

EVALUATION AND MONITORING OF TRENDS WITH REGARD TO
PASSENGER NEEDS ON THE LEVEL OF SERVICE AND TREATMENT
OF PASSENGERS (SHORT "EU SERVICE GUARANTEES - EUSG")

EU COMMISSION, TENDER TREN/A5/25-364/2005

**An examination of the conformity of service guarantees
with existing EU law**
(ANNEX 12)

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7. ESWE – ESWE Verkehrs GmbH Wiesbaden
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9. UVG Uckermärkische Verkehrsgesellschaft
10. VBN Verkehrsverbund Bremen/Niedersachsen, Bremen – Customer guarantees
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6. VRR Verkehrsverbund Rhein-Ruhr
7. RBG Rheinbahn AG
8. WSW Wuppertaler Stadtwerke
9. VRS Verkehrsverbund Rhein-Sieg
10. Stadtwerke Münster
11. AVV Aachener Verkehrsbetriebe
12. BVG Berliner Verkehrsbetriebe
13. EVAG Erfurter Verkehrsbetriebe AG
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Art.	Article
CC	Conditions of Carriage
CIV	International Convention concerning the Carriage of Passengers and Luggage by Rail
MC	Montreal Convention
Para.	Paragraph
Proposed regulation	Proposal for a Regulation on International Rail Pas- sengers' Rights and Obligations

Part 1: Introduction

This report examines various service guarantees in European countries in terms of their compatibility with Community law.

It is fundamentally assumed within the framework of this investigation that the conditions of carriage are final and conclusive. Where a company has not specifically regulated liability, it is presumed that it grants no further compensation. It is further assumed that no further warranties or liability regulations exist at a national level.

The report's content is confined to late arrivals and missed connections and thus to thematically connected subject areas (e.g. overbooking in air transport).

The report is divided into the different types of transport companies:

- A. Long-distance railways
- B. Local and regional buses
- C. Various local and regional means of transport (bus/rail /ship)
- D. Air transport.

The following regulations are adduced as benchmarks:

I. General regulations

1. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours¹
2. Council Directive 93/13/EEC of 5.4.1993 on unfair terms in consumer contracts²
3. Council Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgements in civil or commercial matters³

¹ OJ EC 1990 No. L 158, p. 59 et sqq.

² OJ EC 1993 No. L 95, p. 29 et sqq.

³ OJ EC 2001 No. L 12, p.1 et sqq.

II. Air Transport

1. Regulation (EC) No. 261/2004⁴
2. Regulation (EC) No. 2211/2005⁵
3. Regulation (EC) No. 2027/97⁶
4. Regulation (EC) No. 889/2002⁷
5. Montreal Convention for the Unification of certain rules for International Carriage by Air⁸

Notes on reports:

In addition, the “Proposal for a Regulation on International Rail Passengers’ Rights and Obligations”⁹ and the “International Convention concerning the Carriage of Passengers and Luggage by Rail” (CIV)¹⁰ will be drawn on as representing European regulation on questions of railway transport.

The report only deals with breaches under European law. Clauses or parts of service guarantees that do not breach this law are not mentioned.

In the summaries too, only clauses that breach Community law are listed. Clauses that have been examined and are regarded as acceptable will not be mentioned.

Where a clause contains an incomplete regulation of consumers’ rights or no regulation at all, it will be regarded as an exclusion and thus as a breach.

The other questions to be examined include:

- E. To what extent does RyanAir’s Passenger Charter breach EU Directive 2005/29/EC?
- F. 2. How is the phrase “non-legally-binding” in the ECAC Airline Passenger Service Commitment to be interpreted (Is it binding on companies)?

⁴ OJ EC 2004 No. L 46, S. 1 et sqq.

⁵ OJ EC 2005 No. L 344, S. 15 et sqq.

⁶ OJ EC 1997 No. L 285, S. 1 et sqq.

⁷ OJ EC 2002 No. L 140, S. 2 et sqq.

⁸ OJ EC 2001 No. L 194, S. 39 et sqq.

⁹ Cf. the plenary session document A6-0123/2005 of 28.4.2005, which extensively modifies the proposed regulation COM(2004), 143.

¹⁰ Appendix A of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in version of the modified protocol of 3 June 1999.

