

**EXPLANATORY MEMORANDUM TO THE
CIVIL AVIATION (DENIED BOARDING, COMPENSATION AND
ASSISTANCE) REGULATIONS 2005**

2005 No. 975

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description:

2.1 This instrument creates a criminal offence for non-compliance with the provisions of Council Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, in the United Kingdom. It further designates the Air Transport Users Council (AUC) as the UK's complaints handling body for the Council Regulation and the Civil Aviation Authority (CAA) as the UK's enforcement body.

3. Matters of special interest to the Joint Committee on Statutory Instruments:

3.1 The EC Regulation, save for Article 5.3, creates a strict liability regime for the payment of compensation/provision of assistance. The domestic enforcement Regulations will provide for a defence to an allegation of a breach of the obligations imposed by the Regulation by absolving an operating air carrier which has acted with due diligence. In cases in which an operating air carrier is able to show that it did act with due diligence, it will still be liable in the civil courts. The due diligence defence may be argued to undermine indirectly the primary obligations in the Regulation. In any event, it may be thought to create a two tier enforcement system. If so, a court may consider that the domestic Regulations fail the test that remedies for breaches of the obligations in the EC Regulation must be effective and dissuasive. But EC jurisprudence also provides that, in the absence of an EU wide harmonised system of penalties for breaches of EC regulations, it is permissible for Member States to provide for remedies that are analogous to those applicable to similar infringements of national law of a similar nature or importance (a). In national law, we do provide in analogous fields for a due diligence defence, for example Article 122(1) of the Air Navigation Order 2000 which provides a due diligence defence for breaches of the Order which potentially attract criminal liability. While there is a risk of legal challenge, it is believed that there are reasonable prospects of successfully defending the method of implementation that we have chosen.

4. Legislative background:

a Case C-7/90 Vandevenne: (1991) | E.C.R. 4371

4.1 Council Regulation 261/2004 has had direct application in the UK and other Member States since it entered into force on 17 February 2005. In order to ensure that passengers receive the compensation and assistance to which they are entitled, the Council Regulation requires Member States to lay down rules on sanctions applicable to infringements of its provisions, and to ensure that these sanctions are applied. The sanctions are required to be effective, proportionate and dissuasive. The present Statutory Instrument seeks to meet the UK's obligations in this respect.

5. Extent:

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background:

General

7.1 Council Regulation 261/2004 was adopted by the European Parliament and Council on 26 January 2004. It updates, expands upon and replaces an existing Regulation on denied boarding compensation dating back to 1991. The Council Regulation seeks to deter airlines from excessive overbooking or cancellations for commercial reasons by increasing the level of compensation payable when this occurs. In addition, it extends the right to compensation to include cancelled flights, unless certain criteria are met, and creates new rights for passengers affected by cancellations and long delays. In order to ensure that passengers receive compensation and assistance to which they are entitled Member States are required to lay down rules on sanctions applicable to infringements of the provisions of the Regulation.

Size and nature of the problem

7.2 According to AUC statistics, during the period April 2002 to March 2003, 269 complaints were received from passengers regarding overbooking compared to 558 complaints about flight cancellations and 506 complaints about flight delays. It is however likely that these figures may increase with the entry into force of the Council Regulation and a greater awareness by passengers of their rights.

Level of interest

7.3 The Council Regulation has been controversial with the airlines from the outset, and is currently the subject of a legal challenge before the European Court of Justice (ECJ). Notwithstanding this, our legal advice is that the UK must comply with its obligations to establish sanctions applicable to infringements unless or until such time that the ECJ declares the Council Regulation invalid. Failure to do so would expose the UK to possible infraction proceedings from the Commission.

7.4 The Department has consulted twice on the proposed enforcement Regulations. In the first consultation paper it was proposed that airlines retain records of the

compensation and assistance provided in order to assist the designated complaints and enforcement bodies to assess the strength of passenger complaints. Industry strongly opposed such an approach citing the additional regulatory burden that this would impose. Industry also sought the provision of a defence against the strict criminal liability proposed for non-compliance given the sometimes ambiguous language used in the Council Regulation.

7.5 In view of the responses to the first consultation paper, the Department agreed to review its proposals with a view to simplifying the enforcement Regulations and reducing the regulatory burden whilst not undermining the overall aim of protecting passengers' rights. After consultation with the CAA and the AUC, a revised set of enforcement Regulations were prepared, removing the information gathering requirement and providing a due diligence defence, upon which the Department again consulted industry. The responses to the second consultation were broadly supportive of the Department's revised approach, which is now reflected in the present Statutory Instrument. Summaries of the responses to both consultation papers can be found on the Department's website.

