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EU Air Passengers' Rights Past, Present, And Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study)

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**EU AIR PASSENGERS' RIGHTS PAST, PRESENT, AND
FUTURE: IN AN UNCERTAIN WORLD (REGULATION
(EC) 261/2004: EVALUATION AND CASE STUDY)**

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ABSTRACT

Passenger rights have continued to be strengthened following deregulation in the European Union (EU—previously the European Community) with common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, and long flight delays. In January 2020, the European Commission (EC) stated that “these rights need to be better known and easier to understand and enforced.”¹ This article considers the emerging role of Claims Management Companies (CMCs) as a step to aid passengers in achieving redress against airlines, undertaking a case study of a CMC in Spain.

The research also addresses the complexities of airline passenger rights, for within a short period of time of the EC’s making this statement, COVID-19 struck Europe. The year 2020 will no doubt turn out to be one of the most complex and difficult years for aviation as airlines fight to stay afloat and face market and regulatory uncertainty, especially regarding potentially increased passenger rights. The article concludes by making recommendations for regulatory revisions in this uncertain period.

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¹ European Commission Press Release IP/19/6814, Less Than Half of EU Travellers are Aware of EU Passenger Rights (Jan. 13, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6814 [<https://perma.cc/JW25-V2VW>] [hereinafter Press Release IP/19/6814] (quoting Adina-Ioana Vălean).

I. INTRODUCTION

THE STARTING PREMISE for this article is the following acknowledgment in terms of the successes and challenges of passenger rights in the EU: “The European Union is the only area in the world where citizens are protected by a full set of passenger rights. However, these rights need to be better known and easier to understand and enforced.”²

In 2020, in the midst of a global pandemic,³ this statement is explored and re-examined in the context of developments and promoted regulatory revisions.

The financial performance of airlines is often challenged, as their performance is subject to global world affairs such as the rise of oil, political wars, terrorist attacks, *and now COVID-19*. Such uncertainties make forecasts and predictions challenging for both commercial aviation modellers and airline passengers.⁴ Inevitably, all challenges stand to affect profitability and ultimately the future of the airline. This, therefore, also stands to affect the available choices for customers and their rights.

The International Air Transport Association (IATA) bases its twenty-year Air Passenger Forecast prediction for passenger demand on “such factors as the emerging middle class in developing countries, diverging demographic outlooks, further liberalization of aviation markets, and climate change.”⁵ The apparent likelihood of an epidemic or health crisis therefore seems to have been, as anticipated, somewhat lower on its radar as a potential factor impacting passenger demand.

Increased competition through liberalization has been positive for passengers, helping drive down prices and increasing

² *Id.*

³ *WHO Announces COVID-19 Outbreak a Pandemic*, WORLD HEALTH ORG. (Mar. 12, 2020), <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> [<https://perma.cc/TQ24-4VT3>].

⁴ A point raised on many occasions and by various sources. *See generally* RIGAS DOGANIS, *THE AIRLINE BUSINESS* 4–26, 258–91 (2d ed. 2006); *see also* KOSTAS IATROU & MAURO ORETTI, *AIRLINE CHOICES FOR THE FUTURE FROM ALLIANCES TO MERGERS*, at xiii–xiv, 14 (Routledge 2016) (2007); Norman Ashford, *Problems with Long Term Air Transport Forecasting*, 19 J. ADV. TRANSP. 101, 107, 111–13 (1985); *The Mayor of London’s Response to Airports Commission Discussion Paper 01, Transport for London* (Mar. 2013), <http://content.tfl.gov.uk/airport-commission-discussion-paper-01-demand.pdf> [<https://perma.cc/2WM5-S8CU>].

⁵ *What’s Inside the 20-Year Forecast*, INT’L AIR TRANSP. ASS’N, <https://www.iata.org/en/publications/store/20-year-passenger-forecast/> [<https://perma.cc/VU2N-SJCU>].

travel opportunities across the world.⁶ However, Newton's Third Law, as applied to motion, states that for every action, there is an equal and opposite reaction.⁷ And arguably a negative effect of liberalization—as viewed from the passengers' perspective (particularly with the entrance of low-cost carriers)—could be a reduction of airline services and other comforts. Invariably, there is a need to ensure passengers feel safeguarded in terms of services provided and received. Hence, the EU has implemented Regulation (EC) 261/2004,⁸ which sets out to aid passenger rights and entitlements.