The following regulations serve as benchmarks in respect of these issues:

1. Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 on unfair commercial practices¹¹
2. ECAC Airline Passenger Service Commitment

The report ends in the third part, which contains the conclusion.

¹¹ OJ EC 2005 No. L 149. S. 22 et sqq.

Part 2: REPORT

A. Long-distance railways

I. EU Compensation

1. UIC – CER – CIT Delay Compensation scheme for international Rail Passengers

a) Area of Application

The *UIC – CER – CIT Delay Compensation scheme for international Rail Passengers* applies to all European railway companies (as well as to those in Switzerland and Norway).

Some countries, namely Belgium, Luxemburg, Portugal, Poland, Hungary and Slovenia, do not have their own service guarantees, but rely on the *UIC – CER – CIT Delay Compensation scheme for international Rail Passengers*.

b) Amount of Compensation

Compensation of 20 % of the ticket price is paid for a delay of more than 60 minutes for daytime trains and for a delay of more than 120 minutes for night trains, although individual railway companies are of course free to provide larger amounts. The service guarantee does not however provide for a progressive increase in compensation payments for longer delays. Art. 15 Para. 1 of the proposed regulation on the rights and obligations of railway passengers¹² contains the following scale:

a minimum compensation payment of 25 % for a delay of at least 60 minutes,
50 % for a delay of at least 120 minutes, and
75 % for a delay of at least 180 minutes.

A flat-rate compensation payment would therefore seem to be too low.

Art. 15 Para. 1 of the proposed regulation deals with compensation for delays in general and does not differentiate between daytime and night trains, so compensation payments for night trains made only after a delay of 120 minutes would seem to be too low.

¹² Cf. Plenary session document A6-0123/2005 of 28.4.2005, which extensively modifies the proposed regulation COM(2004), 143.

The customer's right of withdrawal is unreasonably restricted by the payment of a maximum of just 20% of the fare, since an effectively exercised withdrawal may ensure a passenger a refund of up to 100%. This restriction of the right of withdrawal may be a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Under the terms of Art. 3 Para. 1 of the Unfair Commercial Practices Directive, a contractual clause is deemed unfair if it gives rise to a significant and unjustifiable disparity in the contractual rights and obligations of the parties to the contract in breach of good faith and to the detriment of the consumer. The annex to the secondary legal instrument contains a non-exclusive list of clauses that could be deemed to be unfair under the terms of Art. 3 Para. 3 of the Unfair Commercial Practices Directive. Art. 3 Para. 3b) of the annex of the Unfair Commercial Practices Directive may apply in respect of the current issues, since it provides for the possibility of declaring clauses unfair if they attempt, or have as their consequence, the exclusion or undue restriction of consumers' claims against a trader, where the trader fails to fulfil one of the contractual obligations wholly or in part, or does so inadequately. The intention of paragraph b) of the annex of the Unfair Commercial Practices Directive is to ensure that consumers retain their contractual rights.¹³ Consumers' existing rights are not completely excluded, so only the second variant of the form of unreasonable restriction comes into question here. Any reduction in the scope of a right and any legally binding limitation on the assertion or enforcement of default rights, including on time limits and cut-off periods, is regarded as a restriction of those rights.¹⁴ Since the maximum fare refund paid is 20%, the available legal consequence of the exercise of the right of withdrawal, namely restitution of payments made, is restricted. This restriction must therefore also be unreasonable. This is the case where it represents a breach of good faith, because it particularly undermines the fundamental concepts of the legal regulations by depriving consumers of the main contractual substance of their rights. Where there are no national legal regulations for evaluating interests, the basic rules of European contract law (Lando Principles) may serve as an orientation.¹⁵ These are non-binding "soft laws", but they could serve as a blueprint for the contract law part of a future European civil code that would take legal provisions in individual member states and relevant international regulations into consideration on the basis of comparative law. A significant breach of the legal concept be-

¹³ Wolf, in: *Wolf/Horn/Lindacher*, Anh No. 1b RiLi Rn. 21.

¹⁴ Wolf, in: *Wolf/Horn/Lindacher*, Anh No. 1b RiLi Rn. 26.

