

Empowering Parliaments and enforcing citizens' rights in the implementation and application of Union law

Case analysis: the transposition and implementation of Regulation 261/2004 on air passenger rights

KEY FINDINGS

The EU air passenger rights regime is one of the most comprehensive in the world conferring directly applicable rights on individuals which are enforceable before national courts. Nevertheless, air passengers are still struggling to enjoy their rights and obtain individual redress. The majority of complaints made to National Enforcement Bodies (NEBs) and Alternative Dispute Resolution (ADR) entities concern the right to compensation in the event of a long delay, cancellation or denied boardings. The 'extraordinary circumstances' exception appears to be the main area of dispute.

The national enforcement systems are improving, but the sanctioning regimes in many Member States are too weak to incentivise airlines to comply with Regulation 261/2004. Sanctions are not imposed in a systematic manner, and are often applied as the exception rather than the norm. The collection of sanctions is also problematic. The wide variation in enforcement systems across the EU undermines the single aviation market and is a further factor contributing to non-compliance. There is considerable scope for national parliaments to shape the legal frameworks of the national enforcement regimes to ensure that they have an adequate deterrent effect to incentivise compliance by airlines.

Passenger awareness is improving but remains low and knowledge may not always be accurate. Passengers need guidance on how to obtain redress. There is evidence to suggest that the establishment of aviation ADR is proving to be successful at providing a simple, fast and low cost means of resolving disputes.



1. Brief overview and state of play

This case study draws on the latest available data¹ to analyse the implementation and application of Regulation 261/2004² which introduces common rules on assistance and compensation to air passengers when their travel is disrupted. The case study will first explain why the European Union (EU) enacted air passenger rights and the current state of play in terms of their enjoyment. It will set out the current legal framework before exploring its shortcomings. Finally, it gives examples of best practice and presents some recommendations for national parliaments and EU institutions to improve the enforcement of citizens' rights.

The European Union (EU) aviation market has experienced significant growth since its liberalisation in 1992 with new airlines, innovative business models, additional routes, and an expansion in passenger numbers. This growth has brought increasing levels of travel disruption for passengers. In response, the EU introduced Regulation 261/2004 which confers on air passengers the right to assistance and compensation. It reflects the EU's commitment to a high standard of consumer protection.³ The Regulation has been plagued by non-compliance from the outset. From volcanic eruptions to snowstorms, from strikes to air traffic control shortages, passengers are frequently having flights disrupted across Europe. The consumer protection rights to which air passengers are entitled under EU law are not always respected by the airlines. Passengers seeking redress are often thwarted by uncooperative and litigious airlines, weak and under-resourced national enforcement bodies, and expensive and ill-informed courts. In some Member States, passengers are turning to claims aggregation agencies and street-level enforcement agents to obtain compensation to which they are rightfully entitled.

The European Commission (Commission) and Member States have made significant efforts to improve enforcement at national level to stimulate compliance by the airlines. The emergence of Alternative Dispute Resolution (ADR) to resolve disputes between passengers and airlines is proving to be a success. However, the most recent evaluation of air passenger rights undertaken by the European Court of Auditors (ECA) and published on 8 November 2018 concludes that the EU's system of passenger rights is 'well-developed', but warns of the considerable effort required by passengers to benefit from them.

In 2013, the Commission issued a proposal to re-cast Regulation 261/2004 in order to address its shortcomings and the main drivers of non-compliance, namely the lack of a uniform and effective enforcement regime and the regulatory burden on the airlines which was disincentivising compliance. The proposal stalled in the Council as a result of a dispute between the UK and Spain. The UK's withdrawal from the EU in 2019 may unlock the legislative process. This may prove timely as there are signs that the current legal framework is coming under strain once more. 2018 has seen a considerable increase in travel disruption due to strikes, bad weather and air traffic control shortages. Airlines still incur (uncapped) liability for care and assistance even if the disruptive event is not their fault. In July 2018, four of the EU's largest airlines⁴ took the unprecedented step of filing a joint complaint to the Commission over strikes by French air traffic control. Their principal legal argument is that the closure of French air space hinders their right of free movement. With the EU's aviation market forecast to grow by 5% each year until 2030,⁵ and concerns about a lack of capacity in the market

