

# EU Enforcement Mechanisms: Passenger Rights EC Regulation 261/2004

## Abstract

Liberalisation of the European air transport market in the 1990's increased competition among airlines and resulted in lower fares. This led to Regulation EC 261/2004 which aimed to increase passenger rights; and whilst, law academics and the legal profession have dissected the Regulation alongside the respective Court cases that have aided the interpretation and application of such, the scope of this paper is to explore the enforcement mechanisms available to air travellers. In doing so, the role of and intervention by the National Enforcement Bodies (NEBs) is primarily considered, with specific focus on the Spanish authority. The research also encompasses some comparison study-analysis with the UK NEB processes to show the effectiveness of the authorities including commonalities and disparities. The research considers passenger rights' within the broader scope of EU consumer protection, and the mechanisms that are also available to complainants, and finds that there are myriad of differences across the Member States in respect of ensuring compliance with Regulation 261/2004.

**Key words:** *Reg. EC261/2004; Passenger Rights; Enforcement Bodies; CPC*

## 1. Introduction

Before the mid 1980's, the aviation market in the now European Union (EU) was fragmented, with intra-EU aviation not being controlled by a single agency. Air travel, remained subject to individual Member States regulating their own domestic aviation policy. It was therefore commonplace for each country (of the then European (Economic) Community - EEC) to apply subsidies to their airlines, particularly to their 'State flag carrier.' This lack of unity created market distortion and resulted in higher fares, which invariably also affected passengers' satisfaction. These practices inevitably went against the policy direction for one internal, single market and consistency for passengers, and, hence, affected the rights of the consumer.<sup>1</sup> In order to create a single market, within a united Europe, a series of packages were introduced to liberalise the EU internally (Table 1: Summary of EU Deregulation Packages). This ultimately

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<sup>1</sup> Fox, S. J. 'Safety & Security: *The influence of 9/11 to the EU Framework.*' *Research in Transportation Economics* – Special Edition DOI: 10.1016/j.retrec.2014.07.004 Vol. 45 (2014), pp. 24–33.

led to the creation of a single market for aviation in the 1990s, which removed the commercial restrictions for airlines flying within the EU.<sup>2</sup>

This initiative arose due to two primary reasons:

- (1) The earlier U.S. process of deregulation (beginning from 1978);
- And,
- (2) As a consequence of, the Court of Justice of the European Union (CJEU) case.<sup>3</sup>

However, this was arguably also due to consumer demands, whereby global communications had enabled European customers to see the benefits of liberalisation in the U.S. air transport market.<sup>4</sup>

<p><b>First Package: (adopted in December 1987)</b></p> <ul style="list-style-type: none"> <li>- Council Regulation 3975/87 on the Application of the Competition Rules to Air Transport</li> <li>- Council Regulation 3976/87 on the Application of the Treaty to certain categories of agreements and concerted parties</li> <li>- Council Directive 601/87 on Air Fares</li> <li>- Council Decision 602/87 on capacity-sharing and market access</li> </ul>	<p><b>Summarised:</b></p> <p>This introduced the relaxation of established rules – for intra-EU traffic, limiting government rights re opposing new fares. It extended flexibility to airlines re seat capacity-sharing.</p>
<p><b>Second Package: (adopted in July 1990)</b></p> <ul style="list-style-type: none"> <li>- Council Regulation 2343/90 on market access</li> <li>- Council Regulation 2342/90 on air fares</li> <li>- Council Regulation 2344/90 on the application of the Treaty to certain categories of agreement and concerted parties</li> </ul>	<p><b>Summarised:</b></p> <p>This extended market access, providing greater flexibility over fare-setting and capacity-sharing. This led to the concept of “Community (EU) Carriers” being developed and having the right to carry unlimited cargo and passengers between their home State and other EU countries.</p>
<p><b>Third Package: (adopted July 1992)</b></p>	<p><b>Summarised:</b></p>

<sup>2</sup> Sarah Jane Fox, BREXIT: A bolt from the blue! – *Red sky in the morning? Issues in Aviation Law and Policy*. Volume 16, No. 1. Autumn, (2016) pp 83-119.

<sup>3</sup> Case 13/83, Parliament v. Council, 1985 E.C.R. 1513, 46–50.

<sup>4</sup> Sarah Jane Fox, BREXIT: A bolt from the blue! – *Red sky in the morning? Issues in Aviation Law and Policy*. Volume 16, No. 1. Autumn, (2016) pp 83-119.

<ul style="list-style-type: none"> <li>- Council Regulation 2407/92 on licensing of air carriers</li> <li>- Council Regulation 2408/92 on market access</li> <li>- Council Regulation 2409/92 on fares and rates</li> </ul>	<p>This introduced the freedom to provide services within the EU and in 1997 the freedom to provide “cabotage,” the right of an airline of one Member State to operate routes within another Member State.</p> <p>Further reforms re: Public Service Obligation on routes, regarded as essential for regional development.</p>
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**Table 1 – Summary of EU Deregulation Packages**  
Source: Author (Fox)

The Third Package<sup>5</sup> remained applicable for 15 years, before being replaced by Regulation 1008/2008 on common rules for the operation of air services in the Community (the Air Services Regulation<sup>6</sup>).

The Air Services Regulation added further simplicity and internal liberalisation by setting out rules on:

- Market access;
- Public Service Obligations;
- The granting of and oversight of operating licenses for Community (EU) Carriers;
- Aircraft registration and leasing;
- Pricing; and
- Traffic distribution between airports.

Liberalisation also led to new airlines entering the market, some of them applying new business prototypes, such as the Low-Cost Carriers (LCC) model. As a consequence, the increase of competition among airlines resulted in lower fares to air passengers, hence increasing passenger opportunities.<sup>7</sup> That said, at times, this came at a price in terms of a more rigid model (LCC’s in particular) and the protection afforded to the traveller, especially when they experienced overbooking.

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<sup>5</sup> Replacing Regulations 2407/92, 2408/92, 2409/92 as of Nov. 1, 2008.

<sup>6</sup> Council Regulation (EC) No. 1008/2008, Common Rules for the Operation of Air Services in the Community, 2008 O.J. (L 293) of 31.10.2008 (P. 3–20).

<sup>7</sup> Maria Belén Rey, Structural changes in the Spanish scheduled flights market as a result of air transport deregulation in Europe. *Journal of Air Transport Management* (2003) 9(3), 195–200. [https://doi.org/10.1016/S0969-6997\(02\)00097-2](https://doi.org/10.1016/S0969-6997(02)00097-2)

In 1991 the European Community responded by establishing common rules for a compensation system for denied-boarding in scheduled air transport (Reg. 295/91).<sup>8</sup> This recognised that the practice in the field of denied-boarding compensation differed substantially between air carriers. And, as a result, it was acknowledged that certain ‘common minimum standards’ in the field of denied-boarding compensation should be introduced in the light of increased competition, that would ‘oblige’ and ‘define’ common rules for boarding in the event of an overbooked flight. In essence, this necessitated the paying of compensation and additional services to passengers who were denied boarding. Part of this also sought to educate passengers as to these rules and hence, their entitlements.

In the 2001 White Paper for Transport,<sup>9</sup> the Commission set the objective to introduce passenger protection measures to all modes of transport. It was clearly recognised that one of the failings lay in the fact that national authorities applied the law in different ways, which confused passengers and carriers alike and created distortions in the market.

In respect to air passengers, a 2004 Proposal sought a *new* Council Regulation to amend the Regulation (Reg. (EEC) 295/91) – as it was recognised that the Community ‘*must aim at ensuring a high[er] level of protection for users’ interests;*’ whereby, it was acknowledged that, ‘*greater protection should be ensured for passengers’ rights in this area.*’<sup>10</sup>

This resulted in a ‘*new*’ Regulation (Reg. EC 261/2004<sup>11</sup>), which entered into force on 17 February 2005. It had the intention to strengthen existing passenger rights including also increasing the scope. For example, one area - concerned removing the ever-blurring borderline

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<sup>8</sup> Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport. OJ L 036, 08/02/1991 P. 0005 – 0007.

<sup>9</sup> COM(2001) 370: White Paper - European transport policy for 2010: time to decide. COM/2001/0370 final. Brussels, 12.9.2001.