Yet, conversely, airlines would identify that they face their own challenges, and such reductions are the consequence of competing to stay viable in a highly competitive market.⁹ From the airlines' perspective, the increased competition (including from new players) has therefore resulted in financial challenges, with many airlines going bankrupt, consolidating, ceasing to trade, or some combination of all three. While passengers may need to be protected, airlines would also identify that, at times, Regulation (EC) 261/2004 has become an added burden and a burden that should not necessarily be borne by them.¹⁰

⁶ Author Fox has written extensively in this area. See, e.g., Sarah Fox & Rosida Ismail, *ASEAN Open Skies – Aviation Development in 2015: 'Blue or Cloudy Skies?'*, 40 ANNALS OF AIR & SPACE L. 607 (2015); Sarah Jane Fox, *Aviation: A Risky Business*, 5 INT'L. J. PUBLIC L. & POL'Y 333 (2017); Sarah Jane Fox, *BREXIT: A Bolt from the Blue! – Red Sky in the Morning?*, 16 AVIATION L. & POL'Y 83 (2016); Sarah Fox & Luis Martín-Domingo, *EU Enforcement Mechanisms: Passenger Rights EC Regulation 261/2004*, 44 ANNALS AIR & SPACE L. 167 (forthcoming 2020); Sarah Jane Fox, *Single European Skies: Functional Airspace Blocks – Delays and Responses*, 41 AIR & SPACE L. 201 (2016); Sarah Jane Fox & Rosida Ismail, *The Skies the Limit! Collaborating to Open the Skies with China – Challenges and Opportunities*, 4 EUR. J. COMP. L. & GOVERNANCE 387 (2017); Sarah Jane Fox & Rosida Ismail, *'The Skies the Limit!' Open Skies – with Limitations!*, 4 EUR. J. COMP. L. & GOVERNANCE 7 (2017).

⁷ ISAAC NEWTON, *THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF PHILOSOPHY* 117–19 (I. Bernard Cohen & Anne Whitman trans., Univ. Cal. Press 1999) (1687).

⁸ Regulation 261/2004, of the European Parliament and of the Council of 11 February 2004 on Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No 295/91, 2004 O.J. (L 46) (EC) [hereinafter Regulation (EC) 261/2004].

⁹ See DOGANIS, *supra* note 4, at 4–26, 258–91; IATROU & ORETTI, *supra* note 4, at xiii–xiv, 1–22.

¹⁰ See Fox & Martín-Domingo, *supra* note 6; Steven Truxal, *Air Carrier Liability and Air Passenger Rights: A Game of Tug of War?*, 4 J. INT'L & COMP. L. 103, 115–18 (2017). See also concerns and discussions of the airlines after the Icelandic dust and volcanic disturbance Eyjafjallajökull, in April and May 2010. David Alexander, *Volcanic Ash in the Atmosphere and Risks for Civil Aviation: A Study in European*

In 2019–2020, the benefits of globalization—opening up the world through air travel—have also intensified the spread of COVID-19,¹¹ and as a consequence, the future of many airlines now looks uncertain and certainly *faces challenges like never before*. These are unprecedented times, and there is little doubt that few people would have forecast the magnitudinal effect that one virus could have had across the globe. This subsequently will also stand to affect (would be) air passengers for some time to come.

The focus of this article is to consider passenger rights—yesterday, today, and in the future—from a European perspective. Hence, the article reflects on the evolution of the air traveler’s passenger rights, giving legislative consideration to Regulation (EC) 261/2004 on air passenger rights, specifically the means provided by the regulation to seek redress for infringements. Evaluations of Regulation (EC) 261/2004 over a period of time—particularly the enforcement process—are therefore discussed.¹²

Crisis Management, 4 INT’L J. DISASTER RISK SCI. 9, 13 (2013) (noting that Michael O’Leary, the CEO of the European airline Ryanair, was particularly vocal with his concerns over the airlines’ liability and obligations under extraordinary circumstances); 511 Parl Deb HC (6th ser.) (2010) col. 47WH (UK); Case C-12/11, *Denise McDonagh v. Ryanair Ltd.*, 2011 EUR-Lex CELEX LEXIS 0012 (Jan. 31, 2013); Owen Bowcott, *Ryanair Facing Payout over Passengers Stranded by Volcanic Ash Cloud*, GUARDIAN (Mar. 22, 2012), <https://www.theguardian.com/business/2012/mar/22/ryanair-payout-stranded-ash-passengers> [<https://perma.cc/5ZHS-A5ME>]; Geoff Meade, *Ryanair Loses Icelandic Volcano Costs Legal Battle*, INDEPENDENT (Mar. 22, 2012), <https://www.independent.co.uk/news/business/news/ryanair-loses-icelandic-volcano-costs-legal-battle-7581400.html> [<https://perma.cc/E38J-X8W6>]; Dan Milmo, *Ryanair to Reject ‘Ludicrous’ Iceland Volcano Claims*, GUARDIAN (June 1, 2010), <https://www.theguardian.com/business/2010/jun/01/ryanair-passenger-compensation-legal-challenge> [<https://perma.cc/8K7Q-8ZUW>]; see *infra* Section III.D (discussing Steer Davies Gleave reports).

¹¹ See Amy McKeever, *Here’s How Coronavirus Spreads on a Plane—and the Safest Place to Sit*, NAT’L GEOGRAPHIC (Mar. 6, 2020), <https://nationalgeographic.com/science/2020/01/how-coronavirus-spreads-on-a-plane/#close> [<https://perma.cc/SN5P-2WY8>].

