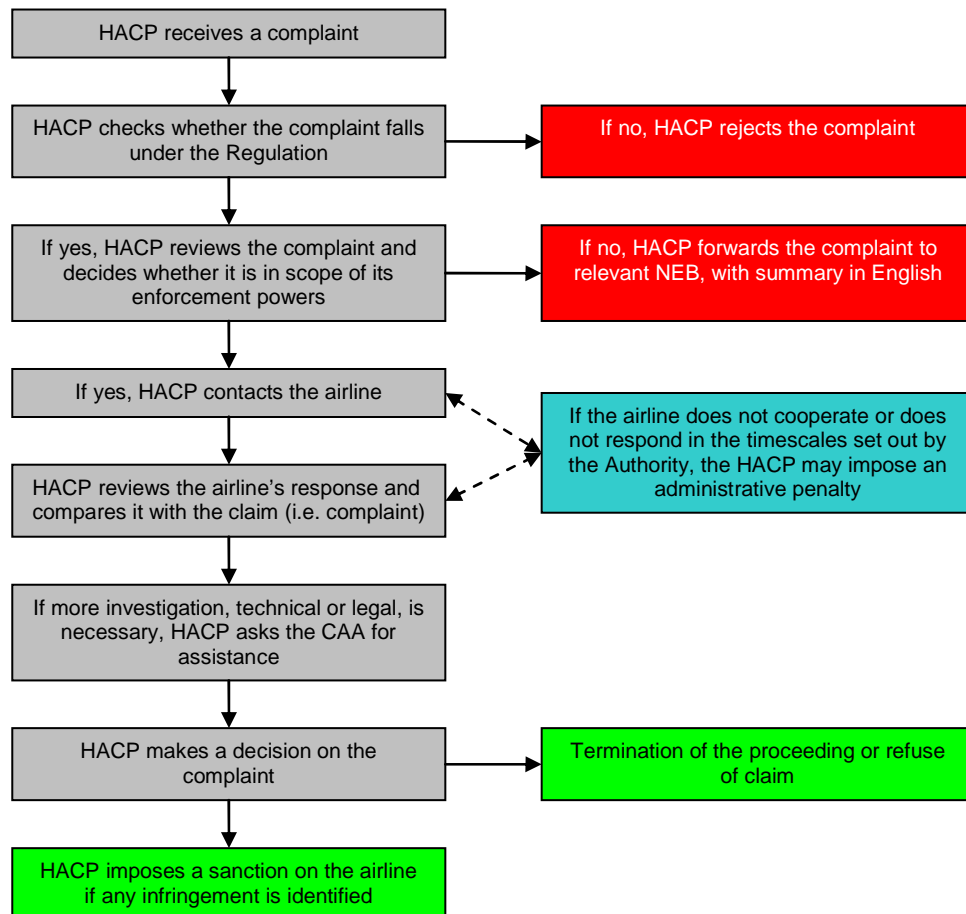
Source: HACP

6.13 In addition, in one case in 2008 the CAA issued a penalty for an infringement of the General Conditions of Carriage.

**The complaint handling and enforcement process**

6.14 The complaint handling in Hungary and the enforcement process is summarised in Figure 16.3 below. As stated above, both complaint handling and enforcement is undertaken by the HACP.

**FIGURE 6-3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: HUNGARY**



Note: Scheme prepared on the basis of schematic description of the process provided by the HACP; does not include potential appeal process.

- 6.15 A complaint can be either submitted to the regional office of the HACP, or to the CAA. CAA passes complaints relating to the Regulation to HACP; similarly if HACP receives a complaint that is within CAA's remit, it passes this to CAA. The complaint can be submitted in written form or electronically, and the claimant can also use the EC complaint form.
- 6.16 Upon the submission of a complaint to a regional office of the HACP, an administrative process is launched. There are three possible ends that the regional office can get to:
- termination (without sanction);
  - transfer to any other relevant authority; or
  - imposition of a sanction to the carrier.
- 6.17 A complaint can be submitted to the HACP or the CAA in any language; it is the responsibility of the Authority to ensure that complaints are translated into Hungarian. The languages that can be covered through in-house staff language skills presently are Hungarian, English, German and Spanish. The response to a complaint is submitted in English in cases when the language of the incoming complaint is not Hungarian.
- 6.18 If a sanction is imposed, the carrier has the option of appealing the decision; in such cases, the appeal is submitted to the HACP headquarters. This may either confirm or cancel the decision of the regional HACP office. If the decision is upheld by the HACP headquarters, the carrier may appeal to a civil court that will ultimately decide on the sanction.
- 6.19 If a complaint is to be transferred to another NEB, it is not translated but is accompanied by a short summary in English, in line with the NEB-NEB agreement.
- 6.20 An unusual feature of the complaint handling procedure in Hungary is that, in addition to sanctions for non-compliance with the Regulation, sanctions are imposed if the carrier does not respond to the queries or does not cooperate with the HACP (or the CAA) in the process of the investigation of the complaint through an administrative penalty. This penalty is completely independent from the possible sanction for non-compliance with the Regulation and may be imposed repeatedly.

*Time taken to resolve complaints*

- 6.21 The HACP states that the average time it takes to resolve a case is 2 months. Due to the relatively low number of complaints and high share of rejected claims, these are processed without delay. At the time of our interview with HACP in September 2009, all of the cases received in 2008 were deemed to be closed from the HACP point of view; there are however cases where the carrier has opted to appeal or where the legal period for the payment of the sanction is still pending.

*Claims of extraordinary circumstances*

- 6.22 Where airlines claim extraordinary circumstances as justification for not paying compensation, HACP asks CAA for assistance in the investigation of the issue in all cases. The CAA has the competence to perform investigation of the extraordinary

circumstances since it has the relevant technical and legal expertise. CAA reports back to HACP on the outcome of its investigation so that the HACP may continue to process the complaint.

- 6.23 In 2008, the CAA only upheld airline claims of extraordinary circumstances in 37% of cases investigated. The HACP states that, since the result of the recent ruling by the European Court of Justice, the adjudication of extraordinary circumstances is more even, which could be taken to indicate that carriers have been more likely to pay compensation voluntarily. It also states that it does not intend to re-open old cases either on their own initiative, or upon request in the light of the recent ruling.

*Response issued to the passenger*

- 6.24 The initial response to the submitted complaint is a notification of its acceptance and (if required) a request for provision of passenger's personal data, such as the reservation code, postal address, flight number and bank account number. The bank account number is requested in order to provide assistance to the passenger, as the carriers' sometimes claim the compensation cannot be paid as this is missing.
- 6.25 The HACP notifies the claimant about the outcome of the proceeding through a formal letter. This is to provide the passenger with a recognised statement on the case, which can be used to pursue compensation through a civil court procedure.

*Circumstances under which sanctions are imposed*

- 6.26 HACP's policy is to impose sanctions in all cases where an infringement of the Regulation is found. In addition, as noted above, it can also impose penalties for failure to co-operate with the complaint handling process, for example by failing to provide information that is requested.
- 6.27 The CAA can impose sanctions for violation of other regulations linked to air transport, typically for violation of General Conditions of Carriage.

*Imposition of sanctions on carriers not based in the Member State*

- 6.28 According to HACP, there are no legal barriers to the imposition of sanctions on non-national carriers – the sanction would be sent, with a translation into English, to the company's offices. However, there have only been four fines imposed on non-national carriers to date, and in both cases the carrier had an office in Hungary, and therefore the procedure for imposing sanctions on carriers without an office in Hungary has not had to be tested. HACP said that if the carrier did not respond appropriately to a sanction, it could use the CPC Network.
- 6.29 HACP told us that the low number of sanctions issued to foreign carriers arose from the relatively small proportion of operations at Budapest airport accounted for by foreign carriers (the largest airlines are Malev and Wizzair, both registered in Hungary).
- 6.30 When an infringement of the Regulation is identified and sanction is imposed, this fine must still be paid even if the carrier eventually decides to pay compensation to the passenger. However, when a carrier appeals against the imposition of a sanction, it is

suspended until it is either re-confirmed, cancelled or amended by the higher authority.

*Collection of sanctions*

- 6.31 In the event of that the carrier paid the sanction voluntarily, it would be collected by HACP, but otherwise, collection would be the responsibility of the tax authority.
- 6.32 The HACP informed us that 100% of the sanctions imposed in 2008, which are due for payment, were collected. However, this only includes sanctions where the period stipulated by law for payment has ended. Considering all decisions where a sanction has been imposed, the proportion of payments is approximately 80%.
- 6.33 The highest consumer protection fine imposed in 2008 was for 1,500,000 HUF (€5,455). In this case, the carrier used its right to make a first appeal (to the headquarters of HACP), but the sanction was confirmed and was subsequently paid by the carrier.
- 6.34 To date, there have only been two cases in which a carrier has used its right to make an appeal to the civil courts. In both cases, the disputes relate to extraordinary circumstances. The sanction set and confirmed by HACP in both cases is 1,000,000 HUF (€3,636).

*Publication of information*

- 6.35 HACP does not publish statistics for complaints, as there is no requirement in Hungarian law for it to do so. However, the Authority publishes its binding decisions on its website, as this is required by law (Act CLV of 1997).

**Other activities undertaken by the NEB**

- 6.36 As discussed above, checks have been undertaken on the information provided by carriers in all cases of extraordinary circumstances. 37 such checks have been undertaken in 2007 and 2008.
- 6.37 In addition to this, HACP performs occasional inspections at Budapest Airport to verify compliance with Article 14.

**Work with other organisations**

- 6.38 HACP informed us that it has not used either the ECC Network or the CPC Network since there has been no complaint that required usage of these systems. However, the ECC for Hungary informed us that it does forward complaints relating to passenger rights to HACP.

**Alternative means for passengers to obtain redress**

- 6.39 There is no small claims court for disputes within Hungary. There is however an Arbitration Board (ABD), established by Article 18 of the Act CLV of 1997 on Consumer Protection. The objective of the ABD is effective and low-cost enforcement of consumer rights. The purpose of the ABD is to reach agreement between businesses



and consumers, to settle a dispute outside of court. Subjects covered by the ABD are primarily disputes between consumers and business entities regarding the quality and safety of products and services, the application of product liability regulations, the quality of services, and matters relating to the conclusion and performance of contracts.

- 6.40 In relation to the disputes associated with the Regulation, the ABD is an option for the claimant to pursue the compensation. The claimant may also seek assistance at the National Association for Consumer Protection in Hungary (NACPH) prior to starting a proceeding with the ABD. It is intended to help the parties to come to an agreement; the purpose is to have the possibility to settle the dispute between the claimant and the carrier, thus avoid bringing the case to the court. The Act CLV of 1997 states the maximum timescale for an alternative dispute resolution is 90 days; this period can be extended once by 30 days.
- 6.41 Disputes between a passenger and carrier undertaken through the courts or through ABD are entirely separate from any proceedings between HACP and the carrier. The passenger can however use the decision of the HACP on their complaint as evidence in the pursuit for redress.

### **Issues with complaint handling and enforcement in Hungary**

#### *Ability of consumers to obtain redress*

- 6.42 In the event that HACP determines that a carrier has infringed the Regulation, this may lead to a consumer protection fine being imposed, but this does not force the carrier to pay compensation or a refund to the passenger. The passenger has to pursue this in a separate process through either the courts or the ABD. HACP has indicated that in some cases, airlines voluntarily provide compensation once the complaint is submitted and HACP launches the proceeding, but it does not collect data for the proportion of cases in which this occurs.

#### *Imposing dissuasive sanctions*

- 6.43 HACP has the power to impose high penalties on carriers (maximum HUF 2 billion, or €7.2 million); and it imposes a penalty in every case in which an infringement is found. In principle, this regime should provide an economic incentive for carriers to comply with the Regulation. However, in practice the highest sanction imposed has been HUF 1.5 million (€5,455) and most sanctions have been much lower than this. Given that it is likely that only a small proportion of passengers are likely to complain to HACP, it is still unclear that this is sufficient to provide an economic incentive for carriers to comply with the Regulation – although it is more likely to do so than the enforcement regimes in many other Member States.
- 6.44 In addition, the fact that HACP is required to impose sanctions in every case of non-compliance means that it could be forced to impose a sanction where it finds a minor technical non-compliance which does not significantly inconvenience passengers (for example, failure to offer passengers a fax or telex). Although it does have flexibility to impose very low sanctions in such cases, this could be considered disproportionate.

#### *Application of sanctions to foreign carriers*

- 6.45 Very few sanctions have been issued to foreign carriers to date, and those that have been issued were all given to carriers with offices in Hungary. Therefore, the procedure to apply sanctions to carriers without offices in Hungary has not been tested to date. HACP claims that this is due to the comparatively low number of complaints relating to the foreign carriers, which is probably linked to the relatively low share of movements at Budapest Airport: compared to other central European States, there are few flights operated by foreign-registered low cost carriers.
- 6.46 Therefore, although HACP considers that there should be no problem in imposing and collecting a sanction, it was not clear at this stage what the exact steps would be if there was an infringement, in particular relating to the communication and collection of the sanction.

### **Conclusions**

- 6.47 The complaint handling and enforcement process undertaken by HACP and CAA has a number of strengths. In particular, it involves investigation of every complaint, including analysis of all claims of extraordinary circumstances. The fact that HACP can impose sanctions on carriers for failure to co-operate properly with the investigation of the complaint, for example by not providing information where requested, is likely to have contributed to the fact that it has not faced the problems other NEBs have faced in terms of collecting information.
- 6.48 However, this process is inevitably quite time consuming, and HACP is facilitated by the fact that the number of complaints received is very low in comparison to that received by NEBs in many other Member States. It is unclear whether HACP will have sufficient resources to undertake the same procedure if the number of complaints continues to increase rapidly.
- 6.49 The key disadvantage of the process is the fact that imposing a consumer protection fine on the carrier does not force it to provide appropriate redress to the passenger. Another issue is that, as sanctions have not been imposed as yet on foreign airlines without offices in Hungary, the procedures for doing this are untested.

### *SWOT analysis*

- 6.50 A SWOT analysis of the complaint handling and enforcement processes in Hungary is provided below.

TABLE 6.2 SWOT ANALYSIS: HUNGARY

Strengths	<ul style="list-style-type: none"> <li>• Adequate resources available to HACP to handle complaints</li> <li>• Technical/legislative expertise of the CAA available to HACP to rule on claims of extraordinary circumstances</li> <li>• Simplicity in launching a proceeding and imposing sanctions</li> <li>• Significant penalties can be imposed for non-compliance</li> <li>• All claims of extraordinary circumstances are investigated</li> <li>• Penalties are regularly applied</li> <li>• Sanctions can be imposed on carriers for failure to co-operate with the process (for example, for not providing information)</li> <li>• A ruling is issued to the passenger in each case, and this can be used as evidence in a court case</li> <li>• HACP handles complaints submitted in all major European languages and responds to passengers in English where the complaint is not in Hungarian</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Even where HACP finds that a carrier has infringed the Regulation, there is no obligation on the carrier to provide redress to the passenger</li> <li>• Required to impose a sanction for every infringement, even if minor/technical</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• None identified</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• The process undertaken by HACP and CAA is very detailed and time consuming, and it may be difficult to maintain this if the number of complaints increases significantly</li> </ul>

## 7. IRELAND

### **The National Enforcement Body**

- 7.1 The National Enforcement Body (NEB) for Ireland is the Commission for Aviation Regulation (CAR), which is an independent regulatory authority. CAR is one of a small minority of NEBs that is not a Civil Aviation Authority (CAA); the CAA for Ireland is the Irish Aviation Authority (IAA).
- 7.2 CAR is an independent public body operating under the auspices of the Department of Transport, and it is accountable to the Irish Parliament. CAR's principal function is the economic regulation of levied charges for use of Dublin airport, and the terminal navigation charges levied at Dublin and the other main airports in Ireland. It also has some responsibilities relating to consumer protection.
- 7.3 CAR has approximately 1.75 FTEs working on issues relating to the Regulation.

### **Legal basis of complaint handling and enforcement**

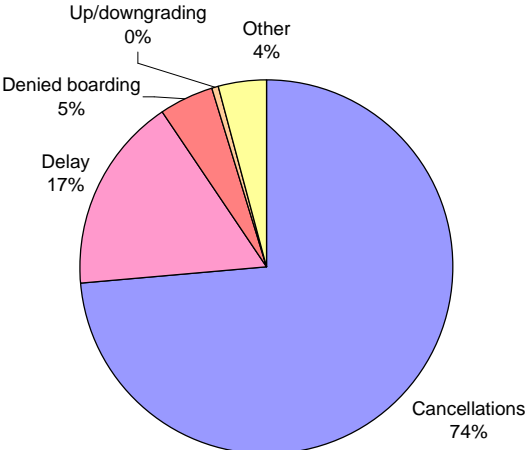
- 7.4 CAR's powers as aviation regulator were defined in the Aviation Act 2001. Regulation 261/2004 was transposed into Irish law by means of Statutory Instrument 274 of 2005 (SI 274/2005), and the power to impose sanctions for non-compliance with the Regulation are defined in section 45(a) of the Aviation Regulation Act 2001 as inserted by the Aviation Act 2006. The Statutory Instrument entitles CAR, in the event that it considers that a carrier has failed to comply with the Regulation, to issue a Direction instructing it to comply. The Direction might be a requirement to pay compensation to an individual passenger or group of passengers, or to change a policy or practice.
- 7.5 Under the amended Aviation Regulation Act, non-compliance with a Direction would be a criminal offence and subject to prosecution. The maximum penalties defined in the Act for non-compliance with a Direction are:
- €5,000 if the case is heard in a District Court; and
  - €150,000 if the case is heard in the High Court.

### **Complaint and enforcement statistics**

#### *Complaints*

- 7.6 In 2008, CAR received 2,894 queries from passengers on issues related to the Regulation. Of these queries, 413 were valid complaints, but 227 fell within the competence of other NEBs, as they related to events which occurred in other Member States.
- 7.7 As illustrated in Figure 6.1 below, the vast majority of valid complaints received by CAR related to flight cancellations.

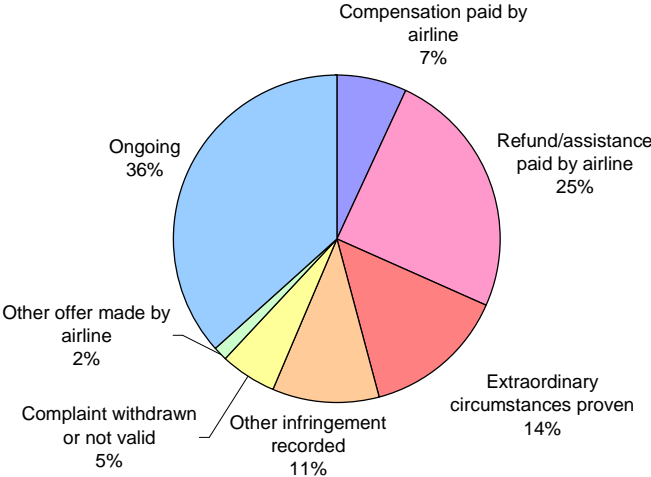
**FIGURE 7.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: IRELAND**



Source: SDG analysis of data provided by CAR

7.8 The current status of the complaints received during 2008 (as of July 2009) is illustrated in Figure 7.2 below. Of the complaints that had been resolved, 67% were valid in some form. However, this figure excludes the high proportion of queries received by CAR which did not turn out to be valid complaints: in effect, this provides an initial filter of complaints which does not exist in most other States.

**FIGURE 7.2 STATUS OF COMPLAINTS RECEIVED DURING 2008: IRELAND**



Source: SDG analysis of data provided by CAR

7.9 CAR informed us that there was no significant difference in the number of complaints, in relation to the number of passengers, for the two main airlines operating in Ireland (Ryanair and Aer Lingus).

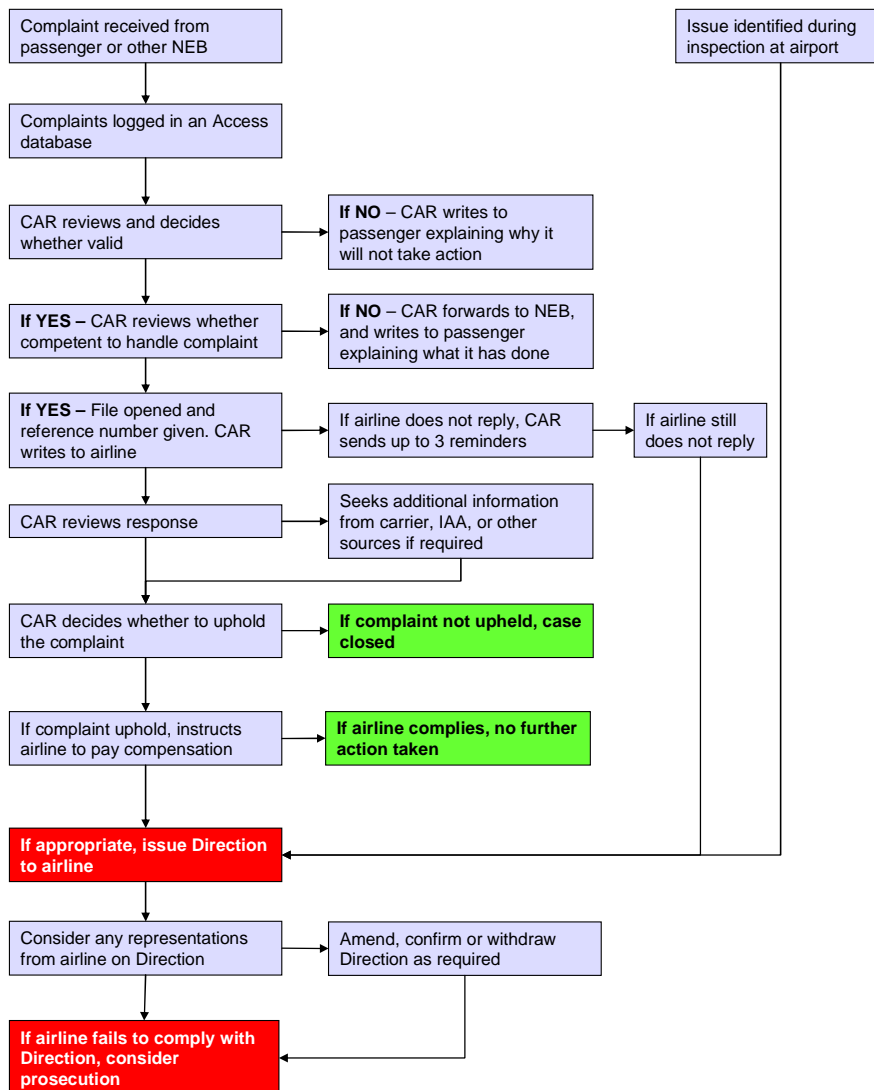
*Enforcement*

7.10 To date, CAR has issued four Directions to carriers relating to the Regulation. It informed us that it expects to issue significantly more Directions in future as the process becomes more established. Of the four Directions which have been issued to date, two have been complied with, one has to be reissued, and in the fourth case the carrier has gone into liquidation. Three of these Directions related to failure to pay compensation for cancellations in circumstances which CAR did not accept were extraordinary. CAR has not needed to prosecute any carrier for failure to comply with a Direction.

**The complaint handling and enforcement process**

7.11 CAR’s complaint handling and enforcement process is illustrated below. The key unusual feature of the complaint handling process is that, in the event that the carrier does not provide restitution to the passenger when this is appropriate, CAR will issue the carrier with a ‘Direction’ to do so. Failure to comply with this Direction is a criminal offence.

**FIGURE 7.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: IRELAND**



- 7.12 CAR is able to handle complaints written in French, German, Italian and Spanish as well as English. It is able to reply in Spanish and English.

*Time taken to resolve complaints*

- 7.13 The majority of complaints are dealt with quickly. CAR informed us that, for example, of a random sample of 10 sequential valid complaints received during March 2009, five had been resolved within 4 weeks and all but three had been resolved within 5 months. The amount of time between receipt of complaints and analysis of the complaint is relatively short (3 weeks).

- 7.14 CAR informed us that it is common for carriers to take 4-6 weeks to respond to them, and in some cases longer. As a result, in a small proportion of cases, the total amount of time to resolve the case can exceed 6 months. CAR also highlighted that it has relatively limited resources and that can also cause delays during periods where there are a high volume of complaints.

*Claims of extraordinary circumstances*

- 7.15 CAR investigates all cases of cancellations where carriers claim extraordinary circumstances, requesting proof in the form of technical reports or event logs, and a non-technical explanation of the event. Although CAR does not have operational or technical expertise, it can draw on experience within the Irish Aviation Authority (IAA), although CAR informed us that given IAA's own workload, it is not always possible to secure replies within a specific timeframe.

- 7.16 Unusually, CAR does not consider that the ruling by the ECJ in the case *Wallentin-Hermann v. Alitalia* has increased the proportion of cases in which carriers have to pay compensation. This is largely because, unlike some other NEBs, CAR was not previously accepting cases of technical problems as automatically being extraordinary circumstances. It considers that, for the carrier to be exempt from paying compensation in the event of cancellations, it is now sufficient for the carrier to show that it had maintained the aircraft properly.

*Response issued to the passenger*

- 7.17 CAR issues a response to each passenger, which summarises the complaint and the response of the airline, and states its conclusions and whether further steps will be taken or the case closed. If it decides that a carrier has to pay compensation or refund the passenger, CAR will instruct the carrier to do so. If the carrier does not agree, CAR will issue a Direction requiring the carrier to do this (discussed below).

- 7.18 In the event that a prosecution did take place, CAR would request the judge to issue an order requiring the carrier to pay compensation to the passenger, although there is no guarantee that he/she would do so.

*Circumstances under which sanctions are imposed*

- 7.19 A sanction can only be imposed in Ireland for non-compliance with a Direction. When a carrier receives a Direction, it has 14 days to make representations to CAR that the

Direction is not valid for some reason, in which case CAR has 2 months to confirm, amend or withdraw the Direction.

7.20 Section 45(A) of the Aviation Act defines that if a carrier fails to comply with a confirmed Direction, it would be committing a criminal offence. CAR would therefore have to consider prosecuting the carrier.

7.21 The process to impose sanctions would be a criminal process and therefore the standard of evidence necessary for criminal cases would be required. CAR informed us that, for constitutional reasons, it is difficult to have a system of administrative sanctions in Ireland.

*Imposition of sanctions on carriers not based in the Member State*

7.22 In order to issue a Direction, it is necessary to serve this on the carrier. Section 45(3) of the Aviation Act, as amended, allows this to be done in the following ways:

- delivering it to the carrier;
- leaving it at the address at which the carrier undertakes its business;
- sending it by registered letter to this address;
- sending it to another address which the carrier has specified can be used for the delivery of a Direction; or
- sending it by fax or email, provided that one of the other methods is also used, and a fax/email delivery receipt is obtained.

7.23 There is no requirement that the address is within Ireland, and therefore, in principle there should be no problem if the carrier is based in another State or outside the EU.

*Collection of sanctions*

7.24 Collection of any fine would be the responsibility of the court that issues the fine, not the NEB, and this issue has not been addressed as yet as no fine has been issued.

7.25 However, CAR informed us that the general procedure in Ireland, is that a Court issues an order (Decree) to pay. If this is not honoured, the order can be executed by the Sheriff or the Country Registrar (depending on the location of the court that issued the fine). If the Sheriff does not succeed in executing the order, the matter escalates to the Circuit Court, and the options available at that stage includes orders that the offender is committed to prison.

*Publication of information*

7.26 CAR publishes an annual report which provides details of the complaints received, including what the complaints relate to and the outcome of the complaints. It also provides some summary information on the number of complaints per airline although this is not detailed (it is only divided into Ryanair, Aer Lingus, and other).

**Work with other organisations**

7.27 Where complaints are received for which CAR is not the competent NEB, it forwards the complaint to the relevant NEB with a short summary in English.



- 7.28 CAR works closely with the ECC for Ireland where this is helpful, for example by forwarding complaints for which the ECC is the competent organisation (such as complaints relating to lost luggage). In addition, CAR and the ECC meet regularly to discuss issues of importance.
- 7.29 CAR has received a number of requests through the CPC Network but it believes that these were inappropriate for use of the Network and has contacted the relevant NEB directly about this. It has not made any requests using the Network. CAR informed us that it was not clear what relevance the Network had to enforcement of this Regulation, as enforcement is always the responsibility of one specific NEB, depending on the State in which the incident occurred.

#### **Other activities undertaken by the NEB**

- 7.30 During 2008, CAR undertook 11 inspections at airports in Ireland in order to check whether carriers were complying with Article 14 of the Regulation. Advance notice of inspections is provided to the airport, but not to air carriers. In the event that a cancellation or long delay occurs during the inspection, the inspectors will check whether the airline concerned complies with its obligations under the Regulation.

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

- 7.31 There is no Alternative Dispute Resolution (ADR) process in Ireland which handles disputes relating to air passenger rights. However, in 2008, the Law Commission published a consultation on the possible introduction of ADR procedures in other sectors and therefore it is possible that the scope of ADR processes in Ireland may be extended in the future.
- 7.32 There is a small claims court system in Ireland. The fee charged is relatively low (€15); there is no limit on the value of consumer claims that can be heard; and claims can be heard within 6 years of the event occurring. However, the ECC for Ireland considers that the process is “hugely time-consuming and expensive for the consumer”<sup>7</sup>.

