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Multimodal Passenger Rights in the European Union

Development, Compatibility, and Challenges of the EU Mode-Specific Passenger Rights Regulations in the Light of a Potential Legislative Measure for Passenger Rights in Multimodal Transport

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Preface

This thesis was written in completion of a Master of International and Comparative Law with a specialization in International Business Law at the University of Helsinki. The work explores the feasibility of a potential EU legislative instrument for passenger rights in multimodal transport and tries to establish how such an instrument may be reconciled with existing mode-specific passenger rights regulations.

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Maximilian Huemer

Contents

List of Abbreviations

ADR	Alternative Dispute Resolution
AG	Advocate General
ASA	Air Service Agreement
CAA	Civil Aviation Authority
CIV	Uniform Rules concerning the Contract of International Carriage of Passengers by Rail
CJEU	Court of Justice of the European Union
COTIF	Convention concerning International Carriage by Rail
CVR	Convention on the Contract for the International Carriage of Passengers and Luggage by Road
ECA	European Court of Auditors
ECC	European Consumer Centre
ELFAA	European Low Fares Airline Association
EU	European Union
GDS	Global Distribution System
IATA	International Air Transport Association
NEB	National Enforcement Body
MEP	Member of the European Parliament
PRM	Persons with reduced mobility

1 Introduction

1.1 Introduction to the topic

Passenger rights in the European Union (EU) are at a crossroads. Key pieces of EU passenger rights legislation are up for amendment in front of issues of effective enforcement, and existing ambiguities and especially air passenger rights have come under a lot of scrutiny from various stakeholders in recent years. Despite these developments, overarching goals of sustainability and environmental considerations of the EU are pushing towards increasing passenger multimodality, a development to be accompanied by an EU measure addressing the rights of passengers in multimodal transportation. This represents a novelty, as this field of passenger transport so far has been left untouched by the existing passenger rights instruments of the EU, which have focused on the four main modes of passenger transport[1] separately. To grasp the magnitude of the task of addressing this legislative gap of multimodal passenger rights and to understand the problems of reconciling such a measure with the existing passenger rights system, it is imperative to contextualise it in front of the developments and drivers that led to the current mode-specific system of passenger rights protection in the EU.

1.1.1 The root of passenger rights in transport market liberalization

While the first European Union legislative initiatives in the field of passenger rights were adopted in the beginning of the 1990s,[2] the necessity of intervention of the legislator in this field, which had previously been governed by a number of mode-specific international agreements, is

1 Air, Rail, Sea and inland waterways, Bus and Coach.

2 Commission, 'Strengthening passenger rights within the European Union' (Communication) COM(2005) 46 final, para.9.

intrinsically linked to the efforts of liberalization of the EU transport market.[3]

The legislative basis for the EU's transport market liberalization had already existed since the Treaty of Rome,[4] which stipulated the importance of the creation of a single transport market, as an enabler of the key cornerstones of the envisaged common European market, specifically in the fields of services and the free movement of goods and people.[5] Despite the inclusion of transport in the Treaty of Rome, and some efforts of concretization in terms of objectives of a transport policy[6], concrete steps towards market liberalization only became a reality after the Commission had initiated proceedings against the Council in front of the Court of Justice of the European Union (CJEU), for a breach of the Treaty of Rome. There had been an apparent lack of progress regarding the liberalization of the transport market.[7] The decision, obliging the Council to strengthen its efforts towards transport market liberalization and the concretization of progressive steps towards the finalization of the internal market through the single European act[8] set the scene for a number of market openings and removal of regulatory barriers.

Part of the following developments, and ultimately leading to the liberalization of the first transport sector, were a number of legislative

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3 Commission, 'Proposal for a Council Regulation (EEC) on common rules for a denied boarding compensation system in scheduled air transport' COM(90) 99 final, para.4.; One of the reasons for community action in the field lies in changes brought about by the liberalized market.

4 Treaty establishing the European Economic Community (Treaty of Rome) [1957]; Francesco Gaspari, 'Recent Developments in EU Air Transport Liberalization and Re-Regulation Policies and the New Legal Order of International Air Transport (2012) 11(3) Issues in Aviation Law and Policy 415, 422.

5 Magdalena Majewska, 'European Union Transportation Policy: From the Treaty of Maastricht Up to Now' (2014) Studia juridical et politica Jaurinensis, 75.

6 See e.g. Commission, 'Memorandum on the General Lines of the Common Transport Policy COM(61) 50 final.

7 C-13/83 *European Parliament v Council of the European Communities* [1985] ECLI:EU:C:1985:220.

8 Single European Act (SEA) [1987] OJ L169/1.

proposals for the air transport market by the Commission.[9] Prior to this first liberalization initiative, the air transport market had been characterized by distinct national networks, the structure of which was mostly shaped by historical circumstances.[10] These distinct markets were dominated by one or more national carriers, which were owned by their respective governments and operated virtually all domestic routes.[11] Intra-community air travel was largely limited in the routes available and had been monopolised by the national carriers, operating a closed intra-European network based on bilateral air service agreements (ASA) between the respective states.[12] In this restricted market, with national 'flag' carriers enjoying wide ranges of monopolies, airline operations, access to markets, as well as available routes and fares were limited and regulated by those national carriers and their governments.[13] The choice of operations for flag carriers for intra-community routes was furthermore limited by what had been negotiated in the bilateral ASAs with other governments.[14] Within their domestic sphere, those carriers were specifically protected by their governments, which heavily regulated market entries favouring the national 'flag' carriers, mainly by implementing market access restrictions in bilateral ASAs.[15]

These barriers and limitations inherent in this protected and fragmented market were not sustainable under the goals of the Commission

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9 Eva Casalprim-Calves, 'The Added Value of EU policy for Airline services and air passenger rights' (European Parliamentary Research Service, 1 February 2014) <https://epthinktank.eu/2014/02/04/the-added-value-of-eu-policy-for-airline-services-and-air-passenger-rights/> accessed 10 June 2019.

10 B. Graham, 'Air Transport Liberalization in the European Union: An Assessment' (1997) 31 Regional Studies 807, 807.

11 Casalprim-Calves (n 9), 1.

12 See e.g. Guillaume Burghouwt, Pablo Mendes de Leon, and Jaap de Wit, 'EU Air Transport Liberalization: Process, impacts and future considerations' (International Transport Forum; Discussion Paper No.2015-04, January 2015), 7.

13 Dolores O'Reilly and Alec Stone Sweet, 'The Liberalization and European Reregulation of Air Transport' in Wayne Sandholtz and Alec Stone Sweet (eds.) *European Integration and Supranational Governance* (Oxford, 1998), 166.

14 Bilateral ASAs regulated the number of operations on the international routes between the countries, as well as revenue sharing between the carriers operating these routes.

15 Burghouwt, Mendes de Leon, and de Wit (n 12), 7.

and were subsequently addressed by three liberalization packages adopted between 1987 and 1993, culminating in the completion of the liberalization of the sector and the creation of the Single European Aviation Market in 1997.[16] These legislative packages progressively opened the market, removing restrictions on capacity, fares, routes, as well as setting harmonized European air carrier licensing standards through the concept of the community air carrier.[17] Following these liberalization packages, an EU licensed air carrier was able to operate his services from and to any airport in the territory of the EU, and to freely set fares on the routes they operate.

A number of developments could be observed during and following this liberalization process. Positive effects included a growth of the sector in terms of flight frequencies, new routes, increasing number of operators and the availability and connection of airports and regions. Domestically, the developments led to a decrease in share of previously dominant national carriers over time and the market saw the emergence of new business models of low-cost carriers, widening the regional availability of routes, increasing competition, and lowering airfares. Ultimately, the liberalization led to an increase in (passenger) mobility throughout the EU.[18]

However, these changes to the market were also accompanied by some repercussions, as the amount of passengers increased, leading to apparent capacity constraints and air space congestion. Passengers were increasingly experiencing a number of differing service disruptions, which needed to be addressed by adequate legislative measures for consumer protection. At that point, the only means of redress for passengers existed in the form of international agreements (in air transport the Montreal Convention[19]), which, however, were limited in what kind of service

16 Louise Butcher, 'Aviation: European liberalisation, 1986–2002' (House of Commons Library, SN/BT/182, 2010), 7; John Balfour, *European Community Air Law* (Butterworths 1995), 15–6.

17 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3, art.2.

18 See e.g. Burghouwt, Mendes de Leon, and de Wit (n 12).

19 Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999 (Montreal Convention; ICAO Doc

disruptions they addressed.[20] Additionally, reliance on these agreements and effectuating claims often meant dealing with the laws, regulations, and especially court systems of different countries, which brought with it language barriers, or lengthy procedures.

The problems that passengers experienced frequently during their journeys were not necessarily covered under the existing international framework, while at the same time, the Commission sought to deliver a minimum level of protection for passengers wherever they are in Europe, based on the freedom of movement.[21] The inception of passenger rights in the European Union can therefore be seen as a response to negative effects (for passengers) of the market liberalization efforts coupled with the absence of an adequate protection in existing international conventions for specific types of service disruptions and general levels of protection.

1.1.2 Creating passenger rights in all modes of transport and addressing issues of multimodality

The first mode-specific EU passenger rights instrument for air transport sought to address one such negative effect, namely that of overbooking and the related issue of denied boarding, in front of diverging levels of protection provided by air carriers in these cases. The instrument, Regulation 295/91, addressed these problems by harmonizing levels of protection and offering standardized compensation for passengers, as well as a number of assistance rights. While generally received positively, the Regulation faced a recast in 2004, extending its scope to cover cases of cancellation and delays, as the development of the liberalized sector led to a surge in these kinds of service disruptions. This regulation is still in

No 4698).

20 Those Conventions mainly concern injury or death to passengers, liability in cases of lost or damaged luggage, as well as delays.

21 Jana Valant, 'Consumer Protection in the EU: Policy Overview' (European Parliamentary Research Service, August 2015) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf> accessed 10 June 2019, 10.

force today, although an amendment has been proposed in 2013, which currently remains in a legislative deadlock.[22]

Already in 2001, the Commission stressed the utility of EU legislation as the foundation for passengers to help transport users understand and exercise their rights. It also emphasized that following the air passenger rights legislation there would be similar approaches for other modes of transport.[23] To this end, the Commission adopted a regulation for rail passengers in 2007 as part of the third railway liberalization package, which aimed at improving the quality of rail transport. This regulation is also up for an amendment, with the proposal currently in the legislative process.[24] The goal of implementing passenger rights for all modes of transport was completed with a regulation covering passenger rights for sea and inland waterway transport in 2010 and for bus and coach transport in 2011.[25] These regulations represent the core of passenger rights legislation in the European Union, and albeit some differences as to the content of rights[26], they are somewhat comparable, as they are all based on the principles of non-discrimination, accurate, timely, and accessible information, as well as immediate and proportionate assistance, and contain a set of ten core passenger rights.[27] While the

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22 Sacha Garben, 'The Turbulent Life of Regulation 261: Continuing Controversies Surrounding EU Air Passenger Rights' in Michal Bobek and Jeremias Prassl (eds) *Air Passenger Rights: Ten Years On* (Hart Publishing 2016), 283.

23 Commission, 'White Paper European transport policy for 2010: Time to decide' (White Paper) COM(2001) 370 final, 17, 83.

24 European Parliament, 'MEPs vote for upgrade to rail passenger rights' (European Parliament Press Release, 15 November 2018) <http://www.europarl.europa.eu/news/en/press-room/20181106IPR18319/meps-vote-for-upgrade-to-rail-passenger-rights> accessed 10 June 2019.

25 Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] OJ L334/1; Regulation (EU) No 181/2011 of the European Parliament and of the Council of February 16 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] OJ L55/1.

26 Attributable to different market characteristics; See Commission, 'A European vision for Passengers: Communication on Passenger Rights in all transport modes' (Communication) COM(2011) 898 final, 2.

27 ibid, 3; See also chapter 4.

current mode-specific passenger rights exist for all modes of transport, the Commission also stressed that there are still shortcomings when it comes to correctly implementing and enforcing them.[28] Indeed, both the air and rail regulation are currently up for amendment, with the air regulation in particular having come under a lot of scrutiny since its inception, as a large number of cases have been referred to the CJEU asking to clarify vague concepts and provisions and uncertainties related to enforcement are still prevalent.

Despite the proper functioning of the mode-specific passenger rights legislation being somewhat contested and legislative developments addressing attested issues, the European legislator is currently facing developments rendering the further expansion of the system to multimodal journeys necessary. As part of the Commission's vision for a 'competitive and sustainable transport system' in front of sustainable development goals, and especially reaching prescribed emission reduction targets, the transport industry, as one of the integral parts of the European economy, is facing changes.[29] The sector is faced with the challenge of facilitating its anticipated growth, while at the same time promoting the most efficient and sustainable modes of transportation.[30] To this end, one integral component will be to promote transport multimodality through increased mode integration and to support systems and developments enabling this integration.[31] Multimodality represents a key driver of enabling a modal shift away from road transport and can offer, if modes are seamlessly integrated, a more efficient and sustainable transportation system.[32] In its passenger dimension, multimodal transportation should be accompanied by an adequate protection of passenger's rights,[33] especially taking into

28 ibid, 2.

29 Commission, 'White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, 5.

30 ibid, para.17.

31 COM(2011) 898 final (n 26), 2.

32 Commission, 2018 – Year of Multimodality' (Logistics and multimodal transport) <https://ec.europa.eu/ transport/themes/logistics-and-multimodal-transport/2018-year-multimodality_en> accessed 10 June 2019.

33 COM(2011) 898 final (n 26), 15.

account that current passenger rights legislation does not address issues of multimodality.[34] Consequently, there are a number of problems and gaps in the protection of passengers on multimodal journeys,[35] which would only be aggravated given the focus on enhancing and promoting passenger multimodality, i.e. increasing the market share of multimodal passenger transport. This may render an adaptation of the passenger rights system in its current scope necessary.

The Commission initiated first steps towards addressing passenger rights in multimodal transport with an inception impact assessment in 2016. The assessment reiterated the absence of adequate protection under the currently existing mode-specific system, described the specific cases of inadequate passenger protection in multimodal journeys, and proposed different policy options to address them. These options range from measures of self-regulation in the form of codes of good conduct and practices to the adoption of a comprehensive legislative instrument specifically addressing passenger rights in multimodal transport.[36] The inception impact assessment forms part of the consultative approach of the Commission to find out, if an EU intervention in this specific field is needed, and what scope it should take.[37] Following the inception impact assessment, a public consultation was conducted in 2017, asking industry stakeholders, consumer representatives, and passengers about the experiences with the current passenger protection system and specifically their perceived coverage of multimodal journeys.[38] Generally, the results of this consultation indicated that an EU legislative measure in this regard

34 Biljana Cincurak Erceg and Aleksandra Vasilj, 'Current Affairs in Passengers Rights Protection in the European Union' (2018) 2 EU and comparative law issues and challenges 216, 228–9.

35 Commission, 'Rights of passengers in multimodal transport' (Inception Impact Assessment, December 2016) <http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_move_005_passenger_rights_multimodal_transport_en.pdf> accessed 10 June 2019, 2.

36 ibid.

37 ibid, 6.

38 Commission, 'Public consultation on a possible initiative at EU level in the field of passengers rights in multimodal transport (Passenger Rights) <https://ec.europa.eu/transport/themes/passengers/consultations/2017-pax-rights-multimodal-transport_en> accessed 10 June 2019.

would be needed to clarify passenger rights coverage in multimodal journeys.[39]

Most recently, and based on extensive stakeholder consultation, a support study mandated by the Commission elucidated the legal gaps for passenger rights protection in multimodal transport, and analysed which policy option would be the most favourable in front of a set of parameters, to address the identified problems. Albeit data limitations not warranting any definitive conclusions, the study also tilted towards proper legislative measures, rather than soft law or self-regulation, being the most favourable policy option to address the legal issues.[40]

Notably, all of the current developments seem to put their focus on the necessity of addressing passenger rights in multimodal transport, as well as the adequate scope and characteristics of a possible instrument. Both the inception impact assessment and the study emphasise market development and frequency of disruptions and complaints as indicators of necessity. Necessity is ultimately rendered to be applicable based on the identified problems and anticipated developments of the multimodal passenger transport market. Scope so far has been addressed in relation to the most suitable policy option, yet particularities on the application to different types of multimodal transportation are left out.

Aside from the identification of legal gaps and problems in the current system of mode-specific passenger rights, any considerations as to the effects on that system by actually implementing a new legislative measure on passenger rights in multimodal transport are not being discussed. Based on its very nature, a measure seeking to address passenger's rights arising out of the combination of transport modes, which are already separately covered under legislative instruments at the EU level, may possibly encroach upon that system. The transposition of rights to a multimodal context existing already in differing forms for the modes separately, may represent an additional liability burden for transport

[39] See EU Survey, 'Passengers rights in multimodal transport' <https://ec.europa.eu/eusurvey/publication/2017-pax-rights-multimodal-transport> accessed 10 June 2019.

[40] Marie Brunagel and others, Exploratory Study on passenger rights in the multimodal context (Ernst & Young, Draft executive summary, February 2019).

operators. Choices of extent and content of the rights in the multimodal context, could mean that a transport operator would not only face diverging levels of liability in connection to the passenger right – depending on whether it applies in a mode-specific or multimodal context – but also that the multimodal liability level may be higher than what is applicable under the mode-specific regulation. Hence, as it would potentially also add more complexity to the EU passenger rights system, it should be analysed how the transposition and application of passenger rights in a multimodal context are to be conciliated with the existing protection in the mode-specific regulations, especially in front of the problems that these mode-specific regulations have faced.

1.2 Research question and structure

Given the potential effect of a multimodal measure on the existing mode-specific passenger rights protection system and the goal of a proper functioning of the passenger rights protection system in the EU, this thesis aims to provide an answer to the following question: Is it feasible, in front of the *status quo* of the system of mode-specific passenger rights in the EU, to establish a legislative measure addressing passenger rights in multimodal transport? Moreover, how can such a measure be reconciled with the existing system in front of issues related to its development, compatibility, enforcement, and interpretation?

To provide an answer, the following structure based on four substantive chapters has been adopted: Following this introduction, chapter two will address the state of multimodal passenger transport in the EU. The chapter follows a twofold purpose of outlining the multimodal passenger transport market in the EU, as well as describing the developments towards a measure addressing passenger rights in multimodal transport and its necessity. Pertaining to the market description, the chapter addresses issues of definition and scope in relation to multimodality, existing models for providing multimodal passenger transport in the EU, factors of integration as a means for market development, as well as applicable limitations. The developments towards an EU multimodal

passenger rights instrument focus on illustrating the current level of protection in multimodal scenarios, as well as problems resulting from legislative gaps. It outlines the developments towards a new measure at the EU level so far, establishing the baseline for analysing the feasibility of a measure in front of the existing mode-specific regulations.

Chapter three aims to provide an understanding of the development of the current system of mode-specific passenger rights regulations, and an overview of the current system. The chapter gives insights into the policy developments that have led to the adoption of passenger rights in all transport modes and identifies problems, which the regulations had to face. It also aims at providing an answer as to why differences between these regulations exist and in how far they play a role in the development of a potential legislative measure for passenger rights in multimodal transport on a general level.

Building on the differences established in chapter three, chapter four zooms in to compare the iterations of specific rights in the mode-specific regulations, pointing out differences, gaps, and problems experienced with these rights, as well as implications for a potential transposition of them to a multimodal context. Based on the identified gaps and problems, which a multimodal measure should seek to address, the rights analysed focus on those of importance in relation to service disruptions. Pertaining to the feasibility of a multimodal measure, this chapter points out the normative challenges of reconciling such a measure with the existing system, and outlines potential avenues to overcome them.

Lastly, chapter five looks at the mode-specific rights in practice, specifically addressing issues of interpretation and enforcement that have come up with the regulations. The aim of this chapter is to depict the condition of the current passenger rights instruments, in order to find out in how far interpretative ambiguities and other issues related to the functioning of the regulations may have a hampering effect for the development of multimodal passenger rights. The question this chapter asks is essentially how can the implementation of a multimodal passenger rights instrument be effectuated on the basis and in connection to a

system of mode-specific rights, which are not being effectively enforced, and which face a number of interpretative issues?

1.3 Methodology and delimitations

In its core, this thesis aims to find out if an envisaged solution to a problem (EU legislative measure on passenger rights in multimodal transport) stemming from a gap in the current legislative system (mode-specific existing passenger rights instruments not addressing passenger protection inherent to multimodal scenarios), is reconcilable with that system and may feasibly be implemented. This approach falls within the realm of doctrinal research, as it gives a systematic exposition of the rules of a particular field of law, and offers an analysis of their relationship to address gaps in the existing law.[41]

To support a finding as to the feasibility of an EU legislative measure on passenger rights in multimodal transport, the system of mode-specific passenger rights protection instruments as it currently exists, will be analysed. This will take into account the system's development (i.e. what were the drivers behind development and what shortcomings have been experienced throughout the development), in how far the separate instruments of this system offer comparability and what differences exist, and ultimately what kind of issues have been experienced, from both a normative perspective, as well as practical implications. The results will be compared against and put in perspective of the solution – in this case the addition of a new set of rules to the existing system – in order to identify which points of the analysis of the existing system represent potential hindrances to the creation and proper functioning of the new measure.

The normative framework for the analysis stems from within the legal system.[42] The analysis of the existing system tries to grasp the normative complexity of the mode-specific EU passenger rights legislation and present an understanding of its issues with a view to aid a solution to

41 Jan M. Smits, 'What is legal doctrine? On the aims and methods of legal-dogmatic research' (Maastricht European Private Law Institute Working Paper No.2015/06), 5.

42 Smits (n 41).

fill a gap left by the system.[43] With the basis in normative description, the goal is to provide a prescriptive element not so much in relation to informing the practical solution to fill the gap and attested problems left by the mode-specific passenger rights system, but more to determine how the form of the envisaged solution fits the existing system. Ultimately, this bears down to a question of justification of the proposed solution by testing its acceptability within the existing legal system.[44]

Notably, part of the assessment goes beyond the basis of relying on normative aspects and sources, by contextualising the rules of the existing system in terms of its success (i.e. effective enforcement). Despite this being a diversion from a purely doctrinal approach, it is vital to view a passenger rights system also from the perspective of its envisaged societal effects and enforcement goals. Studying the experiences of stakeholders dealing with the system in practice provides an important background, insofar as indications of non-compliance or enforcement problems represent another point of reconciliation of the existing system with the proposed new measure. In other words, if proper enforcement, the main denominator for success of this passenger rights system is not guaranteed, it is crucial to evaluate, how a new measure could potentially aggravate this issue. From a methodological standpoint this means that for the most part the assessment finds itself on the doctrinal side of legal methodology, by analysing an existing system and trying to find on the basis of the norms, rules, concepts, and cases of this system, whether a particular legal solution can be reconciled with it. However, part of this analysis of reconciliation is concerned with the impact of the system, i.e. the contextualisation of the law in its societal impact in terms of effective enforcement.[45]

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43 ibid, 9; John C.P. Goldberg, 'Pragmatism and Private Law' (2012) 125 Harvard Law Review 1640, 1652. This explanation of the normative complexity represents the descriptive component of the legal-dogmatic research approach.

44 Smits (n 41), 12.

45 Paul Chynoweth, 'Legal research in the built environment: A methodological framework' (International Conference on Building Education and Research, 15th February 2008, Sri Lanka), 671.

In totality, the analysis therefore consists of three parts. Through outlining the development of the mode-specific passenger rights system in the EU (part one), an understanding can be gained of the overarching differences between the instruments, as well as problems experienced in their development. The identification of these problems will help to classify the current processes of establishing a measure for multimodal transport, and indicate the points of focus for the sections to follow. In other words, outlining the development of the existing system will elucidate its issues and underlying root causes, indicating points where reconciliation is necessary with a view to adding a new legislative instrument.[46] To this end, the main sources used for this part of the analysis consist of proposals and preparatory documents for the mode-specific regulations to describe the reasons for adopting them, as well as depicting issues experienced, where proposals were made to amend existing regulations. Additionally, sources of evaluation of the instruments were utilized to outline specific issues, which the regulations have faced in their lifetime.

The second part of the analysis takes up one of the parts identified as problematic with a view to adding a new measure, namely existing differences in right contents posing potential hindrances. The main sources utilized for the analysis are the secondary laws of the EU on passenger rights in the different modes of transport. The focus of the analysis is on the four main mode-specific regulations which govern the rights of passengers in cases of service disruptions, namely Regulation 261/2004 (Air), Regulation 1371/2007 (Rail), Regulation 1177/2010 (Sea and Inland Waterways), and Regulation 181/2011 (Bus and Coach). There are other pieces of EU secondary legislation dealing with the rights of passengers in the various transport modes, for example those implement-

[46] In *casu*, the underlying issues of differing experiences with the Regulations were attributed to overarching themes such as differences in the transport markets and instruments being enacted at different times, but most important were differences in the content of the rights, interpretation of rules by the CJEU, and enforcement issues underlying the overarching themes.

ing international conventions on passenger's rights,[47] or those with the specific scope of addressing rights of persons with reduced mobility,[48] as well as an instrument addressing package travel.[49] However, the main problems a multimodal measure would need to address can be found in the rights applicable in cases of service disruptions.[50] Hence, the analysis is limited to those rights, which are contained in the aforementioned main mode-specific regulations. The analysis itself is structured as follows: Starting point is the description of the respective right in its iterations in the mode-specific regulations. The diverging right contents are compared, outlining inconsistencies between the regulations. Based on this comparison, problems and shortcomings are discussed. Those are then put in the context of multimodal transportation and specifically the baseline of an EU legislative instrument addressing multimodal passenger rights. Following this exercise of transposition of the rights, conclusions are drawn as to potentially hindering effects for establishing such a measure, elaborating on issues of reconciling existing inconsistencies with a new measure, as well as how problems within the mode-specific context may be affected by a multimodal measure.

Lastly, the analysis focuses on issues of interpretation and enforcement of the mode-specific regulations and in how far these apply in a multimodal context and affect a potential legislative measure. The interpretative part rests on the discussion of the main interpretative issues that have come up in front of the CJEU regarding provisions of the regulations. As virtually all cases concern the air regulation, the focus will lie on the interpretative issues of this instrument. Next to case law and opinions of the advocate general, the discussion will be supplemented by

47 For example, Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents [1997] OJ L285/1.

48 Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L204/1.

49 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation 2006/2004 and Directive 2011/83 of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1.

50 This is established based on the identified problems in Chapter 2; See section 2.2.1.

academic commentary on the respective matters, which is being utilized to assess how decisions have influenced the functioning of the regulations. The enforcement part focuses on three factors pertaining to effective enforcement of the regulations, namely stakeholder compliance, right awareness and knowledge, as well as the effectiveness of the National Enforcement Bodies (NEB). From a source perspective, the focus lies on existing quantitative and qualitative assessments of these factors.

2 Multimodal passenger transport in the European Union

Discussions on multimodal, or intermodal passenger transport[51] in the European Union, and the benefits for the passenger transport market enabled by it, have been present in the transport policy of the European Union since 2001.[52] Already at that point, the Commission identified not only the importance to promote multimodal travel,[53] but also addressed the issues that had barred passengers from travelling on multimodal journeys, namely those related to the provision of information and ticketing, as well as hindrances in transferring from one mode to another.[54] Enabling multimodal passenger transportation in the EU therefore depends on a number of issues, ranging from the technical (integrated ticketing, provision of information, etc.) and organizational aspects (cooperation between transport operators, infrastructure enabling multimodal journeys) to regulatory approaches helping with the implementation of passenger multimodality in the EU. Especially on the technical side, advancements have been made, while passenger rights remain to be mode-specific.

The development of passenger rights for multimodal transport consequently represents only one component of the multimodal transport sector and the Commission has geared its transport policy towards addressing all facets of multimodal transportation in the EU to foster the development of the sector, including (next to passenger rights) also infrastructure, digitalisation, as well as information.[55]

Ultimately, the development of multimodal passenger transport in the European Union and its status can serve as an indicator, if and to what extent passenger protection specifically addressing passenger

51 Definitional issue, explanation below in section 2.1.1.

52 COM(2001) 370 final (n 23), 80.

53 Transport is seen as a service of general interest for the public benefit,

54 COM(2001) 370 final (n 23), 80.

55 Brunagel and others (n 40), 3.

multimodality are needed. To this end, there are certain factors that aid in assessing this necessity. The market definition and specifically the scope of the multimodal passenger transport market play a role in establishing what is to be considered multimodal passenger transport and how it would currently be protected under the existing mode-specific passenger rights framework. This includes an assessment of underlying contractual models for multimodal journeys. Additionally, it is important to consider how widespread multimodal offers from transport operators are, if they are used and ultimately what the size of this part of the European transport market is. Notably, because of the aforementioned contributing factors, the size assessment is rather challenging, especially in the absence of viable data.[56] Nonetheless, on the basis of this it is important to then look into how passengers are actually protected in multimodal situations and which issues might come up in a multimodal journey to ascertain what potential measures may be needed to address issues faced by passengers which are not covered by existing passenger rights systems. As the Commission already has identified a potential need to address specifically passenger rights in a multimodal context, this section concludes with the developments for a new measure thus far, which ultimately represents the baseline for the following analysis of the feasibility of such a measure.

2.1 EU multimodal passenger transport market

2.1.1 Definition of multimodal passenger transport

To possibly ascertain the market size of the European multimodal passenger transport market, as an indicator for the necessity of specific

[56] Ernst & Young, who were commissioned by the Commission to conduct a study on passenger rights in a multimodal context identified the absence of assessments of the size of the multimodal passenger transport market, and addressed the issues with a proposal of assessment based on traffic at hubs. However, the parameters were considered not robust enough for definitive findings; See Commission, 'Passenger Multimodality workshop on studies' (Presentation EY, February 2019) <https://ec.europa.eu/transport/themes/logistics/events/multimodal-transport-passenger-multimodality-workshop-studies_en> accessed 10 June 2019.

passenger rights measures, it is important to understand what exactly falls under the term of 'multimodal transport'. Notably, next to the term of multimodality in relation to passenger transport, intermodality is often used as well. While in freight transport the differentiation between these terms and their essential scope has been established,[57] both terminologies are often used synonymously when it comes to passenger transport and there is an apparent lack of a clear definition of the terms on the passenger sphere.[58]

Bak and Burnewicz hold in this regard that the efforts to actually define the terms in a passenger context are rather limited and mostly go as far as establishing the common denominator of both types of transport consisting of 'two different modes which can be used in a door-to-door transport chain in an integrated way'.[59] This common ground seems to be reiterated in other sources mostly in relation to intermodality, describing it as the capacity to combine different modes of transport or different legs of the same mode of transport in an integrated and flexible manner, enabling a seamless interchange between modes on one journey.[60] Others view intermodality more as a policy principle enabling said seamless journey through transport mode linking.[61] Multimodality is often referred

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57 Monika Bak and Jan Burnewicz, 'Challenges for Multimodal Passenger Transport' in Joseph S. Szyliowicz and others (eds), Multimodal Transport Security: Frameworks and Policy Applications in Freight and Passenger Transport (Edward Elgar Publishing, 2016), 177; The main difference appears to be of contractual nature, with multimodal pertaining to a single contract for all modes used, while intermodal transportation consists of the use of separate contracts for the different modes used to ship the goods; For a discussion on the definitional nuances of multimodal and intermodal freight transportation, see also Olena Bokareva, 'Multimodal Transportation under the Rotterdam Rules: Legal Implications for European Carriage of Goods and the Quest for Uniformity' (Doctoral Disseration, Faculty of Law, Lund University 2015), 61–67.

58 ibid.

59 ibid.

60 Monika Nogaj, 'Codification of Passenger Rights: Cost of non-Europe Report' (European Parliamentary Research, 2015) <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536367/EPRS_STU(2015)536367_EN.pdf> accessed 10 June 2019, 126.