¹² Reference is particularly made to three commissioned EC reports:

- (1) Steer Davies Gleave, European Comm’n Directorate-Gen. Energy & Transp., *Evaluation of Regulation 261/2004* (Feb. 2010), https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf [<https://perma.cc/CAX6-YKPW>] [hereinafter *Steer Davies Gleave 2010*];
- (2) Steer Davies Gleave, European Comm’n, *Exploratory Study on the Application and Possible Revision of Regulation 261/2004* (July 2012), <https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application->

The article commences by revisiting the European air sector liberalization process to consider the development of rights and protections afforded to passengers. The middle section demonstrates this through reference to a specific case study (never previously reported on) from Spain. This research thus contributes to the past literature with a more recent evaluation of the infringement mechanisms, principally the emerging role of CMCs as part of this analysis. This helps provide an understanding as to why the involvement of CMCs has become more prevalent. Passenger complaints are considered that were handled by a Spanish CMC from August 1, 2015 to July 31, 2017. This data is supplemented by Freedom of Information (FOI) data provided by the Spanish National Enforcement Body, Agencia Estatal de Seguridad Aerea (NEB-AESA).

Finally, the article looks to review passenger rights today (2020) in this uncertain COVID-19 period and in the near future, considering what it means to the passengers (and invariably to airlines). In this respect, it should also be kept in mind that, as of this date, Spain has been highly affected by both the number of COVID-19 cases and the related death toll.¹³ This has the potential to affect the appetite to travel in the future, including the proclivity to register a claim, let alone the availability of national and European airlines.

II. RESEARCH CONTEXTUALIZATION – SETTING THE SCENE

A. LIBERALIZATION IN EUROPE: HISTORICAL REFLECTION

The European air transport market was liberalized through a series of packages commencing in the 1980s (Table 1).¹⁴ This

and-possible-revision-of-regulation-261-2004.pdf [https://perma.cc/BW5T-5723] [hereinafter *Steer Davies Gleave 2012*];

(3) Steer Davies Gleave, European Comm'n Directorate-Gen. Mobility & Transp., *Study on the Current Level of Protection of Air Passenger Rights in the EU*, MOVE/B5/2018 - 541 (Jan. 2020), <https://ec.europa.eu/transport/sites/transport/files/studies/isbn-978-92-76-14244-7-study-on-the-current-level-of-protection-of-air-passenger-rights-in-the-eu.pdf> [https://perma.cc/U8HK-U9UK] [hereinafter *Steer Davies Gleave 2020*].

¹³ World Health Org., *Situation Report – 92*, WHO CORONAVIRUS DISEASE 2019 (COVID-10) SITUATION REPS. (Apr. 21, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331863/nCoVsitrep21Apr2020-eng.pdf> [https://perma.cc/5TRE-CYQ8].

¹⁴ Author Fox's (designed) copyright as used in teaching materials 2011–2014 at Buckinghamshire New University, United Kingdom (U.K.) [hereinafter Fox

led to the creation of a single market for aviation in the 1990s that saw new airlines entering the market, some of them applying new business models (for instance, the low-cost carriers).¹⁵ The “Third Package,”¹⁶ enacted in 1992, remained applicable for fifteen years before being replaced by Regulation 1008/2008 on Common Rules for the Operation of Air Services in the Community (Air Services Regulation).¹⁷

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

- (1) Market access;
- (2) Public Service Obligations (PSOs);
- (3) The granting of and oversight of operating licenses for Community (EU) carriers;
- (4) Aircraft registration and leasing;
- (5) Pricing; and
- (6) Traffic distribution between airports.¹⁸

The increase of competition among airlines resulted in lower fares for air passengers.¹⁹ However, in order to secure improved standards for passengers, in terms of services, the EU adopted Regulation (EC) 261/2004, introducing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, and long delay of flights.²⁰

Copyright]. This Fox Copyright is referred to in some of her previous articles. See Fox, *BREXIT: A Bolt from the Blue! – Red Sky in the Morning?*, *supra* note 6, at 95–97; Fox & Martín-Domingo, *supra* note 6 (manuscript at 1–3).

¹⁵ Sarah Fox, *Safety and Security: The Influence of 9/11 to the EU Framework for Air Carriers and Aircraft Operators*, 45 RES. TRANSP. ECON. 24, 28–29 (2014).

¹⁶ Council Regulation 2407/92, 1992 O.J. (L 240) 1 (EEC); Council Regulation 2408/92, 1992 O.J. (L 240) 8 (EEC); Council Regulation 2409/92, 1992 O.J. (L 240) 15 (EEC).

¹⁷ Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008 on Common Rules for the Operation of Air Services in the Community, 2008 O.J. (L 293) 3, 3 (EC) [hereinafter Regulation 1008/2008].

¹⁸ *Id.*

¹⁹ María Belén Rey, *Structural Changes in the Spanish Scheduled Flights Market as a Result of Air Transport Deregulation in Europe*, 9 J. AIR TRANSP. MGMT. 196, 200 (2003).