<sup>10</sup> COM(98)0041: Proposal for a Council Regulation (EC) amending Regulation (EEC) No 295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport. COM/98/0041 final. OJ C 120, 18.04.1998 P. 0018.

<sup>11</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 ([OJ L 46, 17.2.2004, p. 1](http://data.europa.eu/eli/reg/2004/261/oj/eng)).

between scheduled and non-scheduled air services, and thereby extending the application of rights to more passengers – i.e. on non-scheduled (charter) flights.

Although this Regulation still remains applicable today; and, while judgments in the Court of Justice of the European Union (CJEU) has sought to aid interpretation; it has also, arguably, been recognised, that more protection, and consistency, could, and should be afforded to users – the ‘customers’ of an air transport service, not least in respect to seeking redress from the airlines. Hence, it is acknowledged, that whilst the legal profession and law academics<sup>12</sup> may have previously published extensively in relation to air transport passenger rights, the scope of this article is fourfold; namely, to:

- (i) Explore the enforcement mechanisms available to the air traveller under the extended common compensation and assistance rules in the event of denied boarding, of cancellation and long delay of their flight(s) provided by European legislation. In doing so, the primary consideration of this article will be to analyse the role of and intervention by the National Enforcement Bodies (NEBs), with specific focus on the Spanish system so as to show the mechanisms that are/can be used. This article also encompasses some comparison analysis with the UK NEB processes to demonstrate commonalities and disparities in this regard.
- (ii) Consider passenger rights within the broader spectrum of consumer protection (part of the wider perspective of fundamental rights).
- (iii) Draw a conclusion of where improvements in the process can be made (from the stance of the consumer); and,
- (iv) Identify continuing challenges to be faced by both airlines and passengers.

## 2. Passengers’ Rights: Related literature

The overarching scope of passengers’ rights in transport is based upon three cornerstones:

- i. non-discrimination;
- ii. accurate, timely and accessible information;
- iii. immediate and proportionate assistance.

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<sup>12</sup> See for instance: Renzo van der Bruggen, “Compliance with the Air Passenger Rights Regulation: past, present and future” (2017) 5 *European Transport Law - Europees Vervoerrecht* 473; Michel Bobek & Jeremias Prassl, eds, *Air Passenger Rights Ten Years On* (Oxford: Hart, 2016); Francesco Rossi Dal Pozzo, *EU Legal Framework for Safeguarding Air Passenger Rights* (Cham: Springer, 2015); Cees Van Dam, *Air Passenger Rights* (APR Publishing, 2011); Olena Bokareva, “Air Passengers’ Right in the EU: International Uniformity versus Regional Harmonization” (2016) 41:1 *Air & Space Law* 3; Jeremias Prassl, “Reforming Air Passengers Rights in the European Union” (2014) 39:1 *Air & Space Law* 59.

From these keystones stem ten rights for EU passengers.<sup>13</sup>  
Namely, the:

- 1) Right to non-discrimination in access to transport;
- 2) Right to mobility: accessibility and assistance at no additional cost for disabled passengers and passengers with reduced mobility (PRM);
- 3) Right to information before purchase and at the various stages of travel, notably in case of disruption;
- 4) Right to renounce travelling (reimbursement of the full cost of the ticket) when the trip is not carried out as planned;
- 5) Right to the fulfilment of the transport contract in case of disruption (rerouting and rebooking);
- 6) Right to get assistance in case of long delay at departure or at connecting points;
- 7) Right to compensation under certain circumstances;
- 8) Right to carrier liability towards passengers and their baggage;
- 9) Right to a quick and accessible system of complaint handling;
- 10) Right to full application and effective enforcement of EU law.

The current Regulation (EC 261/2004 – herein – ‘*the Regulation*’) directly addresses these rights, which is further complemented by specific legislation which addresses some of these areas in further detail (for example - PRM). The Regulation also reflects certain provisions of the Montreal Convention, wherein, the primary aim was also focused on consumer protection.<sup>14</sup> Therefore, whilst the CJEU has interpreted the Regulation<sup>15</sup>, it has extensively also been influenced by the application and interpretation of the Montreal Convention 1999.<sup>16</sup> That said, this has also posed challenges with regards to the relationship between EU law and international norms.<sup>17</sup> This together with CJEU judgments has added to the controversy of the Regulation,

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<sup>13</sup> COM(2011) 898 final - Communication from the Commission to the European Parliament and the Council. A European vision for Passengers: Communication on Passenger Rights in all transport modes. Brussels, 19.12.2011.

<sup>14</sup> Whalen, T. J. The New Warsaw Convention: the Montreal Convention, 25(1) *Air & Space Law* (2000) 14-15.

<sup>15</sup> Correia, V. (2011) Evolution of Air Passengers Rights in European Union Law, 2(9) *Aviation & Space Journal*, (2011) 7-14.

Correia, V. and Rouissi, N Global, Regional and National Air Passenger Rights – Does the Patchwork Work? 40(2) *Air & Space Law* (2015) 123-146.

<sup>16</sup> The Convention for the Unification of Certain Rules for International Carriage by Air (‘The Montreal Convention’) was approved by decision of the Council of 5 April 2001 (OJ 2001 L 194, p. 38). See discussions within Bokareva, O. Air Passengers’ Right in the EU: International Uniformity versus Regional Harmonization. *Air & Space Law* 41, No. 1 (2016) 3-24.

<sup>17</sup> Prassl, J. Reforming Air Passengers Rights in the European Union. *Air & Space Law* 39, no. 1 (2014), 59-82.

Fox, S. J. ‘Safety & Security: *The influence of 9/11 to the EU Framework.*’ *Research in Transportation Economics* – Special Edition DOI: 10.1016/j.retrec.2014.07.004 Vol. 45 (2014), pp. 24–33.

Truxal, S. (Air carrier liability and air passenger rights: a game of tug of war? *Journal of International and Comparative Law*, 4(1), (2017) pp. 103-122.

particularly, as viewed from the perspective of air operators, who have, at times, refused to apply its provisions and have repeatedly challenged the measures in EU Member States' courts<sup>18</sup>.

Whilst it is not within the scope of this paper to consider CJEU (or other court cases) there are three key pinnacle judgments that need to be identified within the context of this research; namely, *IATA/ELFAA*<sup>19</sup>; *Wallentin-Hermann*<sup>20</sup> and *Sturgeon*,<sup>21</sup> all of which had significant impact on the interpretation of the Regulation.

- (i) *IATA/ELFAA*<sup>22</sup> – the judgment was given on 10 January, 2006 and related to Articles 5, 6 and 7 of the Regulation – Compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights – Validity – Interpretation of Article 234 EC (Article 267 TFEU).

The ruling, confirmed its full compatibility (of the Regulation) with the Montreal Convention and the compatibility between the two legal instruments.

- (ii) *Wallentin-Hermann*<sup>23</sup> – the judgment was given on 22 December 2008 and related to 'extraordinary' circumstances, whereby passengers on an Alitalia flight were informed five minutes before a scheduled departure that the aircraft had an engine fault. Alitalia had, however, been aware of that problem since the night preceding that flight.

The judgment given was that technical defect affecting an aircraft which results in the cancellation of the flight was not covered by the term 'extraordinary circumstances,' within the meaning of Article 5(3) of the Regulation, as it fell within normal exercise of the airlines activity (in this case general/routine maintenance). In the circumstance of this case, Alitalia was able to commit the time and resources to rectify the defect (paragraph 34).

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<sup>18</sup> Dam, Cees van 'Air Passenger Rights after Sturgeon'. *Air and Space Law* 36, no. 4/5, (2011) 259–274. Bruggen, van Der, R. Compliance with the Air Passenger Rights Regulation: past, present and future. *European Transport Law*, Issue 5, (2017) p. 473-503.

<sup>19</sup> C-344/04 (IATA & ELFAA) *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*. EU:C:2006:10 [2006] ECR I-00403.

<sup>20</sup> Case 549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061.

<sup>21</sup> Joined Cases C-402/07 and C-432/07 *Sturgeon, Christopher and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA*: Cases. EU:C:2009:716. [2009] ECR I-10923.

<sup>22</sup> C-344/04 (IATA & ELFAA) *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*. EU:C:2006:10 [2006] ECR I-00403.

<sup>23</sup> Case 549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061.

- (iii) *Sturgeon*<sup>24</sup> – the judgment was given on 19 November 2009 and also concerned ‘extraordinary circumstance.’