61 Paul Riley and others, 'Intermodal Passenger Transport in Europe: Passenger Intermodality from A to Z (The European forum on intermodal passenger travel) <http://www.rupprecht-consult.eu/uploads/tx_rupprecht/LINK_Guidance_ Brochure.pdf> accessed 10 June 2019, 6.

to on a more general or overarching level, as for example the Commission refers to it as 'the use of different modes (or means) of transport on the same journey', utilizing the strengths of the different modes.[62] Yet this falls short of incorporating aspects of integration that may be necessary for facilitating such transport. This integration aspect however, is what intermodality seeks to address, in its description as a characteristic of a transport system enabling seamless door-to-door transport by use of two different transport modes in an integrated manner.[63] This translates into viewing multimodality as the more overarching, all-encompassing term, with intermodality as an integral part or characteristic that enables the use of different transport modes through integrative measures. This view essentially portrays multimodal transport as a more complex system.

Yet another more nuanced approach to differentiation of the two concepts holds that multimodality entails the existence of different modal options on a particular route or transport corridor.[64] Intermodality on the other hand does not offer this choice of mode and only refers to the use of one mode after the other in a journey.[65] Consequently, multimodality would therefore – under the assumption of parallel modes being available for the same journeys – consist of both single-mode transport solutions, as well as intermodal transport solutions on a given route within a transport corridor.[66] This further underlines the status of multimodality as the more overarching term, yet also supports the view of the separate existence of an intermodal transport system where the mode combination offers advantages over single-mode transportation.

The liberalized EU passenger transport market in its totality would, based on the definitional approaches outlined, offer both the possibility

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62 Commission, '2018 – Year of Multimodality' (n 32).

63 Commission, 'Intermodality and Intermodal Freight Transport in the European Union A Systems Approach to Freight Transport Strategies and Actions to Enhance Efficiency, Services and Sustainability' (Communication) COM(97) 243 final, 1.

64 SUTRANET, 'Transport Systems Concepts and Definitions' (Annex 1.2.1. to the final report, 2005/2007) <http://sutranet.plan.aau.dk/pub/wp1%20publications/1.2.1_Systems%20Definitions.pdf> accessed 10 June 2019, 1.

65 ibid.

66 Bak and Burnewicz (n 57), 178.

for multimodal and intermodal systems, depending on the various transport corridors within it. Under the consideration of treating multimodality as the overarching term, it seems to be more sensible to apply it, especially under the transport policy goals of the Commission, to further modal shifts and the combination of several modes of transport to support environmental, social, as well as efficiency goals.[67] Ultimately, the varying contractual options, not all pertaining to integrative measures, underline the conceptualization of transport mode-combination in the EU as multimodal.

2.1.2 Different multimodal contractual models and integrative measures

Underlying the definition of multimodal transportation are the various contractual models applicable to journeys combining different modes of transport, as well as corresponding potential levels of integration provided by the transport operators. The different contractual models in particular play a significant role not only for the assessment of the EU multimodal transport market, but also for the scope of a possible instrument specifically addressing passenger rights in multimodal transport.

2.1.2.1 Typologies of multimodal transport models

On a general level, multimodal transport in the EU can be separated into those journeys governed by separate contracts for each mode, and those where the different legs of a journey are combined under a single contract.[68] These two types represent the structure under which differing multimodal products on the European transport market exist. Separate contract multimodal journeys primarily include those multimodal journeys created on the passenger's initiative. Hereunder the passenger himself buys separate tickets for legs of his journey with different transport modes, which combined together represent a multimodal travel chain. Additionally, separate contract multimodal journeys can also be

67 Commission, '2018 – Year of Multimodality' (n 32).

68 Brunagel and others (n 40), 4.

based on an agreement between two carriers, where tickets for separate legs can be obtained from one of the transport operators.[69] Similarly to this construct, and in the absence of an agreement between the transport operators, passengers may also be able to buy a multimodal journey through an intermediary (agency, tour operator), which will book the legs of the journey separately for the passenger.[70] Single contract multimodal journeys on the other hand require some form of ticket integration. Generally, two forms of this multimodal product exist. First, carriers can create a multimodal product, where one of the carriers will be the single contracting party towards the passenger. Since the operation of the services is being carried out by two different transport operators, the carriers involved in the product usually agree on how the liability will be shared.[71] The second option would be (similarly to the intermediary option under separate contract multimodal journeys) a single contract product by an intermediate entity, where the passenger concludes a transport contract with the intermediate entity combining the two separate modes in one package. Consequently, contractual liability lies with the intermediary, not with the transport operators.[72]

What becomes clear from the spectrum of contractual solutions for multimodality schemes portrayed is that the offer of different contractual models depends on levels of integration.[73] This means that advancements in multimodality schemes (even including those where the passenger combines modes himself), and thereby the expansion of this specific transport market, are connected to the development of various measures of integration. Those integrative measures can take various forms, ranging from the provision of information to passengers, over

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69 An example of this would be the product offered by Flixbus (Germany) and WESTbahn (Austria) where passengers can use a combination of train and bus to reach a number of destinations from smaller Austrian cities, with the tickets for both legs being sold through Flixbus <https://westbahn.at/en/offers/westbahn-offers/flixbus/> accessed 27 April 2019.

70 Nogaj (n 60), 128.

71 Brunagel and others (n 40), 4.

72 ibid.

73 Nogaj (n 60), 128.

the creation of systems enabling integrated booking of several transport modes, including a combination of fares, to ultimately providing full ticket integration, where a single ticket is issued and valid for the whole multimodal journey.[74]

2.1.2.2 Varying degrees of integration

The Commission has identified the benefits of integrative measures for the development of multimodal services in the EU, in the form of promoting more seamless door-to-door travel experiences. Policy initiatives have been started, yet to this date there is no uniform European approach to even integrated ticketing. To a certain extent, the absence of a harmonized system of integration represents a reason why the wide spectrum of contractual models exists. However, the more single-contract multimodal journey schemes exist, the less passengers would need to rely on combining modes themselves and the more they might be incentivized to choose multimodal products as part of a modal shift.

The EU measures towards integration started with a framework directive 'for the deployment of intelligent transport systems (ITS) in the field of road transport and for interfaces with other modes of transport'.[75] In essence, it aims at providing a data collection system between the Member States, to provide real-time traffic information to citizens. This is specifically important in multimodal transportation, as such information can be helpful especially in cases of disruption.[76] Following this directive, a number of delegated acts have been adopted, the latest being a regulation on the provision of EU-wide multimodal

74 ibid, 127.

75 Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport [2010] OJ L 207/1.

76 Grimaldi, 'Remaining Challenges for EU-wide Integrated Ticketing and Payment Systems' (Executive Summary, February 2019), 3; It should be noted that the development of information systems also plays a crucial role for passenger rights in multimodal transport. As certain information rights for passengers are currently enshrined in the mode-specific system, the creation of multimodal passenger rights consequently also revolves around transposing these rights to a multimodal context. Integrative transport information measures could enable such a transposition, perhaps under an EU-wide homogenous effort.

travel information services.[77] This act addresses the specifications that are necessary to enable accessibility, exchange and update of standardized travel and traffic data to provide multimodal information services. However, it does not fully cover integrated ticketing.[78] Based on this regulation, it should be noted, that while a truly cross-border integrated ticketing system does not yet exist in the EU, developments of projects following the EU acts on the national level seem to indicate that there is an interest towards an EU-wide system of this kind.[79]

Despite advancements of integrative measures at local or national level, the main focus for the multimodal transport market, under consideration of passenger rights in multimodal transport, rests on existing contractual offers or systems showing more relevance for intra-community services, that is those with a cross border element. This is simply because current passenger rights legislation excludes urban and local transportation from its scope, and in front of a progression of passenger rights to also address multimodal transport journeys specifically, urban or local multimodal transportation schemes cannot therefore be taken into consideration, despite their potentially large share in the EU multimodal transportation market.[80]

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77 Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services [2017] OJ L 272/1.

78 Grimaldi, 'Remaining Challenges for EU-wide Integrated Ticketing and Payment Systems' (n 76), 3; Commission Delegated Regulation (EU) 2017/1926 (n 77), Art.1.

79 Grimaldi, 'Remaining Challenges for EU-wide Integrated Ticketing and Payment Systems' (n 76), 6; An example of an already existing legal framework on the basis of Regulation 2017/1926 is that of the Finnish Act on Transport Services, which sets standards to promote the interoperability of information and ticketing systems of transport providers, obliging them e.g. to an open application programming interface, to allow integration of transport modes in one system and the creation of seamless travel solutions; See also information on Mobility as a Service (MaaS), <https://maas.global/maas-as-a-concept/> accessed 27 April 2019 and Jukka Lång, Kaisa Päivinen and Suvi Syvänen, 'Paving the Way for a Mobility Revolution' (D&I Quaterly, 29 March 2019) <https://www.dittmar.fi/insight/paving-the-way-for-a-mobility-revolution/> accessed 29 April 2019.

80 Undoubtedly, the long-term goal should be to facilitate a passenger rights system that would also cover these transport services.

The varying degree of integration in relation to the different contractual bases can be exemplified with some of the multimodal products currently offered on the market. They also serve to show the current limitations of these products, which the development of harmonized interpretation measures on the EU level may help to alleviate. By far the most prevalent mode-combination (regardless of the underlying contractual modes) is air-rail.[81] Hence, the two examples below are of this sector, as it is the most mature in terms of integration and market development.[82] Several of these agreement-based multimodal products exist now in the EU, and while their basis is the same, they differ mainly in their level of integration. Integrative measures range from agreements analogous to the traditional interlining agreements[83] to full ticket integration, comparable to codeshare agreements, where integration also extends to IT systems, and may go as far as covering also baggage handling, specific train wagons for passengers using the multimodal offer, as well as other additional services.[84]

One of the products that offers full ticket integration is 'AiRail' (Now 'Lufthansa Express Rail') which provides, as the name suggests air-rail multimodal journeys based on an agreement between Lufthansa, Deutsche Bahn, and Fraport (the owner and operator of Frankfurt Airport).[85] This product would fall under the typology of single contract multimodal journeys created by the carriers.[86] Lufthansa Express Rail offers specific high-speed train routes to and from Frankfurt airport

81 Brunagel and others (n 40), 6.

82 ibid.

83 An airline is authorized to sell rail tickets, without any further integration of their products; Paul Chiambaretto and Christopher Decker, 'Air-rail intermodal agreements: Balancing the competition and environmental effects' (2017) 23 Journal of Air Transport Management 36, 37.

84 Paul Chiambaretto and Christopher Decker, 'Air-rail intermodal agreements: Balancing the competition and environmental effects' (2017) 23 Journal of Air Transport Management 36, 37.

85 Silvia Maffii and others, 'Integrated Ticketing on Long-Distance Passenger Transport Services' (European Parliament Directorate for Internal Policies, August 2012) <http://www.smart-ticketing.org/downloads/reports/EU_Parliament_ study_integrated_ticketing.pdf> accessed 28 April 2019, 39.

86 See section 2.1.2.1.

in combination with a national or international Lufthansa flight.[87] The product offers full fare, booking and ticket integration, as well as a dedicated carriage on the train segment, and baggage services.[88] The rail-leg is essentially treated as a flight with a distinct flight number, and the railway stations under the agreement have been allocated an IATA three letter identification code.[89] Passengers receive a single individual ticket covering the whole journey.[90] Interestingly, the responsibility/liability lies with the operator of the air segment (here Lufthansa), as the rail segment is seen as part of the air travel.

Even though Lufthansa express rail serves as a great example of working fully integrated ticketing on cross-border multimodal services, it still is rather limited in scope, as it only serves a number of train destinations in Germany. Yet, expansions are planned. In this regard, it should also be considered that such offers and their development not only hinge on the willingness of operators to reach agreements to create these multimodal mobility solutions, but a number of other contributing factors play a role as well. Most prominently, the question needs to be asked, where the infrastructural limits of products like these lie. This concerns mainly the connection of airports to high-speed or long-distance train networks.[91] Generally, these agreements have been established by flag carriers in connection with high-speed railway operators, to serve the air operator's hub concept. Practically speaking this entails high investments in infrastructure, assuring seamless mode connections at the hubs, which may only be economically feasible where a high volume of passengers is to be expected.[92] This typology therefore significantly limits the potential for expansion.[93] Other factors include, for example,

87 Maffii and others (n 85), 39.

88 Changmin Jian, Tiziana D'Alfonso and Yulai Wan, 'Air-rail cooperation: Partnership level, market structure and welfare implications' (2017) 104 Transportation Research Part B 461, 462.

89 <https://www.iata.org/publications/Pages/code-search.aspx> accessed 28 April 2019.

90 Maffii and others (n 85), 40.

91 Maffii and others (n 85), 33.

92 ibid, 29.

93 ibid.

the compatibility of different communication and booking systems, coordination of schedules, as well as potential effects on competition of these agreements.[94]

In front of these limitations of the most integrative systems, it seems that multimodal solutions with less integration could perhaps have a wider scope in terms of their operability, indicating more potential for market growth. An example of this would be the Deutsche Bahn 'Rail&-Fly' offer, which is based on agreements with the German train operator Deutsche Bahn and a large number of tour operators and airlines.[95] Under these agreements, varying degrees of integration exist, however, on a general level passengers purchase flights or tour packages, including transportation from a German train station. From the outset this multimodal product appears rather similar to what Lufthansa offers together with Deutsche Bahn (Lufthansa Express Rail), however, some differences as to the level of integration remain. While fares are integrated, ticket and booking integration varies, depending on the agreement of the tour operator or air carrier with Deutsche Bahn.[96] Another limitation exists regarding journey planning, as not all agreements under the Rail&Fly umbrella have incorporated the train schedules in the Global Distribution System (GDS) of the respective airlines. In fact, this type of integration is not available under the agreements with tour operators, and not all agreements with air carriers offer it either. Here, the scope ranges from either providing a link in the air carrier's booking process to the website of Deutsche Bahn, or even including the booking of the train on the website of the air carrier, to GDS integration of trains, essentially offering multiple train destinations as part of the air carrier's flight network.[97] This last option offers the same level of integration as the Lufthansa Express Rail product, yet slight differences remain, as they have dedicated staff on board the train, as well as specific wagons and reserved seats for

94 ibid, 33.

95 Around 70 tour operators and 80 airlines.

96 Rail tickets can be in the form of an extra voucher given to passengers when booking with a tour operator, or the rail tickets might be booked through the website of Deutsche Bahn.

97 Maffii and others (n 85), 104.

those passengers, which Rail&Fly does not offer. Yet the most significant difference from 'Lufthansa Express Rail', even of the most integrated Rail&Fly product is within the sphere of passenger rights. Except for those Rail&Fly products which offer full GDS integration, where airlines will be responsible for assuring a seamless connection of the passenger, they will in all other iterations under the Rail&Fly umbrella be responsible for informing themselves about train schedules, being present in time for check-in of their flight, as well as bearing the costs for alternative flights or accommodation in cases of disruptions leading the passenger to miss their flight leg.[98] In essence, this means that there are a wide number of disparities in passenger protection, even though the product term is the same.

In terms of the level of integration, it should be stated that the higher the level, the more financial resources potentially need to be invested. GDS integration and additional services, such as baggage handling are harder to implement than merely selling tickets of another mode through an air carrier's website, or even just linking to them. Hence, the feasibility of higher levels of integration, as exemplified with the Lufthansa Express Rail product, not only hinges on the connection to high-speed rail networks and the potential market size of passengers passing through large hub-airports, but also on the establishment of infrastructure at connection points, enabling the envisaged seamless connection points, as well as systems integration. All of these factors need to be taken into consideration when assessing the viability of such highly integrated multimodal products, and therefore, limit the potential for these offers. Consequently, less integration translates into potentially wider availability of offers, due to less dependency on financial investments necessary to facilitate integrative measures, or reliance on infrastructure, as exemplified with the Rail&Fly products. Even though on paper these agreements can (depending on their scope) also fall under the single-ticket multimodal journeys based on carrier agreements, the level of integration, and corresponding to it, the level of passenger protection, or integrated journey planning can differ significantly. Ultimately, what

[98] ibid, 106.

this indicates is that differing levels of integration, corresponding to varying contractual models and even variations within one model, reveal legal gaps in the protection of the passenger on these multimodal journeys. Additionally, it appears that a higher level of integration (and correspondingly a high level of passenger protection) will require more investment from participating carriers and is ultimately limited by infrastructural developments. Multimodal products with lower levels of integration (such as Rail&Fly) have more growth potential, as especially the latter restrictions do not apply in the same way. Hence, the question is how to assure levels of protection of the consumer closer to that of highly integrated services, where higher levels of protection cannot be guaranteed based on the underlying agreements and transport contracts with the passengers.

Here passenger rights come into play, which may help alleviate this situation. They could help in overcoming disadvantages related to lesser levels of integration and could facilitate the development of multimodal passenger transport in the EU. Such development should be geared towards addressing other mode combinations than air-rail, which currently is the predominant form of multimodal journeys in the EU. Increased availability would therefore be coupled with higher levels of passenger protection, to enable the development of lesser integrated multimodal transport services, by offering a standardized journey from the passenger's point of view, through the reliance on a minimum level of protection in the multimodal context, aside from contractual assurances.[99] In the end, it should also be pointed out that not only enabling such passenger rights, but consequently the development of the market depends also on advancements of other factors, such as measures towards EU wide integrated ticketing and multimodal transport information.

[99] All Ways Travelling Consortium, 'To develop and validate a European passenger transport information and booking system across transport modes' (Final Report, 17 June 2014) <https://ec.europa.eu/transport/sites/transport/ files/themes/its/studies/doc/20140812-july9thversion-awtfinalreport.pdf> accessed 10 June 2019, 243.

2.1.3 Challenges in assessing the market size

Based on the available options for multimodal journeys it is now essential to gain an overview of the market size and additionally, what share of the overall European transport market multimodal schemes represent, as this is a key parameter for the creation of a passenger rights instrument in multimodal transport and an indicator for necessity of such an instrument. Notably, as opposed to the single-mode transport markets, the determination for the multimodal market faces a number of challenges. These stem on the one hand from the definition of what is considered multimodal, and on the other hand from the varying underlying contractual bases.

Based on the definition of multimodal passenger transport, covering all cases where passengers combine two or more modes of transport under a single journey, a broad spectrum of journeys would be applicable. This would include under consideration of the underlying contractual models, both multimodal journeys under separate transport contracts, as well as those under single transport contracts. For a market size determination, this broad scope may be problematic as separate contract multimodal journeys include also those combined by the passengers themselves to form a multimodal journey. Any definitive determination of this specific segment of the market would only be possible with sufficient consumer input, or perhaps information on passenger numbers at large European hubs where passengers switch between modes.[100] Additionally, with a view to the creation of passenger rights in multimodal transport, it should be noted that current legislation excludes urban and local transport. This is a characteristic which is also expected to be taken over by a potential multimodal instrument,[101] while available statistics on the whole transport market, as well as specific modes do not necessarily differentiate between urban, local, national and international (intra-EU) passenger transport

[100] This approach has been taken by Ernst & Young in their exploratory study for the Commission on passenger rights in the multimodal context; See Commission, 'Passenger Multimodality workshop on studies' (n 56).

[101] Commission, 'Rights of passengers in multimodal transport' (n 35), 3.

when assessing the market size.[102] This is insofar problematic, as it exacerbates the determination of the share of multimodal passenger transport of the whole EU passenger transport market. Furthermore, there appears to be an apparent lack of data on multimodal transportation, as a final report for the Commission on developing transport information and booking systems across transport modes in the EU notes. 'An in-depth analysis and segmentation of the multimodal travel market's demand side cannot be performed because of a lack of appropriate data at a European level.'[103]

Notably, in an exploratory study for the Commission 'on passenger rights in the multimodal context', an assessment of the size of the multimodal passenger transport market at EU level has been made, based on traffic at hubs in the EU.[104] Based on the assessment of the study, 'the total multimodal market[105] is estimated at approximately 65.7 million passengers in 2016 […]'.[106] With 65% share of this market, the air-rail segment represents the biggest part, yet compared to the totality of international air traffic in the EU only accounts for a marginal size of 7%.[107] Interestingly, the study finds that a majority of 95% of multimodal passengers use separate contracts for their journeys.[108]

Taking this assessment at face value, a number of considerations can be made regarding a potential measure for passenger rights in multimodal transport. Compared to the overall number of passengers, albeit also including urban and local transport,[109] the number of passengers travelling multimodal is marginal. This bears the question of the necessity of a passenger rights instrument when only a small number of passengers actually travel multimodal and perhaps an even smaller number actually

102 See e.g. Eurostat, 'Passenger Transport Statistics' <https://ec.europa.eu/eurostat/statistics-explained/index.php/ Passenger_transport_statistics> accessed 07 May 2019.

103 All Ways Travelling Consortium, 'To develop and validate a European passenger transport information and booking system across transport modes' (n 99), 129.

104 See EU Commission, 'Passenger Multimodality workshop on studies' (n 56) and Brunagel and others (n 40), 6.

105 Including both single contracts and separate contracts.

106 Brunagel and others (n 40), 6.

107 Brunagel and others (n 40), 6.

108 ibid.

109 Which were excluded from the multimodal market assessment of the study.

experiences disruptions during their multimodal journeys, rendering the application of specific passenger rights in the multimodal context necessary. Perhaps passenger rights in this market should only be addressed, once it has matured.[110] To this end, another point for determining necessity would be to establish how mode-specific passenger rights instruments provide protection for passengers on multimodal journeys, which the next section will address.

It is also apparent from the assessment that almost all multimodal transport is executed under separate contracts, and that of these separate contract journeys, most are created on the passenger's initiative and not based on agreements between carriers or sold through intermediaries.[111] This would bring up the question of whether it should be a goal to further incentivize single contract multimodal journeys and aim at a shift of passengers towards these and ultimately, what the role of a passenger rights instrument may be. Could it incentivize the creation of more single contract multimodal offers from carriers, and if so, what level of integration could be provided and where are the limits of this single contract multimodal market? To the contrary, could it actually inhibit the development of such contractual models if it offers a high level of protection that is perhaps not reconcilable with economic considerations under such single contract multimodal transportation products, especially in relation to their development costs?

Lastly, with the majority of multimodal transport consisting of a combination of air and rail, the question arises what potential there is for other mode combinations, or whether perhaps the current percentage share is also a reflection of the general share of the modes in the EU transport market.

Ultimately, these considerations bear down to whether – in front of the current options for multimodal passenger transportation in the EU and the size of the market – there is a necessity for a passenger

[110] Yet, the point could be made, that the air-rail segment, which accounts for a majority of multimodal travel has indeed matured already and may be in need of passenger rights addressing this issue.

[111] See Commission, 'Passenger Multimodality workshop on studies' (n 56).

rights instrument specifically addressing issues related to multimodal transport.[112] If necessity is found, under which goals and with which scope should passenger rights be adopted, to assure both the continued development of the multimodal passenger transport market in the EU, as well as afford passengers an adequate protection when travelling on a multimodal journey?

2.2 The need for passenger rights in multimodal transport as part of a consolidated passenger rights approach

In front of the contractual differences and diverging levels of integration, the conclusion of using passenger rights as both a means to alleviate different levels of passenger protection in relation to the different contractual bases, and to foster the development of multimodal services in the EU, appears to be a viable solution. Yet, there is somewhat of a divide as to the effect of a potential measure for passenger rights specifically addressing issues in the multimodal context. The question is, whether, instead of furthering multimodal services in the EU, a high level of passenger protection may actually hinder their development, as well as steps taken in corresponding factors of multimodal transport development (i.e. information sharing, infrastructure)? A concern is that depending on the level of protection provided by such an instrument, it could actually act as a disincentive for transport operators to further develop their cooperation and multimodal services, especially, if connected to economic uncertainties. This concern bears down to what has been at the basis of mode-specific passenger rights instruments in the EU, namely the maintenance of a balance between high levels of passenger protection and potential economic repercussions for transport operators subject to obligations under these instruments.[113]

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[112] While market size is one determinant, current levels of protection offered is the other.

[113] See e.g. Commission, 'Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations (recast)' COM(2017) 548 final, 2.

Based on the apparent legal uncertainties under the contractual solutions, the question for necessity of passenger rights in a multimodal context needs to be discussed also under consideration of the existing protection provided by the mode-specific passenger rights regulations, and, in how far they are applicable to the different multimodal contractual types. Under consideration of the protection provided, and, if necessity based on persisting legal gaps remains, one can then advance towards questions pertaining to the scope of possible multimodal passenger rights instruments, as well as their feasibility.

2.2.1 Current passenger rights protection in multimodal transport and problems to be addressed

The current system of passenger rights protection in the EU consists of a number of regulations with a mode-specific scope.[114] This means that the use of existing passenger rights legislation, as well as their effect are limited to the extent that they apply independently to every transport mode under a single contract of carriage.[115] On a general level, when a journey involves multimodal transport, the application of passenger rights cannot be guaranteed when an event occurring in one segment of the journey affects the following segment of the journey, in cases where the second segment is with another mode of transport.[116] In other words, one can generally only rely on the passenger rights regulations for each mode on each segment of a multimodal journey separately.

From the regulatory perspective, only the proposal to amend the air passenger rights regulation[117] currently addresses the application of

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114 MaaS Alliance, 'Passenger Rights in Multimodal Transport' (MaaS Alliance Vision Paper, September 2018) <https://maas-alliance.eu/wp-content/uploads/sites/7/2018/09/Vision-Paper-on-Multimodal-Passenger-rights-240918-FINAL.pdf> accessed 10 June 2019, 5; Nogaj (n 60), 131.

115 Commission, 'Rights of passengers in multimodal transport' (n 35).

116 ibid.

117 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation on (EEC) No 295/91 [2004] OJ L46/1.

passenger rights in a multimodal context. The proposal extends the scope of the instrument to also apply to multimodal transportation, insofar, as one leg of an air journey, carried out in accordance with the contract of carriage, is carried out by another mode of transport.[118] However, this proposal has not been accepted and is in fact in a deadlock.[119] In practice, the amended air passenger rights regulation, should it be adopted with the inclusion of this scope, would then apply to single contract multimodal journeys on the basis of an agreement between carriers.[120] Separate contract journeys, and those single contract journeys sold through intermediaries would not fall under its scope. Should this proposal be adopted, another question would be, whether the carrier's reaction would be to circumvent the scope of the Regulation by rather offering their multimodal journeys through intermediaries. In any case, it seems that while providing a concrete step towards addressing passenger rights in multimodal transport, the proposal falls short of addressing the whole spectrum of multimodal transportation, not least due to its application in only those mode combinations with an air segment.

Aside from the single-mode protections, multimodal transport journeys based on agreements between carriers may also include a number of contractual assurances and integrative measures guaranteeing certain rights of passengers. However, those do usually not go beyond offering alternative transportation to the final destination and are highly dependent on the type of agreement the journey is based on. In the absence of a multimodal scope of the existing legal instruments, even passengers on single contract multimodal fully integrated journeys (such as AiRail/Lufthansa express rail), cannot rely on one instrument for their whole journey, at least when it comes to compensation. Due to the rail segment being a part of the air travel as booked via the air carrier's website,

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118 Commission, 'Proposal for a Regulation amending Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air' COM(2013) 130 final, 17.

119 See section 3.2.1.

120 Brunagel and others (n 40), 9.

Lufthansa takes responsibility to assure assistance to the passengers in cases of disruptions (based on the transport contract).[121] On the other side of the spectrum, where a passenger combines the transport modes himself under separate contracts, any such contractual assurances are not applicable and the passenger has to solely rely on the mode-specific passenger rights, which, as outlined, do not include any multimodal journeys within their scope.

Despite the contractual assurances of more integrated forms of multimodal transport, there are a number of potential problems passengers may face. These problems mainly result from the mode-specific scopes of existing instruments and absence of harmonized standards, leaving potential gaps of passenger rights protection. In particular, these problems concern information provided to passengers, rights in cases of service disruptions, as well as enforcement of rights for multimodal journeys.[122] Problems under information rights revolve around potential disadvantages for PRMs in multimodal journeys, based on varying times to inform for assistance in advance, as well as the provision in general of information on delays, cancellations and connection times in one mode of transport relevant for a subsequent leg. Further, while the mode-specific regulations include provisions on the provision of information on passenger rights, this remains to be mode-specific, and there are no requirements to provide information on the applicable passenger rights for multimodal situations. This includes a lack of obligations to provide even general information on who will be responsible for a multimodal journey.[123]

Passenger rights applicable in cases of disruptions pose the main problem in multimodal journeys. Essentially, in the absence of protection beyond the single mode scope, passengers cannot fully exercise their rights throughout their multimodal journey.[124] This becomes especially

[121] Maffii and others (n 85), 40.

[122] See e.g. Commission, 'Rights of passengers in multimodal transport' (n 34) and Marie Brunagel and others (n 40).

[123] ibid, 7.

[124] ibid, 8.

apparent where a service disruption on one segment of a multimodal journey affects the subsequent segment. In those cases, unless covered by a carrier agreement in an integrated multimodal journey, passengers will suffer from a lack of protection at connection points in relation to assistance provided by carriers, as well as the continuation of their journeys on subsequent legs with other modes. In particular, this lack of protection pertains to (aside from the previously discussed information rights), potential reimbursement, re-routing or re-booking, assistance rights and entitlement to compensation. The latter is also lacking in cases of full integration, which may, based on the transport contract and agreement between the carriers, guarantee a continuation of the journey.

Lastly, there is a problem of enforcement. The designated national enforcement bodies (NEB), appointed based on the mode-specific existing regulations, do not have the legal basis to deal with complaints related to multimodal journeys.[125] Passengers themselves will not be able to seek redress and enforcement of their issues in a multimodal context, as there are no rules or standards applicable to these situations under the current EU passenger rights legislation.[126] In the absence of a specific framework, diverging levels of protection may be applicable throughout the EU.[127]

Unfortunately, there is no data currently, on the extent to which these problems are apparent in multimodal transportation. This relates both to data on incidents in multimodal transport services, as well as passenger complaints.[128]

Nonetheless, under consideration of these problems, it appears that the current system leaves the protection of passengers in multimodal transport journeys largely untouched, with the only redress possibilities stemming from contractual assurances of carriers offering integrated multimodal transport journeys. From the perspective of potential problems and legal gaps, it could therefore be argued that a necessity for passenger rights in multimodal transport exists. However, necessity

[125] Commission, 'Rights of passengers in multimodal transport' (n 35), 2.

[126] Marie Brunagel and others (n 40), 7.

[127] ibid.

[128] Commission, 'Rights of passengers in multimodal transport' (n 35), 2–3.

from the perspective of maturity of the market still remains to be answered. Both components have been addressed by the EU legislator in its first efforts of exploring the possibility to address passenger rights in multimodal transport.

2.2.2 Efforts towards an EU measure for passenger rights in multimodal transport

Although there is a trend towards combining different transport modes, passengers still face various difficulties in relation to their multimodal journeys concerning ticketing, journey and route planning, as well as passenger rights protection.[129] Alongside the developments of offering better modal choices and integrating modal networks, which the Commission aims for under the overall goals of establishing a competitive and sustainable European transport system, some key enablers of such a transport system include an increase in links between modes via the creation of multimodal connection platforms, integration of information, booking and payment and systems.[130] Further, the Commission pointed out, that a wider use of collective modes would need to be accompanied by 'an appropriate set of passengers' rights'.[131] Promulgated as a goal for achieving an efficient and integrated mobility system in the EU, passenger rights in multimodal transport are intended to complete the framework on passenger rights in the EU, however, such a measure should cover passengers with integrated tickets under single transport contracts only.[132]

The Commission reiterated the importance of increased transport integration, also for the passengers' benefit, and the corresponding need to adapt the passenger rights framework especially to address issues of disruptions at the connecting points of an intermodal journey in a

[129] Commission, 'Delivering EU-wide multimodal travel information, planning and ticketing services – dream or reality?' (Logistics and Multimodal Transport, 19 November 2018) <https://ec.europa.eu/transport/themes/logistics/events/2018-year-multimodality-travel-information-planning-and-ticketing_en> accessed 10 June 2019.

[130] COM(2011) 144 final (n 29), para.23.

[131] ibid.

[132] ibid, 23.