¹ There have been several evaluations of Regulation 261/2004. This case study draws primarily on the following: Evaluation of Regulation 261/2004 prepared for the European Commission by Steer Davies Gleave, February 2010; Commission Staff Working Document Impact Assessment accompanying the proposal for revision of Regulation 261/2004: 13.3.2013, SWD (2013) 62 final; Commission Staff Working Document: Complaint handling and enforcement by Member States of the Air Passenger Rights Regulations 7.5.2014, SWD (2014) 156 final; European Court of Auditors Special Report on EU passenger rights, 8.11.18.

² 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 delay of flights, and repealing Regulation (EEC) NO 295/91 (Text with EEA relevance): OJ L 46/1 17.2.2004.

³ Article 12 TFEU (formerly Article 153 (2) EC) is a horizontal provision which states that 'Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities; Article 38 of the EU Charter of Fundamental Rights states that 'Union policies shall ensure a high level of protection.'

⁴ IAG (owner of British Airways, Aer Lingus, Iberia and Vueling), and low cost carriers EasyJet, Ryanair and WizzAir.

⁵ https://ec.europa.eu/transport/modes/air_en

(currently the focus of broader initiatives by DG Mobility and Transport), the full enjoyment of air passenger rights seem increasingly under threat.

2. Implementation of Regulation 261/2004 in the Member States

Regulation 261/2004 introduces common rules on assistance and compensation for air passengers. It came into force in 2005. The regulatory framework for air passenger rights has evolved considerably over the past thirteen years. The Regulation should now be read in conjunction with the case law of the EU's Court of Justice (CJEU) which has provided authoritative definitions of key provisions; non-legislative action undertaken by the Commission to improve legal certainty, enforcement and compliance; and broader consumer protection enforcement mechanisms such as extra-judicial redress. This section sets out the **three** principal elements of the current regulatory framework: substantive rights and obligations; the general enforcement of Regulation 261/2004 at national level (monitoring, investigating and sanctioning); and individual enforcement through individual complaint-handling and individual redress.

2.1. Substantive rights and obligations

Where air travel is disrupted through denied boarding, involuntary up-grading or down-grading, delay or cancellation, air passengers may be entitled to a right to care and assistance, reimbursement or re-routing, or compensation up to €600 (Table 1). Airlines are also obliged to provide accurate information to passengers about their rights. The liability of the airlines may be limited in relation to the right to compensation by invoking the defence of 'extraordinary circumstances'.

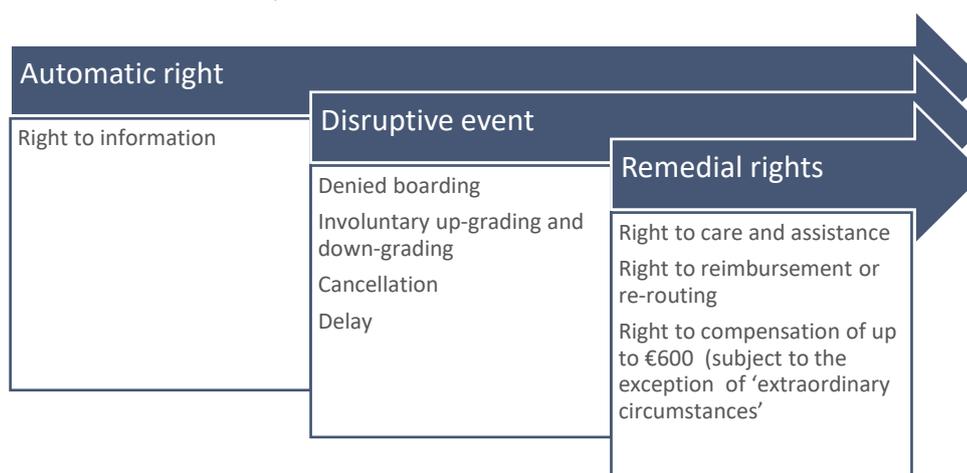


Table 1

There are **two judgments** of the CJEU which are of particular significance:

- *Sturgeon & Böck*⁶, where the Court (controversially) extended the right to compensation to passengers who are delayed for more than three hours; and
- *Wallentin-Hermann*⁷, in which the Court confirmed that a 'technical fault' does not fall within the definition of 'extraordinary circumstances' and therefore cannot exempt an airline from the right to compensation.

