



Denied Boarding Compensation Regulation (EC) No. 261/2004 - Summary of responses

Background

On 16 August 2004 the Department for Transport launched a consultation paper seeking views on a set of proposed enforcement Regulations to be put in place in the UK to ensure compliance with Regulation (EC) No.261/2004 on Compensation and Assistance to Passengers in the Event of Denied Boarding, Cancellations and Long Delays (the Council Regulation). The closing date for receipt of responses was Monday 8 November 2004. By 15 November, nineteen responses had been received, eight from individual airlines, seven from industry representative bodies, and one each from the Civil Aviation Authority (CAA), the Air Transport Users Council (AUC), the Confederation of British Industry and one private individual.

Key Issues

1. Recording and retaining information relating to the Council Regulation

Under enforcement Regulation 3, airlines would be required to retain certain information relating to implementation of the Council Regulation, specified by the CAA, for a minimum period. This proposal provoked considerable opposition from airline and industry representative bodies. Six respondents considered that this requirement went beyond the obligations imposed by the Council Regulation and was therefore disproportionate. Eight respondents agreed that the broad wording of this requirement would impose an onerous burden on carriers, as much of the information that would need to be kept is not currently held by airlines. It was suggested by a number of respondents that if such information were to be required to be held, this should be limited to those records currently kept for business purposes. Two respondents highlighted the potential cost and complexity of developing and maintaining an appropriate recording system, and it was argued that before introducing such a requirement a full cost impact assessment should be carried out by the Department.

On the question of the retention period for such records, five respondents considered two years to be an appropriate length of time, two suggested one year would be adequate, and one respondent considered that one week would be sufficient unless a claim/complaint had been logged within that time.

Government response: It is accepted that the original wording of regulation 3 was broad in its scope. The aim was to ensure that the enforcement body would have at its disposal sufficient information to determine whether there was evidence of persistent non-compliance with the provisions of the Council Regulation. However, in view of the legitimate concerns raised by the industry, and having been satisfied

by the CAA that enforcement would not be compromised without a specific obligation on carriers to collect and retain such information, the Government has decided to delete regulation 3 in its entirety. Under the new proposals it will be a matter for individual airlines to decide how much information to collect and retain, with an eye to rebutting any future allegations that they are not meeting their obligations under the Council Regulation.

2. Appropriateness of sanctions

Responses to the question about the appropriateness of the proposed criminal sanctions for non-compliance with the provisions of the Council Regulation were divided. Passenger representatives felt that the sanctions should be sufficient to incentivise airlines to comply with the Council Regulation and that if these were not sufficiently dissuasive an airline might choose to accept the risk of a small fine rather than pay compensation to large number of passengers. Further, it was argued that in addition to the penalties imposed for non-compliance, airlines should also be required to pay any outstanding compensation to those passengers to whom compensation was still owed.

In contrast, airline respondents generally considered the imposition of criminal sanctions to be inappropriate and pointed out that passengers already have civil remedies available to them to recover damages for care and assistance not provided. Seven industry respondents argued that a number of the obligations created were either ambiguously drafted or could be impossible to comply with for logistical reasons. In the circumstances, the airline respondents argued that it would be unfair to make non-compliance with such provisions a criminal offence.

One respondent considered that the concept of bringing a criminal action against Directors or employees of an airline for non-compliance to be out of proportion to that necessary to enforce the Council Regulation.

Five respondents, (all airlines or industry representatives) felt that the level of fines proposed were disproportionate to the offences committed, arguing that the obligations imposed by the Council Regulation were sufficiently dissuasive to make additional criminal penalties unnecessary. Two respondents suggested that the level of fines should be capped. One airline respondent conceded that an unlimited fine may be appropriate in the event of wilful non-compliance, but not where it was impossible for the airline to comply.

Finally, four respondents argued that the sanctions imposed by Member States should be consistent across the European Union and to this end the UK should consider administrative sanctions rather than criminal penalties.

Government response: The Government is mindful that the Council Regulation requires Member States to lay down rules on sanctions applicable to infringements that are effective, proportionate and dissuasive. However, it is also 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. The Department considers that in such circumstances, criminal sanctions are entirely appropriate. The imposition of criminal penalties is not unusual in UK civil aviation legislation, and there are no suitable administrative penalties available (for example, revocation or suspension of an airline's operating licence would be disproportionate).