'Communication on Passenger Rights in all transport modes'.[133] They also pointed out, that passenger rights can encourage a shift towards multimodal journeys.[134] A first step in this regard was taken with the 2013 proposal to amend Regulation 261/2004 on air passengers' rights, which includes a provision establishing that the Regulation would apply to the whole journey in cases where a part of the journey is carried out by another mode of transport, in accordance with a contract of carriage.[135]

As part of a resolution of the Parliament in 2015 on 'Delivering multimodal integrated ticketing in Europe', it was reiterated that the Commission should respond to an earlier resolution from the Parliament, to propose a 'Charter for Passengers' Rights covering all forms of transport'. This should include a separate section on multimodal journeys and, in a clear and transparent manner, cover the protection of passenger rights in the multimodal context. To establish this, both the characteristics of each mode of transport, as well as those of the integrated multimodal ticketing should be taken into account.[136]

In response to this, the Commission initiated a public consultation[137] in 2017, asking stakeholders to provide input on a planned initiative on passenger rights in multimodal transport.[138] The consultation aimed at ascertaining, whether a more comprehensive approach towards passenger rights in multimodal transport was necessary. To this end, it sought to receive input from stakeholders on key elements of the impact assess-

133 COM(2011) 898 final (n 26).

134 ibid, 2.

135 COM(2013) 130 final (n 118), 17; However, as the proposal remains in deadlock, this change has not entered into force and the status quo remains that all passenger rights instrument currently in force at the EU do not cover issues related to multimodal passenger transportation; See also: Anthony Teasdale (ed), 'Europe's two trillion euro dividend Mapping the cost of Non-Europe 2019–24' (European Parliamentary Research, April 2019) <http://www.europarl.europa.eu/RegData/etudes/STUD/2019/631745/EPRS_STU(2019)631745_EN.pdf> accessed 10 June 2019, 130.

136 European Parliament, Delivering multimodal integrated ticketing in Europe (European Parliament Resolution) 2017/C 265/01, para.17.

137 For the questionnaire see: <https://ec.europa.eu/transport/sites/transport/files/2017-publ-consult-pax-rights-multimodal-transport.pdf> accessed 10 June 2019.

138 Commission, 'Public consultation on a possible initiative at EU level in the field of passengers rights in multimodal transport' (n 38).

ment[139] preceding the consultation, mainly on issues when combining modes of transport, policy options presented, as well as potential impacts of these options.[140]

The inception impact assessment also considers an initiative of the EU legislator to represent the completion of the EU legislative framework on passenger rights. Ultimately, passengers should be adequately protected 'when using a combination of different transport modes during their journeys in the EU'.[141] The necessity of intervention is based on the one hand on the identified problems resulting from a continued existence of the status quo of existing passenger rights[142], as well as an expected growth of the sector (although currently there is only a limited magnitude of the problems described). This provides somewhat of an answer to the question of necessity brought forward earlier, as the market size component is deemed to be fulfilled based on the expected growth of the market, which would need to be accompanied by a set of passenger rights.

Based on this, the Commission proposed four different policy options. First, self-regulation under codes of good conduct may present a solution. Hereunder, transport providers could agree on recommended practices to be implemented on a voluntary basis, the development of which would be done jointly with the Commission and the results made available to assure more harmonization in multimodal transport agreements between carriers. A second option would be a soft law approach in the form of a guidance or recommendations from the Commission to clarify applications of existing provisions in multimodal scenarios, the extent of this depending on appropriate measures identified to mitigate effects of the problems in multimodal passenger transportation. Option three and four both concern a new legislative instrument. Option three would essentially entail an amendment to the existing regulations, extending their scope to also cover cases of multimodal transport. This instrument

139 Commission, 'Rights of passengers in multimodal transport' (n 35).

140 ibid.

141 Commission, 'Rights of passengers in multimodal transport' (n 35), 4.

142 Commission, 'Rights of passengers in multimodal transport' (n 35), 2; See also section 2.2.1.r

would essentially provide in how far mode-specific regulations would apply to incidents occurring in a multimodal context. Lastly, option four proposes a new comprehensive set of rules, beyond the amendments to the existing regulations under option three. This instrument could address, at least in relation to single contract multimodal journeys, information rights, PRM rights, carrier obligations in cases of service disruptions, as well as complaint handling.[143] However, it would also hold the option to include provisions specifically addressing aspects of multimodal products involving separate contracts.[144]

The results of the consultation showed that there is a need for more transparency and better understanding of passenger rights.[145] Specifically for multimodal journeys, needs for clarification appear to exist in relation to disruptions (assistance, redress, etc.), and generally it seems that there is a lack of information on passenger rights in multimodal journeys.[146] This is essentially in line with what has been pointed out in the inception impact assessment as the legal gaps and problems in relation to passenger protection in multimodal transport. A number of stakeholders who partook in the consultation published additional papers outlining their standpoints, which give a bit more insights into some identified problems. However, it should be noted that those published opinions mostly stem from organisations representing passengers. Therefore, on a general level they favour the latter options of a legislative instrument.[147] To this end, the European Consumer Organization (BEUC) sees a linking of the existing passenger rights system as the next logical step, to address legal uncertainties in multimodal transport, to clarify the situation for consumers choosing multimodal journeys.[148] A specific focus should

143 ibid, 4–5.

144 ibid, 5.

145 Marie Brunagel and others (n 40), 3.

146 For the results see: <https://ec.europa.eu/eusurvey/publication/2017-pax-rights-multimodal-transport> accessed 10 June 2019.

147 On the contrary, transport operators favour soft-law measures and remain opposed to policy packages containing legislative measures.

148 BEUC, 'Multimodal Journeys: How to make sure passengers are better protected?' (BEUC, 2017) <https://www.beuc.eu/publications/beuc-x-2017-057_pga_beuc_position_paper_pr_in_multimodal_journeys.pdf> accessed 10 June 2019, 2.

also be put on strengthening enforcement through a power increase for NEBs. The most viable options to facilitate multimodal passenger protection lie, in their view, with offering a horizontally consolidated framework for passenger rights, including rules on multimodal journeys, or a separate legal instrument covering such journeys, essentially representing the latter two policy options introduced by the Commission in the inception impact assessment.[149] Other organizations follow in the same vein, referring to the necessity of EU intervention in the field, due to multimodal passenger transportation predominantly being in the sphere of long-distance international travelling and as a means to incentivize multimodal transport solutions in the industry.[150] However, it was also pointed out that to facilitate such a measure, existing passenger rights should be brought in comparable range, to ameliorate the conditions for transport providers to offer multimodal products, and consumers to understand applicable rights.[151] Additionally, it will also be important not to inhibit this incentivizing effect by offering too high levels of consumer protection.[152] The association of passenger rights advocates (APRA) goes a step further, pointing out that it might be challenging to ensure the enforcement of such a measure, in front of differing right contents and interpretations in the mode-specific regulations, attesting a feasibility issue to the policy options presented in the inception impact assessment.[153] Nonetheless, the overall results show a need to address passenger rights in a multimodal context.

Following the public consultation, the Commission entered the 'year of multimodality' in 2018, which sought as one of its key goals to work 'towards a legislative framework to protect passenger rights in multimodal

149 ibid.

150 See for example the response of the European Passengers' Federation to the consultation: <http://www.epf.eu/wp/wp-content/uploads/2017/06/Survey-multimodal-passenger-rights-EPF.pdf> accessed 10 June 2019.

151 ibid, 17.

152 ibid, 16.

153 APRA, 'Public consultation on a possible initiative at EU level in the field of passengers' rights in multimodal transport' (Association of Passenger Rights Advocates) <http://www.passengerrightsadvocates.eu/wp-content/uploads/ 2017/09/Consultation-multimodal-transport-.pdf> accessed 10 June 2019.

journeys'.[154] Current challenges were discussed at a conference towards the end of the year, shedding light on passenger rights issues, as well as integrated ticketing solutions and developments. Most recently, and as a part of the impact assessment[155] for multimodal passenger rights, a support study 'on passenger rights in the multimodal context' was presented, aimed at finding out which of the presented policy options is the most viable to address the identified issues in relation to passenger rights protection in multimodal transport.[156] At the point of writing, only the executive summary of this study is available, which however, does provide some insights into the viability of the policy choices.

In assessing the viability of the options, the study has two baselines. The first considers that the amended Regulation 261/2004 including its multimodal component will be adopted, while the second assumes that the proposal will not be adopted, or at least not with the multimodal scope.[157] Additionally, it should be noted that the study assumes that passenger rights will not lead to an increase of the overall size of the multimodal market, and may only improve the share of especially single and separate contracts within the market, leading to an impact on passenger protection.[158] Under the first baseline, the study concludes that a dedicated legislative instrument for multimodal passenger rights in connection with soft-law measures furthering single contract multimodal journeys would be the most favourable option.[159] This is based on the findings that in case of an amendment of Regulation 261/2004 the air-rail market and other combinations involving an air segment, would already be covered by an improvement on passenger rights in multimodal transport, leaving only improvements to the marginal markets of other mode combinations to an additional legislative measure. However, the main benefit lies in its

154 Commission, '2018 – Year of Multimodality' (n 32).

155 The consultation, as well as the support study form part of the overall impact assessment aiming to establish, whether an EU initiative is needed, and in particular, if it should focus on single contract and/or separate contract multimodal transport.

156 Marie Brunagel and others (n 40), 12.

157 ibid, 9.

158 Commission, 'Passenger Multimodality workshop on studies' (n 56).

159 Marie Brunagel and others (n 40).

potential to raise passenger awareness and address information measures, while also being the most favourable in terms of potential impacts on carriers as well as passengers.[160] Regarding the second baseline, the study concludes that the most favourable option would be a revision of existing passenger rights, extending their application to key areas of multimodal transport also in connection with soft-law measures promoting the development of single contract multimodal transport products. This approach would foster the development of single contract multimodal products the most, while at the same time providing a high level of protection for passengers, as well as substantial profits for transport operators.[161]

Despite these findings, the study ultimately points out that in the face of limited available data and without additional analyses and a univocal support from stakeholders, there can be no definitive conclusions as to the 'preferred' policy package to address passenger rights in multimodal transport. Therefore, the conclusion of the study remains that legislative action should only be taken after monitoring further market developments.[162]

It appears that the developments for multimodal passenger rights now focus mainly on the multimodal passenger transport market itself, and whether the status quo and estimated market developments warrant measures from the EU, addressing passenger rights in multimodal transport in front of the identified legislative gaps and problems. In establishing this necessity, some key findings can be observed. Notably, passenger rights may be put in the perspective of increasing the multimodal passenger transport market overall. Hereunder, passenger rights only represent one factor in this development. Other factors such as available infrastructure, economic viability, and booking and information system synergies play a pivotal role, and may to some extent be a prerequisite for

160 Marie Brunagel and others (n 40), 12.

161 ibid.

162 ibid, 13.

actually enabling a proper functioning of passenger rights.[163] The effect of passenger rights on market developments may therefore be questioned.

Nonetheless, a necessity for passenger rights in multimodal transport may exist. This necessity is essentially based on two components, namely, market size and developments, as well as necessity based on legal gaps in passenger protection and resulting issues for passengers. The latter part seems to be fulfilled, as passenger rights in multimodal transport – outside of guarantees under carrier agreements as part of single contract multimodal products – largely remain unaddressed by the existing passenger rights system in the EU.

Necessity based on market size and corresponding numbers of complaints may be debated, not only in the absence of enough data on disruptions and complaints in relation to multimodal journeys, but also because of the marginal share of multimodal passenger transport of the overall EU passenger transport market. However, a potential justification may lie in the envisaged market developments, based also on advancements in the contributing factors, such as infrastructure and system solutions, as well as enabling legislative instruments. As section 3.3 points out, a further support may come from the fact that legislative efforts being developed alongside market developments may provide the chance of differing results than with previous mode-specific regulations, which were developed more as a reaction to market developments, leading to a number of issues in their development.

Assuming necessity of intervention to be fulfilled, there appears to be no definitive answer as to how a potential measure should look like, although indications from the public consultation as well as the support study point towards some form of legislative act from the EU being the most viable solution.[164] Despite this indication, a point that has not been addressed yet is in how far such an envisaged legislative measure would actually be feasible and reconcilable with the existing passenger rights system. Clearly, the existing system may be significantly affected by such

[163] E.g., proper provision of multimodal information rights may depend on efforts of information sharing and system compatibility between transport operators.

[164] Marie Brunagel and others (n 40), 12.

a measure, regardless of its form, as it would indicate the application of existing rights in multimodal situations, and ultimately lead to the extension of liability for transport operators. Therefore, it is important to not only consider necessity and scope at this point, but also anticipated effects and problems of a legislative measure addressing passenger rights in multimodal transport, and examine how a transposition of passenger rights to multimodal journeys may be effectuated in practice, to see how it is reconcilable with the existing passenger rights system. To this end, a first step is to look into the development of the mode-specific system, as well as underlying problems of issues experienced.

3 The development of a comprehensive set of EU passenger rights in all transport modes

The regulatory system for passenger protection in transport in the EU is unique in that it offers a number of legislative instruments ensuring the protection of citizens in all main modes of transport.[165] The establishment of such far-reaching protection is intrinsically linked to the liberalization of the European transport market, as the rise in competition and market players inevitably led to more service disruptions and inconveniences for the passengers.[166]

Notably, the Commission recognized these negative effects, attesting that the market developments had not always been accompanied by adequate passenger protection.[167] Passengers suffered from growing numbers of cancellations, delays, lost luggage, and other service disruptions, while at the same time facing burdensome formalities and limited as well as ineffective means of redress.[168] A number of Eurobarometer surveys, indicating amongst others a high consumer dissatisfaction with certain transport services, as well as issues in complaint handling and belief in complaint effectiveness, further underline this.[169] Therefore, the enactment of specific passenger rights instruments on a European level

[165] air, rail, sea and inland waterways, bus and coach; See <https://ec.europa.eu/transport/themes/passengers_en> accessed 10 June 2019.

[166] Monika Nogaj (n 60), 40.

[167] COM(2005) 46 final (n 2), 3.

[168] ibid; The Commission mainly refers to the fact that in the absence of European legislation, passengers would need to rely on largely ineffective national laws and are faced with court proceedings in unfamiliar national courts with lengthy procedures. Ultimately as part of the freedom of movement this needed to be overcome in order to ensure passengers a minimum level of protection, regardless of where in the EU they are.

[169] Jens Karsten, 'Passengers, consumers, and travellers: The rise of EU passenger rights in EC transport law and its repercussions for Community consumer law and policy' (2007) 30 Journal of Consumer Policy 117, 123; Commission, 'Special Eurobarometer 228 Passengers' Rights (July 2005) <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_228_sum_en.pdf> accessed 10 June 2019, 31.

represents an effort to limit and remedy such negative effects of market liberalization, offering an adequate level of protection to passengers.[170]

3.1 Previous and current protection on an international level

Before considering the policy developments in the EU leading to passenger protection in all modes of transport today, the focus needs to be shifted on other instruments on the international level regulating the rights of passengers in transport. EU legislation and international agreements represent the main means of redress available to consumers. A discussion of the protection to international agreements will also help to differentiate and compare the efforts of the European legislator and to highlight how these international agreements were taken into account and implemented at the European level. While passenger rights in all transport modes do exist to a certain extent through international agreements, their content and reach remains limited and often does not address the specific problems or offer the adequate immediate redress for the negative effects of market liberalization in the EU and solutions are left to national laws, providing varying degrees of protection.

On an international level, certain passenger rights have existed almost since the beginning of commercial transport. The first instrument in this regard was the Warsaw Convention of 1929 regulating amongst others the liability of air carriers in cases of lost or damaged luggage, death or injury to the passenger, as well as the liability in cases of delays.[171] The instrument was significantly amended over time with a number of protocols added that led to issues of transparency. A major amendment in 1999 brought together those protocols and the main text of the Convention in a new instrument, the Montreal Convention, which entered into force in 2003.[172] The Montreal Convention modernised the compensation regime

[170] Monika Nogaj (n 60), 40.

[171] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (Warsaw Convention).

[172] Montreal Convention (n 19).

of the Warsaw Convention, offering simplified and limited liability for baggage and passengers.[173] It is now widely accepted and ratified.[174] The EU as a whole has ratified it and transposed the Convention in Regulation 889/2002, extending its scope to cover domestic flights as well.[175] From the European perspective the Montreal Convention plays a pivotal role, as it includes a provision on air carrier liability in cases of delay,[176] as well as a clause of exclusivity,[177] the latter indicating the Convention as the exclusive mean of redress in delay cases falling under its jurisdiction. This has led to proceedings in front of the Court of Justice of the European Union (CJEU) grasping upon the compatibility of the EU regulation on air passenger rights in cases of denied boarding, cancellations and delay with the Montreal Convention.[178]

While air transport was the first sector to have an instrument addressing certain rights of passengers, other transport modes also employ such regulatory instruments, albeit with different scopes and levels of passenger protection.

In rail transport, carrier liability provisions can be found in the 'Uniform Rules concerning the Contract of International Carriage of Passengers by Rail' (CIV), which is part of the 'Convention concerning International Carriage by Rail of 9 May 1980' (COTIF).[179] Similarly to the Montreal Convention, this instrument also covers cases of liability regarding death or injury to passengers, as well as lost or damaged luggage.[180] It also features a provision on liability for cancellation or

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173 Steven Truxal, 'Air Carrier Liability and Air Passenger Rights: A Game of Tug of War? (2017) 4 Journal of International and Comparative Law 103, 105.

174 There are currently 136 parties to the Convention; for the full list, see <https://www.icao.int/ secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> accessed 10 June 2019.

175 Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents [2002] OJ L140/2.

176 Montreal Convention (n 19), Art.19.

177 ibid, Art.29.

178 This matter will be addressed in Chapter 5.

179 Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) – Appendix A to COTIF (2006).

180 ibid, Title IV

delay.[181] Notably, this provision includes a rather high threshold for such service disruptions, as it only gives rise to the liability of the carrier, if the 'journey cannot be continued the same day' or when such a continuation cannot 'reasonably be required' due to the circumstances of the disruption.[182] Possible defences for the carrier include unavoidable circumstances not connected with the operation of the railway, fault of the passenger, as well as third party behaviour that is unavoidable (excluding other undertakings operating on the same railway from the third party exemption). Payment of damages is rather limited, as it covers only 'reasonable costs of accommodation' and those incurred from contacting 'persons expecting the passenger'.[183] Interestingly, the CIV works in a symbiosis with the EU regulation, as it functions as the basis upon which the regulation rests. In terms of the liability provisions, the rail regulation refers to the CIV, which is annexed to it, and provides more detailed and precise provisions.[184]

In international sea passenger transport carrier liability is regulated by the 'Athens Convention relating to the Carriage of Passengers and their Luggage by Sea' (Athens Convention).[185] Similarly to Montreal and CIV, this Convention covers cases of death or injury to passengers, as well as lost or damaged luggage and vehicles. It does not, however, contain a provision on liability in cases of delay or cancellation, which is left to national law. The Athens Convention has also been transposed to EU law by means of a regulation.[186]

For transport by road, no viable international instrument exists at the international level. The exception to this would be the UN Economic

181 ibid, Art.32.

182 ibid.

183 ibid.

184 Jeremias Prassl, 'Compensation for Delayed Rail Journeys: EU Passenger Rights on Track' (Eutopialaw 15 January 2014) <https://eutopialaw.com/2014/01/15/compensation-for-delayed-rail-journeys-eu-passenger-rights-on-track/> accessed 10 June 2019.

185 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (1974).

186 Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L131/24.

Commission for Europe Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR).[187] Although this Convention includes liability provisions in cases of death or injury, as well as lost or damaged luggage, and generally regulates similar contractual issues to its counterparts for other transport modes, only nine countries have currently ratified it, including four EU Member States.[188] Therefore – before the EU enacted a regulation governing rights for passengers travelling by bus or coach – passengers had to resort to national law to resolve issues in road transport.

3.2 Development of mode-specific passenger rights regulations on the European level

3.2.1 Air transport

The first passenger rights instrument in the European Union was adopted in 1991 in the field of air passenger transport.[189] The instrument, Regulation 295/91 on denied boarding compensation, came to be about as a response to the market changes amidst the liberalization of the air transport sector.[190] The Commission had raised concerns about the so-called "no-show" problem and its side effects.[191] Essentially, airlines would overbook flights to account for the possibility of passengers not showing up to their flight, although they had booked a seat and paid for their ticket.[192] As a result, situations arose where passengers with valid reservations were denied a seat on their flights due to overbooking. While

187 Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) (1973).

188 For the list of signatories, see: <https://www.unece.org/trans/maps/un-transport-agreements-and-conventions-28.html> accessed 10 June 2019.

189 Truxal (n 173), 110.

190 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport [1991] OJ L36/5.

191 Balfour, *European Community Air Law* (n 16), 139.

192 These no-shows were mostly attributed to holders of fully flexible tickets; Francesco Rossi Dal Pozzo, *EU Legal Framework for Safeguarding Air Passenger Rights* (Springer, 2015), 145.

on a general level the treatment of passengers in cases of overbooking relates to the service quality provided by the airline and is therefore out of the realm of EU regulatory interference, the Commission found there to be significant differences in treatment between air carriers in combination with the level of protection being unknown. This lack of transparency was, in the eyes of the Commission, not to be solved by the market itself and rendered intervention necessary, to assure a minimum level of protection, as well as to account for the imminent increase in competition on the market as a result of the liberalization processes.[193] In other words, the Commission was concerned that while competition increased, the lack of transparency with regards to the level of protection in overbooking cases could possibly lead to abuse by the airlines, as no consistent level of protection was dictated by EU legislation, and levels of protection were commonly not known.

The new Regulation 295/91 aimed at solving this problem by obliging carriers to lay down and make public their rules for boarding in the event of an overbooked flight,[194] as well as providing for rules on compensation for denied boarding.[195] Novel in its approach, the regulation contained assistance rights[196] – such as the obligation to provide meals and refreshments, as well as hotel accommodation, where applicable – and a comprehensive compensation system with amounts based on the length of the flight and a limitation of damages by the ticket price paid.[197] Aside from financial compensation, passengers also had a choice of an alternative flight at the earliest opportunity, re-routing or reimbursement of the ticket price.[198]

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193 Commission, 'Proposal for a Council Regulation (EEC) on common rules for a denied boarding compensation system in scheduled air transport' COM(90) 99 final, 2–3.

194 Council Regulation (EEC) No 295/91 (n 190), Art.3.

195 ibid, Art.4.

196 ibid, Art.6.

197 ibid, Art.4.; The limitation of damages by the ticket price is quite remarkable, as it has been deleted in Regulation 261/2004 (n 117), which gave the basis for criticism as to the possibility of receiving a claim amount that is significantly higher than the ticket price paid.

198 Council Regulation (EEC) No 295/91 (n 190), Art.4.

After it entered into force, the Regulation was generally well received, especially by interest groups, while airlines attested that it was not necessary to have such a far-reaching legislative instrument, as they already had comparable voluntary schemes in place.[199] Over the years, certain problems of the Regulation in practice became apparent. At a consultation of experts from the Member States, as well as interested parties in 1997 by the Commission, one of the main concerns voiced was the insufficient information often given to passengers. Passengers were often not aware of their rights and airlines omitted their responsibilities under the Regulation to inform them accordingly. Other issues that called for an amendment were the adjustment of claim amounts for inflation, as well as market changes as a result of the liberalization processes, such as the emergence of code-sharing agreements and the difference between scheduled and non-scheduled flights becoming less important, the latter creating a gap in the legislation for certain passenger groups. Furthermore, criticism arose, as it did not provide protection in other cases of service disruptions, namely delays and cancellations.[200]

Especially the last point, concerning the widening of the scope was voiced as a concern in the opinion of the Economic and Social Committee on the Commission's first Proposal to amend the Regulation.[201] Ultimately, the Commission decided to withdraw its proposal in order to replace it with a stronger one, in front of the backlash the text had gotten.[202] A new proposal was presented in 2001, which implemented the proposed changes with the suggestions made by the Parliament[203], as

199 Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation (EC) amending Regulation (EEC) No 295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport' (98/C 284/05).

200 Rossi Dal Pozzo (n 192), 145.

201 Opinion of the Economic and Social Committee (n 199), section 2.2.

202 Commission, 'Communication from the Commission to the European Parliament and the Council, Protection of Air Passengers in the European Union' (Communication) COM(2000) 365 final, para. 32.

203 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights' COM(2001) 784 final, para. 19.

well as it widened the scope to also cover long delays and cancellations, with the payment of compensation also applicable in the latter cases.[204] Additionally, the proposal included a provision to establish designated bodies at the national level responsible for the enforcement of the Regulation.[205] Interestingly, the new proposal included a flat rate compensation attached to the length of the flight (in the final text of the Regulation there are three flight length brackets with corresponding compensation amounts), rather than keeping the limitation by ticket price included in the previous Regulation 295/91.

Again, this new proposal faced some backlash, mainly from airlines complaining about the compensation amount being in certain cases significantly higher than the ticket prices paid. Ultimately, the recast of the Regulation entered into force in 2004 as Regulation 261/2004 with lowered amounts of compensation and the exclusion of liability in cases of extraordinary circumstances. However, this Regulation did not remain uncontested in both its substance and concerning the instrument as a whole.[206] In essence, the Regulation appeared to be riddled with ambiguities in its text, leading to a plethora of cases referred to the CJEU for clarification of terms, scope, and substance of the Regulation.[207] This influx of case-law was further fuelled by issues of enforcement stemming both from a reluctance of airlines to comply and their predominant choice for the path of litigation. The latter would lead in the last instance to a referral of questions to the CJEU for seemingly minor definitional nuances. Further issues resulted from underpowered NEBs possibly contributing to a behaviour of non-compliance by carriers, as adequate sanctioning powers were missing to ensure effective enforcement.[208]

In response to the apparent issues and in order to codify the vast amount of decisions handed down by the CJEU, the Commission proposed

204 ibid, Arts.1, 10.

205 National Enforcement Bodies (NEB).

206 See Chapter 5.

207 See e.g. Kinga Arnold and Pablo Mendes de Leon, 'Regulation (EC) No 261/2004 in the Light of Recent Decisions of the European Court of Justice: Time for a Change?' (2010) 35(2) Air and Space Law 91.

208 See section 5.2.1.

to amend the Regulation in 2013. While this proposal aimed at codifying the *status quo* of the case law, other substantive issues of the Regulation (such as the amount for claims) remained untouched or were not effectively decided on.[209] Ultimately, the proposal remained in a legislative deadlock over the inclusion of the Gibraltar airport in its territorial scope.[210] In an effort to provide clarity for the stakeholders, the Commission released guidelines for the Regulation in 2016.[211] However, while providing an adequate depiction of the current case law, thereby fulfilling on its promise of clarity, the added value of these guidelines remains contested and an actual amendment of the Regulation seems almost impossible.

While the development in air passenger rights exemplified the difficulties of adapting to market changes on the regulatory level, the EU also considered the introduction of similar systems in other passenger transport modes at the time Regulation 261/2004 was proposed. The desire to introduce passenger rights protection for the other modes of transport was first voiced in a White Paper from the Commission outlining the future transport policy objectives until 2010.[212] The Commission noticed that the legislation in this regard 'must lay the foundation for helping transport users to understand and exercise their rights'.[213] To this end, the White Paper called for measures in rail and maritime passenger protection instruments, as well as urban transport, as far as possible.[214] Ultimately, this should create a system, where 'regardless of the mode of transport used, users can both know their rights and enforce them'.[215]

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209 E.g. whether to include an exhaustive or non-exhaustive list of extraordinary circumstances.

210 Essentially a clash between the governments of the UK and Spain.

211 Commission, Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council (Commission Notice) (2016/C 204/04); Truxal (n 173), 113.

212 COM(2001) 370 final (n 23), 17.

213 ibid.

214 ibid, 83.

215 ibid.

3.2.2 Rail transport

The first other sector considered in this regard was rail transport. The focus on this sector by the Commission was specifically rooted in the fact that the international passenger rail services had lost significant amounts of market share, due to issues in punctuality as well as lack of information.[216] The Commission stated these reasons for the decline; however, one can also consider that the developments on the air passenger transport market – mainly the availability of more routes and lower fares – may have played a role in the alienation of the rail transport sector by passengers. Passenger rights in the rail sector were first addressed in the third railway package, adopted by the Commission in 2004.[217] The package formed part of the legislative effort of 'gradually opening up rail transport service markets for competition, making national railway services interoperable and defining appropriate framework conditions for the development of a single European railway area'.[218] The third – of the now four – railway packages was intended to function as a tool for the revitalization of the sector, by proposing an opening of the market by 2010,[219] as well as regulations on passenger rights and certification of train crews.[220] Those proposed efforts were included as legislative proposals in the package with the aim of overcoming the problems that had been identified in the sector, to increase its market share again.

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216 COM(2005) 46 final (n 2); High speed connections excluded; Commission, 'Communication from the Commission to the Council and the European Parliament Towards an integrated European railway area' COM(2002) 18 final.

217 Commission, 'Third railway package of 2007' (Rail) <https://ec.europa.eu/transport/modes/rail/packages/2007_en> accessed 10 June 2019.

218 See <https://ec.europa.eu/transport/modes/rail/packages_en> accessed 10 June 2019.

219 Vincent Pedret Cusco, 'EU Transport and EU Transport Policy' in Luis Ortiz Blanco and Ben van Houtte (eds) *EU Regulation and Competition in the Transport Sector* (2nd Edition, Oxford University Press 2017), 15.

220 Commission, 'Third railway package of 2007' (n 217); Karsten (n 169), 118; Loris Di Pietrantonio and Jacques Pelkmans, 'The economics of EU railway reform' (Bruges European Economic Policy Briefings no 8, September 2004) <https://pdfs.semanticscholar.org/6ef1/30d3a6a1cd1d3f17cd0b48b9a6c09836d24c.pdf> accessed 10 June 2019.

As part of this package, the Commission introduced a proposal for a regulation on rail passenger rights, as a solution in particular to concerns of the service quality of rail passenger transport. Here, the main issues brought forward by citizens and interest groups were the punctuality of services, provision of information on fares, timetables, and delays, security and safety, as well as complaint handling procedures.[221] To this end, the proposal included provisions on minimum information requirements before, during and after the journey, contract conditions, liability rules in cases of accidents, delays or cancellation, assistance rules for persons with reduced mobility, as well as cooperation of railway undertakings.[222] In other words, the proposal focused on establishing 'minimum quality standards for rail passenger services'.[223] Notably, the proposal went beyond the rights and obligations enshrined in the CIV.[224]

The proposed 'Regulation on Rail Passengers' Rights and Obligations' entered into force on 3 December 2009.[225] It effectively created an EU legal regime covering the liability of rail carriers, as it implemented relevant provisions from the CIV including liability rules for death or injuries in cases of accidents, as well as lost, damaged or delayed luggage (extending the scope to domestic rail passenger services), while adding substantive provisions on common service disruptions, such as delays, cancellations or overbooking.[226] Additionally, the Regulation also set

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221 COM(2002) 18 final (n 216), 30.

222 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on International Rail Passengers' Rights and Obligations' COM(2004) 143 final, p.4–5.

223 Heike Wetzel, 'European railway deregulation: the influence of regulatory and environmental conditions on efficiency' (Working Paper Series in Economics No. 86, Institute of Economics, Leuphana Universität Lueneburg, May 2008) <http://hdl.handle.net/10419/28204> accessed 10 June 2019, 8.

224 COM(2005) 46 final (n 2) 8; Nuria Rodriguez Murillo, 'New Rights for Rail Passengers in the European Union (2008) International Travel Law Journal 91, 91–2.

225 Commission, 'Report on the Application of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on Rail Passengers' Rights and Obligations' COM(2013) 587 final, 2.