#### **Issues with complaint handling and enforcement in Ireland**

- 7.33 The key unusual feature of the complaint handling and enforcement process in Ireland is that a sanction cannot be issued directly in the case of non-compliance with the Regulation: the carrier must be issued with a Direction to rectify the incident or change its policy, and can be prosecuted only for non-compliance with the Direction. Issue of any sanction would be on the basis of a criminal procedure and therefore this would be a complex and expensive process: CAR estimated that a contested case could take up to 2 years and incur legal costs in excess of €100,000. The process would be even more costly and complex if the carrier was not based in Ireland, particularly if it did not have an office within Ireland.

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<sup>7</sup> Source: ECC Ireland, The development of Alternative Dispute Resolution (ADR) in Ireland

7.34 CAR undertakes relatively detailed complaint handling and analysis of complaints. It is possible that a State with a higher volume of air traffic would not be able to undertake this level of detailed analysis. The only significant weakness in the process is that CAR does not have direct access to technical expertise to evaluate cases of extraordinary circumstances: it can use expertise within the IAA when needed, but there is no formal obligation on IAA to provide this assistance.

**Conclusions**

7.35 The key strength of the complaint handling and enforcement process in Ireland is that individual cases are evaluated and that carriers are instructed by CAR to pay compensation or refund a passenger where they have infringed the Regulation.

7.36 The key weakness of the process is that a sanction could only be issued for non-compliance with a Direction, which would in turn only be issued if a carrier failed to comply in an individual case. Therefore, whilst the system may be very effective at obtaining redress for individual passengers that complain to CAR, it does not provide an economic incentive for carriers to comply with the Regulation: a carrier would always have several opportunities to rectify a case before a sanction was ever imposed. It is not clear that this regime is dissuasive as required by Article 16(3).

7.37 A SWOT analysis of the complaint handling and enforcement processes in Ireland is provided below.

**TABLE 7.1 SWOT ANALYSIS: IRELAND**

Strengths	<ul style="list-style-type: none"> <li>• Passengers are issued with an individual response and carriers are instructed to pay compensation where this is required</li> <li>• Maximum penalty for non-compliance is relatively high and therefore should provide an adequate incentive</li> <li>• CAR undertakes inspections at airports to ensure compliance with Article 14</li> <li>• All claims of extraordinary circumstances are analysed</li> <li>• Most complaints are dealt with relatively quickly</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Sanctions can only be issued after a criminal procedure, which is expensive and slow, and requires high standards of evidence</li> <li>• Sanctions can only be issued after a Direction is not complied with, which may mean that there is little incentive to comply with the Regulation unless a Direction is issued</li> <li>• CAR itself does not have technical/operational expertise (although it can draw on the IAA where needed)</li> <li>• Enforcement process is more complex if the carrier does not have an office or a registered address in Ireland</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• There is potential for development of Alternative Dispute Resolution process covering air passenger rights</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• The lack of resources within CAR means quick handling of complaints is challenging</li> </ul>



## 8. ITALY

### The National Enforcement Body

8.1 The Italian National Enforcement Body (NEB) is the Ente Nazionale Aviazione Civile (ENAC), established on 25 July 1997 by Legislative Decree 250/97. It is the Italian Civil Aviation Authority. ENAC is independent from the aviation industry although the nature of the organisation means that it does work closely with the industry. Its main tasks include:

- Safety and security;
- Passenger rights;
- Environmental protection in the sector; and
- Development of the sector.

8.2 ENAC has a team of seven full time staff in its headquarters working on passenger rights although one is focused mostly on Regulation 1107/2006. In addition it has co-ordinators based at the airports, who spend a proportion of their time on passenger rights. 14% of these staff are based at the main hub airports of Rome Fiumicino and Milan Malpensa. The table below provides the breakdown of the staff working on Regulation 261/2004.

**TABLE 8.1 ITALY: STAFF WORKING ON REGULATION 261/2004**

Staff	Number
Full time staff at head office	7
of which project manager	1
of which coordinators	6
Airport co-ordinators	79
of which Office heads	25
of which airport inspectors	54

Source: ENAC

8.3 ENAC considers that, given the number of complaints that it has to handle and the complexity of the process, it does not have sufficient staff to undertake complaint handling.

### Legal basis of complaint handling and enforcement

8.4 ENAC's powers in relation to complaint handling and enforcement were granted through Legislative Decree 69/2006 of 27 January 2006, which came into force on 21 March 2006. The Decree sets out the process that needs to be followed by ENAC and the fines that have to be imposed.

8.5 In the event of non-compliance with the Regulation, ENAC is required to impose civil (administrative) penalties on the carrier. The maximum penalties for non-compliance with the Regulation are shown in Table 8.2 below. The maximum fine is reduced if the carrier pays the fine within 60 days of the notification.

**TABLE 8.2 PENALTIES UNDER ITALIAN LAW**

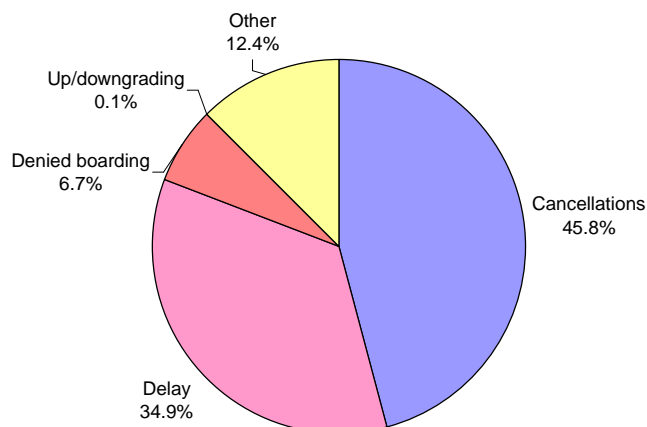
Penalties	Minimum (€)	Maximum (€)	Reduced (€)
Denied Boarding	10,000	50,000	16,666.67
Flight cancellations	10,000	50,000	16,666.67
Delay	2,500	10,000	3,333.33
Upgrade/downgrade	1,000	5,000	1,666.67
Lack of priority and assistance to the disabled or to unaccompanied children	10,000	50,000	16,666.67
Provision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

- 8.6 If there are infringements of multiple Articles as part of the same incident, or the infringement results in complaints from more than one passenger, the fine can be increased three fold.<sup>8</sup>

### Complaint and enforcement statistics

#### Complaints

- 8.7 In 2008, ENAC received 6,299 complaints from air passengers, of which 4,811 were related to Regulation 261/2004 (33% less than the previous year). Of these, 4,518 fell within the competence of ENAC and 224 within the competence of other NEBs. Some complaints (67) were not classified. As illustrated in Figure 6.1 below, the vast majority of complaints received by ENAC related to cancellations.

**FIGURE 8.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: ITALY**

Note: The 'other' category includes failure to provide a refund/re-routing as required. This would result from a delay, cancellation or denied boarding but it is not clear which. It also includes failure to provide information in accordance with Article 14.

<sup>8</sup> Law 689/1981 Article 8 (1) and (2)

8.8 In 2008, 2,836 complaints were closed, equivalent to almost 60% of the total complaints received. Complaints were closed either because the complaint was not within the scope of the Regulation (we understand this is the large majority), because the airline paid compensation, the case was forwarded to another NEB or a fine was issued and the airline paid it. We understand that the remaining cases are still ongoing: ENAC said that this was usually either because the airline had not responded, or because ENAC has not as yet processed the complaint. However, no further statistics were available on the outcome of the complaints.

#### *Enforcement*

8.9 Since ENAC started to impose sanctions in 2006, and up to the end of 2008, in total it imposed 452 fines on carriers for non-compliance with the Regulation. Table 6.1 below shows the number of fines issued, according to the Article of the Regulation that infringed by the carrier. As discussed in more detail below, to date most of the fines related to these infringements have not been paid.

**TABLE 8.3 ITALY: PENALTIES ISSUED**

	2006	2007	2008
Denied Boarding	9	9	1
Flight Cancellations	38	94	47
Delays	21	24	11
Right to reimbursement or re-routing	1	2	11
Right to care	21	24	24
Upgrade/Downgrade	0	0	0
Person with reduced mobility	0	2	0
Provision of information	40	45	28
<b>Total</b>	<b>130</b>	<b>200</b>	<b>122</b>

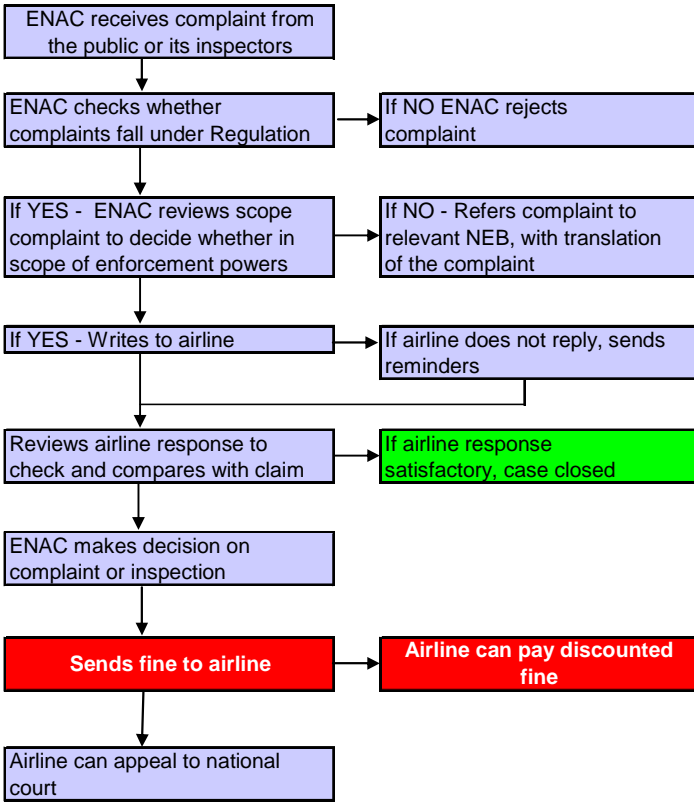
Source: ENAC

#### **The complaint handling and enforcement process**

8.10 The complaint handling and enforcement process in Italy is summarised in Figure 8.2 below. The key unusual features of the process in Italy, compared to other Member States, are that:

- most complaint handling and enforcement is undertaken by ENAC staff based at the key airports rather than the passenger rights team at ENAC headquarters; and
- the enforcement process often starts as a result of an inspection by the airport-based staff rather than a complaint from a passenger.

FIGURE 8.2 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: ITALY



- 8.11 Passengers can send complaints to ENAC by mail, fax and e-mail, or by filling in the forms available on the ENAC website. ENAC is able to handle complaints written in English, French and Spanish as well as Italian and will seek to reply to passengers in these languages. However, it was acknowledged that other languages such as German can present problems.
- 8.12 ENAC has developed a bespoke database system to record complaints and track progress. When a complaint is received it is logged and forwarded to:
  - the competent ENAC airport representative to deal with them if the flight originated from an Italian airport;
  - the relevant NEB in another Member State if the flight originated from another Member State; or
  - to Head Office if the flight originated from a country outside the EU.
- 8.13 ENAC states that it investigates every complaint it receives from a passenger. When a complaint is received, ENAC responds to the individual and keeps the person updated on the investigation. If the investigation finds that there was an infringement then it will communicate the result to the passenger. However, it is not within ENAC’s powers to force the airline to pay any compensation to the passenger. The onus remains on the passenger to pursue any such compensation through the courts.
- 8.14 Having received the complaint and carried out the initial investigation, the relevant staff member in each airport writes to the airline requesting further details, on

whether/why it did not comply with the Regulation, and sets out the fine that will be imposed if the ruling goes against the airline. 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. However, if there are no such reasons then ENAC imposes a fine.

*Time taken to resolve complaints*

8.15 According to the procedures, the total time taken for a complaint to be processed and the case to be closed can span between 4 to 6 months depending on whether the airlines accepts to pay the reduced penalties or decides to appeal to the courts. However, in practice, we understand that complaints can take significantly longer than this to resolve:

- ENAC stated that some airlines take a very long time in responding to them; and
- as discussed in more detail below, the appeal process is very slow.

8.16 The fact that 40% of complaints submitted in 2008 were still open implies that some complaints take much longer than 6 months. ENAC was not able to provide any statistics on the average time taken to conclude cases.

*Claims of extraordinary circumstances*

8.17 As mentioned above, ENAC investigates all cases and therefore investigates all cases where carriers' claim extraordinary circumstances. The procedure requires the ENAC official to request specific proof from the airline. As ENAC is also the Civil Aviation Authority, it has staff with the technical and operational expertise to investigate these cases of extraordinary circumstances and the staff working on passenger rights do this with the assistance of its Technical Directorate.

8.18 ENAC considers that the ECJ ruling in the case *Wallentin-Hermann v. Alitalia* has made its task more difficult, because it is now required to decide on whether circumstances in a given case were extraordinary, rather than merely whether a technical problem occurred. There is therefore more risk that its decision could be challenged by either the passenger or the carrier.

8.19 ENAC stated that, on the basis of guidance from the Commission, it has not reopened cases closed prior to the ECJ ruling, except where the passenger specifically asks for the investigation to be reopened.

*Response issued to the passenger*

8.20 When the violation has been identified through a passenger's complaint rather than an inspection, ENAC responds to the complainant and then keeps them updated on the current status of the proceedings. In particular it informs the passenger about the various steps of the complaint handling process and on whether there has been a finding against the airline which the passenger can pursue further in the courts. However, ENAC does not formally oblige the airline to provide redress to individual passengers, and it does not consider that this is its role.

*Circumstances under which fines are imposed*



- 8.21 ENAC informed us that fines are imposed when complaints are valid and when it has investigated all the circumstances that confirm the violation of the Regulation, or when an inspection identifies a non-compliance. ENAC informed us that it always imposes a sanction if these criteria are met. To ensure this, ENAC is required to fill in a form that details the criteria for the sanctions.
- 8.22 Although ENAC does not have discretion about whether to impose a fine, the amount of the fine can vary within the limits described in Table 8.2 above, according to the following factors:
- the degree of the violation;
  - whether the airline is a repeat offender;
  - the actions put in place by the carrier to overcome or mitigate the consequences of the violation;
  - the number of passengers affected by the violation compared to those that actually boarded; and
  - other applicable criteria.
- 8.23 However, we note that the number of fines imposed is small in comparison to the number of complaints received (2.5% in 2008). This is surprising given that we were also informed that fines are often imposed on the basis of inspections rather than on the basis of a complaint. This is because:
- An incident in which there is an infringement of the Regulation is considered as a single ‘event’ even if there are infringements of multiple Articles, or complaints from multiple passengers, and therefore only one sanction can be imposed (although the maximum sanction can be increased three times).
  - As discussed above, a significant proportion of complaints have not been closed (meaning ENAC has not finished processing them).

*Imposition of fines on carriers not based in the Member State*

- 8.24 ENAC informed us that it does impose sanctions on carriers that are not based in Italy, but the process of issuing the notification of the sanction is more difficult if the carrier does not have an office in Italy. The ENAC department responsible for the complaints handling process, supported by the Department for Legal Affairs, follow the procedure set within Regulation EC 1393/2007 which rule the notification of proceedings to be sent to another Member State.
- 8.25 However, this process is quite complex and slow, and therefore on some occasions, ENAC has short-cut it by using the Italian embassy or consulate in the State in which the carrier is based to deliver official letters. This ensures that the letters are sent to the appropriate office and also to ensure that the timescales are shorter.
- 8.26 One foreign carrier operating in Italy informed us that ENAC had issued notification of a sanction process on it by giving the notification to operational staff in a rest room at the airport. As a result the notification was not passed to the airline’s management and it is contesting the fine on this basis. Whilst we cannot verify claims relating to

individual cases, this would if true indicate that there was a problem with the notification of sanctions.

*Collections of fines*

- 8.27 ENAC informed us that only approximately 20% of the fines that had been issued to date had been paid. The reason for this is that fines have only been imposed in the last 3 years, and the process for collection of the fine can take significantly longer than this. ENAC said that the process of collection of fines was easier for Italian carriers, for which it is the licensing authority, but similar issues applied to all carriers.
- 8.28 In most cases the airlines have not responded to the request for payment, while some have appealed the decision to the courts. If a carrier decides to pay the fine within the time limit, it has to be paid into an ENAC account; where carriers do not respond to the request for payment, the Tax Office is responsible for collection, but ENAC said that this process is very slow, taking at least one year. However, the tax office does have a number of powers to encourage carriers to pay, including ultimately seizure of aircraft.
- 8.29 Of those cases that have been appealed, the first stage appeal has gone in favour of ENAC in the majority of cases to date (all except one), but airlines can appeal to a second stage, and none of these appeals have been concluded to date. ENAC explained that some carriers deliberately delay the appeal process. After a sanction or a decision is issued, a carrier can wait one year before deciding whether to appeal or to pay the fine, and many wait until the last moment; it will then be some time before the appeal is heard. ENAC informed us that it is possible for a carrier with an effective legal department to delay payment of a fine for 5-7 years and there have been cases where a carrier has ceased operations before the process has been concluded. Delaying tactics do not necessarily incur the carrier significant legal or administrative costs as it may be a standard procedure adopted by the company for all cases, not just cases related to this Regulation.
- 8.30 It should be noted that the issues that have been identified in relation to the collection of fines represent general problems with administrative procedures in Italy, and are not specific either to airlines or to this Regulation.

*Publication of information*

- 8.31 ENAC does not publish statistics relating to the number of complaints received. However it provides online all the internal documents describing the procedures that ENAC follows for handling complaints as well as updated information on passenger rights.

**Other activities undertaken by the NEB**

- 8.32 ENAC staffs based at airports undertake regular inspections to ensure that carriers are complying with this and other Regulations. Unlike many other NEBs, the scope of the inspections undertaken by ENAC are not limited to ensuring compliance with Article 14, but extend to ensuring that the carrier has fulfilled its obligations in the event of delay, cancellation or denied boarding.

- 8.33 In 2008 ENAC staff have undertaken a total of 2,157 investigations, far more than in any other Member State, albeit 7% less than planned. 27% were related to service quality at airports, 20% to airline punctuality, 23% to the efficiency of the airlines' complaints handling system, 8% on the verification of flight cancellations and delay, 5% on the extent to which carriers adhere to passenger rights and finally 17% were investigation related to violations of Regulations 889/2002 and 261/2004.
- 8.34 As an example, in the first quarter of 2009, ENAC undertook 103 investigations (9% less than those planned) for the South of Italy region related to the Regulation. The table below shows the breakdown of these investigations according to the different articles of the Regulation.

**TABLE 8.4 ENAC INVESTIGATIONS – JANUARY-MARCH 2009**

Regulation article	Shares
Denied Boarding	25%
Flight Cancellations	26%
Delays	22%
Need to inform passenger of their rights – Article 14(1)	3%
Need to inform passenger of their rights – Article 14(2)	17%
Person with reduced mobility	1%
Procedures check	5%
<b>Total (actual number of investigations)</b>	<b>103</b>

Source: ENAC.

- 8.35 In addition, ENAC informed us that it had undertaken approximately 20 meetings with carriers to discuss application of the Regulation. It has had regular meetings with the Italian carriers Alitalia and Myair, but also some meetings with foreign carriers.
- 8.36 In addition to the activities that ENAC undertakes in relation to Regulation 261/2004, ENAC informed us that it pursues other activities to promote a “culture” of air passenger rights and service quality. Some of these activities have been:
- the creation of a specific Department and the use of specific inspectors to ensure air passenger rights protection;
  - the publication of internal documents setting quality standards and quality management procedures;
  - the promotion of projects aimed at improving airports' quality;
  - the provision and the use of different instruments (written material, internet free telephone number) to inform passenger on their rights;
  - the set up of a database to record complaints and their status; and
  - the carrying out of planned inspections with the airlines and ground handlers at airports where a number of activities and practices are reviewed.

#### **Work with other organisations**

- 8.37 Where complaints are received for which ENAC is not the competent NEB, it forwards the complaint to the relevant NEB with a short summary in English.
- 8.38 ENAC works closely with the Italian ECC and meets with them frequently, they have also prepared a joint information document for passengers. However, ENAC reported that a practical difficulty is that the ECCs operate on the basis of the nationality of the trader, whereas NEBs have to operate on the basis of where the event occurred. This leads to an inherent conflict in the manner in which complaints handling works.
- 8.39 ENAC informed us that there have been a number of technical problems with the CPC Network. ENAC has not used it and to date it has received two requests for assistance via it.

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

- 8.40 As mentioned above, passengers can complain to ENAC, but ENAC does not provide them instruct airlines to pay compensation or a refund in any individual case. If ENAC find that there has been a breach then passengers can use this decision to go through the courts to obtain compensation.
- 8.41 Passengers can also use national consumer associations for assistance but they have no power to force the carriers to pay compensation - the only benefit they have is greater negotiating power in discussions with carriers.
- 8.42 There is a small claims court procedure in Italy. Claims for less than €2,582 can be heard by a Justice of the Peace, using a claim procedure that is as simple as possible. A lawyer is not required if the claim is for less than €516 or if the Justice of the Peace otherwise decides that this is not required. However, usually a final decision will only come after two years, and if the claim is for over €516, there is a significant cost linked to the legal counsel's salary (usually this is between 20%-30% of the amount of money claimed). Since 2006, for claims of less than €1,100, appeals can only be made if procedural rules, constitutional law or Community law have been breached, or the principles underlying the substance of the case have been violated.<sup>9</sup>
- 8.43 Passengers can use this procedure no more than 1-5 years after the infringement occurred (depending on whether it is a contractual claim or a claim for consequential damages).
- 8.44 Some consumer associations (e.g. Assoutenti) believe that going through the courts is the most effective route, although it clearly takes time. However, others including ADICONSUM and Legaconsumatori have stated publicly that this process does not guarantee a fair settlement for the consumer.

#### **Issues with complaint handling and enforcement in Italy**

##### *The ability to impose dissuasive sanctions*

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<sup>9</sup> Source: European Judicial Network, ENAC

- 8.45 The key problem with the complaint handling and enforcement process in Italy is that, as discussed in detail above, only approximately 20% of fines which are levied have actually been paid. This results from delays both in the Italian tax office, which is responsible for collecting sanctions, and in the legal system, when carriers appeal. It is possible to delay payment by several years and there have been cases where carriers have gone bankrupt before a fine has had to be paid. These issues are not specific to this Regulation or to airlines, but the inherent nature of the air transport industry, where companies enter and exit the market relatively frequently, exacerbates the problem.
- 8.46 Therefore, even though ENAC imposes fines in each case where it upholds a complaint, the fact that fines are often not paid means that they cannot provide an economic incentive to comply with the Regulation. This means that Italy is not compliant with the requirement in Article 16(3) to introduce dissuasive sanctions.
- 8.47 In addition, the number of fines imposed is very low in comparison to the number of complaints and the number of inspections. This does not appear to be consistent with a policy of issuing a fine in every case where there is an infringement. In part, this is because ENAC has not finished processing a significant proportion of the complaints it receives (40% of those received in 2008). It is also partly because multiple complaints from different passengers about the same incident would only lead to one sanction.
- 8.48 This also raises an issue with the level of sanctions. Where an infringement impacts a large volume of passengers (for example if the Regulation is infringed for every passenger booked on a flight), the maximum sanction may be less than the costs the airline avoids through non-compliance. This also implies that Italy is not compliant with the requirement in Article 16(3) to introduce dissuasive sanctions.

*The ability of individual passengers to obtain redress*

- 8.49 Even where ENAC upholds a complaint and issues a fine, there is no obligation on the carrier to compensate the passenger. The fact that the court system is relatively slow and a lawyer is required for any claim over €516 means that it is not an attractive alternative for passengers. Therefore, it is difficult for an individual passenger to obtain redress.
- 8.50 According to several Italian Consumer Associations (e.g. ADICOSUM, Legaconsumatori, Assoutenti), airlines are not complying with their obligations under the Regulations, and ENAC is not successfully enforcing them. Consumer associations have stated that ENAC has greater difficulties in handling complaints relating to foreign carriers. Assoutenti informed us that that the Italian carriers are keen to solve complaints without going through the courts, but this is not the case with foreign carriers. It also informed us that the problems are more significant with low cost carriers, as high staff turnover makes ensuring continuity in the complaint process impossible.

**Conclusions**

- 8.51 The complaints handling process in Italy has some strengths and weaknesses, set out in SWOT analysis below. A key strength is that ENAC has staff based at the airports who are able to monitor compliance with the Regulation, and a very large number of inspections are carried out, which are not limited in scope to Article 14 as in most other Member States. Enforcement based on this monitoring may be more effective than enforcement based on passenger complaints, because there is less possibility for the carrier to contest what has occurred.
  
- 8.52 The fact that ENAC has imposed so many fines on airlines is an anomaly amongst the Member States and one that, according to ENAC, could put Italy at a competitive disadvantage in terms of attracting airlines to operate from its airports. In principle it should provide an economic incentive to comply with the Regulation but, as discussed above, the fact that most fines have not been paid means that this is not the case at the moment.

*SWOT analysis*

- 8.53 A SWOT analysis of the complaint handling and enforcement processes in Italy is provided below.

**TABLE 8.5 SWOT ANALYSIS: ITALY**

Stakeholder type	Details
Strengths	<ul style="list-style-type: none"> <li>• Staff are based at the airports and therefore can monitor compliance with the Regulation</li> <li>• Inspections are significantly more extensive than those in other States</li> <li>• Fines are imposed frequently when infringements of the Regulation are found</li> <li>• In principle all cases are investigated</li> <li>• ENAC has a technical and operational expertise to enable it to evaluate extraordinary circumstances claims.</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• 80% of sanctions have not been paid by carriers</li> <li>• The entire process is very time consuming and a final decision (including court rulings) can take 5 years or longer.</li> <li>• The relative number of sanctions compared to other Member States could mean that there is a potential competition disadvantage to using Italian airports.</li> <li>• Although ENAC issues rulings on individual cases, it cannot force the carrier to provide redress to the passenger. The individual must pursue the claim through the courts. The court procedure is slow and relatively expensive.</li> <li>• The enforcement process is more complex if the carrier does not have an office or a registered address in Italy.</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• Final court decisions should provide a greater degree of certainty as to what will be sanctioned and this might provide more incentive to comply with the Regulation.</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• ENAC does not have enough staff to handle the large number of complaints</li> </ul>

## 9. LATVIA

### The National Enforcement Body

- 9.1 Latvia has a single body responsible for complaints handling and enforcement: the Consumer Rights Protection Centre (CRPC). This is a government agency, and except for the sectors of medicine and food it is responsible for all consumer protection within Latvia. Its role is to protect the rights of consumers by: supervising the trade of goods and supply of services, providing consumers with information, and helping consumers to resolve any conflicts. Since it has a wide remit, air transport issues are necessarily a small part of its function.

#### *Resources available*

- 9.2 While the CRPC has a number of staff capable of handling complaints regarding the Regulation, the amount of time it spends on issues relating to the Regulation is significantly less than 1 FTE. Where necessary, the complaints handling team can request technical or other specialist expertise from the CAA or Riga airport.

### Legal basis of complaint handling and enforcement

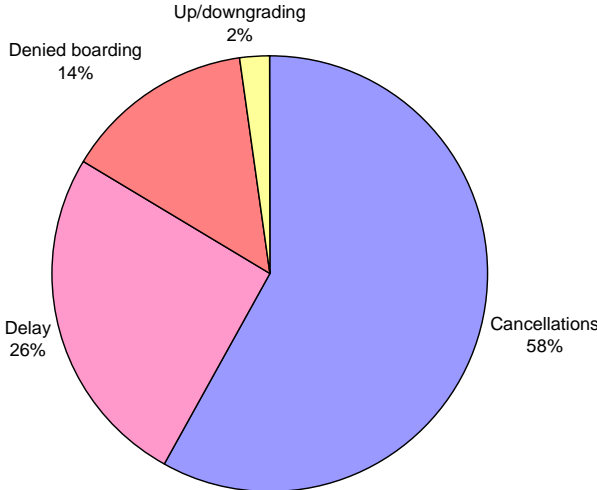
- 9.3 The CRPC is a civil authority accountable to the Ministry of Economics. Its legal responsibilities are set out in the Statute of Consumer Rights, which describes its mandate across all fields of consumer action, not just the rights of air passengers.
- 9.4 The enforcement regime is defined in the Latvian Administrations Violations Code, which established fines of L50-L100 (€71-€143) for failure to provide air passengers with information, and L100-700 (€143-€999) for failure to respect air passengers' rights. These fines are applicable for violation of any air passenger law which relates to denied boarding, cancellation or long delay, and therefore the scope is slightly wider than Regulation 261/2004. Both fines are per case. In addition, the CRPC was recently granted the power to fine companies up to L10,000 (€14,300) for failure to comply with a request for information made in the course of investigating a complaint. This has improved co-operation of companies with investigations.
- 9.5 Both sets of fines have restricted application, however, as the Administrative Violations Code does not set out a legal basis for fining companies based outside of Latvia. At present the only carrier which can be sanctioned is Air Baltic, and sanctions cannot be imposed on the carrier with the largest volume of traffic flying out of Latvia.
- 9.6 The laws above define a civil enforcement regime, following an administrative process common to all violations of consumer rights (set out in the Administrative Violations Code). The CRPC makes legally binding decisions on cases and does not have to seek court authorisation, but its decisions can be appealed to the administrative court. There are no criminal sanctions for breaches of consumer rights legislation.

