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Citation for final published version:

Drake, Sara 2020. Delays, cancellations and compensation: Why are air passengers still finding it difficult to enforce their EU rights under Regulation 261/2004. *Maastricht Journal of European and Comparative Law* 27 (2) , pp. 230-249. 10.1177/1023263X20904235

Publishers page: <https://doi.org/10.1177/1023263X20904235>

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**Delays, cancellations and compensation: why are air passengers still finding it difficult to enforce their EU rights under Regulation 261/2004?**

**Sara Drake\***

**Abstract**

The aim of this article is to identify why air passengers travelling in the European Union (EU) conferred with the highest standard of consumer protection in the world under EU law are still being denied their rights and finding it difficult to seek effective legal redress. This article argues that the poor regulatory design of Regulation 261/2004 is the principal cause of non-compliance which has been compounded by inadequate application by the Member States and regulatory resistance by the airlines. It will then demonstrate how the European Commission (Commission) has responded through the adoption of both deterrence and compliance-based enforcement strategies, and maps out the mechanisms, tools and actors harnessed by the Commission to create a complex hybrid, multi-layered system of enforcement. The article reveals that despite this iterative, piecemeal approach, enforcement gaps persist, and it argues that the effectiveness of the regime is unlikely to improve without legislative reform.

**Keywords**

Consumer protection, air passenger rights, Regulation 261/2004, enforcement

**1. Introduction**

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Air passenger rights as set out in Regulation 261/2004 (also known as EC261)<sup>1</sup> are routinely portrayed as one of the EU's flagship policies for citizens, along with the Mobile Phone Roaming Regulation<sup>2</sup> and more recently the General Data Protection Regulation (GDPR).<sup>3</sup> Regulation 261/2004 is ambitious and confers an unprecedented standard of consumer protection on air passengers for those who have their travel disrupted in the EU.<sup>4</sup> It reflects the EU's commitment to a high standard of consumer protection<sup>5</sup> which cuts across all policy

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

<sup>2</sup> Regulation (EU) No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast) (Text with EEA relevance) [2012] OJ 172/10.

<sup>3</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/1. See for example, [the Foreword of President Juncker's Foreword](#) in the European Commission's 2017 Annual Report on the Monitoring the Application of Union Law, COM (2018) 540 final (12.7.2018) at p.2.

<sup>4</sup> It replaces 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 36, 8.2.1991. It increases the standard of protection for passengers denied boarding and extends protection to include cancellations without a prior warning, and (long) delays. The Regulation applies to all passengers (and not just EU citizens) departing from an airport located in the EU/EEA and to passengers departing from an airport in a third country to an airport in the EU/EEA where the operating air carrier is a EU/EEA carrier unless they receive benefits or compensation and were given assistance in that third country: Article 3 of [Regulation 261/2004](#).

<sup>5</sup> The EU's commitment to a high level of consumer protection was strengthened by the Treaty of Lisbon 2007 and is reflected in Article 12 TFEU (formerly Article 153 (2) EC) a cross-cutting provision which states that 'Consumer protection requirements shall be taken into account in defining and implementing other Union

sectors including transport.<sup>6</sup> This ambition is reflected in the regulatory design of the Regulation since it explicitly grants passengers a minimum range of consumer rights with corresponding legal obligations imposed on airlines *through automatically binding legislation*. In essence, where air travel is disrupted through denied boarding,<sup>7</sup> involuntary up-grading and down-grading,<sup>8</sup> delay,<sup>9</sup> or cancellation,<sup>10</sup> EU rights are triggered which are directly applicable and enforceable before a national court.<sup>11</sup> Air passengers may have a right to care and assistance such as meals, drinks, telephone calls and hotel accommodation,<sup>12</sup> a right to reimbursement or re-routing,<sup>13</sup> and a right to compensation of up to €600 per passenger,<sup>14</sup> ~~depending on the flight distance~~. The liability of the airlines to pay

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policies and activities' and can be found in Article 38 of the EU Charter of Fundamental Rights states that 'Union policies shall ensure a high level of protection'.

<sup>6</sup> The Regulation was adopted on the basis of Article 100 (2) TFEU (ex-Article 80 (2) EC) (transport) rather than Article 169 TFEU (ex -Article 153 EC) (consumer protection).

<sup>7</sup> Article 4 of Regulation 261/2004.

<sup>8</sup> Article 10 of Regulation 261/2004.

<sup>9</sup> Article 6 of Regulation 261/2004, but see also the CJEU's controversial 2009 judgment in Joined Cases C-402/07 and C-432/07 *Sturgeon* EU:C:2009:716 in which the right to compensation for cancellation under Articles 5 and 7 was extended to passengers who suffer a long delay of three hours or more. The *Sturgeon* judgment was confirmed in 2012 by the CJEU in *Nelson* (Joined Cases C-581/10 *Nelson and Others v. Deutsche Lufthansa AG* and C-629/10 *TUI Travel and Others v. Civil Aviation Authority*) EU:C:2012:657.

<sup>10</sup> Articles 5 and 7 of Regulation 261/2004.

<sup>11</sup> Confirmed by the CJEU in *McDongah v. Ryanair* (C-12/11) EU:C:2013:43.

<sup>12</sup> The right to care set out in Article 9 arises where passengers are disrupted by denied boarding (Article 4), cancellation (Article 5), and delay (Article 6) depending the distance to be travelled and the length of the delay.

<sup>13</sup> The right to reimbursement or re-routing set out in Article 8 is triggered by denied boarding (Article 4), cancellation (Article 5) and delay (Article 6).

<sup>14</sup> Article 7 sets out the right to compensation which may arise if there is denied boarding (Article 4), cancellation (Article 5), and a long delay following the *Sturgeon* judgment.

compensation may be limited if passengers are given sufficient notice in advance,<sup>15</sup> and if a cancellation (or long delay) is due to ‘extraordinary circumstances.’<sup>16</sup> Passengers also have a right to full and accurate information about their rights at the start of a journey, and when travel is disrupted.<sup>17</sup>

Despite what appears to be a robust legal regime for the conferral of EU rights, in practice, the experience of air passengers can be very different.<sup>18</sup> Air passengers experience flight disruption for reasons as varied as volcanic eruptions, snowstorms, strikes, air traffic control shortages, ~~and even~~ drones, and more recently climate change protesters.<sup>19</sup> Yet, there are repeated reports that the consumer protection rights to which air passengers are entitled under EU law in these circumstances are not always respected by the airlines.<sup>20</sup>

The purpose of this article is to identify why air passengers conferred by EU law with the highest standard of consumer protection in the world are still being denied their rights and

<sup>15</sup> In accordance with Article 5(1) (c), there is no right to compensation if passengers are informed of the cancellation at two weeks before the scheduled departure time; or if they are notified between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no later than two hours before the scheduled departure time and to reach their final destination less than four hours after the scheduled time of arrival; or passengers are informed less than seven days before their scheduled departure time and are offered re-routing allowing them to depart no more than one hour before the scheduled departure time and to reach their final destination less than two hours after the scheduled arrival time.

<sup>16</sup> Article 5 (3) of Regulation 261/2004.

<sup>17</sup> Article 14 of Regulation 261/2004.