226 Maria Victoria Petit Lavall and Achim Puetz, 'Rail Passenger Rights under Regulation (EC) No 1371/2007 and Their Implementation in Spain: Does the Spanish Rail Sector Regulation Comply with the *Acquis Communautaire*?' (2016) 66(2-3) Zbornik PFZ 363, 365.

certain information requirements, gave rights to disabled persons and those with reduced mobility, as well as it addressed security and service quality standards.[227] Most notably, national governments could choose to exempt domestic, urban, suburban and regional rail passenger services under certain conditions and timeframes from certain provisions of the Regulation.[228]

The Regulation did not receive the same backlash as the one for air transport, as it had generally been implemented effectively by railway undertakings and no significant issues of non-compliance or ambiguities in the text of the Regulation had become apparent.[229] However, as the Regulation was also enacted as part of a policy geared towards increasing the share of rail passenger transport, its success needed to be put into perspective of reaching this envisaged goal.[230] In this regard, a 2013 report from the Commission on the application of Regulation 1371/2007 indicated some issues the Regulation was facing. Those included amongst others the still limited availability of through-ticketing and re-routing services in case of service disruptions, varying access for disabled persons and those with reduced mobility, as well as the fact that the possibility for exempting domestic services remained an obstacle to the objective of the Regulation itself, and the wider policy objective of creating a Single European Railway Area.[231] In practice, a wide use of the exemption had created an inconsistent legal system, where different regimes applied to domestic and intra-EU international rail services.[232]

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227 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L315/14, Chapters II, V, VI, VII.

228 ibid, Art.1(5); Damiano Scordamaglia, 'Rail passengers' rights and obligations in the EU' (European Parliamentary Research, November 2018) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621909/EPRS_BRI(2018) 621909_EN.pdf> accessed 10 June 2019.

229 COM(2013) 587 final (n 225), 2.; With the notable exception of the CJEU case C-509/11 *ÖBB Personenverkehr AG* [2013] ECLI:EU:C:2013:613 excluding the force majeure exception.

230 COM(2013) 587 final (n 225), 2.

231 ibid, 9.

232 Scordamaglia (n 228), 4.

Overcoming these issues would be inherently linked to enhancing the service quality, which in turn should aid in acquiring a larger share of the transport market. Following these developments, the Commission published an inception impact assessment.[233] It reiterated the attested problems and added ambiguities resulting from the interpretation of the CJEU to exclude a *force majeure* exemption for railway operators under the Regulation, as well as an unclear link between the Regulation and the annexed provisions of the CIV.[234] After publishing interpretative guidelines on the Regulation,[235] addressing explanations and recommendations for frequent issues, the Commission published a proposal to amend Regulation 1371/2007 in 2017.[236] The proposal addressed many of the issues, ultimately aiming at 'striking a balance between strengthening rail passenger rights and reducing the burden on railway undertakings' with a number of measures.[237] These included, amongst others, the removal of exemptions for long-distance domestic services by 2020, strengthening the rights of disabled persons and persons with reduced mobility, as well as providing more details on the complaint-handling process and deadlines.[238] Notably, the proposal parts with the previous exclusion of the *force majeure* exemption for rail passenger service operators and will include such a clause in the amended Regulation, thereby assuring more legal fairness especially under the overarching goal of balancing interests of consumers and rail service providers. Additionally, this also indicates a move towards providing similar or somewhat comparable levels of protection in the different mode-specific passenger rights regulations, as the *force majeure* exception exists – albeit with differing scopes – in the other regulations.

233 Commission, 'Impact Assessment Accompanying the document Proposal for a Regulation from the European Parliament and the Council on rail passengers' rights and obligations' (Staff Working Document) SWD(2017) 318 final/2.

234 Scordamaglia (n 228), 4.

235 Commission, 'Interpretative guidelines Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations' (Communication) (2015/C 220/01).

236 COM(2017) 548 final (n 113).

237 ibid, 2.

238 ibid, 2–4.

While the proposal is currently going through the legislative process, it certainly fits in the overall objective of rail transport liberalization and integrates with the adoption of the fourth railway package focusing on technical compatibility in the rail sector, as well as market opening.[239] In aiding the liberalization process, an amended rail passenger rights regulation would play a pivotal role, ensuring consistency in the implementation of the rights across the EU and the rail service providers.[240]

3.2.3 Sea and inland waterway transport

Next to the developments in the rail sector, the Commission focused on establishing a passenger rights regime in the maritime transport sector, in accordance with the goals set out in the Commission's White Paper.[241]

Similarly to the developments in rail passenger rights, as a response to the White Paper outlining the future transport objectives, the Commission published a 'Communication on the enhanced safety of passenger ships in the community'.[242] It included a number of elements that should be considered as part of a European maritime passenger liability scheme, including strict liability for fault and neglect of carriers, compulsory insurance, as well as a right to direct action.[243] As the Commission deemed these elements to be fulfilled by the newly adopted 2002 Protocol of the Athens Convention[244], the EU regime was to be implemented within the international context given by the Convention.[245] To this effect, the Commission proposed a regulation 'on the liability of carriers of passengers by sea and inland waterways in the event of accidents'.[246] The

239 Scordamaglia (n 228), 2.

240 ibid.

241 COM(2001) 370 final (n 23).

242 Commission, 'Communication from the Commission on the enhanced safety of passenger ships in the community' (Communication) COM(2002) 158 final.

243 ibid, 12–3.

244 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents (Proposal) COM(2005) 592 final, 2.

245 ibid.

246 ibid.

proposal would essentially transpose the text of the Athens Convention (as amended by the 2002 protocol) into EU law as an annex to the proposed Regulation.[247] The proposed Regulation 392/2009 entered into force on 23 April 2009 with the annexed provisions of the Athens Convention applying as of 31 December 2012 directly in all Member States.[248] The Regulation included provisions on carrier liability for passengers and luggage in cases of accidents, and applied the provisions of the Athens Convention[249] to cross-border, as well as national transport within the EU, thereby extending its scope. Further, it requires compulsory insurance, and enables direct actions against insurers of EU registered vessels.[250]

While the practice of implementing international passenger rights legislation into EU law could already be seen in the implementation of the Montreal Convention, as well as the CIV, the developments as regards the Athens Convention remain unique in that the Athens Convention (in its ultimately implemented form) was not yet binding when the Regulation was created and not even when it entered into force.[251]

However, Regulation 392/2009 only marked one part of the envisaged passenger rights protection regulations in maritime passenger transport.[252] Complementing the goal of implementing passenger rights in all

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247 Stefan Kirchner, Grit Tüngler and Jan Martin Hoffmann, 'Carrier Liability for Damages Incurred by Ship Passengers: The European Union as a Trailblazer Towards a Global Liability Regime?' (2015) 23 University of Miami International and Comparative Law Review 193, 208.

248 Regulation (EC) No 392/2009 (n 186), recital 2 and art. 12; Javed Ali, 'Regulation (EC) no 392/2009 of the European parliament and of the council 2009 on the liability of passengers by sea in the event of accidents' (Hill Dickinson LLP, 01 July 2012) <https://www.hilldickinson.com/insights/articles/regulation-ec-no-3922009-european-parliament-and-council-2009-liability-passengers> accessed 14 October 2018.

249 Not all provisions were included and some have been amended to a certain extent as well.

250 Cincurak Erceg and Vasilj (n 34).

251 Kirchner, Tüngler and Hoffmann (n 247), 207; for potential problems resulting from this, see: Måns Jacobsson, 'Perspective of the Global Compensation Regimes; The Relationship between EU Legislation and Maritime Liability Conventions (2012) 4 European Journal of Commercial Contract Law 63, 72.

252 Simone Lamont-Black, 'Sea Passenger Rights and the Implementation of the Athens Convention in the EU' (2018) 32(2) Australian and New Zealand Maritime Law Journal 36, 37.

modes of transport, the Commission identified the need for strengthening passenger rights in maritime transport in four major areas, namely measures for persons with reduced mobility, automatic and immediate solutions for service disruptions, information obligations, as well as complaints and possible means of redress.[253]

To this end, the Commission published a proposal for a regulation in 2008, addressing specifically the aforementioned measures, to 'improve the attractiveness of and confidence in maritime transport, as well as to achieve a level playing field for carriers from different Member States and for other modes of transport'.[254] In its scope, the proposal included domestic and international commercial passenger services, as well as those on inland waterways.[255] Especially the expansion to cover inland waterways – although a rather small market in passenger transport[256] – marks a departure from previous international and European legislation in maritime passenger rights, as it had not been included in the scope of previous instruments.

The proposed Regulation 1177/2010 became applicable on 18 December 2012, aiming to offer a basic protection to passengers that travel by sea or inland waterways with passenger services or cruises.[257] In its provisions, the Regulation offers a roughly comparable set of rules to the other regulations, by providing for information and assistance requirements in cases of interrupted travel, re-routing or reimbursement for cancelled or delayed journeys, as well as compensation of the ticket

253 Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws' (Proposal) COM(2008) 816 final, 2.

254 ibid, 3.

255 ibid.

256 Commission, 'Report on the application of Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (Report) COM(2016) 274 final, 2; See also Commission, 'Impact Assessment concerning the rights of passengers travelling by sea and inland waterway' (Staff Working Document) (SEC(2008) 2950), 15.

257 COM(2016) 274 final (n 256), 2; Massimiliano Piras, 'European Union – Maritime Passenger Transport' (2012) 36 Tulane Maritime Law Journal 627, 635.

price in these cases, while also putting a focus on persons with reduced mobility.[258]

In 2015, the Commission published a report on the application of the Regulation, generally attesting that there had been no 'deliberate, severe or systematic noncompliance with the Regulation'.[259] While the report suggests – also based on the input given by various stakeholders in the preparation of the report – an adequate implementation of the Regulation indicating that an amendment of the Regulation is not necessary, the Commission did identify three main obstacles in the application of the Regulation and proposed measures to overcome them. First, the Commission identified an insufficient provision of information and a lack of awareness by passengers. While already improving this with a marketing campaign, the Commission aimed to further raise awareness about passenger rights. Second, enforcement of the Regulation differed between Member States, as implementation steps were taken too late,[260] NEB's roles and powers varied, and enforcement was on different levels due to the non-binding nature of NEB decisions or non-existence of alternative dispute resolution mechanisms. To combat these issues, the cooperation between NEB's has been furthered, and standard forms have been introduced, alongside the encouragement to introduce alternative dispute resolution mechanisms under Regulation 2013/11/EU.[261] Lastly, there were some concerns as provisions had been interpreted differently by NEB's and operators, however, not to an extent that an amendment would be necessary. This has partly been overcome by the Commission through clarifying the practical application of some provisions. However, the Commission pointed out that should the need arise, it will publish general interpretative guidelines, as has been done for passenger rights in other transport modes.[262]

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258 Cincurak Erceg and Vasilj (n 34), 224; Lamont-Black (n 252), 46.

259 COM(2016) 274 final (n 256), 9; Cincurak Erceg and Vasilj (n 34), 225.

260 Leading to infringement procedures.

261 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

262 COM(2016) 274 final (n 256), 9–11.

3.2.4 Bus and coach transport

Road transport (Bus and Coach) was the last main transport mode that received a Regulation on passenger rights by the EU, thereby completing the objective of the Commission to provide passengers with minimum and harmonized protection in all modes of transport to encourage the use of public transport and increase mobility.[263] Public road transport in general is a unique sector with features that are distinct from the other modes, making an intervention of the EU legislator to introduce passenger rights for this mode of transport necessary.

Firstly, the market for coach and bus transport had already been liberalised since the beginning of the new century, leading to a significant growth of the sector.[264] This was furthered by national market liberalisations in Germany and France, in 2013 and 2015 respectively.[265] Secondly, the demographic and value for passengers of this transport mode differs greatly from the other modes. Passengers of bus and coach transport often have a low income (a large percentage are students and elderly reliant on small pensions). In geographically isolated areas in Europe, bus transport is often still the only available mode of transport, making the provision of these services vital[266] for groups of society that cannot afford or are not able to operate a personal car. This is especially a

263 Cincurak Erceg and Vasilj (n 34), 217.

264 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Proposal) COM(2008) 817 final, 2; Council Regulation (EEC) No 684/92 of 16 March 1992 on common rules for the international carriage of passengers by coach and bus [1992] OJ L74/1; Council Regulation (EC) No 12/98 of 11 December 1997 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State [1997] OJ L4/10.

265 Commission, 'Report on the application of Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004' (Report) COM(2016) 619 final, 2; Dick Dunmore, 'Comprehensive Study on Passenger Transport by Coach in Europe' (Final Report, Steer Davies Gleave, April 2016) <https://ec.europa.eu/transport/sites/transport/files/modes/road/studies/doc/2016-04-passenger-transport-by-coach-in-europe.pdf> accessed 10 June 2019.

266 Since they rely on these services to reach their school, place of work, or partake in social activities such as visiting friends.

factor for persons with reduced mobility, as their access to bus and coach services needs to be assured. Thirdly, the road passenger transport sector has a unique structure, as it mainly consists of small and medium-sized enterprises (SME) that have to share the available infrastructure with other actors. This has led to differences in the provisions of the bus and coach regulation compared with those of other transport modes.[267] Lastly, there is no previous regulatory instrument on the international level[268] that governs passenger rights in bus and coach transport and there are varying degrees of passenger protection in national legislation with no common rules on dispute settlement.[269]

Based on these specific market characteristics and the general emphasis of the Commission since its 2001 White Paper for the future of the transport policy to establish passenger rights regulations for all transport modes, it proposed a regulation for passenger rights in bus and coach transport in 2008.[270] As to the areas of passenger protection that the proposal should strengthen, the Commission found the rights of persons with reduced mobility, liability issues, as well as compensation and assistance in the event of interrupted travel to be of main concern.[271] Unsurprisingly, transport operators and their representatives did not see the need for such measures, especially as the market would not be adapted to such an additional legislative burden, and matters had been widely addressed through voluntary commitments and national legislation. Consumer associations on the other hand referred to the vast differences in passenger protection throughout the Union, rendering an EU passenger rights instrument necessary.[272] The Commission considered a community legal action covering rights of bus and coach transport in both international and domestic services the most appropriate to establish uniform rights in this sector.[273]

267 Namely the exclusion of rules on compensation in cases of delays and cancellation.
268 Aside from CVR (n 187); See section 2.1.1.
269 COM(2008) 817 final (n 264); COM(2016) 619 final (n 265).
270 COM(2008) 817 final (n 264).
271 ibid.
272 ibid, 6.
273 ibid, 7.

The proposed Regulation 181/2011 entered into force on 1 March 2013. The scope of the Regulation includes regular services for non-specified groups of customers that have their boarding or alighting point in a Member State.[274] As there is no international agreement, the Regulation also includes a provision referring to national laws of the Member States for the compensation in cases of death or injury to persons, as well as lost and damaged luggage. However, the Regulation sets the minimum limit of compensation that is to be provided.[275] In its substantive provisions, the Regulation follows the proposal, as it provides several provisions on the rights of persons with reduced mobility, including assistance rights, information on accessibility, and designation of specific terminals for persons with reduced mobility and addresses passenger rights and liability in cases of delay and cancellations. Further, the Regulation also lays out a procedure for bringing forward claims and calls for the designation of NEBs. As with the Regulation on rail passenger rights, Regulation 181/2011 also includes the possibility for Member States to exempt domestic regular services from the application of certain provisions of the Regulation for a duration of four years, with an option for the period to be renewed once.[276]

As with the other Regulations, the Commission published a report on the application of the Regulation.[277] Generally, the Commission attested that there were not any serious or deliberate breaches of the Regulation with most complaints being related to information requirements or assistance rights. The NEBs noted that many claims fell outside the scope of the Regulation.[278] However, just as with maritime transport, the Commission identified three factors hindering the effective application of the Regulation. Those factors mirrored the ones in the maritime passenger rights legislation. The factors of concern were a lack

274 Regulation (EU) No 181/2011 (n 25), Art.2(1); The whole Regulation is applicable to services of 250km or more in length, while some provisions still apply to those with less length.

275 ibid, art.7.

276 ibid, Art.2(4).

277 COM(2016) 619 final (n 265).

278 ibid, 10.

of awareness, to be combatted by information campaigns, enforcement lagging behind in some Member States to be rectified by infringement procedures, collaboration and exchange between NEBs, and guidance by the Commission, as well as differing interpretations of provisions, where the Commission provided clarification to the stakeholders and may issue guidelines, if necessary.[279] Further, the Commission emphasised the importance of making bus stations accessible to persons with reduced mobility and providing information on required standards to improve accessibility. Lastly, the assurance of connections to other modes is mentioned to further multimodal connections. All in all, also due to the limited experiences in the application of the Regulation (i.e. lack of complaints and sanctions), the Commission considered an amendment not to be necessary.

3.3 Conclusions in the light of future measures in multimodal passenger transport

While this overview provides insight into the creation and developments of the current European passenger rights legislative system, it also illustrates important characteristics of the market and significant commonalities and differences in the legislation and issues that the passenger rights instruments in the transport modes have faced.

The adoption of passenger rights for all transport modes and the current system may best be described as fragmented. There is a focus on specific rights, however even within the transport modes, those rights may be dispersed among different sets of legislation. An example for this would be the fact that the rights of persons with reduced mobility in air transport are in a separate Regulation than information, assistance and compensation rights, a separation, which does not exist in the other modes of transport.[280] In the same vein falls the interplay of the European passenger rights instruments with international agreements on passenger

[279] ibid, 12.

[280] See Regulation (EC) No 1107/2006 (n 48).

rights. Both air and maritime international passenger rights agreements[281] have been transposed into EU law as separate regulations, while for rail transport, the relevant international agreement has been annexed to Regulation 1371/2007 with provisions on liability for passengers and luggage in the Regulation referring to the annexed provisions. In bus and coach transport, no viable international agreement on passenger rights exists. Regulation 181/2001 therefore tries to fill this gap by including minimum maximal compensation amounts for accidents and lost or damaged luggage, but national law will handle compensation.

Nonetheless, a common core of passenger rights seems to exist in one instrument for every mode, although the contents of these rights might differ, as the following section will show. These common rights are rooted in the goal of the Commission to establish passenger rights in all modes of transport, in order to provide a minimum protection for consumers in the liberalized transport markets. This 'comprehensive integrated set of passenger rights rules in all modes' of transport now exists in the form of Regulation 261/2004 for air passengers, Regulation 1371/2007 for rail passengers, Regulation 1177/2010 for waterborne passengers, and Regulation 181/2011 for bus and coach passengers.

Albeit these common grounds, experiences with the regulations have differed significantly between transport modes, for a variety of reasons. Most importantly, measures have been adopted at different times, and while the air passenger rights regulation has been in force for almost fourteen years, the regulation for bus and coach transport has been for only five. A regulation with a longer lifetime can be evaluated better, as more practical experiences exist, passengers and stakeholders had more time to become aware of the regulation and acquainted with its provisions and processes, and therefore more can be said about its performance and issues that have come up.

Related to this are the apparent differences in the modal transport markets. Share of the overall transport market and composition of their market are two factors that have an effect on the performance of passenger rights regulation. The former mainly relates to the reach of the

[281] Addressing liability in cases of accidents or lost and damaged luggage.

regulations, translating into numbers of complaints that have to be seen in correlation to the size and transport share of the respective market. The latter becomes especially important when considering the possible effects of passenger rights regulation on market players. Economic repercussions related to the adherence to passenger rights for smaller enterprises are higher than for more established, larger transport providers. Larger enterprises are also more equipped to respond to complaints and manoeuvre the regulatory landscape. In the mode-specific passenger rights system this difference translates into more means of larger enterprises to address passenger rights policy and to seek means of redress themselves. However, this difference in size of undertakings becomes even more prevalent when considering the implementation of a system of multimodal passenger rights rules, where service disruptions in one mode of transport can trigger obligations from another mode of transport, which may lead to a significant economic burden for smaller undertakings. Therefore, a fair and transparent establishment of liability questions in multimodal passenger transportation needs to be put in place, to deal with situations where e.g., transport is interrupted on the rail leg of a multimodal ticket and a subsequent air leg (which may be significantly more expensive) is missed and would need to be reimbursed.

Although the above reservations play a significant role in the experiences that fuelled the development of the regulations, there are a number of underlying issues. From the overview of developments above a certain number of issues can be inferred that – regardless of the contextualisation of regulation lifetime and market composition – have warranted action from the Commission to initiate measures in order to ensure a proper functioning of the regulations. Generally, the Commission wants to assure that the regulations are properly applied and enforced. Proper application depends mainly on three factors, namely compliance by transport operators, awareness and understanding of passengers, and proper functioning of NEB's and other enforcement mechanisms. Underneath these factors are a number of issues that have had an influence on the three factors, which have appeared with the regulations (although there are differences between them). The majority of these issues can be

categorized as being either related to the enforcement of the regulation, or to be of an interpretative nature. They will be addressed in chapter 5 to analyse repercussions of the *status quo* of the regulations with a view of implementing a measure for passenger rights in multimodal transport.

Lastly, differences in experience may stem from differences in the content of rules, which the next chapter will address. Differences, gaps and inconsistencies will be pointed out concerning a selection of the core passenger rights from which conclusions as to their effect on possible multimodal passenger rights will be drawn.

4 EU passenger rights regulation – Overview and comparison of rights and obligations in case of service disruptions

Based on the fragmented nature of the system, transport market differences, and the adoption of the instruments at different times, they differ in scope and terminology and offer varying levels of protection for passengers.[282] Legislative gaps and inconsistencies exist between the transport modes, and the codified rights can be very complex.[283] Further adding to this complexity are interpretations of provisions by the CJEU, even adding substantial content to the provisions.[284] Nonetheless, taking into consideration previous consumer protection in transport through international conventions, the EU still offers a unique comprehensive set of rules with far reaching mechanisms for consumer protection and relatively easy means of redress, at least in theory.

Despite the differences, there are some shared underlying principles forming the basis for what the EU considers the core of passenger rights.[285] These principles are non-discrimination, accurate, timely and accessible information, as well as immediate and proportionate assistance.[286] Based on those principles, EU passenger rights instruments provide ten basic rights. Those rights are: Right to non-discrimination in access to transport; Right to mobility (accessibility and assistance for PRM); Right to information[287]; Right to renounce travelling[288]; Right to fulfilment of the transport contract in case of disruption[289]; Right to assistance in cases of long delay; Right to compensation under certain circumstances; Right to

282 Nogaj (n 60), 40.
283 ibid, 38.
284 ibid.
285 Cincurak Erceg and Vasilj (n 34), 218–19.
286 ibid.
287 At any stage of travel and before purchase, notably in case of disruption.
288 Reimbursement of full cost of the ticket when the trip is not carrier out as planned.
289 Rerouting or rebooking.

carrier liability towards passengers and their baggage; Right to a quick and accessible system of complaint handling; Right to full application and effective enforcement of EU law.[290]

The categorization into these ten rights has been outlined by the Commission in a 2011 White Paper, already with the aim of establishing comparability and as a step away from a 'purely modal approach to a more intermodal vision'.[291]

While the totality of these rights are dispersed over a number of instruments, a common core exists in four regulations (one per transport mode) that – at least from their typology – include common rights on information, reimbursement, re-routing, assistance, and compensation, as well as the designation and role of national enforcement bodies (NEB).[292] Based on their shared typology, they offer an amount of comparability that will aid in understanding the normative differences between the passenger rights in the transport modes and perhaps offer insights into the particular choices for certain rights and their scopes, based on the characteristics of their respective transport market.

The purpose of this overview will be to outline differences between these core rights and illustrate resulting issues on a purely normative level to draw conclusions as to how these differences and problems pose challenges for the adoption of a multimodal passenger rights instrument. The focus on these specific rights finds its justification in the problems inherent in multimodal passenger transportation that the Commission aims to tackle with their proposed measure. In practice, the major challenges for a new measure addressing multimodal passenger rights are to provide adequate protection in cases of service disruptions. Redress possibilities through NEBs need to be ensured for multimodal journeys, accessibility and assistance rights and obligations need to be clarified beyond the modal transport, and lastly, rights and obligations need to be established

290 COM(2011) 898 final (n 26) 3–4.

291 ibid, 4.

292 Commission, 'Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights' (Communication) COM(2011) 174 final, 3.

regarding both passengers with single multimodal transport tickets, as well as separately bought tickets for the segments of the journey.[293]

The most crucial point of the above problems is that of adequate protection in cases of service disruption, i.e. the rights of passengers in cases of missed connections as a result of service disruptions. This is why the following sections will therefore discuss the rights to information, renounce travelling, fulfilment of the contract in case of disruptions, assistance, and compensation, as these rights provide the core protection in those cases. They will be outlined and discussed in their iterations in the four transport modes, pointing out differences and gaps between the mode-specific passenger rights regulations. Related issues and possible repercussions resulting from this for a new instrument for passenger's rights in multimodal transport will be discussed as well. A wide stance is taken in the projection of the differences and issues to a multimodal measure, in that both single-contract, as well as separate contract multimodal journeys are taken into account.

4.1 Right to information

The right to information plays a pivotal role in the EU passenger rights regulatory system and applies to all transport modes.[294] The scope of the right under the four core regulations fulfils a twofold purpose. First, the provisions[295] assure that potential passengers receive pre-contractual information, such as final prices, or general conditions to adhere to standards of transparency.[296] Second, the regulations include information obligations for the carrier before and during the journey, both on

[293] Especially as the single contract multimodal products (in most cases) do not offer contractual assurances beyond fulfilment of the contract and separate contracts leave the passenger with just the rights for the separate mode-specific transportation chosen, which do not address multimodal situations at all; Commission, 'Rights of passengers in multimodal transport' (n 35), 2.

[294] Nogaj (n 60), 73.

[295] In air and rail transport.

[296] Interestingly, pre-contractual information is only covered in the air and rail regulations, not in maritime and bus transport. However, such information may also be covered by other general European consumer legislation.

a general level and with specific scopes and details in cases of service disruptions. This latter iteration of information obligations is of most concern for a possible multimodal passenger rights protection in cases of service disruptions, as the former is more of a concern in the practical implementation and development of multimodal passenger transport.[297] Therefore, the focus of the comparison lies on information obligations before and during the journey and in cases of service disruptions.

Regarding obligations on information before and during the journey, all regulations contain both general, as well as more specific obligations relating to service disruptions. In general, both bus and maritime regulations include rather similar texts, therefore having the same extent of rights, while major diversions can be found in the rail and especially air regulation.

Considering the general obligations, rail, maritime, and bus regulations include an obligation for the carrier to inform passengers about their rights. In rail transport, this needs to take place at the point of sale of the ticket,[298] while in maritime transport this information needs to be made available publicly at ships, ports or terminals in an accessible format.[299] In bus transport, the provision of such information has to take place latest at departure with the provision of information either at the terminals or through the internet.[300] The information should be appropriate and comprehensible.[301] Additionally, in those three regulations, the contact details of the relevant NEB should be provided.[302] While in those three modes of transport the extent of the general information obligations regarding the rights of passengers are the same – aside from minor differences in the point of provision of rights, as well as the medium – the air passenger

297 What is meant by this is that the information rights/obligations here mostly concern information on ticket prices, scheduling, etc. in multimodal situations, which is an important right for passengers and essential for growing the market for multimodal passenger transport in the EU.

298 Regulation (EC) No 1371/2007 (n 227), Art.29(1).

299 Regulation (EU) No 1177/2010 (n 25), Art.23(1).

300 Regulation (EU) No 181/2011 (n 25), Art.25(1).r

301 ibid.

302 Regulation (EC) No 1371/2007 (n 227), Art.29(2); Regulation (EU) No 1177/2010 (n 25), Art.23(3); Regulation (EU) No 181/2011 (n 25), Art.25(1).

regulation diverts quite a lot from this standard. Here, information on rights need only to be given when a service disruption actually happens.[303] Generally, there only needs to be a visible text at the check-in referring to the possibility to ask for information on passenger rights in cases of service disruptions. The notice in cases of service disruptions is to be given to passengers in written form and should also contain the contact information of the NEB.[304]

Passengers need to be informed about their rights at any time of their journey, to be able to assess what they are entitled to in every situation.[305] Practice has shown that especially in air and rail transport, a lack of information is always to the detriment of the passenger, especially in the event of a service disruption.[306] In the past, issues of non-compliance of the rights by carriers by providing incomplete, incorrect or difficult to obtain information have been subject of many complaints to NEBs.[307] Some reasons for this may be found in the text of the regulations itself. For example, aside from the air regulation stipulating written information, and the bus regulation giving the option to make information available through the internet, there is no uniform approach – not even within the regulations – to provide information in a certain manner. The rail regulation keeps it even more vague by requiring only an 'appropriate format'.[308] Additionally to the medium, there seems to be an apparent lack of definition of the quality of information that should be provided. Air and rail regulations are silent on this matter, while maritime and bus regulations require the provision of adequate information in an

303 Regulation (EC) No 261/2004 (n 117), Art.14(1); Denied boarding, cancellation or delay of at least two hours.

304 ibid, Art.14(2).

305 Nogaj (n 60), 76.

306 ibid, 76; Francesco Dionori, Will Macnair, and James Steer, 'Evaluation of Regulation 1371/2007' (Final Report, Steer Davies Gleave, July 2012) <https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-evaluation-regulation-1371-2007.pdf> accessed 10 June 2019.

307 ibid; Simon Smith, 'Evaluation of Regulation 261/2004' (Final Report, Steer Davies Gleave, February 2010) <https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf> accessed 10 June 2019, 36.

308 Regulation (EC) No 1371/2007 (n 227), Art.8(3).

accessible format.[309] There is an apparent lack of clarity when it comes to the quality and specific content of information that might further possible non-compliance. At least when it comes to information during the journey, the rail regulation specifies certain information that needs to be provided, such as delays, next station, or security and safety issues.[310]

Under the second component of the right to information, information in cases of service disruption, the right contents of the core regulations also differ. The air regulation specifies that information should be provided as early as two weeks in advance, up until one hour before departure, with different rights of redress depending on the time left to departure.[311] Further, an explanation as to possible alternative transport options is to be given. In the rail regulation, specific information requirements exist concerning delays, where passengers have to be informed about the situation, as well as estimated departure and arrival times. As to a time limit, the regulation only offers the vague requirement of providing information 'as soon as it is available'.[312] The maritime regulation employs the same vague requirement of providing information as soon as possible, but gives 30 min. after the originally scheduled departure as a deadline for carriers or terminal operators to inform.[313] Similar to the rail regulation, information on estimated times of departure and arrival should be given to passengers.[314] Comparable to the air regulation, passengers are to be informed of alternative connections in cases where they miss a connecting transport service.[315] The bus regulation holds the same requirements as to provision of information "as soon as possible", with the same deadline. The same rules apply to the content of the information.[316] Notably, the bus regulation is the only one that further specifies the means of information

309 Regulation (EU) No 1177/2010 (n 25), Art.22; Regulation (EU) No 181/2011 (n 25), Art.24.

310 Regulation (EC) No 1371/2007 (n 227), Art.8(2).

311 Regulation (EC) No 261/2004 (n 117), Art.5(1)c.

312 Regulation (EC) No 1371/2007 (n 227), Art.18(1).

313 Regulation (EU) No 1177/2010 (n 25), Art.16(1).

314 ibid.

315 ibid, Art.16(2).

316 Regulation (EU) No 181/2011 (n 25), Art.20(1).

provision, stating that where feasible information should be provided electronically.[317]

In the context of a new measure for multimodal passenger transport, the provision of information during the trip and especially in cases of service disruptions plays a very important role. Passengers need to be informed not only about the rights that they have in those situations, but should also receive information necessary for them to assess, whether other rights at their connecting points might apply.[318] The main hurdle for a multimodal passenger rights instrument to overcome is what standard should be applied when it comes to the provision of information and how that standard is reconcilable with the existing instruments? The below considerations focus on issues regarding the point of information, means of information, as well as quality of information.

The point of information might pose problems, as the mode-specific regulations do not provide the same point where information will be provided to passengers. Especially to assure adequate and timely information on their rights in a multimodal context this point needs to be clearly communicated by the instrument. Based on the differences in the mode-specific regulations in this concern (mainly due to the air passenger rights regulation requiring provision of information only in cases disruptions actually happen), a possible clash with the mode-specific solutions might apply. However, this is a rather minor hindrance, as a solution could be to stipulate in a possible measure for multimodal transport, that information on the rights in this regard will be provided at the points stipulated in the mode-specific regulations. Nonetheless, for the sake of clarity and enhancing awareness, a harmonization of the point of information throughout the mode-specific regulations would be the best solution.

