



Home Office

Misdirected Passengers new civil penalty: Codes of Practice

Government consultation

This consultation ends on 19 January 2018

About this consultation

- To:** Airport operators (of airports at which a control area is designated), carriers operating at those airports, other relevant commercial operators, industry bodies affected by the new civil penalty proposals
- Duration:** From 10 November 2017 to 19 January 2018
- Enquiries (including requests for the paper in an alternative format) to:** By email to MisdirectedPassengersCivilPenaltyConsultation@homeoffice.gsi.gov.uk
- How to respond:** Please email or send your response by 19 January 2018 to:

Misdirected Passengers Civil Penalty Consultation
Border Security & Visa Policy Unit,
2nd Floor, Peel, Home Office,
2 Marsham Street,
London
SW1P 4DF
- Email:
MisdirectedPassengersCivilPenaltyConsultation@homeoffice.gsi.gov.uk
- Response paper:** A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available online at GOV.uk

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Foreword by Rt Hon Brandon Lewis MP, Minister of State for Immigration

Immigration and security checks on all passengers arriving in the United Kingdom are a fundamental element of a secure border. Passengers arriving in the UK on scheduled flights must be directed to the arrival airport's immigration control to be cleared for entry to the UK. There are a small number of cases where this does not happen and passengers are not presented to Border Force. Such passengers have been 'misdirected'.

The Government recognises that this is not a problem of deliberate attempt to circumvent immigration control. Misdirections occur because mistakes are made in the handling of these passengers on arrival, and some airlines and airport operators are simply not investing enough to build failsafe processes. However, by creating circumstances in which passengers can bypass immigration controls, the integrity of the UK's border is undermined. Border Force takes recovery action to locate the passengers and undertakes checks retrospectively on every misdirected passenger, creating considerable extra work.

The Government must therefore find an effective way to manage this risk and bring down the number for misdirections. This is why the Government introduced provision for a new civil penalty for occurrences of misdirected passengers in the Immigration Act 2016.

The civil penalty will be supported by two codes of practice which will provide guidance to prevent misdirections from occurring and factors to be taken in to account when deciding the level of penalty. By issuing a code of practice for the sector to follow, Border Force have a mechanism for working with port operators and carriers to review and help improve operating practices.

This consultation seeks views on the framework for delivering the new civil penalty regime which includes the codes of practice and maximum level of penalty. We look forward to hearing your views.

Rt Hon Brandon Lewis MP

Minister of State for Immigration

Executive summary

Conducting checks on arriving passengers is a key part of the UK's border security regime. Carriers and port operators have a legal duty to present passengers to immigration control for appropriate checks to take place. Where passengers are not presented to Border Force for appropriate immigration and security checks to take place, this is known as an occurrence of 'misdirected passengers'. Whilst there is an existing criminal offence for a port operator or carrier to fail to direct arriving passengers appropriately, a civil penalty is seen as a more appropriate and effective sanction that will lead to better compliance and reduce occurrences of misdirections, by encouraging carriers and port operators to invest in better processes, and by providing clear guidance to minimise the risk of misdirections occurring.

New provisions in the Immigration Act 2016 have introduced the legal basis for a civil penalty scheme which will allow Border Force to levy a penalty if a misdirection of passengers occurs. We intend to apply that penalty in relation to passengers arriving in the UK (from outside the Common Travel Area) on commercial, non-General Aviation¹ flights. The supporting provisions will be set out in the codes of practice and the maximum charge level will be introduced in secondary legislation.

Under the new civil penalty regime, where the airport operator or any commercial carrier operating non-General Aviation flights have been served with a notice designating a control area (for the embarkation and disembarkation of passengers) and the conditions and restrictions to be observed in that control area (which will include the requirement to present passengers to immigration control for appropriate checks to take place), and passengers are then misdirected, the airport operator or owner or agent will be liable to a civil penalty charge if they have not taken reasonable steps to avoid this.

This consultation primarily seeks views on the detail of and the processes that will support the penalty, including the maximum penalty level, the content and structure of the two codes of practice and the methodology used for the charging framework.

¹ Border Force defines General Aviation (GA) as any aircraft not operating to a specific and published schedule and not making a military flight.

