

Articles

Passenger Claims and Alternative Dispute Resolution: An Ongoing Bromance or a Bad Idea?

by Delphine Defossez*

1. Introduction

The air transport sector generates the largest share of cross-border consumer complaints. Despite the enactment of solid dispute resolution frameworks around the world, passengers often face difficulties in enforcing their rights. While these problems are not new, the Covid-19 pandemic has highlighted the systems' deficiencies, especially in Europe, with numerous passengers complaining about their reimbursement (or the lack thereof).¹

The ongoing "bromance" between aviation disputes and alternative dispute resolution mechanisms (ADR), especially mediation, is reaching new heights. In recent years, it has become obvious that traditional dispute resolution was not the most effective way to deal with aviation claims despite often being the only

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¹ Patrick Gibbels, APRA, *Give Airlines a Finger And They'll Take Two Arms: Why Regulation EC261 Is Crucial for Consumers* (June 3, 2020), <https://www.passengerrightsadvocates.eu/publications/>; BEUC, COVID-19 AND EU TRAVELLERS' RIGHTS: EVALUATION OF THE MEMBER STATES IMPLEMENTATION OF THE EU COMMISSION RECOMMENDATION ON 'VOUCHERS' (Dec. 10, 2020), https://www.beuc.eu/publications/beuc-x-2020-119_covid-19_and_eu_travellers_rights.pdf.

recourse for passengers.² The difficulties for passengers in contacting airlines resulted in the need for new mechanisms. ADR offers great opportunities to the aviation sector as a whole, and not only for passengers. Indeed, the industry is dominated by only a few suppliers, meaning that it is in the parties' interest to maintain a good working relationship. Moreover, commercial agreements between contracting parties are often long-term. Finally, unlike the national enforcement bodies (NEBs), which have territorial jurisdiction and are, therefore, linked to the location of the incident, ADR bodies offer more flexibility as their jurisdiction is often related to the nationality of the airline or the country of residence of the passenger.

New ADR mechanisms for passenger claims, particularly Online Dispute Resolution (ODR), are being developed to offer passengers an easier means of redress. Despite their numerous benefits, it is questionable whether ADR mechanisms are really the most appropriate for aviation, especially in Europe. Indeed, many European initiatives do not provide enforcement powers to the ADR authority, rendering those mechanisms meaningless in certain circumstances. Addressing the enforcement problem of public ADR is an important issue for consideration. In the United Kingdom, the decisions of ADR bodies approved by the CAA are binding upon airlines. However, the use of ADR mechanisms is not mandatory in aviation. As a result, in early 2022, the U.K. Department of Transportation published a report on possible reforms, including mandatory ADR.

At the EU level, the enforcement problem is even more critical due to the patchwork of systems available, with both public and private companies offering ADR services, and with some services being specifically dedicated to aviation passengers while others are very general. An additional problem is the inability of ADR authorities to directly raise a question before the Court of Justice of the European Union. This lack of uniformity raises the question as to whether it is time to implement an EU ADR system for aviation as a one-stop solution, rather than allowing the proliferation of different systems.

² ECC-Europe, *Air Passenger Rights: Why the Revision of Regulation 261/2004 Is Urgent? Position of the European Consumer Centres France and Germany* (Sept. 28, 2018), https://www.europe-consommateurs.eu/fileadmin/Media/PDF/publications/prises-de-position/Air_passenger_rights_why_the_revision_of_Regulation_261_2004_is_urgent.pdf.

2. *Examples of ADR in Aviation*

Mediation is not only effective in avoiding the breakdown of parties' commercial relationships, it also offers a speedier conclusion than arbitration or litigation. Despite being well-suited for the aviation industry, the absence of ADR mechanisms, and mediation in particular, has been attributed to the "absence of a universally recognised framework for the direct enforcement of international mediated settlement agreements."³ To remedy this problem, the Singapore Convention on Mediation⁴ was signed in 2019. As of 2022, the Convention counted 55 signatories and 9 ratifications.⁵ One concern is that the U.K. and the EU have not signed the Convention. However, countries such as Qatar and Saudi Arabia – which both have very successful airlines – have signed and ratified it. Their participation in this Convention demonstrates a trend toward a less confrontational mode of litigation. While the Singapore Convention only applies to cross-border commercial transactions and not consumers, it shows a willingness at the international level to grant mediation a more binding status.

Currently, the availability of ADR for airline passengers is based on a national willingness to introduce these mechanisms, resulting in great variations from country to country. ADR could be very helpful for passengers by saving them time and money. Indeed, the existing ADR mechanisms mainly apply to the most common issues that passengers encounter, namely compensation for canceled or delayed flights and lost baggage.

a. *Canada*

In order to ensure a high level of enforcement, the Canadian Transport Agency (CTA) has launched a dedicated platform allowing passengers to complain in case of a lack of answer from an airline. The CTA was granted powers to "resolve disputes using

³ Melvin Lum, *Mediation in Aviation Disputes: Reaching Higher Altitudes with the Singapore Convention on Mediation*, INT'L BAR ASSN, <https://www.ibanet.org/article/5201B173-F579-4A53-A416-B18A287C0053> (last visited July 16, 2022).