Within the judgment reference was made to *Wallentin*,<sup>25</sup> namely that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of ‘extraordinary circumstances’ within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

However, significantly Articles 5, 6 and 7 of the Regulation were also considered, for which it was stated that it must be interpreted as meaning that passengers, whose flights are delayed, may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled. They may therefore rely on the right to compensation laid down in Article 7 of the Regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.

Despite these and other significant judgments, Dam refers to a wide-spread culture whereby air carriers have been ‘*boycott[ing] European legislation or at least not tak[ing] it seriously.*’<sup>26</sup>

However, it has also been conversely stated, this has also led to the Regulation being one of the most successful areas of EU law in the field of consumer protection; but at the same time, this has resulted in inconsistent approaches being taken.<sup>27</sup>

As Arnold and Mendez de Leon rationalised (in 2010), the dispute may not lie in the Regulation itself but, with those airlines, who use they ‘*the ignorance of the passengers*’ to their advantage so as to ‘*often refer to [potential defences] to be able to refuse claims.*’<sup>28</sup> However, in 2013, Arnold also offered that airlines, ‘*generally do not compensate their passengers, unless a claim is submitted. It is unlikely that this practice will change.*’<sup>29</sup> Based on his it could be prudent to deduce that potentially some improvements have occurred with more reputable and ethical practices being followed by the carriers.

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<sup>24</sup> Joined Cases C-402/07 and C-432/07 *Sturgeon, Christopher and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA*: Cases. EU:C:2009:716. [2009] ECR I-10923.

<sup>25</sup> Case 549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061.

<sup>26</sup> Dam, Cees van ‘Air Passenger Rights after *Sturgeon*.’ *Air and Space Law* 36, no. 4/5, (2011) 259–274.

<sup>27</sup> Prassl, J. Reforming Air Passengers Rights in the European Union. *Air & Space Law* 39, no. 1 (2014), 59–82.

<sup>28</sup> Arnold, K. and Mendes de Leon, P. Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change? 35 *Air and Space Law*. (2010) 91, 110.

<sup>29</sup> Arnold, K. EU Air Passenger Rights: assessments of the proposal of the European Commission for the amendment of Regulation (EC) 261/2004 and Regulation (EC) 2027/97. 38 *Air & Space Law*. (2013) 403–438.

Summarised, depending upon the circumstances, the Regulation ‘requires’ that airlines:

- Provide assistance to passengers – this is with regards to accommodation, refreshments, meals and communications facilities
- Offer re-routing and refunds
- Pay compensation (up to 600 Euros) per passenger; and
- Proactively inform passenger about their rights under the Regulation

The Regulation applies to all flights from and within the EU and to flights outside the EU to an airport within the EU (operated by an EU-registered carrier). As part of the enforcement mechanism Member States are also ‘required’ to set up enforcement bodies which have the ability to impose sanctions.

### **2.1. National Enforcement Bodies: Reviews**

Article 17 of the Regulation, provided that a report ‘*shall*’ be submitted to the European Parliament and the Council on the operation and the result of the Regulation. However, the requirement for this was in respect of one defined date – 1 January 2007; that said, several analysis reports have been undertaken, no doubt because of some of the findings within the first study. At regular intervals the EU Commission has commissioned studies and collected data from the NEBs relating to the number of complaints handled as well as the sanctions imposed to the airlines in order to have a better understanding on how the Regulation was being enforced.<sup>30</sup>

The earlier study (in 2006<sup>31</sup>) stated that the objective was to assess the extent to which air carriers were complying with the requirements laid down within the Regulation as well as through further interpretation provided by subsequent CJEU jurisprudence. It was also to investigate whether the enforcement process was sufficiently working, with a view to proposing an amendment to the Regulation.

The Regulation lays silent in regards to defining the competences and tasks to be undertaken by the enforcement bodies, and indeed the governance of these organisations. Given this, it was

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<sup>30</sup> See link at: [https://ec.europa.eu/transport/themes/passengers/studies/passengers\\_en](https://ec.europa.eu/transport/themes/passengers/studies/passengers_en)

<sup>31</sup> Steer Davies & Gleave, Review of Regulation 261/2004. Final Report (2007).

observed the procedures varied between EU States, with some NEBs not directly assisting passengers with individual claims.

Coming less than 2-years after the Regulation had entered force, it was concluded that it was difficult to assess *‘whether it has any quantitative effect in changing the overall level of denied boarding, delays/cancellations...’* Although, there was *‘anecdotal evidence that airlines have not always complied with the Regulation.’*<sup>32</sup>

It was said that, passenger filing complaints with the NEBs had to wait what was said to be *‘a very long time’*<sup>33</sup> before receiving back any feedback (although this was not specifically defined). Another identified issue related to language barriers, particularly relevant when the claim was filed in another Member State where the flight disruption had occurred.

At the time, it was concluded that the most effective bodies appeared to be in Denmark and Belgium. In the vast majority of cases the complaint handling body was also the Civil Aviation Authority<sup>34</sup> (CAA) although the level of resources substantially varied across the EU. Article 16 of the Regulation requires that the NEBs have the obligation to impose *effective, proportionate and dissuasive sanctions*. This said, there are various legal differences between the types of sanctions that are, and, can be, applied within Member States.

One remedy advocated within the report was to improve the standardisation of enforcement approaches across the EU by establishing a *‘Code of Good Practice,’* which would consider timescales, such as replies from the NEBs to the respective passenger(s).

In 2010, the EU Citizenship Report – *‘Dismantling the obstacles to EU citizens’*<sup>35</sup> reinforced the Commissions commitment to ensure adequate enforcement of air passengers’ rights. This said,

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<sup>32</sup> COM(2007) 168 final – Communication from the Commission to the European Parliament and the Council – pursuant to Article 17 of the Regulation (EC) No. 261/2004. Brussels, 4.4.2007.

<sup>33</sup> COM(2007) 168 final. Section 6, page 8.

<sup>34</sup> In States where it is not, it is more generally operated by the statutory consumer authority.

<sup>35</sup> COM(2010) 603 final - EU Citizenship Report (2010) Dismantling the obstacles to EU citizens’ rights. Brussels, 27.10.2010.

the 2010 evaluation report<sup>36</sup> (herein, SDG) concluded once more that enforcement was still not *effective, proportionate and dissuasive* enough so as to provide airlines with an economic incentive to comply with the Regulation and as a consequence the inconsistent approach risked distorting competition. It was also stated that enforcement processes in most Member States were too complex, too slow, and again, there were noticeable differences in national legal frameworks. Once more the lack of a clear mandate for the NEBs was reinforced, no doubt largely attributed to the fact that Article 16 failed to ensure the means to achieve a harmonised, efficient and consistent approach across the EU.

One further aspect identified related to the lack of information given to passengers regarding their rights, alongside information as to how a passenger should lodge a complaint with airlines in the first instance. When the matter was referred to a NEB the timeframe for receiving a response was said to vary from between four to eighteen months. Once again, language hurdles were also identified as an impediment to achieving resolve.

The 2011 EU White Paper on Transport once more emphasised the need to ‘*develop a uniform interpretation of EU law on passenger rights and a harmonised and effective enforcement, to ensure both a level playing fields for the industry and a European standard of protection for the citizens.*’<sup>37</sup> The Commission Communication also stressed the issue of non-uniform enforcements as well as gaps in the text of the Regulation and, hence, the continuing difficulties for passengers trying to enforce their individual rights.

A year later, in 2012, SDG published a follow-on report which evaluated the number of comparison studies across the EU – including within Spain and the action and processes undertaken by the NEB.<sup>38</sup>

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<sup>36</sup> Steer Davies Gleave: Evaluation of Regulation 261/2004. Final Report. February, 2010.  
[https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010\\_02\\_evaluation\\_of\\_regulation\\_2612004.pdf](https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf)

<sup>37</sup> COM(2011) 144 final – Road Map to a Single European Transport Area – Towards a competitive and resource efficient transport system. Brussels, 28.3.2011.

<sup>38</sup> Steer Davies, Gleave, Exploratory study on the application and possible revision of Regulation 261/2004 Final Report July 2012.  
<https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf>

### 3. Spain: AESA

The NEB in Spain is Agencia Estatal de Seguridad Aérea (AESA) – the CAA. At the time of the SDG report in 2012 the Spanish Authority had more full-time employees than any other State (Table 2: Spain-UK comparison: Efficiencies and Effectiveness).

