

Make them pay: national enforcement bodies at the service of air passengers' rights

Every day, thousands of Europeans travel by air, hoping to reach their destinations safely and on time. However, some of their journeys may experience unexpected turnarounds. In fact, following the exponential increase in the number of flights operated, there has been an upsurge in the number of complaints filed by passengers against air carriers, due either to flight delays and cancellations or to claims for reimbursement and compensation, and it is in the latter that airlines are most likely to resist.

[Regulation \(EC\) No 261/2004](#) (“Regulation”), establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, was designed to ensure a high level of protection for passengers in the field of air transport. In substance, the Regulation entails airlines’ liability, save in exceptional circumstances, by establishing a set of rights for passengers, ranging from the right of travellers to be informed of their rights to the right to assistance, reimbursement or re-routing. Subject to compliance with certain conditions, Article 7 provides for a right to compensation.

The regular and effective functioning of the protection mechanism set up by the Regulation has been called into question by airlines, which complain about the regulatory burden it entails. As a result, it is common practice for many of these airlines to ignore claims for compensation from passengers whose flights were cancelled or delayed, even if all the requirements for compensation are met.

Having seen their requests for compensation rejected and hoping to avoid the costs and delays of legal action, many passengers turn to the competent national enforcement body (“NEB”) hoping that it will compel the company to pay them the compensation due. Invariably, they are confronted with the justification that those bodies are not competent to do so.

The question therefore arises as to whether a NEB is obliged, or simply empowered to order an airline to pay the compensation provided for in Regulation 261/2004.

Article 16 of the Regulation mandates Member States to designate a NEB whose task would be to ensure and supervise general compliance “by their air carriers” with the Regulation (recital 22) and which must take the measures necessary to that effect, including, where appropriate, sanctions for infringements by airlines.

In [Ruijsenaars and Jansen \(C-145/15 and C-146/15\)](#), a national court asked the European Court of Justice (“the ECJ” or “the Court”) “*whether Article 16 of Regulation No 261/2004 must be interpreted as meaning that, where an individual complaint has been made by a passenger to the body designated by each Member State pursuant to Article 16(1) of the regulation following the refusal by an air carrier to pay to the passenger the compensation provided for in Article 7(1) of the regulation, that body is required to take enforcement action against the carrier with a view to compelling it to pay the compensation*” (see para 27 of the judgment).

In its examination of the preliminary question, the ECJ, following its usual line of reasoning, based itself on the wording of the different paragraphs of Article 16 of the Regulation, as well as on the objectives of the Regulation, while taking account of the discretion enjoyed by the Member States in conferring powers on the bodies referred to in Article 16(1).

It then considered that it is open to Member States to empower the competent NEB to adopt measures in response to individual complaints in order to remedy inadequate protection of air passengers (see para 36 of the judgment). In this regard, it is important to consider the European Commission’s recommendation according to which “*passengers may be advised to make complaints to the national enforcement body of the country where the incident took place, within a reasonable time frame, when they consider that an air carrier has infringed their rights*”¹.

¹ See Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council (2016/C 214/04), para 7. Note also that, if understood this way, there are two different competences – competence to decide on the complaint and competence to receive the complaint – that require NEBs to always act under the EU general principles, such as the principle of sincere cooperation.

However, the Court made a clear distinction between the task entrusted to the NEB's of contributing to the proper application of the Regulation in general and the role of ensuring the protection of passengers' rights in individual cases, which is assigned to the national courts. It also held, regarding the provisions of the regulation having direct effect, that a passenger may rely on such provisions in actions seeking compensation from an air carrier under Article 7 of the Regulation².

This allowed the Court to conclude that air passengers enjoy effective judicial protection within the scope of the Regulation (see paras 29-37 of the judgment).

In light of the above, the Court held that a NEB *"is not required to take enforcement action against the carrier with a view to compelling it to pay the compensation"* (see para 38 of the judgment).

In practice, national enforcement authorities exhaustively inform the complainants that they do not provide compensation or reimbursement services based on Regulation 261/2004. NEBs point out that their competence is merely to investigate the infringements committed, to instruct the corresponding sanctioning measures and to apply fines and other penalties, justifying such behaviour with their lack of power to enforce civil law claims of individual passengers against the air carrier. So, in order to get compensation, passengers must, in principle, address their claims directly to the airline concerned and, if necessary, to enforce them before the competent national courts³.

The question then arises whether such a solution provides truly effective judicial protection for passengers' rights.