In 2016, the Commission published **Interpretative Guidelines** on Regulation 261/2004.⁸ This **non-binding** post-legislative guidance is seen as a short term measure to 'facilitate and improve the application of the Regulation and to promote best practices' reflecting its Better Regulation agenda. One of the key aims of the interpretative guidelines is to promote more effective and consistent enforcement of the current Regulation

⁶ Joined Cases C-402 *Sturgeon v. Condor Flugdienst* [2009] ECR I-10923 and C-432/07 *Böck and Lepuschitz v. Air France SA*

⁷ Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061.

⁸ https://ec.europa.eu/transport/sites/transport/files/themes/passengers/news/doc/2016-06-10-better-enforcement-pax-rights/c%282016%293502_en.pdf

by reducing legal uncertainty, particularly in light of the extensive body of law emanating from judgments of the CJEU. The guidelines replace any previous information such as Q&As published on the Commission's website, and are without prejudice to the interpretation of the Regulation by the CJEU.

2.2. The general enforcement of Regulation 261/2004 (monitoring, investigating, sanctioning)

The enforcement of Regulation 261/2004 has been decentralised to the Member States. The Regulation sets out general obligations on the Member States to implement an enforcement policy. Member States are required to designate a **National Enforcement Body (NEB)** responsible for general enforcement (monitoring, investigating and sanctioning) and to which passengers can make **individual complaints**. The NEBs appointed are mainly civil aviation authorities, but can also be consumer authorities, or government departments. The general enforcement and complaint handling tasks may not be undertaken by the same body. Member States must enact sanctions at national level which are **'effective, dissuasive and proportionate'**.

The Commission has no power to take action directly against the airlines, but it can instigate infringement proceedings against the Member States for breach of Regulation 261/2004. The Commission has taken on a pro-active role to improve and support enforcement by the NEBs. It has issued various non-binding guidance to promote legal certainty. It has also established an informal **NEB network** to promote cross-border co-ordination and best practice, particularly with regard to individual complaint-handling (NEB-NEB agreement, NEB-airlines agreement⁹). It is currently developing **wikis** to promote communication between itself and the NEBs, as well as between the NEBs. The Commission has conducted detailed studies to gather statistical data on complaint handling and enforcement by the NEBs¹⁰ (in the absence of reporting obligations) and to encourage the publication of sanctions imposed and/or airlines' performance in complying with Regulation 261/2004. In the 2013 proposal, the Commission seeks formal powers to issue legally binding measures, and for more reporting obligations.

The NEBs are assisted in their general enforcement role by EU consumer enforcement mechanisms such as **European Consumer Centre Network (ECC-Net)** and the **Consumer Protection Co-operation (CPC) network**.

2.3. Individual complaint handling and individual redress

A key requirement for the success of the EU's air passenger rights policy is for passengers to have an awareness and accurate knowledge of their rights. Regulation 261/2004 does require airlines to inform passengers of their rights. The Commission has taken a number of initiatives to promote passenger awareness including several information campaigns. Passengers can seek advice and assistance from **Europe Direct Contact Centre** and the **Your Europe** website which includes standard complaint forms and a **Passenger Rights App**.

Passengers who are denied their rights have several options when seeking redress. In its 2016 Interpretative Guidance, the Commission recommends that passengers first contact the airlines directly to make a complaint. If no response is received, or the response is not satisfactory, passengers have several further options. Passengers can make a complaint to the NEB (but not all can secure redress), commence a claim in the civil courts, contact an ADR entity to resolve the dispute (but not all can issue binding decisions), or engage a claims management agency to pursue the complaint on their behalf for a fee.

