

Regulatory Triage Assessment	
Title of regulatory proposal	Misdirected Passengers: Consultation on Codes of Practice and a new civil penalty
Lead Department/Agency	The Home Office
Expected date of implementation	6 April 2018
Origin	Domestic
Date	24/06/2016
Lead Departmental Contact	Border Security & Visa Policy
Departmental Triage Assessment	Low-cost regulation (fast track)
<p>Rationale for intervention and intended effects</p> <p>When the majority of passengers arrive in the UK on international commercial flights they must be directed to the immigration control to be cleared for entry into the UK. There are continuing instances of passengers being misdirected (sent to the wrong part of an airport); the result is that they do not undergo the required checks before entry into the UK. Misdirected passengers can also include airline staff found to be abusing the crew channel. These instances of misdirected passengers constitute an avoidable border security breach, undermining the UK's policy of conducting 100 per cent checks on scheduled passengers arriving at the border in order to identify any criminal, security and immigration concerns.</p> <p>The Home Office has worked closely with the relevant members of the airline industry sector since mid-2013 to raise awareness of this issue and the resulting risks. Misdirections continue to occur in significant numbers. Any misdirection has a resource implication for Border Force (BF) because of the resulting recovery action, about 2-3 days work. Current legislation provides for a criminal sanction (a fine of up to £5,000 or a maximum of six months imprisonment, or both) for the misdirection of passengers. A civil penalty is seen as a more effective sanction which can be used to help drive improvements in reducing occurrences of misdirection.</p>	
<p>Viable policy options (including alternatives to regulation)</p> <p>The Home Office applied non-regulatory approaches with the sector since mid-2013 to raise awareness of the risks from misdirected passengers. This has led to a greater understanding of the problem, more cooperation from the sector and some practical outcomes (for example, safer door arrangements). General awareness posters have been circulated to airports, and the Department for Transport now includes misdirection in their airport safety training. None of these approaches have met the policy objective. The policy option under consideration is to:</p> <ul style="list-style-type: none"> • Introduce a civil penalty scheme where a number of mitigating factors are taken into consideration but allows persistent offenders to face significant penalties that are commensurate with the Macrory Principles, Annex 1, Macrory (2006), for failure to present passengers to immigration controls for required checks. • Introduce two new codes of practice (one setting out best practice as to how to avoid misdirection, and hence a penalty, and a second code setting out how the maximum level of penalty will be determined). The first code formalises the accepted practice and procedure at UK airports since the introduction of the Immigration Act 1971. 	

Initial assessment of business impact

This policy has been designed to effectively combat misdirection of passengers at airports. A civil penalty will be applied when carriers and/or airport operators fail to take reasonable steps to comply with notices regarding designated airport control areas. These failures could include the misdirection of disembarking passengers and abuse by crew of the crew clearance channels, by using them in circumstances when they are not entitled to do so. The accompanying codes of practice (one setting out best practice and one setting out how the maximum level of penalty will be determined) subject to consultation and implemented as best practice and guidance for carriers and port operators.

- This civil penalty would apply to any operator of an airport where a control area is designated and any commercial carrier operating non-general aviation flights into an airport where a control area is designated and they should adhere to the code of practice setting out best practice. The impact of the civil penalty will fall on non-compliant business. Firms should adopt best practice and ensure standards are met at all times so that avoidable errors are largely eliminated.
- The private sector may incur a small familiarisation cost in year 1 only, as staff read the updated codes of practice. The main code of practice is new but builds on existing practices, including training which is normal staff training, and introduces a system of oversight by BF which is not onerous. Total gross costs to business are estimated to be about £40,000 in Year 1 or £0.04 million. In the high scenario, the estimate is £120,000 in Year 1 or £0.12 million.
- The Home Office is consulting the industry to find out more about any impacts that may occur.
- The main impact on the public sector is likely to be familiarisation costs to BF. Administration of the scheme, handling objections and appeals, provision of training to carriers and collaborating and liaising with the private sector, where the latter requests assistance will be absorbed within the current budget. Total gross costs to BF are estimated to be about £40,000 in Year 1 or £0.04 million. In the high scenario, the estimate is £60,000 in Year 1 or £0.06 million.
- The main benefit from this policy is to ensure that all passengers and relevant airline staff that enter the UK undergo an immigration and security check. It may produce non-cashable savings for BF in that they should spend less time attempting to recover passengers who did not undergo a check at the airport.