<sup>18</sup> M. Bobek and J. Prassl (eds), *Air Passenger Rights Ten Years On* (Hart, 2016).

<sup>19</sup> Sky News, ‘Extinction Rebellion protester climbs on plane at London City Airport’ 22<sup>nd</sup> October 2019.

<sup>20</sup> See for example the mass cancellation of flights in the summer of 2018 by Ryanair: *Financial Times* ‘Ryanair pilots’ strike cancels 400 flights at height of holidays’, 10<sup>th</sup> August 10<sup>th</sup> 2018.

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finding it difficult to seek effective legal redress. The scale of non-compliance with these EU rights by the airlines raises important questions not just about the operation of Regulation 261/2004 but also about its regulatory design including its enforcement policy. This article makes an important contribution in three ways. First, it identifies the three inter-connected factors which drive non-compliance (~~poor regulatory design; inadequate implementation and application by the Member States and regulatory resistance by the airlines~~) and argues that extensive litigation concerning Regulation 261/2004 before national courts has arisen by default rather than by design and should not be taken to signify that rights are being effectively enforced (Section Two).—Second, it explores how the Commission has sought to counter non-compliance in the absence of legislative reform and in light of its limited *legal* competence where enforcement is decentralised to the Member States. The article identifies ~~the co-existence of three~~ strands to the Commission's enforcement strategies and maps out the mechanisms, tools and actors harnessed by the Commission to create a complex hybrid, multi-layered regime of enforcement (Section Three). ~~Third,~~ The article will argue that despite this iterative, piecemeal approach, several enforcement gaps persist, and that the effectiveness of the regime is unlikely to improve without legislative reform (Section Four).

## **2. A story of non-compliance**

Regulation 261/2004 has been beset by non-compliance since it came into force in 2005. Three drivers of non-compliance have been identified.<sup>21</sup> First, there are flaws in the

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<sup>21</sup> Several ex post evaluation studies of Regulation 261/2004 have been undertaken since it came into force in 2005 by a number of different actors: Commission Communication to the European Parliament and the Council pursuant to Article 17 of Regulation (EC) No 261/2004 on the operation and the results of this Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights: COM (2007) 168 final, 4.4.2007; Steer Davies Gleave Report prepared for the European Commission: Evaluation of Regulation 261/2004, February 2010; Communication from the

regulatory design of the original Regulation. These have been compounded initially by poor implementation by the Member States, and ~~latterly~~ by inadequate application by the national enforcement authorities. A further factor has been the hostility of some airlines to the operational and financial burden placed on them in a highly competitive market.

#### A. The existence of ‘grey zones’

The drafting of rights (and corresponding legal obligations) in broad terms which are open to different interpretations by the main stakeholders (so called ‘grey zones’) has led to high levels of litigation before the courts. The ‘extraordinary circumstances’ exception is a good example and is discussed below. While it may be assumed that a ruling by the CJEU would provide a final and definitive interpretation, controversial and broadly worded judgments have led to further preliminary reference requests from national courts judgments.<sup>22</sup>

#### B. Complexity of the legal provisions

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Commission to the European Parliament and the Council on the application of Regulation 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 SEC (2011) 428 final; Commission Staff Working Paper Accompanying document to the Communication from the Commission to the European Parliament and the Council on the operation and the results of Regulation (EC) 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 COM (2011) 174 final; Exploratory Study on the application and possible revision of Regulation 261/2004, Steer Davies Gleave, July 2012; 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 No. 30/2018 on EU passenger rights, 8.11.18.

<sup>22</sup> See, for example: C-549/07 *Wallentin-Hermann* EU:C:2008:771.

Another difficulty arises from the complexity of the Regulation itself and its provisions conferring rights on passengers. For example, ~~The~~ the right to compensations for cancellation and the amount to be paid ~~conferred on air passengers~~ differs according to the flight distance, and may not be payable at all depending on the reasons for the disruption, the length of the delay, and the flight distance and whether advance notice has been given to passengers by the airlines in line with three different possible time-frames.<sup>23</sup> —As a result, passengers find it difficult to accurately know and assess what their rights are and how to enforce them.

### C. A weak decentralised enforcement regime

It is argued that a major impediment to the effective enforcement of air passenger rights is the regulatory design of Article 16, the provision which sets out the legal framework for enforcement at national level. Article 16 requires each Member State to appoint a national enforcement body (NEB). However, it does not define the competences of these national bodies. Article 16 states rather vaguely that, ‘where appropriate, this body [NEB] shall take the measures necessary to ensure that rights of passengers are respected.’ Individual passengers can complain to this body, or any other competent body designated by the Member State, about an alleged infringement of the Regulation ‘at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.’ The NEBs clearly have a monitoring role, but the Regulation does not specify that passengers should be awarded redress by the NEB. Indeed, the CJEU has explicitly ruled that NEBs are *not* required by *EU law* (i.e. under the Regulation) to confer

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<sup>23</sup> [Article 5 \(1\) \(c\)](#).



individual redress; this is a matter for *national law*.<sup>24</sup> Neither does the Regulation require the NEB to force the airline to confer redress. This gives rise to an enforcement gap. In terms of sanctions, Article 16 (2) requires the Member States to adopt national penalties for infringements committed by airlines which are ‘effective, proportionate and dissuasive.’ Member States have considerable discretion in enacting penalties which has led to the implementation of legislation which is too weak to deter non-compliance by the airlines in practice. In Member States where a criminal procedure rather than an administrative procedure is applicable, the legal thresholds can be too high to lead to any sanctions being imposed. Moreover, in some Member States, the sanctions are too low to have any real deterrent effect. For example, in Lithuania and Romania, the maximum sanction per incident (not per passenger) is as low as €1,000.<sup>25</sup> Furthermore, legal barriers arise for NEBS when applying sanctions to airlines based in other Member States or collecting sanctions from non-domestic carriers. There can also be difficulties in the application of a national enforcement policy: NEBs can lack sufficient resources, a shortage of operational/technical expertise to assess the factual evidence or validity of the claims of airlines and tend to reactive rather than pro-active. Many NEBs fail to systematically monitor compliance by the airlines and simply react to complaints. There can be differences across the Member States in how the ‘grey zones’ are interpreted by the NEBs and the extent to which they investigate the defence of ‘extraordinary circumstances.’ Furthermore, not all infringements of the Regulation are penalised. In its 2014 report, the Commission found that the NEBs were not routinely punishing non-compliance, and sanctions were only applied in 1%-2% of cases, which is extraordinarily low.

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<sup>24</sup> Joined Cases C-145/15 and C-146/15 *K. Ruijsenaars and Others v. Staatssecretaris van Infrastructuur en Milieu* EU:C:2016:187.

<sup>25</sup> Commission Staff Working Document (2014), p. 33-34.