Member State & Enforcement Body	Resources available (FTE)	Annual operating costs (Euros)	Number of complaints received	Number of cases engaged for sanctioning	Available languages for complainants	Time taken to handle the complaint
Spain – AESA - CAA	38 – total 21 (Reg. 261)	1.9 (total) 1.2 million (261 complaint handling)	32, 651	62	Spanish English (Able to receive & reply)	5-6 months
UK – CAA (formally the UK Air Transport Users Council)	14 – total 8-10 (Reg. 261)	1.5 million	8,843	0	Receive in all EU languages Reply only in English	In some cases, over 6 months

**Table 2: Spain-UK comparison (2010<sup>39</sup>) Efficiencies and Effectiveness (Resources available, operating costs and sanctions)**

Source: Authors

Based on data from SDG-2012<sup>40</sup> and SWD(2014) 156 final<sup>41</sup>

From a Spanish perspective whilst 62 cases were engaged for sanctioning only 48% of sanctions were collected. Since 2009-2010 Spain has amended national law so as to explicitly specify that sanctions are available for infringements and has taken steps to rectify difficulties with regards to the imposition and collection of sanctions which was a specific issue in relation to non-national

<sup>39</sup> It should be noted that this may have been impacted by the Spanish long-haul carrier – Air Comet entered into insolvency, for which they received over 25,000 complaints:

Total in Spain: 32,206 compared with the UK: 6,436 (SDG – 2012) whilst 32,651 and 8,843 recorded by the EU SWD(2014) 156 final.

<sup>40</sup> Steer Davies, Gleave, Exploratory study on the application and possible revision of Regulation 261/2004 Final Report July 2012.

<https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf>

<sup>41</sup> SWD(2014) 156 final: Commission Staff Working Document

Complaint handling and enforcement by Member States of the Air Passenger Rights Regulations. Brussels, 7.5.2014

carriers.<sup>42</sup> This said, in 2012 the number of cases engaged for sanctioning by AESA was 118 with only 42% having been collected.<sup>43</sup>

In 2010, the sanctions that could be imposed in the UK could be unlimited in terms of fines for a failure to comply with an enforcement order, whereas, for criminal prosecution for infringement it was approximately 5,800 Euros (£5,000). In contrast, the Spanish Authority could impose a maximum fine of 4.5 million Euros, that said, for most infringement the maximum lay at 70,000 Euros with a minimum of 4,500 Euros being applied.<sup>44</sup> And, in 2010 Member States which has already imposed sanctions continued to do so, whilst the UK, with the largest aviation market, had not imposed any sanctions then or previously for infringements – demonstrating only too clearly the impact of different legal systems and processes. The position in the UK in 2012 showed that 12 cases had been engaged for sanctioning; however, the number of sanctions collected was shown as nil.<sup>45</sup>

In the period prior to 2009-2010, it was identified that many Member States (including the UK) were not applying the rights as identified in the *Sturgeon*<sup>46</sup> judgment, the Spanish NEB however did. Likewise, AESA were fully compliant with *Wallentin*,<sup>47</sup> as was the UK NEB in this instance.<sup>48</sup>

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<sup>42</sup> - Law 21/2003 (Aviation Security Law), as amended by Law 1/2011:

- Article 37(2)(1): requires compliance with Regulations 261/2004 and 1107/2006
- Article 37(2)(2): requires airlines to provide information
- Article 55(2): defines sanctions

- Royal Decree 28/2009: defines inspection regime

- Law on Public Administrations and Administrative Procedures (Law 30/1992): defines operation procedures for the NEB

- Regulation on Procedures for the Imposition of Sanctions (Royal Decree 1398/1993)

(Source – SDG report – 2012).

<sup>43</sup> SWD(2014) 156 final.

<sup>44</sup> Steer Davies, Gleave, Exploratory study on the application and possible revision of Regulation 261/2004 Final Report July 2012.

Note: SWD(2014) 156 final refers to the following classification system:

- Minor infringements: warning or fine of 4,500 Euros to 70,000 Euros
- Serious infringements: fine of 70,001 Euros to 250,000 Euros
- Very serious infringements: fine of 250,001 Euros to 4,500,000 Euros.

<sup>45</sup> SWD(2014) 156.

<sup>46</sup> Joined Cases C-402/07 and C-432/07.

<sup>47</sup> Case 549/07.

<sup>48</sup> Steer Davies, Gleave, Exploratory study on the application and possible revision of Regulation 261/2004 Final Report July 2012.

More recent data obtained from AESA identifies that in 2016, 15,804 complaints were reported to the Spanish NEB. Whilst in 2017, there had been a slight increase to 15,863.<sup>49</sup>

The data obtained from AESA identified that it had recorded complaints against 145 airlines in 2016 and against 166 airlines in 2017. Table 3 shows the airlines receiving more than 500 complaints in each year.

AIRLINE	YEAR	
	2016	2017
Air Europa	1,693	1,625
Air Nostrum	<	703
Iberia	2,010	2,406
Norwegian Air International	<	1,417
Ryanair	1,660	1,789
Vueling Airlines	4,800	2,333

**Table 3: Airlines receiving more than 500 complaints in a year**  
Source: Authors (based on AESA data<sup>50</sup>)

Tables 4 and 5 show the time it has taken AESA to investigate the complaints per month. This equates to an average of 91 days in 2016 and 119 days in 2017. The rise in time at the end of 2016, across the last 3 months, and into 2017, was largely attributed to Vueling Airlines. Across the summer of 2016, a number of Vueling Airlines flights were delayed, and a further number of flights were cancelled due to pilot action. Vueling is part of the International Airlines Group (IAG<sup>51</sup>), as is Iberia<sup>52</sup> and both are therefore Spanish Airlines.<sup>53</sup> Likewise, Air Europa<sup>54</sup> is also a Spanish Airline and the three rank as the three largest airlines in Spain. Vueling operates using a Low-Cost Carrier (LCC) business model.

<sup>49</sup> Freedom of Information request by authors (reply 21 June, 2018).

<sup>50</sup> Ibid.

<sup>51</sup> IAG is the parent company of Aer Lingus, British Airways, Iberia and Vueling Airlines.

<sup>52</sup> The full name: is Iberia Lineas Aeras De España SA Operadora.

<sup>53</sup> IAG It is a Spanish registered company with shares traded on the London Stock Exchange and Spanish Stock Exchanges.

<sup>54</sup> The full name is: Air Europa Lineas Aereas, S.A.U. The airline company is part of the Globalia tourism group.

In 2017 Air Europa formed a partnership with the Irish LCC Ryanair, allowing its passengers ease of access to book Air Europa long-haul flights on its website.<sup>55</sup>

Air Nostrum is again a Spanish regional carrier and its core business relates to:

- Domestic connection flights to and from Madrid.
- International connection flights to and from Madrid.
- Niche markets Public Service Obligation (PSO) flight routes.

In May, 1997, Air Nostrum signed a franchise agreement with the Iberia Group, thereafter becoming known as ‘Iberia Regional Air Nostrum,’ this later provided access to the ‘Oneworld’ airline alliance, as an affiliate of Iberia, whilst Vueling operates a codeshare arrangement. Air Europa remains in the ‘SkyTeam’ airline alliance group.

It would not be viewed as unusual for national (in this case Spanish) owned airlines to experience the highest number of complaints in their own country, given that they would have a large share of the market, no doubt, also linked to loyal customers and the ease of reporting a complaint in the Spanish language and nationally too.

On the other hand, Norwegian Air International, as the name suggests, is Norwegian owned and is a subsidiary of Norwegian Air Shuttle. Whilst winning several prestigious awards as Europe’s Best Low-Cost Airline and Best Low-Cost, Long Haul Airline,<sup>56</sup> the group has experienced a surge of complaints over the last few years.<sup>57</sup>

With regards to Ryanair, the only other non-Spanish airline coming within this list, its recent partnership with the Spanish Air Europa airline could potentially be a factor, but it is doubtful – given that a high level of complaints were registered in both years, with only a small increase in 2017. The likelihood would this is as a result of the number of flights operated (given it is a LCC and, given that it operates internally, on routes within the Spanish domestic market and out of

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<sup>55</sup> This provide flights to 20 routes from Madrid to 16 countries in North, Central and South America, including Argentina, Brazil, Cuba, Mexico and the United States of America.