Business Impact Target

Business Impact Target Status: The preferred option includes:

- A civil penalty, which is a statutory provision that does not qualify for the Business Impact Target (BIT); and
- Introducing two Codes of Practice both of which qualify towards the BIT.

The BIT status arises from s.22 of the Small Business, Enterprise and Employment Act 2015. However, no BIT target (or methodology for calculating it) has been set for the current Parliament at the time of writing. Total gross costs to business from this proposal are estimated to be about £0.04 million in Year 1 only as there are no ongoing costs to business. In the high scenario, the estimate is £0.12 million in Year 1.

Rationale for Triage rating

The proposed measure is a low-cost regulation that qualifies for the fast track process because the gross costs to business (even in the high estimate) do not exceed £1 million in any single year.

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Better Regulation Unit signoff:	Alexander Fraser	Date: 12/06/2017

Supporting evidence

1. The policy issue and rationale for Government intervention

When passengers arrive in the UK on international commercial flights from outside the Common Travel Area they must be directed to the immigration control point to be cleared for entry into the UK. There are continuing instances of passengers being misdirected (sent to the wrong part of an airport); the result is that they do not receive the required checks before entry into the UK. Misdirected passengers will also include airline staff found to be abusing the crew channel. These instances of misdirected passengers constitute an avoidable border security breach, undermining the UK's policy of conducting 100 per cent checks on scheduled passengers arriving at the border in order to identify any criminal, security and immigration concerns.

The Home Office has worked closely with the relevant members of the air industry sector since mid-2013 to raise awareness of this issue and the resulting risks. Misdirections continue to occur. Any misdirection has a resource implication for BF because of the resulting recovery action, about 2-3 days work. Current legislation provides for a criminal sanction (a fine of up to £5,000 or a maximum of six months imprisonment, or both) for the misdirection of passengers. A civil penalty is seen as a more effective sanction which can be used to help drive improvements in reducing occurrences.

2. Policy objectives and intended effects

This policy has been designed to effectively combat misdirection at airports and to effectively eliminate avoidable errors that lead to misdirection. A civil penalty will be applied when carriers and airport operators fail to comply with notices regarding designated airport control areas. These failures could include the misdirection of disembarking passengers and abuse by crew of the crew clearance channels, by using them in circumstances when they are not entitled to do so. The accompanying codes of practice (one setting out best practice and one setting out how the maximum level of penalty will be determined) will be agreed through consultation and implemented as best practice and guidance for the benefit of carriers and port operators. The intended effect is to ensure the proper standards are met, that adequate training is given to operatives, to penalise those who continue to permit ineffective behaviour that contributes to avoidable errors and hence misdirection, and so to reduce numbers of misdirections.

3. Policy options considered, including alternatives to regulation

Option 1 is the do nothing option. This does not introduce any change to the current situation. There are no significant costs associated with this option but as it does not meet the policy objective it is not the Government's preferred option.

The proposed policy, Option 2, which is under consideration, includes measures to:

- Introduce the civil penalty via an enabling clause and relevant schedule in the Immigration Act 2016 which received Royal Assent in May 2016. A civil penalty will be applied when carriers and airport operators fail to comply with notices regarding designated airport control areas and have not taken reasonable steps to prevent this. These failures could include the misdirection of disembarking passengers and abuse by crew of the crew clearance channels, by using them in circumstances when they are not entitled to do so. Compliant businesses will be unaffected.