#### D. Hostility by airlines to the regulatory burden

Air carriers, particularly the low-cost airlines, fail to adhere in full to the legal obligations set in Regulation 261/2004 because of the operational and financial burdens it imposes on them. An early challenge to its validity brought by the International Air Transport Association (IATA) was unsuccessful.<sup>26</sup> The Commission has acknowledged that airlines have found it difficult to bear the costs and/or risks which emanate from their duty to provide assistance, care, and/or compensation in exceptional situations. The practical and financial repercussions arising from the 2010 Icelandic volcano which saw European air space closed is a good illustration. Although this natural event fell within the definition of ‘extraordinary circumstances’, the airlines were still liable under the Regulation to provide (unlimited) care and assistance. The Commission has estimated the combined costs of the airlines would have increased by approximately 1.5 times compared to a “regular” year if the Regulation had been fully complied with by the airlines, amounting to €960 million.<sup>27</sup> The Commission has also accepted that the regulatory burden may be disproportionately greater than the price of the airfare for smaller, often regional air carriers, operating short-distance flights with small aircraft. Most hostility from airlines arises from their obligation to pay financial compensation for cancellations, particularly since the Court’s *Sturgeon* judgment extended the right to compensation for long delays over three hours on the basis of the principle of equal treatment.<sup>28</sup> Further disapproval stems from the Court’s narrow interpretation of the ‘extraordinary circumstances’ exception in the *Wallentin-Hermann* judgment which excluded

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<sup>26</sup> C-344/04 R (*International Air Transport Association and European Low Fares Airline Association*) v.

*Department of Transport (ex parte IATA)* EU:C:2006:10.

<sup>27</sup> Commission Staff Working Document, Impact Assessment (2013) at p. 17.

<sup>28</sup> S. Garben, ‘Sky-High Controversy and High-Flying Claims? The *Sturgeon* case law in light of judicial activism, Euroscepticism and Eurolegalism’ 15 (2013) *Common Market Law Review* 15-46.

a large number of technical faults from the scope of the derogation.<sup>29</sup> It held that the application of the exception should be assessed on a case by case basis, and only applies where two cumulative conditions are satisfied: (i) the circumstances are not inherent in the normal exercise of the activity of the air carrier concerned; and (ii) are beyond the actual control of that carriers on account of its nature or origin.

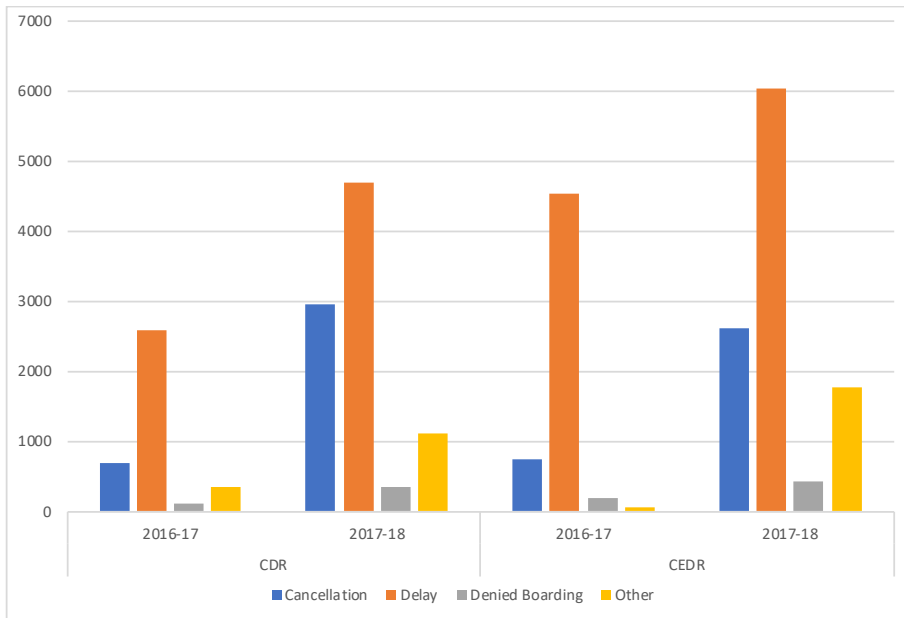
It is difficult to identify the true scale of non-compliance, but it is clear that the lack of voluntary compliance by airlines continues. In a recent survey of 10 Member States conducted by the European Court of Auditors (ECA 2018) reveals that the numbers of complaints handled by the NEBs are increasing. Most 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 cancellations (19%).<sup>30</sup> An analysis of the complaints made to the UK’s newly established Aviation ADR bodies since they came into operation in 2016 also show a rise in complaints with the majority of complaints made relating to the right to compensation for cancellation, long delays and denied boarding (see Table 1 below).<sup>31</sup>

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<sup>29</sup>C-549/07 *Wallentin-Hermann*.

<sup>30</sup> ECA 2018, p. 27, paragraph 53.

<sup>31</sup> Aviation ADR and the Centre for Effective Dispute Resolution were the two Aviation ADR bodies appointed by the UK’s NEB, the Civil Aviation Authority. The figures are taken from the first two annual reports (2016-2017 and 2017-2018).



**Table 1.** Source: Adapted from the annual reports of the UK aviation ADR entities.

More recently, considerable resistance from airlines in paying compensation is evident where cancellations and long delays have been caused by strikes. Recital 14 states that ‘strikes that affect the operation of an operating air carrier’ could be considered ‘extraordinary circumstances’ and exempt an airline from liability. This interpretation is arguably correct where the strike affects services run by a third party such as ground handlers or air traffic control. Where the strike action causing the disruption is taken by the airlines’ *own* staff, the CJEU has been less sympathetic. In *Krüsemann*,<sup>32</sup> the CJEU held that a ‘wildcat strike’ by TUIfly staff in response to surprise proposals to restructure the business could not be regarded as beyond the actual control of the air carrier concerned and therefore did not fall within the exception of ‘extraordinary circumstances’.<sup>33</sup> It held that restructuring is a normal

<sup>32</sup> Joined Cases C-195/17 et al *Krüsemann and Others v. TUIfly GmbH* EU:C:2018:258.

<sup>33</sup> *Ibid*, para 43.

management activity for airlines and that conflicts with staff may arise. Therefore, ‘the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity if the air carrier concerned.’<sup>34</sup> The Court drew attention to the fact that the ‘wildcat strike’ ceased once an agreement with the staff representatives had been concluded.<sup>35</sup> Despite this ruling, airlines are still refusing to pay compensation for strike action by their own staff. In December 2018, the UK’s NEB launched enforcement proceedings against Ryanair for refusing to pay compensation for cancelled flights in the summer of 2018 arising from strikes by their own pilots and cabin crew. Ryanair claimed that the ‘extraordinary circumstances’ exception applies.<sup>36</sup>

An increasing problem for airlines is the financial cost of providing care and assistance where the travel disruptions are due to the actions of third parties such as airports, or air navigation service providers (ANSPs) which includes air traffic control and ground handlers. The Commission acknowledges that the airlines may subsume these costs into ticket prices, but the current regime does not incentivize third parties to address the cause and severity of disruption. The airlines may seek to recoup their costs from third parties. Indeed, the Regulation does not preclude this, but it may be difficult to do so in practice since it has been

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<sup>34</sup> Ibid, para 42.

<sup>35</sup> Ibid, para 44. For criticism of the CJEU’s judgment, see M. Kucko, ‘The Decision in *TUIfly*: Are the Ryanair Strikes to be seen as Extraordinary Circumstances?’ 44 (3) *Air and Space Law* 3 (2019) 321-336.