Introduction

This paper sets out for consultation the content of two codes of practice which will support carriers and airport operators in taking all reasonable steps to minimise the occurrence of a misdirection and sets out a clear charging matrix for the penalty when a misdirection does occur. We are keen to get the views of commercial and relevant private aviation sector partners on these proposals, including whether the first code of practice is reasonable and not unduly burdensome; on whether the second code of practice and charging matrix considers the correct factors and is weighted appropriately; and on the maximum level of penalty.

The consultation is aimed at airport operators and carriers, operating international commercial flights into the UK and other relevant commercial operators and industry bodies affected by the new civil penalty proposals.

A Regulatory Triage Assessment has been completed and is attached. The costs to business arising from this proposal are estimated to be low and fall well below £1m gross costs in any year. The estimated costs will be revised once all consultation responses have been considered. Any costs that count towards the Business Impact Target will be validated by the Regulatory Policy Committee and reported as required by the s.23 Small Business, Enterprise and Employment Act 2015.

The proposals

Our policy objective is to have an effective and enforceable civil penalty regime which will have the effect of reducing occurrences of misdirected passengers, in order to protect the integrity of the UK border and provide for the security of the UK.

We are implementing a civil penalty that will:

1. **Apply following an occurrence of any misdirection of a passenger or passengers where reasonable steps have not been taken to avoid it;** misdirected passenger refers to a passenger who has failed to disembark from a flight within a prescribed control area and/or has not been subject to the conditions or restrictions to be observed within it before exiting that control area.

A passenger is a person who is not a member of a carrier's staff but does include members of a carrier's staff who are;

- a third country national (i.e. not a British, EU, EEA or Swiss national) who arrives on an aircraft in the UK as a member of a carrier's staff but who is not crew as defined by the Immigration Act 1971 section 8(1) and section 33².
- a GBR/EU/EEA or Swiss national/family member, member of a carrier's staff *who arrives on an aircraft in the UK as non-operational crew – this includes any who are positioning*.

2. **Place liability for payment of the civil penalty on the carrier or port operator** (who are responsible where it is the actions of their employees or contractors that have led to a misdirection occurring) including:

- any operator of an airport where a control area is designated (under the Immigration Act 1971, under Schedule 2, paragraph 26 (3));
- any commercial carrier operating non-general aviation flights into an airport where a control area is designated (under the Immigration Act 1971, under Schedule 2, paragraph 26 (2));
- the above will include flights arriving in the UK operating to a published schedule.

² For the purposes of section 8(1) of the 1971 Immigration Act, a crew member is someone who 'arrives at a place in the United Kingdom as a member of the crew of a ship or aircraft under an engagement requiring him to leave on that ship as a member of the crew, or to leave within seven days on that or another aircraft as a member of its crew'. Section 33 of the Immigration Act 1971 interprets 'crew' to mean 'all persons actually employed in the working or service of the ship or aircraft, including the captain, and "member of the crew" shall be construed accordingly'.

Liability would be decided by the Home Office in determining which party caused passengers to fail to disembark within a prescribed control area and/or be subject to the conditions and restrictions to be observed within it.

3. **Be supported by two Codes of Practice;**

- the first Code of Practice for minimising the risk of occurrences of misdirected passengers is to be followed by agents and operators of aircraft and persons concerned with the management of airports in the United Kingdom (to whom relevant control area designation notices have been issued), and will set out the measures to be taken and the procedures to be followed that will minimise the risk of misdirected passengers, and to avoid being issued with a civil penalty. The first code is advisory but will be a factor in determining the level of penalty if a misdirection occurs and reasonable steps have not been taken to avoid it. The first code will not constitute all reasonable steps – this will be determined by the existing system in place to present passengers correctly which the first code requires to be deposited with and reviewed by Border Force;
- the second Code of Practice intended to provide a fair and transparent charging mechanism for the civil penalty regime.