<sup>56</sup> Skytrax awards: <https://www.norwegian.com/en/about/our-story/awards-and-recognitions/>

<sup>57</sup> ‘The number of complaints against Norwegian increased from 50 in 2016 to 305 in 2017, according to the newspaper *Dagens Næringsliv*’ 10 April, 2018: <https://standbynordic.com/norwegian-suffers-surge-in-complaints/> [Accessed 21 July 2018].

Spain to other destinations) plus, there may also be a link to the ongoing dispute with its pilots (particularly in 2017). Noting additionally that the airline has often been criticised for its business model which has frustrated passengers (for example - changes in cabin-baggage policy and seat allocation<sup>58</sup>) alongside, the added complexity in filing a complaint. What is not known from the data is how many of these complaints were actually in accordance with the Regulation (as opposed to factors outside of it). This said, Ryanair has recently stated that it would pay compensation for delayed or cancelled flights faster than any other airline, declaring that valid claims would be paid within 10 days. In a bid to do so the company has reportedly (January, 2018) established a special unit of 150 customer service staff has been established in Madrid to process claims.<sup>59</sup>

Putting this further into perspective, by reviewing data from the UK-CAA, in the first quarter of 2018, it is shown that whilst 2400 complaints were received relating to Ryanair (directly in respect to the Regulation, as well as 1121 other complaints outside of this) this equated to 289 complaints per million passengers carried (pax) so whilst the number of complaints may appear high or higher than competitors, the annual carriage of customers also needs to be factored in.

<b>2016</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>MONTH</b>	92	97	87	82	85	91	76	77	79	109	100	120

**Table 4: Average time for AESA to investigate (2016)<sup>60</sup>**

<b>2017</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>MONTH</b>	138	129	126	149	157	152	158	108	92	80	67	71

**Table 5: Average time for AESA to investigate (2017)<sup>61</sup>**

As is evident, there was a noticeable rise in the amount of sanctions imposed to the airlines in 2017, with an average fine of 7,248.99 (in 2016) to 38,460 (in 2017) Euros (Table 6) (although it is not known if these has any direct correlation to the airlines listed above).

<sup>58</sup> Independent (online): Simon Calder, 'Ryanair seat assignments: Passenger complain, but airline insists 'no new policy.' 12 June, 2017.

See <https://www.independent.co.uk/travel/news-and-advice/ryanair-seat-assignments-five-year-old-allocated-place-away-from-family-seating-policy-pay-reserve-a7785726.html>

<sup>59</sup> Independent (online): Simon Calder, 'Ryanair pledges to pay compensation for delayed or cancelled flights within 10 days.' 31 January 2018. <https://www.independent.co.uk/travel/news-and-advice/ryanair-compensation-delayed-cancelled-flights-refund-10-days-latest-updates-a8187046.html>

<sup>60</sup> Freedom of Information request by authors (reply 21 June, 2018).

<sup>61</sup> Freedom of Information request by authors (reply 21 June, 2018).

<b>RESULT OF SANCTIONS - AESA Regulation (EC) 2004/261</b>				
<b>YEAR</b>	<b>TOTAL NUMBER</b>	<b>RESOLUTION</b>	<b>ACHIEVED RESOLUTION</b>	<b>TOTAL AMOUNT OF SANCTION Euros</b>
<b>2016</b>	<b>50</b>	No sanction collected	<b>1</b>	
		With sanction	<b>49</b>	355,200.00
<b>2017</b>	<b>46</b>	No sanction collected	<b>1</b>	
		With sanction	<b>45</b>	1,730,700.00

Table 6: AESA data for sanctions in 2016 and 2017<sup>62</sup>

**3.1. EU Guidelines**

Over a period of time the EU Commission has issued guidelines to the NEBs in order to achieve more consistency as to the approaches taken across the Member States and therefore to mitigate the disparity of practices. Whilst these remain ‘guidelines’ per se, the Commission refers to these as ‘rules<sup>63</sup>.’ This said, academics are still of the opinion that there remains ongoing difficulties in translating ‘*law in theory into law in action.*’<sup>64</sup>

Within the latest procedural guideline summary document (2017), it is stated the NEB should be the competent authority for incidents within their territory, including in the case of long delays at the final destination.<sup>65</sup> In the event of missed connections during an intra-EU connecting flight leading to long delays at the final destination, the competent NEB should be viewed as the connecting point where the connection flight was missed.<sup>66</sup> Where there is a transfer from a third country airport to a third country airport it should be viewed as the NEB within the originating State within the EU. And, for events outside the EU involving an EU licenced carrier, the NEB should be deemed as the one located within the destination Member State.

<sup>62</sup> Freedom of Information request by authors (reply 21 June, 2018).  
<sup>63</sup> NEB - Complaint Handling Procedure Under Regulation (EC) 261/2004 (version 3.1. / 04-2017). Available at: [https://ec.europa.eu/transport/sites/transport/files/neb-neb\\_complaint\\_handling\\_procedures.pdf](https://ec.europa.eu/transport/sites/transport/files/neb-neb_complaint_handling_procedures.pdf)  
<sup>64</sup> Bruggen, van Der, R. Compliance with the Air Passenger Rights Regulation: past, present and future. *European Transport Law*, (2017) Issue 5, p.473-503.  
<sup>65</sup> As per the judgment of ‘*Sturgeon*’ - Joined Cases C-402/07 and C-432/07.  
<sup>66</sup> See C-11/11, *Folkerts*. ECLI:EU:C:2013:106.

Of course, some of these basic principles as to which NEB should be contacted also potentially leads to linguistic difficulties for the complainant, and if this is the case, the EU Commission states that the two NEBs should agree on the transfer of the file. However, given the disparity of applying sanctions (as per the above evidence) there is reason to claim that a post-code lottery exists – whereby, the customer/consumer remains subject to the Member States efficiency and effectiveness in achieving redress and, in some instances, may not actually undertake an investigation on behalf of an individual.<sup>67</sup> Clearly the EU continues to recognise these differences, as the guidance document refers to the fact that NEBs should coordinate ‘*to avoid contradicting rulings.*’

### 3.1.1. Complaint Handling procedure

The following is said in respect of the general complaint handling procedure:

1. Acknowledgement of receipt within a 2-week period (first analysis/filtering).
2. Assess whether similar complaints were received relating to that particular complaint.
3. Case submission to the airline requiring reply within a 6-week period from the date of receipt. If no reply is received back from the airline then a reminder should be sent (adding an additional 2-week delay).
4. On reply from airline – assess the evidence received from all parties, followed by an independent ruling communicated to the complainant and to the airline.
5. In the case of no reply from the airline – assessment to be made on the basis of the passenger complaint and respective action taken accordingly.
6. NEB to examine repetitive incidents with particular airlines.
7. Complaints to be registered on a database.
8. Timescale for complaint handling procedure (maximum)
  - 3-4 months for what is defined as ‘clear cases;’
  - 6 months for ‘complex’ cases;
  - Longer than 6 months for cases that involve legal proceedings.

A special provision is made with respect to ‘*extraordinary circumstances,*’ which no doubt recognises and addresses both the complexity and also the controversy that has existed in

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<sup>67</sup> As per section 2.1. National Enforcement Bodies: Reviews.

previous rulings (e.g. *Wallentin*<sup>68</sup> and *Sturgeon*<sup>69</sup>). In this respect it is stated that the following should be followed:

- If the information provided by the airline is of a detailed and coherent nature then NEBs are left with a degree of flexibility and can apply random checks – whilst being mindful of ‘*respecting the principle of proportionality.*’
- If the information is only provided in a vague or general format which prevents the NEB from making sound judgment, each incident should be followed up on an individual case-by-case assessment which necessitated requesting supporting documents (such as proof: e.g. logbooks, incident reports, maintenance manuals, etc).

Within the guidance, NEBs are also clearly directed to closely work and collaborate with the European Consumer Centres (ECC) in order to gather data and information so as to support procedures leading to sanctions being applied. As above, there is likely to be a degree of differences between the decisions taken by each NEB; for example, whilst reference is made to a database, for fairness and consistency this should debatably lie at an EU level and be monitored so as to ensure *effective and proportionate* action as well as *dissuasive sanctions* are taken, and, importantly, enforced.