<sup>36</sup> Claims made by passengers directly to the airline had been rejected. Passengers then decided to bring their complaint before AviationADR, one of the UK’s two ADR entities appointed by the CAA, and with which Ryanair had (voluntarily) entered into an agreement. However, Ryanair terminated their agreement with AviationADR: ‘UK Civil Aviation Authority begins enforcement action against Ryanair’, CAA News, 5<sup>th</sup> December 2018.

reported that national law may prevent this.<sup>37</sup> In 2018, the number of delays and cancellations increased considerably due to strikes by French air traffic control. Although such disruption falls within the scope of the ‘extraordinary circumstances’ exception, the airlines are still required to provide care and assistance. This prompted four major EU airlines to make a complaint to the Commission in June 2018 claiming that their right to free movement had been restricted. The airlines have based their complaint on the *Commission v. France (Spanish Strawberries)* judgment.<sup>38</sup> It remains to be seen whether the Commission will follow up this complaint by launching an infringement action against France. Should the Commission bring an action against France, a deciding factor will be whether it is proportionate for France to allow the exercise of the (fundamental) right to strike<sup>39</sup> by the air traffic control employees where it disrupts the right of free movement of the airlines and their passengers.<sup>40</sup>

#### E. Weaknesses inherent in civil litigation before national courts

Weak public enforcement by the NEBs at national level has meant that many passengers have turned to the national courts to enforce their EU rights by bringing civil claims. Interestingly, a close examination of the Recitals to the Regulation reveals limited reference to the role to be played by the national courts in enforcing EU rights. Recital 22 states that the role of the national enforcement bodies in ensuring compliance ‘*should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law.*’<sup>41</sup> There is no other reference to the role to be played by the national courts in the

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<sup>37</sup> 2013 Report, p. 20.

<sup>38</sup> C-265/95 *Commission v. France* EU:C:1997:595.

<sup>39</sup> The right to strike is set out in Article 28 of the EUCFR.

<sup>40</sup> C-112/00 *Schmidberger* EU:C:2003:333..

<sup>41</sup> The right to an effective remedy including access to a court is now enshrined in Article 47 of the EUCFR.

Regulation. High levels of litigation have arguably arisen by default rather than by design with public enforcement by the NEBs envisaged as the main avenue for remedying non-compliance. The lack of an explicit role for private enforcement may have emboldened some actors to try to close the door on this important path of redress for individuals to enforce their EU rights. In *McDonagh v. Ryanair*,<sup>42</sup> the Council of the EU intervened in the case and argued that the individual litigant did *not* have legal standing to bring a civil claim before the courts against Ryanair. This litigant sought damages for breach of her right to care after she had been left stranded in Portugal for several days, following the Icelandic volcanic eruption. The CJEU firmly rejected the Council's argument and confirmed that Article 16 could not be interpreted as allowing *only* the national enforcement bodies to sanction the failure of air carriers to comply with their obligations under the Regulation, and that air passengers can invoke the failure of an airline to comply with their obligations under the Regulation before a national court.<sup>43</sup>

The re-regulation of the internal market (here the aviation sector) which incurs the creation of individual rights enforceable through the courts combined with weak central enforcement by the European Commission and fragmented national enforcement has been termed 'Eurolegalism' by Keleman.<sup>44</sup> Garben argues that the Eurolegalism is the root cause of the high levels of litigation in relation to Regulation 261/2004 exacerbated by judicial activism on the part of the CJEU in *Sturgeon* stimulating further preliminary references from some Euro-sceptic national courts resistant to the perceived emergence of a US style

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<sup>42</sup>C-12/11 *McDonagh v. Ryanair* EU:C:2013:43.

<sup>43</sup> In this case, the CJEU is specifically referring to Articles 5 (1) (b) and 9 of the Regulation (paras. 18-25).

<sup>44</sup>See R.D. Keleman, *Eurolegalism. The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

“compensation culture”.<sup>45</sup> Other commentators have attributed the high levels of litigation to the contentious relationship between the Regulation and international law in the form of the Montreal Convention and the lack of acceptance of the CJEU’s position in its *JATA*,<sup>46</sup> judgment in the national courts.<sup>47</sup>

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Yet, while instigating legal proceedings to protect EU rights is constitutionally an important pillar of the EU’s traditional enforcement regime, it is no panacea for protecting consumer rights. First, it should be recalled that not all passengers are willing or can afford to pursue complex and often expensive court proceedings. Second, ~~legal scholars have identified~~ significant diversity in the application of the Regulation and its subsequent case law has been identified in the national courts of the different Member States so that a successful claim is by no means guaranteed.<sup>48</sup> Third, in some Member States such as the UK, passengers have been obliged to turn to debt recovery agents to enforce domestic court judgments which have awarded them compensation where the airlines still fail to pay.

### 3. The emergence of a multi-layered hybrid enforcement policy

Since 2007, and quite separate to the legal battles being played out before the courts between air passengers and airlines, the European Commission has taken multiple steps to address non-compliance with Regulation 261/2004. It is not just the airlines which can be

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<sup>45</sup> S. Garben, ‘Sky-High Controversy and High-Flying Claims? The Sturgeon case law in light of judicial activism, Euroscepticism and Eurolegalism’ (2013) *Common Market Law Review* 15-46; S. Garben, ‘The Turbulent Life of Regulation 261: Continuing Controversies Surrounding EU Air Passenger Rights’ in M. Bobek and J. Prassl, *Air Passenger Rights Ten Years On*, p. 259-294.

<sup>46</sup> C-344/04 R (*International Air Transport Association and European Low Fares Airline Association*) v. *Department of Transport (ex parte IATA)*.

<sup>47</sup> See further J. Prassl, ‘Tackling Diversity Through Uniformity? Revisiting the Reform of Regulation 261/2004’ in M. Bobek and J. Prassl, *ibid.*, pp. 325-342.

<sup>48</sup> See M. Bobek and J. Prassl, *ibid.*



non-compliant, but the Member States and the NEBs themselves. Moreover, the Commission has limited *legal* competence to address directly the failings of the airlines and the Member States. The Commission cannot directly sanction the airlines. It must direct its oversight towards the Member States and their designated NEBs. A number of infringement proceedings were initiated against several Member States soon after the Regulation had come into force for failing to designate a NEB, or enact national sanctions.<sup>49</sup> Nevertheless, the broad enforcement provisions in the Regulation arguably complicate the instigation of further infringement proceedings against countries where the national enforcement policy is weak.<sup>50</sup>

Without the stick of Article 258 TFEU action, and notwithstanding the Commission's rather belated strategic focus on the enforcement of EU under the Juncker Commission (2014-2019),<sup>51</sup> the Commission has adopted a range of non-legislative actions under its general administrative function set out in Article 17 TEU.<sup>52</sup> This type of 'enforcement' activity by the Commission is not always visible, and often overlooked or perhaps not given sufficient emphasis by legal scholars since it takes place away from the courts.<sup>53</sup> The Commission has

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<sup>49</sup> 'Commission Defends Passenger Rights' Press Release IP/05/858, 6 July 2005. Judicial proceedings were brought against Luxembourg, Sweden and Austria: C-264/06 *Commission v. Luxembourg* EU:C:2007:240; C-333/06 *Commission v. Sweden* EU:C:2007: 351; C-235/06 *Commission v. Austria* (removed from the register by Order) EU:C:2006:725.