¹⁵ Which may be found at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html.

hind these principles would therefore constitute an infringement of the Unfair Commercial Practices Directive.

Under the terms of Arts. 8:101, 8:103 and 9:301, a party to a contract has the right to cancel the contract in the event of substantial non-performance by the other party without valid reason. A party to a contract can therefore claim a refund of money paid for services not received or paid for services justifiably refused under the terms of Art. 9:307. The value of the services already provided must also be reimbursed under Art. 9:309. A passenger can therefore reclaim the complete fare price in the case of a cancelled train journey. In the event of delay, use must be paid for and a compensation for the value provided. For a delay of more than two hours however, this may be less than 80% of the fare. The maximum refund of 20% of the fare therefore unreasonably restricts passengers' rights, constituting a breach of Art. 3 Paras. 1 and 3b) of the annex of the Unfair Commercial Practices Directive.

No further compensation for delay is guaranteed. Since the service guarantee is regarded as final and conclusive, the railway company thus excludes any liability for consequential damages such as the costs of accommodation, transport or notification, regardless of the proportion of fault, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Art. 32 § 1 of the CIV and Art. 17 Para. 2 of the proposed regulation provide for compensation payments for delay as well for reimbursement for consequential damages. Art. 16 Para. 2 a) of the proposed regulation also prescribes the complete refund of fares in the event of a missed connection or cancelled train service.

c) Entitlement to Claim

A claim for compensation can only be made for a journey costing at least 50 Euros for a single journey, including booking costs and surcharges, which is a contravention of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Consumers whose tickets are worth less than 50 Euros are therefore excluded from receiving any compensation. Under Art. 15 Para. 3 of the proposed regulation, the minimum amount below which railway companies need not make compensation payments, is at least four Euros. Based on a minimum compensation payment specified under Art. 15 Para. 1 of the proposed regulation, the minimum amount must therefore be more than 12 Euros.

d) Form of Compensation

Compensation is basically made in the form of travel vouchers, which are valid for only one year and may only be used for the services of the railway company that issued the ticket. This time limit may be open to objection. It is possible that a customer who only rarely uses the railways as a means of transport will not be able to redeem the voucher within the period set, but cash compensation is also not paid out, so the customer's claim to compensation from the railway company is virtually excluded. This is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Art. 15 Para. 2 of the proposed regulation prescribes flexible conditions for the use of vouchers or other benefits in terms of their validity period and destination. Compensation must also be paid out in cash at the customer's discretion.

A travel voucher is "usually" only redeemable as a 2nd class ticket. Since this is not a rigid regulation and exceptions may be made, it is not objectionable.

In contrast to Art. 15 Para. 1a of the proposed regulation, which prescribes various compensation payments for holders of season tickets, the service guarantee only provides for compensation of equal value where the railway company does not issue travel vouchers.

e) Exclusion of Liability

Claims for compensation are excluded in cases where the customer is at fault, which means that the railway company's liability is not proportional, but is completely excluded, even in the case of only partial contributory negligence on the part of the customer. This is a fundamental breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, which deems any waiver of consumer rights to be unfair. Art. 32 § 2 b) of the CIV and Art. 11 a No. 2 of the proposed regulation include provisions dealing with this issue.

Scheduled works about which passengers are previously informed also do not give rise to grounds for compensation. This corresponds with the definition of "delay" in Art. 2 Para. 15 of the proposed regulation, which does not define a change to a timetable as a delay if it is announced at least 48 hours in advance.

f) Result

The service guarantee contains some clauses that are deemed unfair in the light of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. These include the provisions on the amount of compensation, on entitlement to claim, and on compensation made exclusively in the form of vouchers.

2. General Terms and Conditions for the International Carriage of Passengers by Rail (GTC-CIV)

a) Area of Application

The GTC-CIV are the general conditions of carriage of the CIV (Appendix A of COTIF) and generally regulate appropriate levels of compensation in cases of delay, cancellation of an international train or missed connections, among other things. On the issue of delay, the GTC-CIV relies on the CER/UIC/CIT Charter on Rail Passenger Services.

b) Amount of Compensation

Adequate compensation, covering the costs of the traveller's accommodation, a taxi and the notification of persons waiting, is to be paid in the event of the delay or cancellation of an international train or a missed connection. This conforms with the provisions of Art. 32 § 1 of the CIV and Art. 17 Para. 2 of the proposed regulation.