With regard to the level of fine available to the courts following conviction, the Government has carefully considered the arguments put forward by both industry and passenger representative groups. The Government accepts that a summary only offence and a level five penalty on the standard scale (currently Â£5,000) would be sufficiently dissuasive, given the nature of the offences in question, and the adverse publicity a conviction would generate. The Government is also satisfied that such a penalty, would be sufficient to make it unnecessary to extend criminal liability for non-compliance to individual officers of the operating air carrier. Should there be evidence of systematic non-compliance, the CAA would be able to bring more than one charge, each capable of attracting a separate fine.

Turning to the alleged ambiguity in the wording of the Council Regulation, the Government considers that the airlines' concerns in this regard would be sufficiently addressed by the provision of an appropriate due diligence defence (see below).

Finally, the Government acknowledges the desire of airlines to ensure that the Council Regulation is enforced evenly across Member States. However, in an EU of 25 Member States it is not possible to harmonise enforcement proceedings completely. The different domestic legal regimes in different Member States make it inevitable that enforcement arrangements will vary.

3. Provision of a due diligence defence

Five respondents argued that airlines, or their directors, should have a defence available where, having taken all reasonable precautions and exercised due diligence, an offence is nevertheless committed because of the act or failure of a third party, or on reliance on information provided by a third party.

Government response: The Government acknowledges the concerns raised by the airline industry concerning the potential difficulty of strictly complying with all of the provisions of the Council Regulation in all circumstances, and wishes to allay fears that an airline might find itself facing criminal charges because of exceptional circumstances leading to an act of non-compliance, or an isolated instance of human failure on the part of one of its staff. In the circumstances it is felt appropriate that a suitable defence should be provided for an airline that has taken all reasonable steps to ensure compliance. This is set out in regulation 4(1) of the new draft.

4. Proposed division of responsibility between the CAA and the AUC

Ten respondents commented on the proposed division of the enforcement and complaints responsibilities provided for under the Council Regulation. There was broad agreement with the proposal to designate the CAA as the UK's enforcement body and the AUC as the UK's complaints body. However, the majority of respondents felt that the designation should be made on the face of the enforcement Regulations.

Two respondents expressed concern about whether the CAA or AUC had the necessary expertise to interpret and apply the Council Regulation, suggesting that the Department should provide guidance on the issue. One respondent felt that if the AUC were to be designated as the complaints body in connection with this Regulation, it would be inappropriate for it to continue to be funded by the airlines.

Government response: In view of the comments received, the Government is content to designate the CAA as the UK's enforcement body and the AUC as the UK's complaints body on the face of the enforcement Regulations (see regulation 5 in the new proposals). However, it is not considered to be appropriate for the Government to provide guidance on the interpretation of a Community instrument. The AUC's role is a formalisation, in specified circumstances, of the more general functions it carries out already on behalf of passengers.

5. Limiting the authority to commence proceedings under the enforcement Regulations

Three respondents expressed concern that the enforcement Regulations do not give the CAA the exclusive authority to commence criminal proceedings that would remove the possibility of private individuals initiating prosecutions.

Government response: Legal advice is awaited from the Attorney General on whether this is an appropriate case for a consent requirement for private prosecutions. In any event the Government questions whether private individuals would go to the expense and risk of pursuing individual cases of non-compliance in the criminal courts.

6. Limiting the territorial scope of the enforcement Regulations

Two respondents argued that the territorial scope of the enforcement Regulations appeared to be unlimited and could potentially be applied to all EU and non-EU airlines operating anywhere in the world. It was suggested that the enforcement Regulations should be expressly limited to flights departing from UK airports and to flights from a country outside the UK to such airports as specifically provided for in Article 16 of the Council Regulation.

Government response: The Council Regulation requires the UK to implement national enforcement legislation. The enforcement Regulations are to be made under section 2 of the European Communities Act 1972, which automatically limits the territorial scope of subordinate UK legislation.

7. Delaying commencement of the enforcement Regulations

Five respondents pointed out that the Council Regulation is currently subject to legal challenge in the European Court of Justice. In view of this, it was argued that it would be inappropriate to commence the enforcement Regulations until the outcome of the legal challenge has been determined.

Government response: The Government has taken legal advice on this issue and has been informed that unless or until it is set aside or otherwise declared invalid, the Council Regulation will enter force in the UK on 17 February 2005. At that time the UK is obliged to have established an appropriate enforcement regime.

8. Certain operations should be exempted from the enforcement provisions

Two respondents sought exemptions for certain niche markets, identifying in particular pleasure flights operated on vintage aircraft.

Government response: The Government has some sympathy for the operators of such flights, but the provision of an exemption would create a disparity between the terms of the EC measure and our domestic implementation.