<sup>50</sup> Commission Report 2013.

<sup>51</sup> Communication from the Commission, EU Law: Better results through better application (2017) C18/10.

<sup>52</sup> See E.Chiti, 'The Governance of Compliance' in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (OUP 2012), p. 30-56.

<sup>53</sup> Although see M. Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2009). In contrast, political scientists are more familiar with the activities of the Commission in its pursuit of compliance. For an overview of political science approaches to compliance, see L. Conant, 'Compliance and

sought to monitor more closely the actions or inaction of the Member States through a mix of enforcement (deterrence-based) strategies and management (compliance-based) strategies.<sup>54</sup> As argued by Tallberg, these strategies should be seen in the EU context as complementary and mutually reinforcing.<sup>55</sup> A third strand to the Commission's approach has been to draw non-governmental actors into the enforcement regime to bolster capacity and co-ordination. The Commission's approach reflects a wider, more contemporary trend in regulatory enforcement<sup>56</sup> as it follows 'tried and tested' mechanisms and tools adopted in other fields such as its 'trail blazing' EU environmental policy.<sup>57</sup> Indeed, although the regulation of airlines and their obligations to their passengers falls ostensibly within the remit of DG MOVE (Mobility and Transport), the Commission has turned to its general consumer protection enforcement framework which falls under DG JUST (Justice, Consumers and Gender Equality). By drawing these strands together, this article identifies an enforcement regime which is hybrid in nature and acts as a valuable case study into the EU's enforcement policy more broadly. Nevertheless, the fact remains that, as will be evidenced below, there are still a staggeringly large and growing number of complaints by individual passengers.

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What EU Member States Make of It' in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (OUP 2012), p. 1-30.

<sup>54</sup> See J. van der Heijden, 'The long, but promising, road from deterrence to networked enforcement' in S. Drake and M. Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar, 2016), p. 77-104; N. Gunningham, 'Enforcement and Compliance Strategies' in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, 2010), p. 120-145.

<sup>55</sup> J. Tallberg, Paths to Compliance: Enforcement, Management, and the European Union 56 (3) *International Organization* (2002), 609-643, at 610.

<sup>56</sup> See van der Heijden in S. Drake and M. Smith (eds.), *New Directions in the Effective Enforcement of EU Law and Policy*, p. 84.

<sup>57</sup> A. Čavoški, An assessment of compliance strategies in the environmental policy area, 41 (2) *European Law Review* (2016) 252-274.

This indicates that enforcement gaps and non-compliance persist undermining regulatory standards and the overall regulatory goal of the EU.

#### A. Strengthening the original deterrence-based approach

The legal framework originally set out in Regulation 261/2004 reflects the deterrence-based *decentralised* enforcement strategy commonly adopted by the EU institutions when regulating the EU's internal market.<sup>58</sup> The strategy aims to root out non-compliance with EU law through monitoring the behaviour of regulatees, investigating potential breaches, and the imposing sanctions as punishment. This approach works on the basis of two assumptions. First, that regulatees are rational actors who weigh up the costs and benefits of compliance, and are capable of responding to incentives, and second, if non-compliance is detected and punished with adequate frequency and severity, the regulatees and others will be deterred from breaching the rules in the future.<sup>59</sup> The Commission has taken multiple steps to strengthen the three prongs to the enforcement regime: (i) the monitoring, investigating and sanctioning functions of the NEBs; (ii) private enforcement before the courts; (iii) alternative and more cost effective paths of legal redress.

##### *1. Public enforcement by the NEBs*

The cross-border nature of air travel renders the monitoring, investigating and sanctioning of infringements outside the jurisdiction of a NEB difficult, if not impossible. To counter-act this enforcement gap, the Commission has harnessed the support of the European Consumer

<sup>58</sup> T. Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Wiley, 1995).

Although in some sectors, there is a trend for centralisation of enforcement to EU agencies: M. Scholten, 'Mind the Trend! Enforcement of EU Law has been moving to "Brussels"' 24:9 (2017) *Journal of European Public Policy* 1348-1366.

<sup>59</sup> N. Gunningham, in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation*, p. 121.

Centres (ECC-Net).<sup>60</sup> The role of ECC-Net is to act as a central point for the collation of complaints, and for assisting the NEBs by offering an independent complaint-handling service, forwarding unresolved complaints to them, as well as assisting with the collation of data for follow-up and monitoring purposes.<sup>61</sup> The Commission has also brought the Consumer Protection Cooperation (CPC) Network<sup>62</sup> into its institutional framework. This network specifically links national authorities responsible for the enforcement of consumer law to jointly address breaches of Union laws thus protecting consumers' interests in cases where the trader and the consumer are based in different countries.

## *2. Private enforcement through the national courts*

As a legislator, the EU has limited competence in the field of civil justice, but it has adopted a number of measures which have direct relevance for claims based on Regulation 261/2004. Passengers may pursue a claim following the European Small Claims Procedure (ESCP).<sup>63</sup> It offers a less formal and expedited judicial procedure for a cross-border claims below €2000 through the use of a standard form and removing lawyers from the preliminary steps. This

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<sup>60</sup> Established in 2005 and covering the 28 Member States as well as Iceland Norway, ECC-Net is responsible for informing consumers about their rights, and for providing assistance in resolving cross-border disputes.

<sup>61</sup> ECC-Net Air Passenger Rights Report 2015: Do consumers get the compensation they are entitled to and at what cost?

<sup>62</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation). It should be noted that this Regulation will be repealed by a new CPC Regulation (Regulation 2017/2394) which comes into force on 17 January 2020.

<sup>63</sup> Regulation 861/2007 establishing a European Small Claims Procedure (ESCP) [2007] OJ L199/1. Denmark has opted out of judicial cooperation so the ESCP cannot be used in Danish courts, but Danish citizens can use it in courts of other Member States. However, a parallel, national version exists in Denmark.

reduces time and costs and increases access to justice.<sup>64</sup> The availability of collective redress as another mechanism for collating multiple low value claims into a single legal action at national level is mixed, and there has been significant resistance to the introduction of an EU instrument to facilitate such claims. This may change with the introduction of new EU-wide legislative measures. In its New Deal for Consumers 2018,<sup>65</sup> the Commission seeks to introduce representative actions for mass harm to consumers including air passengers. Despite its promotion by the Commission as a mechanism for addressing instances of mass-harm to consumers similar to the ‘Dieselgate’ scandal,<sup>66</sup> the original draft proposal contained a rather ambiguous re-evaluation clause which stated that one year after the directive has come into force, its application to air (and rail) passenger rights will be evaluated and may be withdrawn.<sup>67</sup> Consumer groups welcomed the basic proposal but called for the re-evaluation clause to be removed.<sup>68</sup> Unsurprisingly, the reaction of the airline industry to an EU-wide measure which could expose them to further financial claims, is hostile. It is highly unlikely that the clause will survive the legislative process. In its first reading, the European Parliament removed the clause and inserted a new provision which stated that three years

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<sup>64</sup> P. Cortés, ‘Enforcing EU consumer policy more effectively: a three-pronged approach’ in S. Drake and M. Smith (eds.), p. 202-230 at. p.211.