### Complaint and enforcement statistics

#### *Complaints*

9.7 CPRC received 49 complaints regarding aviation in 2008, however these included complaints regarding damaged baggage. So far in 2009, it has received 43 complaints. The reasons for these are set out in Figure 6.1. The majority of complaints received in 2009 were regarding cancellations.

**FIGURE 9.1 TYPES OF COMPLAINTS RECEIVED DURING 2009: LATVIA**

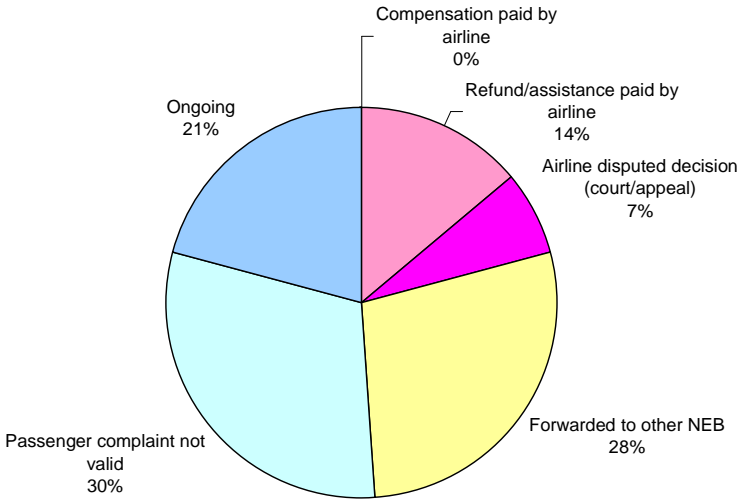


Source: SDG analysis of data provided by CRPC

9.8 Of the complaints received by the CPRC in 2009, 58% were not considered for investigation; half of those not considered were referred to another NEB, and half were referred back to the passenger as invalid. Of the 18 complaints that the CRPC did investigate, in 6 cases the airline paid for a refund or assistance, and in 3 the CRPC’s decision was disputed by the airline. In the remaining cases the investigation is ongoing.



FIGURE 9.2 STATUS OF COMPLAINTS RECEIVED DURING 2009: CRPC



Source: SDG analysis of data provided by CRPC

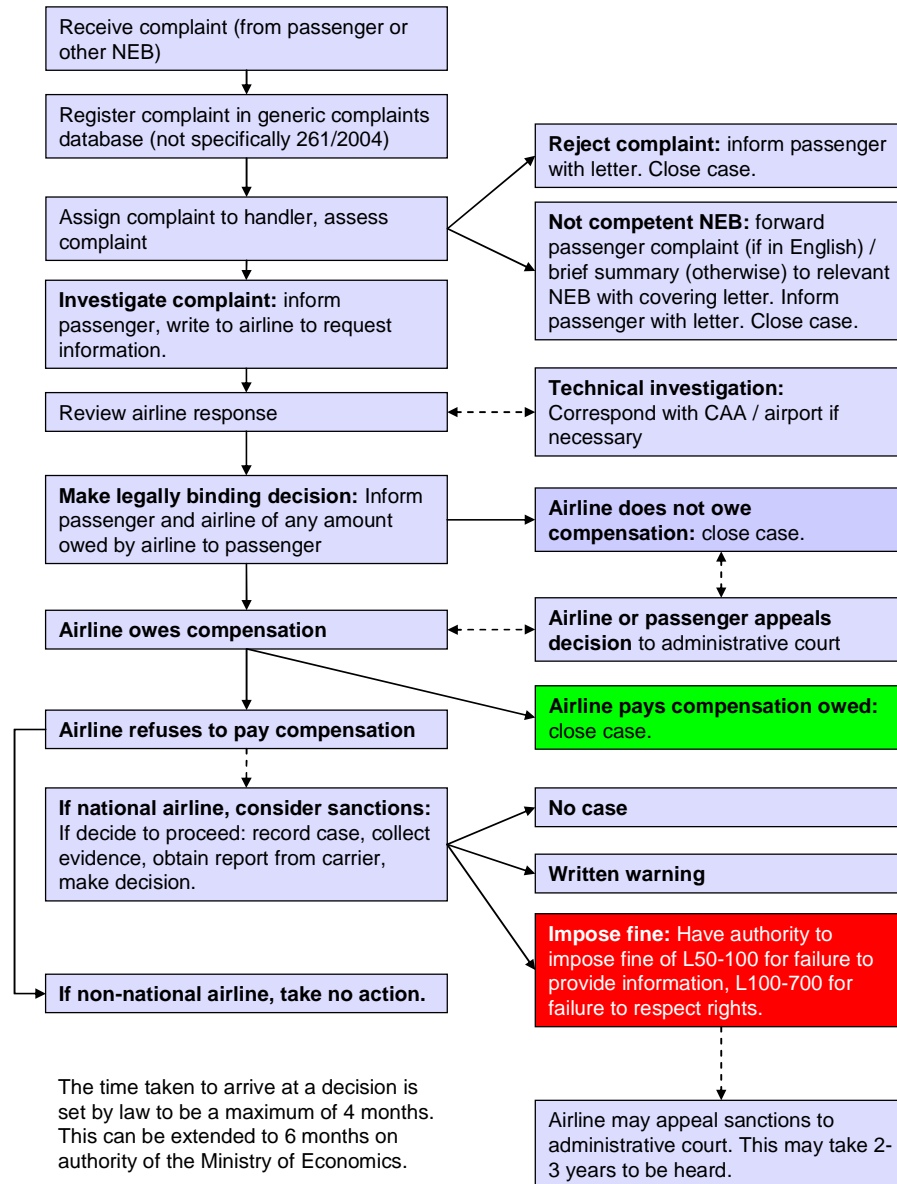
*Enforcement*

9.9 To date, the Latvian NEB has issued around 10 fines including three fines of L300 (€430) in 2008. Air Baltic has appealed all fines, and all of the appeals are waiting to be heard in the administrative court. There is a long waiting list for court hearings, and cases may take 2-3 years to be heard. The process has improved since 2006, when the airline had the option of further delaying confirmation of any fine through a preliminary appeal to the Ministry of Economics.

**The complaint handling and enforcement process**

9.10 The Latvian complaint handling and enforcement process is summarised in Figure 16.3 below. Both complaint handling and enforcement are undertaken by CRPC.

**FIGURE 9.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: LATVIA**



9.11 The process the NEB has for handling complaints is similar to that in place in other Member States; however it is enhanced by being empowered to issue legally binding decisions and subsequent fines, without having to appeal to a higher authority. Both passengers and airlines are able to appeal decisions to the administrative courts.

9.12 It should be noted that the CRPC receives a very low number of complaints compared to many other NEBs, reflecting the relatively low volume of air traffic in Latvia. CRPC handles all consumer complaints, of which aviation forms only a small proportion, and hence the complaints process is not as well-defined as in States with larger aviation markets.

*Time taken to resolve complaints*

- 9.13 Time limits for the complaints process are set by Latvian law, and make several requirements of CRPC: they must send the consumer an update within 1 month, and arrive at a decision within 4 months of receipt of a claim (this can be extended to six months with the permission of Ministry of Economics). CRPC informed us that they are able to meet this deadline, and complaints typically take 2-3 months to resolve.
- 9.14 CRPC informed us that the response time from airlines has in general been very good, usually taking 2 weeks but with no responses longer than a month. We were informed by Air Baltic that there can be a problem of timing when it is necessary to check Rīga airport's weather logs in support of a claim of extraordinary circumstances: these are only kept available for 3 months, and it may take longer than that for a complaint to reach Air Baltic.

*Claims of extraordinary circumstances*

- 9.15 Where airlines claim extraordinary circumstances as justification for not paying compensation, CRPC will always investigate. The investigation may include requesting copies of log books or weather reports, and inviting the responsible captain or engineer to give evidence to justify the reason given. CRPC is able to call on operational and technical expertise from the CAA, or where necessary request assistance from the CAA of another State.

*Response issued to the passenger*

- 9.16 CRPC provides an individual and legally binding decision to the passenger, which includes detailed explanations of the reasons for their decision. This sets out which, if any, articles of the Regulation have been violated, and states what the airline owes to the passenger.

*Circumstances under which sanctions are imposed*

- 9.17 CRPC is legally able to impose a sanction if an airline fails to comply with a decision it has made. It does not have a formal policy regarding when sanctions are imposed, but considers each potential case on its merits.

*Imposition of sanctions on carriers not based in the Member State*

- 9.18 The process for imposing sanctions is set out in the Latvian Administrative Violations Code, and this specifies that fines may be imposed on 'legal persons'. Under Latvian law, this means that although CRPC can fine individual non-Latvian people, it does not have a legal basis on which to fine non-Latvian companies.

*Collection of sanctions*

- 9.19 If CRPC imposes a fine, the airline has the opportunity to appeal to the administrative court. The court is very busy, and since it is cheap for an airline to request an appeal, and appeals can take 2-3 years to be heard, all fines imposed so far have been appealed. None of the contested cases has yet been heard, and hence no fines have been paid to date.

- 9.20 If a fine is confirmed (either through the failure of an appeal, or through the airline not contesting the fine), then the airline concerned must pay the fine within one month. If it does not, the CRPC passes the fine to bailiffs for compulsory collection. The bailiffs are empowered to fulfil by the payment by seizure of property, if necessary.

*Publication of information*

- 9.21 CRPC does not publish statistics for complaints received or the outcomes of individual cases. When there is an important case where the outcome is in the collective consumer interest, a summary of the case is published on CRPC's website.

**Other activities undertaken by the NEB**

- 9.22 CRPC undertakes inspections at Riga airport roughly once per year, in order to verify compliance with Articles 14(1) and 14(2) and, where opportunities arise, with other parts of the Regulation. The inspections check what printed information is available. However, as Riga is a small airport with relatively few flights, on a given inspection day there is a low probability that they will be able to check airlines' responses to a cancellation or delay. CRPC are also now under tight budgetary constraints, and do not have sufficient resources to do any inspections in 2009.

- 9.23 In addition to corresponding with airlines to investigate complaints, CRPC have meetings with Air Baltic on an ad hoc basis to discuss any issues which need addressing. Interactions with Air Baltic are made slightly more complex by the partial state-ownership of the airline.

**Work with other organisations**

- 9.24 The CRPC forwards complaints to other NEBs if there is a prima facie case of non-compliance but the incident occurred in another Member State. If the complaint is in English they will forward the complaint, or if in Latvian they will send a brief summary translation.
- 9.25 Although the CRPC has not needed a strong working relationship with the ECC so far, they will work with them, for example when they need translation outside their linguistic competencies, or regarding a complaint forwarded by the ECC. The CRPC has not used the CPC network to get cooperation from another NEB. Both organisations share the same building as the CPC terminal, so if a higher level of international cooperation is required in the future this should be relatively straightforward to achieve.

**Alternative means for passengers to obtain redress**

- 9.26 Although there is no small claims court or ADR mechanism, the CRPC's complaint handling process is effectively a small claims court: it is free to the passenger and gives a legally binding decision. As noted above, there are limitations to the process in particular a passenger seeking compensation from a foreign airline will not have the same level of legal leverage as one seeking compensation from Air Baltic.

**Issues with complaint handling and enforcement in Latvia**

*Inability to impose dissuasive sanctions*

- 9.27 The key problem for CRPC is that under the present system it is impossible for them to impose dissuasive sanctions. There are a number of barriers which prevent sanctions from being effective:
- The NEB is unable to impose sanctions on non-national carriers, and this removes any threat of sanctions on the largest carrier operating in Latvia.
  - The maximum fine the NEB can impose for non-compliance with the Regulation is very low (approximately €1,000). In some circumstances, a carrier may avoid costs similar to this level through non-compliance. Although CRPC imposes a fine every time a complaint is upheld, it is likely that most passengers will not complain, and therefore this is not sufficient to provide an economic incentive for carriers to comply with the Regulation.<sup>10</sup>
  - The combination of the right to appeal and a lack of capacity in the court system means that where CRPC are able to impose sanctions, it takes several years for them to be confirmed (none have been confirmed so far). This delay negates the possibility of sanctions having a dissuasive effect due to their impact on an airline's reputation.

*Resources*

- 9.28 CRPC staff have a wider remit than just the Regulation, and we were informed that they are very busy. In addition, as a result of the economic crisis, the CRPC budget is under pressure, and is unlikely to allow additional activities in the future (for example, airport inspections).

**Conclusions**

- 9.29 The system of complaints handling in Latvia appears to be reasonably effective. CRPC are able to investigate complaints with the assistance of operational colleagues, and passengers receive a legally binding decision within an acceptable timescale (typically 2-3 months).
- 9.30 However, while the decision is legally binding, the legal incentives available to ensure compliance with the Regulation are inadequate: fines are too low, can only be applied to Latvian companies, and it is easy to delay payment for a number of years. In our opinion, the combination of these factors means that Latvia has not introduced dissuasive sanctions as required by Article 16(3).

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<sup>10</sup> It should be noted that the fines available for failure to provide information as part of an investigation are higher, and should be sufficient to incentivise co-operation.

SWOT analysis

9.31 A SWOT analysis of the complaint handling and enforcement processes in Latvia is provided below.

**TABLE 9.1 SWOT ANALYSIS: LATVIA**

Stakeholder type	Details
Strengths	<ul style="list-style-type: none"> <li>• The complaint handling process is well-established and relatively quick</li> <li>• The NEB is able to make legally binding decisions which require carriers to pay compensation</li> <li>• Although there is no separate ADR mechanism, the CRPC complaints handling process is a substitute for an ADR</li> <li>• Technical/operational expertise is available to CRPC to investigate complaints</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• The maximum sanction for non-compliance is too low to provide an economic incentive to comply with the Regulation</li> <li>• The NEB is unable to impose sanctions on non-national airlines</li> <li>• All fines can be appealed, and since the courts are very busy it takes several years for a fine to be confirmed</li> <li>• No alternative dispute resolution process other than CRPC</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• There is significant scope for improvement in the sanctions regime</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• Budgetary pressure may lead to a reduction of activities in coming years, for example no airport inspections</li> </ul>

## 10. NETHERLANDS

### The National Enforcement Body

10.1 The Inspectie der Verkeer Waterstraat (IVW, Transport and Water Management Inspectorate) is designated as the body responsible for enforcing the Regulation and is empowered to take measures to ensure that the rights of passengers arising from the Regulation are honoured. IVW is the body responsible for handling complaints about alleged breaches of the Regulation.

10.2 In addition to aviation, IVW are responsible for general enforcement of all transport legislation: air, water and land, including bus, taxi, trucks and rail. They also have responsibility for enforcing PRM legislation. To improve international recognition, the air division of IVW is also known as the CAA.

#### *Resources available*

10.3 IVW has 5 FTE working on both the Regulation and Regulation 1107/2006, although one of these is working for the NEB as part of a transfer programme and is not funded by IVW. Approximately 80% of staff time is spent on the Regulation, equal to 4 FTE, of which 3.2 FTE are funded by IVW. In addition, the expertise of operational colleagues can be called on when required. The complaints process was recently streamlined by moving two front line staff from The Hague to IVW's central office in Hoofddorp.

### Legal basis of complaint handling and enforcement

10.4 The enforcement regime is defined by the following pieces of legislation:

- Instellingsbesluit Inspectie Verkeer en Waterstaat (Resolution to set up the Transport and Water Management Inspectorate), Article 2, paragraph 1, item d;
- Wet luchtvaart (Civil Aviation Act), Article 11.15, section b, item 1; and
- Algemene wet bestuursrecht (General Administrative Law Act), Chapters 4 (process) and 5 (level of fines).

10.5 Sanctions are set out by the Civil Aviation Act, which establishes the circumstances under which a sanction can be imposed, and by Article 5:31 of the General Administrative Law Act, which sets out the penalties which can be imposed.

10.6 The sanctions available under this law take the following form: a duty imposed on the carrier (e.g. to pay a passenger an amount owed), a fine for failure to meet the duty, and a time period during which the airline can fulfil the duty without having to pay the fine. There are then three types of fine possible:

- a lump sum;
- a sum per failure to meet the duty imposed; or
- a sum per unit of time during which the duty has not been performed (e.g. where the passenger has not been paid).

- 10.7 A fine that is levied per failure or per unit of time, and which is therefore multiplicative, must include a cap. For example, IVW could fine an airline €1,000 per day for every day beyond the payment deadline that it does not pay the passenger, up to a cap of €20,000.
- 10.8 There is no fixed maximum level for the fine, including for any caps set; the law states that the sanction should be in reasonable proportion to the amount of loss and to the severity of the violation, and the intended effect on the carrier of the fine. The aim of a duty backed by a fine is to remedy the infringement, prevent a further infringement or prevent a repetition of the infringement. Any fines imposed are through an administrative, not criminal, process.
- 10.9 Sanctions are intended to be reparatory (to obtain the redress due to the passenger), and can therefore only be applied for breaches that can be made good by the airline. Fines cannot be applied where this is not possible, for example for failure to provide information. Having identified such a failing, however, IVW can apply fines which set an amount the airline must pay for each future failure to provide information.
- 10.10 This also means that if this redress is provided, then there is no longer an infringement and no fine is applicable. The current law does not allow for punitive fines to dissuade airlines from such behaviour in future. There is a proposal for a law to impose punitive administrative fines pending in the Tweede Kamer (House of Representatives); IVW informed us that this is likely to be passed in mid-2010.

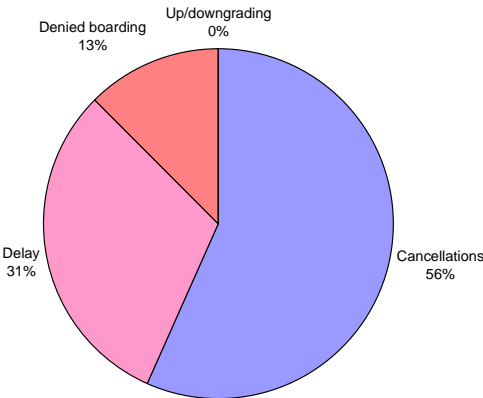
### **Complaint and enforcement statistics**

#### *Complaints*

- 10.11 IVW received 1,069 complaints relating to the Regulation in 2008. In 2009 it had received 591 complaints up to 1 September, equivalent to an annual total of 888. Statistics were not available for other years. If this total was recorded, it would be a reduction of 14%, which is likely to be at least in part due to the decline in passenger traffic at Dutch airports resulting from the economic situation.
- 10.12 As illustrated in Figure 10.1 below, the majority of valid complaints received by IVW related to flight cancellations, while 31% related to delays.



**FIGURE 10.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: NETHERLANDS**

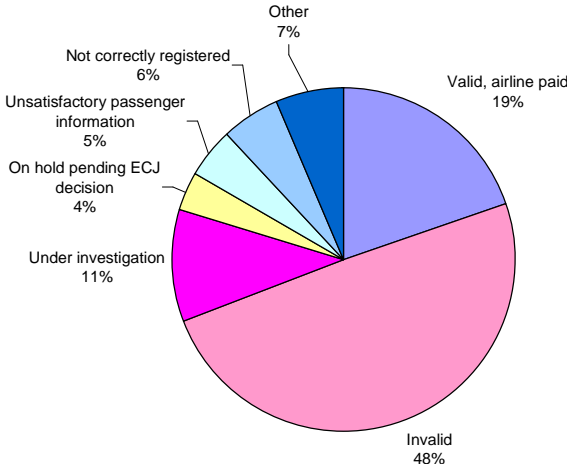


Source: SDG analysis of data provided by IVW

10.13 IVW took up 49% of the complaints that it received in 2008. Of the remaining cases, 27% were referred to other NEBs and the rest were either sent back to the passenger (12%) or rejected because there was not a prima facie case of non-compliance with the Regulation (12%).

10.14 Figure 10.2 shows the results of the complaints which were taken up by IVW (507 in total). In half of cases, IVW found that the complaint was invalid, compared to 19% of cases where IVW found for the passenger. In every case where IVW found for the passenger, the airline paid the amount required. 15% of cases were in progress, including some on hold pending an ECJ preliminary ruling. The 7% of cases classified as Other include 18 where the carrier concerned has declared bankruptcy since the complaint was made.

**FIGURE 10.2 STATUS OF COMPLAINTS RECEIVED DURING 2008: DENMARK**



Source: SDG analysis of data provided by IVW

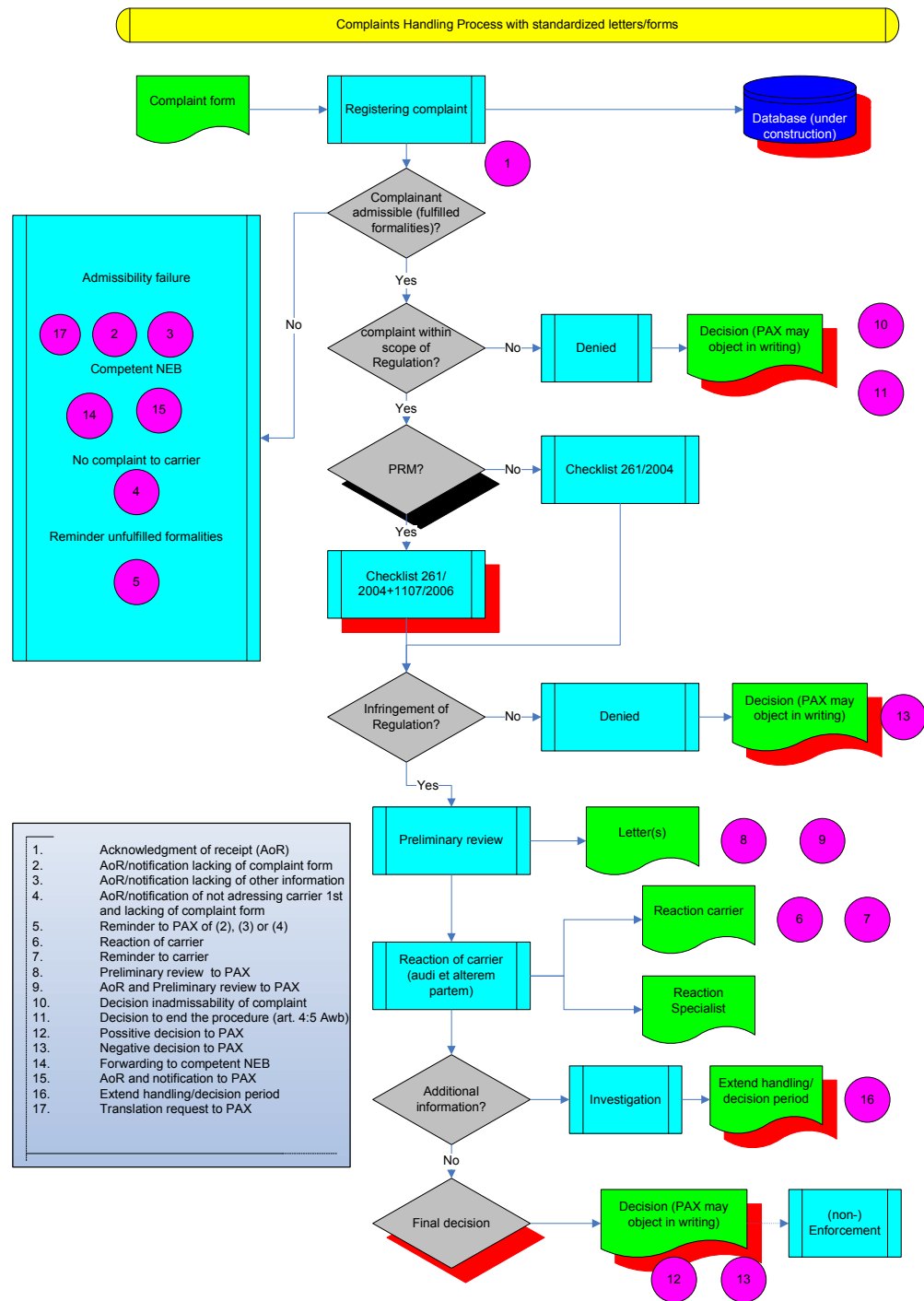
*Enforcement*

- 10.15 In 2008 IVW did not threaten any sanctions, but issued a number of warnings. Up to 1 September 2009, it had imposed 3 sanctions, but the details of these sanctions are confidential.
- 10.16 The sanctions are reparatory and not punitive; the amendment which will come before the Dutch parliament next year will allow for additional punitive sanctions which can be imposed even when there is no longer an outstanding infringement.
- 10.17 Warnings have also been given at airport inspections, when airlines have been unable to provide leaflets in response to a delay. Warnings were issued to five airlines; four of these have been inspected since and have rectified the problem.

**The complaint handling and enforcement process**

- 10.18 IVW's own representation of the Dutch complaint handling and enforcement process is summarised in Figure 16.3 below (as this figure is very detailed we have not produced our own). IVW undertakes both complaint handling and enforcement.

**FIGURE 10.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: NETHERLANDS**



10.19 Note that at the points where the box has a red shadow, the passenger or airline may protest and appeal. IVW will receive and respond to claims in Dutch and English, and may handle complaints in German and French out of courtesy.

- 10.20 The complaint handling and enforcement procedures are set out in the General Administrative Law Act<sup>11</sup>. The complaint handling process undertaken by IVW is very similar to the complaint handling process undertaken by NEBs in other Member States, although to a higher degree of detail and thoroughness than we have seen with some other NEBs. Many of the letters sent to both airlines and passengers are standardised (set out in the blue box at the bottom left of Figure 16.3), and the points at which these are sent out are very clearly defined. IVW makes forms available on its website in both Dutch and English.
- 10.21 Currently IVW uses a spreadsheet to record key details of each complaint, but they are developing a new database which they expect will allow better monitoring. This will be operational from 1 January 2010.
- 10.22 If an airline fails to comply with a decision, IVW will issue a warning requesting it comply or risk sanctions: IVW is required by law to allow interested parties to state their views, and so if a sanction is imposed this will only be after multiple warnings. If a sanction is imposed the airline may also protest the fine, which can take up to 3 months. The protest results in a semi-independent review of the decision and the evidence used to make it, by a separate section of IVW. If the decision stands, the airline can appeal to the administrative chamber of the Rechtbank (District Court), then if necessary to the Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State), the highest administrative law court. This process can take up to 2 years. The airline may request a preliminary ruling which defers payment of the fine to the end of the appeal process.

*Time taken to resolve complaints*

- 10.23 IVW informed us that the complaint handling process typically takes 3-6 months. At time of writing they did not have any statistics available, however once their new database is in place, this will be possible. IVW informed us that Dutch airlines generally do respond within the 6 weeks set out in the NEB-NEB agreement, but for some foreign carriers it can take 2-3 months and multiple reminders to obtain a response.

*Claims of extraordinary circumstances*

- 10.24 IVW always investigate claims of extraordinary circumstances, calling on operational and technical colleagues when necessary. It will also check airport data for evidence of cancellations, e.g. by comparing the flight plan with the number of flights actually operated.
- 10.25 IVW informed us that the ECJ ruling on technical problems has had little effect on how it treats claims, as it already assessed whether or not a technical problem should be regarded as an extraordinary circumstance on the basis of the merits of each case. One result of the ruling is that airlines have claimed extraordinary technical problems less frequently. Dutch civil courts are also finding in favour of the passenger more

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<sup>11</sup> Chapter 5, section 5.3, in conjunction with Chapter 4.

often in such cases. For example, there was a case where ground handling staff had driven moveable steps into the tail of the plane, and the judge decided that since there was a risk of this happening in normal operations, this was not extraordinary.

- 10.26 While IVW is not re-opening old cases decided before the ruling, it is in the process of reviewing relevant cases which were put on hold pending the result of ECJ ruling (since 2007), and has also re-opened cases when passengers requested it.

*Response issued to the passenger*

- 10.27 IVW provides individual responses for each passenger, with an explanation of the reasoning behind the decision. This may include a sheet summarising all parts of the Regulation in clear language, with a reference to the section relevant to the passenger's particular case. Whilst the decision of IVW is not legally binding, non-compliance carries with it the threat of a fine.

*Circumstances under which sanctions are imposed*

- 10.28 Up to 1 July 2009, IVW's policy was to impose sanctions in the case of repetitive or particularly severe infringement, and not to impose fines on the basis of individual cases. From this date, each individual case can be considered for the imposition of sanctions.

*Imposition of sanctions on carriers not based in the Member State*

- 10.29 The process for imposing sanctions in the Netherlands is set out by territorial law. If the incident occurs on Dutch soil, or on a Dutch carrier flying to the Netherlands from a third country, then IVW are competent to issue fines. The airline must be notified in writing of the decision and sanction. IVW must prove that the company being fined has been notified, for example by proving receipt of the letter setting out the fine. The law states that if IVW can prove it has sent the fine, it is up to the other party to prove it has not received it.