In relation to this first point stands the notion of the means of information. Under the mode-specific regulations, a certain divergence exists

[317] ibid, Art.20(4): Granted that that the passenger has requested this electronic provision and has provided the carrier with necessary contact details.

[318] This would mainly relate to information on departures and arrivals, as well as estimated delays and possible alternative connections.

with no uniform approach to the appropriate medium, as it ranges from an appropriate format to written and electronic means. Under the heading of adequate and timely provision of information, a multimodal measure would need to assure a uniform medium of information for passengers to rely on. However, in the current system this divergence does not seem to cause any major practical difficulties.[319]

Lastly, the quality of information needs to be discussed. In a multimodal context this is perhaps the vital component for passengers, as they especially need to know about arrival and departure times, alternative connections and in particular their rights in any cases of service disruptions.[320] In the current system, detailed quality of information requirements vary between the modes. These differences might pose a problem in a multimodal system, as reliance on them in a new measure would mean passengers would run the risk of receiving different levels of quality of information depending on the transport mode they are currently travelling with. On the contrary, an imposition of e.g. a list of information quality requirements[321] might be a viable solution so long as clashes with existing requirements can be avoided. Here, a new multimodal measure may bring clarity to the ambiguous term of adequate information, as included in the maritime and bus regulations.

In the end, information requirement differences play a decisive role in multimodal transport; diverging levels of information provision with ambiguous contents would be to the detriment of the consumer when kept in a multimodal system, or when reliance in case of this right would remain solely on the basis of the existing mode-specific regulations. The decisive factor will be whether a new standard should be implemented by the multimodal measures on information provisions and whether this standard is based on one of the previous provisions. This would in turn bring up the question of what happens with the old standards that are still in existence in the mode-specific regulations. At this point,

319 Nogaj (n 60), 77.

320 BEUC (n 148), 3.

321 This could be specifics, such as amount of delay, estimated departures and arrivals, etc.

there is no clear answer on this matter, but it shows that even when it comes to information provision, diverging levels of standards in the mode-specific regulations may have negative repercussions on assuring adequate information provision in a multimodal context.

4.2 Right to renounce travelling and fulfilment of the contract in case of disruptions

When it comes to disruptions of service, passengers generally have the right to receive either a reimbursement of their ticket price and discontinue their journey – In those cases, the regulations ensure transportation back to the point of departure – or opt for a re-routing to their final destination, or re-booking at their convenience. Notably, this right is triggered by a number of service disruption events,[322] but they vary between the regulations. Generally, the Commission refers to the right to renounce travelling and the right to fulfilment of the contract as two separate rights. However, as the choice between both rights is always triggered by a service disruption, meaning that the general requirements for events triggering the choice for these rights are the same in each regulation, they will be introduced together in one part, for the purposes of this comparison.

In all regulations the choice for passengers to opt for re-routing, re-booking, or reimbursement is based on the condition that a service disruption has happened. In air transport the right is triggered by both voluntary and involuntary denied boarding[323], by the virtue of a cancellation,[324] and in cases of delays of at least five hours.[325] Notably, in the case of delay there is no choice, as only reimbursement is applicable. This differentiates the air regulation from those in the other modes of transport, where the choice is offered in cases of delays, cancellations and overbooking, the latter only in the bus regulation. In relation to delays,

[322] Delays, cancellations, denied boarding, overbooking.
[323] Regulation (EC) No 261/2004 (n 117), Art.4(1) and (3).
[324] ibid, Art.5(1)a.
[325] ibid, Art.6(1)c(iii).

the time limits to trigger the right and their point of calculation differ.[326] However, the time and calculation differences find their justification in the characteristics of each transport market that they correspond to.[327]

4.2.1 Reimbursement

Once passengers have made their choice, additional requirements in each regulation apply. In the case of reimbursement, the requirements are time limits and items subject to reimbursement. Regarding time limits, the air regulation and the sea and inland waterways regulation call for reimbursement within seven days[328], while in rail transport reimbursement is to be paid within one month after the submission of the request. In the bus and coach regulation, reimbursement is to be paid within 14 days 'after the offer has been made or the request has been received'.[329] These differences could pose problematic insofar as they do not uniformly stipulate a point of calculation for the time limit, leaving transport operators with the discretion to delay payments.[330] This problem has actually manifested in practice, when Regulation 261/2004 was assessed for a possible amendment, as some European Consumer Centres (ECC) voiced a perceived difficulty to obtain reimbursement within the time limits given.[331]

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326 Where the rail regulation provides for a delay at the final destination of at least 60 minutes (Regulation 1371/2007 (n 227), Art. 16(1)), both sea and inland waterways and bus and coach regulations use a delay at the point of departure as the indicating factor, with delay times of 90 and 120 minutes, respectively (Regulation 1177/2010 (n 25), Art.18(1); Regulation 181/2001 (n 25), Art.19(1)).

327 Nogaj (n 60), 86.

328 Regulation (EC) No 261/2004 (n 117), Art.8(1)a; Regulation (EU) No 1177/2010 (n 25), Art.18(1)b and (3).

329 Regulation (EC) No 1371/2007 (n 227), Art.17(2); Regulation (EU) No 181/2011 (n 25), Art.19(1)b and (5).

330 Nogaj (n 60), 88.

331 ibid; Mark Havenhand, Will Macnair, and Simon Smith, 'Exploratory study on the application and possible revision of Regulation 261/2004' (Steer Davies Gleave, Final Report, July 2012) <https://ec.europa.eu/transport/sites/transport/ files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf> accessed 10 June 2019.

Regarding the substance of the reimbursement, all regulations offer the same content as to what is being reimbursed. Generally, reimbursement will include the full cost of the ticket price for parts of the journey not taken, or for those that have been made but that do not serve any purpose regarding the original travel plan. All regulations also offer the option (where relevant) to then return the passengers to their original point of departure. While this general uniform approach is helpful, some problems remain that stem not so much from what is covered by the right to reimbursement, but more from what is not addressed.

While in general all service disruptions trigger the choice for the right to reimbursement, it is not clear what happens when a delay occurs during the transportation. None of the regulations hold any rules in this regard, except the proposal for a new air passenger rights regulation, giving the passengers the right in cases of tarmac delays of 5 hours or longer to reimbursement and to disembark the aircraft.[332]

Further developments on this right may also have an influence on passengers in multimodal transport. In a multimodal measure, it would be pivotal to establish what the choice of the passenger for a reimbursement, and disembarkation would mean in relation to subsequent legs with other transport modes of their journey, as the other option is to be re-routed or re-booked. It would be necessary to establish what rights passengers could enjoy in relation to their other legs. While the interruption of travel could mean that they would miss subsequent parts of their travel itinerary, therefore potentially entitling them to certain rights in the multimodal context[333], it is to be seen whether their choice for reimbursement should perhaps limit the application of further rights of reimbursement or assistance for other legs of their journey, as this represents a conscious choice of interruption and return to the original point of departure. On the other hand, the choice subsequently means

[332] COM(2013) 130 final (n 118), 19; C-452/13 *Germanwings GmbH v Ronny Henning* [2014] ECLI:EU:C:2014:2141; Nogaj (n 60), 86.

[333] Depending on the extent of the system, those would include assistance rights, reimbursement, or compensation.

a discontinuation of the entire multimodal transport on the basis of a service disruption in one leg.

Another issue relates to missing clarifications for the process of obtaining reimbursement. While generally covered under the right to information, misinformation is still a looming problem in the enforcement of the regulations.[334] Therefore, clarification is needed as to the actual obligations of the carrier and steps of the passenger in making their choice for reimbursement.[335] This clarification would be vital in a multimodal context, especially under the considerations of possible subsequent rights of the passenger's other legs of their journey. Passengers would need to know not only how to effectuate their choice for reimbursement, but also what that choice entails for the other legs of their journey. Is reimbursement for subsequent legs applicable? What if there is a return to the original point of departure?

Furthermore, the issue remains that only the bus and coach regulation includes a redress mechanism for passengers in the form of ticket-price based compensation where carriers actually fail to offer a choice for passengers facing service disruptions.[336] In a multimodal context, this situation could cause confusion with passengers[337] and could lead to difficulties in relation to possible passenger rights further down the travel chain. An obligation to compensate, where a choice is not given could function as a further economic incentive for carriers to adhere to their obligations.[338]

Adapting reimbursement rights to multimodal passenger transport will require a number of policy decisions that might have far-reaching economic effects for transport service providers and could influence decisions of passengers. The three main questions that need to be addressed

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334 See e.g. European Court of Auditors, 'EU passenger rights are comprehensive, but passengers still need to fight for them' (Special Report No 30/2018, November 2018) <https://www.eca.europa.eu/Lists/ECADocuments/SR18_30/ SR_PASSENGER_RIGHTS_EN.pdf> accessed 10 June 2019.

335 Nogaj (n 60), 87.

336 Regulation (EU) No 181/2011 (n 25), Art.19(2).

337 Nogaj (n 60), 88.

338 ibid.

by a measure for passenger rights in multimodal transport in this regard are: If a passenger experiences a service disruption during a leg of a multimodal transport journey (be that a single contract or two separate contracts), that would trigger the right to renounce travelling, should this right also extend to other legs of the passenger's journey? Should the choice for reimbursement affect the possible application of other rights related to subsequent legs of the passenger's journey, given that it is a conscious choice of ending the whole journey, where continuation (re-routing; re-booking) has been the other option? Lastly, who should be responsible to pay a reimbursement for the other affected legs of the multimodal transportation journey? The general choice for extending the right to reimbursement to subsequent legs of a multimodal transportation journey would potentially cause enormous economic repercussions. Especially in cases where separate contracts would be included, this would constitute a huge liability for transport providers that would often be unforeseeable, as they are not aware whether passengers might have booked subsequent legs with a different transport mode themselves.

In front of the already existing issues of the application of this right in the mode-specific context, it appears that an extension of the right to apply in a multimodal context would add a new dimension to most of these problems. Further possible unforeseen economic repercussions for transport operators may impede effective enforcement in the form of a timely reimbursement.

4.2.2 Re-routing and re-booking

The other choice for passengers facing certain service disruptions is to make use of their right to fulfilment of the contract, which is enshrined in the regulations as the option to make use of re-routing or re-booking, ensuring a continuation of the passenger's journey[339] or the provision of alternative transportation. Notably, only air and rail offer the third choice

[339] It should be noted that while in rail and bus transport interruptions during service are possible, rendering continuations of service possible, this generally does not apply to air and sea transport.

of re-booking. However, this does not preclude transport providers of the other modes from offering it as an option to passengers. The only difference to re-routing is that passengers are given the option to opt for a later transportation to their final destination at their convenience rather than a re-routing at the earliest opportunity.[340]

In air transport, the choice for re-routing or re-booking applies only in cases of denied boarding and cancellations, not in cases of delays, where only the option for reimbursement remains for passengers. As all other regulations offer the option of re-routing in cases of delays, the exclusion in air transport seems to lack justification. However, re-routing in these cases in air transport would provide a number of logistical obstacles due to the limited availability of the same routes to the specific destinations and additional costs for air carriers where re-routing through other carriers is necessary.[341] To offset this, the air regulation actually offers the opportunity to provide re-routing to alternative airports and cover the costs of transportation from the alternative to the final destination.[342] This preparedness further underlines the unjustified exclusion of the option to re-route in cases of long delays. The 2013 proposal to amend the air regulation tackles this problem by extending the right to re-routing to also cover cases of long delays.[343]

Based on the fact that the events that trigger the possibility to choose for re-routing or re-booking are the same as for reimbursement (except in air transport),[344] the focus will be on the content of the right, once the choice has been made.

All regulations offer the same core of the right to re-routing or re-booking, namely a continuation (or re-routing) under comparable transport conditions to the final destination at the earliest opportunity.[345]

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340 E.g. Regulation (EC) No 261/2004 (n 117), Art.8(1) b and c; Nogaj (n 60), 87.

341 Nogaj (n 60), 92.

342 Regulation (EC) No 261/2004 (n 117), Art.8(3).

343 Nogaj (n 59), 92; COM(2013) 130 final (n 118), 20.

344 With the only differences being the time limits and calculation points for delay until passengers can make use of their right.

345 See e.g. Regulation 261/2004 (n 117), Art.8; Regulation 1371/2007 (n 227), Art.16; Regulation 1177/2010 (n 25), Art.18; Regulation 181/2011 (n 25), Art.19.

In the air and rail regulation, another choice is offered for later re-booking at the convenience of the passenger.[346] The maritime and bus regulations further specify that such re-routing should be fulfilled by the carrier at no additional cost for the passenger, however, this should also be inferred from the other regulations. As with the right to reimbursement, only the bus and coach regulation offers compensation when a carrier fails to provide the option of re-routing.

The main practical issue of the right to re-routing relates to ambiguities of the provisions. Under the current system, there is no concrete definition of what 'under comparable conditions' entails, nor is there an indication of specific requirements for alternative transport at the 'earliest opportunity'.[347] This has led to a narrow interpretation by transport operators of both terms. To this end, a report from the European Court of Auditors (ECA) has shown that air and rail operators have offered excessively long bus journeys (instead of a rail or air journey) as alternative transportation in several cases brought to NEBs.[348] Generally, the carriers often offer only transportation on their own services, mostly due to financial reasons.[349] While re-routing by the same carrier to the same original destination would certainly fall under comparable conditions, such re-routing is often not the earliest opportunity, as e.g. other transport operators of the same transport mode would provide services at an earlier time.[350] Some redress is offered by the proposal to amend the air regulation, as it stipulates a 12 hour timeframe for airlines to arrange re-routing via their own services, after which reasonable and comparable alternative transport services should be provided.[351] Further, the proposal enshrines that passengers can rely on alternative transport

346 See e.g. Regulation (EC) No 1371/2007 (n 227), Art.16(c).

347 Nogaj (n 60), 93; For an analysis of the alternative transportation requirement, see also Joseph M. Bech Serrat, 'Re-Routing under the Air Passenger's Rights Regulation (2011) 36(6) Air and Space Law 441.

348 European Court of Auditors (n 334), 14.

349 ibid; Nogaj (n 60), 93.

350 ibid.

351 COM(2013) 130 final (n 118), 20.

by other operators and modes.[352] However, as this proposal has not yet been adopted, the *status quo* remains that the narrow interpretation is to the detriment of the passenger.

This narrow interpretation might prove to be a problem in multimodal transport service disruptions. Firstly, the question arises to what extent re-routing would cover subsequent legs of a multimodal journey, similarly to the question raised regarding the right to reimbursement. In case the right would extend to subsequent legs of a journey, the lack of a definition regarding 'comparable conditions' becomes an even larger problem. It is clear that re-routing for the leg where the disruption occurred to the final destination has to be assured under 'comparable conditions', but what the extension would entail for subsequent legs remains to be solved for cases, where the re-routing would mean the passenger arrives too late at the connection point to use their second transport leg. In practical terms, a measure for passenger rights in multimodal transport would need to cover a solution to the logistical question of providing alternative transportation also for the other legs, where applicable.

Furthermore, it would need to be established whether the 'comparable conditions' definition could extend to cover the whole multimodal chain. This would avoid further complications by essentially requiring to organise a second alternative transport, in case the first re-routing would arrive so late at the connection point that the passenger would miss their subsequent leg and require further alternative transport to their final destination. Additionally, this brings up the question whether a clearer definition of time limits, such as suggested under the air proposal would actually have a remedial effect in a multimodal context. While such time limits do provide a solution to addressing the mode-specific issues related to alternative transportation under comparable conditions, incentivizing the use of other transport operators and modes for re-routing, it might work to the detriment for passenger rights in multimodal transport. Giving a timeframe to organize transport via their own services before resulting to the services of other providers/modes may increase the possibilities of having a delay at the connection point so that the passenger

[352] ibid.

would miss their second leg. In summary, solving the definitional issues for 'comparable conditions' and 'earliest opportunity' needs to be done with a multimodal measure in mind, where an extension of the right for multimodal situations is considered. Ultimately, as with the right to reimbursement, the question arises, who bears the responsibility for the provision of further transportation and the fulfilment of the right in a multimodal context. Again, one is faced with the consideration of foreseeability, especially in a case where the right would apply to separate transport contracts and single contracts for a multimodal journey alike. In the end, under the premise of ensuring continued travel for passengers, a new measure for multimodal passenger transport should address the rights of passengers to receive reimbursement or re-routing, and therefore needs to provide solutions to the stated problems in one way or another.

Figure 1 (See Annex I) illustrates in this regard the options both under the current mode-specific regulations, as well as possible considerations of a new multimodal measure in a model multimodal transport journey, showing the complexity of adequately addressing the rights to re-routing and reimbursement in a multimodal context.

4.3 Right to assistance in cases of long delays

In cases of travel disruptions, passengers are furthermore entitled to a minimum level of assistance under all four regulations.[353] Similarly to the right to reimbursement or re-routing, receiving assistance is dependent on certain conditions that vary between the transport modes. All regulations offer this right in cases of delays and cancellation. In the air regulation, it is also applicable in cases of involuntary denied boarding.[354] Different time limits apply in cases of delay.[355] In its content,

[353] European Court of Auditors (n 334), 11.

[354] Regulation (EC) No 261/2004 (n 117), Art.4; P.P.C. Haanappel, 'The New EU Denied Boarding Compensation Regulation of 2004' (2005) 54 German Journal of Air and Space Law 22, 23.

[355] While the air regulation currently requires a delay of 2–4 hours depending on the distance (The proposal changes this to two hours regardless of flight length), the rail regulation stipulates a delay in arrival or departure of more than 60 minutes for the

the extent of assistance is very similar throughout the regulations. All offer snacks, meals or refreshments in reasonable relation to the waiting time if available and, should the disruption warrant an overnight stay, they require the provision of a hotel accommodation and transportation to and from the place of accommodation to the terminal.[356] Notably, both the maritime and bus regulation limit the maximum amount per person per night to EUR80 and offer accommodation for a maximum of three and two nights, respectively.[357] Further, both regulations impose exceptions to the provision of assistance in cases where passengers have purchased open tickets without a set departure time, where they have been informed about the cancellation before the purchase of the ticket, where the disruption is caused by the passenger,[358] or in cases of severe weather conditions endangering the safe operation of the transport service. Those exceptions do not exist in the air and rail regulation.

Some of these differences find their justification in the characteristics of the different transport modes, especially when it comes to the length of delays. However, there are some uncertainties related to the right of assistance, which might also play a role in a multimodal context. Notably in this regard are differences related to applicable exemptions and limitations. The fact that both in air and rail no *force majeure* exemptions exist makes those in the other regulations seem unjustified, as assistance is of the essence for passengers in all situations of service disruptions, especially when circumstances might be unforeseen, such as adverse weather conditions. Factors of limitation include the cap of nights and prices for accommodation applicable for sea and inland water, as well as bus and coach. Under the considerations of limiting possible abuse

right to assistance to apply (Regulation 1371/2007 (n 227), Art.18(1) and (2)). In both maritime and bus regulations, there needs to be a delay in departure of 90 minutes (Regulation 1177/2010 (n 25), Art.17; Regulation 181/2011 (n 25), Art.21). The bus regulation further only applies the right for journeys with a scheduled duration of more than three hours (Regulation 181/2011 (n 25), Art.21.).

356 See e.g. Regulation (EC) No 1371/2007 (n 227), Art.18; Regulation (EU) No 1177/2010 (n 25), Art.17.

357 Regulation (EU) No 1177/2010 (n 25), Art.17(2); Regulation (EU) No 181/2011 (n 25), Art.21(b).

358 Only in the sea and inland waterway regulation.

where passengers would ask for a reimbursement of hotel prices and meals, one might find a justification for those limits.[359] Nonetheless, these limitations might prove to be not sustainable for all foreseeable provisions of service, where market conditions at the place of disruption may not allow adherence especially to the per night cost cap. These uncertainties are further enhanced by the fact that the regulations do not explicitly offer reimbursement or indicate what actually is to be reimbursed in cases where the carriers have not or cannot provide assistance themselves, nor are there any repercussions for the carriers for not adhering to the assistance rights under the respective regulations.[360] Especially in multimodal transportation, this might have severe consequences. In cases, where assistance is not provided at a point of connection, the passenger, under the current system would mostly not know which standards are to be applied for his assistance rights, or whether they are subject to any exceptions or limitations. Legal certainty would be needed, not only to establish who is to provide assistance, but also what rules should govern the level of assistance. In this case again the question comes up, whether a multimodal measure should introduce a new standard or whether reliance on the diverging mode-specific standards is reconcilable with the particular situation of assistance at connection points of multimodal transport journeys? While this question, at least in cases of multimodal transport via a single contract, should be possible to solve by including care obligations in the agreements between the carriers offering multimodal journeys, carriers providing such services do not include any assistance and care rights in their terms and conditions.[361]

Ultimately, this problem has an even more fundamental dimension rooted in a mode-specific context. While the right to assistance rests upon certain conditions related to service disruptions, it is not specified in any of the regulations whether the right may still be enjoyed in cases where a passenger has made a choice for either reimbursement or re-routing. This becomes a problem, where passengers miss their connection (e.g.

359 Nogaj (n 60), 99.

360 ibid.

361 Commission, 'Rights of passengers in multimodal transport' (n 35), 2.

where two flights were booked on a single ticket and a passenger misses their second flight due to a service disruption). Practically this means that even in the mode-specific transport context, assistance might not be ensured at connection points.

Both in the mode-specific and multimodal transport context there should be a clear answer to the question of whether to provide assistance rights also in cases of reimbursement and re-routing and especially whether assistance is to be provided at connection points.[362] Perhaps a solution may be in adding the right to the choices of reimbursement and re-routing, as assistance is essentially triggered by the same service disruptions and conditions that trigger the choice between reimbursement and re-routing. Based on this, specific iterations of the right could be included as an addition to every choice individually, catering more towards the circumstances and consequences of the choice for reimbursement or re-routing. In practical terms, this could mean, for example, that a choice for re-routing would include an assurance as to the provision of assistance should the re-routing mean a connection would be missed.

4.4 Right to compensation

The right to compensation, applicable in all transport modes, is the right with the most notable differences in content, as the circumstances for the right to be applicable differ significantly. Furthermore, it is the right that offers most controversy when it comes to its interpretation by the courts and stakeholders alike. The differences already start with the circumstances that amount to a passenger being eligible for compensation. The air regulation employs the most complex system in this regard. Generally, the right applies in cases of denied boarding and cancellation, however with the former only in those cases where passengers have been denied boarding against their will. Regarding cancellation, some restrictions apply as well. Essentially the Regulation has three time brackets for

[362] In the case of multimodal transport furthermore who is to provide that assistance.

when the information on a cancellation is to be given.[363] If passengers are informed of a cancellation within these time brackets and the carrier adheres to corresponding obligations[364], the right to compensation will not apply. While compensation is not applicable in cases of delay according to the text of the Regulation, the right has been extended to apply also in cases of long delays of at least three hours by the CJEU in its infamous *Sturgeon* ruling.[365] According to the court, those delays are factually to be treated as cancellations for the purposes of providing compensation.[366] The proposal to amend the air regulation includes compensation for delays of at least five hours and clarifies that compensation also applies to missed connections caused by a delay.[367] While from the perspective of offering comprehensive passenger rights throughout the modes of transport, this ruling seems to be reasonable,[368] it has caused significant outcry from the industry and academia alike, as it may encroach upon the exclusivity clause of the Montreal Convention.[369]

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363 Two weeks before departure, between two weeks and seven days before departure, less than seven days before departure.

364 Regarding the provision of information two weeks before departure, compensation will not be applicable. Between two weeks and seven days before departure, the carrier has to offer re-routing with a departure of no more than two hours before original departure.

365 C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA* [2009] ECLI:EU:C:2009:716; See also section 5.1.1.1.

366 ibid.

367 COM(2013) 130 final (n 118), 19.

368 As compensation is applicable in cases of delays in all other transport modes.

369 See e.g. Charlotte Thijssen, 'The Montreal Convention, EU Regulation 261/2004 and the *Sturgeon* Doctrine: How to Reconcile the Three?' (2012) 12 Aviation Law and Policy 413; Section 5.1.2.; P.P.C. Haanappel, 'Compensation for Denied Boarding, Flight Delays and Cancellations Revisited (2013) 62 German Journal of Air and Space Law 38, 48–50; Ulrich Steppler and Mareike Muenning, 'No Compensation for Long Delay in Spite of Sturgeon: Will This New Jurisprudence Prevail?' (2011) 36(4/5) Air and Space Law 339; Robert Lawson and Tim Marland, 'The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of *IATA* and *Sturgeon* – in Harmony or Discord?' (2011) 36(2) Air and Space Law 99; Cees van Dam, 'Air Passenger Rights After Sturgeon' 36 Air and Space Law 259; Sacha Garben, 'Sky-High Controversy and High-Flying Claims? The Sturgeon Case Law in Light of Judicial Activism, Euroscepticism, and Eurolegalism (2013) 50 Common Market Law Review 15; Karl Riesenhuber, 'Interpretation and Judicial Development of EU Private Law – The Example of the Sturgeon Case (2010) 6(4) European Review of Contract Law 384.

The fact that airlines suddenly also had to compensate long delays under Regulation 261/2004 may have also added to the issues of enforcement which are still prevalent with this regulation. However, the most debated and interpreted restriction to the right of compensation for cancellation under the air regulation is the so-called 'extraordinary circumstances' exception. Hereunder, carriers do not have to pay compensation for circumstances 'which could not have been avoided if all reasonable measures had been taken.'[370] This ambiguous provision has led to many complaints and ultimately a number of cases referred to the CJEU.[371]

In the other regulations the circumstances triggering the right to compensation are not as complex as in air transport. In the rail regulation, compensation applies in cases of delay of over 60 minutes, unless reimbursement has been accepted. This right is only restricted in so far as it does not apply to delays caused outside the EU territory[372] and that no compensation is paid if the passenger is informed about the delay before purchasing the ticket or the alternative service provided leads to a delay of less than 60 minutes. Notably, the proposal for a recast of the rail regulation includes an extraordinary circumstances exemption in cases of 'severe weather conditions or major natural disasters endangering the safe operation of the service'.[373] However, the Members of the European Parliament (MEPs) rejected the inclusion of such an extraordinary circumstances exemption.[374]

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370 Regulation (EC) No 261/2004 (n 117), Art.5(3).

371 European Court of Auditors (n 334); The developments and problems regarding this notion (also in the light of a multimodal passenger rights measure), as well as the compatibility of the Regulation with the Montreal Convention will be discussed in Chapter 5.

372 An interesting limitation considering that in air transport the territorial scope would include such delays.

373 COM(2017) 548 final (n 113), Art.17(8).

374 European Parliament, 'MEPs vote for upgrade to rail passenger rights' (n 24); European Parliament, 'European Parliament legislative resolution of 15 November 2018 on the proposal for a regulation of the European Parliament and of the Council on rail passengers' rights and obligations (recast) (COM(2017)0548 – C8-0324/2017 – 2017/0237(COD))' P8_TA-PROV(2018)0462, Amendment 81.

Similarly to this, in the maritime regulation, the right to compensation applies in cases of cancellation or delays, depending on the amount of delay and the length (time) of their scheduled journey.[375] A number of exemptions exist as well, including weather conditions endangering the safety of the ship, extraordinary circumstances,[376] as well as disruptions caused by passengers, open ticket holders, or if a passenger has been informed of a disruption before purchase. Notably, both the rail and maritime regulation provide for a minimum threshold for compensation of four and six euros, respectively. Lastly, the bus regulation also offers the right to compensation, however not as a direct right that arises out of the circumstances of a disruption, but as a right applicable because of the omission of the carrier to offer reimbursement or re-routing in cases of delays of 120min. or more or in cases of overbooking.[377] No additional conditions or restrictions are applicable in this regard. The conditions necessary for the right to compensation to be applicable differ to some extent between the regulations and especially differences in applicable exemptions and their interpretations make the application of this right in practice a rather complex system.

Further differences also exist with regards to the amount of compensation and applicable time limits for payment. Again, the air regulation offers the most complex system, as it classes the level of compensation in three brackets with the amounts corresponding the lengths of the flight.[378] This flat-rate compensation differentiates the air regulation from the others, as they offer compensation calculated based on the ticket price. Additionally, there might be a reduction of the amount of compensation by 50% if the offered re-routing does not exceed the scheduled arrival by 2, 3 or 4 hours depending on the flight length bracket.[379] Notably the

375 Four brackets exist: 1hr delay for journeys of up to 4hrs; 2hr delay for journeys between 4–8hrs; 3hr delay for journeys between 8–24hrs; 6hr delay for journeys of more than 24hrs.

376 Similar definition as under the text of the air regulation.

377 Regulation 181/2011 (n 25), Art.19.

378 EUR250 for flights of less than 1500km; EUR400 for intra-community flights between 1500–3000km; EUR600 for all flights not under the other categories.

379 Regulation 261/2004 (n 117), Art.8(2).

Regulation does not impose a time limit for the payment of compensation for the carrier.

In the rail regulation, the compensation amounts to 25% of the ticket price for delays between 60–119 minutes. For delays of 120 minutes or more, the compensation amount will be 50% of the ticket price.[380] In the legislative process for the recast of the rail regulation, MEPs have backed an increase of the percentages with delays of more than 120min. being eligible for a compensation in the amount of 100% of the ticket price.[381] Contrary to the air regulation, the rail regulation imposes a time limit for the payment of compensation of one month after the submission of the request. The maritime regulation has a similar approach to the air regulation in that it introduces brackets for journey lengths (in this case related to the time) in relation to the amount of delay.[382] If the delay amounts of the brackets are fulfilled, the standard amount of compensation is set at 25% of the ticket price, the same percentage as currently applicable under the rail regulation. Notably, should the delay be double the amount of the required delay time under the corresponding journey length bracket, the compensation will double as well. The time limit for payment is also set at one month after the submission of the request. Lastly, the bus regulation holds for a compensation amount of 50% of the ticket price on top of a reimbursement.[383] The payment deadline is also one month after the submission of the request.

As with some of the other rights, a few differences in the regulations can be attributed to the different characteristics of each transport market.[384] However, already in the mode-specific context, a number of issues exist, bearing the question, whether a uniformity of compensation

380 Regulation 1371/2007 (n 227), Art.17(1).

381 European Parliament, 'European Parliament legislative resolution of 15 November 2018 on the proposal for a regulation of the European Parliament and of the Council on rail passengers' rights and obligations (recast)' (n 374), Amendment 76.

382 Regulation (EU) No 1177/2010 (n 25), Art.19(1).

383 Regulation (EU) No 181/2011 (n 25), Art.19(2).

384 For example, the varying time and distance brackets correspond to the particular characteristics of the transport modes.

in passenger transport is attainable, also with a view to a multimodal passenger rights instrument.

First, the differences in exemptions, especially concerning the use of 'extraordinary circumstances' may pose a problem in a possible application to a multimodal journey, especially from the viewpoint of clarity for passengers. Other issues relate to the vast differences in the preconditions for the right of compensation to be triggered. It will be challenging for passengers to see through the complex system, ultimately providing hindrances to the proper application of the right in practice in a multimodal context.

Albeit these systemic differences between the regulations and issues related to their complexities mostly in connection to passenger uncertainties, the implications of an extension of the right to apply in a multimodal context go further than that. In a mode-specific context the scope of the regulations regarding the right to compensation are rather easy to establish. If a passenger has booked a two-leg transport journey using two different modes and those two legs are under two separate transport contracts with separate transport providers, there will be no reliance on the rights applicable to the transport mode of its second leg, should there be a disruption on the first leg, including the right to compensation. Now, this separation is exactly what a new multimodal instrument would seek to overcome. How to assure that the passenger can rely on his rights for the whole journey? In the case of compensation rights, the main concerns are as follows: What will be the conditions for the application of the right (which standards apply), how does the right extend in practical terms, and ultimately, which transport operator may be liable to pay compensation? In the light of the functionality of the right, those three questions are intrinsically linked.