⁴ United Nations Convention on International Settlement Agreements Resulting from Mediation, *opened for signature* Aug. 7, 2019, No. 56376 (entered into force Sept. 12, 2020), <https://www.singaporeconvention.org/>, [hereinafter Singapore Convention on Mediation].

⁵ *Id.*

a range of tools from facilitation and mediation to arbitration and adjudication.”⁶ During the consultation period on the Air Passenger Protection Regulations (APPRs), the Alternative Dispute Resolution Institute of Canada (ADRIC) recommended the inclusion of an ODR. It noted that “[ODR] can be very effective for dealing with high volume/high emotion disputes.” While the CTA can act as a mediator, claims must first be filed directly with the airline.⁷ Once the passenger receives written notice, or a delay of 30 days has passed, the passenger can commence a complaint on the website; CTA will then act as a mediator.

b. *United Kingdom*

The U.K. has also demonstrated a strong will to move toward more ADR. In a 2022 report, the Department of Transportation is seeking views on reforming aviation consumer policy on a range of air passenger rights issues. Some of these issues include increasing the enforcement powers of the U.K.’s Civil Aviation Authority, changing compensation for delays and cancellations, and making air travel more accessible. Most importantly, the U.K. is envisaging mandatory alternative dispute resolution for all airlines in an effort to ensure better protection and enforcement of passengers’ rights. The last point is of particular interest, since under the U.K. regulations⁸ participation in ADR schemes is not mandatory for airlines. The regulations require, however, that all businesses point consumers to a certified ADR scheme.

Initially, the Air Transport Users Council (AUC) was the complaint handling body for aviation. The AUC was effectively internally independent from the CAA but was closed in 2011 when its complaint handling function was incorporated into the CAA. The CAA was directly involved in the mediation of those cases. In 2015, following the enactment of the regulation, the CAA an-

⁶ Press Release, Canadian Transp. Agency, *New Air Passenger Protection Regulations Now in Force* (July 15, 2019), <https://www.canada.ca/en/transportation-agency/news/2019/07/new-air-passenger-protection-regulations-now-in-force.html>.

⁷ Canadian Transp. Agency, *Air Passenger Protection: File an Air Travel Complaint*, https://formulaire-forms.otc-cta.gc.ca/en/air-travel-complaint?subject=children_u14&wbdisable=true (last visited July 16, 2022).

⁸ Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations, 2015, No. 542 (U.K.); Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations, 2015, No. 1392 (U.K.).

nounced its intention to end its role as a complaint handler.⁹ Indeed, while the U.K. government recognized the importance of mediation for passengers' claims, the government took the view that mediation could be conducted by private bodies. As a result, the CAA was appointed as U.K.'s competent authority to approve ADR providers and oversee the implementation and enforcement of the U.K. regulations. While the regulations did not impose an obligation on air carriers to submit claims to ADR, a large number of airlines and airports now use approved ADR bodies, such as AviationADR for easyJet and Bristol and Manchester airports, or the Centre for Effective Dispute Resolution used by British Airways and Heathrow and Gatwick airports.¹⁰ Those two organizations have the power to make binding determinations under the Scheme Rules, if the passenger agrees with the decision.¹¹ However, the ADR process can be stopped by any court proceeding.¹² This means that even if the system becomes mandatory, airlines could easily frustrate the system by lodging a lawsuit.

Currently, the CAA is only involved with complaint handling for airlines not affiliated with an ADR scheme. However, the CAA has made it clear that it is prepared to seek future legislative changes to make ADR compulsory if necessary.¹³

Claims under UK261 and UK1107, the retained (post-Brexit) versions of EU Regulations 261/2004 and 1107/2006,¹⁴ can be dealt with by the CAA's Passenger Advice and Complaints Team (PACT).¹⁵ PACT only advises passengers as to whether their

⁹ CAA, CONSUMER COMPLAINTS HANDLING AND ADR: CAA POLICY STATEMENT AND NOTICE OF APPROVAL CRITERIA FOR APPLICANT ADR BODIES, CAP 1286, (2d ed. Oct. 2016), <https://publicapps.caa.co.uk/docs/33/CAP%201286%20OCT16.pdf>.

¹⁰ Centre for Effective Dispute Resolution (CEDR), *Aviation: Aviation Adjudication Scheme* (2022), <https://www.cedr.com/consumer/aviation/>.

¹¹ AVIATION ADR, 'AIRLINE' SCHEME RULES 8.2 (May 2021), <https://www.aviationadr.org.uk/wp-content/uploads/2021/05/AviationADR-Scheme-Rules-airline-MAY-27-2021.pdf>.

¹² *Id.* at 5.1.

¹³ DAVID McCLEAN ET AL., SHAWCROSS AND BEAUMONT: AIR LAW ch. 5 (4th ed. 2021).

¹⁴ Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations, 2019, S.I. 2019/278, ¶¶ 8, 9 (U.K.).