2.3.1. Individual complaints directly to airlines

There have been considerable improvements in complaint handling by airlines with contact details and complaints procedures available on websites. There are still concerns about timescales and the detail of information given to complainants. In its evaluation the ECA reports that there can be a lack of transparency

⁹ Understanding between NEB and airlines on procedures:

https://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/neb/neb_airlines_procedures.pdf

¹⁰ A 2011 report covers 2007-2009 (SEC (2011) 428 final) and a 2014 study covers 2010-2012. (SWD (2014) 156 final).

with regard to complaints made to airlines, where passengers on the same flight suffering from the same disruption may not receive the same redress.

2.3.2. Individual complaints to NEBs

Regulation 261/2004 explicitly states that individuals can make a complaint to the NEB. However, not all NEBs have the same functions. In the 2014 SWD, 9 NEBs are also ADR bodies.¹¹ If a complaint is upheld, not all NEBs have the power under national law to order the airlines pay compensation. It should be noted that the CJEU has confirmed that there is no obligation on NEBs under Regulation 261/2004 to provide individual redress. This is a matter for national law.¹² There has been significant effort on the part of the Commission to improve the individual complaint handling procedures of the NEBs through the publication of non-legally binding guidance.

2.3.3. Civil claims before the national courts

Weak public enforcement by the NEBs at national level has meant that some passengers have turned to the national courts to enforce their EU rights by bringing civil claims. Civil claims are regulated by national law subject to the EU principles of effectiveness and equivalence and the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights. It should be recalled that not all passengers are willing or able to pursue court proceedings. One deterring factor is that court proceedings can be slow and expensive. Passengers may be assisted by the **European Small Claims Procedure**. There are also new EU proposals for **consumer collective redress** which specifically refer to the possibility of bringing group actions for breach of Regulation 261/2004.¹³ This development is likely to be resisted by the airlines.

2.3.4. Extra-judicial redress

Alternative Dispute Resolution (ADR) offers a straightforward, quick and low cost way to resolve disputes between air carriers and passengers. It is fast becoming a significant alternative route by which passengers can secure individual redress across the EU.¹⁴ Since 2016, passengers have also been able to access the European Online Dispute Resolution (ODR) platform¹⁵ which acts as a single point of entry for consumers and traders who wish to resolve a dispute by engaging with an ADR entity.

In the UK, two aviation ADR entities have been appointed. The number of complaints in their annual reports show a similar pattern to the NEBs in the ECA 2018 report, with the majority of complaints relating to the right to compensation for cancellation, long delays and denied boarding (see Table 2). Both bodies report that in the vast majority of cases the airline complies with the outcome. The UK's NEB (Civil Aviation Authority) also reported that in 2016-2017, 75% of complaints were decided in the passengers' favour.¹⁶

	Consumer Dispute Resolution Ltd (Aviation ADR)		Centre for Effective Dispute Resolution (CEDR)	
	2016-2017	2017-2018	2016-2017	2017-2018
Cancellation – right to compensation	694	2952	738	2622

¹¹ Austria, Estonia, Finland, France, Latvia, Malta, Romania, Spain and Sweden.

¹² Joined Cases C-145/15 and C-146/15 *Ruijsseenaars and Jansen*: ECLI:EU:C:2016:187.

¹³ Representative actions (COM (2018) 184) subject to Art 18 (2) of the proposal.

¹⁴ Directive 2013/11/EU of the European Parliament and Council of 21 May 2012 on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22/EC: [2013] OJ L165/63.

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524>

¹⁶ <https://www.caa.co.uk/News/Thousands-more-airline-passengers-are-now-receiving-compensation-thanks-to-Alternative-Dispute-Resolution/>

	Consumer Dispute Resolution Ltd (Aviation ADR)		Centre for Effective Dispute Resolution (CEDR)	
Delay – right to compensation	2577	4689	4534	6015
Denied boarding – compensation	119	339	178	419
Other	351	1117	52	1771
Total	3741	9097	5502	10,827

Table 2: Source: Adapted from the annual reports of the ADR entities

In 2017, the Commission facilitated the establishment of a **pan-EU network of ADR** entities covering travel and public transport, called **TRAVEL_NET**, which will act as forum for exchanging views and sharing best practice.¹⁷ This network has the potential to facilitate the collation of statistical data on the enforcement of Regulation 261/2004.