*Collection of sanctions*

- 10.30 The financial department of IVW collects the fines, and if the airline does not pay it can obtain a court order from the civil court. This gives it the power to request private collection companies to obtain the amount due. In theory this could be used to impound aircraft, but IVW informed us that this could risk diplomatic tension (for example, retaliatory removal of traffic rights of national carriers) and therefore is unlikely to happen in practice.

- 10.31 For the reasons noted in paragraph 10.15 above, none of the sanctions imposed to date have been paid.

*Publication of information*

- 10.32 A summary of complaints received is published in the annual report, which is available on the IVW website. Sanctions imposed are not currently published, as IVW has had legal advice that any publication could be challenged by airlines. The

amendment to the regime to be passed in 2010 (see 10.10) would additionally permit and require IVW to publish every sanction imposed.

#### **Other activities undertaken by the NEB**

- 10.33 IVW undertake regular inspections at Schiphol and 3 other airports, checking for:
- information displayed at check-in desks;
  - whether leaflets are available; and
  - the level of knowledge of staff and ground handling partners (e.g. what is required to be provided, and by when).
- 10.34 Inspections are performed without notice and without introducing themselves as the NEB. IVW does 10 inspections per year, 6 at regional and 4 at international airports.
- 10.35 The focus for inspections is on busy periods, and as IVW is based 7 minutes from Schiphol airport it is able to do reactive inspections, checking airlines' responses to incidents. Currently two IVW staff are qualified inspectors; next year they expect more staff to qualify, and they will be able to increase the number of inspections.
- 10.36 In recent inspections of handling staff, one third had appropriate knowledge, one third had an informed supervisor, and one third had some information printed on boarding passes. Where leaflets are not available, IVW may give a warning, informing airlines that they have to have leaflets available or they will be subject to a fine.
- 10.37 IVW also holds informative talks with airlines, and where necessary (for example, where there are problems with communication, or persistent problems experienced by passengers) IVW may require airlines to attend formal meetings at its offices where they are issued with warnings. Prior to imposing any sanctions, IVW will send multiple letters to the airline, and make multiple phone calls, in order to encourage compliance. IVW will also sometimes invite airlines to meetings in advance of any problems occurring, to improve lines of communication.

#### **Work with other organisations**

- 10.38 IVW forwards complaints to other NEBs if there is a prima facie case of non-compliance but the incident occurred in another Member State, providing a brief English translation of the complaint. IVW informed us that it has good email relationships with some other NEBs. It has never asked other NEBs to help in the enforcement of the Regulation, but on a number of occasions it has asked other NEBs to liaise with an airline where it has had trouble obtaining information from them.
- 10.39 IVW has had complaints passed on from the Dutch ECC, and has referred passengers to the ECC when they need legal advice in other countries. It has not used the CPC network, as it considers that it is impractical to use: IVW informed us that the network was too bureaucratic, and it is more efficient to obtain information from an email or a phone call to another NEB. IVW prefers to email directly, and would only use CPC if an NEB was not co-operating and it was necessary to make a formal request.

- 10.40 IVW said that it has attempted to collect denied boarding statistics from airlines, but so far this has not been successful.
- 10.41 Vereniging Van Reizigers is a Dutch consumer organisation working on passenger rights, which has undertaken work specifically on this Regulation. It told us that initially IVW refused to handle individual passenger complaints, on the grounds of limited budget. VVR had then brought a court procedure against IVW, which resulted in the court stipulating that IVW had a duty to handle complaints.

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

#### *ADR system*

- 10.42 From 1 July 2009, passengers in the Netherlands have been able to use the aviation division of the Geschillencommissie luchtvaart (the Air Travel Disputes Commission, hereafter GC). GC is an ADR system handling complaints regarding Regulations 261/2004 and 1107/2006, and Dutch airline blacklist legislation. It is independent of government and industry, but funded by both: fixed costs are covered by the Ministry of Justice, and per case costs are covered by BARIN (the industry association for airlines operating in the Netherlands). The Statutes of GC set out the procedures to be followed, and require the consumer and airline to agree to the terms, particularly that the commission's decision is legally binding.
- 10.43 GC handles complaints within the same geographical scope as the NEB, and there is no limit on the size of claim which can be handled. However:
- it can only hear cases where the airline is a member of BARIN; and
  - cases must be brought to GC within 3 months of the final response from the airline.
- 10.44 Evidence about complaints is gathered entirely through written correspondence between GC, airlines and passengers. Once sufficient evidence is gathered, the case is heard. The commission hearing the case is composed of three members: a trial judge, a representative of Consumentbond (a Dutch consumer organisation) and a representative of the airline industry. The representative of the airline industry is independent from the particular case being heard. The passenger and airline in question are not present except in exceptional circumstances. The commission can call on technical experts if required, including: members of the pilots' association, engineers from the airline industry, and procedural experts from the airline industry. No technical experts independent of the airline industry (e.g. from the CAA) are available to the court.
- 10.45 Pursuing a case costs the passenger a fee of €50, once it has been established that the case merits arbitration. No cases have yet been through the arbitration process (the first case is scheduled to be heard on 18 December 2009), but the time limits in the statutes expect the process to take on average 4-5 months.
- 10.46 Decisions are final and there is no possibility of appeal, unless the case can be shown to contain procedural errors. If the passenger wins, the airline pays the fee. If the

airline refuses to pay what is owed, BARIN has a mechanism to ensure payment via bailiffs. An anonymised version is made public on the GC website.

- 10.47 Up to 22 October 2009, the system has received 25 complaints, with 12 being handled. This low number may reflect the length of time which can elapse before a complaint is registered. GC supports the growth of the scope of the system, so that in future it would be a central ADR body for the Regulation.
- 10.48 A limitation of the GC process is that it can only treat claims from airlines which are members of BARIN. This means that complaints cannot be treated involving a number of major carriers, including British Airways, Ryanair, and Arkefly. There is no geographical restriction on complaints that can be heard, for example on where the ticket was purchased or on the country of residence of the passenger. Where a claimant does not speak Dutch, the ECC is used to provide translations.
- 10.49 VVR, the consumer organisation interviewed for this study, was sceptical that the ADR system would be beneficial to consumers, on the grounds that it was set up by the airlines. However there is as yet no evidence on the efficacy of the system.
- 10.50 The key difference between the procedures of the ADR and the IVW is that in the eyes of the law, the ADR process is under civil law and is between the airline and the passenger, and the IVW process is under administrative law and is between the airline and the IVW. If the passenger uses the ADR, he/she retains the right to go to the IVW.

*Small claims procedure*

- 10.51 On 1 September 2009 a small claims court procedure was introduced in the kantongerechten (Sub-District Courts) of the 19 District Courts. The procedure is quicker than in the District courts, but takes longer than the ADR procedure discussed above, and timescales may vary depending on the district. The fee depends on the size of claim, and varies between €70 and €100. The largest claim which will be accepted is for €5,000.
- 10.52 A court procedure must be brought within 2 years of the alleged violation, and is started by a writ of summons, which must be served on the defendant by a bailiff. After the writ of summons and the written statement of defence a hearing is normally held, at which the parties appear in person and can be questioned by the judge. In the sub-district court litigants can represent themselves; there is no obligation to engage a lawyer.
- 10.53 The general rule is that the costs have to be paid by the unsuccessful party, where 'costs' refers to the costs of the other party. If the judge in the sub-district court considers certain costs to have been unnecessary they will not be charged to the unsuccessful party. The judge may also limit the costs. The judge may also divide the costs incurred on both sides between the parties.
- 10.54 It is only possible to appeal against a decision by the sub-district court if the claim (or interest) is worth more than €1,750. The deadline for appeals is three months from the date of the judgment. The appeal is initiated by a writ of summons. In appeal proceedings the parties must always be represented by a lawyer.



- 10.55 A passenger may also pursue a case in the civil courts, however the costs of such a case are likely to be higher than the claim, and the case may take many months to be heard.
- 10.56 As of June 2009, the European small claim court procedure (Regulation 861/2007) was incorporated in the sub-district courts. Under this procedure the sub-district court handles (European) cross-border cases pertaining to civil and commercial matters. The largest claim which will be accepted is for €2,000 and there is no possibility of appeal.

#### **Issues with complaint handling and enforcement in the Netherlands**

- 10.57 The key problem with the sanctions regime in the Netherlands is that sanctions would not be imposed on airlines which consistently violate the Regulation but rectify any non-compliances on investigation by IVW. An airline with a policy of non-compliance except when investigated would only provide redress to passengers who brought complaints to IVW, which is likely to be a small proportion of passengers. If there is no sanction for such behaviour, there is no economic incentive to comply in all cases. The sanctions available would therefore not be dissuasive.
- 10.58 A law has been drafted to remedy this (see 10.10) and is expected to be passed in mid-2010.

#### **Conclusions**

- 10.59 If the complaint handling process diagram we were provided with is followed, then complaints are handled in an efficient and effective manner which provides a high level of information for the passenger. In particular, identifying the contacts which are required to be made at a given point in the system enables efficiencies to be made (in many cases form letters can be used) and ensures that the passenger is kept informed on progress with their case. Cases can be investigated with the expertise of operational staff, and claims of extraordinary circumstances are always investigated. There are relatively frequent airport inspections, which can be reactive to incidents and thereby monitor actual airline behaviour; few other NEBs undertake reactive inspections.
- 10.60 There are a number of positive aspects to the enforcement regime in place. There are no limits to the size of fines which can be imposed, and they have been used to impose sanctions at a dissuasively high level. The ability to impose fines which increase in proportion to length of time left unpaid is also useful for encouraging swift compliance. There is also no limitation on imposition of fines on foreign carriers.
- 10.61 The key weakness is the inability to impose punitive fines. This is addressed in new legislation which is likely to come before the Dutch parliament in 2010; the new law should rectify the problem, but the situation should be monitored to ensure this is the case. The new law also intends to place a requirement on IVW to publish all sanctions imposed; at time of writing, there are doubts over whether such publication could be open to legal challenge, and the new law will also address this.
- 10.62 The structure of complaint handling in the Netherlands may change over the next few years, in response to the creation of an ADR system specific to the rights of air passengers. The system, similar in structure to that in Sweden but with the ability to

call on technical experts, was introduced in July 2009 and is thus still in initial stages. If it proves a success, there is a possibility that the complaint handling role would be passed from IVW to the ADR; the Commission should observe the progress of the Dutch ADR as it becomes better established. As it stands, however, there is still a need for IVW in cases concerning airlines which have not joined the ADR.

#### *SWOT analysis*

10.63 A SWOT analysis of the complaint handling and enforcement processes in the Netherlands is provided below.

**TABLE 10.1 SWOT ANALYSIS: NETHERLANDS**

Strengths	<ul style="list-style-type: none"> <li>• Adequate resources available to handle complaints</li> <li>• Passengers kept well-informed of progress with their case</li> <li>• Technical/operational expertise available to investigate complaints</li> <li>• Frequent inspections are carried out by IVW to verify compliance in a number of areas; IVW are also able to perform reactive inspections</li> <li>• The maximum level of sanctions is unlimited</li> <li>• Sanctions have been applied and the process is established</li> <li>• IVW is able to impose sanctions on non-national carriers without difficulty</li> <li>• There are two alternatives to the NEB, one of which is an ADR system designed specifically for complaints relating to this Regulation</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• IVW are unable to impose punitive fines to ensure future compliance</li> <li>• IVW are unable to publish any sanctions imposed</li> <li>• The ADR system is not able to handle all cases (i.e. where the airline is not a member of BARIN)</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• The new legislation (expected to be passed in 2010) should address the problems with sanctions: lack of punitive fines and inability to publish sanctions</li> <li>• The new ADR system should, as it develops, become a valuable alternative for passengers travelling with carriers that are members of BARIN</li> <li>• The new complaints database being introduced should improve monitoring e.g. of timescales for complaints</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• None identified</li> </ul>

## 11. PORTUGAL

### The National Enforcement Body

- 11.1 Portugal has one entity responsible for both complaint handling and enforcement of Regulation 261/2004, the National Institute for Civil Aviation (INAC). Established in 1998 by decree-law 133/98, INAC is a publicly owned corporation, which functions as an independent regulatory authority responsible for regulation, oversight and inspections in the sector of civil aviation. This covers airports, air transportation, air navigation and all staff providing services in these areas. INAC is also responsible for consumer protection.
- 11.2 Regarding Regulation 261/2004, INAC is responsible for the implementation of the legislation and is the exclusive body for handling complaints.

#### *Resources available*

- 11.3 In its complaints handling department, INAC has 3 members of staff who are competent to handle Regulation 261/2004 complaints, with work on the Regulation equivalent to 2 FTEs. In addition, the head of the complaints handling department works on Regulation 261/2004 amongst other areas. In total, INAC has roughly 220 staff members.
- 11.4 INAC considers that, given the number of complaints that it has to handle and the complexity of the process, it does not have enough resources to handle the number of complaints received. In particular, the complaints handling team does not have sufficient time to investigate complaints using the expertise of technical and operational colleagues.

### Legal basis of complaint handling and enforcement

- 11.5 INAC was designated by the Ministry of Public Works, Transport and Communications as the Portuguese National Enforcement Body (NEB) under the Joint Order 357/2006. The enforcement regime is defined in Decree Law 209/2005, which assigns the level of fine (from a standard scale of light, serious or very serious) which is applicable for each breach of the Regulation. The level of fine imposed is dependent on the turnover of the airline, and fines are imposed for individual cases.
- 11.6 The standard scale of fines is generic across several pieces of legislation, and is set out in another law (Decree Law 10/2004). The highest fine possible is €250,000, applicable for situations considered as very serious. Very serious violations include: refusal to provide specialist information leaflets to partially sighted passengers, non-provision of assistance and benefits to passengers who have been denied boarding, and not giving priority to persons with reduced mobility or non-accompanied children. Fines for 'light' violations vary between €350 and €3,000, depending on the size of the company and whether the violation was intentional or negligent. 'Serious' violations can incur fines between €1,500 and €10,000, while 'very serious' violations have fines of €4,500 to €250,000 available. Light violations include, for example, delayed payment of compensation or reimbursements.

- 11.7 To impose a fine, the complaint handling section of INAC passes a case to its legal department, who will decide whether or not to impose a fine. Any fine imposed must be approved by the Board of INAC (this is an internal administrative procedure).
- 11.8 In 2006, a law was passed requiring all companies providing services to have a complaints book, and setting out requirements for companies' responses to such complaints. When a passenger makes a complaint in such a book, Portuguese law requires the original of any complaint submitted in a complaint book to be passed to the relevant authority within 10 working days, and for the company to respond to any further requests from the authority within 10 working days, including copies of communications it has had with the passenger.

### **Complaint and enforcement statistics**

#### *Complaints*

- 11.9 In 2008, INAC received a total of 9,511 complaints from passengers (7% more than in 2007) and, within those, 1,526 complaints relating to the Regulation (4% less than the previous year). 24% of these related to cancellations.
- 11.10 INAC was not able to provide statistics on the other reasons for complaints, outcomes of complaints, or on how many have been forwarded to other NEBs.
- 11.11 The complaints books introduced in 2006 (see 11.8) dramatically increased the number of complaints received: 80% of complaints received by the INAC now come from complaints books.

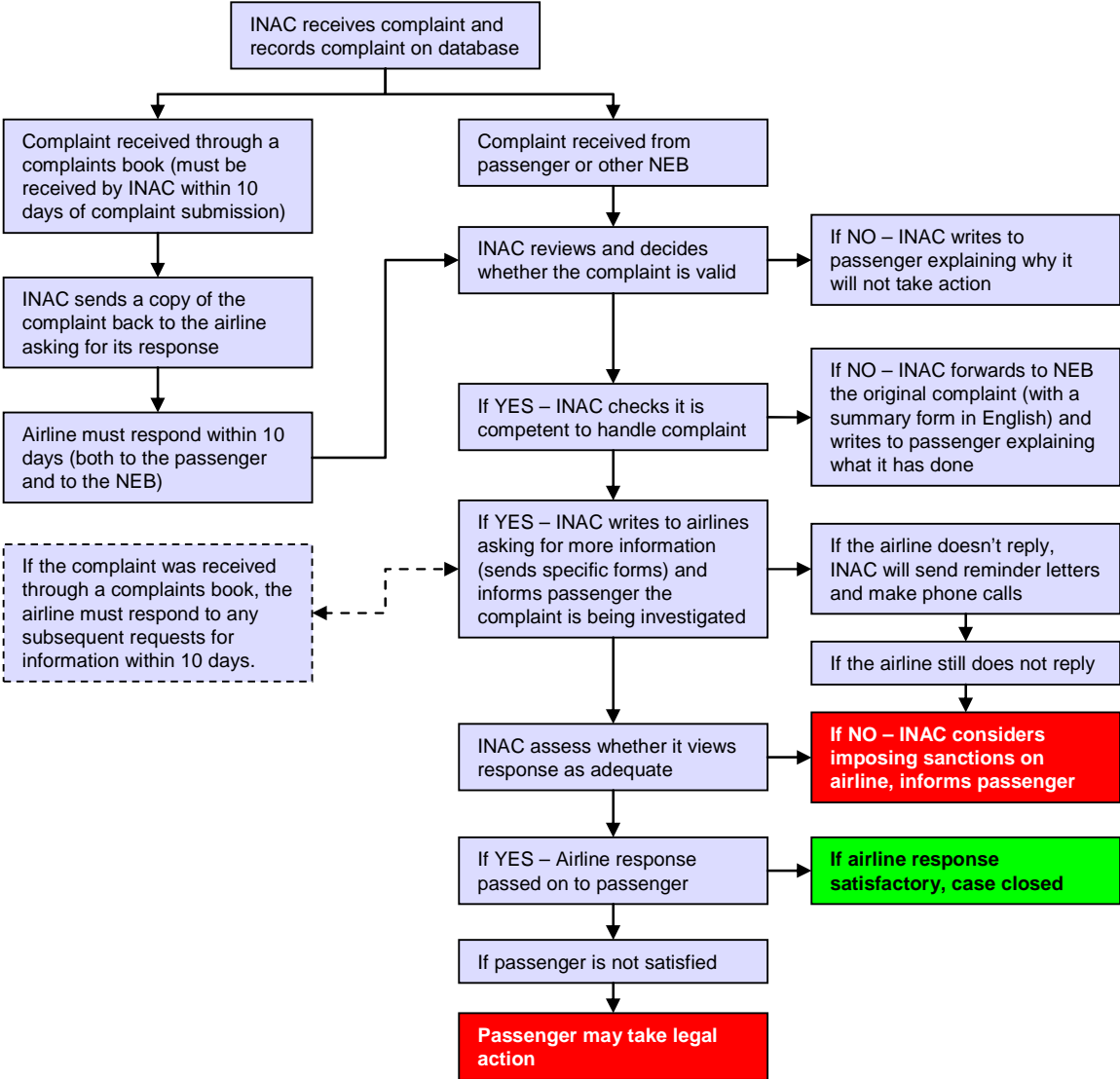
#### *Enforcement*

- 11.12 The section of INAC that we spoke to was unable to provide exact statistics for fines, but informed us that to date, at most ten fines have been imposed in Portugal for non-compliance with the Regulation. We were unable to obtain exact statistics from the relevant section of INAC within the timescales for the study.
- 11.13 INAC informed us that they would like to impose more fines, but that they were restricted by resources.

### **The complaint handling and enforcement process**

- 11.14 The Portuguese complaint handling and enforcement process is summarized in Figure 11.1 below. Both processes are undertaken by INAC.

FIGURE 11.1 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: PORTUGAL



11.15 The complaint handling process undertaken by INAC is similar to the complaint handling process undertaken by NEBs in other Member States, with the exception that it does not request information such as technical logs or maintenance records. When INAC requests information from an airline, it uses one of a set of standard forms it has developed for delays, cancellations and denied boarding. This is the only technical information INAC requests. It does not have any technical expertise within the complaints team, and is unable to investigate complaints using the expertise of operational and technical colleagues. In the event that INAC views an airline’s response as inadequate, it has no powers of further investigation but may decide to impose a sanction on the carrier.

11.16 When INAC analyses a case, it may make checks such as: if the airline denied boarding, checking that the flight was actually full; if the airline denied boarding and claimed that the passenger was late to check-in, checking that the flight did leave on time.

- 11.17 Passengers can send complaints to INAC by mail, fax, e-mail, by filling in forms available in airport stands, or by filling the form in the airlines complaints book. As shown in the diagram above, the time limits applicable to ‘book’ complaints are different, and hence these complaints are treated differently. INAC is able to receive and respond to complaints in Portuguese, Spanish, English and French. All complaints (not just Regulation 261/2004) are entered in a database.
- 11.18 INAC issues non-binding decisions with an explanation of the reasons for the decision. If the airline has not paid the passenger, INAC also informs passengers that the decision may be useful in small courts or other procedures, and makes the passenger aware of their rights under the Montreal convention.
- 11.19 Where a passenger should receive compensation, INAC gives carriers several opportunities to rectify the situation before imposing sanctions, as the imposition of sanctions will not obtain reimbursement for the passenger. If an airline repeatedly refuses to provide information to justify their position, or disagrees with INAC’s decision on a case, the complaint handling section of INAC can pass the case to its legal department, who will decide whether or not to impose a fine. At this point INAC’s complaint department has no further knowledge of the complaint, is unable to inform the passenger of any progress, and considers the case closed. Any fine imposed must be approved by the board of INAC (this is an internal administrative procedure).

*Time taken to resolve complaints*

- 11.20 During 2008 the average across all resolved complaints (not just those regarding the Regulation) was 45 days. However, many complaints remain unresolved and so the real average is likely to be much higher. Typically, a complaint regarding the Regulation will take approximately 6 months to resolve, but in complex cases it may take up to a year. INAC has a backlog of unresolved complaints, due to lack of resources. Because of the stricter deadlines in Portuguese law, it has recently given higher priority to complaints from complaints books.
- 11.21 INAC finds it difficult to meet the deadlines set out in the NEB-NEB agreement. Airlines sometimes, but not always, meet the deadlines in the NEB-airline agreements. In other occasions, airlines do not respond at all.

*Claims of extraordinary circumstances*

- 11.22 Where airlines claim extraordinary circumstances as justification for not paying compensation, INAC will judge the airline’s justification on a case-by-case basis. It will request the airline’s description of the incident, including of the specific technical problem if this is cited, but will not investigate whether the carrier’s claim is true, for example by checking log books. INAC accepts the information provided by airlines in good faith, as this information may be eventually used in a judicial action against the airline. Generally, technical problems identified during maintenance are not considered as extraordinary circumstances, but technical problems at the point of take-off are considered as extraordinary circumstances.
- 11.23 INAC is aware of some complexities around interpretation of extraordinary circumstances. For example, different levels of training can mean some pilots are able

to fly in certain weather conditions, while other pilots cannot. This may mean that in the same weather conditions, one airline might fly while another cancels its flight and claims extraordinary circumstances.

*Response issued to the passenger*

- 11.24 INAC provides individual responses to passengers. These summarise the correspondence with the airline, and give an explanation of INAC's decision and the reason for it. This is intended to be enough to set out the passenger's claim in a court case (either arbitration procedure, justices of the peace or regular judicial courts procedures).

*Circumstances under which sanctions are imposed*

- 11.25 We have been provided with information from INAC on the circumstances under which sanctions can be imposed which appears to be contradictory. We sought to clarify this with INAC but did not obtain a clear position within the timescale for submission of the report.
- 11.26 INAC initially told us that it will consider imposing a fine if an airline repeatedly refuses to provide information to justify its position, or disagrees with INAC's decision on a case. In such cases the complaint handling section of INAC passes the case to its legal department, who will decide whether or not to impose a fine. The complaint handling department is separate from this process, and does not have full sight of how it functions.
- 11.27 INAC informed us that it would be unable to impose sanctions for a case where an airlines which violated the Regulation but rectified the non-compliances on investigation by INAC. However, it also informed us that if an airline systematically violated the legislation, but rectified this during the mediation stage after a complaint, it **would** nonetheless be able to impose a sanction. This appears to be contradictory.
- 11.28 In any case, as noted above, INAC's ability to impose sanctions is constrained by lack of resources.

*Imposition of sanctions on carriers not based in the Member State*

- 11.29 INAC informed us that there are no specific difficulties in Portugal relating to imposition of sanctions on carriers not based in Portugal: the standard procedure is followed, and if the carrier does not pay the fine then the case is transferred to the General Prosecutor, who has powers to obtain payment by compulsion. The complaint handling department was not able to provide details of the procedure (e.g. the process for notifying the fine to the airline), or whether any of the fines which had successfully been imposed regarded non-Portuguese carriers; this information is outside its remit, and we are attempting to contact INAC's legal department to confirm these points.
- 11.30 Decree Law 10/2004 establishes the amounts for each fine to be collected by the INAC. Article 2 states that the fines are applicable to situations that occur in Portuguese territory, independently of the nationality of the operator, on board aircraft registered in Portugal and aircraft leased by an operator registered in Portugal. The law does not appear to apply to flights from third countries to Portuguese airports

operated by non-Portuguese EU carriers: however, we have not been able to identify any such services as being operated at present and therefore this is not currently a significant issue.

*Collection of sanctions*

11.31 Fines are collected by the finance department of INAC, and are shared as follows:

- 60% for the government;
- 30% for INAC; and
- 10% for the overseeing authority (in this case, INAC).

11.32 The section of INAC that we spoke to was unable to provide information on the powers available to the finance department for collection, or on the proportion of fines which had been collected. If the airline fails to pay an imposed sanction within the time limit (10 days), the sanction is passed to the general prosecutor, where the case waits for a hearing at the court of the general prosecutor, before being sent for compulsory execution. This would allow the seizure of property, if necessary.

*Publication of information*

11.33 INAC was not able to confirm whether statistics for complaints or sanctions imposed are published. INAC provides online updated information on passenger rights.

**Other activities undertaken by the NEB**

11.34 INAC undertakes approximately one inspection per major airport per year (except in the Azores, where an inspection is still to be done). INAC checks:

- information at check-in stands;
- leaflets, including availability in both English and Portuguese, whether the information is simply and clearly presented, and whether contact details of the NEB are included; and
- staff knowledge, (both airlines and ground handling staff).

11.35 A number of flights are observed and, if there is a delay or cancellation, INAC checks whether the airline responds appropriately.

11.36 The results have shown evidence of good compliance - some airlines always provide assistance, even if a delay is under 2 hours - and of poor compliance. Poor compliance has included: claims that there is no obligation to provide assistance in extraordinary circumstances; a third country airline claiming the Regulation did not apply to them; and leaflets containing a mistake in the original Portuguese translation of the Regulation (defining long delays as 4 hours, instead of 5 hours). In general it has been satisfactory.

11.37 INAC has also taken a number of pro-active measures towards compliance.

- In advance of past meetings with the Commission it spoke with Portuguese airlines to discuss issues relating to the Regulation (it is at time of writing too busy to continue this).



- It used letters and telephone calls to encourage airlines to reimburse passengers.
- In June 2008 INAC held a one-day seminar on Regulation 261/2004, inviting approximately 70 delegates from airlines (Portuguese, EU and others such as Cap Verde and Angola), travel agents, ground handlers, airports, representatives of small courts, the CAAs of Cap Verde and Angola, and others. The seminar discussed difficulties, attempted to find areas of agreement, and gave examples of insufficient responses. The Commission attended as an invited speaker.
- It also provides extra information on the Regulation on its website.

### Work with other organisations

- 11.38 Where complaints are received for which INAC is not the competent NEB, INAC forwards them to the relevant NEB with a summary form in English; this includes complaints received via airline complaint books. It will also contact other NEBs when it needs assistance on cases. INAC informed us that it has good relations with the Spanish NEB, for example, which it previously used to obtain contact details for Clickair.
- 11.39 INAC maintains regular contact with the ECC Network, which it considers was particularly helpful when dealing with SkyEurope's bankruptcy.
- 11.40 INAC reported that there have been a number of technical problems with the CPC Network. INAC has not used it to date.

### Alternative means for passengers to obtain redress

- 11.41 The Portuguese Court System has two alternative dispute resolution processes: Arbitration Centres and Justices of the Peace. These mechanisms are divided by counties, functioning independently in their territorial competence. This competence is determined by the location of the headquarters of the company against whom the complaint is being made (in this case, airlines).
- 11.42 The process through the Arbitration Centres encompasses three phases:
- **Mediation/Conciliation:** Dispute resolution is promoted through a joint solution in the interests of both sides (consumer and airline);
  - **Arbitration:** When the mediation/conciliation phase fails to reach agreement, the process moves to arbitration. This is a simple court procedure, where the judge gathers the necessary proof for the resolution of the process, which skips the formalities of a normal judicial procedure. These procedures rarely last more than 6 months and do not involve any technical specialists. The judge may sometimes request an expert evaluation (the expert would be INAC);
  - **Judicial procedure:** Arbitration requires the voluntary adhesion of both sides. Non-acceptance by the airline will force the consumer to appeal to a common judicial procedure.
- 11.43 Arbitration centres solve disputes through mediation, are free of costs and their decision is non-binding. Justices of the Peace have some cost (€35) and also solve disputes through mediation, though their decision can be binding. Finally, a passenger may also use the regular civil courts, but these take a long time and incur the risk of paying high costs. Their decision is binding, with the possibility of appeal.