¹⁵ CAA, *How the CAA Can Help* (2022),

complaints are valid. PACT can also take the complaint to the airline but it has no enforcement power. Additionally, a CAA consumer panel was established as a “critical friend” to ensure that the interests of current and potential passengers are central to the CAA’s policies. It is, however, not a claim handler.

The U.K. has thus introduced various mechanisms to ensure the highest level of consumer protection, and the CAA has played a pivotal role in helping consumers. For instance, in 2020, the CAA reviewed airlines’ refund policies and performance.¹⁶ Following this review, the agency received commitments from airlines to improve their refund policies and practices. A recurrent flaw in the system is, however, the non-mandatory nature of the ADR obligation. It will, therefore, be interesting to see how the recommendations of the Department of Transport would translate in practice; would this mandatory mediation be conducted by the same private schemes or by the CAA itself? Another option would be to re-launch the AUC, which until 2011 addressed these types of issues.

Regarding the time limitation for filing passenger claims, English courts have already established that the limitation in the Montreal Convention does not apply to Regulation 261/2004 but instead, the English law of limitation prevails.¹⁷ This means that passengers have up to six years to file a claim. Even if the ADR procedure is delayed due to a lack of staffing, the possibility of a claim being time-barred is quite low.

c. *EU Aviation ADR*

The European Union has adopted a mediation scheme for consumer claims.¹⁸ One of its objectives is to promote high-quality consumer ADR through the introduction of certification mechanisms. This requires ADR bodies to “continuously comply with several binding requirements set down in the Directive testifying

Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK, 42 J. CONSUMER POL’Y 109, 123 (2019).

¹⁶ CAA, *UK Civil Aviation Authority Reports on Airline Refunds Review* (July 30, 2020), <https://www.caa.co.uk/News/UK-Civil-Aviation-Authority-reports-on-airline-refunds-review/>.

¹⁷ *Dawson v. Thomson Airways Ltd.*, [2014] EWCA Civ 845 (Eng.).

¹⁸ Council Directive 2013/11/EU, *Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)*, 2013 O.J. (L 165) 63.

– among other things – of their impartiality, expertise, transparency, accessibility, as well as of the fairness, timeliness and effectiveness of their procedures.”¹⁹ The Directive aims at solving some of the recurrent problems of ADR, such as lack of independence of schemes or due process issues.

One of the major issues with Regulation 261 is the weak role of NEBs. This specific aspect has been criticized for years. Indeed, while NEBs clearly have a monitoring role, the regulation does not require them to force airlines to compensate passengers, resulting in an enforcement gap.²⁰ In fact, such an enforcement role can only be granted by national law, which undermines harmonization and leads to significant variations in sanctions.²¹ The European Court of Auditors reached a similar conclusion in its Special Report on passenger rights: “The procedures applied by carriers and NEBs in responding to individual claims are not transparent. Passengers on the same journey affected by a travel disruption can be treated differently.”²² Moreover, many NEBs “do not have the power to deal with individual claims.”²³ Enforcement can be further complicated when it comes to non-EU airlines. This lack of enforcement undermines the efficiency of the entire NEB system.²⁴ Additionally, the NEB system is often limited by language requirements, rendering it even less efficient. In the 2020 proposed revision of Regulation 261, NEBs were given a much more proactive role. The European Consumer Centres Network (ECC-Net) also advocated for involving NEBs in dispute settlement.²⁵

¹⁹ Biard, *supra* note 15, at 109.

²⁰ Sara Drake, *Delays, Cancellations and Compensation: Why Are Air Passengers Still Finding It Difficult to Enforce Their EU Rights under Regulation 261/2004?*, 27 MAASTRICHT J. EUR. L. 230, 234 (2020).

²¹ Joined Cases C-145/15 & C-146/15, *K. Ruijsenaars and Others v. Staatsecretaris van Infrastructuur en Milieu*, EU:C:2016:187.

²² ILIANA IVANOVA ET AL., EUR. CT. OF AUDITORS, EU PASSENGER RIGHTS ARE COMPREHENSIVE BUT PASSENGERS STILL NEED TO FIGHT FOR THEM (2018), https://www.eca.europa.eu/Lists/ECADocuments/SR18_30/SR_PASSENGER_RIGHTS_EN.pdf.

²³ BEUC, EU AIR PASSENGER RIGHTS AND ENFORCEMENT – REAL IMPROVEMENTS ARE NEEDED 5 (2019) https://www.beuc.eu/publications/beuc-x-2019-083_eu_air_passenger_rights_and_enforcement.pdf.

²⁴ Delphine Defossez, *Proposed Revisions of Regulation 261/2004: Endangering Passengers' Rights and Going Against the International Trend?*, 91 J. AIR TRANSP. MGMT. 102008 (2021).