² For this purpose, it is relevant to identify the airline responsible for the damage concerned. Situations of successive flights or code sharing may complicate the practical application of the Regulation. According to recital 7, *"in order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight (...)"*. See, also, Article 3(5) regarding the scope of application of the Regulation: *"This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger"*.

³ See, for example, the website of the German national enforcement body (available at https://www.lba.de/EN/AirPassengersRights/Complaint_Procedure/Complaint-Procedure_node.html) and the website of the Portuguese national enforcement body (available at <https://www.anac.pt/vPT/Passageiros/DireitosPassageiro/comoapresentarumaqueixa/Paginas/Howtosubmitacomplaint.aspx>).

In fact, it must be stressed that the rules currently in force regarding the international legal competence of courts in this field are not the most passenger friendly. That is because they do not completely ease individual passengers' concerns, instead recurrently dissuading them to follow legal action to enforce their rights and obtain compensation.

A straightforward example is the following: since Regulation 261/2004 does not contain rules regarding the competence of the national courts of the Member States, such competence is to be determined in light of Article 7(1)(b) of Regulation 1215/2012⁴. Based on the contract celebrated between the passenger and the air carrier, the competent court is the one located in the Member State where the services were provided or should have been provided. Considering, for instance, that a passenger residing in Portugal was travelling from Athens to Lisbon through Munich, and the connection flight Munich-Lisbon was cancelled, the German courts are normally the ones with competence to settle the dispute.

Such reasoning has been justified by the existence of a sufficiently close link with the material elements of the dispute, therefore ensuring the close connection required by the rules of special jurisdiction between the contract for carriage by air and the court with jurisdiction, and in respect of the principle of predictability⁵.

The Court of Justice, however, has been providing some latitude regarding the rules set out in the preceding paragraph. It considered that, when a claim for compensation is made, both the place of arrival and the place of departure of the aircraft must be considered as the place of provision of the services which are the subject of an air transport contract⁶. In other words, passengers who want to take legal action are free to choose between the national courts of the take-off country or of the country in which they land.

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1–32.

⁵ See, in this regard, judgments of 7 March 2018, *Fightright GmbH v. Air Nostrum Líneas Aéreas del Mediterráneo SA*, C-274/16, paras 73 and 74.

⁶ Judgment of 9 July 2009, *Rehder*, C-204/08, EU:C:2009:439, para 43.

In these circumstances, the passenger is naturally led to question whether it would not, after all, be more expedited to just enable NEBs with the necessary powers to make air carriers pay the compensation provided for in Article 7 of Regulation 261/2004, without prejudice to the possibility to appeal to the competent courts.

The answer is *a priori* quite forthright: Regulation 261/2004 does not provide for such a possibility. Nonetheless, this would be a quite straightforward task since the compensation amounts are set in the Regulation itself. The NEBs' task would thus be limited to verify, based on the documents attached to the complaint, if the conditions to receive compensation are met. That is an objective task they could easily be able to perform – the same task the courts need to achieve themselves. It would not only support passengers whose rights established in the Regulation were violated, but it would also relieve the national judicial systems of such in principle purely mechanical task⁷. An intervention by the legislator, amending the rule in that sense, would presumably be a one-size-fits-almost-all solution. Only the most complex or contested situations would finally be dealt with by courts.

While waiting for that intervention, one final question remains as to whether the Member States can act on their own initiative by conferring the necessary powers on their NEB, or even imposing on them the use of such powers. This is precisely the question that was brought to the ECJ's attention in [LOT \(C-597/20\)](#).

The reference for a preliminary ruling in that case originated from a number of passengers who asked the Hungarian Consumer Protection Inspectorate to apply the regulation in order to oblige *LOT Polish Airlines* to pay compensation amounting to EUR 600 to each passenger concerned. The Hungarian NEB considered itself competent under Article 16 to impose a “consumer protection fine”. Conversely, the air carrier

⁷ In some jurisdictions, this mechanism is already in operation. Recently, the Northern-American Transportation Department imposed a total of \$7.25 million in fines on six airlines for failing to comply with customer refund requirements over the course of the pandemic. One of the airlines concerned is TAP Portugal, to which €122 million in refunds and pay fines for cancelled or significantly changed flights were imposed. “*These fines are part of DOT’s ongoing work to ensure Americans receive the refunds they are owed from airlines. Since the beginning of the COVID-19 pandemic, DOT has received a flood of complaints from air travellers about airlines’ failures to provide timely refunds after they had their flights cancelled or significantly changed*”. See <https://www.portugalresident.com/tap-ordered-to-pay-e122-million-in-refunds/>.

argued that this would deprive the Hungarian civil courts of their jurisdiction, stressing the civil nature of the relationship between an air carrier and a passenger.