2.3.5. Claims management agencies

In some Member States, the gaps in individual redress have been filled by (private sector) claims aggregation agencies that take action to secure compensation for a fee (often 50% of the compensation paid). There is evidence to suggest that this is a popular option with passengers despite the high levels of fee. In the ECA 2018 report, interviews with airlines suggested that as much as 50% of claims are made by claims management agencies.¹⁸ Following concerns about poor practice, in 2017, the Commission issued new information for travellers on the role of claim agencies.¹⁹

3. Shortcomings of Regulation 261/2004

This section sets out the shortcomings in the regulatory framework of Regulation 261/2004, which contribute to non-compliance and undermine its implementation and application. This analysis is drawn from the data available, particularly the 2010 Independent Report and the Commission's 2013 staff working document (SWD). It focuses on the two main drivers of non-compliance: the lack of a uniform and effective enforcement system in Europe, and the disincentivising regulatory burden on the airlines. In the absence of legislative reform, many of these shortcomings persist.

3.1. Lack of uniform and effective enforcement system across Europe

The lack of a uniform and effective enforcement system across the Member States has been attributed to **three** root causes:

- difficulty in interpreting the Regulation;
- ineffective national enforcement systems;
- complex individual complaint handling and inadequate individual redress.

¹⁷ https://ec.europa.eu/luxembourg/news/commission-facilitates-new-network-resolve-consumer-disputes-travel-sector_fr

¹⁸ ECA 2018, paragraph 60.

¹⁹ https://ec.europa.eu/transport/themes/passengers/news/2017-03-09-air-passenger-rights-commission-gives-guidance-consumers-role_en For detailed legal information, see https://ec.europa.eu/transport/sites/transport/files/2017-03-09-information-note-air-passenger-rights-on-claim-agencies_en.pdf

3.1.1. Difficulty in interpreting key aspects of the Regulation

The difficulty in interpreting key aspects of the Regulation stems from the existence of **'grey zones'**. These are legal provisions which are open to different interpretations by the airlines and passengers, giving rise to disputes. The Regulation has been heavily litigated in the national courts. The CJEU's rulings have not always resolved areas of legal uncertainty. It has been reported that NEBS and national judges can adopt different interpretations of the judgments. A notable example is the definition of the 'extraordinary circumstances' exception. This provision also appears to be the main reason for disputes between passengers and airlines. The application of the Regulation is also hindered by the complexity of the Regulation. Passengers find it difficult to accurately know what their rights are and how to enforce them.

3.1.2. Inconsistent and insufficiently effective sanctioning policies

A major weakness in the implementation and application of Regulation 261/2004 is the ineffectiveness of the national enforcement regimes. The Regulation confers significant discretion on the Member States to implement an enforcement regime and sanctioning policy. This has led to variations in enforcement across the Member States. In addition, in many of the Member States, the enforcement regime is too weak to deter non-compliance by the airlines. The vague nature of Article 16 means that it is difficult for the Commission to instigate infringement proceedings. In its 2014 SWD, the Commission reported that the NEBs were not routinely sanctioning non-compliance, and sanctions were only applied in 1%-2% of cases. Even if sanctions were imposed, the NEBs experienced difficulty in collecting them, in part due to administrative and/or legal procedures. It is suggested that this may be an area where the national parliaments could play a significant role in improving the national enforcement environment.

A wide range of shortcomings in national enforcement regimes have been identified:

- Inadequate resources.
- Lack of operational/technical expertise to assess the validity of the 'extraordinary circumstances' exception.
- Sanctions are too low to act as a deterrent.²⁰
- Sanctioning policy is not sufficiently pro-active. NEBs do not monitor the practices of the airlines but simply react to complaints. Despite high numbers, sanctions may not be imposed.
- Not all infringements of the Regulation are sanctioned. This may be a policy matter, or because the legal thresholds for imposing sanctions are too difficult to meet. For example, criminal procedures have higher thresholds than administrative procedures.
- Not all NEBs have the power under national law to order individual redress.
- Legal and/or practical difficulties in applying sanctions to carriers based in other Member States.
- Legal and/or practical difficulties in collecting sanctions, particularly if carriers are based in other Member States.
- Interpretation of the Regulation by the NEBs differ (not all investigate the 'extraordinary circumstances' exception to the same degree).

