

1

Welcome Aboard: Revisiting Regulation 261/2004

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As noted in the introduction to the first volume in this series,¹ the nature and operation of European Union (EU) law have traditionally been analysed in a highly ‘centralised’ way, through the lenses of Brussels and Luxembourg, in terms of the Treaties and their interpretation by the Court of Justice of the European Union (CJEU). In consequence, both scholarship and legal discourse have often been aimed at the European level, describing and analysing EU law primarily from a perspective akin to that of a fully-fledged and autonomous legal system. Member States and their legal systems, on the other hand, feature much less frequently in this analysis; at least beyond the supposedly obedient application and implementation of primary and secondary EU law, as a source of preliminary references and as recipients of the rulings thus issued.

I. From Landmark Cases to Landmark Legislation

This volume returns to the quest of changing our understanding of EU law by eschewing the traditional top-down, centralised and unitary perspective, and adopting a bottom-up, composite and by definition comparative approach instead. For the present study, however, neither a landmark decision, as was the case with *Viking* and *Laval*,² nor a large-scale socio-legal transformation of entire judicial systems in the new Member States of the Union³ is at stake. Instead, we set out to analyse a rather discrete piece of secondary legislation: Regulation No 261/2004 establishing common rules on compensation and assistance to

¹ M Freedland and J Prassl, ‘*Viking, Laval* and Beyond: An Introduction’ in M Freedland and J Prassl (eds), *EU Law in the Member States: Viking, Laval and Beyond* (Hart Publishing, 2014) 1.

² Freedland and Prassl (eds) (n 1).

³ M Bobek (ed), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Hart Publishing, 2015).

passengers in the event of denied boarding and of cancellation or long delay of flights (Regulation 261).⁴

At first sight, this choice might fail to excite all but a select group of EU aviation experts. To generalist EU lawyers, Regulation 261 may appear somewhat too technical, even dry. Even specialist EU lawyers are unlikely to have studied the Regulation in their academic capacity, even though they may well have encountered its (non-) application as passengers, when their flight was delayed or, in the less lucky course of events, cancelled. Even then, however, Regulation 261 would hardly appear to be the object of much sustained academic study.

Upon further consideration, however, the EU's enactment in 2004 of a comprehensive passenger rights regime fits neatly into the identification of 'landmark' developments in Union law which our series hopes to chart.⁵ First, because the form of the legislative instrument in question is a regulation. The choice of such legal instrument may appear counterintuitive: why focus on a regulation for a *comparative* study of EU law in the Member States? If 'implementation studies' are carried out, they typically examine the national transposition of directives, or other EU sources that expressly mandate national implementation. By contrast, a regulation is directly applicable across the entire Union. In the vast majority of cases, it is not to be transposed by the Member States. Thus, it ought to be the same in all Member States and comparative studies of its application may seem redundant—an assumption that stands in stark contrast with the picture conveyed by individual chapters reflecting on the national application of a nominally 'uniform EU regime'.

Secondly, Regulation 261 offers a well-arranged and compact view of a sub-field of EU law. In contrast to a number of other areas of EU rules, where there are multiple sources at the EU level which make the tracking of impact and causality of individual pieces of legislation or case law on the national level difficult, air passengers' rights are a discrete area of law introduced and codified in a single, concise regulation. This allows for a reliable study of national implementation, since the area of law is clearly demarcated and can be captured even within the confines of the present volume.

Thirdly, as 10 years have passed since Regulation 261's entry into force on 17 February 2005,⁶ the time is ripe for a detailed analysis of the Regulation's impact across national legal systems. Over the years, individual analyses of the Regulation have ranged from praise for providing 'a high degree of protection for passengers'⁷

⁴ European Parliament and Council Regulation (EC) 261/2004 of 11 February 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 repealing Regulation (EEC) No 295/91 (Regulation 261) [2004] OJ L46/1.

⁵ Freedland and Prassl (n 1) 3.

⁶ Regulation 261, Art 19.

⁷ A Milner, 'Regulation EC 261/2004 and "Extraordinary Circumstances"' (2009) 34 *Air and Space Law* 215, 220.

to warnings of ‘a multiple failure’,⁸ ‘in practice lead[ing] to significant problems in the implementation of ... passenger rights’,⁹ or even to ‘serious concerns about the rule of law in the EU’ itself.¹⁰ The national reports at the core of this book allow us to revisit the controversies surrounding the EU’s passenger rights regime in the broader context of individual Member States, and to observe how the Regulation has begun to be absorbed into national discourse and practice.

Fourthly, given the Regulation’s explicit consumer-protective tendency,¹¹ it furthermore provides a good illustration, *pars pro toto*, of some of the challenges faced by the broader consumer *acquis* in its interaction with established market practices across different Member States.

Lastly, there is also the underlying conflict between Union norms and international law that clearly surfaces in this specific area, making it a good case study for a phenomenon that is of increasing importance in EU law more broadly.¹² Decisions of the Court of Justice and of domestic courts¹³ in the present context may provide (and indeed already have) important clues as to different judiciaries’ broader approach to the reconciliation of EU law with international norms.

II. The Multi-Layered Perspectives of a Multi-Dimensional Problem

The evidence from EU and international law, as well as from a cross-section of Member States collected in this volume, is organised as follows. Part I focuses on analysing Regulation 261/2004 at the EU level, as well as in its broader international context. Part II then turns to the Member State perspectives, surveying the (by now perhaps un-) surprisingly diverse impact of the air passenger rights Regulation in 15 EU countries, as well as its extra-territorial implications. Part III draws on these reports, as well as the EU-level perspectives in Part I, to engage in a dialogue across the various spectra, with chapters looking at the implications of

⁸ K Arnold and P Mendes de Leon, ‘Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!’ (2010) 35 *Air and Space Law* 91, 110.

⁹ L Giesberts and G Kleve, ‘Compensation for Passengers in the Event of Flight Delays’ (2010) 35 *Air and Space Law* 293, 303.

¹⁰ J Balfour, ‘Airline Liability for Delays: The Court Justice Rewrites EC Regulation 261/2004’ (2010) 35 *Air and Space Law* 71, 75.

¹¹ Recital No 1, as well as the overall tone and thrust of Regulation 261, hints at the Regulation’s being primarily a consumer protection measure. However, it is true that the formal legal basis for Regulation 261 was former Article 80(2) TEC, ie the title on transport policy, not consumer protection.

¹² Recently most notably Opinion 2/13 on accession to the European Convention on Human Rights (ECHR), ECLI:EU:C:2014:2454. See generally K Ziegler, ‘Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights’ (2009) 9 *Human Rights Law Review* 288.