The differences of the right in its current iterations found in the regulations represent a barrier to establishing uniform multimodal conditions for the application of the right, insofar as they are a response to characteristics of their respective transport modes. Consequently, a decision to impose (in a multimodal context) the conditions for the application on the right of one transport mode to another is highly unreasonable. A

more feasible approach would perhaps be to establish a general extension of the right to the whole journey, including an obligation to compensate also for subsequent legs.[385] However, also with this approach there would be a number of problems. First, there is no foreseeability for transport operators on who might be eligible, where the right also applies to separate contract multimodal journeys. Second, an extension in this way would also mean the possibility of severe economic repercussions for transport operators, as it would add another compensation obligation on top of the already existing one for their own transport mode. Ultimately, this also bears down to the question of how a disruption in one leg could actually trigger the conditions for compensation in another. In practical terms, it would still be the passenger arriving late or not arriving at all (due to disruption on a previous leg and re-routing, or return to the point of departure). Based on this, the notion of applying the right to compensation in a multimodal context has a more fundamental component. It would have to be decided, whether the damage caused by the disruption on one leg has caused a comparable/similar amount of damage for the passenger further down his multimodal travel chain, and if that damage should be compensated equally. Only if this fundamental question can be answered to the affirmative, subsequent considerations as to applicable conditions and payment obligations can be addressed.

In the end, an extension of the right to multimodal journeys could potentially lead to an increasingly complex system on top of the already challenging application of the right in the mode-specific context with all its pre-existing differences. In the light of this, a more sensible approach would be to adhere to the mode-specific limitations, also in a multimodal context, when it comes to the right to compensation, so as to avoid any added complexities, as well as avoid the imposition of conditions and obligations with possibly severe economic repercussions for transport operators. In order to give this limitation a multimodal character there could be the option to at least consider the whole multimodal journey

[385] An example of this can be found in the proposed amendment of Regulation 261/2004, where the Regulation would apply also to subsequent legs operated by other modes under the transport contract.

when it comes to trip length calculations for compensation under the applicable regulation.

4.5 Overcoming normative challenges to a multimodal instrument – A creation of unnecessary complexity

Already in the context of single-mode transport, some right content differences have led to issues in practice and the analysis of significance of the gaps, as well as the resulting issues have led to a number of considerations to bear in mind in the creation of a new multimodal instrument, as well as possible hindrances and challenges. Notably, the magnitude of the identified challenges can be somewhat differentiated in relation to the scope of such a new instrument (mainly the question of whether it will apply to separate- and/or single contract multimodal journeys).

Under the right to information, the main challenge a new instrument would face is to assure the provision of adequate and timely information needed in a multimodal context, as passengers in these specific situations need to be able to assess their rights for their whole journey. A passenger would need to have both information on available rights in cases of service disruptions at connecting points, as well as general information on their connection opportunities. Under this general challenge, a new instrument would need to address the differences in legislation from the perspectives of providing uniform points of information to assure clear communication for adequate and timely information especially in cases of disruption. Further harmonization should be done regarding the medium of provision of information leading to further certainty and reliance of passengers. Lastly, clear requirements as to the quality of information to be provided should exist. In essence this relates to overcoming vague definitions of 'adequate information', as they currently stand in the mode-specific regulations, and clearly defined terms as to what should be informed about. Most effectively, this could be achieved by the creation of a new standard of information provision. Ultimately, information provision developments also hinge on technological advancements, and

legislative changes enabling the availability of the required information. In this field, the Commission is already pushing forward with proposed measures on integrated ticketing,[386] enabling developments in information provision needed for passenger rights protection in multimodal transport.

Crucial for the development of a passenger rights measure for multimodal transport will be the rights to renounce travelling and fulfilment of the transport contract in case of a disruption. They serve as the main redress in cases of disruptions and missed connections.

Under the right to renounce travelling (reimbursement), the main issue bears down to its envisaged scope in a multimodal context, i.e. the consequences of a right extension to cover the whole multimodal journey, enabling passengers to claim reimbursement also for subsequent legs of their multimodal journey. Under this overarching question there are a number of issues that need to be overcome, such as a uniform application of obligations in cases the choice for reimbursement is not given, whether a choice for reimbursement limits other rights for subsequent legs (see assistance), who will be responsible for reimbursement, and ultimately the issue of foreseeability.[387] Translating the availability of reimbursement into practical terms, it is first and foremost an additional financial burden on transport providers, and debatable in front of the consideration of vastly differentiating ticket prices and profit margins in the different transport modes.[388]

The right to fulfilment of the transport contract in case of a disruption (re-routing or re-booking) generally has to deal with the same overarching question of extension and related issues. Here the existing rights offer term inconsistencies, as 'under comparable conditions' and 'earliest opportunity' are not sufficiently defined and have already led

386 See section 2.1.2.2. and Grimaldi (n 76).

387 The latter is more an issue of separate contract multimodal journeys, as under single contracts, it will be the operator with whom the passenger has entered into the transport agreement that is responsible.

388 Again, in a fully integrated ticket based on transport operator collaboration the financial burden may be less of an issue than in a separate contract scenario, also under the viewpoint that the 'leading' operator in those agreements is mostly an air carrier, which usually has more economic power and generally represents the transport mode with higher ticket fares.

to narrow interpretations in modal journeys. Under the transposition of the right to multimodal journeys, this is insofar problematic, as there need to be clear definitions for the provision of alternative services taking into account not only the transport operator's own services, but also other operators, as well as transport modes. Consequently, 'at the earliest opportunity' might also need to be reassessed in a multimodal context, because a successful continuation of the journey hinges on a timely re-routing, to mitigate the risk of missing a connection. Ultimately, the already envisaged solutions for this, in terms of providing time limits seem to miss the mark. While they do impose a sense of uniformity, they miss the mark insofar as said uniformity does not exist in the varying travel itineraries of multimodal journeys, as well as varying connection times. Therefore, a sufficient definition of 'earliest opportunity' that tries to assure fulfilment of the transport contract in that the re-routing would bring the passenger to a connection point in time, seems to be unattainable and as a consequence the question of subsequent re-routing of a missed second leg unavoidable. Yet again, this gives rise to questions of bearing the costs and responsibility.

The right to assistance also holds some problems and limitations. It probably is one of the most crucial rights in a multimodal context, especially when it comes to the provision of assistance at connection points. Most important for an application in a multimodal context would be to find a solution to the overarching questions of who is to provide assistance at connection points, and what level of assistance should be provided. Based on the differences in the mode-specific regulations, this would make it necessary to change the existing *force majeure* exemptions in the maritime and bus regulation, as well as to establish more uniform approaches to existing limitations of the right to assistance.[389] Consequently, it is to be seen if a possible reliance on diverging mode-specific standards is reconcilable with the particular issues of providing assistance in a multimodal context. The question of responsibility on the other hand can be more easily solved in the context of a single-contract multimodal journey, not only because these

[389] E.g. amounts for necessary accommodation.

journeys mostly happen on routes that already have the necessary infrastructure to assist passengers at connection points, but also because the contractual relationship could easily account for the provision of assistance and necessary clarifications as to responsibility. In a separate contract journey, this becomes rather difficult, as fault-based solutions would still not help over the fact that the liable operator may not have the means at a connection point to provide assistance. And yet again, one would be faced with the issues of unforeseeability, as well as the related economic repercussions for the operator obliged to provide assistance at the connection point. Additionally, the transposition of this right to a multimodal context would also need to deal with the issue of scope, generally needing to clarify the application of assistance rights in cases of re-routing and subsequently missed connections.

Lastly, the right to compensation under certain circumstances probably presents the most significant obstacles when it comes to the consideration of its application in a multimodal context. In practice, a new instrument would need to overcome the separation of the regulations in cases of compensation by offering a uniformity of applicable requirements and preconditions, as well as compensation amounts. Given the fact that the right contents here are intrinsically linked to specific market characteristics renders a harmonization almost unattainable. This means that an application of this right in the multimodal context hinges on how the extension is executed in practical terms, to be able to keep the transport mode specific requirements and conditions.

While the comparison of the rights has enabled a projection of resulting issues to a multimodal context, the main takeaway is perhaps that the absence of harmonized standards for passenger rights in cases of service disruptions represents a number of challenges to the creation of a measure addressing passenger rights in multimodal transport. The discussion of these challenges under the individual rights bear the questions if overcoming them only adds to the complexity of the passenger rights system, rather than providing comprehensive protection in a multimodal journey and whether it is therefore actually feasible to provide such a

multimodal measure, given the current gaps and inconsistencies in legislative framework. To this end the following conclusions can be drawn:

1. **Multimodal journeys cannot be treated as a separate mode of transport:** Regardless of the measure that is ultimately chosen, one has to bear in mind that an extension of existing rights or the creation of new rights for multimodal journeys specifically do not add just a separate regulation or set of rules, but add another layer over all existing ones. Therefore, one of the biggest obstacles will be how to reconcile the existing framework and its content with a new layer of rules?
2. **If absence of harmonization is the cause of issues, the assumption would be that harmonization of the mode-specific system would help the creation of a functioning multimodal measure.** This statement is only partly accurate. Although harmonization would mean that many of the right content discrepancies could be overcome, the reality of developing the existing system has shown that amendments take a long time and remain a political challenge in and for itself. Additionally, there are a number of issues identified that cannot be resolved purely by harmonization. Applying the rights in a multimodal context brings forward very specific issues, including liability, foreseeability, and extensive economic repercussions that are separate from the issues related to the normative differences. Furthermore, mode specific characteristics often represent a separate barrier to harmonization.
3. **Bridging the gaps is a complex undertaking:** A new measure would need to find adequate solutions to create a set of rules applicable in a multimodal context, while at the same time making sure that the mode-specific system is not interfered with. There are no clear-cut solutions and in most cases, the analysis has shown that solving liability and practical issues related to the provision of the rights is hindered by the existing ones.
4. **Scope is a decisive factor:** The scope of a new measure is most crucial, as many of the issues are scope-dependent. In concrete terms this means that deciding to have a new measure apply to

single-contract multimodal journeys, and/or separate contract multimodal journeys, has an enormous effect on the issues such a new measure would need to overcome. While the discussion has manifested that an application to single-contract multimodal journeys makes finding a solution to many of the issues easier and is in fact intended, the reality of such a choice would mean that a significant amount of multimodal journeys would still not be covered.

5. **The mode-specific system as it exists at the moment suffers from issues in relation to legislative differences and inconsistencies.** Based on these issues, it has to be questioned, if a new multimodal instrument that, in practice, would add to the already existing ones is the right step when considering a proper functioning of passenger rights in the European Union.

5 The status quo of existing instruments: Issues of interpretation and enforcement

Other important components that have shaped the existing mode-specific rules come in the form of interpretation of them by the courts and their enforcement in practice. Those two components stand in relation to each other, as interpretation of the rules by the courts often stems from issues with enforcement in practice, or at least ambiguity related to the proper application of them. Similarly, court judgments have had an influence on the effective enforcement of the regulations. Additionally, issues of interpretation and enforcement are also indicative for the differing experiences with the regulations, as outlined in section 3. These issues of the existing regulations potentially represent an additional hindrance to establishing a comprehensive set of passenger rights for all transport modes including a legislative measure on passenger rights in multimodal transport. This section therefore aims to outline the enforcement and interpretation issues experienced throughout the existing regulations in order to draw conclusions as to their potential effect on a possible multimodal passenger rights measure. The main question here will be, whether they widen the legislative gap already existing on the normative side, thereby aggravating associated problems – which, as has been established in chapter 4 represents a significant hindrance to multimodal solutions – and ultimately in how far they are actually reconcilable with the different approaches to a multimodal measure.

5.1 Interpretation of provisions by the CJEU

5.1.1 Inherency of main interpretative problems in the air regulation

Regulation 261/2004 has by far faced the most issues, criticism and problems throughout its lifetime,[390] compared to the other mode-specific passenger rights instruments of the EU. It would be easy to attribute this solely to the fact that the Regulation has been in force the longest out of all the instruments, however, the reasons for the issues it has faced go beyond just that.

One apparent reason may lie in the sheer size of the air transport market for passengers, with over a billion passengers having travelled by air in the EU in 2017.[391] This would mean that there is an increased potential for more claims, due to the high number of passengers travelling by air, as well as the number of potential situations triggering an application of passenger's rights. Another indicator may be the characteristics of the air transport market, as there is a near limitless variety of potential incidents, which can affect passengers in air transport.[392] Combined with a high level of safety requirements,[393] not only the occurrence of events disrupting the service may happen frequently, but also complaints from

[390] See e.g. Arnold and Mendes de Leon (n 207), 93; The main points of criticism relate to unclear terminologies in the provisions, an inconsistent use of the terms and excessive financial burden on air carriers.

[391] See Eurostat, 'Air passenger transport in the EU' (Press Release 187/2018, December 2018) <https://ec.europa.eu/eurostat/documents/2995521/9428738/7-06122018-AP-EN.pdf/50a52d8d-3f61-4517-ace3-d3f56ed5cd91> accessed 10 June 2019.

[392] Jeremias Prassl, 'The European Union and the Montreal Convention: A New Analytical Framework' (2012–2013) 12 Issues in Aviation Law and Policy 381, 390; For a recent example of potential systematic airline non-compliance in Finland, see also Finnish Competition and Consumer Authority, 'Consumer Ombudsman takes Finnair to Market Court for breach of air passengers' rights (Press Release, 27 September 2017) <https://www.kkv.fi/en/current-issues/press-releases/2017/consumer-ombudsman-takes-finnair-to-market-court-for-breach-of-air-passengers-rights/> accessed on 14 May 2019.

[393] For some insights, see Jochem Croon, '"Wallentin-Hermann" and a Safe Flight In Aviation there are No Minimum Rules on Maintenance' (2012) 61 German Journal of Air and Space Law 609, 610–612.

passengers, as the terminology of the Regulation does not account for the specifics of incidents leading to service disruptions, and clarification may be required by the courts. Indeed, the Commission noted in its assessment of the Regulation prior to the proposal for an amendment, that uniform interpretation represented one of the problem areas to be addressed.[394] The lack of uniform interpretation may also be rooted in the provisions itself, which, as the various references to the CJEU for clarification have demonstrated, are riddled with ambiguity. Lastly, an underlying reason for the magnitude of problems in relation to the Regulation is to be attributed to compliance by stakeholders. Although this issue falls more under the realm of effective enforcement,[395] it has become apparent that airlines, who showed somewhat of a resistance against the Regulation from the outset, seem to frequently refuse to comply with their full obligations under the Regulation. This is a development, which to some extent may also be attributed to the often very protective stance towards passengers that the CJEU has taken in a few landmark decisions.[396]

Combined together, these reasons have led to a large number of complaints from consumers, as well as proceedings in national courts and references to the CJEU for the clarification of provisions. As a discussion of the totality of the jurisprudence of the CJEU on the matter would certainly go far beyond the scope of this thesis, and since, based on the very particular issues clarified by the CJEU[397], there is no relevancy for a number of references in the context of a multimodal legislative measure, the following discussion will centre around two main issues which have accompanied the Regulation and the landmark cases which attempted to resolve them. The first concerns the substantive problem of the Regulation's interaction with international law, namely the compatibility of Regulation 261/2004, and specifically the rights awarded in cases of

394 COM(2011) 174 final (n 292).

395 Which will be discussed in section 5.2.

396 Garben (n 22), 259.

397 This relates mostly to the fact that the Court is often asked to clarify, whether very specific circumstances amount to an exemption from the right to pay compensation, or similar assertions, whether a specific circumstance falls under a term or concept of the Regulation.

delays, with the Montreal Convention.[398] The development in front of the CJEU regarding this compatibility issue also involves, what can be seen as a landmark decision and problem of the Regulation in its own terms, namely the extension of scope of the right to compensation to long delays. The second issue revolves around the judicial development regarding the term of 'extraordinary circumstances', which represents the key exemption for carriers from their obligation to compensate. The judicial developments and academic commentary as to both of these issues should also be seen in perspective of the overarching consideration of the Regulation to ensure a balance between a high level of consumer protection and economic repercussions for air carriers.

5.1.2 Regulation 261/2004 v Montreal exclusivity

5.1.2.1 Issues of compatibility in front of the CJEU

The basis of the issue of compatibility of Regulation 261/2004 with the Montreal Convention rests essentially on the compatibility of two provisions. On the one side stands Art.6 of Regulation 261/2004, which concerns the rights of passengers in cases of delay. At the inception of the Regulation, and until the *Sturgeon* ruling of the CJEU,[399] the rights applicable in cases of delay were limited to those of re-routing or re-imbursement, as well as assistance.[400] On the other side is the so called 'exclusivity clause' of the Montreal Convention, which stipulates that 'in the carriage of passengers […], 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 […].[401] In connection with the fact that the Montreal Convention does include a provision for the liability of

[398] See e.g. Jeremias Prassl and Michal Bobek, 'Welcome Aboard: Revisiting Regulation 261/2004' in Michal Bobek and Jeremias Prassl (eds), Air Passenger Rights: Ten Years On (Hart Publishing, 2016), 16.

[399] C-402/07 and C-432/07 (n 365).

[400] As stipulated earlier, the extent of the rights is dependent somewhat on the length of the delay.

[401] Montreal Convention (n 19), Art.29.

air carriers in cases of delays,[402] the existence of a liability provision for delays in the EU regulation may be viewed as breaching the exclusivity requirement of the Montreal Convention, which the EU as a whole has ratified and implemented in EU law.[403] Given the existence of an international norm, which is in conflict with a domestic law addressing the same subject, such domestic law is to be voided.[404] The strict interpretation of this concept of exclusivity under the Montreal Convention, upholding its premise to maintain international uniformity, and prevent that the liability regime established by it could be undermined by contract or statutory provisions,[405] has been affirmed in the case law of the Montreal Convention.[406] Strict interpretations of the concept, such as in *Sidhu v British Airways*,[407] confirmed that even a lack of remedy for a specific situation cannot be used to circumvent the exclusivity of the Montreal Convention to rely on national law.[408]

This potential incompatibility of the provision for delay under Regulation 261/2004 and Art. 29 of the Montreal Convention, establishing it as the exclusive mean of redress for action in cases of delay, is at the core of the first landmark ruling of the CJEU in what is commonly referred to as the *IATA* case.[409] The case, a preliminary reference from the high court of London, revolved around the International Air Transport Association (IATA) and the European Low Fares Airline Association (ELFAA), contesting the validity of Regulation 261/2004. The questions referred concerned, next to the main issue of inconsistency with the Montreal

402 ibid, Art.19.

403 Council Regulation (EC) No 2027/97 (n 47).

404 Paul Stephen Dempsey and Svante O. Johansson, 'Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage' (2010) 35(3) Air and Space Law 207, 208.

405 Dempsey and Johansson (n 404), 209.

406 Olena Bokareva, 'Air Passengers' Rights in the EU: International Uniformity versus Regional Harmonization' (2016) 41(1) Air and Space Law 3, 6–7.

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

408 Prassl and Bobek (n 398), 17.

409 C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECLI:EU:C:2006:10.

Convention, procedural irregularities, lack of legal certainty, as well as a lack of proportionality pertaining to the provisions on cancellation, delay, and compensation.[410]

The Advocate General (AG Geelhoed) in its opinion saw the main question in relation to the compatibility to establish whether there is a conflict between the two provisions in question, based on their scope and object.[411] To find out whether there is a conflict, the AG argued that in relation to bringing an action for damages in cases of delays, the Convention is exhaustive, however actions which do not fall under 'actions for damages' may still exist in other measures.[412] He further elaborated that Art.6 of Regulation 261/2004 applies regardless of whether any damage has occurred.[413] Hence, he concluded that Art.6 does not deal with civil liability or an action for damages, and rather addresses minimum service standards during a delay, rendering the passenger protection in this case public nature.[414] Such a provision creates an obligation for the air carrier, to afford a right to all passengers to receive immediate care and assistance during a delay, which is inherently different from the civil liability regime for damage caused by delay under the Montreal Convention.[415] Consequently, the AG found that the provisions are complementary, rather than in conflict with each other.[416]

The CJEU essentially took this consideration as the basis for its decision, coming to the same conclusion as the AG and holding the Regulation to be compatible with the Montreal Convention.[417] In its argumentation, the Court distinguished between two types of damages caused by a delay.

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410 Jorn 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(2) Air and Space Law 133, 139.

411 C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECLI:EU:C:2006:10, Opinion of AG Geelhoed, para.33.

412 ibid, para.45.

413 ibid, para.47.

414 ibid, paras.46–47.

415 ibid, paras.50–51.

416 ibid, para.42.

417 Wegter (n 410), 142.

Those are damages almost identical for every passenger, which can be addressed by standardised forms of assistance and care, and individual damage based on the reason for travelling and to be remedied by compensation applicable on an individual basis.[418] Based on this distinction, the Court considered that the provision on delay under the Montreal Convention[419] governs only the latter kind of damage, and further that it does not preclude other forms of intervention by public authorities to afford a standardized and immediate form of redress, based on the damage inherent in the inconvenience of a delay.[420] Therefore, as Art. 6 is an example of such standardised and immediate redress, it falls outside of what is regulated by the Convention, as it 'operates at an earlier stage than the system which results from the Montreal Convention'.[421] Since the Regulation does not preclude passengers from seeking further redress under the Montreal Convention for the 'individual damage' they might experience, the Court concluded that measures alike the one afforded by the Regulation, 'cannot therefore be considered inconsistent with the Montreal Convention'.[422]

Although the reasoning of this judgment, and the conclusion of the Court were questioned, mainly based on the objective of the Montreal Convention (i.e. the interpretation of what falls within the scope of damages under the Convention), the concerns over the CJEU's approach were only aggravated further by the now infamous *Sturgeon* ruling.[423] From the outset, the case concerned a matter that is internal to Regulation 261/2004, namely what the distinction between the concepts of compensation and delay is, and if a long delay should be treated in

418 C-344/04 (n 404), para.43.

419 Montreal Convention (n 19), Art.19; Andrew Harrington, 'EC 261/2004 and European Commission Reform: A Long and Winding Road to Clarification' (2013) 62 German Journal of Air and Space Law 620, 625–6.

420 ibid, para.44–45.

421 ibid, para.46.

422 ibid, paras.47–48.

423 C-402/07 and C-432/07 (n 365); Dempsey and Johansson (n 404); Kieran St Clair Bradley, 'Case C-344/04, The Queen ex parte International Air Transport Association, European Low Fares Airline Association v. Department for Transport (2006) 43(4) Common Market Law Review 1101; Wegter (n 410).

the same way as a cancellation, mainly relating to the entitlement of compensation.[424] In short, the court ruled that a delayed flight could not be regarded as cancelled, regardless of the length of the delay, when it is operated in accordance with the air carrier's original planning.[425] However, based on the comparability of the damage suffered in cases of delay and cancellations, and a possible infringement of the principle of equal treatment resulting therefrom, as well as an existing linkage between long delays and compensation stemming from the preamble of the Regulation, the Court found that passengers whose flight had been delayed by at least three hours[426] are entitled to compensation under Art.7 of the Regulation.[427]

The judgment faced criticism as to how the Regulation had been interpreted by the Court, and especially its interpretation of the preamble leading to an extension of the right.[428] This criticism mainly centred around arguments implying that the Court did not adequately consider the context of the provision in question and the objectives pursued by it,[429] and that it went beyond its assigned role of observing the law, as it factually created new law through the *Sturgeon* decision.[430] Notwithstanding the criticism of the judgment, the extension of the right arguably constituted a step towards harmonization of the right to compensation in so far as Regulation 261/2004 was the only mode-specific regulation[431] not including compensation in cases of delay.

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424 Thijssen (n 369), 429.

425 C-402/07 and C-432/07 (n 365), para. 39.

426 Reaching their destination three or more hours after the originally scheduled arrival time.

427 C-402/07 and C-432/07 (n 365), paras.59–62.

428 See (n 369), as well as John Balfour, 'Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004' (2010) 35(1) Air and Space Law 71;

429 In this regard, that the Regulation specifically only deals with compensation for denied boarding and cancelled flights.

430 See e.g. Jae Woon Lee and Joseph Charles Wheeler, 'Air Carrier Liability for Delay: A Plea to Return to International Uniformity' (2012) 77 Journal of Air Law and Commerce 43, 71–72.

431 At the time of the ruling, however, the only other mode-specific passenger rights regulation was Regulation 1371/2007 (n 227).

With a view towards a legislative instrument governing multimodal transport, the extension of the right to delay may therefore be seen as a positive influence, as the transposition of a more or less harmonized standard represents less of a hindrance to an application in a multimodal context. Although compensation amount differences, as well as conditions for the application of the right still differ significantly between the Regulations, which does represent a hindrance. Nonetheless, it assures at least that the basis for the application of the right, namely in which kind of service disruption the right may apply is easier to establish in a multimodal context, and at least as to this basis, no points of reconciliation with the existing mode-specific system are needed.

However, the criticism of the judgment also has an external dimension, as the extension of the delay provision brought up issues of the compatibility of the Regulation with the Montreal Convention. The Court itself considered that regarding a differential treatment of delay and cancellation when it comes to the applicability of compensation 'there appears […] to be no objective ground capable of justifying such a difference in treatment'.[432] However, academic criticism of the judgment seems to inherently disagree with this statement, seeing that the coverage of compensation for delay under the Montreal Convention represents such a ground for applying the difference. Furthermore, the judgment in *IATA*, as well as the intention of art.6 suggest that compensation was deliberately left out to avoid compatibility issues with the Montreal Convention.[433] The Regulation specifically excludes compensation for delay from its scope to avoid running into issues of compatibility with the Montreal Convention. The judgment in *Sturgeon* relied on the damage differentiation established in *IATA*, and it appears questionable, why the court considered the applicability of compensation to cases of delay not to fall under the 'individualized' damage covered by the Montreal Convention.[434] Based

[432] C-402/07 and C-432/07 (n 365), para.59.

[433] See Robert Lawson and Tim Marland, 'The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of *IATA* and *Sturgeon* – in Harmony or Discord?' (2011) 36(2) Air and Space Law 99, 106; Thijssen (n 369), 431.

[434] ibid.

on this, the compatibility of both judgments is questionable, if the Court in *IATA* relied in its justification of the compatibility of the Regulation with the Montreal Convention on the absence of compensation, while *Sturgeon* extends the provision on delay to include compensation.[435]

Unsurprisingly, stakeholders voiced their criticism with this ruling, as they had to face a rising number in claims for assistance, care and compensation.[436] Varying compliance with the ruling in front of national courts, and courts voicing their doubt about the compliance with the Montreal Convention led to a subsequent reference to the CJEU, asking specifically if the right to compensation in cases of delay is compatible with the Montreal Convention.[437] In its judgment, the Court confirmed and upheld its previous rulings in *IATA* and *Sturgeon*, providing a justification for the compatibility of the provision on delay including the right to compensation with the Montreal Convention. The justification essentially bears down to the court classifying the monetary compensation as a redress mechanism for the inconvenience resulting from a loss of time, which is caused by the delay. It is an identical inconvenience suffered by all passengers equally, which is addressed through the Regulation by a standardised measure (compensation based on fixed amounts), which may be applied immediately[438].[439] Further, there is not necessarily a causal link between the delay and the inconvenience at hand, the loss of time, which is the basis for the right to compensation.[440] The Court ultimately found that the right to compensation for delay is compliant with the Montreal Convention, as a loss of time, is not 'damage caused by delay', which is what is covered by the delay provision under the Montreal Convention. It is rather an inconvenience and the compensation is standardized and

435 ibid.

436 Bokareva (n 406), 12.

437 C-581/10 and C-629/10 *Nelson, TUI Travel and Others* [2012] ECLI:EU:C:2012:657.

438 Although practice shows that this is rarely he case. Rather passengers will be required to submit their claims to the air carrier with all relevant documents and information after their journey.

439 See Sonja Radosevic, 'CJEU's Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention' (2013) 38(2) Air and Space Law 95, 100.

440 C-581/10 and C-629/10 (n 437), para.53.

immediate, contrary to the individual compensation, which needs to be claimed under the Montreal Convention.[441] Yet again, this judgment faced a lot of criticism from stakeholders and academics alike, pertaining mostly to the aforementioned points of misinterpretation of the scope of the delay and exclusivity provisions of Montreal, as well as issues in relation to the differentiation of damages of the Court. Criticism also focused on practical notions, such as the fact that immediacy does not apply to the compensation under the Regulation in practice, although stipulated by the provision.[442]

The criticism, as well as the judgments remain relevant in relation to recent developments, as the proposal of the Commission to amend Regulation 261/2004 includes the right to compensation under its amended article for compensation.[443] Given the vast amount of criticism, and diverging applications of the national courts[444], there is a need to put this issue into perspective of developments of the overall passenger rights system.[445]

5.1.2.2 Compatibility with international instruments in a multimodal context

With such a substantial issue of a mode-specific passenger rights instrument remaining unresolved (at least from the perspective of the stakeholders), it should be assessed, in how far this could have an influence, or present a hindrance in the developments towards a passenger rights instrument for multimodal transport.

The baseline again is the establishment of a legislative measure on passenger rights specifically addressing rights in multimodal transport, applicable in cases of service disruptions, with an open scope discussion

441 Thijssen (n 369), 434.

442 Radosevic (n 439), 101–108.

443 COM(2013) 130 final (n 118), 19.

444 Which are still faced with having to adhere to their obligations under the Montreal Convention, while at the same time in principle applying the CJEU jurisprudence on the matter (although preliminary rulings are not binding legal precedent), which arguably may be seen as violating the exclusivity of the Montreal Convention.

445 Radosevic (n 439), 102–103.

of both single contract and separate contract multimodal journeys. From the outset, the application and potential effect may appear to be limited, as the issue of Montreal compatibility hinges on the fact that the multimodal journey has an air component. However, as has been shown, a majority of multimodal journeys currently has an air component, making this a relevant consideration for the EU multimodal passenger transport market.[446]

Based on the discussion of the cases and the development of the discussion and issues around it, as well as the indication from the EU legislator to uphold the approval of compatibility of Regulation 261/2004 with the Montreal Convention, there appear to be two possibilities for the *status quo* of the compatibility issue to constitute a hindrance for a measure addressing passenger rights in multimodal transport. The first has to do with the overall functioning of the passenger rights system and provides the basis for the second issue related to reconciling Montreal compatibility with a multimodal measure.

Given the contested nature of the rulings in academia, with stakeholders, as well as in front of national courts,[447] with the CJEU upholding its reasoning, a level of uncertainty seems to be attested to the issue. Especially resulting from the disagreement of some national courts with the argumentation of the EU and subsequent non-compliance, these developments may further a 'lack of uniformity, legal uncertainty and unequal treatment'.[448] This represents a problem for the development of a multimodal instrument in itself, as a fundamental issue in one of the core rights of the very system a multimodal measure would need to address remains a concern for stakeholders. This is insofar problematic, as it might open up the possibility for compatibility to be addressed again in relation to the concept of compensation being applied in multimodal scenarios. In particular this means that, should an EU legislative measure on multimodal transport[449] address the right to compensation in a way

446 See section 2.1.3.

447 See e.g. Garben (n 22), 268–272.

448 Bokareva (n 406), 21.

449 Which will consequently also apply to air segments of a multimodal journey.

that would diverge from the interpretation and classification of the kind of compensation awarded in cases of delay under Regulation 261/2004, the compatibility of such a provision with the Montreal Convention may be questioned.[450] Hence, potentially problematic points in the light of the judgments of the CJEU would be deviations from the applicability of the right to compensation on the basis of it being a redress for time loss, and its key characteristics of immediacy, standardisation, and identical damage suffered. Together, in the reasoning of the Court, they render the compensation afforded by the Regulation inherently different from the individualized 'damage occasioned by delay' under the Montreal Convention, and generally applicable at an earlier stage.[451]

In practical terms, whether such deviations are applicable is dependent on how the right to compensation is transposed to a multimodal measure.[452] Essentially the abovementioned points become an issue in a situation, where a right to compensation of another mode-specific regulation may apply to the whole journey, including an air segment, as the compensation amount under the other Regulations is based on the ticket amount, and could therefore raise concerns about the standardization aspect of the Court's reasoning. Additionally, should the legislator decide to implement a completely new standard for the right to compensation in multimodal situations, including air segments, the case law of the Court and ultimately the exclusivity clause under the Montreal Convention would act as an inhibiting factor as to what kind of rights can be afforded in cases of delay.[453] However, should the

[450] With regards to its application to the air segment of a multimodal journey.