The accompanying matrix in the second Code of Practice uses a charging methodology that implements heavier penalties for frequent infractions and for infractions which involve high numbers of passengers, and therefore pose potentially higher levels of risk to the security of the border and which have the greatest impact on Border Force resource; whilst also giving financial incentives to encourage compliance with the first Code of Practice and the taking of effective remedial action. It seeks to establish an effective balance of punitive measures and recognition of efforts taken to minimise the causes and the impact of occurrences of misdirection of passengers. The level of penalty (as a percentage of the maximum penalty payable) will be determined based on:

- the numbers of previous misdirections in a rolling 12 month period;
- the numbers of passengers misdirected;
- compliance with the first Code of Practice;
- assistance in the taking of urgent recovery action i.e. attempts to recover the misdirected passenger(s) and return them to the immigration control for immigration and security checks);

4. **Apply a maximum charge level for the civil penalty of £50,000**, though the maximum amount would only be payable in the case of higher levels of infractions and non-compliant practices. Where the liable party can demonstrate compliance with the first Code of Practice for minimising the risk of occurrences of misdirected passengers, and assists in taking urgent recovery action they will be liable to lower percentages of

the maximum penalty payable. Border Force will work with the sector as detailed in the first Code of Practice to resolve any compliance issues to ensure the safety of customers, staff, aircraft and the security of the UK border.

5. **Be supported by an objections and appeals process** (detailed at Appendix A). It is anticipated that the new misdirected passengers' civil penalty objections and appeal process will be based on similar processes currently in place, to ensure carriers and airport operators will have a degree of familiarity with the new appeals process and to minimise the operational impact on their business.

Carriers and airport operators will have the right to object to the new civil penalty imposed or the amount. If they wish to object they will be expected to do so in writing, giving full reasons for the objection, and include any supporting documents. The objection and any supporting documents must be received by the Home Office within 28 days of the date of issue of the penalty notice.

Regardless of whether the carrier or airport operator object to the penalty, they will be entitled to appeal to a County Court (if the appeal relates to a penalty imposed in relation to an airport in England & Wales or Northern Ireland) or Sheriff (if the appeal relates to a penalty imposed in relation to an airport in Scotland) against the penalty imposed or its amount. The appeal must be submitted within 28 days of the date of issue of the penalty notice, or if they have objected then within 28 days of the date of the decision on their objection.

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Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Q1. a. Does the first Code of Practice (at Appendix B) address all relevant operational procedures that could help in reducing misdirected passenger numbers and so avoid being issued with a penalty?

Yes	No	Don't know

Q1. b. If you answered 'No' what other procedures should be addressed?

Q2. a. In the second Code of Practice (at Appendix C) are there any other factors that should be taken in to account in deciding the penalty level?

Yes	No	Don't know

Q2. b. If you answered 'Yes' please list those factors.

Q3. a. Has the Home Office set the maximum penalty at the right level?

Yes	No	Don't know

Q3. b. If you answered 'No' please explain your reasons why?

Q4. a. What are the likely training and familiarisation costs for business as a result of this policy change?

b. If there are any other costs, what was taken into consideration when estimating these costs?

c. How can these costs be minimised?

d. What are the likely benefits for industry as a result of a robust penalty regime?

Q5. Do you have any further comments or suggestions relating to these consultation proposals?

Q6. a. When the new Codes of Practice come in to force, how would carriers and operators want Border Force to communicate the new requirements to them?

b. Is there anything else that should be done to ensure airport operators and carriers are properly informed?

Thank you for participating in this consultation.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (for example, member of the public)	
Date	
Company name/organisation (if applicable)	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details and how to respond

Please send your response by 19 January 2018 to:

Misdirected Passengers Civil Penalty Consultation
Border Security & Visa Policy Unit
2nd Floor, Peel,
Home Office
2 Marsham Street,
London SW1P 4DF

Email: MisdirectedPassengersCivilPenaltyConsultation@homeoffice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Home Office at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available online at GOV.uk

Alternative format versions of this publication can be requested from

Misdirected Passengers Civil Penalty Consultation
Border Security & Visa Policy Unit
2nd Floor, Peel,
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2 Marsham Street,
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Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available online at GOV.uk

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are

primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Home Office.

The Home Office will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

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Appendix A

Objections and appeals process as prescribed by paragraph 28C of part 1A of Schedule 2 of the Immigration Act 1971

Border Force is developing an objections and appeals process. It is anticipated that this will be based on similar processes currently in place for other civil penalty regimes.

Objections

28C (1) The recipient of a penalty notice (“the recipient”) may object to the penalty notice by giving a notice of objection to the Secretary of State.

(2) A notice of objection must—

(a) be in writing,

(b) give the reasons for the objection,

(c) be given in the manner and form specified in the penalty notice, and

(d) be given before the end of the period of 28 days beginning with the date specified in the penalty notice as the date on which it is given.