¹³ J Prassl, ‘EU Aviation Law before the English Courts: *Dawson*, *Huzar*, and Regulation 261/2004’ (2014) 39 *Air and Space Law* 365.

the material thus assembled for the EU's internal market, constitutional questions and the future of the passenger rights regime.

A. EU-Level Perspectives

Part I of this book opens with a unique point of view from a key participant in the leading decisions discussed throughout this volume. Judge *Jiří Malenovský* of the Court of Justice, writing extra-judicially, boldly embraces the opportunity 'to defend the position of the Court of Justice and reply to some of the criticism expressed towards certain judgments delivered in the field of air transport'. Having set out the main lines of challenge to the Court's case law and the consistent responses provided by the Court of Justice in return, chapter two begins with a look at the relationship between EU law and international norms in order to explain the decisions' compliance with established rules of international law.

Malenovský then turns to the 'minefield' of the extraordinary circumstances provision, recounting how a series of last-minute withdrawals of preliminary reference requests hampered the Court's early efforts to provide clear guidance, before focusing on a detailed defence of the principle of delay compensation as developed in *Sturgeon v Condor*¹⁴ and confirmed in *Nelson v Deutsche Lufthansa AG*.¹⁵ This meticulous and hitherto unpublished explanation of the Court's reasoning replies to a long series of academic and domestic judicial criticisms, as well as points of divergence with Advocate Sharpston's Opinion, before concluding with a reflection on the broader legitimacy of the Court's work.

Frank Benyon's chapter focuses on the genesis of Regulation 261 and its broader context, in particular the EU's common transport policy: a market liberalisation long resisted by the Member States on grounds of competence, and later by the air carriers when their new-found freedoms came hand in hand with additional passenger rights. The Regulation's consumer-protective approach can, however, be defended by reference to other sectors, such as the regulation of telecoms and the maritime sector. As the Court of Justice noted in *Vodafone*,¹⁶ market integration is not the sole decisive factor in relying on Article 114 TFEU; consumer protection may play an equally central role.

Benyon then contrasts the development of international transport policy with that in the EU, where Member States continue to participate independently in the negotiations of international agreements. This situation was complicated by the Union's ability to take measures in areas subject to international agreements, incorporating them into EU law through Regulations or Directives, even though the Union cannot conduct such negotiations directly unless it is itself a member of the relevant international organisation. This inter-institutional dimension

¹⁴ Joined Cases C-402 and 432/07 *Sturgeon v Condor Flugdienst* [2009] ECR I-10923 (*Sturgeon*).

¹⁵ Joined Cases C-581 and 629/10 *Nelson v Deutsche Lufthansa AG* [2012] OJ C399/3 (*Nelson*).

¹⁶ Case C-58/08 *Vodafone Ltd* [2010] ECR I-4999.

of Regulation 261 is equally important within the Member States, in particular when it comes to the enforcement of its rules through non-judicial actors such as national enforcement bodies (NEBs).

The international dimension is explored further in *David McClean's* contribution. His chapter starts with the observation that 'it has been a feature of the history of the Warsaw Convention, and will be of the Montreal Convention and Regulation 261 and its likely successor, that some courts will find ways of avoiding the clear meaning of the text'. The argument then hones in on the crucial issue when reading Regulation 261 alongside the Montreal Convention: the latter's exclusivity principle, as laid down in Article 29 of the Convention, stipulating that the Montreal Convention defines exclusively the circumstances in which a carrier may be liable in international carriage. McClean describes how the exclusivity principle has been applied in leading cases in the United States and the United Kingdom. He concludes that it is clear that the Montreal Convention was intended to regulate private rights and that some traditional categories of public international law may therefore not be applicable.

On what legal basis might a claim under Regulation 261 then be brought despite the exclusivity of the Montreal Convention? McClean's careful analysis of the distinction between types of damages suffered by delayed passengers, and the role of Article 12 of Regulation 261 in shaping compensation payments, highlights the illogicalities inherent in the leading cases when viewed from the long-established perspective of the Montreal Convention.

These contradictions are the 'fundamental fallacy' at the starting point of *John Balfour's* contribution. Chapter five dissects the assertion in *R (International Air Transport Association and European Low Fares Airline Association) v Department for Transport*¹⁷ (*ex parte IATA*) that there is no conflict between the provisions relating to delay in Regulation 261 and the Montreal Convention, based on the provisions in the Convention excluding and limiting the carrier's liability for delay and on the exclusivity of the Convention as regards any action for damages. The *ex parte IATA* judgment is discussed in detail, noting in particular Article 8(1)(a) of Regulation 261, which Balfour argues is not concerned with 'immediate' relief and does not operate 'at an earlier stage than the system which results from the Montreal Convention'. Instead, he suggests that it has the potential to result in compensation that is by no means standardised and the same for each passenger, and which requires case by case assessment—thus falling squarely into the regulatory domain of the Montreal Convention. This and related conflicts between EU law and the Montreal Convention are traced through the Court's jurisprudence, leading to the conclusion that the only possible way forward would seem to be an action brought by one or more non-EU parties to the Montreal Convention against some or all of the EU Member States before the International Court of Justice.

¹⁷ Case C-344/04 R (*International Air Transport Association and European Low Fares Airline Association*) v *Department for Transport* [2006] ECR I-403.

Silvia Ferreri, on the other hand, approaches the by now well-rehearsed set of cases from the perspective of the non-transportation specialist. She highlights the complexities caused by multiple sources of law that govern the field of aviation law, from the global level to individual Member States, the ‘cumulative effect’ of which leads to difficult questions when different regimes come into contact with each other—in particular if one regime purports to apply exclusively. The resulting problems can be framed as a tension between the advantages of a flexible evolution of international law on the one hand, and its fragmentation on the other—a tension which the Court of Justice sought to diffuse by attempting to reconcile the interpretation of competing, yet equally binding, texts.

This approach, Ferreri suggests, must also be seen in the light of different approaches to judicial interpretation—the Court of Justice’s expansive understanding may well be different from the literal reading of statutes generally adopted by the English judiciary. It is furthermore in line with the ‘presumption of conformity’, which exhorts judges to ‘reconcile commitments stemming from different sources as long as no explicit abrogation is established in the later legislation in unambiguous terms’. It is in the light of this effort to maintain a coherent application of international sources that the cost of strained interpretation ought to be seen. This may well explain why many national judges tend to follow the Court of Justice’s approach of finding an interpretation that reconciles both Regulation 261 and the Montreal Convention rather than pitting the regimes against each other.