### **3.2. Other mechanisms**

This said, the EU identifies that the NEB is the second step in submitting a claim under the Regulation and identifies four steps that should be taken in order for the traveller to exercise their rights (Table 7: Steps to make a claim).<sup>70</sup> So, from this respect, the airline should be being *re-contacted* (in this case by the NEB) having therefore already dismissed the complainant and/or not resolved this matter in a satisfactory manner, including not even responding to the customer in the first place.

Whilst applying step 1 may aid to eliminate and reduce the work of the NEBs it potentially raises other issues with regards to the fact that some complainants may not further pursue this through a NEB – partly because they are not necessarily aware that this is an available (second step) option. There is also the potential that consistent airline offenders will not always be recognised and/or will have an adequate sanction applied against them for frequent breaches and abuses,

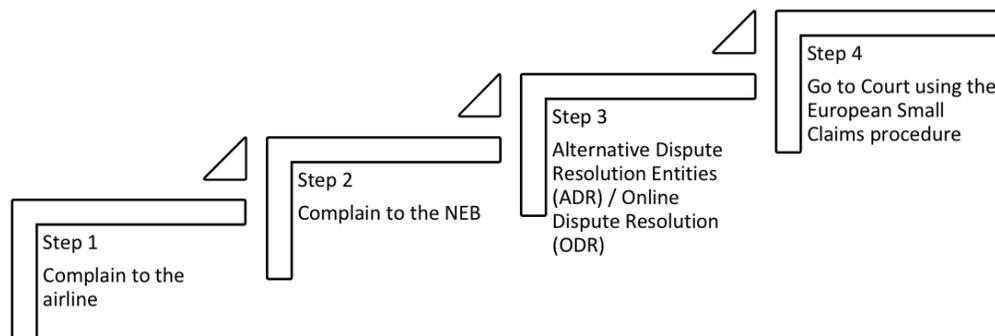
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<sup>68</sup> Case 549/07.

<sup>69</sup> Joined Cases C-402/07 and C-432/07.

<sup>70</sup> The EU (DG Move) have also issued further guidance for the NEB-airline procedure. Available via: [https://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/neb/neb\\_airlines\\_procedures.pdf](https://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/neb/neb_airlines_procedures.pdf)

particularly, if, at this stage, the action is not resolved and/or the NEB is made aware of a complaint.



**Table 7: Steps to make a claim**

Source: Authors based upon guidance given by the EU.

Given the identified limited effectiveness of some of the Members States NEBs, and the fact that many have not applied a remit to assist passengers with individual claims, passengers have also utilised alternative processes to obtain redress, which has included sometimes directly to small claims courts, alternative dispute resolutions (ADR), as well as to the newer breed of solicitors or claims companies which undertake investigations relating to breaches under the Regulation (sometimes on the principle of a no-win-no-fee arrangement).<sup>71</sup>

It should be recalled, from an EU perspective, Regulation 261/2004 fits into a wider arena of consumer protection as well as fundamental rights.

The current sixty-two policy action points fall within four-pillars, namely:<sup>72</sup>

- promoting consumer safety
- enhancing knowledge of consumer rights
- strengthening the enforcement of consumer rules

<sup>71</sup> The use of solicitors and claims companies lies outside the remit of this paper – but readers are directed to a secondary publication: L. Martín-Domingo and S. J. Fox (20xx) Air Passengers’ - EU Protection on delays, cancellations and denied boarding - Regulation 261/2004: Evaluation with a case study, as it is increasingly recognised that ‘*legal professionals and claims management companies (CMCs), ... are playing an increasingly prominent role in aviation complaints by helping consumers take court action.*’ CAP1286, Consumer complaints handling and ADR. CAA policy statement and notice of approval criteria for applicant ADR bodies. UK Civil Aviation Authority, 2015.

<sup>72</sup> Taken from EU Consumer Agenda (2014-2020) and related publications – in particular: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions a European Consumer Agenda - Boosting confidence and growth COM(2012) 225 final, Brussels, 22.5.2012. [https://ec.europa.eu/commission/sites/beta-political/files/consumer\\_agenda\\_2012\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/consumer_agenda_2012_en.pdf)

- integrating consumer interests into key sectorial policies

The Consumer Protection Cooperation consists of a network of authorities that are responsible for enforcing EU consumer protections laws to protect consumers' rights across the EU.

Regulation (EC) 2006<sup>73</sup>, of the same year as the regulation for the protection for air travellers, provides for a wider scope of consumer protection cooperation (the CPC Regulation). The preamble acknowledges that continuing effort is required so as to improve cooperation and address the challenges of enforcement which create barriers for the consumer seeking redress.

Reference is made to discriminatory practices that distort the market across the EU – as is arguably clearly the case with air passenger seeking to enforce their rights.

Within it, it lays down a cooperation framework which enables all national authorities across the EU to liaise and address breaches of EU law, where the trader and customer are based in different countries. The 'CPC Network' has been operating since 2007 and consists of a single liaison office in each State which coordinates the relevant national authorities.

These authorities should cooperate across a number of areas, and specifically identified are:

- Unfair commercial practices;
- E-commerce;
- Comparative advertising;
- Package holidays;
- Online selling; and,
- Passenger Rights

The network works by sharing 3-types of database (the CPC system) which is indeed run by the Commission:

- (i) *Information requests*: whereby an authority is asked for information to establish whether:
  - A trader registered in its jurisdiction has breached consumer law
  - There is reason to suspect that a breach may take place
- (ii) *Requests for enforcement measures*: an authority is requested to do everything required and without delay to stop breaches.
- (iii) *Alerts*: if an authority suspects or is warned about a breach then it informs the Commission and its counterparts in the other States.

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<sup>73</sup> Regulation (EC) No 2006/2004 on consumer protection cooperation (the CPC regulation) and Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 ([OJ L 46, 17.2.2004, p. 1](#)).

Hence, whilst transport is identified as a focused sector, under Regulation (EC) 261/2004, the EU has repeatedly identified that complimentary to the NEBs lies, not only the national consumer bodies, which includes national but the CPC mechanism, including EU Centres – such as the European Consumer Centres (ECC).

In Spain, according to Article 51 of the Constitution of Spain, the consumer protection policy is a shared competence between the State (the Central Government) and the regional governments of the Autonomous Communities<sup>74</sup> (*‘Comunidades autónomas’*). Whilst, the ECC has a public service office in Madrid and is part of a European Consumer Centres Network (ECC-Net). The work of the Spanish ECC is therefore to increase collaboration with the consumer units of the different autonomous regions, as well as the local consumer information offices, tourist offices, consumers associations.

However, the SDG report in 2012<sup>75</sup> clearly identified that most NEBs, including the Spanish entity AESA, are making little to no use of the CPC network. The justification for such was that there was the belief that each NEB has *‘reasonably good contacts with each other.’* There was also the belief that the CPC network was of *‘limited’* relevance to the Regulation (261/2004). At the time it was identified a technical problem with the utilisation of the CPC IT system. Whilst the UK stated that the CPC system was not used extensively, the Spanish NEB has stated that it had never been used as it stated that it has *‘sole competence to enforce the Regulation in Spain.’*<sup>76</sup>

This said, in respect to step 3, AESA confirmed that it is an ADR/mediation body, whilst the UK CAA, in 2014, reported that it was not an official mediation body, but did offer mediation.<sup>77</sup> The UK-CAA has however now stated that it has approved various ADR,<sup>78</sup> bodies (identifying

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<sup>74</sup> National Law for the Defense of Consumers and Users is the basic regulation at national scope. Autonomous Communities have their Basic Laws within the scope of competences of the Autonomous Communities. [http://www.aecosan.msssi.gob.es/AECOSAN/web/consumo/subseccion/legislacion\\_basica\\_consumo.htm](http://www.aecosan.msssi.gob.es/AECOSAN/web/consumo/subseccion/legislacion_basica_consumo.htm)

<sup>75</sup> Steer Davies, Gleave, Exploratory study on the application and possible revision of Regulation 261/2004 Final Report July 2012.

<sup>76</sup> Ibid.

<sup>77</sup> (SWD(2014) 156 final).