Enforcement regime

7.6 Broadly speaking, enforcement of the rights granted to passengers under the Council Regulation in the UK will be a two stage process. In the first instance, an aggrieved passenger will be able to complain to the AUC. The AUC will try to facilitate a resolution to the complaint through mediation between the passenger and the air carrier. Where this is not successful, the passenger will be encouraged to seek appropriate damages through the Small Claims Court by applying the directly enforceable rights created under the Regulation. Where however the AUC suspects that an airline is systematically or flagrantly not complying with the provisions of the Council Regulation, it will refer the matter to the CAA, who will seek reassurances from the airline in question that action is being taken to ensure future compliance with the provisions of the Council Regulation. If such assurances are not forthcoming, the CAA will consider starting enforcement proceedings under regulation 3 of the enforcement Regulations. If proven, the airline will be liable to a fine not exceeding £5,000 for each offence.

8. Impact:

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector is set out in the Regulatory Impact Assessment.

9. Contact:

9.1 David Shephard at the Department for Transport (Tel: 020 7944 5881 or email david.shephard@dft.gsi.gov.uk) can answer any queries regarding the instrument.

Department for Transport

Final Regulatory Impact Assessment

1. Title of Proposal

The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005.

2. Purpose and intended effect of measure

(i) The objective

To ensure airline compliance with EC Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ("the Council Regulation"), in the United Kingdom.

(ii) The background

On 17 February 2005 the Council Regulation entered into force across the European Union, expanding upon and replacing an existing EC Regulation dealing with denied boarding compensation, dating back to 1991. A Regulatory Impact Assessment of the effect of the Council Regulation on business is set out in the **Annex** to this document.

The new Council Regulation requires airlines to compensate and/or provide care and assistance to passengers affected by denied boarding, cancellation or lengthy delays to flights scheduled to depart from an EU airport, or on an EU carrier flying to an EU airport from a third country. In addition, Member States are required to lay down effective, proportionate and dissuasive rules on sanctions applicable to infringements of the Council Regulation's provisions and to ensure that these sanctions are applied.

(iii) Risk assessment

The main risk of not adopting appropriate domestic enforcement legislation is that the UK would be at risk of infraction proceedings by the European Commission for failing to ensure compliance with the Council Regulation.

It would also mean that the Civil Aviation Authority (CAA), designated as the UK's enforcement body for the provisions of the Council Regulation, would have no power to ensure airline compliance.

All the major full service UK airlines (scheduled and chartered) are signatories to the European Airline Passenger Service Voluntary Commitment and routinely provide care and assistance to passengers affected by denied boarding, short notice cancellations or delays. However, evidence from the Air Transport Users Council (AUC) suggest that certain (non-EU) airlines are much more prone to overbooking than others, and even that some airlines routinely flouted the previous EC Regulation

on Denied Boarding Compensation, which was unsupported by sanctions for non-compliance.

3. Options

The Council Regulation places a legal obligation on the UK to establish effective, proportionate and dissuasive sanctions to ensure compliance with the Regulations in the United Kingdom.

Four options have been identified for consideration

- Option 1: Not adopting UK enforcement legislation

The Government could choose not to introduce domestic enforcement legislation and instead rely on the fact that the Council Regulation has direct application in the UK. However, failure to introduce appropriate sanctions and to provide the CAA with powers to bring proceedings against an airline flagrantly or systematically failing to comply with the Council Regulation would be a clear breach of EU law and would expose the UK to the risk of infraction proceedings.

- Option 2: Adopt UK enforcement legislation with criminal sanctions for non-compliance.

This option would comply with the UK's obligation to establish appropriate sanctions applicable to infringements of the provisions of the Council Regulation, and would provide the CAA, the UK's designated enforcement body, with the power to bring criminal proceedings against an offending airline. On conviction, the airline would be liable to a fine not exceeding level five on the standard scale (currently £5,000) for each offence.

- Option 3: As option 2, but with an additional requirement for airlines to maintain records of compensation and assistance provided.

In addition to the points identified in option 2 above, this option would also require airlines to maintain records of compensation payments, offers of re-imbursment/re-routing and care and assistance provided. This would assist the UK's designated complaints and enforcement bodies in investigating allegations of non-compliance.

- Option 4: Adopt UK enforcement legislation with administrative sanctions for non-compliance.

This option would comply with the UK's obligation to establish sanctions applicable to infringements of the provisions of the Council Regulation, but would provide for the imposition of administrative rather than criminal sanctions, for example the revocation or suspension of an airline's operating licence.

4. Benefits

Option 1

No benefits have been identified in connection with this option. Regardless of the establishment of domestic enforcement legislation, the Council Regulation will have direct application in the UK and could be used as the basis for a civil action for damages by individual passengers.

Options 2, 3 and 4

Each of these options would provide the CAA with power to take action against an airline flagrantly or systematically failing to comply with the provisions of the Council Regulation. If an allegation were proven, the resulting criminal or administrative penalty would act to deter future non-compliance.

In addition to the above, option 3 would also require airlines to record and retain information on compensation and/or assistance provided to passengers in the event of denied boarding, cancellations or lengthy flight delays. These records could assist the AUC, the UK's designated complaints handling body for the Council Regulation, and the CAA in determining the merits of a passenger's complaint.

Even if the airlines were not required by the enforcement Regulations to retain records of compensation and assistance provided (Options 2 and 4), it would still be in the interests of airlines to retain certain key records of payments made or offered to defend against a disgruntled passenger's claim for damages in the Small Claims Court.