The GTC-CIV does not include an explicit provision corresponding with Art. 16 Para. 2 a) of the proposed regulation, it only generally prescribes a right to a refund where a journey is terminated. Compensation of 20 % of the ticket price is paid for a delay of more than 60 minutes for daytime trains and more than 120 minutes for night trains. The GTC-CIV does not however, provide for a progressive increase in compensation payments for longer delays, as stipulated in Art. 15 Para. 1 of the proposed regulation (see A. I. 1. b)), so a compensation payment which is not progressively increased would seem to be too low.

c) Entitlement to Claim

A claim to compensation may only be brought for a travel price of at least 50 Euros per single journey, including booking costs and surcharges. Passengers who have paid a lower ticket price are thus excluded from any compensation payments, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The minimum amount of compensation is also above the minimum value specified in Art. 15 Para. 1 of the proposed regulation (cf. under A. I. 1. c)).

d) Form of Compensation

Compensation is made in the form of a travel voucher or in an equivalent manner. There are no further restrictions. Under the terms of Art. 5 of the Unfair Commercial Practices Directive, is this clause is to be interpreted to mean that passengers can choose the form of compensation and can also claim compensation in cash.

e) Exclusion of Liability

Claims to compensation are excluded where the customer is at fault. This clause is not regarded as unfair (cf. under A. I. 1. e)). Art. 32 § 2b) of the CIV and Art. 11 a No. 2 of the proposed regulation include corresponding regulations.

f) Result

The clause on the amount of compensation and on entitlement to claim infringes Community law.

II. Germany

1. DB-AG Kundencharta national Fernverkehr (German railways' long-distance national rail customer charter)

a) Complete Exclusion of Liability in the Case of Contributory Negligence by the Passenger

Compensation cannot be claimed if the cancellation or delay of the train or the missed connection is affected by contributory negligence on the part of the passenger. Regardless of the relevant provisions in Art. 32 § 2 b) of the CIV 1999 and Art. 11a of the proposed regulation, this exclusion contravenes the obligation to assume liability prescribed in Art. 3 Para. 1 Para. b) of the annex of the Unfair Commercial Practices Directive, since liability is not proportionately but completely excluded, even in the case of only partial fault on the part of the passenger.

b) Amount of Compensation

Compared with the compensation amount planned in the Commission's proposed regulation, a refund of 20% of the fare for a 60-minute delay would seem to be too low if the compensation is not increased for longer delays. Art. 15 Para. 1 (cf. under A. I. 1. b)) of the proposed regulation prescribes a progressive increase in compensation payments.

Objections may also be raised given the fact that compensation is paid only for night trains delayed by at least 120 minutes.

c) Compensation Only in the Form of Travel Vouchers

Compensation offered exclusively in the form of travel vouchers that are valid for only one year breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since it seems possible that the railway company's liability would be virtually excluded for an occasional train traveller who is unable to redeem such a voucher. Under the provisions of Art. 15 Para. 2 of the proposed regulation, compensation must be paid in cash at the passenger's discretion.

d) Fixed Upper Limit of 80 Euros

A maximum compensation of 80 Euros for accommodation or for a taxi if a traveller cannot continue his journey as planned before midnight due to a missed connecting train, is incompatible with Art. 32 § 1 of the CIV 1999 and with Art. 17 Para. 2 of the proposed regulation, because these legal instruments do not specify any maximum compensation amount.

e) Compensation for Season Ticket Holders

No. 10 of the DB's conditions of carriage (CC) grants compensation to season ticket holders, thus complying with Art. 15 Para. 1a of the proposed regulation.

2. DB-AG International Transport

The details on the amount and type of compensation (cf. above under A. I. 1. b), d)) and remarks on the proposed regulation are relevant here, since they apply equally to domestic and international transport.

Where special offers of passes (e.g. InterRail, see No. 26.10) are completely excluded from refund (No. 26.2), this exclusion infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

III. France: F_SNCF_Convention

1. Amount of Compensation

Compensation of 1/3 of the ticket price is paid for a delay of more than 30 minutes. The service guarantee does not provide for a progressive increase in compensation payments for longer delays, as stipulated in Art. 15 Para. 1 of the proposed regulation, so this fixed amount would seem to be too low.