<sup>78</sup> As per the CAA website [Accessed 2018]. <http://www.caa.co.uk/Data-and-analysis/Data-for-passengers/Complaints-and-enforcement/Passenger-complaints-data/>

CEDR and CDRL<sup>79</sup>) but still emphasises that CAA’s Passenger Advice and Complaints Team (PACT) will only advise customer on whether they ‘think’ they have a valid complaint, and if so, will take it up with the business concerned. Furthermore, it identifies that PACT cannot impose a decision on an airline while CAA-approved ADR bodies can. It should also be identified that airlines also employ the services of ADR companies, although this is not a mandatory requirement.

In the first quarter of 2018 the UK-CAA reported the following returns against each ADR and/or mediation body (Table: 8).<sup>80</sup>

Airline	ADR/Mediation body	Complaints received Reg. 261/2004	Complaints received - other	Complaints received Reg. 1107/2006 <sup>81</sup>	Remedy awarded (complaints decided in qtr)	No remedy awarded	Complaints per million pax	Total Awarded	Average Awarded	Percentage upheld
Totals	CDRL	3812	368	5	713	299	236	£374,846	£526	70%
Totals	CEDR	3849	91	49	1802	1035	68	£1,429,460	£793	64%
Totals	PACT	467	60	1	440	185	0	-	-	70%

TABLE 8: UK-CAA 1<sup>st</sup>-qtr. return 2018 (by ADR/Mediation body (CAA data - UK<sup>82</sup>))

Step 4 (Table 7) refers to the European Small Claims procedure which is designed to simplify and speed up cross-border claims for up to 5,000 Euros. A judgment made under the European Small Claims Procedure is recognised as enforceable in another Member State, ‘*without the need for a declaration of enforceability and without any possibility of opposing its recognition.*’<sup>83</sup>

[http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard\\_Content/Data\\_and\\_analysis/Passenger%20Complaint%20Data%20Q1%202018.pdf](http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard_Content/Data_and_analysis/Passenger%20Complaint%20Data%20Q1%202018.pdf)

The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended by) [The Alternative Dispute Resolution for Consumer Disputes \(Amendment\) Regulations 2015](#)). Also see the guidance document at: ‘[CAP 1324 – Guidance for ADR applicants](#)’

<sup>79</sup> The CAA (UK) specifically makes reference to, for example - the services of the Consumed Dispute Resolution Ltd – (CEDR) [trading as ‘[AviationADR](#)’] and Consumer Dispute Resolution Limited (CDRL) <https://www.cdrl.org.uk>

<sup>80</sup>[http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard\\_Content/Data\\_and\\_analysis/Passenger%20Complaint%20Data%20Q1%202018.pdf](http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard_Content/Data_and_analysis/Passenger%20Complaint%20Data%20Q1%202018.pdf)

<sup>81</sup> Regulation (EC) No [1107/2006](#) of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. OJ L 204, 26.7.2006, pp. 1-9. ELI: <http://data.europa.eu/eli/reg/2006/1107/oj>

<sup>82</sup>[http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard\\_Content/Data\\_and\\_analysis/Passenger%20Complaint%20Data%20Q1%202018.pdf](http://www.caa.co.uk/uploadedFiles/CAA/Content/Accordion/Standard_Content/Data_and_analysis/Passenger%20Complaint%20Data%20Q1%202018.pdf)

<sup>83</sup> e-justice website: [e-justice.europa.eu](http://e-justice.europa.eu).

The requirement is that the complainant sends the form to the court that has the jurisdiction and respond by completing a section of the form (the ‘Answer Form’), and within 14-days serve a copy of it along with the Answer Form on the defending party. The defendant has a further 30-days to reply and fill in their part of the Answer Form, whereby the court must send a copy of it to the plaintiff within 14-days. Within 30-days of the court receiving the answer they must either:

- (i) makes a judgment on the small claim, or
- (ii) request further written evidence from either party, or
- (iii) summons the parties to an oral hearing, which does not require the representation of a lawyer. The court also has the option of allowing the hearing to be undertaken via video or telephone conferencing.

After a certificate is issued by the court (which in some instances may require translating into the language of another Member State) and a copy of the judgment – it then becomes enforceable in another State. The only exception to this is when it is irreconcilable with another judgment given in the other party State between the same parties.

#### **4. Proposals, Amendments and Developments: *summary analysis***

In 2013 a Proposal to amend, amongst other areas, Regulation 261/2004, was made.<sup>84</sup> The Proposal was based upon Treaty Article 100(2) TFEU and it was clearly recognised that there was limited scope for Member States to act alone to protect consumers, as the Air Services Regulation<sup>85</sup> did not allow Member States to place additional requirements on air carriers. The Proposal stressed the fact that all EU legislation must be in full conformity with the Charter of Fundamental Rights<sup>86</sup>; and, therefore, there was an ongoing need to follow Article 38 and ensure a high level of consumer protection is realised in all Union policies. The aim of the Proposal was to promote the interests of air passenger and ensure that ‘harmonised’ conditions

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<sup>84</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 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 and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air.

<sup>85</sup> Supra. Note 3: Council Regulation (EC) No. 1008/2008, Common Rules for the Operation of Air Services in the Community, 2008 O.J. (L 293) of 31.10.2008 (P. 3–20).

<sup>86</sup> OJ C364, 18.12.2000, p.1.

exist within a liberalised market, whilst also recognising the financial implications to the air transport sector.

The Proposal followed a consultation process wherein consumer and passenger representatives and the industry voiced their opinions, the former identifying that there was inadequate enforcement, especially with regards to financial compensation. As a consequence, several options were proposed:

**Option 1):** Focus on economic incentives (moderate change of enforcement)

**Option 2):** Balance stronger enforcement policy with economic incentives

- Variant (a) Increasing the time after which the passenger has a right to compensation in case of a delay (from three to at least five hours)
- Variant (b) extending the scope of ‘extraordinary circumstances’ to include most technical defaults

**Option 3):** Focus on enforcement

**Option 4):** Centralised enforcement

Following an impact assessment, it was concluded that option 2 was preferable with variant (a) being slightly preferential. However, it is contended that this fails to ensure a consistent approach, including an adequate means to monitor the Member States enforcement mechanisms.

The Proposal clearly identified that ‘*most of the problems with air passenger rights refers to divergencies with application/enforcement*’ of the Regulation, which weakened passengers’ rights, and which only coordinated EU intervention could address as a means to solve the problems being encountered. So, given this, there would be logic for a central monitoring approach – extending to enforcement. Whilst this Proposal remains in force today it has somewhat stalled, with the Commission instead providing Interpretative Guidelines over a number of year, the latest comprehensive ones being in 2016.<sup>87</sup> This inability to push the Proposal forward arguably further stresses the controversy of the Regulation and the differences of opinion between the industry and those that seek to ensure passengers’ achieve their rights. This said, the difference in civil and criminal processes in each Member State and the

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<sup>87</sup> [Commission Notice — Interpretative Guidelines on Regulation \(EC\) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation \(EC\) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation \(EC\) No 889/2002 of the European Parliament and of the Council](#) C/2016/3502 OJ C 214, 15.6.2016, p. 5–21 (2016/C 214/04)

classification of where exactly the Regulation sits in terms of enforcement actions also exacerbates the ability to achieve an amended Regulation, which is also potentially why option 4 would not be favoured by the Member States as it would be viewed as infringing upon their systems, and, hence, sovereignty.

In the interim, the EU Commission continues to issue guidelines to the NEBs, with the aim of achieving more consistency as to the approaches to be taken across the Member States and therefore mitigating the disparity of practices. However, it is questionable whether these are in fact sufficient to address the deficiencies across the EU, which not only compromise the rights of the passengers but also continue to affect the level-playing field between EU carriers.

The Guidelines may provide guidance and give recommendations – but they fail to guarantee consistency across the EU. The language is not assertive and remains weak; for example, the Commission ‘*recommends that passengers be advised to make complaints to the national enforcement body of the country where the incident took place, within a reasonable time frame....*’ (after, firstly having complained to the airline); and, it ‘*recommends that the air carrier replies within 2 months.*’

This ‘woolly’ (non-committal) guidance fails to therefore ensure equality for the air traveller which should be regardless of the Member State where they experienced such a difficulty, associated with their journey.