<sup>65</sup> Commission Communication to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers COM (2018) 183 final.

<sup>66</sup> European Commission’s 2017 Annual Report on the Monitoring the Application of Union Law, COM (2018) 540 final (12.7.2018) at p.26.

<sup>67</sup> Article 18 (2) of Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (Text with EEA relevance) COM (2018) 184 final.

<sup>68</sup> BEUC position paper on the Proposal for a Directive on Representative Actions, October 2018.

after the Directive come into force the Commission should explore the option of establishing a *European Ombudsman for collective redress* for cross-border mass claims.<sup>69</sup>

The introduction of new EU rights to individuals which confer a monetary benefit has attracted other actors into the enforcement framework in some Member States, that of *claim management agencies*. These private actors offer to claim compensation on behalf of passengers who have had their travel plans disrupted. In this sense, the EU has created a new market for the enforcement of EU rights which is transnational in nature. It is a development that is not welcome in all Member States. Indeed, some Member States are hostile to the emergence of such outfits and in some, they are prohibited. The Commission's position appears to be more ambivalent. However, having been made aware by the NEBs of incorrect practices and misbehaviour by some claims agencies, it issued new guidance in 2017 to draw passengers' attention to the legal obligations with which the claims agencies (including solicitors and lawyers acting as claim agencies) must comply in relation to consumer protection,<sup>70</sup> marketing and data protection.<sup>71</sup> It also reiterated its preferred route to redress by which passengers should contact the relevant airline in the first instance before

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<sup>69</sup> Resolution of 26<sup>th</sup> March 2019: PA\_TA-PROV (2019) 0222.

<sup>70</sup> Directive 2005/29/EC on unfair business-to-business commercial practices; Directive 2011/83/EU on consumer rights; Directive 2006/114/EC on misleading and comparative advertising; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; Directive 2002/58/EC on the processing of personal data and the protection of privacy in electronic communications; Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

<sup>71</sup> The Commission referred to rules stating that the claims agencies must clearly state their prices in advance including all applicable fees, that they must produce clear power of attorney, that are not permitted to engage in unsolicited telemarketing, and that no third party to the contract, e.g. travel agent, should transmit passenger data to a claim agency unless permitted to do so by law, or where the passenger has given consent.

considering any other means of redress, and drew attention to the role of national enforcement bodies ‘for enforcing overall compliance’ with the Regulation, and the possibility of ADR as an alternative means of resolving disputes.

It could be argued that the emergence of claims agencies is a by-product of the EU’s Passenger Rights regime and its focus on ‘rights’, but it also reflects the levels of compensation which make this business model viable.<sup>72</sup> Their existence has also been encouraged by the failure of the decentralised public enforcement model as the primary means of enforcement of these new ‘rights’. Some academics have argued that the claims agencies have played an important role in raising passenger awareness and filling the enforcement gap left by inadequate public enforcement and expensive court systems.<sup>73</sup> There is evidence to suggest that this is a popular option with passengers despite the high levels of fees. In the ECA 2018 report, interviews with airlines suggested that as much as 50% of claims are made by claims management agencies.<sup>74</sup> In 2017, the Association of Passenger Rights Advocates (APRA), a non-profit making body was established to promote air passenger rights and to represent the interests of their members in the policy and law-making process. It also sees its role as defending the business model of claims management agencies and countering criticism by, for example, making membership conditional on accepting and adhering to a code of ethics.

### 3. *Extra-judicial redress*

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<sup>72</sup> H. Gnutzmann and P. Śpiewanowski, ‘Consumer Rights Improve Service Quality: Evidence from EU Air Passenger Rights’, *College of Europe Policy Brief* #13.18, October 2018.

<sup>73</sup> *Ibid.*

<sup>74</sup> ECA 2018, paragraph 60.

The Commission's general enforcement strategy in consumer policy has focused in recent years on the promotion of alternative dispute resolution (ADR) and on-line dispute resolution (ODR). The ADR Consumer Directive<sup>75</sup> came into force in 2015 to develop ADR across the EU in a more consistent manner. ADR is regarded as a simple, speedy and low-cost method of resolving disputes between traders and consumers (including passengers and airlines) as opposed to more expensive and complex court actions. The promotion of consumer ADR means that new aviation-specific ADR bodies have emerged as important actors in the enforcement framework for air passenger rights, and there have even been calls to involve these bodies into the informal NEB network and the meetings between the Commission and the NEBs. Importantly, since 2016, the Commission has expressly called for passengers to first complain to the airline, and if they fail to receive an adequate response, to contact the designated ADR.<sup>76</sup> The main weakness of ADR is that it ~~may is~~ not ~~be~~ compulsory for airlines to engage with the ADR entities. In Member States where ADR is compulsory for the aviation sector such as Germany, it is seen as playing an important role in enhancing the protection of air passenger rights.<sup>77</sup>; Furthermore, ~~and~~ not all ADR opinions are legally binding. The ~~eseis~~ enforcement gaps means that passengers may still have to turn to the courts to obtain redress at a later point.<sup>78</sup>

#### B. Compliance-based (or management) strategies

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<sup>75</sup> 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.

<sup>76</sup> 2016 Interpretative Guidance.

<sup>77</sup>C. Hipp, 'Conciliation Bodies as an Effective Tool for the Enforcement of Air Passenger Rights; Examination of an Exemplary Model in Germany' (2017) 11 (2) International Journal of Business, Human and Social Sciences 509-513.

<sup>78</sup> ECA Report 2018.



The second strand of the Commission's approach has been the adoption of a range of management strategies to improve the enforcement of Regulation 261/2004, the main aim being to close knowledge gaps among stakeholders through the promotion of greater awareness, legal certainty, and gathering of data, to build capacity by bringing new actors into the regulatory framework, and to promote greater co-ordination between the different actors through networks.

#### *1. Raising passenger awareness*

A fundamental requirement for the success of the EU's air passenger rights policy is for passengers to have *accurate* knowledge of their rights in the event of travel disruption. Article 14 requires airlines to inform passengers of their rights. While there is advice and assistance available at national level from a range of outlets, the Commission has taken its own steps to promote passenger awareness including several information campaigns. Passengers can seek advice and assistance from the Europe Direct Contact Centre and the Your Europe website which includes standard complaint forms and a useful app. Despite these initiatives, the ECA Report criticised the Commission for failing to provide *adequate* information for passengers on what to do *when* their travel has been disrupted, and who to turn to for redress. The ECA made several recommendations in its report which have been welcomed by consumer bodies.