## Issues with complaint handling and enforcement in Portugal

### *Resourcing*

- 11.44 The workload of staff at INAC is too high to allow the complaint handling process to function properly. This has made the process slow and led to a backlog of cases. The most serious problem is the failure to investigate cases of extraordinary circumstances. INAC stated that it did not have the time to undertake investigations of any cases, or to call on the technical and operational expertise of colleagues. It relies on the possibility of an airline's statement being used in court to ensure that airlines are truthful.
- 11.45 The views of DECO, a Portuguese consumer organisation, support this conclusion (on both the ineffectiveness of the process, and the lack of investigation into extraordinary circumstances). It informed us that the processes in place for resolving consumer disputes were inadequate, although it noted that INAC provides a hotline for customer information, complaint templates and information campaigns. Its view is that the institution doesn't have the necessary logistic capabilities, or sufficient and specialized human resources, to be able to fulfil the complaint management criteria of the Regulation.
- 11.46 These failings are severely detrimental to the consumer: the complaint handling process is slow and, without the checks of investigations, DECO informed us that it tends to act in favour of the airline.

### *The ability to impose dissuasive sanctions*

- 11.47 In paragraph 11.27 above we discussed the lack of clarity around whether INAC could impose sanctions on an airline which systematically violated the legislation, but rectified this during the mediation stage after a complaint. If it cannot, then the fines available would appear not to be dissuasive as required by Article 16(3). An airline with a policy of non-compliance except when investigated would only provide redress to passengers who brought complaints to INAC, which is likely to be a small proportion of passengers. If there is no sanction for such behaviour, there is no economic incentive to comply in all cases. The sanctions available would therefore not be dissuasive.

### *Fines*

- 11.48 The number of fines imposed is very low in comparison to the number of complaints. DECO has received a number of complaints showing that airlines are not complying with their obligations under the Regulation, and on the basis of the fines imposed it does not appear that INAC is doing enough to encourage compliance.

### *Scope of fines*

- 11.49 It appears from the law which sets out the fines available in Portugal that the fines could not be levied with respect to a flight operated by a non-Portuguese EU carrier from a third country to a Portuguese airport. However as we have not been able to identify any such flights as currently being operated, this does not appear to be a significant issue.

## Conclusions

- 11.50 The system of complaint handling undertaken in Portugal has some positive aspects: INAC undertakes some mediation between airlines and passengers, and always tries to convince airlines to reimburse passengers before imposing sanctions. It also makes efforts towards dissemination of information, both to passengers and airlines; the seminar for industry on the Regulation was well-received. However, the key weakness is the insufficiency of resources available to INAC, and the consequences of this lack of resources, particularly that it does not undertake any in-depth analysis of claims of extraordinary circumstances.
- 11.51 The sanctions regime appears in theory to be effective: the maximum levels of fines are set at a level which would be dissuasive to airlines, and are available for all breaches of the Regulation. In practice, however, few fines have been imposed and the circumstances under which they can be imposed are not clear.

### *SWOT analysis*

- 11.52 A SWOT analysis of the complaint handling and enforcement processes in Portugal is provided below.

**TABLE 11.1 SWOT ANALYSIS: PORTUGAL**

Strengths	<ul style="list-style-type: none"> <li>• Inspections are carried out by INAC to verify compliance</li> <li>• The maximum sanction is adequate to provide an economic incentive to comply with the Regulation</li> <li>• Alternative dispute resolution processes are available.</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Inadequate resources available to INAC to handle complaints and impose sanctions</li> <li>• Circumstances in which sanctions will be imposed are unclear</li> <li>• The complaint handling process is slow</li> <li>• INAC does not investigate claims of extraordinary circumstances</li> <li>• Links between the complaints handling and legal departments of INAC appear to be poor, and this lack of flow of information may lead to ineffective enforcement</li> <li>• Small claims court system is dependent on both parties agreement to participate in the process</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• Technical/operational expertise in INAC could be deployed in the investigation of complaints</li> <li>• INAC complaint form provided to passengers in airports could be considered as proof in a court case.</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• The fact that INAC staff are overloaded could cause problems given the large number of complaints.</li> <li>• In the event that a non-Portuguese EU carrier was to start operating services to Portugal from third countries, current law would not permit fines to be imposed in relation to these services</li> </ul>

## 12. POLAND

### The National Enforcement Body

12.1 The National Enforcement Body (NEB) for Poland was designated as the Civil Aviation Office (CAO) Commission on Passengers' Rights. The NEB is represented by the President of the Civil Aviation Office. The Commission on Passengers' Rights (CPR) was designated by the President of CAO as its unit to enforce the Regulation. CPR, acting in the name of the President of CAO, undertakes the duties specified in Article 16 of the Regulation. In particular it checks air carriers' compliance with the principles of the Regulation and handles passengers' complaints.

#### *Resources available*

12.2 The CPR states that there are nine people (director, secretary and 7 lawyers) employed full time and one legal adviser employed part-time. For cases requiring thorough knowledge of aviation, especially those involving study of technical documentation, it can draw on advice from technical and operational experts working in other CAO departments.

### Legal basis of complaint handling and enforcement

12.3 The procedure for dealing with complaints is based on Polish law, in particular the Aviation Act (Articles 205a, 205b, 209a, 209b) and the Administrative Procedure Code. In each case, the President of CAO issues a decision which states whether there was an infringement of the Regulation or not. If an infringement was found, the President requires the airline to address it within 14 days and, according to Article 209(b)(1) of the Aviation Law, is required to impose fines on the airlines for each infringement. The fines range from 200 to 4,800 PLN (€47-1,131)<sup>12</sup>. The law states that a fine must be imposed for every infringement which is recorded – there is no flexibility not to impose fines for a minor, technical infringement.

12.4 The list of infringements of obligations, conditions and the height of fines for each infringement is specified in Annex 2 to the Act and is presented in Table 12.1.

**TABLE 12.1 POLAND: FINES APPLICABLE**

Infringement of	Minimum and maximum fines
Article 4(1)	200 to 4,800 PLN (€47-1,131)
Article 7	1,000 to 2,500 PLN (€235-589)
Article 8(1)	200 to 4,800 PLN (€47-1,131)
Article 9	200 to 4,800 PLN (€47-1,131)
Article 10(1)	200 to 4,800 PLN (€47-1,131)
Article 10(2)	200 to 4,800 PLN (€47-1,131)
Article 14	200 to 4,800 PLN (€47-1,131)

<sup>12</sup> Average exchange over the last year was used (9 October 2008 - 9 October 2009, EUR 1 = PLN 4.2444). Source: European Central Bank.

- 12.5 Fines are applied per Article and per passenger, and are cumulative, so in cases where a carrier breaches more than one Article or there are complaints from more than one passenger, the total fine can exceed €1,131.

### Complaint and enforcement statistics

#### Complaints

- 12.6 In 2008, CPR received 1,538 complaints relating to the Regulation (Table 6.1). The number of complaints increased each year between 2006 and 2008, but CPR said that some decline is visible in 2009 year to date, possibly due to the decline in traffic linked to the global economic crisis. The majority of complaints related to cancellations. 74% of complaints related to low cost carriers.

**TABLE 12.2 POLAND: COMPLAINTS RECEIVED IN YEARS 2006-2009**

	2006	2007	2008	2009*
Cancellations	437	526	816	390
Long delays	263	206	142	52
Denied boarding	65	99	78	27
Requests for information and others	334	366	502	221
<b>Total</b>	<b>1,099</b>	<b>1,197</b>	<b>1,538</b>	<b>690</b>

\* Data covers the year to 31s July 2009. Source: CAO

- 12.7 CAO does not compile statistics for the outcome of complaints.

#### Enforcement

- 12.8 The system of sanctions is regulated Chapter XIa of the Aviation Act (on financial penalties). Since 1 April 2007, imposition of sanctions has been obligatory, so every time CAO identifies an infringement of the Regulation, a sanction has to be imposed. The level of the sanction, within the minimum and maximum levels defined in the law, is at the discretion of CAO and depends on the circumstances of the case. For example, if a meal and refreshments were provided to the passenger during a delay, but there was no access to a telephone, the sanction for infringement of Article 9 would be lower than if the carrier failed to provide any care at all.
- 12.9 In April 2007 the Aviation Act was amended to change the system of sanctions. Before this, imposition of fines was discretionary but the level of the fines was higher (€1,000-25,000). Since 1 April 2007 the fines were lowered but the number of fines imposed has increased significantly (Table 12.3).

**TABLE 12.3 POLAND: SANCTIONS APPLIED IN YEARS 2006-2009**

	2006	2007	2008	2009
Number of fines	11	32	105	102
Total amount of fines	Not available	Not available	185,300 PLN (€43,658)	117,600 PLN (€27,707)
Average fine	Not available	Not available	1,764 PLN	1,153 EUR

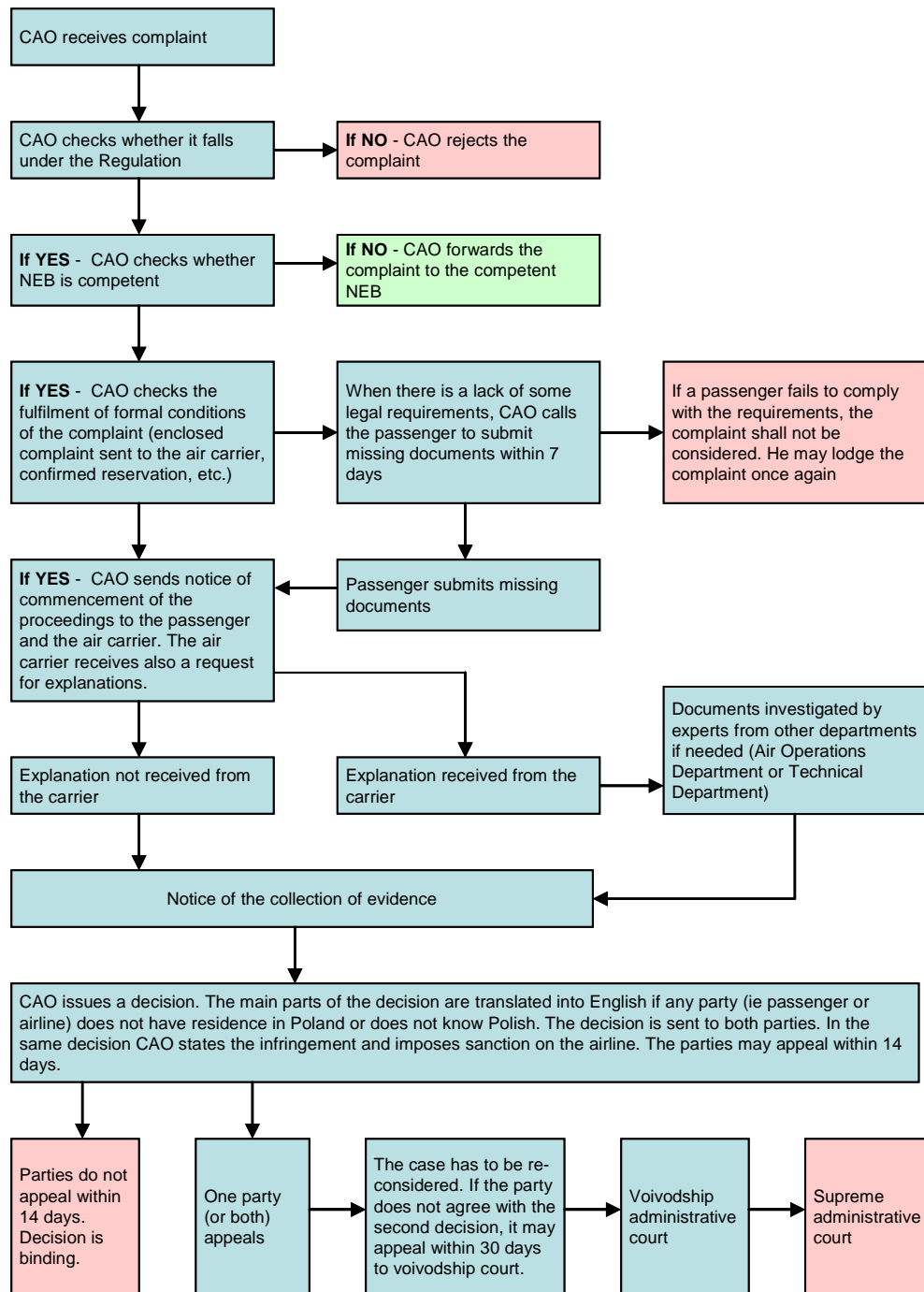
			(€416)	(€272)
System	Optional	Discretionary / Since 1 April 2007 obligatory	Obligatory	Obligatory

Source: CPR

### The complaint handling and enforcement process

- 12.10 The complaint handling and enforcement process is summarised in Figure 16.3 below. According to the procedure defined in Polish law, it makes an investigation regarding the alleged infringement of the Regulation, informs the parties about the commencement of the investigation, requests evidence and explanation from the carrier, and informs the parties about the opportunity to participate in each stage of proceedings.
- 12.11 A key unusual feature of the complaint handling and enforcement process in Poland is that CAO not forward passengers' complaints against Polish carriers to other NEBs, even if the alleged infringement took place at an airport in another Member State. Polish law allows CAO to process these complaints itself, and, where appropriate, impose sanctions. CAO informed us that, to date, this had not been contested by Polish carriers.

**FIGURE 12.1 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: POLAND**



12.12 CAO does not accept complaints sent by electronic mail unless there is an electronic signature.

12.13 Each complaint received, provided it meets the legal requirements (such as the passenger already having complained to the carrier), starts the administrative proceeding against the air carrier. CAO informs the parties of the commencement of the procedure and calls the carrier to submit explanation and supporting documents. The burden of proof rests on the air carrier, not only in case of extraordinary

circumstances but with regard to all provisions of the Regulation such as adequate care, which was laid down by the provision of the Aviation Act.

- 12.14 In each case an administrative decision is issued. The parties may appeal against the decision within 14 days and the second decision (the first if there is no appeal) is binding. In accordance with the Act on Proceedings before Administrative Courts, the parties can lodge a complaint against the second decision to the Voivodship Administrative Court in Warsaw within 30 days of the day of receipt of the decision. In addition, this is without prejudice to any right the passenger has to claim further compensation before courts of general jurisdiction.

*Time taken to resolve complaints*

- 12.15 According to CAO, deadlines laid down in the general handling complaint procedure of DG TREN are respected. The Administrative Procedure Code obliges it to finalise the case within 2 months and if it is not able to respect this, it is obliged to inform the parties about the new deadline and the reason for the delay. However, CAO informed us that the time it takes to resolve a typical complaint is 3 months; more time is needed for complicated cases, especially where a party lodges an appeal, technical documents need to be analysed, or there are doubts in the interpretation of the Regulation. The more complicated complaints which need to be resolved by the civil court are usually processed in 5 to 6 months. CAO said that if delays in complaint handling occur, they are usually caused by the complexity of the case rather than lack of resources.

*Claims of extraordinary circumstances*

- 12.16 In all cases where the carrier claims extraordinary circumstances, this investigated by appropriate departments of CAO such as the Technical Department or Operational Department depending on the reason of the cancellation (technical or meteorological). On the basis of their opinion, a ruling is made by the President of CAO as to whether there was an infringement of the Regulation.
- 12.17 CAO informed us that, further to the ruling in the case *Wallentin-Hermann v Alitalia*, it now rules in favour of the passenger in a higher proportion of cases. It said that technical shortcomings are only rarely accepted as extraordinary circumstances; usually, only external events such as storms, lightings, bird strikes and production defects are considered extraordinary circumstances in the meaning of the Regulation. A carrier with significant operations in Poland informed us that in one case CAO had rejected a claim of extraordinary circumstances even where operation of a flight would have been dangerous due to deer being seen on or near the runway.
- 12.18 CAO informed us that, in many cases, in order to avoid imposition of sanctions, air carriers pay compensations to passengers before a decision is issued, if they do not have strong evidence to prove that the extraordinary circumstances occurred.
- 12.19 The main types of documentation that airlines are asked to provide are aircraft technical documentation and METAR documentation:



- Aircraft technical documentation is used to support claims of unexpected flight safety shortcomings. Documentation requested includes aircraft technical logs, hangar work orders, AOG requests, aircraft damage reports etc.
- METAR documentation shows meteorological conditions at an airport of departure or arrival which could affect the flights concerned.
- In addition, sometimes airlines also provide press information related to strikes that disturbed their operations, and their own interior correspondence to support various kinds of extraordinary circumstances.

12.20 CAO is not reopening old cases as a result of the ECJ judgement. The administrative procedure does not foresee this as old decisions on previous cases are binding in law.

*Response issued to the passenger*

12.21 The investigation is finalised by the decision, which, after the appeal period, is binding. The decision is sent to the passenger and the carrier. During the proceedings, the passenger is informed about each stage of the proceedings. However, CAO cannot force carriers to pay compensation and it does not have any means of monitoring whether they do so.

12.22 The CAO handles complaints, which can be written in Polish, English, German, or French. However, the government authorities, including CAO, are obliged to write letters in Polish language only. For the convenience of foreign passengers and carriers, the most important parts of the decisions are unofficially translated into English by CAO employees. In such cases, there is also an English letter with a short explanation attached to the decision.

*Circumstances under which sanctions are imposed*

12.23 As explained above, the Aviation Act requires a sanction to be imposed in every case of infringement of the Regulation. However, CAO informed us that in practice it terminated the procedure and therefore did not impose sanctions in cases where the carrier paid before a formal decision was issued.

*Imposition of sanctions on carriers not based in the Member State*

12.24 There are no specific difficulties in Poland relating to imposition of sanctions on carriers not based in Poland. The Administrative Procedure Code requires a receipt from the carrier to be obtained to confirm notification of the procedure, which is a problem when sanctions are issued to States such as the UK for which no signature can be returned via the registered mail service. To circumvent this, CAO uses commercial courier services to deliver the notification, and the receipt from the courier company is considered sufficient to demonstrate that the notification has been delivered.

*Collection of sanctions*

12.25 According to CAO, almost all airlines pay sanctions. The only exceptions are airlines that are insolvent: for this reason, one charter airline did not pay two sanctions in 2007. All other sanctions imposed in 2007 have been paid (in total 94% paid); and of the 105 fines imposed in 2008, 99 have been paid so far (also 94%).

- 12.26 Collecting fines from carriers not registered in Poland is facilitated by the Polish Tax Office, if agreements between Poland and the given country exist. If such a bilateral agreement does not exist, the Ministry of Finance can facilitate the process. The CAO stated that even non-European carriers pay sanctions.

*Publication of information*

- 12.27 CAO does not publish any statistics for complaints received.

**Other activities undertaken by the NEB**

- 12.28 CAO undertook 18 inspections at airports in 2008, and 13 in the first seven months of 2009, to verify compliance with Article 14. CAO considers that generally the air carriers do comply with the obligations of Article 14 of the Regulation.

**Work with other organisations**

- 12.29 According to CAO, it has good contacts with the Polish ECC, which helps passengers to prepare complaints. In cases where CAO receives complaints which are not within the scope it handles (for example complaints about lost luggage), it informs passengers about the role of ECC.
- 12.30 To date, CAO has only used the CPC Network in one case. CAO considers that the introduction of this Network under Regulation 2006/2004 has not had a material impact on its operations.

**Alternative means for passengers to obtain redress**

- 12.31 Consumers can obtain free legal advice relating to their claims from local consumer ombudsman or from the State-funded consumer organisations (the Polish Consumer Federation and the Association of Polish Consumers). Consumers may also obtain information, legal assistance and support in cross-border disputes from the ECC.

*Arbitration procedure*

- 12.32 Consumers may opt for the alternative dispute resolution provided by the network of consumer courts of arbitration, although the decision to use arbitration must be agreed by the carrier.
- 12.33 These procedures exist at the Voivodship Inspectorates of the Trade Inspectorate. The decisions of the consumer courts, as well as settlements reached in them, are equally binding as the judgments of common courts of law, once a common court of law has confirmed their enforceability. Consumer courts may only hear business to consumer disputes resulting from contracts of sales and provision of services, and and (in most cases) where the value in dispute does not exceed 10,000 PLN. However, the Consumer Court in Warsaw can hear cases regardless of the value.
- 12.34 A case may be filed to the court of arbitration not only by the consumer but also by the enterprise, a consumer organisation, or the local consumer ombudsman. Each of the parties may have a representative, who does not have to be an advocate or legal advisor. The hearings are open to the public and their minutes are taken. The decision

is made by majority vote and a notice thereof, together with the grounds of the decision, is sent to the parties within 14 days. The costs of the proceedings are covered by the losing party but the presiding judge may exempt the parties from paying the costs altogether.

*Small claims procedure*

- 12.35 There is a small claims/simplified court procedure (“postępowanie uproszczone”) defined in the Polish Civil Procedure Code. The cost depends on the value of the claim but is fixed at 30 PLN (€7) for claims up to 2,000 PLN (€472), which would include most claims under the Regulation. In addition, the European small claims procedure can be used for cross-border claims.
- 12.36 Regarding time limits on small claims courts, the substantive law defines the terms of time expiration or explanation of complaints.

**Issues with complaint handling and enforcement in Poland**

*Ability to force carriers to pay compensations*

- 12.37 The Polish NEB imposes sanctions very frequently and the vast majority of these sanctions are paid. However, this does not mean that the carrier will automatically also pay compensation to the passenger. CAO cannot force carriers to pay compensation and it does not have any means of monitoring whether they do so. Therefore, it is not known whether carriers actually pay compensation in these cases.

*Level of sanctions*

- 12.38 The maximum level of sanctions allowed under Polish law is very low. In particular, under current exchange rates, the maximum sanction for failure to pay compensation under Article 7 is €589, marginally less than the maximum compensation payable (€600). The maximum sanction for failure to make the payment required by Article 10(2) in the case of downgrading is also less than the payment would be in most cases if a passenger on a long haul flight was downgraded.
- 12.39 Therefore, even if passengers who suffered breaches of the Regulation always complained to CAO, the regime of sanctions would not be sufficient to provide an economic incentive to comply with the Regulation. In practice, most passengers do not complain: CAO has identified that it usually only receives complaints from a small number of passengers (often only one) for each disrupted flight. Therefore, the sanctions imposed are considerably less than the cost of compensation and assistance that carriers can avoid by non-compliance. This means that Poland is not compliant with the obligation in Article 16(3) to have introduced dissuasive sanctions into national law.

*Handling of complaints for incidents which occurred in other Member States*

- 12.40 As noted above, CAO is handling complaints and imposing sanctions for events which occurred at airports in other Member States, where the carrier is registered in Poland.

- 12.41 This scope of enforcement goes further than Article 16(1) although, as the wording of this Article is permissive rather than restrictive, it is unclear whether it is non-compliant with the Regulation. However, it is non-compliant with the NEB-NEB agreement which states that the NEB can enlarge complaint handling to all complaints submitted by residents, but does not appear to permit enlargement to cover all complaints submitted relating to national carriers. A risk inherent in this approach is that two NEBs may rule on complaints relating to the same incident, and therefore potentially reach contradictory conclusions.

*Adherence to time limits for procedure handling in case of bankruptcy*

- 12.42 CAO considers that it is not always possible to comply with the time limits in the NEB-NEB agreement, and suggests that this should be extended particularly in the case of bankruptcy of a carrier.

**Conclusions**

- 12.43 The activities of the Poland NEB appear to be effective and successful in many areas. In particular, CAO handles all complaints, investigates all cases of extraordinary circumstances, imposes sanctions for every infringement identified, and is successful in collecting sanctions. In addition, CAO makes an effort to handle complaints and communicate with passengers in languages other than Polish, providing an informal translation into English of its communications.

- 12.44 However, the key weakness is that the maximum level of sanctions is too low to provide carriers with an economic incentive to comply with the Regulation in all circumstances, and for this reason Poland appears not to be compliant with Article 16(3). In addition, the fact that the NEB is imposing sanctions for incidents that did not occur on its territory appears to go further than permitted by Article 16(1).

*SWOT analysis*

- 12.45 A SWOT analysis of the complaint handling and enforcement processes in Poland is provided below.

TABLE 12.4 SWOT ANALYSIS: POLAND

Strengths	<ul style="list-style-type: none"> <li>• Sanctions are applied in all cases of non-compliance</li> <li>• Adequate resources available to CAO to handle complaints</li> <li>• Aviation technical and operational expertise is available to analyse cases of extraordinary circumstances</li> <li>• Inspections are carried out to verify compliance</li> <li>• Co-operation with other NEBs and the Polish ECC</li> <li>• Translation into English provided in correspondence with passengers</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Sanctions are too low to incentivise compliance</li> <li>• Small claims court system is slow for passengers. The process takes often more than 6 months.</li> <li>• Inability to force carriers to pay not only sanctions but also compensations to passengers</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• The complaint handling process is relatively slow and could be accelerated</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• Polish carriers may challenge the imposition of sanctions by CAO for incidents which do not occur in Poland</li> <li>• At least one carrier is contesting CAO's ruling on extraordinary circumstances because operation of the flight would have been unsafe</li> </ul>

## 13. SLOVAK REPUBLIC

### The National Enforcement Body

- 13.1 The NEB for the Slovak Republic is the Slovak Trade Inspectorate, or Slovenská Obchodná Inšpekcia (SOI). Its role is defined by Act No 128/2002 on State Inspection (the State Inspection Act), which establishes SOI as the general body for internal market oversight and for domestic consumer protection. SOI has its headquarters in Bratislava and also eight regional inspectorates in regional centres, which report to the head office. SOI is a state administration body funded by resources from the state budget, and is independent of the aviation industry.
- 13.2 The role of the central inspectorate is to oversee and guide the activities of regional inspectorates. The central inspectorate is also responsible for second stage administrative proceedings and subsequently for issuing second level decisions.

#### *Resources available*

- 13.3 There are no employees at SOI who work full time on Regulation 261/2004. SOI informed us that there are at the time of writing four employees competent to handle cases – two based at the SOI headquarters, and two at regional inspectorates – but that in total their work on the Regulation is equivalent to 0.5 FTE. Currently, only the Bratislava and Košice regional inspectorates handle cases relating to the Regulation, as Bratislava M. R. Stefanik and Košice Barca are the only airports where infringements have been reported to SOI.

### Legal basis of complaint handling and enforcement

- 13.4 There are two acts which give powers to SOI to ensure compliance with air passenger rights. The first is Act No 128/2002 on state inspection of domestic markets in the matter of consumer protection (State Inspection Act). The State Inspection Act is also called the ‘Competences Act’ as it defines the competences of the SOI. The State Inspection Act entitles SOI to:
- conduct inspections at any company selling products or providing services, and note any shortcomings related to these activities;
  - request actions to remedy the shortcomings and impose preventative measures;
  - review companies to ensure such actions and measures have been implemented;
  - cooperate with other administrative bodies if necessary and receive suggestions from consumers; and
  - impose sanctions for infringements.
- 13.5 The second act is Act No 250/2007 on consumer protection. Although this Act does not give any powers to the SOI it provides the legal framework for its consumer protection activities. The Act defines some key terms, such as consumer, seller and manufacturer, and defines consumers’ rights and sellers’ responsibilities.
- 13.6 Under the State Inspection Act, a given regional inspectorate of the SOI can impose sanctions on any natural or legal entity up to a value not exceeding €66,000 (2,000,000 in former SKK). The size of the sanction is determined by the regional

inspectorate, taking into account factors such as the number of complaints received from passengers in relation to a given air carrier, and whether or not it is a repeated infringement. Sanctions can be imposed for all possible breaches of the Regulation.

- 13.7 Any sanctions imposed follow an administrative rather than criminal procedure. The State Inspection Act states that where a decision by an inspectorate finds that there has been an infringement of the Regulation, it must be accompanied by a fine for the relevant carrier.
- 13.8 SOI can impose a sanction either on site (at an airport, or at an airline's office) or as a result of a decision. Sanctions applied through a decision are referred to as 'protective measures'. Individual decisions are not required for complaints, and several proceedings based on complaints from different passengers can be resolved with one inspection and decision.
- 13.9 An inspected airline is legally obliged to facilitate the inspection process and failure to do so may result in SOI imposing an administrative penalty of up to €1,660. This penalty can be applied repeatedly. However, in investigations regarding Regulation 261/2004 it is much more common for SOI to impose 'protective measures'.
- 13.10 The sanctions SOI can impose on air carriers under the State Inspection Act are summarised in Table 13.1.

**TABLE 13.1 FINES AVAILABLE: SLOVAK REPUBLIC**

Sanction	Maximum sanction
On site during inspection - first infringement	€3,319
On site during inspection - repeated infringement within one year	€6,639
Protective measure - first infringement	€33,194
Protective measure - repeated infringement within one year	€66,388
Administrative penalty - violation or obstructing of the inspection process	€1,660

### Complaint and enforcement statistics

#### *Complaints*

- 13.11 In 2008, SOI received 39 complaints relating to the Regulation, of which only 28 were classified as valid. There has been an increasing trend of complaints: in 2007 28 complaints were received and in 2006, SOI received 21. During the first seven months of year 2009 the number of complaints received was 229 (equivalent to an annual total of 393, assuming even numbers of complaints across the year). Note that these annual totals exclude any complaints regarding foreign carriers.
- 13.12 The number of complaints received increased steadily between 2006 and 2008, then rose steeply in 2009. The steep rise in 2009 can be attributed to the difficulties experienced by SkyEurope Airlines, which was the carrier with the largest volume of traffic operating in the Slovak Republic. During 2009 the carrier's financial problems resulted in a reduction of its available fleet, as some aircraft were confiscated by the

leasing company. This led to many delays and flight cancellations during the summer season. Finally, at the end of August 2009, Sky Europe ceased operations.