[451] See judgments in C-344/04 (n 409), C-402/07 and C-432/07 (n 365), and C-581/10 and C-629/10 (n 437).

[452] Whether a potential legislative instrument covers single contract and/or separate contract multimodal journeys only plays a role regarding the general transposition and extension of the right to compensation to a multimodal context, as the effectuation of liability agreements between carriers offering single contract multimodal journeys would make the application of a right to compensation easier. While on the other hand the application of the right to separate contracts would increase the unpredictability of an increased economic burden from compensating also for subsequent segments of multimodal journeys.

[453] I.e. how compensation can be addressed.

amendment to Regulation 261/2004 be adopted, these potential issues would not come up, at least from the perspective of the legislator and the Court, as the amended regulation includes the extension of the right as established in *Sturgeon*, and applies the air regulation also to other legs of a multimodal journey. The adoption of a new instrument on the other hand, including the delay extension, may give rise to contentious issue to arise again, leading to a new wave of criticism.

5.1.3 Extraordinary circumstances

A second major contentious issue of interpretation concerns the notion of 'extraordinary circumstances' and its development in front of the CJEU. Notably, this notion exists both in the air and maritime regulations and it has been an issue of discussion under the rail regulation.[454]

5.1.3.1 Development of extraordinary circumstances under the air regulation

Under Regulation 261 /2004, 'extraordinary circumstances' are one of the few exemptions for air carriers from their obligation to pay compensation. The regulation holds that an air carrier 'shall not be obliged to pay compensation […], 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'.[455] It is noteworthy, that the Regulation itself lacks a definition of what constitutes 'extraordinary circumstances', as well as 'all reasonable measures', rendering this provision somewhat ambiguous from the outset. Some further indications as to the concept of extraordinary circumstances can however be found in the preamble of the Regulation, indicating a number of situations in which such circumstances may exist, including 'political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and

[454] See section 5.1.2.

[455] Regulation (EC) No 261/2004 (n 117), Art.5(3).

strikes […]'.[456] However, these situations are only indicative, and do not in themselves constitute extraordinary circumstances.[457]

In the wake of this ambiguous provision and its importance for the air carriers to avail themselves from having to compensate passengers in cases of cancellations (and after *Sturgeon* also delays), it was unsurprising that the use of the notion by the air carriers was contested by passengers wanting to claim compensation.

The first instance where the Court had a chance to address and define the concept of extraordinary circumstances came in *Kramme v SAS*. The request for a preliminary ruling concerned a case where an aircraft had been taken out of operation due to a technical defect and the absence of a replacement aircraft ultimately led to the cancellation of the flight. The air carrier claimed that the occurrence of the technical defect was due to extraordinary circumstances, which the passenger contested.[458] The questions referred to the court essentially asked, which circumstances caused the cancellation, what reasonable measure could have been taken, and what circumstances are to be regarded as extraordinary.[459] Notably, there was never a judgment delivered by the CJEU on this case, as the claimant withdrew shortly before the date of delivery, so the first indications as to the notion of extraordinary circumstances stem from the opinion of the AG in this case.[460]

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456 Regulation (EC) No 261/2004 (n 117), recital 14.

457 See C-549/07 *Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA* [2008] ECLI:EU:C:2008:771.

458 C-396/06 *Eivind F. Kramme v SAS Scandinavian Airlines Danmark A/S* [2007] ECLI:EU:C:2007:555, Opinion of AG Sharpston, paras.17–20.

459 ibid, para.33.

460 Kramme had accepted a last minute compensation from the air carrier, leading him to withdraw. Interestingly, this last minute withdrawal ultimately led to a new rule of the court stating that the withdrawal for a request can be taken into account until notice of the date of delivery of the judgment has been delivered to interested persons, not after; In the field of air passenger rights and compensation, there have actually been more cases withdrawn than judgments and reasoned orders from the CJEU have been issued; For more details on the amendment of the court's procedural rule see Jiri Malenovsky, 'Regulation 261: Three Major Issues in the Case Law of the Court of Justice of the EU' in Michal Bobek and Jeremias Prassl (eds), Air Passenger Rights: Ten Years On (Hart Publishing 2016), 30–31.

As to the circumstances causing the cancellation, the AG considered that they are twofold, as the mere withdrawal of an aircraft from the operation does not necessarily constitute a cancellation, should a replacement be available. Consequently, the unavailability of the aircraft represents the second component of causation.[461] As for the cancellation being unavoidable, and the notion of all reasonable measures being taken, the AG considered the concept in the light of the twofold causation. Accordingly, reasonable circumstances to avoid the withdrawal are deemed to be fulfilled according to the advocate general's reasoning, by compliance with the maintenance checks, mandated by safety regulations.[462] As to reasonable measures after a problem has arisen, the AG referred to measures intended to rectify the problem to avoid a withdrawal (however, notwithstanding safety standards and under consideration of relevant circumstances on a case-by-case basis), as well as contingency measures for replacement aircraft.[463]

The AG addressed the notion of extraordinary circumstances in relation to the technical defect. Based on the conclusion that the requirements of 'all reasonable measures taken' and the cancellation being caused by 'extraordinary circumstances' are cumulative, the AG considered such a defect may fall under what has been referred to in the preamble as 'flight safety shortcomings'. However, the mere classification does not render the technical defect extraordinary per se.[464] Since occurrences of technical problems are part of the operation of an airline, the decisive factor for categorising them as extraordinary, in the argumentation of the AG, was the frequency of occurrence and whether it is unusual.[465] A more frequently occurring and thereby usual technical defect would be harder to classify as extraordinary. Lastly, concerning the replacement of an aircraft, the classification of the unavailability of a replacement

461 C-396/06 Opinion of AG Sharpston (n 458), paras.39–41.
462 ibid, para.45.
463 ibid, paras.46–7.
464 ibid, paras.49–52.
465 ibid, para.59.

aircraft is to be established based on the foreseeability in the light of past experiences.[466]

After the delivery of the opinion, it did not take long, until the Court was confronted yet again with a similar issue, providing the chance to clarify the notion of extraordinary circumstances. This time around, in what is referred to as the *Wallentin-Hermann* case, the Court did give a judgment.[467] The case is insofar significant, as it provides a first attempt at defining what constitutes extraordinary circumstances. In *Wallentin-Hermann*, the Court did not completely follow the suggestions of the AG in *Kramme v SAS*.[468] Generally, the Court also found that a technical problem falling under unexpected flight safety shortcomings does not constitute an extraordinary circumstance in itself, and concluded that the list of situations provided is merely indicative, as these situations may produce such extraordinary circumstances.[469] However, the Court stressed that under the objective of consumer protection, the concept had to be interpreted strictly, leading to a diverging interpretation from the more literal approach the AG had applied in *Kramme v SAS*.[470] The Court came to the conclusion that 'the circumstances surrounding these events can be characterised as 'extraordinary' […] only if they relate to an event which […] is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin'.[471] This means the classification of events as extraordinary is a twofold test based on the cumulative requirements of inherency in the normal exercise of activities and the event being beyond the control of the air carrier. Considering the notion of technical defects

466 ibid, para.62; For a discussion on the practical implications of utilizing the extraordinary circumstances defences, see Marianne Butler, 'Regulation 261/2004: Kramme v SAS the Advocate General's Opinion (2008) International Travel Law Journal 7, 10-1.

467 C-549/07 (n 457); Notably, in this case, the Court did not request an opinion of the AG, which can be attributed to the fact that the questions referred to the Court in this case were almost identical to the ones in *Kramme v SAS,* which the AG had already addressed.

468 Malenovsky (n 460), 32.

469 C-549/07 (n 457), para.22.

470 ibid, paras.19–20; Malenovsky (n 460), 32.

471 C-549/07 (n 457), para.23.

specifically, the Court considered them inherent in the normal exercise of the air carrier, so those defects related to aircraft maintenance may not fall under the notion of extraordinary circumstances.[472] Practically speaking this meant a limitation of technical defects (read: flight safety shortcomings) constituting extraordinary circumstances, with the only options of technical defects not inherent in the normal exercise of air carriers being those caused by hidden manufacturing defects, or those caused by acts of sabotage or terrorism.[473] Notably, the judgment also left it open whether technical defects coming to light outside of mandated maintenance checks would fall under extraordinary circumstances, which the court addressed at a later point. The Court also diverted from *Kramme v SAS* in that it did not see frequency as a factor for determining the presence or absence of extraordinary circumstances.[474] Lastly, as for reasonable measures, the Court deemed the threshold to be 'measures which […] meet conditions which are technically and economically viable for the air carrier concerned', including the deployment of all resources in terms of staff, equipment and financial means, unless it would constitute 'intolerable sacrifices'.[475]

While this judgment provided first delimitations for the concept of extraordinary circumstances and guidance as to how it should be assessed, the notion itself was not really clarified. Both requirements under the extraordinary circumstances assessment (i.e. inherency in normal activity of the air carrier and events beyond its control), remain undefined in the judgment and are therefore up for interpretation by the national courts.[476] Criticism also centred around this lack of definition, arguing for instance that this interpretative freedom may have negative effects as to addressing potentially excessive use of the defence. In the same vein fall the lack of definition of all reasonable measures, as the requirements stated remain rather vague and in front of the considerations of potentially having to

472 ibid, para.24.
473 ibid, para.26.
474 ibid, para.37.
475 ibid, paras.40–1.
476 Arnold and Mendes de Leon (n 207), 107.

deploy all means until it would constitute 'intolerable sacrifices', the requirements of economic and technical viability may be questioned.[477]

The criticism of this judgment, especially in relation to the open interpretation was ultimately founded, as more specific questions in relation to the notion of extraordinary circumstances were referred to the Court. Among these, the most noteworthy is the decision of the Court in *van der Lans*, which gave an answer to what *Wallentin-Hermann* had left open with regards to technical defects not detected in routine maintenance checks.[478] The case concerned an exceptionally long delay due to an engine failure, resulting from a defective fuel pump. The main question was whether this defect, which was not detected during routine maintenance checks, occurred unexpected and was not attributable to defective maintenance, could fall under extraordinary circumstances. The reference to the CJEU represents an example of one of those cases concerning a very particular issue, which had been referred to the CJEU after *Wallentin-Hermann*.[479] Contrary to other similar references, merely providing an answer to the classification of the respective particular issue, the Court actually limited the use of the extraordinary circumstances defence in cases of technical defects further than what was established in *Wallentin-Hermann*. The Court found that 'a technical problem […], which occurred unexpectedly, which is not attributable to poor maintenance and which was also not detected during routine maintenance checks, does not fall within the definition of extraordinary circumstances'.[480] This ruling essentially closed the gap that the previous judgment had left open, excluding any unexpected technical defects from the scope of extraordinary circumstances, ruling out non-detection of defects during routine maintenance checks.

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[477] See e.g. John Balfour, 'The "Extraordinary Circumstances" Defence in EC Regulation 261/2004 after Wallentin-Hermann v Alitalia' (2009) 58 German Journal of Air and Space Law 224, 229.

[478] C-257/14 *Corina van der Lans v Koninklijke Luchtvaart Maatschappij NV* [2015] ECLI:EU:C:2015:618.

[479] ibid, para.33.

[480] ibid, para.49.

Based on both the vast amount of possible events leading to a cancellation or long delay of a flight, as well as the interpretative uncertainties attached to the inherency test in *Wallentin-Hermann*, judgments in the like of *van der Lans*, which concern very specific issues are still being referred to the CJEU tasking the Court to classify whether these specific issues fall under the notion of extraordinary circumstances. Some examples of these in recent years include the classification of bird strikes, wildcat strikes, screws on the tarmac puncturing the tyre of an aircraft, or an oil spill on the runway leading to a cancellation or long delay of a flight.[481] The continuing influx of questions on this matter referred to the CJEU indicates that the concept is by far not sufficiently defined. The amount of cases however, may also be attributed to practices of airlines preferring to start proceedings against passengers, rather than compensating in combination with the uncertain definition and amounts of possible events leading to a cancellation or long delay. A solution to this problem was envisaged with the amendment of Regulation 261/2004, but as has been established, this proposal has not been adopted, and in fact, one of the contentious issues in relation to this is how extraordinary circumstances should be adequately addressed. To this end, the proposal would include the test established in *Wallentin-Hermann*, in connection with either an exhaustive or non-exhaustive list of extraordinary circumstances, the nature of which is the subject of concern.

5.1.3.2 Extraordinary circumstances under the rail regulation

The provision for compensation under Regulation 1371/2007 does not provide for an exemption in cases of extraordinary circumstances, or any other form of *force majeure*. In fact, this absence has been pointed out by the Commission as one of the problematic areas of the Regulation in its proposal for an amendment, which envisaged the inclusion of the exemption for the amended Regulation 1371/2007 under considerations

[481] See C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.* [2017] ECLI:EU:C:2017:342; C-195/17 *Helga Krüsemann and Others v TUIfly GmbH* [2018] ECLI:EU:C:2018:258; C-501/17 *Germanwings GmbH v Wolfgang Pauels* [2019] ECLI:EU:C:2019:288; C-159/18 *André Moens v Ryanair Ltd* [2019] ECLI:EU:C:2019:535.

of legal certainty, fairness and proportionality.[482] The considerations from the Commission in the proposal also stem from, what can be regarded as the first major decision of the CJEU in passenger rights outside the field of air transport, namely its ruling in ÖBB *Personenverkehr AG*.[483] The case arose out of a dispute between a NEB and a rail service provider, the latter of which had been ordered by the former to modify its general conditions of carriage, excluding a number of exemptions under which the rail transport operator would not be liable for compensation in cases of delay.[484] The nature of this case makes it significant for two reasons. First, it asked the Court to elaborate on the powers of NEBs, and second, as one of the terms used by the rail operator concerned a *force majeure* exemption. This second reason is insofar important, as the Court undertook both an assessment of the interplay of the Regulation in connection with the applicable international agreement, the CIV,[485] and provides insights into the analogous treatment of the Regulations, as it discusses the reliance on the principle of extraordinary circumstances under Regulation 1371/2007 by virtue of its inclusion in other passenger rights instruments.[486]

Regarding the question whether the NEB has the power to enforce upon the transport operator the exclusion of exemptions in their terms and conditions, the Court found that in the absence of a national law providing them with such powers they cannot solely rely on their position and enforcement power assigned by the Regulation to specifically impose the content of compensation terms which are not in compliance with what has been set out in the Regulation.[487] While the NEBs have the responsibility for ensuring effective enforcement of the Regulation, it is for the Member States to adopt measures defining the specific powers of the

[482] COM(2017) 548 final (n 113), 4.

[483] C-509/11 (n 229).

[484] C-509/11 (n 229), para.23; See also Prassl, 'Compensation for Delayed Rail Journeys: EU Passenger Rights on Track' (n 184).

[485] Which does provide for a *force majeure* exemption in cases of delay.

[486] C-509/11 *ÖBB Personenverkehr AG* [2013] ECLI:EU:C:2013:167, Opinion of AG Jääskinen, para.39–43.

[487] C-509/11 (n 229), para.66.

NEB.[488] This is an interesting observation by the Court, as it leaves room for interpretation to the Member States regarding what powers NEBs should have in order to fulfil their responsibility for the enforcement of the Regulation. This might also be interesting from a perspective of enforcement in the following section, as an absence of uniformity in powers of NEBs can be to the detriment of their overall effectiveness, as consumer protection through NEBs may vary between Member States.

Regarding the question of reliance on the CIV for exempting carriers in cases of *force majeure*, the Court based its argumentation on the differences between both systems, despite their integrative nature under the Regulation, as well as the intention of the legislator.[489] The relevant article of the CIV deals with compensation for damage or loss resulting from delays and cancellations, offering redress in the form of entitlement to reasonable costs of accommodation necessary because of the delay and costs related to the notification of persons expecting the passenger.[490] An individual assessment of the damage incurred is necessary.[491] The provision on compensation in the Regulation on the other hand provides for a fixed rate standard form of compensation calculated based on the ticket price. Its purpose is to 'compensate the passenger for the consideration provided for a service which was not ultimately supplied in accordance with the transport contract'.[492] Based on this difference in purpose and implementation, the Court considered that these compensation systems cannot be treated the same way, and that the exemption under the international convention cannot be relied upon under Regulation 1371/2007.[493] Additionally, the Court relied in its argumentation on an explanatory report of the CIV, which mentions that delay representing a typical case of improper performance of a contract of carriage justifies national approaches as to the reduction of

488 ibid, para.62.

489 For a discussion on the incorporation of the CIV provisions under the Regulation, see: Petit Lavall and Puetz (n 226), 376–9.

490 C-509/11 (n 229), paras.34–7.

491 C-509/11 (n 229), paras.34–7.

492 ibid, para.38.

493 ibid, para.42.

the cost of transport.[494] The conclusion of the Court further rests on the EU legislature deliberately excluding an application of the exemption to the Regulation.[495]

This decision and the argumentation of the Court provides an interesting insight into the general considerations of complementarity between the EU Regulations and international conventions on the matter of passenger rights, especially in terms of compensation. Indeed, the assessment here seems not too dissimilar from the Court's consideration under the issue of compatibility of Regulation 261/2004 with the Montreal Convention, arguing for the compensation under the Regulation to be of different nature than what is provided under the international convention, thereby not encroaching on its scope. However, here a clear difference lies in the interplay of the instruments in the rail sector, as the CIV essentially works in symbiosis with the Regulation, leaving issues of reimbursement to domestic laws, while the Regulation also refers to the CIV for damages in cases of delay, missed connections and cancellations.[496] Ultimately, the considerations of the Court also bring to light the differences as to the compensation to be provided by the different Regulations. Whereas the air regulation provides a flat rate compensation based on time loss, which does not prevent passengers from also possibly asking for a ticket price reimbursement, the rail regulation's ticket price based compensation exists essentially to consider the delay or cancellation and partially reduce the ticket price based on the delay. Notably, the right is not applicable if passengers have already made use of their right to re-routing and reimbursement.

Lastly, the Court considered, whether the grounds for exemptions provided by the other passenger rights regulations may be applied by analogy to carriage by rail.[497] Both the AG and the Court came to the conclusion that the grounds of exemption in other regulations cannot be relied upon by analogy in carriage by rail.[498] The reasoning behind

494 ibid, para.41.

495 ibid, paras.43–4.

496 Jeremias Prassl, 'Compensation for Delayed Rail Journeys: EU Passenger Rights on Track' (n 184).

497 C-509/11 (n 229), para.46.

498 ibid, para.48; C-509/11 Opinion of AG Jääskinen (n 486), paras.39–43.

this is that the different transport modes are not comparable, as there are differences in the way they operate, conditions of accessibility and distribution of networks. Additionally, based on these differences inherent in the transport modes and the resulting incomparability, it was also confirmed in the CJEU's ruling in *McDonaugh*, that EU legislature may establish different levels of consumer protection, depending on the transport sector concerned.[499]

As pointed out, the Commission's proposal would include a provision for the exemption of the right to compensation in cases of extraordinary circumstances.[500] However, as the European Parliament rejected the inclusion of such an exemption in the amended Regulation, the application of an extraordinary circumstances defence in carriage by rail is not very probable.[501]

5.1.3.3 Extraordinary circumstances in a multimodal context

As an underlying issue of the right to compensation in the mode-specific passenger rights regulations, the notion of extraordinary circumstances also needs to be discussed when it comes to a potential application of the right in a multimodal context. The developments in both air and rail regulations have shown the vast differences of this concept in the existing instruments, not only as to its interpretation, but more substantially, how different transport market characteristics have an influence on the applicability of such exemptions, justifying an unequal treatment under the different EU passenger rights instruments. Based on the developments discussed, there are two main hindrances to the application of the extraordinary circumstances defence, and subsequently the right to compensation, in a multimodal context.

The first relates to the lack of uniformity when it comes to the notion of extraordinary circumstances. It is apparent that 'extraordinary cir-

499 C-12/11 *Denise McDonagh v Ryanair Ltd* [2013] ECLI:EU:C:2013:43, paras.56–7; For a discussion of the case, see: Vincent Correia, Air Passengers' Rights, "Extraordinary Circumstances", and General Principles of EU Law: Some Comments after the *McDonaugh* case' (2014) 13(2) Issues of Aviation Law and Policy 245.

500 COM(2017) 548 final (n 113), 5.

501 See section 4.4.

cumstances' as an exemption ground under the regulations is treated very differently across the transport modes. While in air transport the discussion has centred mostly around the actual definition of the concept and its scope, bringing about problems related to the number of different events that might fall under the term, and generally struggling to adequately define the concept and its assessment for air transport, CJEU case law concerning the rail regulation has ruled out the application of the concept completely. In the maritime regulation, although an exemption from the right to compensation in cases of extraordinary circumstances exists, and albeit this exemption being formulated vaguely, in a similar nature to the concept under the air regulation, there appear to be no significant issues. Under the bus regulation, the concept is not included. This absence of uniformity also finds its justification in the case law of the CJEU, even underlining a necessity of having mode-specific iterations of certain rules, based on the inherently different characteristics of the transport modes.[502] With this justification, the possible avenues for a transposition of the concept to multimodal scenarios would be limited, as a harmonized compensation approach, including an exemption in cases of extraordinary circumstances may not be possible to implement. Essentially, the possible considerations as to how compensation rights could be applicable are limited to those adhering to the mode specific characteristics and corresponding iterations of the concept, as the creation of a harmonized approach would not adequately take into account the different characteristics of the transport modes. Such a harmonized approach would subsequently mean a departure from the reasoning of the Court upholding the varying degree of protection warranted in the different transport modes.

However, even under considerations of this limitation, and therefore an adherence to the mode-specific iterations of the concept of extraordinary circumstances, there may be a second issue, inherent in the strict interpretation of the concept under the air passenger rights regulation. The transposition of the right to compensation to a multimodal context potentially means that transport operators offering multimodal products may face significantly higher economic repercussions regarding the right

[502] C-12/11 (n 499), paras.56–7.

to compensation for passengers.[503] Based on the increased economic burden, the very strict interpretation of extraordinary circumstances in *Wallentin-Hermann* and subsequent decisions such as *van der Lans*, significantly limiting the applicability of the exemption in specific circumstances, may be questioned on the basis of keeping a balance between high levels of consumer protection and financial costs potentially borne by air carriers.[504] The question, as it has already been raised in the mode-specific context after these judgments, will be, whether the expectedly higher economic repercussions for air carriers stemming from an application of the right to compensation in a multimodal context justify a restrictive reading of the concept for extraordinary circumstances, which in itself has put a larger emphasis already on a high protection of passenger's rights, and left out crucial considerations as to the operation and functionality of the air transport market.

5.2 Enforcement issues

An overarching issue may still lie with the enforcement of passenger rights. As has been established under the development of passenger rights in the EU, effective enforcement of the regulations has been one of the issues which the EU legislator had been confronted with. This part shifts the focus towards general awareness and compliance with rights by stakeholders, as well as the role of those entities responsible for effective enforcement. From the outset, one may bring up the point why enforcement represents an issue in the first place, given the fact that the instruments in questions are all regulations, which are binding in their entirety and directly applicable in all Member States.[505] Nonetheless,

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503 I.e. transport operators being liable to compensate for other segments of a multimodal journey, when a service disruption occurs on their segment.

504 See e.g. COM(2013) 130 final (n 118), 4–6.

505 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, Art.288. Jeremias Prassl, 'Tackling Diversity Through Uniformity? Revisiting the Reform of Regulation 261/2004' in Michal Bobek and Jeremias Prassl (eds), Air Passenger Rights: Ten Years On (Hart Publishing 2016), 338.

there are some factors that have influenced the effective enforcement of the instruments, concerning the three main stakeholder groups.

5.2.1 Air operator's reluctance to comply

The first main stakeholder group playing a role in the enforcement of the regulations are the transport operators. Their main detrimental influence on effective enforcement comes in the form of an attested deliberate non-compliance with the passenger rights instruments.

Notably, this issue of deliberate non-compliance appears to be exclusive to the air transport sector. Aside from the apparent disagreement of operators with the content of the Regulation, and in particular its case law concerning provisions for compensation, the prevalence of this issue in the air transport sector is also reflected in the number of complaints received by the NEBs in the Member States. To this end, the last European Consumer Centre Net (ECC-Net) Air Passenger Rights Report from 2015 brought to light that in 2014 73% of complaints about transport services to the NEBs were made in air transport, which rose to 80% in the period between January and June 2015. The other transport modes represent only marginal percentages.[506] This is also reflected in the assessment of the application of the regulations by the Commission. Contrary to the report on the air regulation, which extensively discusses measures to ensure a harmonized application, effective enforcement, and compliance by stakeholders to combat a lack of effective enforcement, the Commission's reports on the other regulations explicitly point out that no deliberate or systematic non-compliance with the respective instruments was found.[507]

The flood of cases and preliminary references to the CJEU regarding the interpretation of Regulation 261/2004 have brought up questions as to the root causes of the magnitude of issues with the Regulation.

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[506] European Consumer Centres Network, 'Air Passenger Rights Report 2015 Do consumers get the compensation they are entitled to and at what costs?' (ECC-Net, December 2015) <https://www.ecc.fi/globalassets/ecc/ajankohtaista/ raportit/2015-ecc-net-air-passeger-rights-report.pdf> accessed 10 June 2019, 24.

[507] See COM(2011) 174 final (n 292); COM(2013) 587 final (n 225); COM(2016) 274 final (n 256); COM(2016) 619 final (n 265).

Part of the search for these causes attests a deliberate non-compliance of air transport operators with the Regulation, stemming from the initial disagreement with the Regulation's fixed rate amounts of compensation, as well as the consumer focused landmark rulings of the CJEU.[508] Coupled with the interpretative ambiguities surrounding contested provisions, conclusions are drawn suggesting that air carriers deliberately refuse to adhere to the rights applicable to passengers, or at the very least do not take them seriously.[509] This non-compliance manifests itself in the way that air carriers handle consumer complaints, including non-transparent processes for filing claims, general unresponsiveness, and ultimately, the air carriers' practices of favouring litigation, taking passengers to court rather than paying compensation.[510] Especially the latter point seems to be reflected in the number of preliminary references asking the CJEU for very specific clarifications, rather than substantial questions concerning the provisions of the Regulation.[511]

The attested airline practices were also echoed in a number of surveys carried out across the Member States, as part of the evaluation of the Regulation as an initial step to its amendment.[512] However, it is extremely challenging to provide any definitive findings as to the compliance of air carriers. This is mainly the case, as the experiences differ between the countries and sometimes even regions, and the fact that most available data on compliance stems from surveys carried out by the NEBs, only representing a limited number of passengers, while air carriers mostly do not provide data on this subject.[513] Nonetheless, the surveys of various NEBs suggested that there were prevalent issues of air carriers ignoring their obligations to provide care and compensation. Compensation was offered mostly only after a passenger request and if a request was made,

508 See e.g. Maria Juul, 'Strengthening Air Passenger Rights in the EU' (European Parliamentary Research Service, May 2015) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/556983/EPRS_BRI%282015%29556983_EN.pdf> accessed 10 June 2019, 3.

509 Cees van Dam, 'Air Passenger Rights After Sturgeon' 36 Air and Space Law 259, 260.

510 Garben (n 22), 273.

511 ibid.

512 Havenhand, Macnair, Smith (n 331).

513 ibid, 173.

the response time of the carrier was rather long, or passengers did not receive an answer at all.[514] Other issues pertained to a deliberate disregard of landmark rulings such as *Sturgeon*, which some carriers even openly admitted, as well as a lack of proper information of passenger's rights. These issues were reiterated by a number of consumer associations, also attesting non-compliance of air carriers with the Regulation. Notably, the compliance issues mostly did not constitute an outright refusal of a right, but rather represented slight diversions from what air carriers would be required to provide under the Regulation.[515] Other issues, in line with the case law on extraordinary circumstances,[516] concerned the frequent reliance on technical problems to avail themselves from having to pay compensation.[517]

For the EU legislator to address this issue of compliance, it had to establish the root causes, which were found mostly in economic drivers. Decisive here are both the potential economic burden of compliance with the Regulation, and especially an increase of that burden through the case law of the CJEU, as well as a missing incentive to comply in the form of not only varying levels of powers of NEBs, but especially a corresponding lack of adequate sanctions.

Despite efforts of the European legislator to address some of these problems, which evidently also represent effects of the development and especially the interpretation of the Regulation, it seems that no adequate solutions have yet been found, as practices of the like described above seem to persist.[518] Measures of the Commission envisaged in their amendment to Regulation 261/2004 included for example those taking

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514 To the contrary of the immediacy of redress, which an effective enforcement of the Regulation should entail.

515 This includes for instance, the practice of reimbursing the assistance costs of passengers retroactively based on receipts provided by the passenger, rather than providing an allowance for care in advance.

516 See Section 5.1.3.

517 Havenhand, Macnair, Smith (n 331), 172.

518 Indicative in this respect is for example the publication of interpretative guidelines for Regulation 261/2004 by the Commission, aiming to enable a more effective and consistent enforcement C 214/04 (n 211); For practical examples, see also (n 520) and (n 521).

into account the financial capabilities of air carriers. Hereunder, proposed changes to the Regulation include a new 5-hour delay threshold for compensation to be applicable for all intra-EU flights, as well as a cap on assistance in the form of hotel prices per night and maximum amount of nights, similar to what has already been implemented in the other Regulations.[519]

However, with the amendment of the Regulation not having entered into force, the *status quo* remains unchanged and practices similar to those attested to air carriers in the assessment of the Regulation before the amendment still exist. In recent years, a couple of examples from the practices of air carriers exemplify the continuation of non-compliance with the Regulation. Ryanair continuously comes under scrutiny of the UK Civil Aviation Authority (CAA) for their practices concerning the application of Regulation 261/2004. In 2017, after the air carrier had cancelled a large number of flights due to rostering issues, the UK CAA initiated an enforcement action against them for repeatedly not informing passengers accordingly about their rights as a result of the cancellations. Similarly, to what had been attested by the NEBs in the assessment of Regulation 261/2004, the issue of Ryanair's practice did not concern an outright refusal to provide a right, but rather the omission to provide information on the full extent of the right.[520] Issues of this kind are not exclusive to low-cost carrier such as Ryanair, as a recent example from Finnair shows. Here, the complaints of passengers, which were taken to the Market Court by the Finnish Consumer Ombudsman, concerned practices of Finnair, where the air carrier would, instead of providing the fixed rate compensation in accordance with Regulation 261/2004, give out gift vouchers or other company benefits. Additionally, Finnair allegedly provided misleading information as to the grounds of refusal to pay compensation. The court of first instance (Market Court) has

519 COM(2013) 130 final (n 118), 8–9.

520 See e.g. UK CAA, 'CAA expedites enforcement action against Ryanair for persistently misleading passengers' (UK CAA, September 2017) <https://www.caa.co.uk/News/CAA-expedites-enforcement-action-against-Ryanair-for-persistently-misleading-passengers/> accessed 10 June 2019.

however ruled in favour of Finnair, the case is currently in appeal with the Finnish Supreme Court.[521]

Ultimately, the above examples are indicative of the persistence of in the best case a problem of diverging interpretation of the Regulation by stakeholders, and in the worst case, deliberate actions from air carriers, abusing the ambiguities in the interpretation of the Regulation. In both cases, the result is a lack of enforcement to the detriment of the passenger.