Although the Hungarian NEB had systematically ordered air carriers to pay the compensation provided for in Regulation 261/2004, there was, at the time of the proceedings, no specific provision in Hungarian law that would allow the NEB to take coercive measures to compensate passengers for airlines' failure to comply with the Regulation.

In view of the remaining doubts, the national court asked the ECJ whether Article 16(1) and (2) of Regulation 261/2004 were to be interpreted as meaning that, where a passenger had lodged an individual complaint with the relevant NEB, that body could oblige the airline concerned to pay the compensation due to the passenger by virtue of the Regulation.

In its judgment of 29 September 2022, the ECJ, following the [*Opinion of Advocate General Richard de la Tour*](#), stated that there is nothing in the wording of Article 16 to prevent a Member State from conferring on its NEB the power to order an airline to pay the lump sum compensation provided for in Article 7 of the Regulation. As the Advocate General rightly pointed out, Article 16 gives Member States the discretion to decide which powers they wish to confer on their NEBs for the purpose of protecting passengers' rights (see para 26 of the judgment).

In particular, the Court acknowledged that such a conferral of powers on the NEB cannot in any event deprive either passengers or air carriers of the possibility of bringing legal action before the competent national court to pursue legal redress in the form of an order for the payment of compensation or an action against the decision of the NEB, respectively (see para 36 of the judgment).

The CJEU then highlighted the premise on which the regulation was conceived, namely to strengthen the rights of consumers in situations of air travel disruption. It stated that *"the specific aim of the fixed compensation (...) is precisely to compensate, in a standardised and immediate manner, for damage consisting in a loss of time equal to or in excess of three hours underlying such a delay, which constitutes 'inconvenience' within the meaning of that regulation, without the passengers concerned having to suffer the*

inconvenience inherent in the bringing of actions for damages” (see para 39 of the judgment).

The judgment in *LOT* therefore allows Member States to reverse, in some way, the burden of proof through the intervention of the NEB, by compelling air carriers to resort to the competent courts against that body’s decision if they do not agree with it. If appropriate, the national court might even request a preliminary ruling from the Court of Justice on the basis of Article 267 of the Treaty on the Functioning of the European Union⁸ (see para 37 of the judgment).

As the Court stressed in paragraph 40 of its judgment, conferring, for reasons of simplicity, speed and effectiveness, enforcement powers on the NEB designated under Article 16(1) of the Regulation will ensure a high level of protection for air passengers while preventing the courts from being clogged up because of the extremely high number of claims for compensation⁹.

At a time when European consumer protection associations have been receiving hundreds of contacts and complaints from passengers for breach of their rights, the ECJ judgment in *LOT* could not be more welcomed. Many European airports have been experiencing operational difficulties, flight delays and cancellations, which undoubtedly cause inconvenience and dissatisfaction amongst passengers. The judgment reminds us of what the precise purpose of the Regulation is: to provide a high level of protection

⁸ Recently, the Court of Justice submitted a request based on the second paragraph of Article 281 of the TFEU, seeking to amend Protocol No 3 on the Statute of the Court of Justice in order to (i) transfer preliminary rulings to the General Court in specific areas and (ii) to extend, at the Court of Justice, the mechanism for the determination of whether an appeal is allowed to proceed. If approved, the General Court will have jurisdiction to hear preliminary references regarding compensation and assistance to passengers.

⁹ Note that, according to article 30(1) of Directive 2001/14/EC of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, Member States are also required to establish a regulatory body to which, by virtue of Article 30(2) thereof, an applicant may have a right to appeal if it considers itself to be unfairly treated, discriminated against or is in any other way aggrieved. Such body, which shall verify compliance with the Directive, acts as an appeal body, notwithstanding the possibility of judicial review. However, unlike in the *LOT* situation, where the Court established that NEBs may be granted the power by its Member State, in para 56 of judgment of 27 October 2022, *DB Station & Service*, C721/20, the ECJ stated that “*Applicants are thus required to apply to that body when they seek compensation for any damage related to the infrastructure charges set by an infrastructure manager or by a service operator referred to in point 2 of Annex II to Directive 2001/14*”. In that case, recourse to the regulatory body is an imposition rather than an option for claimants. This may be explained by the different nature and number of the claimants, which, in the latter case, are not, in principle, the passengers but the railway operators.

for consumers, while helping to relieve the national judicial systems of a potentially huge number of cases that may result from the necessary recourse to court proceedings.