B. Member States’ Perspectives

Part II of this book turns from discussions of Regulation 261 at the European level to reports exploring Member State perspectives. Over a dozen EU states, as well as the Regulation’s extra-territorial impact, are surveyed in 11 chapters, arranged in the alphabetical order of the states to which they relate, chronicling the domestic impact of the Regulation and related case law of the Court of Justice over a period of 10 years: Austria and Germany (*Irena Gogl-Hassanin*), Belgium, the Netherlands and Luxemburg (*Pablo Mendes de Leon* and *Wouter Oude Alink*), Bulgaria (*Alexander Kornezov*), the Czech Republic and Slovakia (*Kristián Csach*), Estonia (*Tatjana Evas* and *Silvia Ustav*), France (*Fabien Le Bot*), Italy (*Laura Pierallini*), Poland (*Krystyna Kowalik-Bańczyk*), Spain (*Mireia Artigot i Golobardes*), the United Kingdom and Ireland (*Benjamin Jones*) and an international contribution with a particular focus on the United States of America (*Brian Havel* and *John Mulligan*).

Each chapter is loosely structured to provide a brief introduction to the country’s relevant institutional and legal framework, before setting out claims under each of the liability events, the role played by the extraordinary circumstances defence and the availability of remedies—or the lack thereof, as the case may be. Particular emphasis is placed, where possible, on the question of whether domestic judges accept the CJEU’s account of Montreal Convention compatibility, as well as the role of NEBs in the (non-) application of the Regulation’s norms, and the

response to the Regulation and its subsequent case law in national academic commentary. From these accounts, a fascinating picture emerges. We can observe a significant degree of diversity in the legal rules that regulate passengers' rights against carriers, and especially in EU law's interaction with Member State law.

Irena Gogl-Hassanin's report on Austria and Germany finds a series of commonalities, not least in terms of a disproportionately high number of preliminary reference requests, as well as some important differences between the two countries. Whilst both jurisdictions have seen a large number of claims, in particular for Article 7 compensation and driven not least by a series of recently established claim aggregator firms, the vast majority of cases have been restricted to first instance courts. In Austria, efforts are currently underway to set up a new NEB, which will also allow claimants to participate in voluntary conciliation. The most frequent legal questions before the courts surround jurisdiction, the notions of cancellation and delay, and, in particular, the extraordinary circumstances defence, with this last usually interpreted restrictively by courts that have generally been far less critical of the CJEU rulings than their German colleagues. Indeed, the latter have played a very active role in pointing out uncertainties in the wording of Regulation 261. After *Sturgeon*, there was a significant increase in the number of cases brought before German courts. Most claims traditionally concerned the question of long delays as distinct from cancellation (no longer a problem after *Sturgeon*) and, once more, the notion of 'extraordinary circumstances'.

Pablo Mendes de Leon and *Wouter Oude Alink* set out by noting how the Netherlands, Belgium and Luxembourg each plays an important role in relation to Regulation 261, as the homes of one of the EU's busiest airports and key EU institutions respectively. Most cases in the Netherlands deal with the scope of extraordinary circumstances. Mendes de Leon and Oude Alink argue that such cases can generally be categorised in three sub-categories—weather, technical condition of the aircraft and other conditions—before analysing the Dutch courts' role in challenging the compatibility of Regulation 261 with the Montreal Convention through preliminary reference requests. In Belgium and Luxembourg, on the other hand, the number of cases dealing with Regulation 261 are comparatively low, even though some Belgian cases dealing with the distinction between cancellation and delay, extraordinary circumstances, the limitation period for actions and the powers of the NEB are addressed. Prior to *Sturgeon* and *Nelson*, the Belgian NEB had taken a narrow view of the application of Regulation 261, with its powers subsequently contested before the Council of State, which held that the former body's rulings are non-binding opinions only.

The implementation of Regulation 261 in Bulgaria has been the source of much confusion, *Alexander Kornezov* explains, due primarily to inadequate national legislation, laissez-faire administrative practices and consistently inconsistent case law. This has led to a situation where most passengers turn to alternative dispute resolution mechanisms without hardly ever taking their case to court. The Bulgarian legislator 'transposed' the Regulation into national law by simply copying its text into an executive order, and by designating an NEB which, while

it has the power to issue binding instructions, merely replies to claims by simple 'letters' devoid of legal force. At the judicial enforcement level, claimants suffer from ambiguity as to whether claims should be brought before administrative or civil courts. The distinction is significant because, in civil cases, the court is a passive adjudicator, with the passenger thus bearing the burden of proving his or her claim. By contrast, at the administrative justice level, the court plays a much more interventionist role. However, the administrative courts have never had occasion to assert their jurisdiction because of the NEB's refusal to adopt a binding decision which could then be challenged. What little case law there is, appears to be equally marred by procedural and jurisdictional problems.

In the Czech Republic and Slovakia, both case law and the administrative practice of the respective NEBs are reasonably similar. *Kristián Csach* explains that both Member States have enacted detailed legislation that covers the distinction between contracts for the transport of persons and contracts for travel services, both of which are relevant when considering the liability of an air carrier. Claims under Regulation 261 are considered regular civil law claims, actionable in the same way as other private law claims. Passengers' claims, however, can be brought either as regular civil law claims or as administrative proceedings. In order to commence the latter, a complaint must first be filed with the air carrier. Only if an unsatisfactory response is given can the passenger turn to the NEB. Interestingly, the Slovak NEB tends to subsume breaches of Regulation 261 in breaches of domestic administrative law. Overall, very few claims seem to have been made in either of these Member States.

The procedural approach to the enforcement of Regulation 261 claims in Estonia similarly relies on two tracks, enabling passengers to make a complaint to the NEB or to issue proceedings in a court. *Tatjana Evas* and *Silvia Ustav* explain that as regards the former, there are two options for settling a complaint before the NEB. The first option is to submit a complaint to the Consumer Complaints Committee, which makes a binding decision. Any failure to comply with such a decision allows the passenger to file an action in a county court. Alternatively, the Consumer Complaints Committee can issue a so-called *precept*, which requires the airline to comply with a particular act. A further option is to file a complaint with the European Consumer Centre of Estonia. Evas and Ustav then analyse the enforcement of Regulation 261 in Estonian courts, noting that there have been very few court cases, and even fewer detailed decisions. Not a single case has considered the Regulation's compatibility with the Montreal Convention. This, they suggest, is primarily due to the questionable effectiveness of domestic procedural rules, as well as to the absence of public or academic discussions of the EU's passenger rights provisions.