(3) Where the Secretary of State receives a notice of objection, the Secretary of State must consider it and—

(a) cancel the penalty,

(b) reduce the penalty,

(c) increase the penalty, or

(d) determine not to alter the penalty.

(4) After reaching a decision as to how to proceed under sub-paragraph (3), the Secretary of State must notify the recipient of the decision in writing.

(5) A notification under sub-paragraph (4) must be given before the end of the period of 70 days beginning with the date specified in the penalty notice as the date on which it is given, or such longer period as the Secretary of State may agree with the recipient.

(6) A notification under sub-paragraph (4), other than one notifying the recipient that the Secretary of State has decided to cancel the penalty, must—

(a) state the amount of the penalty following the Secretary of State's consideration of the notice of objection,

(b) state the Secretary of State's reasons for the decision under sub-paragraph (3),

(c) specify the date, at least 28 days after the date on which the notification is given, before which the penalty must be paid,

(d) specify how the penalty must be paid,

(e) include an explanation of the recipient's rights of appeal, and

(f) include an explanation of the steps the Secretary of State may take to recover any unpaid penalty.

Appeals

28D (1) A person ("the appellant") may appeal to the court against a decision to require the person to pay a penalty under paragraph 28.

(2) An appeal may be brought only if the appellant has given a notice of objection and the Secretary of State has—

(a) reduced the penalty under paragraph 28C(3)(b),

(b) increased the penalty under paragraph 28C(3)(c), or

(c) determined not to alter the penalty under paragraph 28C(3)(d).

(3) An appeal must be brought within the period of 28 days beginning with the date on which the appellant is notified of the Secretary of State's decision on the notice of objection under paragraph 28C(4).

(4) On appeal, the court may—

(a) allow the appeal and cancel the penalty,

(b) allow the appeal and reduce the penalty, or

(c) dismiss the appeal.

(5) An appeal is to be a re-hearing of the Secretary of State's decision to impose a penalty and is to be determined having regard to—

(a) any Code of Practice under paragraph 28A(1) which had effect at the time of the events to which the penalty relates,

(b) any Code of Practice under paragraph 28A(3) which has effect at the time of the appeal, and

(c) any other matters which the court thinks relevant (which may include matters of which the Secretary of State was unaware).

(6) Sub-paragraph (5) has effect despite any provision of rules of court.

(7) In this paragraph "the court" means—

(a) the county court, if the appeal relates to a penalty imposed under paragraph 28 in relation to an airport in England and Wales;

(b) the sheriff, if the appeal relates to a penalty imposed under paragraph 28 in relation to an airport in Scotland;

(c) a county court in Northern Ireland, if the appeal relates to a penalty imposed under paragraph 28 in relation to an airport in Northern Ireland.

(8) But—

(a) the county court in England and Wales, or a county court in Northern Ireland, may transfer proceedings under this paragraph to the High Court, and

(b) the sheriff may transfer proceedings under this paragraph to the Court of Session.

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Appendix B



Home Office

Misdirected Passengers Civil Penalty:

Code of Practice for minimising the risk of occurrences of misdirected passengers

Legal framework

Under paragraph 28 (2) of part 1A of Schedule 2, to the Immigration Act 1971³ (“the Act”), the Secretary of State may impose a penalty on a carrier or airport operator if they fail to take all reasonable steps to secure that:

- (a) passengers embarking on or disembarking from the aircraft at the airport do not embark or disembark at the airport outside a designated control area, or;
- (b) the conditions or restrictions specified in a notice designating a control area are observed.

This Code of Practice is made under paragraph 28A (1) of part 1A of Schedule 2 to the Act. It sets out the measures to be taken and the procedures to be followed by agents and operators of aircraft and persons concerned with the management of airports in the United Kingdom, to whom notices under Schedule 2, paragraph 26 (2) or (3) have been given, that minimise the risk of misdirected passengers, and so to avoid being issued with a civil penalty.

Paragraph 28A(1) of part 1A of Schedule 2 provides that this Code of Practice is to be followed by agents and operators of aircraft to whom notices have been given under paragraph 26(2) and by persons concerned with the management of airports in the UK to whom notices under paragraph 26(3) have been given.