- 13.13 As illustrated in Table 13.2 below, the vast majority of valid complaints received by SOI related to flight cancellations. Of 39 complaints received by the SOI in 2008, 11 were rejected as not valid. The rest related to flight cancellations. All 28 valid complaints were investigated by conducting inspections directly at the carriers' location. In total, 14 inspections were conducted. Sanctions were imposed by the SOI on the carriers, mostly for non-compliance with Article 8 of the regulation requiring air carrier to provide compensation for cancelled flights within 7 days. SOI informed us that the carrier eventually paid compensations or refunds in all 28 cases related to cancellations.

**TABLE 13.2 TYPES OF COMPLAINTS RECEIVED IN YEARS 2006-2009: SLOVAK REPUBLIC**

	2006	2007	2008	2009*
<b>Valid</b>				
Cancellations	1	9	28	-
Long delays	1	0	0	-
Denied boarding	0	2	0	-
Other	5	3	0	-
<b>Total valid</b>	<b>7</b>	<b>14</b>	<b>28</b>	<b>205</b>
<b>Not valid</b>				
Cancellations	5	2	9	-
Long delays	4	1	0	-
Denied boarding	0	1	0	-
Other	5	10	2	-
<b>Total not valid</b>	<b>14</b>	<b>14</b>	<b>11</b>	<b>24</b>
<b>Total</b>	<b>21</b>	<b>28</b>	<b>39</b>	<b>229</b>

\* Data covers the period to 31 July 2009 (split not available yet). Source: SOI

- 13.14 The split by air carriers of all complaints received in 2008 is as follows:

- SkyEurope Airlines - 37 complaints, of which 28 valid;
- Air Slovakia - 2 complaints, both not valid.

#### *Enforcement*

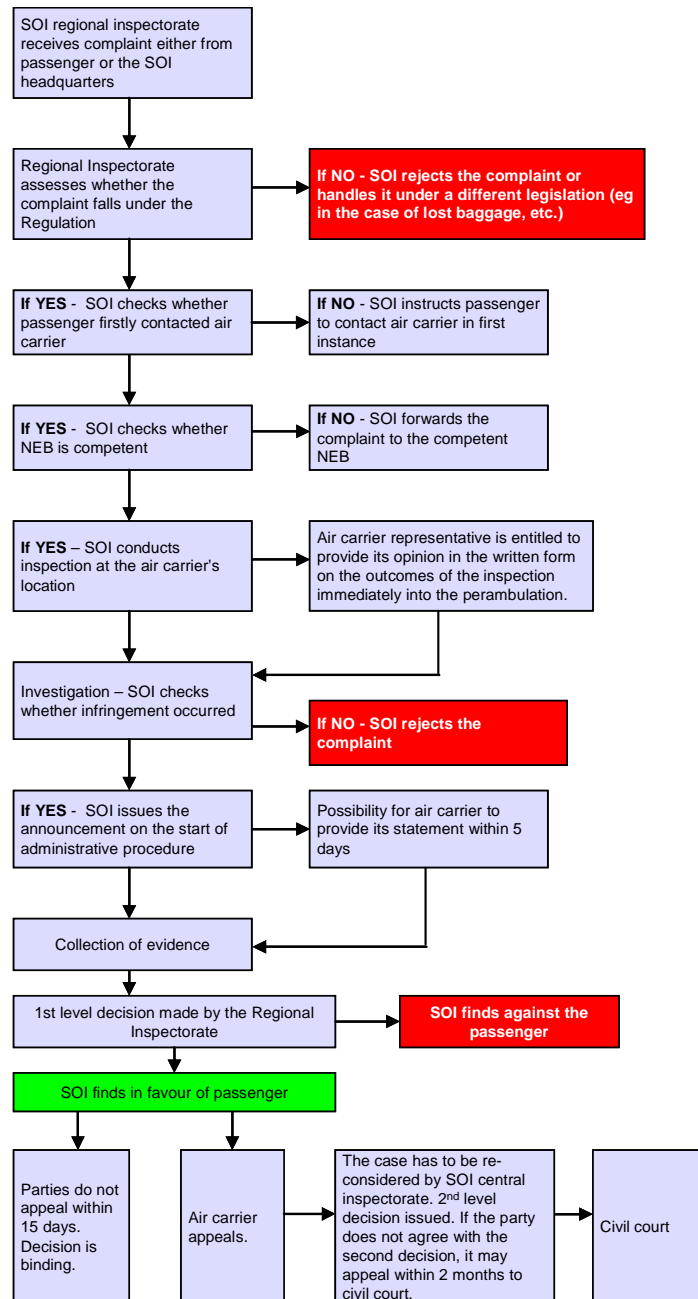
- 13.15 In 2008, SOI issued 14 decisions imposing sanctions on air carriers with a total value of €46,390 (average sanction of €3,314). In 2007, the sanctions applied had a total value of €664. SOI informed us that not all sanctions imposed to date have been paid. Statistics on sanctions are not available, as payments are paid directly to the state budget and cannot be monitored by SOI. SOI were unable to inform us which other state body was responsible for collecting fines. Note that since the Regulation came into force sanctions have been imposed only on air carriers based in the Slovak Republic, in particular SkyEurope Airlines and Air Slovakia.



**The complaint handling and enforcement process**

13.16 SOI’s complaint handling and enforcement process is summarised in Figure 13.1 below. Complaints are always handled by the regional offices; if the main office of the NEB receives a complaint, it is forwarded to appropriate regional inspectorate. SOI is the only body responsible for complaint handling. Passengers are required to contact the air carrier before submitting a complaint to SOI.

**FIGURE 13.1 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: SLOVAK REPUBLIC**



13.17 SOI is required by the State Inspection Act to conduct an inspection at the air carrier’s headquarters for every complaint. Multiple complaints received in a short time-period can be addressed in one inspection; in 2008, SOI received 39 complaints and

conducted 14 inspections. The State Inspection Act also requires the inspected airline to allow SOI inspectors to enter its premises to carry out the inspection. Since SOI is required to make an inspection for every complaint, they are unable to investigate any complaints regarding airlines based outside the Slovak Republic. For such complaints they will gather what evidence they are able to obtain (for example from Slovakian airports) and forward this with the complaint to the NEB of the State in which the carrier is registered.

- 13.18 Reactive inspections as part of the complaint handling process seem to be effective not only for the purpose of investigation, but also as a way of encouraging airlines to make any required payments to complaining passengers quickly. SOI informed us that SOI's announcement of a planned inspection (by phone or by email) can often be sufficient to make the carrier pay refunds or compensation to the passenger immediately. However, in such cases – where the complaint is resolved before the inspection takes place – sanctions are usually imposed anyway, for non-compliance with the time limits set out in Article 8.

*Time taken to resolve complaints*

- 13.19 The average time taken to resolve a typical complaint is 2 months. However, where complaints did not relate to refunds requested from SkyEurope, SOI was able to resolve many cases in less than a month. The legislation setting out how SOI responds to complaints does not state any time limits for their responses.

- 13.20 SOI informed us that they had received a large number of complaints in the weeks leading up to our meeting (9 September 2009) because of the large number of cancelled SkyEurope flights. The current time needed to resolve a complaint may be longer due to overloading of the Bratislava Inspectorate's staff.

*Claims of extraordinary circumstances*

- 13.21 To date SOI has only received complaints claiming extraordinary circumstances from non-Slovakian airlines, and has therefore been unable to investigate them. For one case claiming that adverse weather had prevented a flight they were able to gather information from Bratislava airport and forward it to the NEB for the State in which the carrier was based.

- 13.22 Since the State Inspection Act requires all cases to be investigated, if a Slovakian carrier were to claim extraordinary circumstances then SOI would investigate the case. The State Inspection Act allows SOI to call on other administrative bodies for assistance where special technical expertise is required, however this is yet to be put into practice and it remains to be seen whether SOI would be able to draw on the expertise required to determine if a problem should be regarded as extraordinary.

*Response issued to the passenger*

- 13.23 Once the administrative proceedings are finished (namely that the decision has been issued and any appeal procedures have been completed), the SOI publishes the decision on its website. No formal letters containing rulings or statements of the

outcome are sent to the passenger, but all final decisions of the SOI from the current year are available on its website.

*Circumstances under which sanctions are imposed*

- 13.24 Under the State Inspection Act sanctions are obligatory: if any infringement of the Regulation is confirmed by the inspection at the air carrier's office and by the subsequent investigation, then a sanction is always imposed. The value of the sanction is variable and is determined by the particular regional inspectorate, taking into account various factors including the number of complaints received<sup>13</sup>.

*Imposition of sanctions on carriers not based in the Member State*

- 13.25 Sanctions can be imposed for all possible breaches of the Regulation, however only on national carriers. Sanctions cannot be imposed on non-national carriers as the Act on State Inspection defines the internal market of the Slovak Republic as the area of action for SOI. In addition, carriers which do not have an office in the Slovak Republic cannot be subject to investigation, and SOI is legally obliged to conduct an inspection in order to start administrative proceedings. There were a number of complaints regarding non-national carriers in 2008 which could not be processed for these reasons. Such complaints are forwarded to the NEB of the State in which the carrier is registered, but this is not always successful (as this NEB would have no powers to apply sanctions if the incident related to a flight departing from Bratislava).

*Collection of sanctions*

- 13.26 Although SOI is able to impose fines, it is not able to force carriers to pay them. If it is evident that an air carrier has not paid, the case has to be taken over by an executor. Activities of executors are set out in Act No 233/1995. According to this Act an executor can force a legal entity to pay any debt, including SOI fines, by:

- requesting payment of a claim;
- selling movable assets;
- selling stocks and bonds;
- selling immovable assets; or
- selling the company.

- 13.27 Statistics on payment of sanctions are not available, as payments are made directly to the state budget and SOI is unable to monitor them.

- 13.28 After the first decision, the carrier has 15 days to pay a fine. If the carrier requests an appeal and the fine is confirmed, the fine is to be paid within 60 days of the second decision. The carrier can ask to pay in instalments.

*Publication of information*

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<sup>13</sup> Factors are specified in the State Inspection Act, Article 9 – Fines

- 13.29 All decisions of the Regional Inspectorates from the current year are publicly available on the SOI website. Each decision published on the website includes:
- the air carrier in question;
  - the value of the sanction; and
  - a detailed description of the inspection and investigation outcomes.

**Other activities undertaken by the NEB**

- 13.30 Inspectors from the Regional Inspectorate of Bratislava Region conducted several inspections at Bratislava Airport to monitor compliance with Article 14. The inspections concluded that there were information posters at the airport, and that information leaflets were available in the main hall, at check-in counters, in the customs area as well as at the information stand of each air carrier. SOI concluded that provision of information to passengers at Bratislava airport is generally good. SOI's inspections did not include observing airlines' responses to incidents, or checking the knowledge or training of staff.

**Work with other organisations**

- 13.31 SOI does communicate with NEBs from other Member States when necessary, however, this is problematic given the nature of the requests that SOI is making. For example, the NEB for another Member State has refused to handle complaints regarding its carriers where the possible infringements took place outside Ireland. The NEB concerned has confirmed to us that it had had these requests from SOI but did not proceed as, under Article 16, SOI not it is the competent NEB. As the carrier concerned is not represented by any office in the Slovak Republic, SOI is not able to undertake inspections as required by law, and thus these complaints have not yet been resolved in the Slovak Republic.
- 13.32 Where a complaint needs to be forwarded to other NEB, SOI uses the CPC Network. The SOI also forwards the complaint form received from the passenger. In the case that the complaint is in Slovak, a translation in English is provided to be sent to the competent NEB. SOI has had no contact with the ECC network. The Association of Slovak Consumers (ZSS) informed us that SOI does not work closely with Slovak consumer organisations.

**Alternative means for passengers to obtain redress**

- 13.33 There is no dedicated Alternative Dispute Resolution (ADR) body or small claims court procedure in the Slovak Republic. However, extrajudicial settlement of disputes is facilitated by some consumer organisations, including ZSS. ZSS informed us that awareness of consumers in this area is still poor in Slovakia, and that mediation services of consumer organisations are not well used.
- 13.34 In cases where the air carrier does not pay compensation or a refund to the passenger, a decision issued by the SOI can be used as evidence in a civil court. The costs and timescales of civil cases vary and depend on the conditions of individual cases. The fee for opening a civil case is 6% of the value of the claim (minimum €16.50, maximum €16,600).

## Issues with complaint handling and enforcement in the Slovak Republic

### *Ability to investigate cases and impose fines on non-national air carriers*

- 13.35 As inspection on-site is a required part of the handling process for every complaint, SOI is unable to process complaints related to carriers without a representative office in the Slovak Republic. Further to the insolvency of SkyEurope, foreign carriers now account for most passenger traffic from Slovakia. Cases relating to these carriers are forwarded to the NEB in the Member State where the air carrier has its headquarters. Since these NEBs do not have the power to investigate these cases, this results in some complaints never being investigated.
- 13.36 The inability of SOI to handle complaints relating to foreign carriers breaches the first principle in the NEB-NEB agreement, requiring NEBs to be competent for complaints related to incidents occurring on their territory. It also breaches Article 16(1) of the Regulation, requiring NEBs to be “responsible for the enforcement of this Regulation as regards flights from airports situated on its territory” and Article 16(3), requiring States to introduce dissuasive sanctions.

### *Lack of knowledge of collected fines*

- 13.37 Although SOI is able to pass fines to an executor endowed with powers to ensure collection, they have no way of monitoring these fines once they have been passed on: fines are paid directly to the State rather than via SOI. This makes it impossible for SOI to check whether fines have in fact been collected, and indeed they had been able to establish that at least some of the fines imposed on SkyEurope in 2008 had not been paid to date.

### *Lack of passenger interaction*

- 13.38 SOI do not inform the complaining passenger of the decision they have reached regarding this case. This is different to most other States, where the end of the complaints process is a letter to the passenger setting out the decision which has been reached and the reasons for that decision. All decisions are available on the SOI website; however it would be valuable for a passenger to personally receive an explanation of their case, and to have the opportunity of discussing it with its handler.

## Conclusions

- 13.39 The complaint handling system in the Slovak Republic is particularly strong in the area of imposing sanctions and forcing carriers to pay compensations and refunds to passengers. SOI is able to impose sanctions regularly and systematically, and 100% of all passengers whose complaints were investigated received compensations or refunds if they were entitled to them. The value of the maximum sanction for repeated infringement (€66,000) should be sufficient to be dissuasive, given it has to be applied in every case of a valid complaint.
- 13.40 The key weakness in the complaints handling and enforcement regime is that, as discussed above, SOI is unable to take any action on complaints regarding non-national airlines. This is particularly unfortunate in a context where the largest airline operating in Slovakia is now a foreign airline.

*SWOT analysis*

- 13.41 A SWOT analysis of the complaint handling and enforcement processes in the Slovak Republic is provided in Table 13.3.

**TABLE 13.3 SWOT ANALYSIS: SLOVAK REPUBLIC**

Strengths	<ul style="list-style-type: none"> <li>• There is a system of obligatory sanctions, and SOI have the ability to apply them regularly and systematically</li> <li>• The maximum value of a sanction for repeated infringements is sufficient to be dissuasive</li> <li>• SOI has a high success rate of compensations/refunds paid to passengers by air carriers, although in many cases the carriers paid only after an SOI inspection</li> <li>• Communication with airport authorities when collecting evidence</li> <li>• Ability to use operational and technical expertise available in other state administration bodies if needed (e.g. CAA)</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Inability to investigate complaints on foreign carriers without representative office in the Slovak Republic</li> <li>• Communications with passengers not as detailed as in other States</li> <li>• Inability to force an air carrier to pay sanction</li> <li>• Inability to sanction foreign carriers</li> <li>• Communication with consumer organisations</li> <li>• Inspections on site may not be required for every complaint, and could in some cases be a waste of resources</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• Better usage of ECC network</li> <li>• A more flexible system for investigating complaints could improve the efficiency of complaint processing</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• Low staff numbers and need to conduct inspection on each complaint can significantly prolong time needed to handle a complaint in abnormal situations such as carrier bankruptcy</li> </ul>

## 14. SPAIN

### The National Enforcement Body

14.1 The National Enforcement Body for Spain is AESA (the State Aviation Safety Agency), which is a public organisation responsible to the Ministry of Public Works. Until 2008, enforcement of the Regulation was the responsibility of the Directorate-General for Civil Aviation (DGAC), part of the Ministry, and AESA has been formed with staff from DGAC and is based in the same building. AESA's main responsibility is for safety regulation, including inspections, approvals, and enforcement, but it is also responsible for enforcement of passenger rights legislation in Spain.

14.2 There is no separate body responsible for complaint handling. This is undertaken by the department within AESA responsible for quality and user protection.

#### *Resources available*

14.3 AESA has the following full time equivalents working on complaints handling and enforcement of this Regulation:

- Passenger service, such as complaint handling: 15 FTEs
- Inspections: 2.5 FTEs
- Enforcement and sanctions: 2 FTEs

#### **Legal basis of complaint handling and enforcement**

14.4 Although the Regulation took effect almost 5 years ago, there is still no specific legislation in Spain which explicitly refers to the Regulation or sanctions for non-compliance. Enforcement is undertaken on the basis of the Aviation Security Law (Law 21/2003), in particular Article 33, which states that carriers must "undertake their functions and carry out the activities for which they are responsible with respect to passengers' rights, without discriminating on the basis of place of birth, race, gender, religion, opinion or any other personal or social condition". Although sanctions have been imposed on the basis of this, it is unclear whether this is sufficient legal basis.

14.5 Law 21/2003 allows for sanctions of between €4,500 and €4.5 million, depending on the severity of the infraction. However, in all cases, the sanctions depend on the extent to which the infraction was committed deliberately or negligently, and the impact of the damage caused. Under most circumstances sanctions for breaches of passenger rights would count as minor infractions and therefore the sanction would be €4,500.

14.6 The other legislation which is relevant for the enforcement of the Regulation is:

- Royal Decree 28/2009, by which the inspection regime was approved;
- the Law on Public Administrations and Administrative Procedures (Law 30/1992), which defines how AESA must operate; and
- the Regulation on Procedures for the Imposition of Sanctions (Royal Decree 1398/1993).

14.7 AESA informed us that the Spanish government is considering updating the Aviation Security Law to make explicit reference to the Regulation. However, we were told by DGAC at the time of our 2006/7 study into the operation and results of the Regulation that the law would be amended during 2007, and there does not seem to have been any progress since then.

**Complaint and enforcement statistics**

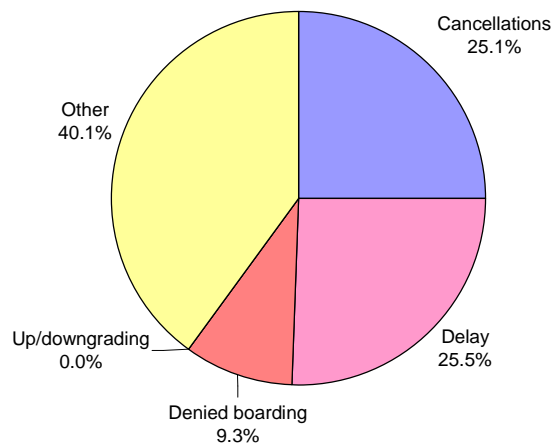
*Complaints*

14.8 AESA received 9,090 complaints from passengers in 2008, although around 40% of these did not relate to the issues covered by the Regulation. The majority of the other complaints received by AESA related to luggage issues. In contrast to most other States where cancellations account for the clear majority of complaints, in Spain slightly more complaints were received about delays.

14.9 AESA had received 6,684 complaints between 1 January and 23 July 2009, which indicates that the number of complaints is still increasing in Spain despite the fall in air traffic volumes.

14.10 Figure 4.1 summarises the number of complaints received in 2008.

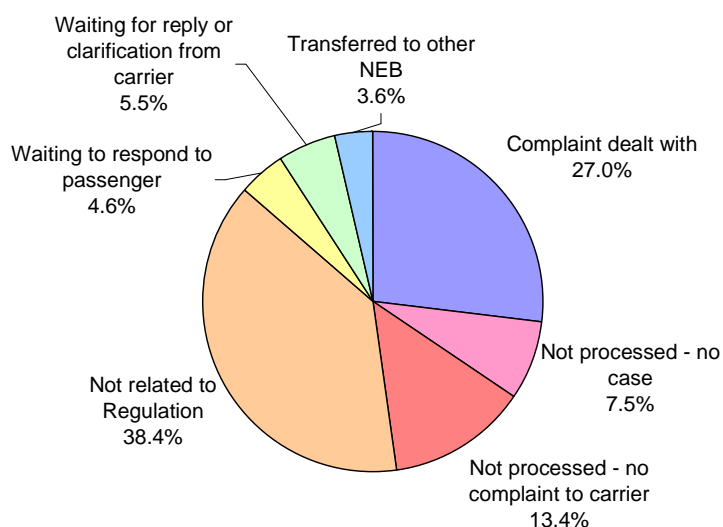
**FIGURE 14.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: SPAIN**



Source: SDG analysis of AESA data

14.11 AESA statistics for the status of complaints received during 2008 are shown below (Figure 14.2). This shows that the majority of complaints were not processed, either because they did not relate to the Regulation, because the passenger had not already complained to the carrier, or there was no prima facie case. However, AESA statistics do not show the outcome of the complaint, such as whether the carrier was found to have breached the Regulation or whether it ultimately paid compensation.



**FIGURE 14.2 STATUS OF COMPLAINTS RECEIVED DURING 2008: SPAIN**

Source: SDG analysis of AESA data

14.12 In addition passengers can complain to AENA, which is a state-owned company that currently operates almost all of the Spanish airports, as well as air traffic management in Spain. AENA informed us that it receives a significant number of complaints at its offices at the airports. The complaints it received relating to this Regulation in 2008 were:

- 6,326 complaints about delays;
- 5,039 complaints about cancellations;
- 824 about denied boarding; and
- 52 about downgrading.

14.13 In total, AENA received almost twice as many complaints on issues relating to the Regulation as AESA. However, AENA is not a body designated to handle complaints under the Regulation. AENA informed us that when it receives complaints relating to the Regulation, it:

- forwards the complaint to the airline;
- notifies the passenger that it has done this, and also tells them to contact AESA if it believes that the airline has failed to comply with its obligations; and
- in the event it receives repeated complaints about the same airline, or passengers complain that they have not had responses from the airline, AENA sends complaints directly to AESA.

#### *Enforcement*

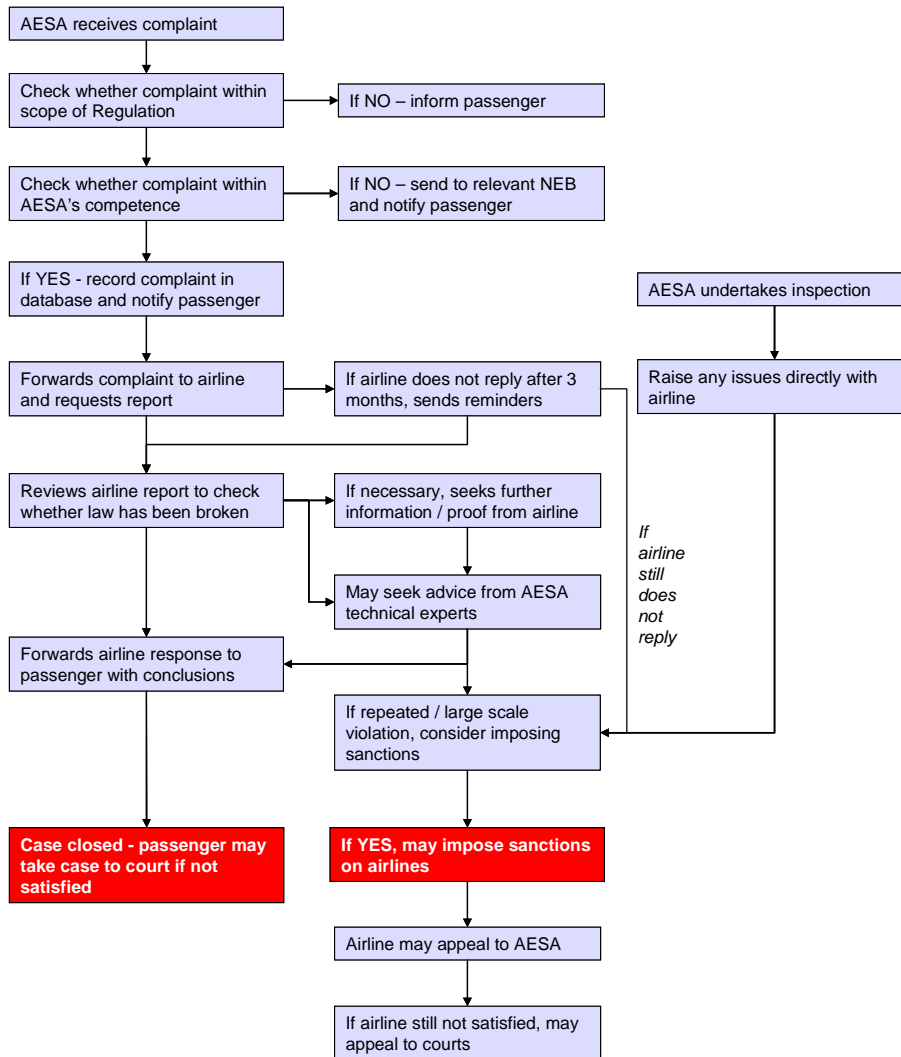
14.14 15 fines were imposed on carriers in 2008 and a further 15 fines had been imposed in the first seven months of 2009. Of these, 31% had been paid by the airlines. In the other cases the airline was either contesting the sanction with AESA, or had appealed to the courts.

14.15 The vast majority of the sanctions were at the lowest end of the scale (€4,500) but one sanction of €135,000 had been imposed on a low cost carrier for repeated failure to offer assistance and instead relying on passengers to claim with a receipt afterwards.

**The complaint handling and enforcement process**

14.16 The complaint handling and enforcement process in Spain is shown in Figure 4.2 below.

**FIGURE 14.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: SPAIN**



14.17 The process of complaint handling in Spain is similar to that in other Member States.

14.18 AESA accepts complaints in written form or by fax but not by email. It will accept complaints, and communicate with passengers, in Spanish and English. Complaints are recorded in a bespoke database (SOTA).

*Time taken to resolve complaints*

14.19 AESA informed us that it typically takes 3-4 months to resolve complaints but it does not have detailed statistics.

*Claims of extraordinary circumstances*

- 14.20 AESA is currently investigating all claims by airlines that there are extraordinary circumstances. However, at the time that we met AESA, it informed us that it did not always have sufficient technical skills to decide on whether extraordinary circumstances applied, and therefore the processing of these complaints was being delayed temporarily.
- 14.21 A consumer organisation told us that it considered AESA to rely excessively on statements by airlines that they had complied or that cancellations were due to extraordinary circumstances, rather than validating this with independent sources, such as AENA.

*Response issued to the passenger*

- 14.22 AESA does provide an individual response to each passenger, providing a copy of the response from the airline and its view on whether the airline has complied with the Regulation. There is also a telephone query service which passengers can contact if they want more explanation or assistance.
- 14.23 However, AESA considers that it cannot become involved in deciding a dispute about a private contract between a passenger and a carrier. Therefore, it may consider imposing sanctions but it will not instruct an airline to pay compensation in an individual case. An airline may decide to pay when AESA becomes involved, but if it does not, the passenger would need to go to court if they wish to obtain redress.

*Circumstances under which sanctions are imposed*

- 14.24 AESA does not have a written policy on when sanctions should be imposed. It informed us that in practice it will impose a sanction where the airline has repeatedly breached the Regulation and this is causing significant harm to passengers' interests.

*Imposition of sanctions on carriers not based in the Member State*

- 14.25 There are no limitations on imposition of sanctions on carriers that are not based in Spain. The notification of the sanction is sent by registered mail; provided a receipt can be obtained, there is no problem in sending these outside Spain.

*Collection of sanctions*

- 14.26 As noted above, only 31% of sanctions that have been imposed to date have been paid. However, AESA informed us that this was largely a result of the fact that sanctions had only been imposed on airlines in the last 2 years, and airlines were appealing against many of the sanctions which had been imposed. If an airline decides to appeal to the courts, the process can last several years, and they would not be obliged to pay whilst the appeal was pending.
- 14.27 When sanctions are imposed, they have to be paid to AESA. However, collection of sanctions is the responsibility of the state tax/customs agency (Agencia Estatal de Administración Tributaria). In the event that the company does not pay, it can withdraw the money directly from the carrier's bank accounts in Spain. However,

AESA informed us that, where a carrier does not have a registered entity in Spain and hence a fiscal identification code (Código de identificación fiscal) this is not possible. This would include most low cost carriers based in other Member States. Therefore where these companies do not pay sanctions voluntarily, it may be difficult to force payment.