Fabien Le Bot's contribution begins by setting out the administrative procedure to bring a claim before the NEB in France. Notably, the NEB is not allowed to take individual decisions granting compensation to passengers. Instead, it assists passengers in their relations with airlines. Sanctions can be imposed on carriers by the Minister responsible for civil aviation at the recommendation

of the Administrative Commission for Civil Aviation. Individual actions for compensation must be brought before a *juge de proximité*, with no right of appeal. Even this low-value judicial procedure can be too complex and troublesome for air passengers, however, in light of the relatively low financial amount at stake. Furthermore, important case law of the CJEU, such as the decision in *Sturgeon*, does not always appear to filter through to first instance judges. A new law establishing a right to bring a class action might provide a new way for consumers to obtain individual damages from the aviation industry, which is said to have generally failed to respect its EU law obligations. Most airlines are reluctant to provide compensation when approached, especially in cases of delay, and follow a deliberate strategy of non-disclosure in an attempt to prevent passengers from knowing about their rights. It remains to be seen, however, whether the new law can be used to make a claim under Regulation 261.

In Italy, *Laura Pierallini* notes that passenger rights include not only the international and European provisions discussed thus far, but also a domestic dimension: the Italian Civil Code and the Italian Navigation Code contain provisions dealing with air passenger rights at the national level. This overlap can be illustrated in the context of Montreal Convention compatibility: Italian case law has qualified the right to compensation for a delayed flight under Regulation 261 as cumulative with the right to damages under Article 19 of the Montreal Convention. One of the most curious aspects of the Italian experience is the fact that even prior to the CJEU's decision in *Sturgeon*, the Italian courts had recognised a right to compensation where a flight is delayed. As a result, the latter case had little if any impact domestically, as a series of decisions by Judges of the Peace from across the country demonstrate. The same is true for the application of the extraordinary circumstances defence: by the time of the Luxembourg court's ruling in *Wallentin-Hermann v Alitalia*, the Italian courts had already limited the extraordinary circumstances defence to situations such as strikes affecting the industry, whereas technical failures were not generally classed as an extraordinary circumstance.

Krystyna Kowalik-Bańczyk's contribution explores the situation in Poland. Even though absolute claim numbers as a proportion of air journeys are still relatively low, the overall implementation of Regulation 261 appears to have been successful in raising the standard of passenger protection. As in many of the jurisdictions surveyed, there are different ways of enforcing the Regulation: through the NEB or before the civil courts. The interaction between these routes can sometimes lead to difficulties. In general, however, the NEB regularly exercises its power to grant compensation to passengers. The interpretation of key terms of the Regulation is ensured in line with the Court of Justice's case law, including both a narrow interpretation of the exceptional circumstances defence and generous awards of financial compensation post-*Sturgeon*. The only exception to this picture is compensation for denied boarding, where the courts have steered away from the Court of Justice's jurisprudence and regularly deny compensation.

The application of Regulation 261 in Spain is of particular interest given that nearly a quarter of all air passenger movements in the EU originate from or are

destined for Spain, as *Mireia Artigot i Golobardes* notes in the introduction to her chapter. Claims usually proceed in three stages, commencing with complaints filed online directly with the relevant airline. If this does not resolve the issue, passengers can engage in mediation procedures, before progressing to file a judicial claim. Claims under the Regulation are often brought—and heard—concurrently with a claim for breach of contract under the Spanish civil code. As a small claim worth less than €2,000, passenger rights complaints can be filed without the assistance of legal counsel, making the enforcement of the Regulation straightforward on paper. In reality, however, access to the courts is slow and lengthy due to significant backlogs, which act as a major deterrent. To address this problem, claims worth less than €3,000 can no longer be appealed—which means that the vast majority of first instance decisions applying Regulation 261 cannot be challenged. In combination with lengthy judicial delays, this has resulted in ‘passengers having little incentive to bring claims’ and in ‘airlines’ systematically denying compensation, knowing that their exposure to claims before courts is remarkably small’.

Turning next to the situation in the United Kingdom and Ireland, a contribution by *Benjamin Jones* finds that the ‘[a]pplication of Regulation 261 in the UK has been undermined by fierce resistance from the air transport industry, a weak NEB and a lack of awareness of Regulation 261 in the lower courts’. The airlines’ response to passenger claims varies dramatically between different carriers in the UK. The Civil Aviation Authority, in its role as the UK NEB, will generally not become involved in individual claims beyond forwarding them to the airline in question; indeed, even overall, ‘its supervision is notably light touch’. The Irish NEB, on the other hand, appears to be more proactive in enforcing complaints in individual cases, as well as in pursuing airlines whose policies lead to repeat infringements. The number of judicial proceedings in the UK has, however, been on the rise more recently, driven in particular by the public’s awareness of a right to delay compensation following media coverage of the relevant Luxembourg decisions, and the increasing availability of no-win-no-fee services provided by solicitors, sometimes in co-operation with claim aggregator firms. The dominant litigation strategy adopted by the airline industry in response to this increase in claims has been a reliance on the extraordinary circumstances defence, and in particular on a non-binding indicative list of such circumstances prepared by several NEBs—both strategies which have become more difficult following the Court of Appeal’s recent interpretation of that defence in line with established CJEU case law.

The last contribution to Part II of this book explores the extra-territorial application of Regulation 261, especially as regards its enforcement before non-Member State courts. *Brian Havel* and *John Mulligan* focus in particular on the United States of America. They note the strong incentive for bringing claims before US courts given the country’s long-established tradition of class action claims, where claimants can petition the court to recover not merely their own entitlement, but also that of every similarly situated individual who has suffered in similar circumstances. Such permission—which the authors emphasise has yet to be granted by a court—would significantly increase the financial exposure of air

carriers. The very applicability of Regulation 261 in US law constitutes a further hurdle for claimants, who have tried to rely on a series of arguments—notably ones akin to the notion of direct effect in EU law and to contractual incorporation of Regulation 261 passenger rights. The direct effect approach has rarely been successful, as Havel and Mulligan note. In contrast, the incorporation of the Regulation's terms into an individual's contract of carriage provides a higher chance of (jurisdictional) success, with a claim's pre-emption by US or international law (in particular the Montreal Convention) as a final hurdle. The chapter concludes with a brief overview of 'copy-cat legislation' in countries ranging from Brazil to the Philippines, which draws on Regulation 261 to inspire domestic air passenger rights statutes.

C. Broader Horizontal Perspectives

On the basis of the comparative insights developed throughout Part II, the final set of chapters in Part III of the volume turns to providing broader perspectives from EU aviation law, the EU internal market, EU private law and consumer protection, as well as EU constitutional and institutional law more generally.