The environmental and social impacts of the proposal have been considered but are not significant.

5. Costs

Option 1

This option would impose no new costs on business, but would not allow the CAA to effectively enforce the provisions of the Council Regulation. In the absence of an effective enforcement regime, airlines could choose to accept the risk of a small number of legal claims rather than incur the costs of providing care and assistance to 300+ passengers. The new passenger rights granted by the Council Regulation could therefore be undermined or applied unevenly, affecting the competitive balance between those carriers that do seek to comply with the Council Regulation and those that choose not to.

In addition, failure to introduce domestic enforcement legislation would expose the UK to the risk of infraction proceedings and fines for breach of EU law imposed by the European Commission.

Option 2

This option will have a small administrative cost for both the AUC and the CAA. Although the AUC anticipate an increase in the numbers of complaints received in connection with denied boarding, cancellations and flight delays, initially it is intended that these will be handled by existing staff. However, if the numbers of complaints rise significantly, additional staff may need to be employed. For the CAA,

additional legal costs may be incurred in bring proceedings against airlines systematically failing to comply with the Council Regulation. However, it is envisaged that the majority of complaints will be satisfactorily resolved either directly between the parties, with the assistance of the AUC, or through the small claims court.

The proposal would not impose any direct costs on the airlines. However, indirectly the impact of the provisions of the Council Regulation on the profitability of certain routes may cause the airlines concerned to consider the viability of continuing to provide the service. Strict enforcement could bring this issue to the fore.

Option 3

As option 2 above, but with additional costs to airlines in recording and retaining information on compliance. Although most airlines currently record compensation payments made under the previous denied boarding compensation Regulation, this option would require additional records to be created and retained. Logistically, the collation of such information, particularly where a major disruption of services had occurred, could be both onerous and delay the provision of care and assistance to passengers. Although during consultation a number of airlines commented on this option, particularly on the additional financial burden it would place on air carriers, no information was supplied on the likely additional costs.

Option 4

As with option 2 above, the AUC and CAA would have small additional administrative costs. However, the greatest impact would be on the airlines should an administrative penalty such as the suspension or removal of an airline's operating licence be imposed. Without a valid operating licence an airline would be grounded. Such an extreme measure is considered to be wholly disproportionate to the "offence" of failure to comply with one of the provisions of the Council Regulation.

The environmental and social impacts of the proposal have been considered but are not significant.

6. Equity and Fairness

No issues of inequity or unfairness have been identified in connection with this proposal as the enforcement legislation will apply equally to all passenger flights leaving UK airports, regardless of nationality or size of operation.

The policy has been examined for race relevance but it is considered that in this case a Race Impact Assessment is not necessary.

7. Consultation with small business: the Small Firms' Impact Test

The proposed enforcement legislation should have no specific impact on small firms as they merely establish sanctions for non-compliance with the Council Regulation.

8. Competition Assessment

Adoption of the proposed enforcement legislation will have no impact on competition. The Council Regulation applies to all passenger flights departing EU airports, regardless of the nationality of the carrier.

9. Enforcement and Sanctions

Member States are required to establish rules on sanctions applicable to infringements of the provisions of the Council Regulation and to ensure that these sanctions are applied.

In the UK, all complaints regarding the failure of an airline to provide compensation and/or care and assistance in accordance with the Council Regulation will, in the first instance, be handled by the AUC. The AUC will seek to facilitate a satisfactory resolution of the dispute between the passenger and the airline, through negotiation between the parties. If agreement cannot be reached, the passenger will be encouraged to seek redress through the civil Small Claims Court. The AUC will not be a party to such action, which must be brought by the individual.

Where however the AUC have evidence of an airline flagrantly or systematically failing to comply with the provisions of the Council Regulation, the matter will be referred to the CAA, the UK's designated enforcement body, to consider enforcement action. If enforcement action is considered necessary, the CAA will commence legal proceedings through the criminal courts. In the event of a successful prosecution, the offending airline will be liable to a fine of up to level five on the standard scale (currently £5,000) for each offence.

10. Monitoring and Review

As mentioned above, all complaints regarding non-compliance with the Council Regulation will initially be handled by the AUC. The AUC currently records the number of complaints received about various aviation related matters, including denied boarding, cancellations and delays, and will continue to do so. The CAA will also notify the Department for Transport (DfT) of the commencement of any enforcement proceedings.

Each year, the CAA and DfT will carry out an annual review of the implementation and enforcement of the Regulation in the UK.

11. Consultation

The Government has conducted two public consultation exercises on this proposal. On both occasions, consultees included all UK airlines operating fixed wing passenger aircraft, international airline representative bodies, the CAA and AUC, the Small Business Service and the Devolved Administrations.

The first consultation, run between 16 August and 8 November 2004, was based upon option 3, criminal sanctions together with a requirement to record and retain details of compensation and assistance provided. From the responses received it was clear that the airline industry had major concerns about the potential additional regulatory costs

associated with this option. In light of these concerns the Government carried out a review of its proposal to see whether the enforcement Regulations could be simplified and the potential regulatory burden lightened without reducing the level of protection available to passengers.