²⁰ See generally Regulation (EC) 261/2004, *supra* note 8.

<p>First Package: (adopted in December 1987)</p> <ul style="list-style-type: none"> • Council Regulation 3975/87 on the Application of the Competition Rules to Air Transport • Council Regulation 3976/87 on the Application of the Treaty to certain categories of agreements and concerted parties • Council Directive 601/87 on Air Fares • Council Decision 602/87 on capacity-sharing and market access 	<p>Summarized:</p> <p>This introduced the relaxation of established rules—for intra-EU traffic, limiting government rights in reference to opposing new fares. It extended flexibility to airlines in reference to seat capacity-sharing.</p>
<p>Second Package: (adopted in July 1990)</p> <ul style="list-style-type: none"> • Council Regulation 2343/90 on market access • Council Regulation 2342/90 on air fares • Council Regulation 2344/90 on the application of the Treaty to certain categories of agreement and concerted parties 	<p>Summarized:</p> <p>This extended market access, providing greater flexibility over fare-setting and capacity-sharing. This led to the concept of “Community (EU) Carriers” being developed and having the right to carry unlimited cargo and passengers between their home State and other EU countries.</p>
<p>Third Package: (adopted July 1992)</p> <ul style="list-style-type: none"> • Council Regulation 2407/92 on licensing of air carriers • Council Regulation 2408/92 on market access • Council Regulation 2409/92 on fares and rates 	<p>Summarized:</p> <p>This introduced the freedom to provide services within the EU and in 1997 the freedom to provide “cabotage,” the right of an airline of one Member State to operate routes within another Member State.</p> <p>Further reforms regarding “Public Service Obligation” on routes, regarded as essential for regional development.</p>

Table 1 – Summary of EU Deregulation Packages²¹

From a wider perspective, an international treaty regime on air carrier liability had already been established by the Warsaw

²¹ See Fox Copyright, *supra* note 14; Fox, *BREXIT: A Bolt from the Blue! – Red Sky in the Morning?*, *supra* note 6, at 96; Fox, *supra* note 15, at 29.

Convention in 1929²² (and its amending instruments) and later advanced by the 1999 Montreal Convention.²³ The premise of these conventions was that both national and regional legislation (where they exist) should be consistent and in accordance with international agreements.²⁴

B. LITERATURE REVIEW

1. *Passenger Complaints: An Overview and the Current Regulation*

As has been commented upon above, liberalization of the air transport industry resulted in a paradoxical situation: (1) there were new market entrants, particularly low-cost carriers, that resulted in an increased number of passengers traveling due to the availability of reduced fares; and (2) conversely, low-cost airlines also offered a lower standard of service (particularly when compared with the full-service airlines) from the perspective of baggage facilities and passenger comfort (e.g., a smaller seat space with reduced leg room and reduced or eliminated meal service).²⁵

While the probability of customers complaining about low fares is moderate-to-nonexistent, the potential for complaints relating to an unsatisfactory level of service should be viewed as significant and highly likely.²⁶ The term “customer satisfaction” is recognized to cover a broad spectrum and is largely applied to a measurement (in many respects, subjective) that is used to

²² Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11.

²³ Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350. The EU is a contracting party to this convention, and some of its provisions have been implemented in EU law by Council Regulation 2027/97, 1997 U.J. (L 285) 1 (EC) as amended by Council Regulation 889/2002, 2002 O.J. (L 140) 2 (EC). These rules are part of a set of measures aiming at protecting air passenger rights in the EU along with Regulation (EC) 261/2004. See Fox, *supra* note 15, at 29; Sarah Jane Fox, ‘To Practise Justice and Right’ – *International Aviation Liability: Have Lessons Been Learnt?*, 5 INT’L J. PUB. L. & POL’Y 162 (2015).

²⁴ Fox, *supra* note 15, at 29.

²⁵ See Janfry Sihite, Tabby Wihasari Harun & Arisetyanto Nugroho, *The Low Cost Airline Consumer Price Sensitivity. An Investigation on the Mediating Role of Promotion and Trust in Brand*, 7 INT’L RES. J. BUS. STUD. 199, 199, 202 (2015).