²⁵ EUR. CONSUMER CENTRES NETWORK, FOR A EUROPE WHICH PROTECTS ITS CONSUMERS IN THEIR DAILY AIR TRAVEL 5, 10–11 (2020), <https://>

Despite the EU's efforts to increase incentives to rely on ADRs for consumers in general, the adoption of ADRs' mechanisms for passengers is far from reaching its full potential. Both the Directive on ADR for consumer disputes and the regulation governing consumer ODR have made possible the creation of various independent dispute resolution bodies to adjudicate disputes between passengers and subscribing airlines.²⁶ However, the level of discretion left to EU Member States has resulted in a total lack of harmonization, with a confusing mix of public and private bodies. Consequently, ADR certification and monitoring tend to diverge significantly across the EU. A sector-specific ADR, with the necessary expertise, would be desirable to facilitate greater fairness and access to redress.

i. ADR Specifically Dedicated to Passengers' Claims

So far, only a handful of EU Member States have introduced an ADR mechanism specifically dedicated to passengers' claims. Among them are Germany and Poland.

In Germany, after years of complaints about the lack of enforcement of passengers' rights, coupled with the resistance of the aviation industry to voluntarily engage in ADR, the government enacted a law.²⁷ Accordingly, airlines are now obliged to take part in ADR procedure, which is only one of the remedies available to consumers. Indeed, passengers can choose to go to court directly or to switch from ADR to a court proceeding at any time during the procedure. While airlines are encouraged to be part of a private settlement procedure, a public ADR has also been put in place.²⁸ According to ECC-Net:

The German public ADR Schlichtungsstelle Luftverkehr can only cover claims in which the consumer couldn't find a solution, with a value of claim of more than 10 € and not more than 5000 € . . . and in which German courts would be competent to rule the case. The case needs to concern either regulation 261/2004 or the Montreal

www.epc.si/media/2020/Brosure-dokumenti/apr-position-paper_en_web.pdf.

²⁶ Council Directive 2013/11/EU, *supra* note 18.

²⁷ Gesetz zur Schlichtung im Luftverkehr [Aviation Arbitration Act], 11.06.2013, 1545 (F.R.G.).

²⁸ LuftVG [Aviation Act] § 57 ff (F.R.G.).

convention (denied boarding, cancellation or delay of transport services, delay or loss of luggage) and/or obligations with regard to passengers with reduced mobility.²⁹

The costs of the procedure are to be paid by the airlines, unless the claim is made in bad faith.³⁰ Additionally, the German Conciliation Body for Public Transport (söp) – a private ADR created under the Consumer Dispute Settlement Act (VSBG) – is also competent. Most large airlines operating in Germany are members of the söp, an independent and neutral organization offering “objective assistance for all travellers who have previously unsuccessfully lodged a complaint with their transport or travel company.”³¹ The söp is financed by its affiliated airlines and is free for passengers to use. To avoid overlap, the public ADR only handles passengers’ cases related to airlines not affiliated with the söp. When a case concerns the online booking process itself, the passenger can also contact the *Online-Schlichter* or the *Allgemeine Verbraucherschlichtungsstelle* (general residual ADR).

Poland not only implemented those European instruments; it also amended its aviation law to include ADR. As a result, in 2019 a Passengers’ Rights Ombudsman was established to deal with out-of-court dispute settlement in accordance with Article 205a of the Polish Aviation Law.³² While the Ombudsman helps the parties reach an agreement, it does not issue decisions in cases.³³ It seems, however, that the Ombudsman has been the victim of its success. Indeed, in 2021, an announcement was made that “due to a lot of applications submitted to the Ombudsman and the limited workers in the Ombudsman’s

²⁹ EUR. CONSUMER CENTRES NETWORK, ALTERNATIVE DISPUTE RESOLUTION IN THE AIR PASSENGER RIGHTS SECTOR 3 (Sept. 2019), https://www.europe-consommateurs.eu/fileadmin/Media/PDF/publications/etudes_et_rapports/Etudes_EN/Alternative_Dispute_Resolution_in_the_Air_Passenger_Rights_sector.pdf.

³⁰ LuftVG [Aviation Act] § 57.4 ff. (F.R.G.).

³¹ Söp, *The Primary Functions of söp*, <https://soep-online.de/en/the-primary-functions-of-sop/> (last visited July 16, 2022).

³² Dominika Zawacka-Klonowska, *Procedure for Out of Court Settlement of Consumer Disputes before the Passenger Ombudsman*, 43 REV. EUR. & COMP L. 65 (2020).

³³ Civil Aviation Auth., *Information About the Waiting Time for Consideration of the Application* (Nov. 30, 2021, 12:11 AM), <https://pasazerlotniczy.ulc.gov.pl/en/news/information-about-the-waiting-time-for-consideration-of-the-application-2>.