This review resulted in the preparation of a revised set of enforcement Regulations, based on option 2, upon which the Government ran a second consultation exercise between 12 January and 11 February 2005. The second consultation paper was positively received and responses were generally supportive of the Government's revised approach.

12. Summary and Recommendation

The UK has a clear obligation to ensure that airlines comply with the provisions of the Council Regulation and to establish appropriate sanctions for infringements that are effective, proportionate and dissuasive.

The Government has no option but to put in place an enforcement regime, but is conscious of the potential practical difficulties of implementing the Council Regulation and considers that the enforcement sanctions should aim to achieve the objectives of the legislation without imposing unnecessary burdens on industry. To this end, the **second option** is recommended. The imposition of a criminal penalty for systematic non-compliance with the provisions of the Council Regulation is considered to be entirely appropriate. The Government considers that there are no suitable administrative penalties that would adequately meet the requirement of being both proportionate and dissuasive (option 4). The outcome of the second consultation exercise also suggests that the Government's revised approach to the enforcement of the Council Regulation, without the need to record and retain records (as envisaged by option 3), is broadly supported by industry. A summary of the costs and benefits is set out in the table below.

Option	Costs Economic, environmental, social	Benefits Economic, environmental, social
1 Do nothing. Rely on direct application in UK to enable passenger to pursue matter through the civil courts	No new costs on business, but would risk exposing UK to infraction proceedings by the European Commission.	None identified. A dissatisfied passenger would still be able to bring a civil action against an airline for compensation or assistance not received as the Council Regulation has direct application in the UK.
2 Provide UK enforcement regime, supported by criminal sanctions for non-compliance.	Small additional administrative and enforcement costs for the AUC, CAA and DfT,	Would enable the CAA, the UK's designated enforcement body, the power to take action against

	dependant on the level of compliance in the UK. No new direct business costs on airlines. Indirect costs dependant on level of compliance with Council Regulation, and other variable factors.	an airline flagrantly or systematically not complying with the provisions of the Council Regulation. Would comply with UK's obligation to lay down rules on sanctions applicable to infringements of the Regulation and remove the risk of infraction proceedings from the European Commission.
3 Provide UK enforcement regime, supported by criminal sanctions for non-compliance and a requirement to retain records of compensation and assistance provided.	As with option 2 above, but with additional costs to airlines for recording and retaining information not previously held as part of usual business records. These costs were not quantified in responses to Department's consultation paper.	As with option 2 above, but additionally this would assist the AUC and the CAA in assessing the strength of a passenger complaint.
4 UK enforcement regime, supported by administrative sanctions for non-compliance.	As with option 2 above, but the penalties available linked to the suspension or revocation of the airline's operating licence. This would effectively halt the airline's operation during the period of the licence suspension, resulting in very significant financial penalties and severe inconvenience to passengers.	As with option 2 above, but with a much stronger penalty for non-compliant airlines.

13. Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed *Charlotte Atkins*

Date: 29 March 2005

CHARLOTTE ATKINS

MINISTER FOR AVIATION

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ANNEX

The following Regulatory Impact Assessment was produced by the Department in connection with Council Regulation EC 261/2004, which was adopted by the European Parliament and Council on 26 January 2004. It is included here to provide further background to the development of the UK's domestic enforcement Regulations that are the subject of the above Final Regulatory Impact Assessment.

DEPARTMENT FOR TRANSPORT

REGULATORY IMPACT ASSESSMENT OF PROPOSED NEW EC REGULATION

Title

1. Proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delays of flights.

Issue

2. Overbooking is a widespread practice amongst scheduled airlines. There is always a proportion of passengers booked onto a flight who do not check in, mainly those holding flexible tickets, and airlines use past experience to estimate the number of these “no-shows”. Sometimes they will overbook, to avoid flying with empty seats. On most flights these estimates are correct but on some occasions too many passengers turn up and some are denied boarding, which can result in considerable inconvenience to those passengers.
3. It is right that passengers denied boarding should be entitled to appropriate levels of compensation, and that this should act as an incentive to airlines to minimise its incidence. Legislation on denied boarding needs to be aware, however, that there are potential benefits to passengers, as well as costs, resulting from overbooking. Scheduled airlines maintain that overbooking is a legitimate commercial practice which benefits passengers by keeping fares lower than they would otherwise be. Overly-punitive rates of compensation may bring this practice to an end and result in increased costs to consumers in the form of higher fares.
4. Many airlines already have a system of calling for volunteers to give up seats in return for compensation, before resorting to denying passengers boarding against their will. British Airways (BA) for example, has a scheme whereby passengers are offered a flat rate of compensation (higher than the statutory minimum).