3.1.3. Complex complaint-handling processes and inadequate individual redress

With regard to passenger awareness, the ECA 2018 evaluation report concludes from their own surveys that passenger awareness is still low (around 39% of those surveyed claimed to be quite aware or entirely aware of their rights).²¹ The ECA also refers to an earlier 2014 Eurobarometer report which achieved a similar result.²² Interestingly, the ECA survey also revealed that passengers' knowledge of their rights is not always accurate. The ECA acknowledges that the Commission has undertaken a number of actions to promote awareness, but

²⁰ For example, the 2014 STD reported that the maximum sanction per incident is less than €1,000 in , Lithuania and Romania.

²¹ ECA 2018, paragraphs 28-32.

²² Special Eurobarometer 420, Passenger Rights, December 2014.

it notes that some of the on-line guidance does not explain clearly how passengers should act when faced with travel disruption.

The ECA 2018 report reveals a wide variation in timescales for handling complaints.²³ It also reports that the numbers of complaints handled by the NEBs are increasing in the majority of the 10 Member States included in their surveys. The NEBs had reported that most of the complaints relate to the right to compensation for delays and disputes over whether the ‘extraordinary circumstances’ exception applies (on average 45% of all claims) and similar disputes regarding cancellations (19%).²⁴ The report also draws attention to the fact that not all ADR opinions are legally binding, and passengers may still have to turn to the courts to obtain redress.

3.2. Regulatory burden discentivises the air carriers

From the outset, certain air carriers have been hostile to Regulation 261/2004 and the operational and financial burdens it imposes on them, particularly the low cost airlines.²⁵ The Commission has acknowledged **three** root causes which discentivise the airlines from complying with the Regulation:

- Airlines are unable to bear the costs/risks which emanate from their duty to provide assistance/care/compensation in certain situations.
- Some aspects of financial compensation (which are in addition to care and assistance) have a strong discentivising effect.
- Airlines are liable for care and compensation where disruptions are due to the actions of third parties.

3.2.1. Airlines being unable to bear the costs/risks which emanate from their duty to provide assistance/care/compensation in certain situations

Sometimes extraordinary events occur that are of long (possibly unlimited) duration and which are beyond the airlines’ control. For example, the duty of care and assistance and re-routing arising from the 2010 Icelandic volcano disruption posed practical as well as financial difficulties for airlines. For smaller, often regional air carriers operating short-distance flights with small aircraft, the costs of meeting the obligations (particularly accommodation) of the Regulation increase disproportionately to the price of the air fare.

3.2.2. Some aspects of financial compensation (which are in addition to care and assistance) have a strong discentivising effect

The Commission’s 2013 SWD reported that resistance from airlines has increased since the *Sturgeon* judgment, which extended the right to compensation to include **long delays over three** hours in line with cancellations, and the *Wallentin-Hermann* judgment, which excluded technical defaults from the ‘extraordinary circumstances’ exception. This observation seems to be borne out by the numbers of complaints by individuals made to NEBs and ADRs for disputes over the right to compensation for long delays (see Table 2).

3.2.3. Airlines are liable for care and compensation where disruptions are due to the actions of third parties

The 2013 SWD reports that airlines may not always be responsible for the travel disruption, but will bear the financial cost of meeting its obligations to passengers under the Regulation. It acknowledges that this cost may be subsumed into the ticket price, but it points to a lack of incentive on the part of third parties (e.g. airports, air navigation service providers (ANSPs) which includes air traffic control, ground handlers) to address the cause and severity of disruption. This has a discentivising effect on the airlines. The airlines may be able to recoup their costs from third parties (the Regulation does not preclude this) but it is difficult to do so in

²³ ECA 2018, paragraph 51.

²⁴ ECA 2018, paragraph 53.

²⁵ A legal challenge to the validity of the Regulation brought by IATA (International Air Transport Association) was unsuccessful: Case C-344/04 R (*International Air Transport Association and European Low Fares Airline Association*) v. *Department of Transport (ex parte IATA)* [2006] ECR I-403.

practice (legal obstacles in national law). For example, there has been a considerable increase in delays and cancellations in 2018 due to strikes by French air traffic control. Such disruption falls within the 'extraordinary circumstances' exception. This has prompted four major EU airlines to make a complaint to the Commission claiming that their right to free movement has been restricted.