- Consult on the accompanying codes of practice (one setting out best practice and one setting out how the maximum level of penalty will be determined) and the maximum level of penalty which will be introduced by statutory instrument (subject to the affirmative resolution procedure). The codes will be brought in by negative resolution.

Non-regulatory options (self-regulation and a significant programme of education and training) were not only considered but were actively implemented. The Home Office worked closely with the relevant members of the air industry sector since mid-2013 to raise awareness of this issue and the resulting risks. However, misdirections continue to occur and some passengers are not recovered and so not cleared for entry into the UK. Any misdirection has a resource implication for BF because of the resulting recovery action (about 2-3 days work per misdirection). Current legislation provides for a criminal sanction (a fine of up to £5,000 or a maximum of six months imprisonment, or both) for the misdirection of passengers. A civil penalty is seen as a more effective sanction which can be used to help drive improvements in reducing occurrences of misdirection. The non-regulatory options were not effective solutions to the problem as there was no sanction for those who did not abide by the principles and best practice offered. Also, the programme did not meet the policy objective nor achieve the intended effect.

4. Expected level of business impact

The level of business impact is expected to be small. A significant cost falls on the public sector in the central estimate. Costs to business (the private sector) are in scope of the Estimated Annual Net Cost to Business (EANCB) and include:

- Carriers reading the code of practice on minimising the risk of an occurrence of a misdirected passenger.
- Carriers reading the code of practice on how the factors work in calculating a penalty.

The first code of practice is about 1,400 words long and the second is about 700 words. The detail of the first code of practice is already available to carriers as guidance but not as a formal code whereas the second code is completely new and the private sector will have to know how the different factors are assessed in order to calculate how a given penalty is calculated. The factors include:

- The number of previous incidents of passenger/crew misdirection in the past 12 months (a rolling period).
- The volume of passengers misdirected.
- Compliance with the first code of practice.
- An effective response by the carrier to recover the misdirected passengers.

The factors used to determine the level of penalty have been prioritised according to the most aggravating impact on the UK economy, society and security. It is very important to try to eliminate or considerably reduce these avoidable errors. Number of previous misdirections is taken as the most serious factor. The greater the volume of passengers misdirected the more likely that large numbers will go unrecovered and therefore will not be cleared (a risk to UK security), so this is discouraged strongly and penalised more heavily. The other two factors reflect compliance with the first code of practice and giving assistance to BF in recovering passengers who

have been misdirected. Failure to do both increases the level of penalty by 40 per cent.

The cost arising from this will apply to all airport operators and carriers with operations in the UK and only relevant staff dealing with directing passengers through airports. Carriers may delegate this function to ground handlers and port operator employees may or may not be involved. This assessment takes account of all staff involved in facilitating passengers through the port system to the point of being checked and cleared for entry into the UK. They are all described as 'carrier staff'.

An informal consultation was carried out with the private sector to ascertain the likely volume of employees that may be involved in directing passengers through the airport system. These are early estimates and the Home Office will seek further information to refine these during the formal consultation period. The estimated volumes of employees for low, central and high scenarios are 6,000, 12,000 and 18,000 respectively. There is a mix of occupations involved in directing passengers from the aircraft to the border control point (description, SOC code, gross hourly wage, proportion of the total related employment assumed are given below):

- Leisure and travel services (621), £10.78, one third.
- Elementary security operatives (9249), £11.66, one half.
- Air travel assistants (6214), £14.71, one sixth.

The two codes of practice contain about 2,100 words and standard reading tables² are used to estimate the time taken to read these, see Table 1. The reading times were estimated using standard calculations (number words / words per minute). Because of lower comprehension a slow reader may need to re-read the guidance (re-read time). There is no re-read time for very good readers where comprehension is between 80 to 85 per cent. An allowance has been made for people who may be dyslexic or where English is not their first language.