²⁶ See Maria Fatima De Souza & Purva Hegde Desai, *Customer Complaints and Their Types in Airline Industry: A Descriptive Exploration of Service Failures in Airline Services*, 3 INT’L J. MANAGERIAL STUD. & RES. 73, 74–75 (2015); Fox, *Aviation: A Risky Business*, *supra* note 6; Michael D. Wittman, *Are Low-Cost Carrier Passengers Less Likely to Complain About Service Quality?*, 35 J. AIR TRANSP. MGMT. 64, 64 (2014).

quantify the degree to which a customer is satisfied with a product, service, or their experience.²⁷ As Wittman identified, “In service industries, customers can choose to register their dissatisfaction with the service they receive by making a complaint to the service provider.”²⁸ Also, there is the option for customers to complain to an overarching regulatory agency in an attempt to highlight what the customer perceives as the service failings and inadequacies of an airline.²⁹ This latter option is normally controlled by a legislative act as opposed to the terms and conditions of the airlines.³⁰

Regulation (EC) 261/2004 sets objectives in terms of standards and requirements for services and hence service-failings.³¹ In other words, Regulation (EC) 261/2004 lays down common rules on compensation and assistance to passengers in the event of specific circumstances where complaints could occur through poor or low service, namely (1) denied boarding; (2) cancellation; and (3) long delay of flights.³²

The aim could therefore be viewed as aiding to strengthen the customer experience by providing common standards and requirements for airlines to adhere to. And in this regard, Regulation (EC) 261/2004 makes no distinction in terms of the airline’s operating model or frequency of flights.³³ This is an interesting factor in terms of variations of the services and standards of the two key players—full-service and low-cost carrier providers.

Through his research, Forbes found that the expectations of service quality were a significant predictor of complaint rates and that passengers are more likely to complain if actual service quality falls below their own expectations.³⁴ However, this remains arguably subjective and relative to the individual. As Weber and Sparks identified, punctuality is a key area where complaints arise, along with scheduling, food quality, cost, fre-

²⁷ See Emrah Cengiz, *Measuring Customer Satisfaction: Must or Not?*, 6 J. NAVAL SCI. & ENG'G 76, 79 (2010).

²⁸ Wittman, *supra* note 26, at 64.

²⁹ *Id.*

³⁰ Fox & Martín-Domingo, *supra* note 6; Wittman, *supra* note 26, at 64.

³¹ Regulation (EC) 261/2004, *supra* note 8.

³² *Id.*

³³ *Id.* art. 3 ¶ 5.

³⁴ Silke J. Forbes, *The Effect of Service Quality and Expectations on Customer Complaints*, 56 J. INDUS. ECON. 190, 190–91 (2008).

quency, baggage delivery, cabin service, and membership of airline alliances.³⁵

Dresner and Xu,³⁶ as well as Steven et al.,³⁷ have suggested that the relationship between complaints and service quality is nonlinear, adding that there is a possible correlation to airline profitability—that is, an increase in complaints will more likely cause profitability to fall in the next period. Arguably, this is regardless of whether a complaint is made. In other words, this could be due to consumers choosing another airline due to their previous experience, resulting in reduced customer loyalty and trust of the brand (a point also referenced by Lin).³⁸ Wittman has further identified that “past analyses of consumer complaints assume that complaints will rise as service quality worsens.”³⁹ This also translates to the three defined areas specified within Regulation (EC) 261/2004—denied boarding, cancellation, and long delay.⁴⁰ This said, the predisposition and hence propensity to complain has also been linked to differing cultural backgrounds.⁴¹ Several studies indicated a link between different cultures and their interpretations and perceptions of service quality.⁴² In other words, a passenger’s expectations are likely influenced by what the passenger is used to in terms of services or service delivery within their own country, including via different transportation means.

³⁵ *Id.* at 195; Karin Weber & Beverley Sparks, *Consumer Attributions and Behavioral Responses to Service Failures in Strategic Airlines Alliance Settings*, 10 J. AIR TRANSP. MGMT. 361, 362 (2004); Off. of Aviation Enf’t & Proceedings, *Air Travel Consumer Rep.*, Apr. 2020, at 47, 55, <https://www.transportation.gov/sites/dot.gov/files/2020-04/April%202020%20ATCR.pdf> [https://perma.cc/C74U-5GGH].

³⁶ Martin Dresner & Kefeng Xu, *Customer Service, Customer Satisfaction, and Corporate Performance in the Service Sector*, 16 J. BUS. LOGISTICS 23, 32–36 (1995).

³⁷ Adams B. Steven, Yan Dong & Martin Dresner, *Linkages Between Customer Service, Customer Satisfaction and Performance in the Airline Industry: Investigation of Non-Linearities and Moderating Effects*, 48 TRANSP. RES. PART E: LOGISTICS & TRANSP. REV. 743, 744 (2012).

³⁸ See Po-Hung Lin, *Shopping Motivations on the Internet: An Empirical Study of Trust, Satisfaction and Loyalty*, 11 INT’L J. ELEC. BUS. MGMT. 238, 243 (2013).

³⁹ Wittman, *supra* note 26, at 64.

⁴⁰ Regulation (EC) 261/2004, *supra* note 8. As stated above, this regulation refers to: (1) denied boarding; (2) cancellation; and (3) long delay of flights. See further discussion *infra* Section II.B.2 (entitled Regulation (EC) 261/2004: Complaints and Handling).

⁴¹ See GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES* 10 (2d ed. 2001).