4. Identifying examples of best practice and policy recommendations

This case study demonstrates that further improvements are needed to enable air passengers to enjoy their rights in the event of travel disruption, and obtain individual redress if these rights are not forthcoming. This section gives examples of best practice in **five** key areas on which national parliaments and EU institutions should focus their attention:

- Passenger awareness and knowledge
- Promotion of legal certainty
- Improving the deterrent effect of national enforcement regimes
- Straightforward, fast and low cost options for individual redress
- Reducing the regulatory burden on airlines (where appropriate)

4.1. Passenger awareness and knowledge

Passengers need to be sufficiently aware of their rights to request them and to self-assess relatively easily whether they are entitled to redress. The ECA report revealed that passengers' expectations can exceed their actual entitlements. This can lead to claims being rejected and resources being used unnecessarily.

Recommendation 1	
National parliaments	European institutions
<p>Ensure NEBs are pro-active in monitoring the right to information.</p> <p>Ensure NEBS are pro-active in promoting a high passenger awareness and accurate knowledge of EU rights working with other stakeholders to achieve this (e.g. airlines, travel operators, airports, media outlets, social media).</p>	<p>Continue with information monitoring of NEBs and compliance of the right to information.</p> <p>Continue the promotion of passenger awareness.</p> <p>Ensure that guidance includes guidance and steps passengers should take when their travel is disrupted (as recommended by the ECA, 2018).</p>

4.2. Promotion of legal certainty

In the absence of legislative reform to remedy 'grey zones' and regulatory complexity, and in view of the large number of CJEU rulings, there is considerable scope for legal uncertainty on the part of passengers, airlines, NEBs, and national courts. There is a role for the NEBs to be pro-active on informing passengers of their rights and options for redress in the event of travel disruption. For example, in July 2018, the UK Civil Aviation Authority issued press releases clarifying the rights of passengers under Regulation 261/2004 following disruption caused by Ryanair strikes.²⁶

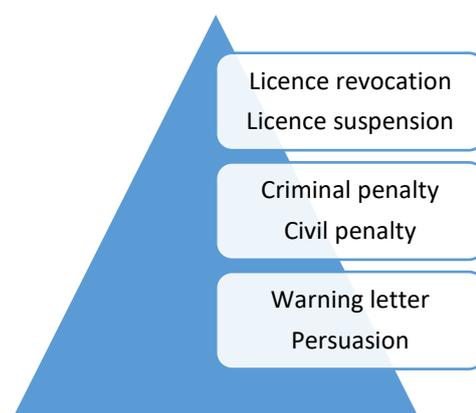
²⁶ <https://www.caa.co.uk/News/CAA-statement-on-passenger-compensation-during-the-current-Ryanair-strike/?catid=155>

Recommendation 2	
National parliaments	European institutions
<p>Ensure that NEBS are pro-active in clarifying the law for passengers where there is travel disruption and their rights, e.g. strikes, air traffic control delays/strikes, weather disruption.</p> <p>Promote training for those involved in enforcement at national level including NEBs, ADR entities and national judges.</p>	<p>The Commission should continue to issue non-binding guidance for key stakeholders, particularly on the definition of 'extraordinary circumstances'.</p> <p>Support the training at national level including NEBs, ADR entities and national judges.</p>

4.3. Improving the deterrent effect of national enforcement regimes

This objective should be a priority since it is fundamental to the success of the regulatory framework and the effective enforcement of passenger rights. Without strong public enforcement by the Member States, airlines are disincentivised from complying with the Regulation, with the onus shifting to passengers to enforce their rights.