Team, the waiting time for consideration of an application is now currently extended.”³⁴ In November 2021, the Ombudsman was dealing with “applications from March 2020,” which demonstrates not only its success but the delay in proceedings. This delay raises an important question concerning time limitations for claims. Unlike the Montreal Convention, Regulation 261/2004 has no time limitation clause. Instead, as stated *supra*, it was left to national authorities to define the appropriate time period, which resulted in great divergence among Member States.³⁵

In the Netherlands, a flight ADR scheme – *Geschillencommissie Luchtvaart* – was established but failed a few years later when the Dutch Board of Airline Representatives (BARIN) withdrew its cooperation. The Dutch example demonstrates the drawbacks of a non-mandatory system. Indeed, non-BARIN members that operated in the Netherlands were not part of the scheme, which resulted in competitive distortion.³⁶

ii. ADR Supplied by National Enforcement Bodies

Other EU Member States, such as Spain and Austria, have opted for ADR supplied by NEBs. In Spain, the entity protecting passengers is the State Aviation Safety Agency (AESA).³⁷ In March 2022, a new Spanish ADR proceeding for claims under Regulation 261/2004 was approved through Ministerial Order TMA/201/2022. This marks a new era in the settlement of passenger disputes in Spain and will hopefully improve the speed of resolution. The regulation was enacted to comply with the mandate of Act 7/2017, which implemented EU Directive 2013/11/EU

³⁴ *Id.*

³⁵ Case C-139/11, Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV, ECLI:EU:C:2012:741; Aporve Khanna, *Seeking Flight Compensation? Better Know the Time Limitation*, CLICK2REFUND (Jan. 3, 2019), <https://www.click2refund.com/Blog/how-far-back-can-i-claim-a-flight-compensation-for-a-delayed-flight>.

³⁶ BARIN, *Geschillencommissie Luchtvaart met Europees Perspectief* (Nov. 20, 2008), <https://www.barin.nl/geschillencommissie-luchtvaart-met-europees-perspectief/>.

³⁷ Orden Ministerial TMA/201/2022, de 14 de marzo, por la que se regula el procedimiento de resolución alternativa de litigios de los usuarios de transporte aéreo sobre los derechos reconocidos en el ámbito de la Unión Europea en materia de compensación y asistencia en caso de denegación de embarque, cancelación o gran retraso, así como en relación con los derechos de las personas con discapacidad o movilidad reducida, art. 1 (Spain), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-4201.

on ADR for consumer disputes.³⁸ The procedure is free of charge.³⁹ According to the Ministerial Order, the ADR is only available for claims related to Regulation 261/2004 to passengers whose flights departed from Spain or any passengers arriving to Spain from an airport situated outside the European Union, unless the non-EU country grants compensation and assistance rights.⁴⁰ Additionally, the new ADR proceeding applies to claims based on Regulation 1107/2006, regarding the rights of disabled persons and persons with reduced mobility.⁴¹ For passengers, participation is on a voluntary basis and the outcome is not binding, while the decision resulting from the procedure is binding on the air carrier.⁴² If, after one month, the company does not comply with the decision, “the passenger may request its enforcement before the commercial court.”⁴³ A failure to comply could also result in significant penalties as airlines are under a legal duty to cooperate.⁴⁴

The Spanish system appears quite similar to the CRT in Canada, as passengers must first contact the airline before initiating any ADR proceedings.⁴⁵ Passengers have one year to file their claims with the AESA from the date of the initial formal complaint. However, the timeframe in which to initiate the initial complaint is not expressly stated. This could create some serious issues as it could be used to extend the time limit stipulated in EU Regulation 261.

One major difference – which is probably one of the biggest issues of the Spanish system – relates to the non-binding nature for passengers. Indeed, dissatisfied passengers can resort to court proceedings if they disagree with the decision. In addition to creating an imbalance in power between airlines and passengers, it could also result in an increase in cases with passengers aspiring for a different outcome. Another foreseen problem is that the de-

³⁸ *Id.* See Council Directive 2013/11/EU, *supra* note 18.

³⁹ Aiyon Abogados, *Order TMA/201/2022 of 14 March: New Procedure for the Settlement of Disputes in Favour of Air Transport Users* (Apr. 19, 2022), <https://aiyon.es/en/order-tma-201-2022-of-14-march-new-procedure-for-the-settlement-of-disputes-in-favour-of-air-transport-users/>.

⁴⁰ Orden Ministerial TMA/201/2022, *supra* note 37, art. 2(2)(a).

⁴¹ *Id.* art. 2(2)(b).

⁴² *Id.* art. 18.

⁴³ AESA, *Alternative Dispute Resolution*, <https://www.seguridadaerea.gob.es/en/taxonomy/term/26> (last visited July 16, 2022).

⁴⁴ Orden Ministerial TMA/201/2022, *supra* note 37, art. 18(4).

⁴⁵ *Id.* art. 6(1).

cision is binding on airlines and can be enforced despite appeals. This means that airlines must compensate passengers while waiting for the appeal decision to be given or face sanctions for not complying with the AESA's decision.