Table 1, Reading Speed Assumptions, 2016.

Words	Cost Scenario	Speed (wpm)	Time	Comp	Re-read time	Allowance	Total time
2,100	High	100	21.0	50%	10.50	1.00	33.0
	Central	200	10.5	60%	4.20	0.50	16.0
	Low	400	5.3	85%	0.00	0.00	6.0

Notes: wpm = words per minute. Comp = comprehension. Units are minutes unless otherwise specified.

The familiarisation cost is calculated as:

$$\text{volume of employees} \times \text{gross hourly wage} \times \text{time spent} = \text{£ millions}$$

¹ They are described as 'carrier staff' because if there is a misdirection, then the legal impact is most likely to fall on the carrier, that is the penalty is served on the carrier. Whilst a carrier or airport operator might arrange or contract with other persons for example, ground handlers, to carry out the measures required by this Code of Practice, the carrier or airport operator will nevertheless remain liable to any penalty incurred in the event of the misdirection of passengers.

² <http://www.readingsoft.com/> Estimates of reading speed are given by a number of reading software companies and this particular website has been used to estimate the time taken to read 2,100 words of guidance on an application form.

This is the only cost that compliant businesses face and the costs are presented in Table 2.

Non-compliant businesses may face a penalty, which varies according to a number of factors in the penalty calculation. It is not known what level the penalty will be set at in a particular case nor, how many firms will face a penalty, as some firms will change their behaviour and avoid a penalty. See beginning of Section 4 and Annex 2, where the matrix of factors is explained and set out.

Table 2, Familiarisation Cost Summary Table, 2016.

£	Low	Central	High
PS Familiarisation	£7,100	£38,000	£117,600
PubS Familiarisation	£22,700	£39,700	£60,500
Total Familiarisation	£29,800	£77,700	£178,100
£ million	Low	Central	High
PS Familiarisation	£0.01	£0.04	£0.12
PubS Familiarisation	£0.02	£0.04	£0.06
Total Familiarisation	£0.03	£0.08	£0.18
BNPV (£)	-£7,100	-£38,000	-£117,600
NPV (£)	-£29,800	-£77,700	-£178,100
BNPV (£m)	-£0.01	-£0.04	-£0.12
NPV (£m)	-£0.03	-£0.08	-£0.18

Total Cost to Business and Business Net Present Value (BNPV)

The total cost to business is estimated to be in a range of £0.0 million to £0.1 million. This cost is simply familiarisation which occurs in Year 1 only. At no point is the total gross cost to business likely to exceed £1 million. The BNPV is the monetised benefits to business minus the monetised costs to business. As there are no monetised benefits then the BNPV is equal to -£0.04 million although in the high scenario this may be approximately -£0.12 million.

Total Cost and Net Present Value

The total cost (cost to business plus the cost to the public sector) is estimated to be in a range of £0.0 million to £0.2 million with a central estimate of £0.1 million. Again, this cost is solely familiarisation which occurs in Year 1 only. The NPV of this policy is -£0.08 million and in the high scenario is only -£0.18 million.

Business Impact Target

The preferred option therefore falls well within scope of the fast-track process threshold, and is in scope for the Business Impact Target in accordance with s.21 of the Small Business, Enterprise and Employment Act 2015. This is a low cost regulatory '**IN**'.

References

Border Force, National Command Centre, 2015, unpublished management information.

Department of Business, Innovation and Skills (2015) Better Regulation Framework Manual, Practical Guidance for UK Government Officials, Better Regulation Executive, March, London.

Department of Business, Innovation and Skills (2013) One-In, Two-Out (OITO) Update (update on One-In One-Out Methodology from 2011), January, London.

Department for Transport (2014) Airport Safety Training, December, London.

House of Commons (2015), Immigration Bill, Bill 74, September, London.

HM Treasury (2003) The Green Book, Appraisal and Evaluation in Central Government, (2003 version includes amendments made in July 2011), London.