A national enforcement policy must have a sufficient deterrent effect on the airlines to promote compliance. It should not be more cost-effective for airlines to infringe the Regulation - and deny passenger their rights - in the knowledge that not all passengers will complain and pursue redress, that the likelihood of a sanction being imposed is remote, and/or that a sanction is not punitive. One approach to enforcement in the regulation literature is that of 'responsive regulation'.²⁷ This is a staged approach to enforcement which is reflected in Ayres and Braithwaite's enforcement pyramid (see below). The NEB would start with moderate interventions designed to persuade compliance. The interventions would gradually increase in severity becoming more punitive in nature. In the context of aviation, one of the recommendations in the 2010 report was that the ultimate penalty would be to suspend followed by the revocation of a licence. The Dutch NEB's website refers to the use of an 'intervention ladder' which reflects the enforcement pyramid.²⁸



Source: Adapted from Ayres and Braithwaite's Enforcement Pyramid of 'Responsive Regulation' (OUP, 1992).

²⁷ See Ian Ayres and John Braithwaite, *Responsive Regulation* (OUP 1992).

²⁸ <https://english.ilent.nl/about-the-ilt/issue-of-permits-and-enforcement/intervention/intervention-ladder>

Recommendation 3	
National parliaments	European institutions
<p>Ensure that the national enforcement policies are robust and have a sufficient deterrent effect to deter non-compliance by airlines. This may require a change in national policy in line with the theory on responsive regulation.</p> <p>Ensure that NEBs have sufficient resources to deliver a robust enforcement policy and to engage effectively with the NEB network.</p> <p>Ensure that NEBs have sufficient access to technical and operation expertise, particularly to assess whether the exception of 'extraordinary circumstances' is valid.</p> <p>Ensure that NEBs are pro-active in terms of monitoring airlines.</p> <p>Amend national law to ensure that it meets the following criteria:</p> <ul style="list-style-type: none"> • Maximum penalty should be sufficient to promote compliance. • National law should have a threshold which is not too difficult to meet (the 2010 report showed that regimes based on administrative penalties were more effective than those based on criminal penalties). • NEBs should have the power to sanction airlines which fail to provide redress to passengers where an individual complaint is upheld by a NEB. The 2010 report concludes that it is only in cases where sanctions are imposed on an airline which fails to provide redress, that there is an incentive to comply. 	<p>Continue to collate data on individual complaint handling and sanctioning by the NEBs.</p> <p>Continue to develop the NEB network including the use of wikis.</p>

4.4. Individual enforcement and individual redress

There are a number of options available to passengers seeking redress, but this increase in choice in itself may cause confusion. There needs to be more guidance on the different choices, and promotion of ADR as the most effective option. There is some debate on whether payment of compensation should be made automatic. Ryanair stated in January 2018 that they were exploring the issue. This could reduce the considerable administrative burden on airlines and passengers. There have been calls from the ECA to introduce a legal obligation on airlines to automatically pay compensation where the duty arises. The UK consumer association, Which?, has recently launched a campaign to put this into practice.

Recommendation 4	
National parliaments	European institutions
<p>Ensure that passengers are clear about the distinction between general enforcement and individual enforcement.</p> <p>Continue to support ADR entities.</p> <p>Consider making ADR decisions binding on the airline.</p> <p>Support the development of consumer collective redress and its application to aviation disputes.</p>	<p>Continue to develop the ADR network.</p> <p>Collate data from ADR network members.</p> <p>Consider making the payment of the right to compensation automatic to those passengers who have provided their contact details to the airlines (as recommended by the ECA, 2018) and Which?, the UK consumer body.</p> <p>Support the development of consumer collective redress and its application to aviation disputes.</p>

4.5. Managing the regulatory burden of the airlines

It is clear from the data that airlines will resist complying with Regulation 261/2004 where the travel disruption is outside their control and falls within the definition of 'extraordinary circumstances', e.g. duty of care and assistance arising from delays/cancellations due to air traffic control strikes/shortages. In the absence of legislative change, national law should allow the airlines to recoup the costs from third parties.

Recommendation 5	
National parliaments	European institutions
<p>Ensure that air traffic control have sufficient capacity to cope with the growing aviation market.</p> <p>Ensure that national law enables airlines to recover their costs which arise under the Regulation from third parties which cause the travel disruption.</p>	<p>Take action to ensure that there is a reduction in delays due to the actions of third parties, particularly air traffic control.</p> <p>Co-operate with EU initiatives to increase capacity in the aviation market.</p>

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