Sacha Garben's contribution suggests that the area of EU air passenger rights has become one of the most turbulent—and fascinating—topics in EU law and politics, turning into a veritable goldmine for scholars of various disciplines because of the many insights the debates surveyed throughout the present volume yield into the political and legal workings of the EU institutional order. Amongst these many potential topics, her analysis focuses in particular on issues of EU inter-institutional dynamics, judicial dialogue and legal culture that underlie this field, across a series of different periods that can already be distinguished in Regulation 261's relatively short life span. In setting out this timeline, Garben emphasises the institutional interaction between the European judiciary, the various legislative actors and stakeholders, the judicial dialogue (or indeed 'shouting-matches') between the Court of Justice and selected national courts, and the rising claims culture in Europe. A detailed exploration of the increasing number of preliminary references shows up important links between judicial action in several Member States, and suggests that 'the on-going preliminary referencing is due to the airlines' litigation practices rather than fundamental questions of interpretation or judicial contestation of the applicable law'. The chapter concludes with a return to three key themes identified in Garben's previous work, looking at the events of the past 10 years—and the proposed changes to come—through the lens of concerns about judicial activism, the inexorable rise of Euroscepticism and the growth of 'Euro-legalism'.

Joasia Luzak approaches the notion of passenger rights from the perspective of the EU private lawyer, with a particular view to consumer protection in the internal market: after all, there is *prima facie* little difference between the Union citizen in his or her capacity as a 'passenger' or as a 'consumer'. The chapter focuses on a comparison of the existing regimes granting rights to consumers when they

purchase services in the EU (including rights under the Consumer Rights Directive, the Services Directive and the Package Travel Directive) with the provisions of Regulation 261, highlighting a series of protections European consumers may already be enjoying generally yet are missing when acting in their capacity as air passengers. These include consumers' information rights, a set of consumer-specific remedies in case of non-performance or improper performance of a contract, as well as a right of withdrawal in certain circumstances. Luzak goes on to question the divergences that quickly become apparent. Might there be important justifications for differences in consumer-protective measures across various service sectors, including the aim to improve the internal market or to strengthen the position of weaker parties in European private law? Luzak does not find any such account particularly convincing. A potential solution for many of the current problems might lie in the further harmonisation of European private law as regards the provision of services, restoring coherence to the rights of Union citizens as air passengers and consumers.

Given the significant controversy and practical problems identified thus far, few commentators were surprised by the Commission's announcement in the Spring of 2013 that it would seek to propose a set of reforms and extensions in an updated Regulation. *Jeremias Prassl* looks at these proposals in detail in chapter twenty, with a particular view to understanding how, if at all, the Union legislator could take account of the multiple dimensions of heterogeneity encountered by the original Regulation and its implementing case law over the past decade. In revisiting his previous conclusions on the reforms, three topics in particular are explored: a future Regulation's relationship with the Montreal Convention of 1999; on-going controversies surrounding the role of the extraordinary circumstances defence; and the role of different actors at the EU and national level in ensuring air carriers' compliance with, and the enforcement of, established and novel obligations. Close scrutiny of each of these topics suggests that despite the relatively frequent application of the Regulation, the chances of establishing a truly uniform regime across 28 different countries (and beyond) are rather slim—a conclusion that poses a non-negligible challenge to traditional assumptions about the operation of EU law in the Member States.

Michal Bobek's contribution returns to the very notion of uniformity and uniform rights in Europe. The chapter offers an overall, EU-law-generalist conclusion to this volume by placing its subject matter in the broader context of the national application and enforcement of EU law. What can the practice of Regulation 261 in the Member States tell us about the life of EU law in the Member States in general? Bobek first sets out the orthodoxy in terms of what and how a regulation is supposed to function within the legal systems of the Member States. Secondly, drawing on the individual country reports in the Part II of this volume, the operation of Regulation 261 in the Member States is examined comparatively in relation to three elements: substantive rights, institutions and procedures. Lastly, the performance of Regulation 261 is evaluated structurally in terms of its ability to unify passengers' rights in Europe, while placing the specific issues raised within

the air passenger rights regime in the context of broader debates relating to EU law sources and institutions.

III. Understanding the Debate: A Primer on (EU) Aviation Law and Air Passenger Rights

Our opening section suggested that despite its highly specialised and technical nature, EU aviation law and Regulation 261 in particular offer fertile ground for a comparative study of the life of EU law in the Member States. The details of these regimes will be discussed at length in the chapters that follow; a succinct introduction to Regulation 261 and some of Court of Justice's most important decisions flowing from it may nonetheless be apposite at this juncture to help EU law generalist readers in navigating key debates and controversies.¹⁸

A. Regulation 261/2004

The Contract of Carriage by Air has traditionally been the subject of international law,¹⁹ falling under a regime dating back to the Warsaw Convention of 1929.²⁰ Despite subsequent improvements to passenger protection,²¹ its underlying regulatory design²² was not significantly modified in the revised Montreal Convention of 1999, to which all EU Member States are signatories. The Union itself acceded to the Convention by Council Decision 2001/539,²³ with the substantive provisions of the Montreal Convention being adopted in Regulation 2027/97.²⁴ However, this incorporation of the Montreal Convention into the Union legal order did not spell

¹⁸ For a full account, see J Prassl, 'The European Union and The Montreal Convention: A New Analytical Framework' (2013) 12 *Issues in Aviation Law and Policy* 381, on which parts of the subsequent discussion draw.

¹⁹ D McClean, 'Carriage by Air' in H Beale (ed), *Chitty on Contract Volume II—Specific Contracts*, 32nd edn (Sweet & Maxwell 2015); D McClean (ed), *Shawcross and Beaumont's Air Law*, 4th edn (Butterworths, 1991).

²⁰ Convention for the Unification of Certain Rules for International Carriage by Air, signed at Warsaw in 1929.

²¹ Not least because of the United States' threatened renunciation: A Lowenfeld and A Mendelsohn, 'The United States and the Warsaw Convention' (1967) 80 *Harvard Law Review* 497.

²² Which is strongly industry-protective, not least due to historical reasons: Larsen *et al*, *Aviation Law: Cases and Related Sources* (Nijhoff 2012) 312; B Havel, *Principles and Practice of International Aviation Law* (Cambridge University Press 2014) para 4.25.

²³ Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [2001] OJ L194/38.