⁴² See, e.g., Fareena Sultan & Merlin C. Simpson, Jr., *International Service Variants: Airline Passenger Expectations and Perceptions of Service Quality*, 14 J. SERVS. MKTG. 188, 198–206 (2000).

the transmission of COVID-19, there were fewer flights being offered with the grounding of many services.¹⁶⁸

British Airways (BA), part of the International Airlines Group (IAG) which encompasses Aer Lingus and the Spanish airlines, Iberia and Vueling, announced that it needed to take dramatic action in order to fight for the survival of the airline and, inevitably, the group.¹⁶⁹ “In a memo to staff on March 13, entitled ‘The Survival of British Airways,’ the carrier’s [Chief Executive], Alex Cruz, spoke of ‘a crisis of global proportions like no other we have known.’”¹⁷⁰ At the beginning of April, BA had agreed to a deal with unions leading to the furlough of more than 30,000 workers as the airline battles what is viewed as its worst ever crisis.¹⁷¹

At the beginning of this article, comments were made as to predictions for airlines’ financial performance and, inevitably, for growth. At the end of this article, a comment is being made as to the fact that it is forecast (and hoped) that “[m]ost of the industry should pull through if the [COVID-19] situation lasts one or two quarters. Any longer, and the future of air travel could be altered for good.”¹⁷² Hence, the simple truth is that the airline industry may not fully recover from the effects of the pandemic.

It is recognized that the coronavirus will drive a “European airline industry shakeout.”¹⁷³ The authors’ forecast of a challenging future for airlines was echoed by one of the most outspoken airline chief executives in Europe, Ryanair’s Chief Executive Michael O’Leary, who has acknowledged that “[i]t’s inevitable in the next couple of weeks we’ll see more failures”¹⁷⁴ of airlines. This will lead to consolidations with airlines taking routes from bankrupt competitors; this was recognized by Citi

¹⁶⁸ See *Coronavirus is Grounding the World’s Airlines*, *ECONOMIST* (Mar. 15, 2020), <https://www.economist.com/business/2020/03/15/coronavirus-is-grounding-the-worlds-airlines> [<https://perma.cc/37UV-7CU3>].

¹⁶⁹ *Our Brands*, INT’L AIRLINES GRP., <https://www.iairgroup.com/en/our-brands> [<https://perma.cc/26JN-VZX8>].

¹⁷⁰ *Coronavirus is Grounding the World’s Airlines*, *supra* note 168.

¹⁷¹ See *British Airways’ Huge Job Cuts*, *ECONOMIST* (Apr. 30, 2020), <https://www.economist.com/britain/2020/04/30/british-airways-huge-job-cuts> [<https://perma.cc/6AU2-L8WL>].

¹⁷² *Coronavirus is Grounding the World’s Airlines*, *supra* note 168.

¹⁷³ Laurence Frost, *Coronavirus to Drive European Airline Industry Shakeout*, THOMSON REUTERS (Mar. 9, 2020), <https://www.rte.ie/news/business/2020/0309/1121184-coronavirus-fallout-on-airlines/> [<https://perma.cc/9QPM-AQD3>].

¹⁷⁴ *Id.* (quoting Michael O’Leary).

analyst Mark Manduca, who stated, “This virus will expedite the thesis of consolidation, possibly to extreme levels.”¹⁷⁵ Aviation has always been subject to a Darwinian theory relating to survival of the fittest.¹⁷⁶ Running alongside this has been the need to increase rights for the passenger.¹⁷⁷

There has always been the opportunity for customers to vent their annoyance at the airlines. As Nyer identified, there are positive benefits of complaining directly to the service provider, inasmuch as complaining directly provides a more positive attitude regarding future repurchasing intentions.¹⁷⁸ The EC Interpretative Guidelines also direct a dissatisfied customer to the airline, indicating that the consumer should refer the matter to the NEB only where there is disagreement with the answer received from the airline or if a response has not been received from the airline.¹⁷⁹ However, invariably, there are obvious barriers for doing so. These include perceived language barriers and potential cultural differences across the current twenty-seven EU states.¹⁸⁰ This also extends to passengers from outside the EU, who still have redress through Regulation (EC) 261/2004.¹⁸¹ Individuals with collectivist tendencies may also be less likely to engage in registering any form of complaint.¹⁸²

That said, on other occasions, the complaint may be misguided in terms of believing a matter lies within the scope of the airline when, in fact, it lies outside of the airline’s control—such as flight delays caused directly by air traffic controllers. This could adversely affect the airline and its reputation. In 2009, Kim and Lee made reference to the fact that the EU’s expert group identified a \$4.4 billion annual financial burden placed on both airlines and passengers because of air traffic control

¹⁷⁵ *Id.* (quoting Mark Manduca).

¹⁷⁶ Sarah Jane Fox, *The Evolution of Aviation In Times of War and Peace: Blood, Tears, and Salvation*, 31 INT’L J. WORLD PEACE 49, 51 (2014); see also Alex Macheras, *Survival of the Fittest: Why Only Europe’s Strongest Airlines Survive*, POINTS GUY (June 30, 2019), <https://thepointsguy.com/guide/survival-of-the-fittest-why-only-the-europes-strongest-airlines-survive/> [<https://perma.cc/HNR9-GKHU>].