5.2.2 Right awareness and knowledge

Effective enforcement of the regulations also depends to some extent on the passengers being aware of their rights and possessing some knowledge on when they apply and what they are entitled to. Passenger awareness plays a crucial role, as passengers need to actively seek e.g. compensation from air carriers.[522] This is only possible, if they are aware of the rights applicable to them. Right awareness represents one of the main reasons, why passengers do not take an action, when experiencing a travel disruption.[523]

Awareness has been flagged by the Commission in its assessment of the Regulations for every mode-specific passenger rights instrument as an issue that needs to be addressed.[524] The Commission has undertaken a number of information campaigns to raise awareness of passenger rights over the years, including measures such as the creation of a mobile phone app, distribution of posters and leaflets, as well as social media

[521] Finnish Competition and Consumer Authority, 'Consumer Ombudsman to appeal Market Court's Finnair ruling' (Press Release, 04 January 2019) <https://www.kkv.fi/en/current-issues/press-releases/2019/4.1.2019-consumer-ombudsman-to-appeal-market-courts-finnair-ruling/> accessed 10 June 2019.

[522] Hinnerik Gnutzmann and Piotr Spiewanowski, 'Consumer Rights Improve Service Quality: Evidence from EU Air Passenger Rights' (College of Europe Policy Brief, October 2018) <https://www.coleurope.eu/system/tdf/research-paper/gnutzmann_spiewanowski_cepob_13-18_fin.pdf?file=1&type=node&id=47207&force=> accessed 10 June 2019, 3.

[523] European Court of Auditors (n 334), 3.

[524] See e.g. COM(2011) 174 final (n 292), 13; COM(2016) 619 final (n 265), 10–11.

campaigns.[525] Awareness raising measures also have come in the form of actions taken against air carriers by NEBs, for example by ensuring that information leaflets on passenger's rights are readily available at check-in counters.[526] In other cases, the magnitude of some events giving rise to a widespread application of passenger's rights have significantly helped to spread the knowledge about the instrument amongst passengers. The most prominent example of this is the eruption of the Icelandic volcano *Eyjafjallajökull* in 2010 (C-12/11), which led to a substantive number of flights being cancelled and subsequently a surge in passenger rights complaints. It is stated that this event helped the dissemination of passenger rights and represents one of the reasons for an increase in complaint numbers in the years following the eruption of the volcano.[527] More recently, the emergence of claim agencies and their omnipresent marketing especially online has also been stated as a factor for increasing awareness of passengers.[528]

The level of awareness of passenger rights has been assessed recently by the European Court of Auditors (ECA) in their special report on passenger rights. As part of the assessment, the ECA conducted a statistical survey of 10.350 citizens from 10 Member States, to determine the self-proclaimed awareness of passenger rights, the reach of the term 'passenger rights', as well as the knowledge of passenger rights.[529] The self-proclaimed awareness was assessed on a scale from 1 ('entirely unaware of my rights as a passenger') to 4 ('entirely aware of my rights as a passenger'). The results showed that 38,6% of respondents were entirely aware (3,6%), or quite aware (35%), while 61,4% indicated a form of unawareness, with 13,5% being entirely unaware of their rights.[530] The ECA attests that this result indicates a rather low level of awareness,

525 Commission, 'Passenger rights campaign' <https://ec.europa.eu/transport/themes/passengers/campaign_en> accessed 10 June 2019.

526 Andrew Cook and Graham Tanner, 'The cost of passenger delay to airlines in Europe' (University of Westminster Discussion Paper, December 2015), 11.

527 ibid, 12.

528 Gnutzmann and Spiewanowski (n 522), 3.

529 European Court of Auditors (n 334), 16.

530 ibid, 17.

pointing out that campaigns by the Commission should have provided some more practical guidance as to the steps to take in cases of travel disruptions.[531] Interestingly, an earlier survey on passenger awareness as part of the Eurobarometer 420 warranted similar results, which the ECA report points out as well. Albeit not offering a scale of awareness, the Eurobarometer survey (with 28.050 respondents), showed that 29% of respondents had at least heard about passenger rights, with slightly less having read, seen, or heard information about their rights (23%).[532]

Judging from the results of especially the ECA report and its conclusions, the level of awareness is on the one hand not yet high enough, as just over one third of passengers appear to be aware of their rights. On the other hand, the report points out that the issue of the awareness campaigns may lie with their lack of providing actual information on how to act during a travel disruption, contact the responsible carrier, or start claim proceedings.[533] This conclusion plays an important role, especially, since the report also connects right awareness to knowledge of the rights, showing that when tasked to select the applicable rights in a given travel disruption scenario out of 15 options (5 correct; 10 fictional), the respondents (on average) selected 2 out of the five correct ones.[534] The Commission, in its responses to the findings of the report, agreed that public awareness still needs improvement, and in particular, that passengers need to be informed how to file complaints successfully.[535]

However, the Commission also pointed out that the duty to provide information mainly rests with the transport operators, and that the

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531 European Court of Auditors (n 334), 4.

532 Commission, 'Special Eurobarometer 420 Passenger Rights (December 2014) <http://ec.europa.eu/commfrontoffice/ publicopinion/archives/ebs/ebs_420_en.pdf> accessed 10 June 2019, 22; Interestingly, the Eurobarometer also sheds some light on the differences in awareness between Member States, showing that while in France only 17% had heard of passenger rights, 48% of respondents in Austria indicated awareness of passenger rights. Notably, except for three Member States, less than 30% of respondents had seen, read or heard about passenger rights (Eurobarometer 420, 23).

533 European Court of Auditors (n 334), 31.

534 ibid, 18.

535 ibid, 52.

implementation is to be monitored by the NEBs.[536] This point of the Commission demonstrates that these issues of enforcement are often not in isolation of each other, but rather stand in close relation. Passenger awareness constitutes a great example of this. Generally speaking, the more passengers are aware of their rights, the more claims will be made per service disruption, raising the potential economic burden for transport operators.[537] Judging from the findings on the issue of airline compliance, a main deterrent for complying with the obligations in full (at least for air carriers) appears to be the economic burden, which can lead to practices influencing also the awareness of passengers of their rights (e.g. displaying information on passenger rights, providing information on causes of disruptions, etc.). The solution to this problem should lie in theory with the third main stakeholder group, the NEBs, which, through their monitoring, enforcement and sanctioning powers should provide the necessary incentive for compliance. However, as the following section will show, an absence of harmonized NEB powers and lack of adequate sanctioning mechanisms can work also as an enabler of ineffective enforcement.

5.2.3 NEB effectiveness, competences and the emergence of alternative dispute resolution mechanisms and claim agencies

Generally, all four mode-specific passenger rights regulations require that the Member States establish a NEB to ensure that the provisions of the instruments are complied with.[538] The NEBs function as a contact point for passengers, as well as they are responsible for taking measures to assure compliance with the Regulations. The particular issues in relation to NEBs are very detailed and go beyond the scope of this thesis. The main points of content however can be summarized as follows. A first issue exists in the fact that the provisions for establishing the NEBs are

536 ibid.

537 Cook and Tanner (n 526), 14.

538 European Court of Auditors (n 334), 25.

rather vague and do not go into specifics as to the exact powers that these bodies should have. This has created a system where the NEBs in a given Member State may be part of another agency, or may be a standalone agency. Furthermore, some of them may handle individual consumer claims, while others have outsourced this part of their activities to another body, such as the European Consumer Centre (ECC).[539] Overall, it is challenging for a consumer to find the applicable NEB as a place of contact in the first place, because of these vast differences.[540] The most contentious issues, in terms of effective enforcement, however lie within their actual enforcement and sanctioning powers. Again, resulting from ambiguous formulations in the regulations, there is no harmonized approach as to how and by which measures NEBs are to assure compliance by transport operators with the regulations. This has led to incredible differences in sanction amounts.[541] There are also differences in the territorial scope of the NEBs, as for example rail NEBs cover carriers registered within their jurisdiction, while in all other modes, their scope of application is based on services departing within the territory of the country, or EU registered operators arriving within their territory with a departure in a non-EU country. Other issues involve for example differing characteristics of procedures, including length and deadlines applicable to handle claims.

Based on this assertion, NEBs seem to have an uncertain role when it comes to assuring effective enforcement. The regulatory ambiguities seem to have led to them being in a position, where there is no uniform approach as to their enforcement powers, and especially how they interact or rather complement the avenues of procedural redress for passengers.

In the wake of these enforcement gaps, and outside of the court systems, there are a number of other redress mechanisms that consumers can resort to, mainly pertaining to so-called claim agencies and alterna-

539 ibid, 26.

540 For a list of NEBs in the Member States, see <https://ec.europa.eu/transport/themes/passengers/neb_en> accessed 10 June 2019.

541 The European Court of Auditors' report found for example that regarding infringements of Regulation 261/2004 sanctions can range from merely €50 (Poland) to €250.000 (Ireland) per passenger, with the amount depending on the seriousness of the infringement in question.

tive dispute resolution (ADR) bodies.[542] Although the ADR bodies should generally be available for consumers in the EU for disputes they may have with traders based on the ADR Directive, their opinions may not always be binding upon the carrier. Additionally, their nature of being a mediating body has led to criticism, as a compromise could potentially mean an amount of compensation that is less than what a passenger would potentially be entitled to.[543]

Another alternative for passengers comes in the form of so-called 'claim agencies', which essentially manage the claims for compensation in cases of disrupted travel on behalf of the passengers. The business models of these claim agencies vary, but mostly they will take a share of the compensation that the passenger is entitled to as their fee (the percentages depend on the agency, but can be up to 50% of the amount of compensation). Despite passengers sacrificing shares of compensation amounts they should be entitled to, claim agencies often offer fast and reliable redress mechanisms, as they deal with the carriers frequently. Some claim agencies even pay passengers their compensation amount up front, once they have assessed that the passenger is eligible to receive it.

5.2.4 Enforcement in a multimodal context

From the above considerations, it is apparent that the current system of mode-specific passenger rights regulations is facing a number of issues when it comes to effective enforcement. Issues relate to the compliance of transport operators with their obligations, a lack of awareness and knowledge of passenger rights, as well as the unclear position and enforcement mechanisms of the NEBs. The latter issue represents the most important, as a solution, in the form of more transparent and harmonized enforcement processes and sanctioning system could help to some extent with the issues concerning other stakeholders. Existing NEB sanctions

[542] For a recent assessment of the state of ADR for air passenger rights, see ECC-Net, 'Alternative Dispute Resolution in the Air Passenger Rights Sector' (Report, December 2017) <https://www.europe-consommateurs.eu/fileadmin/ user_upload/eu-consommateurs/PDFs/PDF_EN/ADR-APR-2017-FINAL.pdf> accessed 10 June 2019.

[543] European Court of Auditors (n 334), 29.

and other enforcement mechanisms would need to be adapted in order to provide enough incentive for carriers to assure compliance. This includes for example also the compliance with information requirements, which in turn may raise passenger awareness. Ultimately, passengers will want to inform themselves about their rights, once a service disruption has happened, making the provision of information at this point crucial for raised awareness. In line with what the ECA report concluded, it is therefore for the Commission to go beyond pure awareness campaigns, as passengers, once the need to enforce their rights arises, need more practical guidance on how to effectuate their claims. Lastly, despite the successes of claim agencies, their emergence to a certain extent is a result and thereby a confirmation of apparent enforcement issues of the instruments.

With a view to a legislative measure addressing passenger rights in a multimodal context, it is especially the role and scope of powers of the NEBs that constitute a particular concern. Part of the lack of protection for passengers in multimodal transport stems from the fact that currently, NEBs do not have the powers to address such issues, as they are missing a legal basis in the mode-specific passenger rights regulations. This is clearly a point a new legislative measure would need to address. Consequently, in order to adequately provide this extension in scope for NEBs, some form of harmonization of NEB powers would be needed. With multimodal transport being predominantly of a cross-border nature, limitations to the scope of application, such as the jurisdiction of rail NEBs only over undertakings registered within a jurisdiction, would need to be amended.

Another point to be addressed in a multimodal context would be that of effective sanctioning and its relation to carrier non-compliance. In the face of increased economic burdens and added complexities, which a legislative measure on passenger rights in multimodal transport would inevitably entail, the detrimental effect on compliance by carriers should be taken into account. Already in a mode-specific context, developments in the interpretation of the regulations leading to potential increased economic burdens had led to forms of non-compliance by carriers. Given the envisaged effects of right extensions, especially concerning the right to reimbursement, re-routing, assistance, and especially compensation,

added economic burdens of such a system could be detrimental to the carriers. If not adequately covered under carrier agreements to offer multimodal products, similar effect as with the mode-specific right extensions (i.e. the carriers' response to the *Sturgeon* doctrine) could be a likely outcome.

In front of the goal of assuring effective enforcement, a new measure should on the one hand regulate the rights of passengers in a way, to assure a balance between a high level of passenger protection and financial interests of carriers, while on the other hand equipping NEBs with adequate and harmonized enforcement mechanisms.[544]

In terms of passenger awareness, concerning the added complexity to an already complex system of passenger rights through the introduction of a multimodal passenger rights instrument, it would be crucial for the Commission to accompany this with adequate measures to raise passenger awareness. Given the fact that purely awareness-focused campaigns have not warranted envisaged results, a shift towards providing passengers with more practical information to effectuate claims may be an approach to take. Yet, until the exact scope and right content of a multimodal instrument have not been determined, it is challenging to determine any appropriate approach to this.

In the end, it seems that the main question for the effect of a new legislative measure on effective enforcement of passenger rights seems to be how it can overcome the already existing problems in relation to effective enforcement. Because of its very nature, an adverse effect on passenger rights enforcement can be expected, as the added complexity of the envisaged new measure, and an expected increased economic burden for carriers exactly fit into the drivers for enforcement issues the system is currently experiencing. Hence, it is crucial for the new measure to find a way, where its introduction not only prevents further advancements of enforcement issues, but also finds and implements solutions to existing ones.

[544] In the face of this balance being interpreted differently by the stakeholders.

6 Conclusions

6.1 Summary of findings

Although multimodal passenger transport *per se* is not a novel concept, discussions and developments on passenger rights in multimodal transport have begun only recently, and in connection to the Commission's general sustainability development goals, in which the transport market plays an integral role. Passenger rights in multimodal transport are to accompany the envisaged focus on promoting transport multimodality with a view to reduce emissions from the sector and enhance its effectiveness and sustainability. Despite the existence of passenger rights on a mode-specific level, the existing legislative instruments do not include an application of passenger rights in multimodal scenarios, creating a legislative gap, which needs to be addressed in front of the raised importance of multimodality for the future of the European transport market.

The developments towards a measure from the EU legislator addressing this gap so far have focused predominantly on questions of necessity and scope of a new instrument, and have brought to light some integral issues for the facilitation of passenger rights in multimodal transport. So far, these substantive developments have come in the form of an inception impact assessment by the Commission, followed by a public consultation, as well as an exploratory study.

A necessity for passenger rights in multimodal transport stems mainly from gaps in the currently existing passenger rights system. As the currently existing instruments come with a mode-specific scope, they do not in any way cover the rights of passengers in multimodal scenarios. Only the proposed amendment of Regulation 261/2004 includes in its scope multimodal journeys with an air segment, yet cannot really be considered, as its implementation remains questionable. In the absence of passenger protection by legislation, the only other current form of protection can be found in more integrated forms of multimodal products, i.e. those based on a single transport contract, enabled by agreements between the trans-

port operators of the respective modes. Those multimodal products do offer some form of protection, however, this is mostly limited to offering alternative transportation to the final destination, and thereby far from the level currently afforded by mode-specific instruments. These forms of protection are also not harmonized (i.e. they vary between transport operators).

Resulting from this gap in passenger rights coverage, the main issues identified in the multimodal context related to information rights, the rights of passengers in cases of service disruptions, as well as issues of enforcement (mainly relating to the missing legislative basis for NEBs to address complaints in multimodal scenarios).

Despite these apparent legal gaps, and resulting problems, certainly rendering a legislative intervention necessary (also in the eyes of the Commission), the parameter of necessity also rests on the assessment of the market. Hereunder, a number of problems became apparent. Not only is the size of the multimodal transport market marginal, compared to the overall EU transport market, but a majority of the market also consists of air-rail combinations. Additionally, most multimodal transport journeys in the EU are based on separate transport contracts, and created on the initiative of the passengers. This results in a number of substantive questions, which are to be considered in the development of a multimodal legislative measure: First, it is important to assert how many passengers in multimodal transport actually experience interruptions leading to situations where protection is necessary. Second, what could be the effect of passenger rights on the market developments? Is it furthering the development of more multimodal offers? Or may it have a detrimental effect if the level of protection is too high? Third, and in relation to market development, it should be asked, what potential there actually is for other mode combinations than air-rail? The current marginal size of other mode combinations in an already marginal transport market, may not paint a picture of necessity for passenger rights here. Lastly, it should also be asked, in how far single-contract integrated offers can actually be developed further and grow, in front of existing limitations, especially in infrastructure?

The developments towards a passenger rights instruments thus far have partly addressed these market size based necessity issues. On a general level, their justification rests both on envisaged multimodal transport market developments under the sustainability goals, rendering an intervention at this point necessary, as well as findings on the effect of passenger rights indicating that their application in a multimodal scenario would not actually contribute to market growth, but rather initiate a shift to more single-contract multimodal offers. Hence, necessity should not look at these potential effects, as the concern of market development lies mainly with other contributing factors, such as the development of new infrastructure, system solutions, and other enabling legislative instruments.

In terms of scope of a potential instrument, the developments thus far do not offer definitive conclusions, yet indications from the stakeholder consultation, as well as the exploratory study have pointed towards legislative options as the favoured way to address multimodal passenger rights, rather than soft-law or guidance approaches. The justifications for this choice stem on the one hand from the apparent legal gaps in the current system that need to be addressed. On the other hand, they concern the benefits of a legislative measure in terms of raising passenger awareness and to address information measures, and ultimately in the assessment of a legislative measure being the most favourable choice in terms of impact on transport operators and passengers.

In the end the considerations thus far, albeit already pointing to an envisaged solution for passenger rights in multimodal transport, do not offer a discussion on how such a legislative solution fits in the already existing system of mode-specific passenger rights. Based on its very nature of addressing gaps in the existing system, it is crucial to assert in how far it would be compatible with it, and where points of reconciliation lie. To this end this thesis has focused on the *status quo* of the existing mode-specific passenger rights system, putting it in perspective of the envisaged multimodal passenger rights measure. Based on the potential problems identified, the focus of the analysis was put on information obligations, rights in cases of service disruptions, as well as enforcement rights.

The developments towards this new legislative measure have been taken into account and have served as the baseline for the analysis, which ultimately aimed to answer the question, whether it is feasible in front of the *status quo* of the system of mode-specific passenger rights in the EU, to establish a legislative measure addressing passenger rights in multimodal transport. To find a conclusion, it was further asked, how such a measure could be reconciled with the existing system in front of issues related to its development, compatibility, enforcement, and interpretation?

The description of the development of mode-specific passenger rights elucidated the fragmented nature of the system at the EU level. While a core focus on a set of rights exists, those may be dispersed among different instruments. The core of passenger rights relevant for the analysis can be found in the four main mode-specific regulations on passenger rights. Notably, the mode-specific passenger rights development has shown differing experiences with the regulations, mainly in terms of the issues they have faced since their enactment. The identified drivers for these differences were the adoption of measures at different times, as well as differences in the size and composition of the respective transport markets and their share of the overall EU transport market. These constituted more overarching concerns, which a multimodal legislative measure should take into account. Especially potential economic repercussions for transport operators need to be put into perspective of the sizes of undertakings in the respective transport markets.

Next to these overarching considerations, actions taken by the Commission in the mode-specific regulations have shown that challenges to a proper application have come in the form of issues with transport operator compliance, awareness and knowledge of rights by passengers, as well as the proper functioning of NEBs and their enforcement mechanisms. Contributing factors to these issues have come in the form of interpretation of provisions of the regulations by the courts. Lastly, the differing experiences with the existing regulations stem from content differences in their rights, where gaps and inconsistencies have led to issues already in the mode-specific sphere.

All of these considerations depict issues of the mode-specific system as it stands indicating the points to consider when assessing how to reconcile a legislative measure on passenger rights in multimodal transport with this system.

Based on the conclusions of the development of mode-specific passenger rights, the analysis of compatibility has taken the issue of right content differences as its main focus. The analysis of the different iterations of the rights relevant in cases of travel disruptions has brought to light a number of normative challenges inherent in the vast differences in right contents. This has led to the main takeaway that the absence of harmonized right contents in the mode-specific regulations represents major challenges to the creation of a measure addressing these passenger rights in a multimodal context. An overarching conclusion of the analysis was that the baseline, in the form of a legislative measure would not be able to function in the same way, as e.g. an addition of another mode-specific regulation. The very nature of multimodal transport, and the problems and gaps in the mode-specific regulations which this new legislative measure would seek to address, would mean that an application of the rights in cases of a transport disruption do not merely add a new iteration of applicable rights to the system. Quite the contrary, solving any issues of liability, regarding reimbursement, rerouting, assistance, or compensation, in a multimodal context requires a careful navigation of existing standards under the respective regulations. A passenger right in the multimodal context adds another layer on top of the mode-specific right iterations. Instead of being isolated within its mode-specific scope, the potential liability of the transport operator of one leg of a multimodal journey, for subsequent rights applicable to another leg with another mode, make it necessary to reconcile it with the diverging right contents in the underlying mode-specific iterations of the right. In front of the functionality of the whole passenger rights system, a multimodal measure would not only need to navigate the existing right iterations to find an adequate solution to address the rights in a multimodal setting, but at the same time address and essentially solve any issues that are already apparent in the mode-specific system. As the analysis has shown, these issues are

manifold, including unclear and diverging definitions, pre-conditions for right applications, and significant differences in right contents and obligations, which, unless overcome, would mostly be aggravated with the addition of a multimodal right layer.

Given these observations, it has further become clear that harmonization in itself does not solve all the issues a multimodal issue would need to face, and in fact, harmonization of rights can in its own right be questioned in front of the different market characteristics of the mode-specific transport markets. These other issues pertain mostly to non-normative issues of the effects of extended liability, including increased economic burdens.

Next to these challenges, contributing factors of the interpretation of the rights, as well as issues pertaining to their enforcement were taken into consideration. From the perspective of interpretation, it has become apparent that the main issues stem from the air regulation, with only one significant other ruling in front of the CJEU concerning the rail regulation. This is problematic and interesting insofar, as a majority of multimodal journeys has an air component, making these issues all the more important for multimodal travel.

Especially, in relation to the substantive interpretative problem of compatibility with the Montreal Convention, the issue could come up in a multimodal context again, should compensation by applied in a multimodal context, in a way diverging from the court given classification of delay under Regulation 261/2004. This however, depends largely on how the right to compensation will be transposed to a multimodal context.

The issue of interpretation for a multimodal instrument has also become apparent in relation to the CJEU's interpretation of the notion of extraordinary circumstances. The developments of the concept in front of the CJEU both under the air and rail regulation have shown the inherent differences in the iterations of this concept in the existing instruments, as well as how market characteristics can shape its application, the latter of which ultimately serves as a justification for unequal treatment under the different passenger rights instruments. With a view to multimodality, it was furthermore found that a transposition of the right to compensation

would also need to navigate the case law carefully, as the application of the right in a multimodal context could actually be contrary to the restrictive reading of the concept of extraordinary circumstances by the Court.

Lastly, a new measure also has to be put into the perspective of its effect on effective enforcement of passenger rights. To this end the analysis of current detrimental effects to an effective enforcement of the existing regulations have shown that there are a number of issues to be addressed when it comes to ensuring a proper application of the provisions. Those range from overcoming apparent issues of non-compliance with the regulation by air carriers, over adequate measures to raise passenger right awareness and knowledge, to strengthening and harmonizing the powers and especially enforcement measures of NEBs, in particular to create a legal basis for them to address passenger rights issues in a multimodal context. Similarly to the normative issues, the addition of multimodal passenger rights may aggravate also the enforcement issues, making it an integral task of the instrument to provide solutions addressing the already existing mode-specific enforcement issues.

6.2 Addressing the legislative gap: Reconciling a multimodal passenger rights instrument with the mode-specific passenger rights system of the EU

From the analysis of the right compatibility and extension of rights to a multimodal context, the interpretative issues, as well as those in relation to a proper enforcement of the regulations, it has become apparent that there are a number of problems, which the current mode-specific passenger rights system is already facing. In front of these problems and the goal of the envisaged passenger rights instrument to fill the legislative gap in the system (i.e. addressing passenger rights in multimodal transport), the nature of this new instrument will make it challenging to be implemented in front of the apparent issues of the system as it stands. Diverging right contents in the mode-specific regulations hinder the application of the rights in a multimodal context, with additional burdens stemming from overcoming already existing problems resulting

from normative challenges in the mode-specific context. In front of this, envisaged solutions often add more complexity, and need to navigate the existing levels of protection to avoid aggravating existing issues. From a practical perspective, the interpretation of some of the rights and underlying terminologies and concepts by the CJEU further limit appropriate solutions and possible avenues for an application of certain rights in a multimodal context, as multimodal iterations of them may encroach upon the jurisprudence of the Court. On top of this, there are still issues of enforcement, which the new legislative measure would need to address, especially pertaining to equipping the NEBs with more extensive powers, actually covering multimodal transport. Ultimately, this means that there is a limitation as to the potential approaches to apply passenger rights in a multimodal context, stemming from the *status quo* of the mode-specific passenger rights system.

From the outset, the developments towards this new legislative measure so far, and the resulting baseline of a legislative instrument specifically addressing passenger rights in multimodal transport have suggested that the focus of such an instrument should be on multimodal journeys based on single transport contracts. While it should also be seen, in how far separate contract multimodal journeys may be addressed.

Given the limitations from the *status quo* analysis of the mode-specific passenger rights, it appears that under the points of reconciliation, most of the rights in cases of service disruptions, may only be reconcilable with the existing system, when applied to single contract multimodal journeys.

An application of them in separate contract multimodal journeys would mean an incredible level of unforeseeability for transport operators in cases of liability to provide e.g. reimbursement, re-routing, or compensation for subsequent legs of a multimodal journey for passengers. As separate contract journeys, especially those combined on the passengers' initiative are not detectable for transport operators, an application of the rights to these journeys would unreasonably distort the balance between a high protection of passenger rights and the potential economic burden for transport operators. The only solution to somewhat alleviate this situation would perhaps lie in the form of registered multimodality on

the passenger's initiative. Hereunder, right protection in a multimodal context even where the multimodal journey is under separate transport contracts, could be ensured if the passengers were given the opportunity to indicate with the separate transport operators that their services will be part of a multimodal journey for the passenger. Resembling an insurance model, the additional right protection could come with a fee. However, it is doubtful whether this would be in line with the premise of the EU's passenger rights regime to provide a minimum protection to passengers wherever they are in the EU. Perhaps the only right that could feasibly be applied to separate contract multimodal journeys would be that of information. Yet, its application hinges on both technological advancements, as well as enabling legislation for further information sharing between transport operators. However, practically speaking, it would be feasible to implement a general obligation for transport operators to provide information on all relevant further connections for their passengers at the final destination of their service.

While generally reconcilable with the *status quo* of the mode-specific passenger rights, even an application of the rights to single-contract multimodal journeys has to overcome a number of challenges. Adequately addressing the legislative gap would mean an application of all rights applicable in cases of service disruptions in a multimodal context. However, for each right there are diverging points of reconciliation that need to be borne in mind. Reimbursement and re-routing would need to consider and overcome definitional shortcomings of the right, which would be aggravated in a multimodal context, and find an adequate scope of the right. The same holds true for assistance rights, where diverging limitations, exceptions, and applicable levels of assistance would need to be harmonized under a multimodal approach. It would also need to be clarified who the responsible operator for assistance would be at connection points. What should be noted, however, is that the basis of single contract multimodal journeys in an agreement between transport operators makes these points of reconciliation easier to implement, as shared burdens and division of costs can be regulated through this underlying contractual basis. However, the normative aspects of these

challenges remain. Lastly, the right to compensation probably poses the most significant issues for an application in a multimodal context. With the right contents linked to specific market characteristics, and the 'unequal' treatment between transport modes being justified by the CJEU, as well as significant underlying problems of delay compensation in the air regulation, and further limitations from the interpretation of 'extraordinary circumstances', a uniform application of the right in a multimodal context would be extremely challenging to implement.

Ultimately, although being challenging, and dependent on a number of factors, the application of passenger rights in multimodal transport is reconcilable with the existing system of mode-specific passenger rights. Yet, it should be asked, at what cost this reconciliation comes. To this end one of the initially asked questions from the market sized based necessity comes to mind. In front of the fact that the rights may only feasibly be applied to single contract-multimodal journeys, and under consideration of these journeys already representing a marginal percentage of an already marginal multimodal transport market, the question arises whether an all-encompassing legislative instrument addressing these issues is necessary and justified. The argument may be made to an extent that necessity should more be inferred from the envisaged development of the multimodal transport market, and the inevitability in front of sustainability goals to further combined transport. Indeed, in front of the problems that the mode-specific passenger rights have experienced thus far, it can be said that the approach of introducing passenger rights as a response to negative developments of the liberalized market having reached a magnitude that warrants addressing them has to some extent been a flawed approach.[545] This would lead to the conclusion that a regulation of passenger rights in multimodal transport, alongside the development of this emerging market may warrant different results, as it can address negative effects before they have reached a certain magnitude by adapting the rights while the market grows.

What stands against it are the considerations of limitation to growth of especially the single-contract multimodal market through infrastructural

[545] Considering especially the problems with Regulation 261/2004.

constraints, as well as the fact that the market composition with a majority of multimodal journeys being a combination of air-rail would not warrant a holistic approach to the application of passenger rights in all possible mode-combinations. In the end, whether such an instrument is feasible goes also beyond its reconciliation with the existing mode-specific system, in that it needs to carefully consider its potential effects on the market. What would be the use of a fully-fledged legislative measure on passenger rights in multimodal transport, which wants to incentivize the growth of the market and the development of more single-contract multimodal journeys, if what harmonized levels of protection would actually achieve, would be a shift towards more separate contract multimodal products, so as to avoid higher liability burdens?

It is challenging to foresee these effects. The goal in the end is to see growth and advancements in multimodal transport being accompanied by a functioning system of passenger rights protection in this market, which is reconcilable with the mode-specific rights. This thesis sought out to provide an answer to the latter part, providing indications, for ascertaining if it is actually feasible to implement. Ultimately, while it is reconcilable (despite a number of limitations being applicable to assure the functionality of the system), the actual feasibility of such a legislative measure on passenger rights in multimodal transport, although desirable, needs to be questioned, especially in front of its goal to adequately fill the legislative gap left by the mode-specific system. The problems, which the existing system is facing, are of a magnitude that render a proper functioning of a system addressing passenger rights in multimodal transport challenging, without adding further detrimental effects to the functionality of the passenger rights system.

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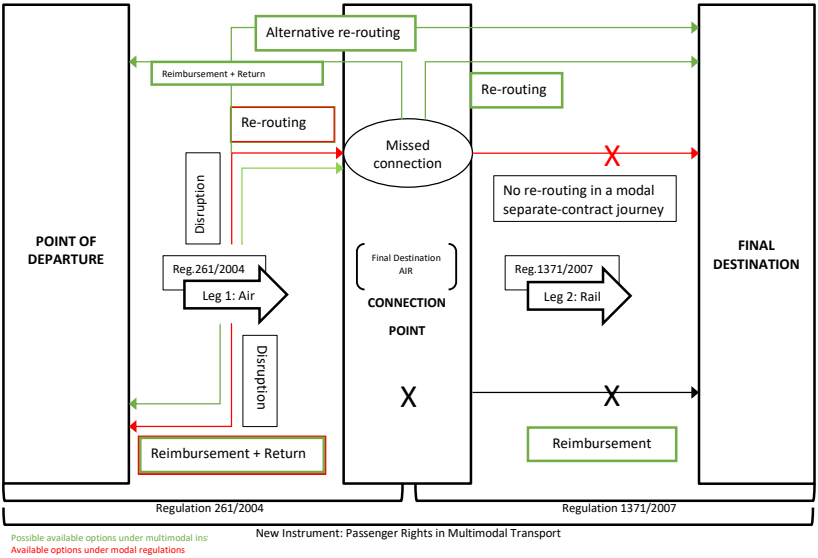
Annex I – Model applications of the rights to re-routing and reimbursement in a multimodal journey



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