²⁴ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents [1997] OJ L285/01, as amended by Regulation 889/2002 of the European Parliament and of the Council of 13 May 2002 [2002] OJ L140/2.

the end of the Union legislator's attempt at regulating passenger rights, which had already begun to address particular incidents such as denied boarding²⁵ and culminated in a broader Regulation setting out a general passenger-protective regime in 2004.

The scope of application of the Regulation's provisions is broad. Nearly all passengers departing from or to the territory of an EU Member State can invoke its protection.²⁶ But whilst its scope of application is therefore broader than that of the Montreal Convention (which was *prima facie* inapplicable in the case of purely domestic flights), it is not unlimited.²⁷ The Regulation's regime is mandatory and cannot be excluded, limited or waived.²⁸

i. Liability Events

Four possible events are identified in the Regulation:

- (1) *Denied boarding*—Article 4 provides that in case of overbookings, the airline first needs to call for volunteers, who will be entitled to a refund or re-routing pursuant to Article 8. If the denied boarding is involuntary, the full remedial suite (as laid down in Articles 7, 8 and 9) applies.
- (2) *Cancellation*—In the case of flight cancellation, passengers are likewise entitled to the full range of remedies under the Regulation in accordance with Article 5, subject only to limited exceptions (such as, for example, notification of the cancellation at least two weeks before the scheduled time of departure). The Court of Justice has defined the relevant event broadly, including, for example, the return to base of a flight that had originally departed on time but had to turn around en route due to subsequent technical problems.²⁹
- (3) *Delay*—Article 6 of the Regulation sets out a series of distance/time pairs, delays in excess of which trigger the assistance specified in Articles 8 and 9. The judicial interpretation of this provision has become the subject of extensive controversy.
- (4) *Involuntary upgrading and downgrading*—Article 10 deals with on-board responses to overbooked flights, providing that the carrier may not charge customers for involuntary upgrades, and in the case of transportation in a class lower than that for which the ticket was purchased, giving a right to reimbursement of up to 75 per cent of the original ticket price within a maximum delay of seven days.

²⁵ Council Regulation (EEC) 259/91 establishing common rules for a denied boarding compensation system in schedule air transport [1991] OJ L36/1.

²⁶ Regulation 261, Art 3.

²⁷ Case C-173/07 *Emirates v Schenkel* [2008] ECR I-5237: on a flight routing from Germany to Manila and back via Dubai, the Regulation was not applicable to the Manila–Dubai leg of the journey.

²⁸ Regulation 261, Art 15.

²⁹ Case C-83/10 *Rodriguez v Air France* [2012] ECR I-9469.

ii. *The Extraordinary Circumstances Defence*

The payment of compensation in case of cancellation of a flight, provided for in Article 5, is subject to a defence set out in Article 5(3) of Regulation 261. It is worded as follows:

An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

As the Commission notes, '[i]n practice, experience has shown that, in most cases, airlines invoke these extraordinary circumstances when facing a cancellation. In 2005, the Commission advised all Community carriers that such a practice cannot be abused.'³⁰

The CJEU's response was an unsurprisingly narrow interpretation of the provisions laid down in Article 5(3), notably in relation to technical difficulties with the designated aircraft. In its decision in *Wallentin-Hermann v Alitalia*,³¹ the Court attempted to close off airline's extensive reliance on the presence of 'extraordinary circumstances'. It furthermore found that issues such as 'political instability or meteorological conditions incompatible with the operation of the flight are relevant only if they create an unexpected risk, but are not directly an exemption'.³² In a similar vein, the Court held in *Eglitis v Air Baltic*³³ that so-called knock-on delay resulting from an earlier airspace closure was not in and of itself an extraordinary circumstance.

iii. *Remedies*

The original design of the Regulation as enacted draws on a three-part remedial regime to ensure the differentiated application of a range of distinct yet complementary entitlements of air passengers. They are as follows:

- (1) *Right to compensation*—Article 7 provides for compensation in form of a fixed cash sum of up to €600 in the case of long-haul flights in excess of 3,500 kilometres.³⁴ This amount may be halved for re-routed passengers arriving within a certain window following the scheduled arrival time of the flight originally booked.

³⁰ Communication from the Commission to the European Parliament and the Council pursuant to Article 17 of Regulation (EC) No 261/2004 on the operation and the results of this Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, COM/2007/0168 final [5.2].

³¹ Case C-549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061.

³² M Rasero, 'The Capacity of the Court of Justice of the European Union to Promote Homogeneous Application of Uniform Laws: The Case for Air Carrier Liability for Flight Delays and Cancellations' *Transnational Notes* (NYU Law Blogs) of 26 October 2011, available at <<http://blogs.law.nyu.edu/transnational>> (accessed 1 July 2015).

³³ Case C-294/10 *Eglitis v Air Baltic* [2011] ECR I-3983.

³⁴ Approximately GB £430 or US\$ 630 at the time of final editing in June 2015.

- (2) *Right to reimbursement or re-routing*—Once Article 8 has been triggered, passengers are free to elect between reimbursement of the full ticket cost,³⁵ or re-routing ‘under comparable transport conditions’. As regards the latter choice, the Regulation makes some further provisions (eg as regards destinations with multiple airports); the overall application of this Article in practice appears, however, to be a lot more complex than it first appears.³⁶
- (3) *Right to care*—Pursuant to Article 9, airlines can become responsible for the provision of meals, refreshment and hotel accommodation ‘in a reasonable relation to the waiting time’, as well as having to offer passengers two free telephone calls, fax messages or e-mails.

The Regulation, lastly, includes a series of automatic duties incumbent on all air carriers coming within its scope, notably an obligation to inform passengers of their rights both generally and in the case of a liability event.³⁷ A network of NEBs is designed to ensure compliance with passengers’ rights.³⁸

B. The Court of Justice’s Case Law

Regulation 261 has led to a series of high-profile challenges and decisions, discussed extensively in the chapters that follow, often by some of the key actors involved. The two most important decisions of the Court of Justice revolve around the Regulation’s interaction with international law and the interpretation of its remedial provisions in the case of delayed flights, respectively.

i. Montreal Convention Exclusivity: Case C-344/04 ex parte IATA (2006)

The Montreal Convention of 1999 stipulates that in providing a remedy for certain kinds of damage, its provisions are to be applied exclusive of alternative remedies. Central to this is Article 29, which provides:

In the carriage of passengers, ... any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention ... In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

This wording is said to ‘make very clear the exclusivity of the Convention rules across the whole field of air carrier liability’, and judicial interpretations

³⁵ Subject to certain deductions for already-taken flights in furtherance of the journey’s original purpose: Regulation 261, Art 8(1)(a), and in addition to a return flight to the point of departure where applicable.