Objective

5. The proposal, which would replace an existing Regulation, EEC No. 295/91 on Denied Boarding, aims both to deter airlines from excessive overbooking or cancelling flights for commercial reasons, and to update the existing minimum levels of compensation payable to passengers denied boarding. It would extend the right to compensation in cases of cancelled flights and create new rights for passengers affected by cancellations and long delays, for example, giving passengers affected by significant delays the right to meals and, where appropriate, overnight accommodation. The Regulation would apply to all passengers on all flights leaving the EU (including on non-EU airlines), as in the present Regulation. However, the new Regulation would also apply to flights on EU airlines returning to the EU from third countries.
6. The original proposal suggested a fivefold increase in the minimum level of compensation for those denied boarding (to €750 for flights of less than 3,500 km and €1,500 for flights of more than 3,500 km); the extension of this compensation to passengers on cancelled flights together with a right to reimbursement and care; the provision of assistance to passengers in case of lengthy delays; and a broadening of the scope of the Regulation to include non-scheduled flights (for both seat-only and inclusive tour passengers) and flights returning to the EU from non-EU airports.
7. Following discussion in Transport Council Working Groups the original proposal was revised in a number of areas. The amended text was subsequently adopted as the Council's "Common Position" on 18 March 2003 following political agreement in December 2002. The most significant change was a lowering of the proposed compensation levels and the adoption of a third distance tier so that the following compensation would be payable: €250 for flights of up to 1,500 km; €400 for intra-EU flights over 1,500 km; and €600 for all other flights. At second reading, the European Parliament adopted a number of further amendments, not all of which were accepted by Council. The conciliation process was therefore triggered. During conciliation a further significant amendment was made to the article dealing with cancelled flights so that air carriers would become responsible for providing suitable care and assistance in the form of refreshments and, where appropriate, free overnight accommodation in the event of a flight being cancelled, even where this was caused by circumstances outside of the airline's control. The following assessment is based on the post conciliation text.

Risk Assessment

8. The Commission has stated that in 1999, according to the data made available to it, there were an estimated 250,000 passengers who were denied boarding on scheduled services by the main Community carriers, equivalent to around 1.1 per 1000 passengers. The Commission's objective has been to reduce this number. Figures from the United States suggest that the level there is some ten times lower, primarily because a system of calling for volunteers is compulsory. As outlined above, the incidence of denied boarding is relatively low, and a case could be made for maintaining the status quo. The complaints statistics of the Air Transport Users Council indicate that overbooking is not an area of major concern for air passengers. In 2002/03, 269 complaints were received regarding overbooking compared to 558 complaints about flight cancellations and 506 complaints about

flight delays. Airlines already work to keep the levels of denied boarding to a minimum whilst seeking to optimise load factors by ensuring that the maximum number of seats are sold.

9. Many airlines already operate a system of calling for volunteers, which the US experience suggests is more important to reducing the rates of involuntary denied boarding than a stringently high rate of compensation. The rate of involuntary denied boarding in the US in the first quarter of 2002 was only 0.08 per 1,000 passengers. The volunteer system has already been promoted by the Commission in other initiatives. In 2000, the Commission raised the possibility of requiring airlines to provide passengers with statistics on denied boarding, which would provide a commercial incentive for carriers to keep their rates down. Calling for volunteers is also promoted in the European Airline Passenger Service Voluntary Commitment, to which all the major full-service UK airlines (scheduled and chartered) are signatories.
10. The Association of European Airlines (AEA), representing the main full service scheduled airlines, submitted a preliminary study of the impact of the proposal to the European Parliament Rapporteur in March 2002. For a sample of five major airlines, the AEA reported that the total number of passengers denied boarding in 2001 (voluntarily and involuntarily) was 214,000, out of a total of 168 million passengers (the latter figure representing some 35% of the overall passengers carried by European airlines in 2001). Some 0.13% of the overall number of passengers carried by these airlines were therefore denied boarding^a and the cost to them in denied boarding compensation was some €1.2 million. Non-scheduled (charter) airlines do not overbook and would only exceptionally deny boarding for technical reasons.
11. As regards cancellations, according to figures provided by three main no-fills carriers^b (which are more prone to cancellations on the day of the flight than the full service scheduled airlines) have estimated that there were 1,091 cancellations (excluding those caused by adverse weather) over the 12 month period to September 2001 which would be covered by the proposed Regulation. These affected 126,981 passengers or roughly 0.25% of all their passengers. For cancellations made on the day of the flight, we might assume a slightly lower percentage for the full service scheduled carriers, though they are more likely to cancel flights in advance. Figures for individual airlines are not available as the information is commercially sensitive. Charter carriers only cancel flights for technical reasons and the percentage of their passengers affected would be much smaller.
12. CAA figures for UK airports for the year ending November 2002 revealed the following delays: for flights of over 3,500km, scheduled airlines had 496 flights delayed by over four hours, affecting 71,796 passengers. Charter airlines had 29 such flights delayed by over four hours, affecting 6,987 passengers. Together these amounted to 0.05% of all passengers. For flights of under 3,500 km, 5,704

^a British Airways' rate of denied boarding is less than half this amount.