#### *2. Promoting legal certainty for stakeholders through post-legislative non-binding guidance*

One of the key strategies of the Commission to promote legal certainty and to improve compliance is to issue non-binding post-legislative guidance. This practice is used extensively in other field such as EU competition law where private actors are the main regulatees. In 2016, the Commission issued its Interpretative Guidelines an interim and

short-term measure following the stagnation of plans for legislative reform. The Commission Notice explains more clearly the interpretation of the provisions of the Regulation in light of the case law of the CJEU and replaces any earlier interpretative guidance. Where there is currently no case law, it sets out its interpretation of certain provisions of the Regulation that can give rise to uncertainty. The Notice also suggests ways to facilitate better enforcement and includes guidance for passengers on how to complain and how the NEBs and air carriers should respond. As a result, 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 and accuracy of information given to complainants.<sup>79</sup>

### *3. Data gathering*

It would be unfair to suggest that there is no compliance with passenger rights and that the EU policy is an abject failure. This is far from the truth. Airlines do comply with many of their obligations, particularly the right to care and assistance. Progress has been made, but it is still difficult to quantify the full extent of non-compliance. One key constraint has been the lack of data available to assess the effectiveness of the operation of Regulation 261/2004.<sup>80</sup> Airlines do not make the data on the reasons for delays publicly available viewing this data as confidential business information.<sup>81</sup> More recently, airlines have published data on how much they pay out,<sup>82</sup> but do not give detailed information on the financial burden of complying with the Regulation. The Commission has taken a number of steps to collate the relevant data. In 2014, it conducted its own detailed studies to gather statistical data on

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<sup>79</sup> ECA Report 2018.

<sup>80</sup> Commission Communication 2007.

<sup>81</sup> Ibid.

<sup>82</sup> *BBC News*, 'British Airways owner IAG says strikes cost £121m', 26<sup>th</sup> September 2019.

complaint handling and enforcement by the NEBs (in the absence of reporting obligations) and to encourage the publication of sanctions imposed and/or airlines' performance in complying with Regulation 261/2004. The Commission has also made funding available to third parties to collate data. For example, Lennoc is a private database that gathers and analyses publicly available flight information worldwide including information on cancellations and delays and makes this available on a commercial basis (i.e. for a fee) to NEBs, claims management companies, law firms, travel agents and insurers. However, it does not analyse how many passengers may be having their travel disrupted and whether they were offered redress.

#### 4. Networks

The establishment of transnational horizontal networks between bodies responsible for the implementation and application of EU law and policy at national level is a key management strategy for the Commission.<sup>83</sup> Originating in the field of environmental policy, this technique has proliferated over recent years.<sup>84</sup> Since 2007, the Commission has committed to working more pro-actively with the NEBs in order facilitate compliance.<sup>85</sup> An informal horizontal network between the NEBs working in conjunction with the Commission has been established to identify common issues and to promote co-operation cross-border. This is essential given the transnational nature of the regime, and the fact that an individual may make a complaint against an airline which is registered and licensed in another Member

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<sup>83</sup> J. Polak and E. Versluis, 'The virtues of interdependence and informality: an analysis of the role of transnational networks in the implementation of EU directives' in Drake and Smith, p. 105-129.

<sup>84</sup> E. Mastenbroeck and D. Sindbjerg Martinsen, 'Filling the gap in the European administrative space: the role of administrative networks in EU implementation and enforcement' 25 (3) *European Public Policy* (2018) 422-435.

<sup>85</sup> Commission Communication 2007.

State. Key areas that have been addressed are the distinction between monitoring and applying sanctions as opposed to dealing with individual complaints, the timescale for dealing with individual complaints, the conditions under which complaints can be referred by to NEBs in other Member States; the languages acceptable for referred complaints; and the improvement in the quality of statistics. In 2018, the Commission introduced the APR NEB Wiki platform which allows the NEBs to obtain and exchange information more effectively. However, the informal nature and persuasive underpinnings of the NEB-NEB network has limitations. While the Commission can promote coordination, it has no legal power to force the NEBs to adopt legally binding decisions at meetings of the NEBs.<sup>86</sup> Interestingly, the Commission has also encouraged the formation of networks outside its institutional framework. In 2017, the DG JUST 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.<sup>87</sup>

#### **4. Remedying the enforcement gaps: the need for legislative reform**

The EU aviation market is an important sector accounting for 2.1% of EU GDP and has seen unprecedented growth in recent years with a record 11 million flights in 2018. Notwithstanding a growing concern about the impact of aviation on the environment and measures being adopted to encourage passengers to use other forms of transport<sup>88</sup> or choosing not fly at all, the sector is expected to grow.<sup>89</sup> However, this growth has been accompanied by an increase in the number of cancellations and delays. In 2018, flight delays more than

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<sup>86</sup> Commission Report 2013 at 4.2.1.2.

<sup>87</sup> This network was initiated by the German ADR body, SöP.

<sup>88</sup> *BBC News*, 'France plans 'eco-tax' for air fares', 9 July 2019.

<sup>89</sup> The Commission has predicted growth of 5% per year until 2030: [https://ec.europa.eu/transport/modes/air\\_en](https://ec.europa.eu/transport/modes/air_en)

doubled from the previous year.<sup>90</sup> It has been reported that across Europe, 60% of delays are due to air traffic control shortages, 25% are attributed to bad weather, and 14% are the result of strikes.<sup>91</sup> Plans for the establishment of a Single European Sky (SES) which would reduce the current fragmentation of air traffic control management and create a more streamlined airspace structure have yet to come to fruition. Consequently, the full enjoyment of air passenger rights is increasingly under threat and complaints are soaring as airlines fail to comply with their EU obligations.

Despite the multiple strategies, tools and mechanisms adopted by the Commission to counter-non-compliance mapped out above, it is argued that the key drivers of non-compliance can only be properly addressed through legislative reform. In March 2013, the Commission issued a proposal for reform<sup>92</sup> which has stalled in the legislative process due to a dispute between the UK and Spain over whether the Regulation should apply to Gibraltar.<sup>93</sup>

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<sup>90</sup> Delays doubled in 2018 from the previous year increasing to a total of 19.1 minutes.

<sup>91</sup> *Financial Times*, 'Flight delays in Europe more than double', 9 January 2019.

<sup>92</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 (Text with EEA relevance) COM (2013) 130 final.

<sup>93</sup> The European Parliament welcomed the reforms but made significant changes in its first reading in February 2014: European Parliament legislative resolution of 5 February 2014 on the 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 P7\_TA-PROV (2014) 0092. A more in-depth discussion of the changes is outside the scope of this paper.

There are three key features of the proposal which increase the prospects of compliance by both the airlines and the Member States and their NEBs. First, the proposal seeks to address the flaws in the regulatory design. To address the ‘grey zones’, complexity, and lack of clarity caused by both the Regulation and the subsequent interpretive CJEU judgments, the proposal seeks to codify the interpretation of the ‘extraordinary circumstances’ exception in line with the *Wallentin-Herman* judgment. It introduces a non-exhaustive list of circumstances which can be regarded as extraordinary as well as a list of those that are to be regarded as *not* extraordinary. Second, the proposal takes significant steps to strengthen its decentralised enforcement regime. It places far more specific legal obligations on the NEBs. It clarifies their role by making a clear distinction between the task of general enforcement (monitoring, investigating and applying sanctions), and that of handling individual complaints. It confirms that these tasks can be undertaken by separate bodies provided reporting mechanisms are established to exchange information. The proposal also requires the NEBs to adopt a more proactive approach to the monitoring of compliance with Regulation 261/2004. To assist it in this role, airlines and airports are required (although rather vaguely) to provide the ‘relevant documents’ requested by the NEBs for this purpose. The NEB can also act on information received by the body responsible for passenger complaints including initiating enforcement actions. The NEB is required to publish annual statistics on their activities, including sanctions applied. These more detailed reporting obligations make it easier for the Commission to commence infringement proceedings against a Member State for failing to comply with these obligations.