In Austria, the Agency for Passenger Rights (apf) – a department under Schienen-Control – is a statutory arbitration body for transport in general.⁴⁶ The apf was introduced pursuant to the enactment of the Passenger Rights Agency Act of 2015 and replaced the previous rail transport arbitration board.⁴⁷ The service is provided by the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology (BMK) and is free for passengers.⁴⁸ In 2016, the apf became one of the eight ADR bodies in Austria, pursuant to the Alternative Dispute Resolution Act.⁴⁹ Its main functions are to “inform rail, bus, waterborne and air passengers of their rights, monitor[] observance of the passenger rights embedded in the EU regulations and, if necessary, take[] further steps to induce the companies concerned to fulfil their obligations.”⁵⁰ Indeed, the apf can issue administrative sanctions against airlines for any violations of EU Regulation 261. The apf only handles claims based on Regulation 261/2004 or Regulation 1107/2006 related to flight segments departing or landing in Austria or flights operated by Austrian air carriers.

While the apf seems to offer a good solution, it is important to note that the starting of the procedure suspends the limitation period and other deadlines.⁵¹ Passengers could, therefore, abuse the system by starting a procedure with the apf to obtain some further time, as the proceedings take, on average, close to three months.⁵² This could turn into a serious problem with the in-

⁴⁶ Agency for Passenger Rights (apf), *Organisation*, <https://www.apf.gv.at/en/organisation.html> (last visited July 16, 2022).

⁴⁷ Passagier- und Fahrgastrechteagenturgesetz (PFAAG) [Passenger and Passenger Rights Agency Act] [BGBl I] No. 2015/61; Alternative-Streitbeilegung-Gesetz (AStG) [Alternative Dispute Resolution Act] [BGBl I] No. 105/2015 (Austria).

⁴⁸ PFAAG ¶ 4(1).

⁴⁹ PFAAG ¶ 4(1) in conjunction with AStG ¶ 25.

⁵⁰ PFAAG ¶ 2; AGENCY FOR PASSENGER RIGHTS (APF), OVERVIEW OF THE YEAR 2019, at 2 (2020), https://www.schiennencontrol.gv.at/files/1-Homepage-Schiennen-Control/1g-Presses/Pressemappen/Pressemappen%202020/Agency-for-Passenger-Rights_Overview2019.pdf.

⁵¹ PFAAG ¶ 6(3).

⁵² AGENCY FOR PASSENGER RIGHTS (APF), *supra* note 50, at 4; AGENCY FOR PASSENGER RIGHTS (APF), OVERVIEW OF THE YEAR 2020, at 8 (2020),

crease in claims failed with the agency. Indeed, according to its 2019 and 2020 reports, most of the claims dealt with by the apf related to air transport, with an increase in concluded arbitration procedures between 2019 and 2020.⁵³

iii. ADR for Transport Claims

In France, a Mediator for Tourism and Travel (MTV) was created in 2011 and became operational in 2012.⁵⁴ It is a private initiative by the Syndicate of Travel Agencies (SNAV), Syndicate of Tour Operating Companies (SETO), and the National Federation of Trade Aviation (FNAM). It is free for consumers. The MTV is available for passengers who bought their tickets in France or traveled to or from a French airport, which is in accordance with Article 33(1) of the Montreal Convention. Foreign airlines can only be bound if they willingly submit themselves to the scheme. Its scope, therefore, is broader than the Spanish initiative.

According to the MTV's 2021 report, very few major airlines are parties to the mediation process.⁵⁵ Interestingly, Ryanair is a party to the MTV. This seems to be a new trend for Ryanair, which has also signed a partnership agreement with *Codacons* (the largest Italian consumer association) to settle claims under EU Regulation 261/2004. The Italian example is a bit different from the French one, as under the Italian agreement, the resolution is mainly conducted online through a platform managed and coordinated by *Codacons*. "The role of the Italian aviation mediator, created under the Ryanair-*Codacons* partnership for passenger claims, is envisaged to provide substantial benefits to airlines and consumers and a potential model for other EU jurisdictions."⁵⁶ The agreement demonstrates that ODR (or ADR plat-

https://www.schienencontrol.gv.at/files/1-Homepage-Schienen-Control/1f-Publikationen/Agency-for-Passenger-Rights_Overview2020.pdf.

⁵³ AGENCY FOR PASSENGER RIGHTS (APF), *supra* note 50, at 4; AGENCY FOR PASSENGER RIGHTS (APF), *supra* note 52, at 8.

⁵⁴ LA MÉDIATION TOURISME ET VOYAGE, RAPPORT ANNUEL 2020: LE MÉDIATEUR DU TOURISME ET DU VOYAGE (Mar. 2021), <https://www.mtv.travel/wp-content/uploads/2021/03/RAPPORT-2020.pdf>.

⁵⁵ *Id.* at 12.

⁵⁶ Laura Pierallini, *Ryanair and Codacons Agree ADR Mechanism for Flight Compensation Claims*, INT'L L. OFFICE (Oct. 2, 2019), <https://www.internationallawoffice.com/Newsletters/Aviation/Italy/Studio-Pierallini/Ryanair-and-Codacons-agree-ADR-mechanism-for-flight-compensation->

forms) represents the future for aviation and will avoid the proliferation of claims management companies. The fact that Ryanair, which is notorious for not paying compensation, is party to many ADR mechanisms demonstrates a possible way forward.