*Publication of information*

- 14.28 AESA does not publish statistics for sanctions and complaints. However, details have been made public on occasions by Ministers or other senior officials in response to questions in Parliament.

**Other activities undertaken by the NEB**

- 14.29 140 inspections were undertaken by DGAC/AESA in 2008 and AESA expected to undertake approximately 145 inspections during 2009, of which 115 are planned inspections to check compliance with Article 14, and approximately 30 will be carried out to check carriers' compliance with their obligations towards passengers in the case of delay, cancellation and denied boarding. The number of these inspections cannot be stated precisely because they are initiated when AESA staff are at the airport and an incident occurs: it cannot be known in advance when an incident will occur and therefore whether the inspector will be able to monitor compliance.

- 14.30 On the basis of the inspections AESA has been able to make an assessment of the extent to which carriers operating in Spain are complying with the Regulation. It estimates that around 75% comply with their obligations under Article 14 and 65% comply with their obligations relating to delays, cancellations and denied boarding.

- 14.31 AESA has also undertaken information campaigns both to inform passengers about their rights and to remind airlines of their obligations.

**Work with other organisations**

- 14.32 Where AESA receives complaints which relate to incidents that occurred in other Member States, it forwards the complaint to the appropriate NEB, with a short summary in English.

- 14.33 AESA has not used the CPC Network to date although it expects to do so in the future. It has also not had significant contact with the ECC Network.

**Alternative means for passengers to obtain redress**

- 14.34 Although there is an arbitration system for consumer disputes in Spain, it can only be used where both parties agree. Both AESA and a consumer organisation informed us that airlines generally do not agree to use this system for disputes about passenger rights.

- 14.35 The Spanish court system has a simplified procedure for small claims. The claim can be submitted via a standardised form, a lawyer is not required, and because legal representation is not compulsory, it is not possible for an order for costs to be levied against the losing party, which reduces the risk for a consumer bringing a case against

an airline. However, this only applies for claims of less than €900 and therefore it does not cover all potential claims under the Regulation. Claims can be made up to 2 years after the incident occurs.

- 14.36 In addition, airlines informed us that some regions in Spain have their own consumer court systems which can decide to handle cases relating to the Regulation. Airlines expressed concern that these might not always have the necessary technical skills to rule on complaints.

#### **Issues with complaint handling and enforcement in Spain**

- 14.37 A key problem with enforcement of the Regulation in Spain is that there is still no law which specifically introduces sanctions for non-compliance into national law. It therefore appears that Spain may be non-compliant with Article 16. As noted above, the NEB is undertaking enforcement on the basis of existing law, but the reference in this law to passenger rights seems weak, and it is unclear whether sanctions imposed on the basis of this law will be upheld by the courts. We were informed by the precursor NEB at the time of our 2006-7 study that the law would be amended during 2007, but by mid-2009 this has not happened, and whilst it is still under consideration, change does not appear to be imminent.
- 14.38 The number of complaints received by the NEB in Spain is high. In part, this is because Spain is the second-largest market for air transport in Europe, after the UK, but the rate of complaints is also higher than in most other States. Stakeholders informed us that there were particular problems with flights between Spain and Latin America, and there have been a number of press reports in Spain about long delays and cancellations to some of these flights. It is unclear why there would be more problems with these flights than with other long haul flights operated to/from EU airports although the situation may be exacerbated by the fact that there is relatively limited competition on many of these routes.
- 14.39 Although AESA has more staff working on passenger rights issues than most other NEBs, there appear to be significant delays in handling complaints. AESA acknowledged that complaints often took 3-4 months, although it attributed this to the fact that some airlines took a long time to respond to it. A Spanish consumer organisation informed us that passengers typically had to wait 2-3 months for even an initial response and that the final resolution of the case could take much longer. In addition, AESA does not consider it to be part of its role to adjudicate in individual disputes between passengers and carriers, and therefore, even if it imposes a sanction in an individual case, it does not instruct carriers to pay compensation.
- 14.40 In addition, the fact that there is no alternative dispute resolution system in Spain means that it can be difficult for consumers to obtain redress. The fact that the small claims court process only applies for claims of less than €900 means that it cannot be used for all claims under the Regulation.
- 14.41 There are no specific limitations on imposition of sanctions on carriers that are not based in Spain, but the system for collection of sanctions appears to rely on the company having an office, and hence a bank account, within Spain. Collection of sanctions is at an early stage – sanctions have only been imposed relatively recently,

and do not have to be paid whilst a company appeals – but if this is not resolved, there may be little incentive for carriers not based in Spain to pay sanctions, and therefore there would be little incentive for them to comply with the Regulation on flights from airports in Spain. This also implies that Spain is not compliant with Article 16.

### **Conclusions**

- 14.42 Complaint handling and enforcement in Spain appear to have improved since the study that we undertook in 2006-7. However, the fact that there is still no specific reference to Regulation 261/2004 in national law means that the legal basis for enforcement is weak. Due to the time taken for appeals in the national legal system, it is unclear whether sanctions imposed on the basis of the existing law will be upheld, and therefore, it is unclear whether Spain has as yet introduced dissuasive sanctions as required by Article 16(3). In addition, the limited ability to collect sanctions from carriers without a registered entity in Spain means that there are no dissuasive sanctions for these carriers.

#### *SWOT analysis*

- 14.43 A SWOT analysis of the complaint handling and enforcement processes in Spain is provided below.

TABLE 14.1 SWOT ANALYSIS: SPAIN

Strengths	<ul style="list-style-type: none"> <li>• Technical/operational expertise available within AESA to investigate complaints – although not always available for complaint handling</li> <li>• A relatively large number of inspections are carried out by AESA to verify compliance. Unlike in many other States, these inspections are not limited to ensuring compliance with Article 14.</li> <li>• Sanctions have been imposed for non-compliance</li> <li>• In certain circumstances it is possible to impose high sanctions on carriers, which should incentivise compliance</li> <li>• Sanctions can be imposed through an administrative process</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• There is no explicit reference in national law to the Regulation</li> <li>• Under most circumstances the sanction for non-compliance with the Regulation would be low (€4,500) which may not be sufficient to incentivise compliance</li> <li>• The complaint handling process is slow partly due to the volume of complaints</li> <li>• AESA does not rule on individual complaints as it considers these to relate to private contracts between passengers and airlines. It will not instruct a carrier to pay compensation or reimburse a passenger.</li> <li>• There is no alternative dispute resolution or mediation system</li> <li>• The small claims court process can only be used for claims of under €900 which excludes some potential claims under this Regulation</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• The creation of AESA as an independent agency could lead to improved enforcement in the future, although there is little evidence of this to date</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• AESA's ability to impose sanctions for non-compliance with the Regulation is being challenged on the basis that the law does not explicitly give it this power</li> <li>• The limited powers to collect sanctions from carriers without an office in Spain may mean that they have little incentive to comply with the Regulation</li> </ul>

## 15. SWEDEN

### The National Enforcement Body

15.1 Konsumentverket (KV) is designated as the NEB. It is the government consumer authority responsible for protecting the collective interest of Swedish consumers, and for the enforcement of the Marketing Practices Act. Its work includes monitoring for unreasonable contract terms, undertaking research into consumer issues and providing information to consumers. It does not handle individual cases, and can only act in the collective consumer interest. It reports to the Ministry of Integration and Gender Equality.

15.2 Two other organisations have a role in handling cases but are not designated as NEBs:

- Allmänna reklamationsnämndens (ARN, the Swedish Consumer Agency) is responsible for complaint handling. ARN is also a government consumer authority. Although independent of KV, it is funded by and reports to the same government department. It functions as an alternative dispute resolution (ADR) body for all consumer complaints, including those regarding the Regulation. In total they handle around 10,000 cases per annum.
- The Consumer Ombudsman is independent of ARN, but has links with KV: the Ombudsman and the Director General of KV is the same person, performing different roles. As Consumer Ombudsman he bases his legal actions on the investigations made by KV, but is independent when deciding on legal actions. The Ombudsman can offer legal aid where a court precedent would be beneficial to the collective consumer interest. In relation to Regulation 261/2004, the Ombudsman performs part of the sanction-imposing function.

15.3 The CAA has no involvement in the implementation of the Regulation.

#### *Resources available*

15.4 KV has three members of staff who are competent to work on the Regulation, with work undertaken totalling 1 FTE. There are approximately 120 staff in total. ARN has eleven members of staff competent to work on the Regulation, out of 35 total staff. This is equivalent to 1-2 FTE. The Ombudsman has only occasional involvement with the enforcement of the Regulation. There are 6 staff working for the Ombudsman, drawn from staff at KV.

15.5 Neither KV nor ARN has internal operational or technical expertise, and do not draw on this from staff within CAA.

#### **Legal basis of complaint handling and enforcement**

15.6 Chapter 9, Section 11 of the Swedish Aviation Act designates KV as the NEB competent to enforce Article 14 of the Regulation. KV is only designated as the NEB for enforcement, and has no role in assessing and deciding cases. The Aviation Act refers to the Marketing Practices Act, which sets out the fines and the process to be followed to impose them. Unlimited but proportionate fines can be imposed on carriers for violations of Article 14 of the Regulation, but no other fines are available.



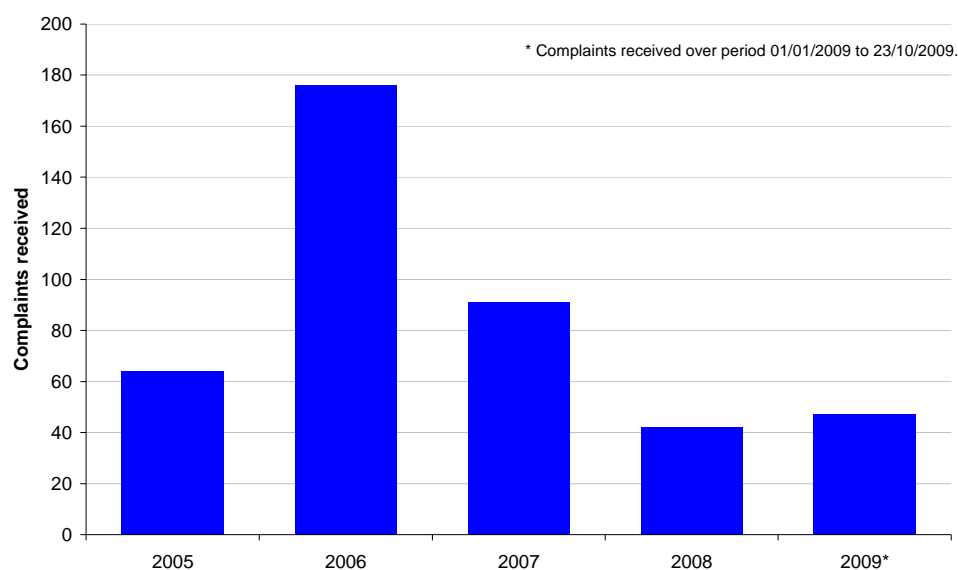
- 15.7 KV may only act in the collective interest of the consumer and cannot pursue individual cases. If an individual case shows evidence of violation of Article 14, however, this is regarded as contrary to the collective interest and KV can prosecute.
- 15.8 ARN cannot impose sanctions, but if one of their decisions is not complied with, the name of the offending carrier is published in a blacklist in a magazine, Råd & Rön. The magazine is independent of ARN, and ARN does not initiate publication.

### Complaint and enforcement statistics

#### Complaints

- 15.9 Although KV does not handle complaints, it is listed as the NEB in the list of contact details published by the Commission, and hence receives complaints. In 2008, KV received 108 complaints related to the Regulation (52% more than in 2007), of which 59 related to cancellations, and 41 had claims of extraordinary circumstances. It forwarded 1 to another NEB. Further details of complaints were not available.
- 15.10 During 2008, ARN received 42 complaints regarding the Regulation. This is 46% of the total in 2007, and 24% of the peak in 2006. The number of complaints is higher in 2009 to date, equivalent to an annual total of 58. As KV refers passengers to ARN, there is likely to be overlap between the complaints received by ARN and KV, and the total numbers of complaints should therefore not be added together.

**FIGURE 15.1 COMPLAINTS RECEIVED 2005-9: ARN, SWEDEN**

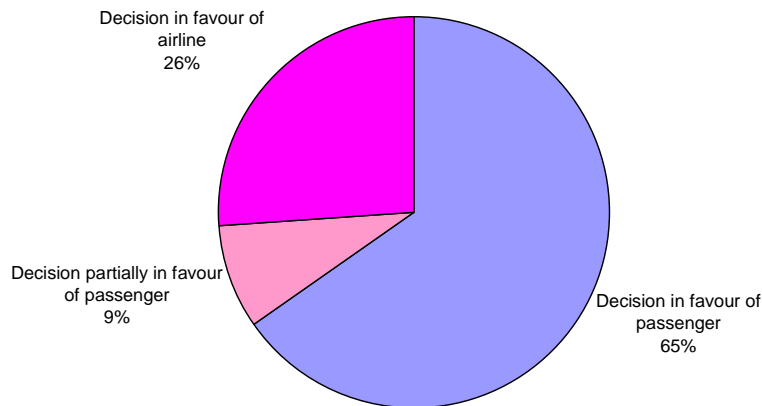


Source: SDG analysis of data provided by ARN

- 15.11 Of the complaints received by ARN in 2008, 24 were actually covered by the Regulation (excluding claims for e.g. damaged baggage). The reasons for complaints were not available. As illustrated in Figure 5.1 below, in the majority of complaints ARN found in favour of the passenger. It should be noted that there were 7 decisions in favour of the airline, but that four of these concerned cases where the passenger had

claimed for compensation as a result of delay. If these are excluded, then ARN found in favour of the passenger in 89% of cases.

**FIGURE 15.2 OUTCOMES OF COMPLAINTS RECEIVED IN 2008: SWEDEN, ARN**



Source: SDG analysis of data provided by ARN

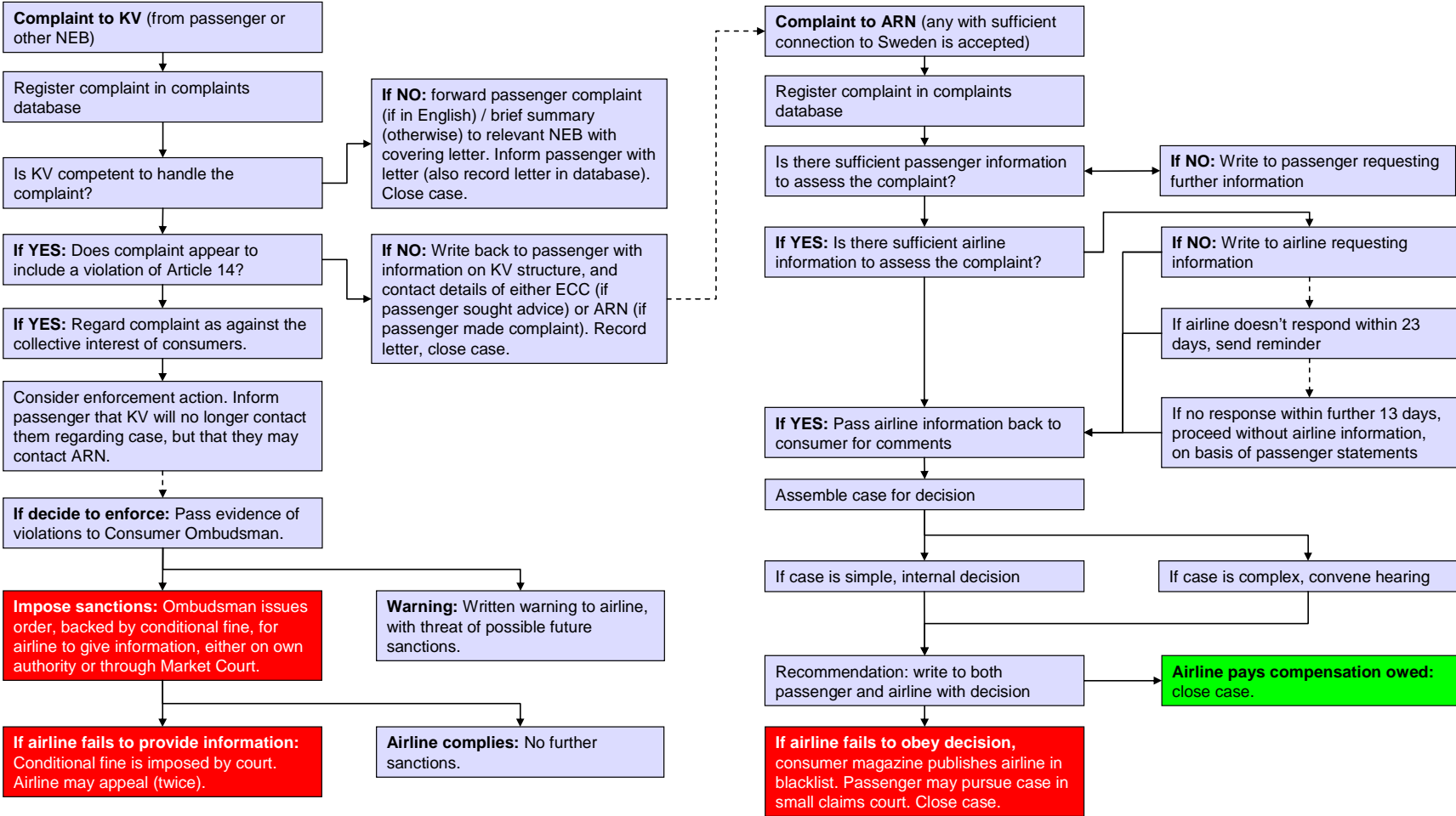
#### *Enforcement*

- 15.12 KV has not applied any sanctions to date as they have been satisfied with airline responses, and these have been checked by inspections. As noted above, KV can only consider sanctions for violations of Article 14 on provision of information, and is not able to impose sanctions for any other violations.

#### **The complaint handling and enforcement process**

- 15.13 The Swedish complaint handling and enforcement process is summarised in Figure 16.3. The process is divided into enforcement, undertaken by KV, and complaint handling, for which ARN is responsible. KV also receives complaints and will forward them to other NEBs where appropriate.

FIGURE 15.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: SWEDEN





*Complaints to ARN*

- 15.14 The Swedish process is different to many other NEBs in a number of ways. One key difference is the structure of the body responsible for making decisions on complaints. This is an ADR system for all consumer complaints, and does not regard itself as an NEB. This means that it does not adhere to the processes set out in the NEB-NEB agreements, and in particular does not forward out-of-scope complaints to other NEBs or investigate claims of extraordinary circumstances.
- 15.15 ARN gathers evidence by letter only, and conducts its procedures without requiring the presence of either concerned party. As shown in the diagram, decisions are made either internally or through a formal hearing. Approximately 50% of cases are regarded as sufficiently simple to be decided internally. The remaining half require a hearing which must have present a chairperson (a lawyer with experience of court proceedings), two representatives of consumer organisations and two (independent) representatives of the airline industry. These representatives are members of ARN.
- 15.16 The decision reached is a non-binding recommendation, and is final. There is no possibility of appeal, although a 'retrial' may be requested on procedural grounds, within 2 months of the decision; such 'retrials' are rare. 85% of recommendations made by the travel section of ARN are complied with; ARN was not able to provide compliance statistics restricted to the Regulation. Technical experts are not used to assess airline evidence, as the burden of proof is on the airline; in complex cases the judge provides procedural expertise. The CAA has no involvement in the process.
- 15.17 ARN will accept any complaint with sufficient connection to Sweden, deciding on a case-by-case basis. It will accept complaints regarding incidents which occurred in Sweden, in addition to complaints regarding incidents elsewhere that are brought by Swedish residents or citizens. However, it will only accept and respond to claims which are in Swedish, have a minimum value of 1000 SEK (€96) per passenger, and which are submitted within 6 months of a carrier's first rejection of a complaint. When KV passes a complaint to the competent NEB, it will provide a translation into English where necessary.

*Complaints to KV*

- 15.18 KV stores all correspondence regarding a complaint in the same database, so that a complaint is linked to all letters sent in response.
- 15.19 The Consumer Ombudsman is responsible for imposing sanctions. To apply a fine for violation of Article 14, KV collects evidence of violations against the collective consumer interest and passes this to the Ombudsman. The Ombudsman decides how to proceed and whether or not to impose sanctions; he may instead recommend a warning, with the threat of sanctions for future violations.
- 15.20 In simple cases, when there is a relevant precedent set by the Market Court, the Consumer Ombudsman can issue an order for the carrier to provide the information required in Article 14 of the Regulation. In cases where the Market Court has set no precedent, the Consumer Ombudsman can initiate a proceeding at the Market Court to get an order for a carrier to provide the required information in article 14 of the

regulation. This order is issued in conjunction with an administrative conditional fine, set by the Court. If the company in question does not follow the order set out by the Market Court or the Consumer Ombudsman, the Consumer Ombudsman can initiate proceedings (at the District Court of Stockholm) for imposition of the conditional fine. The carrier may appeal to the Court of Appeal (and again to the Supreme Court), and any fine would be paid after confirmation by the appeal process.

*Time taken to resolve complaints*

- 15.21 Cases regarding the Regulation involve relatively limited correspondence and typically take 3-4 months for ARN to handle. There are no legally defined time limits for handling complaints, but it is very rare that cases take more than 6 months to handle. ARN was not able to provide statistics on time taken to handle complaints.

*Claims of extraordinary circumstances*

- 15.22 ARN does not investigate any claim of extraordinary circumstances. Its view is that the burden of proof is on the airline, and it is up to them to provide sufficient information to judge the case. Around 75% of such claims have been decided in favour of the consumer. This is not only because the airline in many cases has not been able to prove that the flight cancellation was caused by extraordinary circumstances, but very often because the airline has not been able to prove that it was impossible to take such measures. Airlines operating in Sweden told us that ARN did not have the technical capability to decide on cases of extraordinary circumstances.
- 15.23 The ECJ ruling has had not much effect on ARN's rulings, as it generally judged in line with it prior to the ruling. All ARN decisions are final, so it is not reopening old cases.

*Response issued to the passenger*

- 15.24 The decision reached by ARN is a non-binding recommendation, and is final. Letters describing the outcome and the reason for it are sent to both the passenger and the airline, where appropriate instructing the airline to pay an amount owed.

*Circumstances under which sanctions are imposed*

- 15.25 KV can only impose sanctions for violations of article 14. There is no written policy, but KV informed us that it has a 'one strike and out' policy. If there are sufficient cases to show evidence of a violation (i.e. sufficient to demonstrate it was not an isolated mistake), it contacts the airline with the evidence, who have a chance to rectify the situation. If there was evidence that they had violated the Article again, KV would discuss further proceedings with the Consumer Ombudsman.

*Imposition of sanctions on carriers not based in the Member State*

- 15.26 The main limitation on sanctions is that they are only available for violations of Article 14. Violations of other articles could possibly be pursued under the Marketing Practices Act, if they were regarded as in the collective consumer interest, but this not been explored to date. KV has had discussions with the Justice Department regarding whether there should be sanctions available for consistent violations of other articles.

- 15.27 For violations of Article 14, the KV informed us that although it could in theory impose fines on non-national carriers through the Swedish Courts, it did not believe this was the most efficient method of doing so. KV would use the CPC network to pass a request for a sanction to the relevant NEB, and believed that Regulation 2006/2004 would require the relevant NEB to impose a suitable sanction. This is not consistent with our interpretation of Article 16(1), which is that the other NEB would not be competent to impose sanctions.

*Collection of sanctions*

- 15.28 Fines are collected on behalf of the Government by the Legal, Financial and Administrative Services Agency (Kammarkollegiet), which is endowed with powers to collect debts, including possible seizure of property.

*Publication of information*

- 15.29 All cases considered by ARN are publicly available<sup>14</sup>, as are all enforcement proceedings opened against carriers by KV.
- 15.30 The total number of transport-related cases considered by ARN is published, however the total relating to the Regulation is not specifically published. When a decision of the ARN is not complied with, Råd & Rön magazine publishes the name of the carrier in a blacklist. The magazine also publishes occasional articles on the Regulation, including a recent piece describing how airline compliance with ARN decisions appears to have decreased over recent months.

**Other activities undertaken by the NEB**

- 15.31 KV undertook inspections of airports in 2006 and 2007, examining check-in points, staff knowledge of procedures and availability of leaflets. The inspections were at all major airports, and the inspection carried out in 2007 checked 13 carriers. They were performed by communal consumer guides who gave airline representatives questionnaires on information and procedures to complete.
- 15.32 These questionnaires identified problems with 3 airlines, which failed to meet their obligation to provide information at the check-in and to provided the passenger with a written notice in case of flight disruptions. KV opened enforcement cases against these airlines, requesting improvements. In 2006 the inspections found many problems, but compliance was much better in 2007. It has not undertaken inspections in reaction to an incident in real time. No inspections were performed in 2008 or 2009, but KV hopes to do more inspections in 2010, when there is more funding.
- 15.33 KV also maintains dialogue with airlines to encourage compliance, through telephone, meetings, and through attending seminars and lectures set up by the CAA which are also attended by representatives of airlines.

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<sup>14</sup> As an example, case 2009-1337 is a decision reached after the ECJ ruling on technical problems:

<http://www.arn.se/netacgi/brs.pl?d=REFE&l=20&p=1&u=referat.htm&r=1&f=G&Sect8=PLSCRIPT&s1=&s2=&s3=&s4=2009-1337&s5=&s6=>

### **Work with other organisations**

- 15.34 KV will forward out-of-scope complaints to other NEBs, with a summary of the case translated into English. It sends a copy of this letter to the passenger, with an explanation of the action they have taken. Aside from this, KV has not had much contact with other NEBs. It has sometimes taken calls from other NEBs asking for explanations of the Swedish NEB's legal structure.
- 15.35 KV will also refer complainants to the ECC when they require advice. The Swedish ECC is in the same building, and is part of KV, and hence KV has close contact with it.
- 15.36 KV has infrequently received requests through the CPC network to provide other NEBs with information on airline contact details. It has sent requests to Italy for help establishing a violation of Article 14, and received a response saying that the airline had procedures, leaflets and check-in signs in place.
- 15.37 ARN is not designated as, and does not regard itself as, an NEB and therefore it does not follow the NEB-NEB agreement. It does not forward claims, and will consider any case which has (in its opinion) sufficient connection to Sweden; this includes cases brought by Swedish residents or citizens regarding incidents which occurred elsewhere. It has very little contact with other NEBs.
- 15.38 ARN sometimes receives cases referred by the ECC.

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

- 15.39 ARN is the alternative dispute resolution mechanism within Sweden.
- 15.40 There is a small claims procedure for claims under €2000, heard at a municipal court. There is a fee of 350 SEK (€34), and if the claimant loses they may have to pay for 1 hour of the defendant's solicitor's time (~2500 SEK, €240). The small claims court only allows limited evidence to be presented. The timescale depends on which court is used.

### **Issues with complaint handling and enforcement in Sweden**

#### *Scope of complaints handled*

- 15.41 In addition to considering claims regarding incidents which took place in Sweden, ARN also considers other claims with sufficient connection to Sweden. This includes cases brought by Swedish citizens regarding incidents which occurred outside of Sweden, and which are not within the scope defined in the NEB-NEB agreement. We have been unable to obtain a clear response as to whether it would accept complaints from non-Swedish residents, although in any case the fact that they would need to be submitted in Swedish would be a significant disincentive to any potential complainant. Although ARN does not regard itself as an NEB and thus does not feel it has any obligation to follow the agreement, it performs the function of an NEB and will be regarded as such by consumers. Its unwillingness to follow the NEB-NEB agreement is therefore confusing to consumers, and unhelpful.



*Lack of investigations*

- 15.42 ARN informed us that it sees its role as an impartial arbiter, evaluating the evidence submitted to it, and as such does not undertake investigations. Although the panel considering more complex cases includes airline industry representatives, the only technical information provided will be that which the airline wishes to provide, and no technical experts are present at the meeting or available for consultation.
- 15.43 ARN stated that it is the responsibility of the airline to provide sufficient evidence to back up their case, but it is also important that full evidence is provided and that whoever is making the decision has sufficient understanding to critically assess that evidence. Not doing so risks undermining confidence in the process: an airline we spoke to told us that they had experience of inconsistent decisions from ARN, where two very similar cases received different decisions.

*Ineffective sanctions*

- 15.44 Sanctions are only available in Sweden for violations of Article 14, regarding provision of information. This means that KV is effectively unable to incentivize compliance with the Regulation, as information about rights is of no use to the passenger if those rights cannot be assured. This is a serious breach of Article 16(3). Publication of the name of a carrier in a magazine does not appear to be an effective or dissuasive sanction.
- 15.45 In addition, KV does not impose sanctions on non-national carriers, which means that sanctions cannot provide an incentive to comply with the Regulation for these carriers.

*Ability of consumers to obtain redress*

- 15.46 The ARN process is non-binding, and it has no power to compel airlines to comply with decisions. Despite this, 85% of decisions regarding transport cases are complied with, which implies that potential publication on the 'blacklist' is effective in some cases. However, at time of writing there were 10 airlines on the list, including several large carriers with multiple non-compliant decisions outstanding. Therefore, this alone does not appear to be sufficient to incentivise all airlines to comply.