The Commission additionally reinforces the point that the Court<sup>88</sup> has stated that, ‘*national enforcement bodies are not required to act on such complaints in order to guarantee in each cases [sic], individual passengers' rights. Hence, a national enforcement body is not required to take enforcement action against air carriers with a view to compelling them to pay the compensation provided for in the Regulation in individual cases, its sanctioning role as referred to in Article 16(3) of the Regulation consisting of measures to be adopted in response to the infringements which the body identifies in the course of its general monitoring activities provided for in Article 16(1).*’

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<sup>88</sup> Joined cases C-145/15 and C-146/15, Ruijsseenaars e.a., ECLI:EU:C:2016:187, paragraphs 32, 36 and 38. (Emphasis added).

However, it could also be contended that there is in fact, limited jurisprudence from the CJEU in respect to Article 16, which has not yet been fully interpreted by the Court. At most, it has been mentioned in the cases leading to the judgments in *Commission v Luxembourg*;<sup>89</sup> *Commission v Sweden*<sup>90</sup> and *McDonagh*.<sup>91</sup>

The current Regulation does not actually use the terminology *National Enforcement Body* (NEB) which the Commission constantly refers to, using only the word ‘body’ within Article 16 – which is entitled ‘infringements.’ The reference to ‘*where appropriate ‘this body’ shall take the necessary measures to ensure that the rights of passengers are respected,*’<sup>92</sup> could therefore actually be interpreted as being appropriate only when there has been non-compliance with the Regulation and/or when action by the airlines has not been taken to apply the compensation/protection mechanisms for such, rather than in respect of enforcement of a sanction. The fact that ‘*NEB*’ has become a label for the body is perhaps directive of the fact that enforcement – ‘*action*’ is a role they should be undertaking. Arguably the reference to ‘enforcement’ could relate to the actual assurance of conformity with the Regulation, within a particular State or it could be perceived as being more assertive and meaning rigorous execution of sanctions – which are mentioned in Article 16(3).

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<sup>89</sup> C-264/06, Judgment of the Court (Eighth Chamber) of 19 April 2007.  
*Commission of the European Communities v Grand Duchy of Luxembourg.*  
Failure of a Member State to fulfil obligations - Regulation (EC) No 261/2004 - Article 16(3) - Compensation and assistance to passengers - Measures necessary. ECR 2007 I-00060.

[C-264/06](#), [EU:C:2007:240](#)

<sup>90</sup> C-333/06, Judgment of the Court (Sixth Chamber) of 14 June 2007.

*Commission of the European Communities v Kingdom of Sweden.*  
Failure of a Member State to fulfil obligations - Regulation (EC) No 261/2004 - Air transport - Denied boarding and cancellation or long delays of flights - Compensation and assistance to passengers - Adoption of sanctions. ECR 2007 I-00086

[C-333/06](#), [EU:C:2007:351](#)

<sup>91</sup> C-12/11, Judgment of the Court (Third Chamber) of 31 January 2013.

*Denise McDonagh v Ryanair Ltd.*

Reference for a preliminary ruling: Dublin Metropolitan District Court - Ireland.

Air transport - Regulation (EC) No 261/2004 - Notion of ‘extraordinary circumstances’ - Obligation to provide assistance to passengers in the event of cancellation of a flight due to ‘extraordinary circumstances’ - Volcanic eruption leading to the closure of air space - Eruption of the Icelandic volcano Eyjafjallajökull.

[C-12/11](#), [EU:C:2013:43](#)

<sup>92</sup> Article 16(1).

There is little doubt that Article 16 could have been clearer and should have been more directed and arguable forceful in stipulating certain requirements for the national bodies. Without this, there remains no ‘legal certainty’ which would allow for fair, proportionate and economic sanctions to be applied equally within the EU.

It is also contended that there is an opportunity to use the CPC Network more effectively. *A new CPC Regulation*<sup>93</sup> which entered force on 17 January 2018, will be applicable as from 17 January 2020 replacing the 2004<sup>94</sup> one. This brings a number of improvements to aid the consumer. This includes the following:

- **Stepping up the powers of national authorities in cross-border situation by granting additional powers to enforcement authorities.**
- **A one-stop-shop approach** within an EU-dimension to address widespread infringements. In this respect it is stated that the Commission will have a clearer role to play when an infringement has harmed, is harming or is likely to harm consumers’ collective interests in at least two-thirds of EU countries, provided that the countries concerned together account for at least two-thirds of the EU’s population. The Commission, as the coordinator, having the ability to ask national authorities to jointly investigate bad practices and to address them in a better coordinated and efficient manner. It is said that this will provide for more consistency and make the market more level.
- **Increasing vigilance and market surveillance:** providing a new EU-wide market alert system; and, allowing emerging threats and practices to be detected quicker.

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<sup>93</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws Repealing (EC) No. 2006/2004. OJ L 345, 27.12.2017.

ELI: <http://data.europa.eu/eli/reg/2017/2394/oj>

<sup>94</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 ([OJ L 46, 17.2.2004, p. 1](#)).

Crucially this Regulation states that it will extend the scope to passenger rights.<sup>95</sup> That said, it does not repeal Regulation 261/2004.

## 5. Conclusion

In conclusion, it remains to be seen how the *new CPC Regulation* will be applied in the area of passenger rights and used by the NEBs; specifically, the extent to which this cooperation extends and develops, particularly given the fact, that in the past, there was reluctance to do so, with the belief there was no benefit given afforded to the CAA's given their expertise in this field.

Arguably, those NEBs that do not already do so, should move from a reactive stance into more proactive approach in the claim handling process in order to achieve more conformity with the Regulation and consistency in enforcing it.

Presently there remains a myriad of differences across the Member States in respect of ensuring compliance with Regulation 261/2004. In many instances the sanctions imposed cannot be viewed as *dissuasive*, serving as a deterrent to the airlines. Whilst the Spanish NEB, AESA is an ADR/mediation body, and the UK, CAA, has increased the use of other agents' services in this field, there remains inconsistencies as to the approach taken. The UK-CAA has identified the belief that the '*future of consumer complaints handling in aviation lies not in the CAA handling individuals' complaints, but in ADR schemes, such as consumer ombudsmen.*'

Adding,

*'These bodies are directly funded by the businesses that use them, but have clear and independent governance, with oversight provided by the relevant regulator. This has been the norm for many years in major consumer service sectors, such as financial services, telecoms and energy. It is now time for aviation consumers to benefit from the simple, swift and effective approach to dispute resolution that ADR brings.'*<sup>96</sup>

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<sup>95</sup> Regulation (EU) 2017/2394 - point (1) of Article 3 and as specified within the Annex.

<sup>96</sup> CAP1286 Published by the Civil Aviation Authority, 2015 UK-CAA.

With the aviation market set to grow further, with ‘*all indicators showing a ‘growing demand for global connectivity. The world needs to prepare for a doubling of passengers in the next 20 years.*’<sup>97</sup> For Europe, the prediction is that the growth will be at 2.3%, and will add an additional 550 million passengers a year, with the total market being 1.5 billion passengers by 2036.<sup>98</sup>

Of course, whilst this is good news for the economy, this growth is not without challenges. There needs to be additional infrastructure in place to support this development, as the crowded skies will only add to passenger delays, cancellations and other congestion (including in regards to maintenance schedules).

Other challenges for air travel relate to risks that emanate from global insecurity, which, inevitably leads to flight changes and cancellations, as well as risk from natural events – such as experienced during the ash-cloud crisis.<sup>99</sup> Invariably, these also present financial risks to the airlines as well as inconvenience to the customer. And, then, as well, for Europe (and particularly the UK) there is the unknown challenge of Brexit, given that the UK is one of the major players in the EU, with the largest aviation market – this is set to be surely the next key concern, with legal repercussions that will unavoidably affect air traveller – *not least passenger rights!*

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<sup>97</sup> Alexandre de Juniac, The International Air Transport Association (IATA) Director General and CEO. Expectations are that expects 7.8 billion passengers will travel in 2036, which is nearly doubling of the 4 billion air travellers that were estimated to have flown in 2017. Press release 55, 24 October 2017. <https://www.iata.org/pressroom/pr/Pages/2017-10-24-01.aspx>

<sup>98</sup> Ibid.

<sup>99</sup> The 2010 eruptions of Eyjafjallajökull (Iceland).