In France, passengers can also complain to the Direction Générale de l'Aviation Civile (DGAC), which is a NEB. However, the DGAC does not have the power to oblige airlines to compensate, as its primary function is to ensure the application of Regulation 261/2004.⁵⁷

iv. General ADR

Belgium introduced an ADR system for consumers in 2015, the *Service de Médiation pour le Consommateur* (SMC).⁵⁸ Its aims are defined in Book XVI of the Economic Code and detailed in the *Arrêté Royal du 16 février 2015*.⁵⁹ Its functions are to inform consumers and companies of their rights and obligations, and also to serve as a one-stop shop for ADR claims. Indeed, the SMC receives claims and then transfers them to other specific entities when necessary. Alternatively, if no such entity exists, the SMC would act as a mediator itself. Finally, and interestingly, SMC is also allowed to represent consumers in collective redress cases.⁶⁰ Compared to other entities, the SMC has received fewer complaints, which could be explained by the fact that the consumer protection association in Belgium is quite active and a much better-known entity.⁶¹ It is not clear whether the ADR process suspends the claim and the timeframe in which to submit it. Indeed, although the Law of 25th August 1891 limits the time for filing a claim to one year, a recent Supreme Court decision concluded that the obligations in EU Regulation 261/2004 are considered pe-

claims?utm_source=ILO+Newsletter&utm_medium=Email&utm_content=Newsletter+2019-10-02&utm_campaign=Aviation+Newsletter.

⁵⁷ Gouvernement, *Direction Générale de l'Aviation Civile (DGAC)* (Apr. 15, 2022) (Fr.), <https://www.ecologie.gouv.fr/direction-generale-laviation-civile-dgac>.

⁵⁸ Through the Law of 4th April 2014 implementing Directive 2013/11.

⁵⁹ Available in French, [https://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2013022819&table_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=\(text+contains+\(%27%27\)\)#LNK0671](https://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2013022819&table_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+(%27%27))#LNK0671).

⁶⁰ SERVICE DE MÉDIATION POUR LE CONSOMMATEUR (SMC), RAPPORT ANNUEL 2020, at 11 (2021), https://consumentenombudsdienst.be/sites/default/files/content/download/files/cod-jaarverslag_2020-fr-def-lr_4.pdf.

⁶¹ *Id.* at 27.

nal infractions governed by Article 32 of the Law of 27th June 1937 and therefore have a five-year filing period.⁶²

Portugal has a unique system of ADR for consumers: various regional centers with their own territorial competences and no overlapping of jurisdiction, as well as centers focusing on specific areas (e.g., insurance and motor vehicles).⁶³ In addition, there are two national centers; the *Centro Nacional de Informação e Arbitragem de Conflitos de Consumo* (CNIACC) whose competence is subsidiary, and which can, therefore, only accept complaints when no other center is competent, and *Centro de Arbitragem da Universidade Autónoma de Lisboa* (CAUAL).⁶⁴ Those two initiatives are joint private and public initiatives, partially financed by public authorities. At the municipal level, there are consumer information bodies, *Centros de Informação Autárquico ao Consumidor* (CIAC), whose main function is to provide information. These centers might charge a fee varying between 10 and 50 euros, which are published on the ADR's website. Since a new law took effect in 2019, consumer disputes of low economic value, up to 5000 euros, can be subject to arbitration or mediation if the consumer expressly opts for it.⁶⁵ Previously, companies could voluntarily adhere to arbitration, but under this new law, the rulings of a consumer arbitral tribunal are binding.

3. *Single EU ADR Scheme*

ADR seems to be one of the solutions to the backlog problem and an alternative to taking no action, and it should be promoted. The current system, however, consists of a patchwork of agencies, some entirely dedicated to passengers' rights, and others much more general. Few are overseen by NEBs, which would allow better monitoring of airline compliance with EU Regulation 261. Most of the systems have major flaws, such as their territorial jurisdiction or lack of enforcement powers. There is also a diver-

⁶² *Airhelp Ltd. v. Brussels Airlines SA/NV, Hof van Cassatie* [Court of Cassation], no. C.20.0185.N van, 11 juni 2021, ECLI:BE:CASS:2021:ARR.20210611.1N.5 (Belg.).

⁶³ Lei n.º 144/2015 de 8 de Setembro [Act. No. 144/2015 of 8 September], <https://dre.pt/dre/detalhe/lei/144-2015-70215248> (Port.).

⁶⁴ Authorized through Despacho Ministerial n.º 8294/97 de 29 de Setembro [Ministerial Order No. 8294/97 of 29 September] (Diário da República, n.º 225/1997, 2.ª Série, de 1997-09-29) (Port.).

⁶⁵ Lei n.º 24/96 de 31 Julho [Act No. 24/96 of 31 July] as amended by Lei n.º 63/2019 de 16 Agosto [Act No. 63/2019 of 16 August], art. 14(2) (Port.).

sity in the quality criteria and degree of scrutiny, which could result in forum shopping. Finally, the different structures could result in a lack of consistency in Europe, and even the marketization of ADR schemes.