^b Ryanair (including the services formerly provided by Buzz), easyJet (including the services formerly provided by Go) and Virgin Express

flights by scheduled airlines were delayed by over two hours, and 1,511 flights by charter airlines. 3% of one charter airline's flights were delayed by over 2 hours. These affected 557,744 and 305,946 passengers respectively (0.54% of all passengers).

13. The UK accounted for some 17.1% of all air traffic management (ATM) delays in European airspace in 2003^a. Punctuality figures, for November 2003 for members of the Association of European Airlines showed an average delay per delayed flight of 46 minutes^b.
14. Currently there are no legal rights for passengers subject to long delays, although airlines which are signatories to the European Airline Passenger Service Voluntary Commitment already offer meals and refreshments to passengers in case of delays. Some airlines also offer a refund in case of delays. For example, easyJet already offers reimbursement in case of delays, refunds for delays of over 4 hours (so the flight is free), refreshments after 3 hours and a contribution to hotel costs when flights are cancelled after 8.00pm.
15. The cost to passengers of delays and cancellation will depend on the time for which they are delayed and the costs of the consequences of their being delayed. It is difficult to quantify the latter costs, particularly if it results in business being lost. On the other hand, as paragraph 14 notes, some airlines offer reimbursement if the delay is lengthy, which will reduce the monetary impact. Paragraph 12 indicates that about 80,000 passengers flying over 3,500 kms suffered delays of more than 4 hours in 2002 while about 865,000 passengers who flew less than 3,500 kms suffered delays of more than 2 hours. In total, this suggests that passengers were delayed for more than 2 million hours in 2002. The value of time for air passengers might be about £7/hour for leisure passengers and £40 for business ones. Assuming 20% of delayed passengers are on business trips this would suggest an average value of about £13.50/hour and an aggregate passenger time cost of about £25m.
16. Evidence from the Air Transport Users Council suggests that certain (non-EU) airlines are much more prone to overbooking than others, and even that some airlines routinely flout the existing Regulation on Denied Boarding Compensation. The existing Regulation does not explicitly require Member States to have sanctions to enforce the Regulation. The new Regulation would require this, thereby providing better enforcement.

Options

17. At the Transport Council in December 2002 the UK was the only country to oppose the Regulation, primarily over concerns that the Regulation was encroaching into areas of legitimate commercial competition and that the proposal was likely to have a disproportionate impact on certain sectors of the industry. The UK can continue to oppose the Regulation, but it is likely that in a qualified

^a Central Office for Delay Analysis - Delays to Air Transport in Europe: Annual Report 2003

^b This excludes flights delayed by less than 15 minutes which are regarded as being on time.

majority voting situation we will be outvoted unless other countries change their positions. Nevertheless, two options remain available:

- Option 1: Support the text of the proposed Regulation agreed in conciliation;
- Option 2: Continue to oppose the Regulation on the above grounds and seek to persuade other Member States to vote against adoption.

Identifying the benefits

Option 1

18. The proposed Regulation would have two main benefits. Firstly it would increase the disincentive to airlines to overbook (though clearly this disincentive will be smaller than if the originally proposed fivefold increase in the minimum level of compensation had been accepted). The requirement on airlines to call for volunteers to surrender reservations in exchange for agreed benefits should also push down the levels of denied boarding.
19. Secondly, passengers who are nevertheless denied boarding will receive greater compensation for the inconvenience suffered. Passengers will therefore benefit though the loss to airlines means that there is no net benefit to the economy. In addition, passengers will be entitled for the first time to compensation for cancelled flights, as well as the right to reimbursement/re-routing and care and assistance. In case of long delays, passengers will be entitled to assistance such as meals and accommodation, which not all airlines currently offer.
20. The proposal would widen the scope of the existing Regulation to include non-scheduled flights and flights by Community carriers back to the EU from third countries. The proposal also imposes certain obligations on airlines with regard to the treatment of persons with reduced mobility in case of denied boarding, cancellations and delay.

Option 2

21. If the proposed Regulation is blocked in Council the existing Regulation on denied boarding compensation will remain in force. No new obligations would be imposed on airlines and there would be no immediate incentive to raise ticket prices.

Quantifying the benefits

Option 1

22. The proposal as currently amended would increase the numbers of passengers who could claim compensation, as well as the level of compensation. If the current

levels of compensation were doubled, the compensation claimed by the 214,000 passengers denied boarding by the AEA airlines in 2001 would double from €1.2 million to €2.4 million.

23. During 2001, the five sample AEA airlines cancelled a total of 35,860 flights. However, these included schedule changes made many weeks or months in advance, and the AEA calculate that some 26,688 of these would have been eligible for compensation under the original proposal. The AEA assumed an average load in the realms of 43 passengers per flight, giving a total of 1.15 million passengers claiming compensation for cancellations. This would increase the total number of passengers claiming compensation from 214,000 in 2001 (under the current Regulation), to 1.36 million under the new proposal. However, the proposal restricts compensation to those passengers booked on flights which are cancelled within two weeks of departure.
24. As set out in paragraph 12 above, the number of UK passengers benefiting from assistance in case of delays would be approximately one million.