³⁶ As noted by J Bech Serrat, ‘Re-routing under the Air Passenger’s Rights Regulation’ (2011) 36 *Air and Space Law* 441, 450–51.

³⁷ Regulation 261, Art 14.

³⁸ Regulation 261, Art 16.

have generally confirmed this idea that the Convention remedies should be ‘exclusive ... of any resort to the rules of domestic law’³⁹

In one of the leading decisions on the interpretation of what is today Article 29,⁴⁰ *Sidhu v British Airways*,⁴¹ for example, passengers sued in respect of their detention in Iraq following their flight’s scheduled landing in Kuwait after the beginning of the Iraqi invasion there. Claims were brought at common law, as the Warsaw Convention was accepted as not applying due to a lack of physical harm to the passengers.⁴² The House of Lords held that the claimants could not succeed in their alternative action, even though redress was impossible under the Montreal Convention itself.

Given the bite of Article 29, therefore, a lack of remedy *in casu* cannot be pleaded to outflank the Montreal regime’s exclusivity. On the basis of this strict interpretation of exclusivity, it is not surprising that questions soon arose as to the overall compatibility of Regulation 261/2004 with the Montreal Convention, in particular as regards the relationship between the provisions regulating compensation for delay in the respective regimes. Article 19 of the Montreal Convention provides that a carrier is *prima facie* ‘liable for damage caused by delay in the carriage by air of passengers, baggage and cargo’. These provisions rarely offer meaningful redress to delayed passengers, however, given that a carrier can avoid liability by proving that it or its agents ‘took all measures that could reasonably be required to avoid the damage or that it was impossible for it or [its agents] to take such measures’. Judicial interpretations of this widely-worded exoneration mechanism have excluded technical failures as long as the aircraft was within its ordinary maintenance schedules,⁴³ or where a one-off delay was caused by the unreasonable actions of a third party.⁴⁴

In what has become widely known as the *ex parte IATA* case,⁴⁵ the Grand Chamber of the CJEU responded to a preliminary reference from the High Court in London.⁴⁶ The claimants, two key industry representative bodies, had sought to challenge the validity of the EU regime, more specifically Articles 5, 6 and 7 of Regulation 261, on several grounds, including procedural irregularity in the

³⁹ D McClean, ‘Carriage by Air’ in H Beale (ed), *Chitty on Contracts*, 32nd edn (Sweet & Maxwell 2015) 35-013.

⁴⁰ cf M Clarke, *Contracts of Carriage by Air*, 2nd edn (Lloyd’s List 2010) 8ff.

⁴¹ *Sidhu v British Airways* [1997] AC 430, 436–37.

⁴² This appeared to be because there was no ‘accident’ in either case, and some doubt as to the existence of ‘bodily injury’: see *ibid*, 441.

⁴³ *Martel v Air Inter* (1984 *Revue française de droit administratif* 298; 1981 *Revue française de droit administratif* 239): hydraulics failed after 179 hours, when maintenance cycle was 230 hours.

⁴⁴ *SAS v Wucherpfennig*, LG Hamburg decision of 6 April 1955, [1955] *Zeitschrift für Luft- und Weltraumrecht* 226: Hamburg customs agents refused to hand over cargo.

⁴⁵ *ex parte IATA* (n 17).

⁴⁶ Pursuant to Art 267 of the TFEU. For case commentary, see, eg, J Wegter, ‘The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention’ (2006) 31 *Air and Space Law* 133.

legislative process and violation of the principles of legal certainty and proportionality. The primary thrust of the submissions, however, was the Regulation's purported inconsistency with the Montreal regime—to which the EU, as well as all of its Member States, is a signatory.

Building on the Advocate General's opinion, which had emphasised the regimes' complementarity both in substance and legal nature,⁴⁷ the Court of Justice drew a clear distinction between different kinds of damage,⁴⁸ suggesting that:

Any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance ... Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment ...⁴⁹

The Court of Justice then went on to hold that since Articles 19, 22 and 29 of the Montreal Convention only dealt with the second kind of damage, it would be wrong to suggest that the

authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authority to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer inconvenience inherent in the bringing of actions for damages before the courts.⁵⁰

As the system prescribed in Article 6 of Regulation 261 was one of 'standardised and immediate assistance and care measures',⁵¹ operating at an earlier stage than the system of compensatory damages that resulted from the Montreal Convention, and a claim brought under Regulation 261 could not inhibit a later separate claim under the provisions of the Convention, the two regimes could therefore co-exist,⁵² and the claimants' challenge was bound to fail.

ii. *Financial Compensation for Delay: Cases C-402 & 432/07 Sturgeon (2009)*

The second major controversy arose in the context of financial compensation for passengers whose flights had been delayed but not cancelled. Regulation 261 addresses the former in its Article 6, with liability triggered depending on certain

⁴⁷ Opinion of AG Geelhoed of 8 September 2005 in *ex parte IATA* (n 17) paras 42, 48.

⁴⁸ Unfortunately, this distinction between different types of damage became terminologically lost in the English translation of the decision of the Court of Justice. The ('original') French version of the *ex parte IATA* decision establishes and maintains a conceptual distinction between 'préjudice' and 'dommage'. However, both these categories become just 'damage' in the English version, thus contributing to the confusion concerning whether or not 'damage' under the Montreal Convention is any different from the 'damage' under the Regulation 261.

⁴⁹ *ex parte IATA* (n 17) para 43.

⁵⁰ *ibid*, para 45.

⁵¹ *ibid*, para 47.

⁵² *ibid*, paras 45–46. The Court has since repeated this finding on numerous occasions, including, eg, in Case C-204/08 *Rehder v Air Baltic Corp* [2009] ECR I-6073.

time/distance pairs. Remedies are limited to Article 9 (care) initially, with Article 8 (re-route or reimbursement) applicable additionally after a period of five hours. Crucially, however, Article 7 (compensation) was not included in the original design, at least when approaching the Regulation as to its text, a distinction challenged by the CJEU's much-discussed judgment in *Sturgeon*.⁵³

In July 2005, the *Sturgeon* family had brought a claim for cancellation compensation against Condor, an airline that had transported them from Toronto to Frankfurt with a delay of over 25 hours. In light of this length of time, the claimants alleged that their original flight had been cancelled, rather than delayed.⁵⁴ A question as to the interpretation of the term 'cancellation', and its relationship with the concept of 'delay', was eventually referred to the Court of Justice.⁵⁵ The Fourth Chamber of the Court, having rephrased the joined questions, held that cancelled flights and delayed flights were 'two quite distinct categories', and that a delayed flight could therefore not simply be re-classified as cancelled, as long as the flight was 'operated in accordance with the air carrier's original planning'. The Court then went on to hold, however, that in line with the Regulation's consumer-protective objectives, it could not 'automatically be presumed that passengers whose flights are delayed do not have a right to compensation'. Given the absence of any 'objective ground capable of justifying [the originally designed] difference in treatment of passengers suffering substantially identical problems resulting from different events', the Court of Justice extended the right to compensation in Article 7 of Regulation 261 to passengers suffering delay in reaching their final destination in excess of three hours.