*Arbitration process is unattractive to consumers*

- 15.47 There are a number of other problems with the ARN process:
- it may take up to 6 months to reach a decision;
  - as discussed above, there is no guarantee that the company will abide by the decision;
  - the threshold for a claim is relatively high, as a claim must be over 1000 SEK (€96) per passenger to be considered – a family of five could lose 4999 SEK (€487) and be unable to claim;
  - all documents have to be submitted in Swedish; and
  - if the carrier does not have a representative in Sweden there is the risk that they will not provide a response.

*Stakeholder perceptions*

- 15.48 According to both the airline and consumer organisation we spoke to, there are unsatisfactory aspects of KV's and particularly ARN's performance. An airline with extensive operations in Sweden informed us that ARN's failure to evaluate technical information had led to inconsistent decisions, where different recommendations were arrived at for two similar cases. The consumer organisation considered that KV did not offer sufficient legal assistance to consumers.

### **Conclusions**

- 15.49 There are some positive aspects to the complaints handling and enforcement processes in Sweden: the mediation service provided by ARN is free, and KV has undertaken inspections of airports. These two aside, however, there are many serious failings. The most serious are the fact that sanctions have not been introduced into national law except for violation of Article 14, and the fact that sanctions will not be imposed on non-national carriers, which is plainly not compliant with States' obligations under Article 16.

### *SWOT analysis*

- 15.50 A SWOT analysis of the complaint handling and enforcement processes in the Sweden is provided below.

TABLE 15.1 SWOT ANALYSIS: SWEDEN

Strengths	<ul style="list-style-type: none"> <li>• Adequate resources available to KV and ARN to undertake inspections and checks of information provision, and complaints handling, respectively</li> <li>• Arbitration is free to consumers</li> <li>• Most of ARN's recommendations are complied with</li> <li>• Inspections are carried out by KV to verify compliance with Article 14</li> <li>• Sanctions can be imposed if infringements identified by inspections</li> <li>• Those fines which are available are unlimited</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• Claims of extraordinary circumstances are not investigated, and no technical expertise is called upon</li> <li>• ARN does not forward complaints to other NEBs, which is not in line with the NEB-NEB agreement</li> <li>• ARN only handles complaints submitted in Swedish</li> <li>• ARN has no means of enforcing its decisions</li> <li>• The complaint handling process is slow</li> <li>• Claims of value under 1000 SEK (€96) per passenger are not accepted</li> <li>• There are no sanctions available for non-compliance with any article except Article 14 – this is a violation of Article 16(3)</li> <li>• KV does not impose sanctions on non-national carriers – this is a violation of Article 16(1) and 16(3)</li> <li>• It is unclear whether ARN will accept complaints from non-residents of Sweden – this is decided on a case-by-case basis. This is a violation of Article 16(2).</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• There is scope for improvement in a number of areas</li> <li>• The limitation on imposition of sanctions on non-national carriers is a policy issue rather than a legal issue and therefore could be resolved relatively easily</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• Poor perception of ARN by stakeholders regarding the quality of the complaint handling procedures could lead to non-compliance and disputes</li> <li>• ARN's decisions could conflict with decisions made by NEBs in other States about equivalent cases</li> </ul>

## 16. UNITED KINGDOM

### The National Enforcement Body

- 16.1 The UK has separate bodies responsible for complaint handling and enforcement:
- The Civil Aviation Authority (CAA) is the body designated under Article 16(1) to enforce the Regulation; and
  - The Air Transport Users Council (AUC) is the body designated under Article 16(2) to handle complaints from passengers.
- 16.2 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.
- 16.3 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.

#### *Resources available*

- 16.4 The CAA has on average 2 FTEs working on issues relating to the Regulation. In addition this team can draw on other specialist expertise within the CAA when required.
- 16.5 AUC has 9 FTEs working on complaints handling, and it estimates that 60% of their time is spent dealing with issues relating to this Regulation (5.4 FTEs). AUC considers that it now has adequate resources to handle the number of complaints it receives.

#### **Legal basis of complaint handling and enforcement**

- 16.6 The enforcement regime is defined in the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005, Statutory Instrument number 975 (2005), which established that the maximum penalty for a breach of the Regulation would be level 5 on the standard scale. In addition, the court could order compensation to be paid if it considers that a consumer has suffered a loss from the infringement of the Regulation.
- 16.7 The standard scale of fines was most recently updated by Article 17(1) of the Criminal Justice Act 1991. This defines the maximum for a level 5 fine as being £5,000 (€5,750). This contrasts with the position on enforcement for Regulation 1107/2006, for which an unlimited fine can be applied for certain infringements if the case is considered in a Crown Court (which means a trial before a jury).

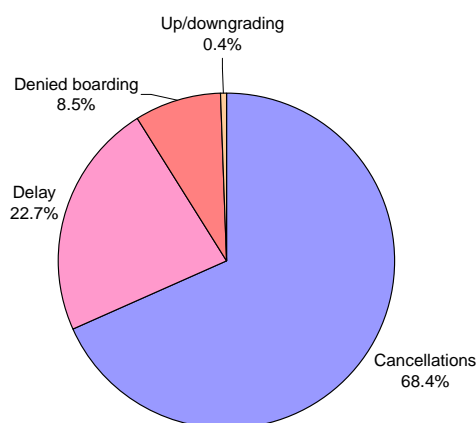
- 16.8 Article 4 of the Statutory Instrument defines a due diligence defence. It states that it shall be a defence for a carrier to show that it took all reasonable steps and exercised all due diligence to avoid committing the offence. This is interpreted as meaning that, in order to prosecute a carrier for breaching the Regulation, it would be necessary to show that the senior management of the carrier had made a decision to systematically ignore or otherwise fail to comply with the Regulation.
- 16.9 Any sanction could only be imposed through a criminal process, which means that the standard of evidence and proof required would be high. This, combined with the due diligence defence, means that it would be very difficult to impose any sanction under UK law. CAA is unlikely to wish to prosecute unless it can be reasonably confident of obtaining a conviction.
- 16.10 In addition, the Enterprise Act 2002 gave the CAA certain civil powers, which do not include imposition of sanctions but do include the ability to apply for a civil injunction against a carrier (a ‘stop now’ order), and to seek binding undertakings from carriers relating to regulatory compliance. It is currently developing its policy on how these powers might be used in the future, and this is expected to be complete by the end of 2009 or early 2010. The CAA is a designated enforcement body under Part 8 of this Act.

### Complaint and enforcement statistics

#### *Complaints*

- 16.11 AUC received 3,003 complaints relating to the Regulation in 2008. This was 2% fewer than in 2007 and 19% fewer than in 2006. AUC informed us that the number of complaints had continued to decline in 2009, although this may partly be due to the decline in passenger traffic at UK airports due to the economic situation.
- 16.12 As illustrated in Figure 6.1 below, the vast majority of valid complaints received by AUC related to flight cancellations.

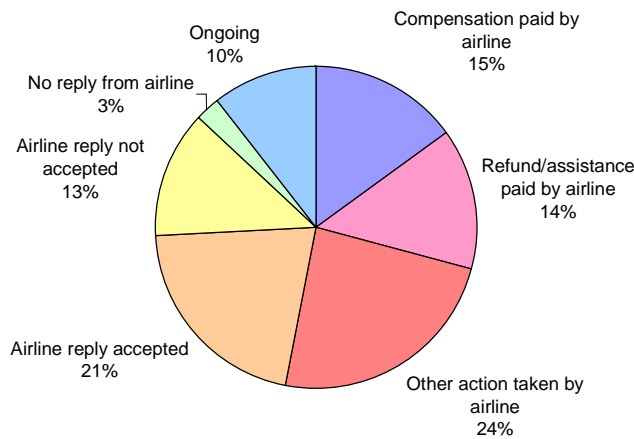
**FIGURE 16.1 TYPES OF COMPLAINTS RECEIVED DURING 2008: UK**



Source: SDG analysis of data provided by AUC

- 16.13 AUC took up about 40% of the complaints that it received in 2008. Most of the remaining cases were either referred to other NEBs or required no action beyond providing information to the passenger. This might arise if, for example, there was not a prima facie case of non-compliance with the Regulation.
- 16.14 Of the complaints which were taken up by AUC, Figure 7.2 shows the results. In the majority of cases, the carrier either paid compensation or took some other action. However, in 13% of cases, the carrier’s reply was considered inadequate by AUC, and in 3%, the carrier did not reply at all.

**FIGURE 16.2 STATUS OF COMPLAINTS RECEIVED DURING 2008: UK**



Source: SDG analysis of data provided by AUC

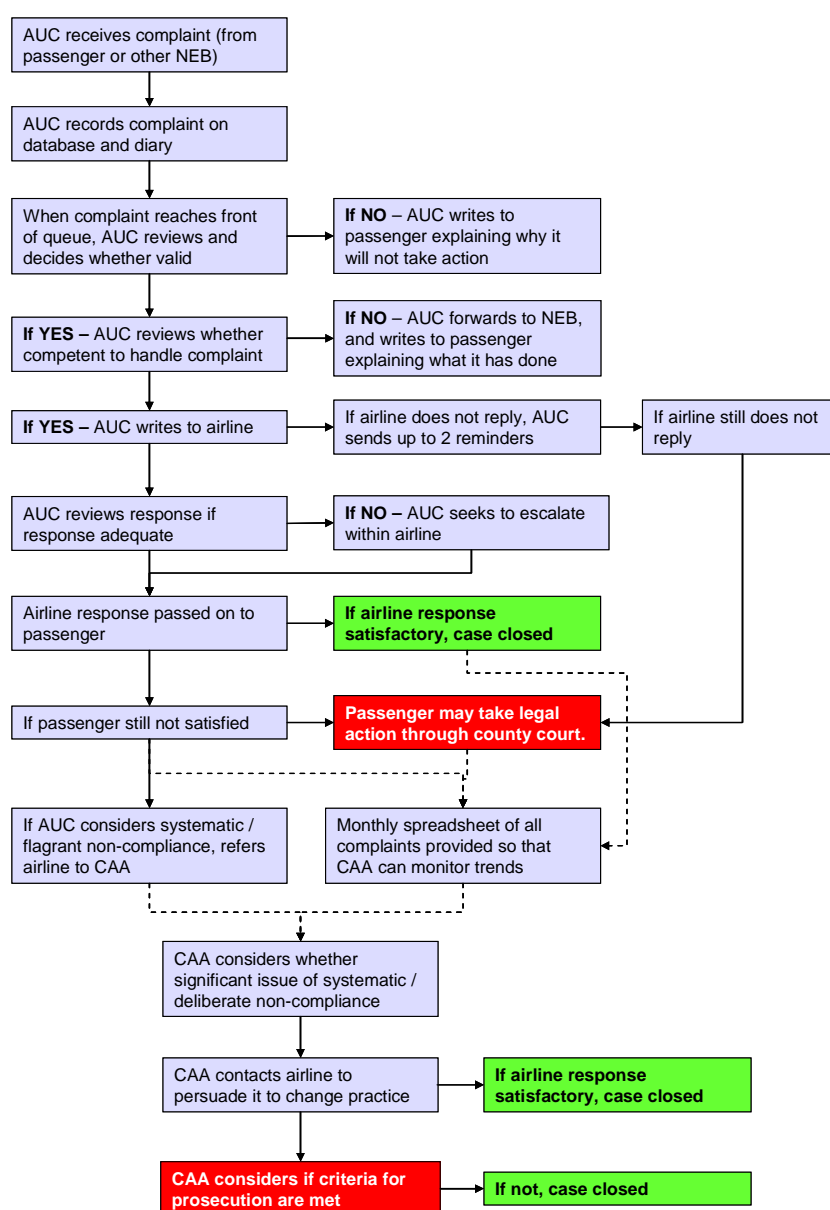
*Enforcement*

- 16.15 There has been no prosecution in the UK to date for non-compliance with the Regulation. However, the CAA informed us that it had taken enforcement action in 47 cases over the 12 months to March 2009. This has included requirements for carriers to change their policies, provide a refund, or to pay compensation.

**The complaint handling and enforcement process**

- 16.16 The UK complaint handling and enforcement process is summarised in Figure 16.3 below. Complaint handling is undertaken by AUC and enforcement is undertaken by CAA.

FIGURE 16.3 COMPLAINT HANDLING AND ENFORCEMENT PROCESS: UK



- 16.17 Complaints can be accepted by the AUC in any EU language, and are professionally translated into English so that they can be processed. However, all responses to airlines are in English.
- 16.18 The complaint handling process undertaken by AUC is very similar to the complaint handling process undertaken by NEBs in other Member States, with the exception that there is no detailed analysis of claims of extraordinary circumstances. In the event that an airline response appears to be inadequate (because it provides insufficient justification or the circumstances do not appear to be extraordinary), AUC has no powers of further investigation and there is no sanction imposed on the carrier. The passenger is advised to go to court if he/she wishes to pursue the matter.
- 16.19 AUC may refer a case to CAA if it believes there is evidence of systematic or flagrant non-compliance. In addition, AUC provides CAA with a monthly spreadsheet giving

details of all of the complaints it has received, so that CAA can monitor any trends. There is also a monthly meeting between AUC and CAA to discuss issues which have arisen, although this does not cover individual cases, and it is for CAA to decide whether to investigate any case further.

- 16.20 If CAA decides to take up an individual case, it will contact the airline concerned, summon it to meetings to discuss the case if appropriate, and (if it finds against the airline) instruct it to provide redress or pay compensation. This is not binding, but it may inform the airline that if it does not do so it will consider other options including criminal prosecution.

*Time taken to resolve complaints*

- 16.21 AUC informed us that there is currently a backlog of cases and it takes 7-8 weeks for an initial analysis of the complaint to be made and the first action to be taken. Some cases are resolved quickly after this, but AUC informed us that some carriers can take 3-4 months to reply to letters. As a result, the total time taken for the complaint handling process can exceed 6 months.

*Claims of extraordinary circumstances*

- 16.22 Where airlines claim extraordinary circumstances as justification for not paying compensation, AUC will request details and challenge the circumstances if they appear vague or the justification is inadequate, but it will not investigate whether the carrier's claim is true, for example by checking log books or weather reports. This appears to be inconsistent with the NEB-NEB agreement facilitated by the Commission, which stated that where airlines provide inadequate explanation, all cases have to be investigated.

- 16.23 CAA does investigate a proportion of cases, but the proportion is low: CAA's policy is to undertake a minimum of four detailed investigations per annum. Where it does investigate a case, this can involve significant effort, including use of operational/technical expertise within CAA.

*Response issued to the passenger*

- 16.24 AUC will provide an individual response to the passenger. It provides the correspondence with the airline, and an explanation as to what the AUC has done with the complaint, and why. This is intended to be enough to set out the passenger's case for a passenger to put together a small claims court case. However, it cannot include a firm statement on whether extraordinary circumstances apply in the case, because AUC does not have the capability to evaluate this.

*Circumstances under which sanctions are imposed*

- 16.25 The CAA would consider prosecution in the event of deliberate and persistent non-compliance by a carrier, and where it had sufficient evidence to prove this to the standard of evidence required for a criminal prosecution. These circumstances have not occurred to date. Any decision as to the level of sanctions would then be made by the Court.



16.26 This policy was defined in a consultation document released by the UK Department for Transport on enforcement of the Regulation:

“The Government [is] conscious of the potential difficulties in implementing the Council Regulation, and is resolved to apply the enforcement Regulations with a light touch. In practice this means focusing on cases of wilful and/or systematic failure to apply the provisions of the Council Regulation, rather than on isolated cases where for one reason or another (maybe outside its control) an airline has failed to meet the strict letter of the law. In the majority of cases where there is an unresolved dispute between a passenger and an airline over the entitlements provided under the Council Regulation, the individual will be encouraged to pursue his or her claim through the Small Claims Court. However, where there is evidence of flagrant or systematic non-compliance with the provisions of the Council Regulation, the CAA will consider initiating enforcement action.”<sup>15</sup>

16.27 In addition, the CAA has to comply with a number of conventions and codes with regard to the roles of prosecuting and enforcement authorities in the UK. The most relevant of these are:

- **Code for crown prosecutors:** This sets out the duty of prosecuting authorities to review, advise on and prosecute cases, ensuring that the law is properly applied, that all relevant evidence is put before the court and that obligations of disclosure are complied with.
- **Regulators compliance code:** The CAA must have regard to the code when determining any general policy or principles about the exercise of functions with relation to consumer protection and safety. The code applies to enforcement generally and not just to criminal enforcement. It requires regulators such as CAA to help and encourage regulated entities to understand and meet regulatory requirements more easily, and respond proportionately to regulatory breaches.
- **Better Regulation Principles:** These principles contain some provisions relevant to enforcement, for example, that enforcers should focus primarily on those whose activities give rise to the most serious risks.

16.28 The CAA states that its policy is to seek to address the root causes of complaints by addressing carrier and industry behaviour. Prosecution is one possible tool for doing this, but the CAA considers that it does not necessarily change air carrier behaviour and therefore does not necessarily collectively benefit consumers.

*Imposition of sanctions on carriers not based in the Member State*

16.29 There are no specific difficulties in the UK relating to imposition of sanctions on carriers not based in the UK although the CAA informed us that there could be practical difficulties where a carrier did not have representation in the UK.

16.30 Although there has been no prosecution under this Regulation, there have been successful criminal prosecutions of carriers not based in the UK under other

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<sup>15</sup> UK DFT (2005): Denied Boarding Compensation Regulation (EC) No. 261/2004, enforcement in the UK

legislation. For example, in 2005 a non-national carrier was prosecuted for misleading pricing and fined £24,000 (€27,000)<sup>16</sup>.

#### *Collection of sanctions*

- 16.31 Any fine would be collected by the Court that imposed the fine, not by the NEB. There have been shown to be problems with the collection of fines by the courts in the UK: the National Audit Office estimated in 2006 that 42% of offenders default on fines<sup>17</sup>. However, the statistics do not distinguish between fines imposed on individuals, which make up over 99% of the total, and fines imposed on business. Therefore, it is not possible to assess how effective the courts could be in collecting fines from airlines.

#### *Publication of information*

- 16.32 AUC publishes statistics for complaints received. It has previously published details of the number of written complaints received by airline, but it no longer does this.

#### **Other activities undertaken by the NEB**

- 16.33 During 2007 and 2008, CAA undertook inspections at 31 UK airports, in order to verify compliance with Articles 14(1) and 14(2), and to test the awareness of staff with regard to their obligations under the Regulation. These inspections have been undertaken in conjunction with Trading Standards officers. This year CAA has undertaken inspections at Heathrow, Gatwick and Luton airports. In cases of severe disruption, such as the heavy snow experienced in February 2009 and the failure of the baggage system at Heathrow Terminal 5 in July 2009, CAA has requested airlines to provide evidence of what measures they took to comply with their obligations under the Regulation.
- 16.34 In the 12 months to March 2009, CAA undertook 47 actions in relation to complaints regarding non-compliance with the Regulation. These actions included sending letters, telephone calls and meetings, and some of the actions CAA required included payment of refunds, payment of compensation, refund of credit card charges and premium rate phone numbers, and changes to websites and carriers' published policies. However, the number of cases in which CAA has taken action are very small in comparison to the number of complaints received by AUC.

#### **Work with other organisations**

- 16.35 The AUC forwards complaints to other NEBs if there is a prima facie case of non-compliance but the incident occurred in another Member State. In addition, 3 months after forwarding complaints, it surveys passengers whose complaints were forwarded. This shows that 60% had not received any response from the NEB the complaint was forwarded to. In particular, only 29% of passengers whose complaints were referred to

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<sup>16</sup> BBC (2005): Ryanair misled customers on price

<sup>17</sup> National Audit Office (2006): Department for Constitutional Affairs Fine Collection

the French NEB, and 25% of those whose complaints were referred to the Italian NEB, had received any response.

- 16.36 Neither the AUC nor CAA works on a regular basis with the ECC Network, although CAA does hold regular meetings with the UK ECC. It has been agreed that the ECC Network will forward relevant complaints to the CAA or AUC, to ensure that there is a consistent approach to complaint handling and enforcement.
- 16.37 CAA has made some limited use of the CPC Network although it states that there are some technical issues related to the web-based structure of the network which have made this difficult. It has made use of the CPC Network where it does not have an established relationship with an NEB; for collecting information on trends; for requesting information from all NEBs at the same time; where it wants to make a formal request for assistance if the NEB does not initially engage; and for investigating issues around prices or unfair practices. It informed us that it had placed five assistance requests and several alerts on the CPC system since it was introduced, and had responded to six requests for assistance from other NEBs via the system.

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

- 16.38 The UK County Court system has a small claims track available, which is intended to be a simple and informal way of resolving a dispute where the amount is less than £5,000 (€5,750). Claims can be brought within 6 years (5 years in Scotland).
- 16.39 There are a number of charges payable to bring a claim through this system (claim fee, allocation fee and hearing fee), and the total charges are higher than in some other Member States. The total fee depends on the amount of the claim. The minimum total fee is £55 (€63), for all claims under £300 (€345), but for a claim of £2,000 (€2,300) the total fee would be £270 (€310).
- 16.40 There are a number of issues with the small claims procedure in the UK:
- Making a claim through the small claims track of the County Court is relatively difficult and time consuming. According to the consumer organisation Which, the total amount of time to process a claim can be 6-9 months.
  - Fees are relatively high and for some smaller claims – for example, if the carrier failed to provide overnight accommodation – the fees could be similar to the amount claimed.
  - Which informed us that claimants can be faced with an unclear case where they are unable to judge the likelihood of success (for example as to whether extraordinary circumstances apply), and that decisions made in these cases vary between judges and between regions.
  - The AUC informed us that it is quite common for the carrier to fail to turn up to court and therefore the passenger wins by default. However, there have also been cases where carriers have not paid even when ordered to do so by the court.
- 16.41 There is no alternative dispute resolution process for air transport claims in the UK. However, the County Court has a mediation service which can be used if both parties agree.

#### **Issues with complaint handling and enforcement in the UK**

*The ability to impose dissuasive sanctions*

- 16.42 As identified above, a key difficulty with enforcement in the UK is that a criminal prosecution is required in order to impose a sanction and therefore the standard of proof required is high. This, combined with the due diligence defence available to carriers, means that it is difficult in practice to impose any sanction for non-compliance with the Regulation. It would only be possible to convict a carrier of non-compliance, and therefore to impose penalties, if it were possible to prove that the senior management of the carrier had deliberately and systematically failed to comply with the Regulation. Even under these circumstances, the maximum penalty would only be £5,000 (€5,750) – far less than the cost saving that a carrier might expect to achieve through deliberate and systematic non-compliance. The bad publicity that a carrier would probably receive if prosecuted could have more impact than the penalty itself.
- 16.43 Similar issues have been identified with regulatory enforcement in the UK in other sectors. A review published in 2005 identified that “regulatory penalties do not take the economic value of a breach into consideration and it is quite often in a business’s interest to pay the fine rather than comply” and that “if penalties do not reflect the advantage gained by a company in breaking the law, dishonest businesses are given further incentive to breach regulations, and undercut honest companies”<sup>18</sup>.
- 16.44 In 2006, a review was undertaken of how to improve regulatory compliance by businesses in the UK<sup>19</sup>. This recommended that regulatory bodies should be given the ability to impose civil financial penalties, partly in order to ensure that there was an economic incentive to comply with regulation, which it acknowledged that the possibility of a criminal sanction did not provide. This was implemented by the UK government in the Regulatory Enforcement and Sanctions Act 2008 (Chapter 13).
- 16.45 Schedule 5 to this Chapter designates a number of regulatory bodies as having this power. However, although other regulatory bodies with roles in the transport sector (the Office of Rail Regulation and the Health and Safety Executive) are designated, the CAA is not. CAA stated that it did not initially wish to be designated under this Act because:
- it believed that the ability to impose criminal sanctions was important given its other responsibilities relating to safety; and
  - it did not have an appropriate structure to impose administrative sanctions, in particular, it did not have an independent appeals procedure.
- 16.46 However, CAA did inform us that it, in conjunction with the Department for Transport (DfT), is considering changes to enable it to impose administrative sanctions. DfT is currently preparing an Aviation Act which would provide a legal means to introduce any changes which were required. The earliest any changes could take effect would be

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<sup>18</sup> Reducing administrative burdens: effective inspection and enforcement, Philip Hampton for HM Treasury, March 2005

<sup>19</sup> Regulatory Justice: Making Sanctions Effective (The Macrory Review)

2011. In addition, as noted above, it is considering in the future the ability to use civil powers under the Enterprise Act 2002, such as powers to apply for a civil enforcement order against a carrier.

*Ability of consumers to obtain redress*

- 16.47 As discussed above, in a significant number of cases (183 in 2008), the airline either did not reply to AUC or AUC considered that the reply was inadequate. In these cases, the passenger is advised that they should go to court if they wish to obtain redress. Although there is a small claims process, this is relatively expensive and slow, and consumers may be reluctant to use it, particularly if the amount to be claimed is small. There is no alternative dispute resolution process. It is likely that a significant proportion of passengers would take no further action, although no statistics are available to verify this.
- 16.48 CAA does take up some cases for further investigation, but the number of actions taken by CAA is small in relation to the number of complaints: CAA informed us that only four claims of extraordinary circumstances per year were analysed in detail. In addition, the letters that CAA sends to carriers require it to provide redress when required to individual passengers that have complained, and requests that carriers improve their processes, but does not require the provision of redress to other passengers travelling on the same flight who are likely to have experienced the same problem.

*Future structure of NEB*

- 16.49 The UK government has recently proposed merging the AUC into Passenger Focus, a government-funded passenger representative body which currently covers bus and rail transport<sup>20</sup>. At the same time it proposed to strengthen the consumer protection role of the CAA, by making this one of the CAA's primary duties. Complaint handling would transfer to Passenger Focus not to CAA.
- 16.50 The merger of AUC into Passenger Focus could be a risk to the effectiveness of complaint handling in the future, as the specialist expertise within AUC could be lost. However, the intention is that this expertise would all transfer to Passenger Focus and therefore in principle there should be no impact.

**Conclusions**

- 16.51 The system of complaint handling undertaken in the UK has some advantages – in particular, passengers do receive some assistance from the AUC in obtaining their rights from carriers, . However, a weakness is that the AUC cannot impose any sanction if the carrier fails to respond adequately; and it cannot undertake in-depth analysis of claims of extraordinary circumstances. This appears to be inconsistent with the NEB-NEB agreement.

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<sup>20</sup> Reforming the framework for the economic regulation of UK airports, UK Department for Transport, March 2009

- 16.52 The key weakness in the enforcement procedure in the UK is that it is very difficult to impose sanctions, due to a combination of the fact that a criminal prosecution is required, and airlines can use a ‘due diligence’ defence. Since sanctions could only ever be imposed in extreme circumstances where it was possible to prove deliberate non-compliance with the Regulation, if sanctions were to provide an economic incentive to comply, the maximum sanction would have to be high. Under current circumstances, the current maximum sanction (£5,000/€5,750) is not sufficient to provide an economic incentive to comply with the Regulation, and therefore the UK appears to be non-compliant with Article 16(3), because it has not introduced dissuasive sanctions into national law. As discussed in detail above, the inadequacy of the regime of criminal sanctions for regulatory enforcement has been recognised by the UK government and has been changed for other areas.

#### *SWOT analysis*

- 16.53 A SWOT analysis of the complaint handling and enforcement processes in the UK is provided below.

**TABLE 16.1 SWOT ANALYSIS: UK**

Strengths	<ul style="list-style-type: none"> <li>• Adequate resources available to AUC to handle complaints</li> <li>• AUC mediates with carriers to try to obtain redress for passengers and challenges claims of extraordinary circumstances</li> <li>• Technical/operational expertise available to CAA to investigate complaints</li> <li>• Inspections are carried out by CAA to verify compliance</li> <li>• Where cases are taken up by CAA, it may instruct the carrier to pay compensation/provide redress to the individual passenger that complains, under threat of prosecution</li> </ul>
Weaknesses	<ul style="list-style-type: none"> <li>• It is very difficult to impose sanctions for non-compliance, due to the combination of a criminal procedure and the due diligence defence available in UK law</li> <li>• The maximum sanction for non-compliance is too low to provide an economic incentive to comply with the Regulation</li> <li>• The complaint handling process is slow</li> <li>• AUC is not able to investigate claims of extraordinary circumstances to evaluate whether they are true</li> <li>• In most cases, if a carrier does not respond adequately, the passenger is advised to go to court if they wish to obtain redress – the case will not be taken up by CAA</li> <li>• No alternative dispute resolution process</li> <li>• Small claims court system expensive/complex for consumers</li> </ul>
Opportunities	<ul style="list-style-type: none"> <li>• The CAA could in the future be granted the power to impose administrative sanctions, which could be a more effective way of incentivising compliance with the Regulation</li> <li>• The use of civil powers under the Enterprise Act may also improve enforcement although it is not clear as yet how this would work</li> </ul>
Threats	<ul style="list-style-type: none"> <li>• Merger of AUC into Passenger Focus could result in loss of key specialist expertise</li> </ul>







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