Macrory (2006) Regulatory Justice: Making Sanctions Effective, November, London.

ONS (2015) Annual Survey of Hours and Earnings, Occupations and gross median wages, Table 14.5a.

Annex 1 Macrory Report (2006) Regulatory Justice: Making Sanctions Effective,

This was designed to identify a set of flexible and proportionate sanctioning tools that can be used by regulators to achieve more effective regulation. This follows on from Hampton's findings that many penalty regimes are cumbersome and ineffective.

Macrory found that many regulators are heavily reliant on one tool - criminal prosecution. This is problematic as:

- The sanctions imposed are often insufficient.
- Criminal prosecution may be a disproportionate response (for example, where non-compliance was unintentional).
- Criminal sanctions are costly and time consuming for all parties. The regulators may be deterred from using their powers which creates a *compliance deficit*.

Recommendations

1. I recommend that the Government initiate a review of the drafting and formulation of criminal offences relating to regulatory non-compliance.
2. I recommend that in designing the appropriate sanctioning regimes for regulatory non-compliance, regulators should have regard to the following six Penalties Principles and seven characteristics.

Six Penalties Principles

A sanction should:

1. Aim to change the behaviour of the offender.
2. Aim to eliminate any financial gain or benefit from non-compliance.
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction.
4. Be proportionate to the nature of the offence and the harm caused.
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate.
6. Aim to deter future non-compliance.

Seven characteristics

Regulators should:

1. Publish an enforcement policy.
2. Measure outcomes not just outputs.
3. Justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament.
4. Follow-up enforcement actions where appropriate.
5. Enforce in a transparent manner.
6. Be transparent in the way in which they apply and determine administrative penalties.
7. Avoid perverse incentives that might influence the choice of sanctioning response.

3. I recommend that in order to increase the effectiveness of criminal courts for regulatory offences, the following actions should be implemented:
 - The Government should request the Sentencing Guidelines Council to prepare general sentencing guidelines for cases of regulatory non-compliance.
 - Prosecutors should always make clear to the court any financial benefits resulting from non-compliance as well as the policy significance of the relevant regulatory requirement.
 - Prosecutions in particular regulatory fields be heard in designated Magistrates' Courts within jurisdictional areas, where appropriate.
 - Regulators provide specialist training for prosecutors and discuss with the Judicial Studies Board (JSB) contributing to the training of the judiciary and justices' clerks.

4. I recommend that with regards to Monetary Administrative Penalties:
 - Government should consider introducing schemes for Fixed and Variable Monetary Administrative Penalties, for regulators and enforcers of regulations, who are compliant with the Hampton and Macrory Principles and characteristics. This can include national regulators as well as local regulatory partners.
 - Appeals concerning the imposition of an administrative penalty be heard by a Regulatory Tribunal, rather than the criminal courts.
 - Fine maxima for Fixed Monetary Administrative Penalties (FMAP) schemes should be set out and not exceed level five on the standard scale.
 - There should be no fine maxima for Variable Monetary Administrative Penalties (VMAPs).

5. I recommend that for an improved system of Statutory Notices:
 - Government should consider using Statutory Notices as part of an expanded sanctioning toolkit to secure compliance beyond the regulatory areas in which they are currently in use.
 - Regulators should systematically follow-up Statutory Notices using a risk based approach including an element of randomised follow-up.
 - In dealing with the offence of failing to comply with a Statutory Notice, regulators should have access to administrative financial penalties as an alternative to criminal prosecution. This power should be extended by legislative amendment to existing schemes of Statutory Notices.
 - Government should consider whether appeals against Statutory Notices should be routed through the Regulatory Tribunal rather than the criminal courts.

6. I recommend that the Government should consider introducing Enforceable Undertakings and Undertakings Plus (a combination of an Enforceable Undertaking with an administrative financial penalty) as an alternative to a criminal prosecution or the imposition of VMAPs for regulators that are compliant with the Hampton and Macrory Principles and characteristics.