Furthermore, these agencies rarely cooperate, often leaving passengers in a difficult position. For instance, a passenger departing from the U.K. on an Austrian carrier bound for France would have to choose between contacting the U.K., French, or Austrian ADR body. This could result in confusion, and even inaction. A one-stop shop would, therefore, be a much easier solution and easily implementable. Indeed, the EU has introduced a similar idea through its ODR platform. It seems, therefore, quite easy to reuse this idea and open a specific ADR portal for passengers' claims.

While the imposition of mandatory ADR mechanisms is *per se* a positive change, introducing ADR at all costs might not be the perfect solution. One of the major dangers stems from the increasing reliance on private mediation schemes. Indeed, it can be wondered whether the independence and impartiality of such entities can be maintained when the primary financial burden rests on airlines. Moreover, this privatization could also hinder the quality of the services rendered, as the entity might want to speed up the process to handle more cases.

Although those schemes offer a real solution to passengers, their business model and lack of enforcement mechanisms can render them inefficient. As the ECC-Net noted:

[I]t is becoming increasingly difficult to obtain the application of the rights foreseen by the EU legislation and case law of the CJEU through amicable agreements. Recourse to justice is no longer the last resort, it is often the only recourse for consumers.

The development of private claims companies specialised in airline complaints is therefore not surprising.⁶⁶

Indeed, the complexity of the EU Regulation and case law, coupled with the unwillingness of airlines to participate, puts passengers in a difficult situation.

⁶⁶ EUR. CONSUMER CENTRES NETWORK, *supra* note 25, at 4.

As noted *supra*, the enactment of the EU framework on ADR has facilitated the creation of various independent dispute resolution bodies. While some of these are public bodies, a large number are private, which are approved by public authorities. For instance, the Aviation ADR in the U.K. is approved by the CAA. The existence of these private bodies raises various questions, such as their funding, but also the lack of enforcement mechanisms available to them. Airlines are able to walk away from the scheme at any time, which happened in 2019 with Ryanair. In fact, it is said that Ryanair saved millions of pounds by doing so, as only a very small number of passengers chose to pursue their claims with the CAA.⁶⁷

The surge of Civil Mediation Councils (CMCs) not only places additional pressure on courts and airlines but demonstrates the need for an easier mechanism. A better integration of ADR schemes is, therefore, desirable to provide passengers with adequate remedies. Moreover, a single EU ADR scheme for aviation would avoid conflicting decisions at the national level and ensure the uniform application of EU law.

One foreseen issue is that the CJEU will not recognize those ADR bodies as a “court or tribunal” within the meaning of Article 297 TFEU.⁶⁸ This means that those bodies would not be able to directly ask the Court a question of interpretation of Regulation 261. Such a barrier can hinder the efficiency of the entire system, as passengers must enter the court system for the CJEU to issue an interpretation. It seems very unlikely that the CJEU would make an exception for such a system without a change in legislation.

⁶⁷ Patrick Collinson & Miles Brignall, *Ryanair Saving Millions in Payouts after Leaving Arbitration Body*, THE GUARDIAN (Oct. 4, 2019, 7:01 PM), <https://www.theguardian.com/business/2019/oct/04/ryanair-saving-millions-in-payouts-after-leaving-arbitration-body>.

⁶⁸ They would not pass the test established in Case C-54/96, *Dorsch Consult Ingenieurgesellschaft v. Bundesbaugesellschaft Berlin*, ECLI:EU:C:1997:413. For a body to be a court or tribunal, it must be established by law, a permanent body of a Member State, have compulsory jurisdiction, the procedure must be *inter partes*, it must apply the rules of law and must be independent and is definitive and enforceable. Arbitral tribunals have not been recognized as tribunals. Case C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2018:158.

4. *Conclusion*

The implementation of the consumer ADR directive has increased the awareness of ADR and initiated the development of new forms of claim handling in the aviation sector. However, the development of ADR has occurred at different paces in Europe, resulting in a varied landscape and a patchwork of systems with a diversity of behavior and degree of scrutiny of competent authorities. This results in divergence in quality and a risk of forum shopping.

At the same time, due to the large share of cross-border consumer complaints and the pace at which the aviation sector is developing, it is crucial to find a solution to the traditional court system. Mediation is working well in the aviation sector, particularly in the United Kingdom. Mediation allows cost savings for both airlines and passengers by avoiding court proceedings. It is, therefore, not surprising that the U.K. is planning on increasing the use of ADR.

While it appears to be quite favorable for consumers, the current system has many flaws. First, there is a need for consistency across Europe. The creation of an EU ADR mechanism for aviation could offer a great solution. It would avoid the disparities that are noticeable in Europe, allow passengers to obtain quicker redress, and help solve the backlog problem. Second, many European initiatives do not provide enforcement powers to the ADR authority, rendering those mechanisms largely meaningless. An EU ADR mechanism could be vested with enforcement powers or those powers can be delegated to national authorities. Finally, a single EU ADR scheme for aviation would avoid conflicting decisions at the national level and ensure the uniform application of EU law.