Option 2

25. Should the proposed Regulation not be adopted the airlines will incur no additional regulatory costs.

Issues of equity and fairness

26. It is intended by the Commission that the proposed measures should impact equally across the airline industry. It is right that all passengers should be treated equally, whether on a scheduled or charter carrier (but see below for discussion of package tour passengers). However, both the no-frills carriers and the European Regions Airline Association have expressed concern that the proposal could impact disproportionately on their services, given that their average fares are lower. Rather than have a flat rate of compensation, they have argued that levels of compensation should be linked to fares. An amendment to link compensation to ticket price, as the UK would have wished, was put forward in the European Parliament but was not supported. The no-frills carriers further argue that passengers should be allowed the choice of low fares in return for less protection. They have also claimed that the proposed Regulation will discriminate against airlines in relation to other modes of transport where passengers are not protected against cancellations or delays.
27. There may also be an issue concerning the inclusion in the proposal of flights by Community carriers from third countries to the EU where passengers do not benefit from compensation in the third country. The Commission believe that this is appropriate to ensure that passengers flying to a third country with an EU carrier are covered on both the outward and return journey. Community airlines have argued that this is discriminatory and will put them at a competitive disadvantage in relation to non-EU airlines. It is important to note, however, that a similar provision was included in the 1998 proposal, which cleared UK Parliamentary Scrutiny.

28. Charter carriers also believe that the proposal impacts disproportionately on them. Since most of their passengers are flying as part of a package holiday, charter carriers are under an obligation to carry their passengers to a particular destination as soon as possible and have little scope to transfer passengers to alternative services. There is concern that giving passengers the right to re-routing would be costly.
29. Finally, airlines have also made the point that the conciliation text does not seek to extend such rights to other modes of transport.

Identifying and quantifying the costs

Option 1

Full service scheduled carriers

30. In its response to the Commission's original proposal the AEA proposed that the current compensation levels (set by the 1991 Regulation) should be increased by 50%, to €225 for flights of less than 3,500 km and €450 for flights of more than 3,500 km. This would represent an increase on the current minimum level (above the rate of inflation in the EU, which was 28% for 1991-2001), but without penalising airlines to the extent that they were unable to overbook and without resulting in significant price increases being passed on to the consumer. We can therefore assume that the airlines could comfortably live with such an increase without it imposing significantly higher costs.
31. As outlined above, the AEA have estimated that for their sample of five leading European airlines, the cost of denied boarding compensation in 2001 was €41.2 million. With a doubling of compensation levels, as agreed in the conciliation text, this figure would reach €82.4 million^a.
32. It is not possible to accurately quantify the financial costs to airlines resulting from the proposal's provisions on cancellations^b. In terms of the compensatory element, BA estimates that the potential additional costs could total up to £36 million, although compensation would not be payable in the event of the cancellation being caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. The proposal suggests that this would include circumstances of political instability, adverse weather, security risks, industrial unrest and unexpected flight safety short comings. Further factors may, in due course, be held to fall within this definition. The proposal would also place additional burdens on customer services. Based on BA's estimate, if such costs were passed on directly to the consumer, this could amount on average to around **£1 per one way ticket**. In addition, carriers will also be required to provide appropriate care and assistance in the form of meals/refreshments and, where necessary, free

^a BA currently pays above the minimum rates of compensation. A doubling of the minimum would therefore not necessarily lead to a doubling of costs.

^b Passengers would be entitled to compensation for all cancellations made within two weeks of departure, unless suitable alternative flights are offered, as defined in the proposal.

overnight accommodation regardless of the cause of the cancellation. In the event of sustained industrial action or adverse weather, these costs could be significant.

No frills carriers

33. The 'no frills' carriers should be treated differently for a number of reasons. They rarely overbook and are therefore not affected by provisions on denied boarding. However, they do cancel flights and would be affected by the right to compensation, care and assistance in such cases. In fact, given the demanding schedules to which they operate, they are more prone to cancelling flights as a measure to avoid lengthy 'knock-on' delays. As mentioned above, the no-frills carriers are concerned that the compensation levels are in no way linked to the ticket price, which for no-frills carriers average €9. The potential costs of providing care and assistance to passengers in the event of both cancellations or long delays, regardless of cause, could have a significant impact on carriers' pricing structure given that load factors are generally high. It is not possible to accurately quantify the potential costs of such care and assistance but it is likely that these will significantly exceed the profit margin that the flight could be expected to generate. Further, the effect of a lengthy delay or cancellation could also impact on later flights, multiplying the cost impact for carriers, particularly in the low cost sector where aircraft utilisation can be high.
34. Information provided by the three main no-frills carriers states that they cancelled 1,357 flights in the 12 months to September 2002. Of these, excluding delays attributed to weather problems, 1,091 were estimated to fall within the scope of the Regulation. These cancellations affected 126,981 passengers (about 0.25% of all their passengers). If each of these passengers were to be paid the minimum level of compensation payable for a short distance flight this would result in a cost to the airlines of approximately €1.7 million. Given passenger numbers of 32.6 million, if this cost were passed on directly to consumers the compensation element alone would add approximately €1 to the price of the ticket, an increase of around 1.5% on the average fare.
35. The no-frills carriers have argued for not only the compensation figure to be linked to the fare paid, but also for the "exceptional circumstances" clause to be reinstated so as to apply to both the compensation element and to the provision of care and assistance.