This judgment triggered a veritable avalanche of academic and practitioner commentary, ranging from those praising the Court's strong role in interpreting Article 6 in line with its consumer-protective purpose to others deeply worried about the threat of 'judicial legislation'.⁵⁶ In spite of the latter observations, the Grand Chamber of the Court in 2012 confirmed the *Sturgeon* extension of delay liability in its decision in the joined cases of *Nelson* and *TUI*.⁵⁷

IV. The Themes and their Implications

The following chapters will further explore these controversies, first from the Brussels and Luxembourg perspective and, in Part II, from the vantage point of

⁵³ *Sturgeon* (n 14).

⁵⁴ An unsurprising argument given the then prevailing airline practice of delaying flights instead of cancelling them, in an attempt to avoid triggering Regulation 261/2004. See C van Dam, 'Air Passenger Rights after *Sturgeon*' (2011) 36 *Air and Space Law* 259, 260.

⁵⁵ A similar set of questions was referred by an Austrian court concerning a long-delayed Air France flight, and joined to the original proceedings (Case C-432/07, *Böck and Lepuschitz v Air France SA*).

⁵⁶ R Lawson and T Marland, 'The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of *IATA* and *Sturgeon*—in Harmony or Discord?' (2011) 36 *Air and Space Law* 99, 100.

⁵⁷ *Nelson* and *TUI* (n 15).

individual Member States. Apart from the differentiated perceptions and understandings of the legislation and case law set out above, there are at least five further points that merit the reader's attention when diving into the chapters and the arguments that follow. What will be offered in this section, by way of an introduction to discussions that follow in subsequent chapters, is a concise identification of five such themes that recur throughout the volume in one way or another.

First, what is the desired *level of uniformity* that EU legislation is supposed to achieve within the Member States? Genuine uniformity that one normally associates with the notion of a common or an internal market? Or is the aim merely similarity, a sort of a legal approximation? Moreover, with regard to what precisely should we evaluate uniformity? Only with regard to the statement of substantive rights, but not their enforcement and realisation? If that is indeed the case, is such a repartition of tasks in fact ever able to deliver any reasonable degree of uniformity, since nobody will be able to reach the same substantive result through such variable procedures?

Secondly, how far is the same European text likely to be read and to be understood in the same way across the Member States? Or is there inevitably bound to be an internal, value-orientated diversity of interpretation of the same instrument? Expanding on the previous point, the reader might think about the *value preferences* and value balance manifested in adjudication choices in the various systems, but nominally hidden behind the same regulation text. In particular, where precisely is the balance to be put in individual cases when interpreting the Regulation? If Regulation 261 was adopted primarily as a consumer protection measure, could it therefore be argued that a certain 'consumer-friendly' interpretative tendency is in fact embedded in it, as a certain meta-rule guiding its interpretation? Is such a vision, arguably present in much of the case law of the Court of Justice, shared by the courts of the Member States?

Thirdly, in a Union with decentralised enforcement of 'federal' rules, in which Member States' authorities act as a 'servant of two masters', enforcing both national rights as well as EU law-based ones, there is always likely to be certain *institutional diversity* in realising European rules at the national level. Connected to the first point above, however, is the question of how much diversity ought to be permissible in fact, in order to be able to talk of a unified, or at least similar, regime in all the Member States. Is it really acceptable if, in terms of institutional structure, one Member State entrusts the enforcement of Regulation 261 to the national aviation authority, another to a ministry and a third to a consumer ombudsperson or trade inspectorate? How far are such institutional choices likely to rebound and decisively to shape the type and style of enforcement of the EU law measure at the national level in the longer run?

Fourthly, *national procedures* naturally connect to national institutional diversity. They follow the same logic of delegation to the Member States' default choice in terms of how EU law-based rights will be enforced at the national level, whilst of course remaining under residual European supervision in terms of their equivalence and effectiveness. However, should there not be at least some basic similarity

in terms of procedural set-up, which would allow the air passenger-consumer to vindicate his or her rights within a fairly similar framework? With this assumption in mind, readers are invited to conduct a little experiment in reading the chapters in Part II of this volume. First, on the basis of Regulation 261 alone, how would one frame the expected procedure for enforcing rights in the case of a delayed flight? Secondly, the reader may compare his or her expectations with the individual procedural regimes in the Member States captured in Part II of this volume. Moreover, it is important to remember that the legislation was put in place for the benefit of the ‘travelling consumer’, ie a person who is often likely to originate from outside the jurisdiction in question. Thus, in realistic terms, the issues of knowledge, access and, above all, comprehensive procedures come to the fore with renewed importance.

Fifthly and lastly, Regulation 261, in the form of a case study dissected in the ensuing chapters, provides considerable food for thought with regard to many of the *grander themes* relating to EU legislation, and the debates concerning its goals, utility and nature. What is the threshold for ‘legislative success’ when looking back at the operation of an EU regime that might now justify adopting further EU legislation on the matter in the first place? If an EU measure is adopted in the name of establishing uniform rules, and this is apparently as good as it gets in application reality later on, was it in fact worth it? Are the transaction costs in terms of adopting EU legislation justified? Does the ‘linear progression’ logic used for the current version of the subsidiarity analysis in the vast majority of Commission proposals (aka ‘there remains diversity on the national level thus EU action is necessary because common rules are needed and nobody else but EU can set those’) make sense, if it is apparent that even further EU rules are in fact unlikely to create greater uniformity? In view of such resistance and diversity, might it not be more useful to select issues and areas within a given field and seek full unification in them, while abandoning others where the Union cannot achieve a reasonable degree of commonality? Moreover and more specifically with regard to individual sources of EU law, if a regulation, ie the strongest legal instrument the EU has at its disposal in terms of achieving uniformity, is only able to achieve such degree of legal approximation, what, then, is the state of legal uniformity achievable by directives, or previously framework decisions, or other sources of EU soft law? It is with these questions in mind that the first part of this volume now turns to an exploration of the EU-level perspective.