Agents and operators of aircraft and persons concerned with the management of airports in the United Kingdom, should take reasonable steps to avoid the possibility of misdirecting passengers, arriving in the UK, at a UK port, so that passengers do not disembark outside any designated control area at a port and are subject to the conditions and restrictions within that control area. If they have been served with a notice designating a control area for the embarkation and disembarkation of passengers, and specifying the conditions and restrictions to be observed within that control area, and passengers are then misdirected, they are liable to a civil penalty charge if they have not taken reasonable steps.

Under paragraph 28A (2) of part 1A of Schedule 2, of the Act the Secretary of State must have regard to this code (in addition to any other matters she thinks relevant) when deciding whether to impose a penalty under paragraph 28, and when considering a notice of objection under paragraph 28C.

The civil penalties regime applies to all ports and carriers served a designation notice under paragraph 26(2) or 26(3) of Schedule 2 to the 1971 Immigration Act. It will apply to flights arriving in the UK as set out in the relevant designation notice.

³ Part 1A was inserted into the 1971 Act by section 74 of the Immigration Act 2016

In determining the level of penalty it is necessary to refer to the factors in the **second Code of Practice - level of civil penalty**. Penalties can be levied against a carrier or airport operator for every instance of misdirection of a passenger up to a maximum of £50,000.

It should be noted that failure to comply with a designation notice made under paragraph 26(2) or 26(3) of Schedule 2 to the 1971 Immigration Act, notwithstanding this civil penalty regime, is a criminal offence under section 27(b)(iv) of the Immigration Act 1971 for carriers and 27(c) for port operators, and carriers and port operators remain liable to prosecution.

This Code of Practice includes an indicative list of reasonable steps to take to avoid the occurrence of a misdirection of passengers. There may be other reasonable steps which are not included in this Code of Practice, and these should be detailed in the system document required by Part 1 of this code.

Definitions

In this Code of Practice –

Misdirected passenger means a passenger who has failed to disembark from a flight within a prescribed control area and/or has not been subject to the conditions or restrictions to be observed within it before exiting that control area.

A passenger also includes;

- a third country national (i.e. not a British, EU, EEA or Swiss national) member of a carrier's staff who is not crew as defined by the Immigration Act 1971 section 8(1)⁴ and section 33.
- GBR/EU/EEA or Swiss crew members who *arrive* on an aircraft as non-operational crew – this includes any who are positioning.

Disembark means to leave an aircraft.

Airport operator means any persons concerned with the management of an airport in the United Kingdom.

Carrier means the owners or agents of an aircraft operating as a non-general aviation flight.

General Aviation means any aircraft not operating to a specific and published schedule and not making a military flight.

Control area means an area designated by a designation notice by the Secretary of State served under Schedule 2, paragraph 26 (2) and (3) of the Immigration Act 1971.

Recovery action means action taken by an airline or airport operator to identify passengers who have been misdirected, as a matter of urgency, and then recover them for the purpose of conducting appropriate border checks.

System Document means a document detailing the system operated by carriers and airport operators to prevent misdirected passengers.

⁴ For the purposes of section 8(1) of the 1971 Immigration Act, a crew member is someone who 'arrives at a place in the United Kingdom as a member of the crew of a ship or aircraft under an engagement requiring him to leave on that ship as a member of the crew, or to leave within seven days on that or another aircraft as a member of its crew'. Section 33 of the Immigration Act 1971 interprets 'crew' to mean 'all persons actually employed in the working or service of the ship or aircraft, including the captain, and "member of the crew" shall be construed accordingly'.

Part 1

1. General principles:

- 1.1. A document detailing the system operated to prevent misdirected passengers must be deposited with the relevant Border Force Regional Director by carriers and airport operators within a month of this Code of Practice coming into force.
- 1.2. This document – the ‘System Document’ - must be updated in accordance with any changes to the relevant operating procedures. This ‘system’ must include:
 - 1.2.1. preventative measures to be taken to avoid a misdirection of a passenger (or passengers);
 - 1.2.2. measures to be taken in the event of a misdirection of a passenger (or passengers) (to include recovery and investigative actions).
- 1.3. Carrier and airport operators, or their representatives, must meet with the relevant Border Force Regional Director (or their designated deputy) to review and agree the efficacy of the system every three months (unless less frequent meetings are agreed with the relevant Border Force Regional Director). Any agreed changes to the system must be updated in the System Document;
- 1.4. A report detailing the events leading up to an occurrence of a misdirection must be provided to the relevant Border Force Regional Director within 12 hours of a misdirection occurring; and
- 1.5. Whilst a carrier or airport operator might arrange or contract with other persons e.g. 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.