¹⁷⁷ See Fox & Martín-Domingo, *supra* note 6 (manuscript at 31); see also Press Release IP/19/6814, *supra* note 1.

¹⁷⁸ Prashanth U. Nyer, *An Investigation into Whether Complaining Can Cause Increased Consumer Satisfaction*, 17 J. CONSUMER MKTG. 9, 15 (2000).

¹⁷⁹ *EC Interpretive Guidelines*, *supra* note 70, at 17.

¹⁸⁰ See Kim & Lee, *supra* note 95, at 350–51.

¹⁸¹ Regulation (EC) 261/2004, *supra* note 8, art. 3.

¹⁸² See, e.g., Raymond R. Liu & Peter McClure, *Recognizing Cross-Cultural Differences in Consumer Complaint Behavior and Intentions: An Empirical Examination*, 18 J. CONSUMER MKTG. 54, 64 (2001).

problems.¹⁸³ While such issues may well be beyond the scope of the airline, on some occasions, it does mean that the airline is burdened with compensating the customer. It is unlikely that COVID-19 will be directly linked by the consumer to the direct failing of any airline; although, arguably aviation has helped intensify the effects of transmission across the globe.

This research has shown the development of mechanisms available to aid travelers in pursuing grievances and complaints against the airlines for a failure of service, including those within the remit and protection afforded through Regulation (EC) 261/2004. Invariably, consumers have chosen, particularly in some cultures, to revert to the use of CMCs, and at times, airlines have selected to pay a claim rather than to risk further financial penalties being awarded against them through the court system. It has also been shown that there remains a weakness in achieving compensation that has been sanctioned by an NEB—unless a court case is pursued.

The 2013 Proposal to Amend Regulation (EC) 261/2004¹⁸⁴ remains somewhat stalled, although the EU procedural steps show its progression as ongoing.¹⁸⁵ That said, there have been no developments between 2014 and 2020, and the reference in development in 2020 refers specifically to the publication of the “Study on the Protection of EU Air Passenger Rights.”¹⁸⁶ However, there must surely be less impetus now to see any legislative changes that could further weaken airlines and impede their recovery from the 2019–2020 pandemic. That said, this does not necessarily equate to strengthening passenger rights to the detriment of airlines; moreover, this should be seen as providing a balance by ensuring appropriate mechanisms are in place and that court redress is an exceptional measure rather than an accepted practice.

One way to achieve this would be to propose that NEB decisions should be binding on the airline, so as to free up court time and save costs. Arguably, the system could operate in a tri-

¹⁸³ Kim & Lee, *supra* note 95, at 350.

¹⁸⁴ *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*, COM (2013) 130 (final) (Mar. 13, 2013).

¹⁸⁵ *Procedure 2013/0072/COD*, EUR-LEX, <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=Celex:52013PC0130> [<https://perma.cc/TU9E-PGCR>].

¹⁸⁶ *Id.*; Steer Davies Gleave 2010, *supra* note 12.

bunal-style manner, whereby the designated national experts in the field make the decision, as opposed to a judge who is not an expert on Regulation (EC) 261/2004 and is certainly inexperienced when compared to the NEB (which is generally, in most states, the state Civil Aviation Authority). Court action is shown to push the average resolution time back significantly, which again causes not only delays but also anxieties. Resorting to courts making a decision also leads to less consistency across the EU. An NEB handling a large volume of claims is assumed to have good experience in this process and hence substantial knowledge of Regulation (EC) 261/2004. Therefore, NEB findings should be expected to have a good level of accuracy and aid consistency of interpreting Regulation (EC) 261/2004, thus providing fairness across the EU.

While Regulation (EC) 261/2004 is considered a pioneering regulation that aims to protect air passenger rights by ensuring high standards for service quality (particularly reliability¹⁸⁷), there is undoubtedly a need for revisions and refinement. The 2020 Steer Davies Gleave report revealed many of the same failings and difficulties as expressed in the earlier 2010 Steer Davies Gleave report.¹⁸⁸ This earlier report advocated that the responsibility for making sure that passenger rights are respected should be borne by the NEBs.¹⁸⁹

With the reduction of the number of flights in 2020 (certainly within the first six months) into and out of the EU, it could be anticipated that the number of complaints by customers to NEBs will be significantly reduced. However, this may not be the case. The failure of Spanish airlines Air Comet and Spanair demonstrated, only too clearly, that without direct recourse to the service provider (i.e., the airline), customers selected to register any negative consequence directly with an enforcement body. However, in such cases it is unlikely that all customers would be compensated when the airline has ceased to trade.

In 2020, more than ever, there is a need to also review whether all responsibility under Regulation (EC) 261/2004 should actually lie with the airline. There is little doubt that the regulation remains, in part, unclear in terms of entitlements. This situation has invariably created the space and opportunity

¹⁸⁷ See Press Release IP/19/6814, *supra* note 1.