Charter carriers

36. Charter airlines do not overbook, nor cancel flights for commercial reasons. Their liability under this Regulation would therefore be limited to delays and to those occasions where they were forced to cancel flights or deny boarding for technical reasons. Since the major charter carriers already offer meals and refreshments under the voluntary commitment, this provision would not impose significant new costs. However, charter airlines are concerned at the potential cost to them if passengers exercised their right to be re-routed on other airlines in the case of long delays. Around 300,000 charter passengers were subject to long delays last year on flights leaving UK airports. If half this number exercised their right to re-routing on other airlines, this could cost the airlines at least £20 million. This

figure could potentially be doubled if flights returning to the UK are taken into account. Charter airlines have argued that this right should not apply to passengers travelling on an inclusive tour. Package travel passengers already have rights to claim damages from the tour operator under EC Directive 90/314 on package travel in respect of cancellation or changes to the service.

Tour Operators

37. If airlines were to pass on the costs and ticket prices increase, there would be a consequential impact on tour operators who would have to raise holiday prices.

Option 2

38. Should the proposal not be adopted by Council, there would be no additional cost to industry. Passengers would continue to be entitled to the existing levels of compensation, care and assistance in the event of overbooking. However, there would be no requirement for passengers to be compensated or assisted in the event of flight cancellations or lengthy delays although some airlines may continue to do so.

Competition Assessment

39. We have examined the market for air travel and, for the purposes of this assessment, concluded that no frills, charter and schedule flights all compete in the same market. The proposed Regulations are likely to have a disproportionate effect on no-frills airlines and, to a lesser degree, charter flights. Competition concerns that may arise from fixed levels of compensation would be negated if this had been linked to ticket price. That said the low costs involved in implementing the fixed fee are unlikely to change the market structure or nature of competition in this market. There will be no distortion of competition for flights departing the EU as the Regulation applies to all airlines.
40. We have also looked at routes where airlines compete with other modes of transport, and concluded that there is unlikely to be any significant effect on competition. Whilst the price of fares will rise, the additional costs would be spread across all of the airline's passengers resulting in a relatively modest increase per ticket, and the added security given to consumers through this measure may actually enhance the desirability of flying.

Results of consultations

41. Regrettably, the Commission carried out no formal consultation on the proposal. DfT consulted UK passenger airlines and aviation organisations with an interest and received thirteen replies. The main concerns of respondents focused on the proposed rates of compensation and the widening of the Regulation's scope. The Association of British Travel Agents (ABTA) and the Federation of Tour Operators (FTO) both endorsed strongly the view of the International Air Carrier Association (IACA) – speaking for the charter carriers - that package travel

passengers should be excluded. DfT has also kept in close touch with interested parties throughout the negotiations.

Enforcement, sanctions, monitoring and review

42. The Regulation would be directly applicable across the EU. The proposal requires Member States to lay down rules on penalties and enforcement and the UK would therefore be required to draw up secondary legislation to this effect providing for “effective, proportionate and dissuasive” penalties for infringements. Further, the UK would be required to designate an appropriate body or bodies responsible for handling passenger complaints and for the enforcement of the provisions of the Regulation. Although the Civil Aviation Authority has an interest in the current Regulation, it does not actively enforce it. It is likely that the Government would designate the CAA as the responsible enforcement body in the UK, with modest resource implications. In addition it is likely that the UK would designate the Air Transport Users Council as the body responsible for handling passengers’ complaints, again with some resource implications.
43. The Commission states in its Explanatory Memorandum that it would monitor the working of the legislation closely, including its effects on the rates of denied boarding and cancellation. The Commission would issue a report within five years of the regulation coming into force and propose further measures if no significant change had been achieved.

Small Business Services

44. The Regulation will apply to all fixed wing passenger carriers operating from UK airports. Small airlines, particularly those in the outlying regions where weather conditions play an important role in day to day operations, could be significantly impacted by the cancellation and delay provisions in the Regulation. Adverse weather, particularly in the far north of Scotland and around the Scilly Isles, make delays almost inevitable. Requiring compensation and assistance to be provided to passengers in such circumstances would have a significant impact on the operators of these services. In many ways, the concerns of the no-frills carriers are echoed by small regional airlines.

Recommendation

45. Compared to the political agreement text, the conciliation text now makes duty of care (refreshments, phone calls, etc) unconditional, with no exemption in the event of “exceptional circumstances”. This is likely to a significant cost implication for all airlines, but particularly for the no-frills sector where average fares are lower. In addition, the UK's underlying concerns about the encroachment of the Regulation into areas of legitimate commercial competition remain unresolved. In the circumstances, it is recommended that the UK should oppose the adoption of this Regulation in Council (option 2).