Part 2

2. The following measures must be taken by carriers and airport operators to complete good risk assessments in relation to the risk of occurrences of misdirection of passengers:

- 2.1. Carriers and airport operators should together carry-out risk assessments in relation to the proper direction of arriving passengers from international flights, at least every six months; The risk assessment process must involve all parties involved in the direction of passengers in that airport; and Such risk assessments must be made available to the relevant Border Force Regional Director for review and comment upon request.

Part 3

3. The following measures must be taken to ensure staff involved in the direction of disembarking passengers are trained appropriately by carriers and airport operators.

3.1. Implementation of an effective training regime, which includes:

3.1.1. Training all new staff in relation to Border Force, carrier and operator responsibilities and requirements and in relevant operational practices for controlling passengers through the airport, before allowing them to operate controls;

3.1.2. Providing refresher training to existing staff at least every six months or as and when there is any change in operational procedures;

3.2. Training in appropriate recovery actions;

3.3. Assessing staff performance and knowledge of procedures at least every six months;

3.4. Allowing Border Force inspection of staff training materials and procedures upon request; and

3.5. Training of crew members on correct usage of the crew channel, and having assurance measures in place to demonstrate compliance.

Part 4

4. Carriers and airport operators must ensure proper action is taken in relation to those responsible for the misdirection of passengers.

They must:

- 4.1. Have thorough investigative procedures in place;
- 4.2. Start an investigation as soon as is practically possible after an incident of a misdirected passenger(s) has occurred;
- 4.3. Take appropriate action in relation to staff members identified as responsible for the misdirection of a passenger(s) (as set out in the System Document); and
- 4.4. Take appropriate action in relation to those responsible for presenting passengers on behalf of carriers and airport operators when a passenger(s) is/are misdirected (as outlined in the System Document).

Part 5

5. The following measures must be taken by carriers and airport operators to ensure that the most effective use is made of existing IT and automated systems to assist in preventing occurrences of misdirected passengers:

- 5.1. Where IT-enabled or automated secure systems are deployed (as outlined in the System Document) they should be maintained and operated appropriately.

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Appendix C



Home Office

Misdirected Passengers Civil Penalty: Code of Practice level of penalty

Issued under paragraph 28A(3) of part 1A of Schedule 2 to the
Immigration Act 1971 (as amended)

Legal framework

Under paragraph 28 (2) of Part 1A of Schedule 2, to the Immigration Act 1971 (“the Act”)⁵, the Secretary of State may impose a penalty on a carrier or airport operator if they fail to take all reasonable steps to secure that:

- (a) passengers embarking on or disembarking from the aircraft at the airport do not embark or disembark at the airport outside a control area, or
- (b) the conditions or restrictions specified in a notice designating a control area are observed.

The measures to be taken by carriers and airport operators to mitigate the risk of misdirected passengers on arrival at a United Kingdom airport are set out in the separate Code of Practice for minimising the risk of occurrences of misdirected passengers issued under Part 1A of Schedule 2 paragraph 28A (1) of the Act.

Paragraph 28A (3) of Part 1A of Schedule 2 to the Act provides that the Secretary of State must issue a Code of Practice specifying matters to be considered in determining the amount of any such penalty.

Accordingly, the Secretary of State has, following consultation with X Y Z and having laid a draft before Parliament, issued this Code of Practice.

In accordance with Part 1A of Schedule 2 paragraph 28A (4) of the Act, the Secretary of State must have regard to the Level of Penalty: Code of Practice in addition to any other matters she thinks relevant:

- (a) when imposing a penalty under Part 1A of Schedule 2, paragraph 28 of the Act, and
- (b) when considering a notice of objection under Part 1A of Schedule 2, paragraph 28C of the Act.

The terms used in this Code of Practice have the same meanings as those given in the Act.

⁵ Part 1A was inserted into the 1971 Act by section 13 of the Immigration Act 2016

Definitions

All references in this Code of Practice have the same meanings as those contained in the Code of Practice for preventing occurrences of misdirected passengers.