7. I recommend that Government should consider introducing pilot schemes involving the use of Restorative Justice (RJ) techniques in addressing cases of regulatory non-compliance. This might include RJ:
 - as a pre-court diversion.
 - instead of a Monetary Administrative Penalty.
 - within the criminal justice system – as both a pre or post sentencing option.
8. I recommend that the Government consider introducing the following alternative sentencing in criminal courts:
 - Profit Order – Where the profits made from regulatory non-compliance are clear, the criminal courts have access to Profit Orders, requiring the payment of such profits, distinct from any fine that the court may impose.
 - Corporate Rehabilitation Order – In sentencing a business for regulatory non-compliance, criminal courts have on application by the prosecutor, access to a Corporate Rehabilitation Orders (CRO) in addition to or in place of any fine that may be imposed.
 - Publicity Order – In sentencing a business for regulatory non-compliance, criminal courts have the power to impose a Publicity Order, in addition to or in place of any other sentence.
9. I recommend that to ensure improved transparency and accountability:
 - The Better Regulation Executive should facilitate a working group of regulators and sponsoring departments to share best practice in enforcement approaches, the application of sanction options, development of outcome measures and transparency in reporting. Regulators and sponsoring departments should work with the Executive to include outcome measures as part of their overall framework of performance management.
 - Publish Enforcement Activities – Each regulator should publish a list on a regular basis of its completed enforcement actions and against whom such actions have been taken.

No. of previous incidents (rolling 12 month period)	No. of passengers misdirected	Compliant with first code of Practice	Effective response	Final charging level % of 'x' (x=maximum charge)	
0 (5% of x)	1 - 5 (0%)	Y (0%)	Y (0%)	5	
		N (+25%)	N (+15%)	20	
		N (+25%)	Y (0%)	30	
	6 - 20 (+5%)	Y (0%)	N (+15%)	N (+15%)	45
			Y (0%)	Y (0%)	10
			N (+15%)	N (+15%)	25
	21 - 49 (+10%)	Y (0%)	Y (0%)	Y (0%)	35
			N (+25%)	N (+15%)	50
			N (+25%)	Y (0%)	15
	50+ (+15%)	Y (0%)	N (+15%)	N (+15%)	30
			Y (0%)	Y (0%)	40
			N (+25%)	N (+15%)	55
1 (25% of x)	1 - 5 (0%)	Y (0%)	N (+15%)	20	
			Y (0%)	Y (0%)	25
			N (+25%)	N (+15%)	40
	6 - 20 (+5%)	Y (0%)	N (+25%)	Y (0%)	50
			Y (0%)	N (+15%)	65
			N (+25%)	Y (0%)	30
	21 - 49 (+10%)	Y (0%)	N (+25%)	N (+15%)	45
			Y (0%)	Y (0%)	55
			N (+25%)	N (+15%)	70
	50+ (+15%)	Y (0%)	N (+25%)	Y (0%)	35
			Y (0%)	N (+15%)	50
			N (+25%)	Y (0%)	60
2+ (45% of x)	1 - 5 (0%)	Y (0%)	N (+15%)	75	
			Y (0%)	N (+15%)	85
			N (+25%)	Y (0%)	50
	6 - 20 (+5%)	Y (0%)	N (+25%)	N (+15%)	65
			Y (0%)	Y (0%)	75
			N (+25%)	N (+15%)	90
	21 - 49 (+10%)	Y (0%)	N (+25%)	Y (0%)	55
			Y (0%)	N (+15%)	70
			N (+25%)	Y (0%)	80
	50+ (+15%)	Y (0%)	N (+25%)	N (+15%)	95
			Y (0%)	Y (0%)	60
			N (+25%)	N (+15%)	75
			N (+25%)	85	
			N (+25%)	100	