To ensure the effective handling of individual complaints, the proposals insert a new provision (Article 16a) which details how individual complaints should be handled by the airlines and by the NEBs. The proposal also imposes new obligations directly on the airlines

to (i) inform passengers about their claim and complaint handling procedures *at the time of reservation*, (ii) provide electronic means to submit complaints, and (iii) give information about complaint-handling bodies. Passengers are required to make a complaint to the air carrier within three months, and airlines must provide a full answer to the complaint within two months. The Member States are required to designate a body or bodies responsible for out-of-court resolution of disputes between air carriers and passengers such as an ADR body. This entity would deal with an alleged infringement that took place at an airport within Member State territory or where a flight from a third country arrived in the territory of the Member State. Complaints should be submitted at the earliest two months after a complaint has been submitted to the air carrier unless the carrier has already replied in full to the complaint. The body receiving the complaint shall confirm receipt and send a copy to the NEB within seven days. A final reply should be given to the passenger within three months and a copy of the final reply sent to the NEB.

Significantly, the proposal seeks to put on a legislative footing the non-legislative actions taken by the Commission to improve enforcement, and includes granting new implementing powers to the Commission under Article 291 TFEU.<sup>94</sup> The proposal also includes a new Article 16b which regulates co-operation between the Member States and the Commission.

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<sup>94</sup> These implementing powers would be exercised in accordance with the post-Lisbon comitology regime set out in Regulation 182/2011. The proposal recommends the use of the advisory procedure for adopting implementing decisions in response to the activity reports sent to the Commission by the Member States. This means that the Commission would submit a draft of the implementing act to the Passenger Rights Committee, chaired by the Commission. The Committee would give its opinion (if necessary by simple majority) on the implementing act within a time-frame set by the Commission. The Commission would make the final decision 'taking the utmost account of the conclusion' from the Committee deliberations. The Commission could revise the measure in light of the deliberations at any time before a final opinion is delivered.

The aim of this co-operation is to promote dialogue both vertically (between NEBs and the Commission) and horizontally (between NEBs) on the interpretation and application of the Regulation at national level via a Passenger Rights Committee (see new Article 16c). This Committee would comprise of two representatives of each Member State of which at least one would represent a NEB. Under Article 16b, Member States would be required to provide an annual report on their activities to the Commission. On the basis of these reports, the Commission may decide to adopt implementing acts. The Member States would also be required to send information on the interpretation and application of Regulation 261/2004 at national level to the Commission. The latter would make this information available to all Member States in electronic form. Furthermore, at the request of a Member State, or on its own initiative, the Commission would be able to examine instances where a difference in application and enforcement had arisen, particularly in relation to the interpretation of the 'extraordinary circumstances' exception. The role of the Commission here would be to clarify the provision to promote a common approach. It may be necessary to adopt a recommendation following consultation with the Passenger Rights Committee. This would be non-binding, with the CJEU having the final say. The Commission may also instruct the NEBs to investigate a specific suspected malpractice by one or several air carriers and report their findings to the Commission within four months.

Third, the proposal seeks to maintain its commitment to a high standard of consumer protection while at the same time reducing the financial burden on the airlines. It attempts this precarious balancing act by codifying the right to compensation for long delay set out in the controversial *Sturgeon* judgment, but extending the trigger for payment of compensation for long delay to five hours from three hours for flights within the EU. It simplifies the right to care and assistance which is to be triggered by a two-hour delay *for all flights*, but it caps the liability of the airlines if the delay or cancellation is due to extraordinary circumstances. It



also removes the duty to provide accommodation if travelling on a smaller aircraft over a short distance (except on a connecting flight). The proposal also requires airports, air carriers and other actors in the air transport chain to set up contingency plans to optimise the care and assistance to stranded passengers, and importantly prohibits national law from restricting the right to air carriers to seek compensation from third parties responsible for delays or cancellations.

It is unclear whether the legislative process will be unlocked by the UK's expected departure from the EU. In any event, it may well be that the time has passed for these proposals to be adopted. There is a strong possibility that any future reform will reflect a shift on the part of policy makers to multi-modal transport (covering air, rail, waterborne and bus), as well as advances in technology including automatic compensation. The ECA Report 2018 recommends that airlines should be obliged to pay compensation without passengers making a specific request.<sup>95</sup> While the technology may be available, legislation is likely to be needed for airlines to adopt this (more effective and efficient) compensation policy.

#### **4. Concluding remarks**

This article explores why air passengers whose travel is disrupted are unable to fully enjoy their EU rights and are still finding it difficult to seek redress. To find the answer to this [question puzzle](#), it has been necessary to explore beyond the original legal framework set out in Regulation 261/2004 and the jurisprudence of the CJEU. It is important to recognise that poor regulatory design is a key driver of non-compliance together with ineffective and inconsistent national implementation and application at national level, and resistance by the airlines to the financial and operational burden imposed on them by the Regulation. The

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<sup>95</sup> ECA Report, Recommendation 4 (d).

high levels of court litigation (and the increasing number of disputes brought before ADR entities and NEBs) signal a failure in policy rather than a healthy attitude to the exercising of new rights. The article charts the different strategies, tools and actors employed by the Commission to improve the effectiveness of the enforcement regime *without* legislative amendment of the Regulation itself.

The article explains that both deterrence and compliance-based strategies have been used by the Commission to reshape the enforcement regime in order to make it more effective. The Commission has been proactive in taking steps to reinforce the traditional deterrence-based regime. It has clarified the monitoring and punitive role of the NEBs, provided new tools to streamline court action and encouraged the use of extra-judicial redress such as ADR. Compliance-based tools have been introduced to include information campaigns, post-legislative interpretative guidance, data collation, and networks to assist in improving enforcement of the law. Across the regulatory framework, new actors have been drawn in by design including consumer associations (ECC-Net, CPC Network) and ADR bodies. Others have entered into the regulatory space without regulation: claims management agencies, APRA Europe and TRAVEL-Net. This has led to the emergence of a complex, multi-layered enforcement regime. There are signs that compliance is improving, yet there are still significant gaps. Moreover, the EU aviation market is changing, and placing the operation of the Regulation 261/2004 under strain. The article demonstrates that the Commission's 2013 draft legislative proposal goes some considerable way to addressing the failures of the original Regulation 261/2004. If adopted by the EU institutions in its current form, it would likely address the main causes of non-compliance and improve the enforcement of EU passenger rights in the field of air travel. It remains to be seen whether the EU legislators will successfully tackle through revised legislation, the powerful vested interests involved in this field in a meaningful way, for the benefit of all concerned,

especially EU consumers. In the absence of this proposed legislative reform, it is argued that the existing hybrid enforcement policy will continue to evolve and increase in its complexity, with gaps and overlaps (e.g. multiple routes for consumer redress) but possibly without being any more effective.