Misdirected passenger means a passenger who has failed to disembark from a flight within a prescribed control area and/or has not been subject to the conditions or restrictions to be observed within it before exiting that control area.

A passenger also includes;

- a third country national (i.e. not a British, EU, EEA or Swiss national) member of a carrier's staff who is not crew as defined by the Immigration Act 1971 section 8(1)⁶ and section 33.
- GBR/EU/EEA or Swiss crew members who *arrive* on an aircraft as non-operational crew – this includes any who are positioning.

Airport operator means any persons concerned with the management of an airport in the United Kingdom.

Carrier means the owners or agents of an aircraft operating as a non-general aviation flight.

General Aviation means any aircraft not operating to a specific and published schedule and not making a military flight.

Control area means an area designated in a designation notice served by the Secretary of State under Schedule 2, paragraph 26 (2) and (3) of the Immigration Act 1971.

Recovery action means action taken by an airline or airport operator to identify passengers who have been misdirected, as a matter of urgency, and then recover them for the purpose of conducting appropriate border checks.

⁶ For the purposes of section 8(1) of the 1971 Immigration Act, a crew member is someone who 'arrives at a place in the United Kingdom as a member of the crew of a ship or aircraft under an engagement requiring him to leave on that ship as a member of the crew, or to leave within seven days on that or another aircraft as a member of its crew'. Section 33 of the Immigration Act 1971 interprets 'crew' to mean 'all persons actually employed in the working or service of the ship or aircraft, including the captain, and "member of the crew" shall be construed accordingly'.

Purpose of this Code of Practice

This Code of Practice is designed to provide a fair and transparent charging mechanism for the civil penalty regime.

Regulations [The Immigration [XYZ] Regulations– to be inserted] provide that the maximum level of penalty is £50,000.

When an incident of misdirected passengers occurs, a number of factors will be taken into account when setting the penalty level:

Firstly, the performance of that carrier or airport operator over the preceding twelve month period;

Secondly, the number of passengers misdirected;

Thirdly, whether the carrier or airport operator is compliant with the Code of Practice for Minimising the Risk of Occurrences of Misdirected Passengers;

Fourthly, consideration will be given to whether the carrier or airport operator has responded effectively to the misdirection, including:

- notifying Border Force immediately that a misdirection of a passenger or passengers is known to have occurred;
- taking urgent recovery action;
- providing a passenger manifest (if appropriate);

The matrix on the following page sets out how these factors will determine the final charge level in individual cases.

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
			Y (0%)	30
	6 - 20 (+5%)	Y (0%)	N (+15%)	45
		N (+25%)	Y (0%)	10
			N (+15%)	25
	21 - 49 (+10%)	Y (0%)	Y (0%)	35
		N (+25%)	N (+15%)	50
			Y (0%)	15
	50+ (+15%)	Y (0%)	N (+15%)	30
		N (+25%)	Y (0%)	40
			N (+15%)	55
1 (25% of x)	1 - 5 (0%)	Y (0%)	Y (0%)	20
		N (+25%)	N (+15%)	40
			Y (0%)	50
	6 - 20 (+5%)	Y (0%)	N (+15%)	65
		N (+25%)	Y (0%)	30
			N (+15%)	45
	21 - 49 (+10%)	Y (0%)	Y (0%)	55
		N (+25%)	N (+15%)	70
			Y (0%)	35
	50+ (+15%)	Y (0%)	N (+15%)	50
		N (+25%)	Y (0%)	60
			N (+15%)	75
2+ (45% of x)	1 - 5 (0%)	Y (0%)	Y (0%)	40
		N (+25%)	N (+15%)	60
			Y (0%)	70
	6 - 20 (+5%)	Y (0%)	N (+15%)	85
		N (+25%)	Y (0%)	50
			N (+15%)	65
	21 - 49 (+10%)	Y (0%)	Y (0%)	75
		N (+25%)	N (+15%)	90
			Y (0%)	55
	50+ (+15%)	Y (0%)	N (+15%)	70
		N (+25%)	Y (0%)	80
			N (+15%)	95
		Y (0%)	60	
		N (+15%)	75	
		Y (0%)	85	
		N (+25%)	100	



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