¹⁸⁸ *Steer Davies Gleave 2010*, *supra* note 12, at 96; *Steer Davies Gleave 2020*, *supra* note 12, at 219–28.

¹⁸⁹ *Steer Davies Gleave 2010*, *supra* note 12, at 99.

for CMCs to come into the process, supporting passengers during the claim process and translating Regulation (EC) 261/2004 into a more workable mechanism for the consumer.¹⁹⁰ This may be due to the comfort of using a mechanism not directly linked to the airline or to a state body. This said, at times, there has been criticism levied against these types of CMCs, who are said to take too high a percentage for their services when the claimant should be able to make their claim via the airline freely.¹⁹¹ The data¹⁹² used for this study was provided from one of those claim companies operating in Spain—a company that would stress that it aided travelers in determining their entitlement and facilitating what is a lengthy process on occasion.

While Regulation (EC) 261/2004 included the creation of NEBs, NEBs' effectiveness and consistency have been questioned.¹⁹³ This has led to two opposite ends of the spectrum perhaps developing: the CMC and the need to use arbitration services. This research has observed, in general, a good functioning of the Spanish NEB supporting the claims process.

One mechanism to aid transparency and ensure passenger rights, afforded under Regulation (EC) 261/2004 or adjacent to it, could be requiring the NEBs to publish periodic statistics on the number of claims filed (including against each airline) with the EC and translating this across all EU states to show consistency of practices and procedures. A good practice to consider, in this respect, is the practice implemented in the United States, where airlines are required to report their statistics to the US-DOT, which collects and processes the information.¹⁹⁴ Such statistics and data are also reported on the Aviation Consumer Protection website.¹⁹⁵ This said, there is also a need for more transparency and accountability at airports and by the air traffic controllers, to provide a better understanding as to why such delays occur in the first instance and who is liable for such delays.

¹⁹⁰ See CIVIL AVIATION AUTHORITY, *supra* note 92, at 7.

¹⁹¹ Anna Tims, *Beware Firms Trying to Take a Cut of Your Flight Delay Claim . . . You Can Do It for Free*, GUARDIAN (Oct. 28, 2018), <https://www.theguardian.com/money/2018/oct/28/flight-delay-compensation-pay-out-claims-firms> [https://perma.cc/GMJ7-QC5P].

¹⁹² FOI Data, *supra* note 84.

¹⁹³ See, e.g., Fox & Martin-Domingo, *supra* note 6.

¹⁹⁴ See Airline Service Quality Performance Reports, 14 C.F.R. §§ 234.1–234.12 (1987).

¹⁹⁵ *Air Travel Consumer Reports*, *supra* note 86.

In terms of the case study used in this article, it is acknowledged that there were some limitations, as one single state (Spain) does not provide an adequate understanding of the whole of the EU in terms of the use of CMCs. The results and use of such services may not be consistent across all of the EU. Furthermore, the nationality or the place of residence of the parties utilizing this service was not known and cannot be assumed to be only Spanish nationals. Future research could perhaps be aimed at analyzing more data from other states in terms of the use of CMCs and whether there is a need for CMCs to be an added and a stated resource referred to within Regulation (EC) 261/2004.

In conclusion, deregulation invariably aided to strengthen the air transport European market, giving airlines more opportunities across the EU. One of the aims of Regulation (EC) 261/2004 was to try to secure high levels of customer service after deregulation.¹⁹⁶ Further, as we come out of 2020, we cannot yet predict what the global or European sector will look like or, indeed, whether legislative and other policy changes will need to be applied in order to allow the industry to recover and not to be disadvantaged by new practices which have arisen to protect the aviation passenger (e.g., CMCs).

Currently, it is reported that airlines “are desperate to avoid having to immediately refund huge numbers of customers” in the midst of this pandemic.¹⁹⁷ In the U.K., airline bodies have written to the government asking them to “allow carriers to issue vouchers instead of refunds,” identifying that “[i]f refunds have to be given [airlines] want to wait until the coronavirus crisis is over and flight levels are back to normal.”¹⁹⁸ However, in the short term, at least, a new normal will have to be established. And it may be that a different tolerance level will have to be applied to perceived failures of service delivery, including those stipulated by Regulation (EC) 261/2004. However frustrating these perceived failures of service delivery, the consumers may also be equally grateful to the airlines to have any services restored that allow them to access friends and different countries of the world.

COVID-19 will inevitably cause a reduction of services (certainly in terms of volume) for some years to come, including

¹⁹⁶ See Press Release IP/19/6814, *supra* note 1.

¹⁹⁷ Baker, *supra* note 154.

¹⁹⁸ *Id.*

leading to the loss of some airlines. And while revisions of the Regulation (EC) 261/2004 have been proposed for some time, there is perhaps a more pressing need to revisit this given the current challenging and changing landscape both airlines and passengers now face.