No compensation is paid to passengers requiring accommodation or a taxi to reach their destinations because of a delay. The service guarantee does not include any such provisions. This exclusion of compensation for consequential damages of any kind, which are provided for in Art. 32 §

1 of the CIV and in Art. 17 Para. 2 of the proposed regulation, breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

2. Form of Compensation

Compensation is made exclusively in the form of travel vouchers (“Bons Voyages”), which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (see under A. I. 1. d)). Art. 15 Para. 2 of the proposed regulation stipulates that compensation must be paid in cash at the passenger’s discretion. Under the terms of Art. 15 Para. 1a of the proposed regulation, the railway company must also provide for compensation payments for season ticket holders.

3. Result

The exclusion of compensation for consequential damages and exclusive provision of compensation in vouchers are unfair clauses within the definition of Art. 3 Para. 1 of the Unfair Commercial Practices Directive.

IV. The Netherlands

1. NS – Geld terug bij vertraging

a) Area of Application

The service guarantee applies to domestic journeys made with the Dutch railway company NS.

b) Amount of Compensation

Customers are paid compensation of 50 % of the fare for a train arriving 30 to 60 minutes late. The company completely refunds the fare for a delay of more than 60 minutes. This clause is commensurate with the spirit and purpose of Art. 15 Para. 1 of the proposed regulation. The minimum compensation amount of 2.20 Euros is likewise unobjectionable, cf. Art. 15 Para. 3 of the proposed regulation.

Compensation for consequential damages is however excluded by the absence of any regulation to the contrary – as laid down in the introduction as one of the premisses of this report. Passengers may be refunded the entire fare, but the cost of accommodation or a taxi is not reimbursed. This exclusion of consumer rights, even where the railway company is at fault, is an unfair clause as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under A. I. 1. b)).

c) Result

The exclusion of compensation for consequential damages breaches EU law.

2. NS Internationaal - Compensation for Delay during International Rail Transport

a) Entitlement to Claim

This guarantee deals only with compensation in the case of a delayed international train. Such claims may be brought only in respect of an international route, international train, and a ticket price of at least 50 Euros per single journey, including surcharge and booking costs. This limitation as to value is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Passengers who have paid a ticket price of less than 50 Euros are also prevented from making any claims against the railway company in case of delay. The minimum compensation payment starts at over 4 Euros, contradicting the terms of Art. 15 Paras. 1 and 3 of the proposed regulation.

b) Amount of Compensation

Compensation of 20% of the ticket price of a single journey is paid for delays of more than 60 minutes for daytime trains and of more than 120 minutes for night trains.

This amount of compensation seems too low. Even for a delay of four hours, compensation of only 20% is paid. The service guarantee would be more consumer-friendly if it provided for a progressive increase of compensation payments for longer delays, as prescribed in Art. 15 Para. 1 of the proposed regulation. The distinction made between daytime and night trains is also inadmissible.

No compensation is paid if accommodation or a taxi becomes necessary due to a delay – there are no provisions on this issue. This is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The railway company thereby excludes liability for consequential damages, regardless of the proportion of blame, causing a significant disparity in the relative rights of consumers.

c) Form of Compensation

Compensation is made exclusively in the form of travel vouchers, which are valid for twelve months. The vouchers can be only be used to purchase a ticket for an international journey. If the customer bought the ticket from a company outside the Netherlands, he can redeem the voucher only in that country.

The limitations of the travel vouchers in terms of the time and also partly the place where they can be used, may be objected to because not all customers will be able to redeem the voucher within the period set. An occasional traveller who will make no further international journeys within a year would in fact be prevented from receiving compensation. This is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (see above). The railway company should at least allow its customers the choice of a voucher or cash payment. The vouchers' conditions of use must also be flexible in terms of their period of validity and destination, (cf. Art. 15 Para. 2 of the proposed regulation). Art. 15 Para. 1a of the proposed regulation also prescribes specific compensation payments for holders of season tickets.

d) Exclusion of Liability

Claims to compensation are also excluded in case of “force majeure”, specifying collisions with people or other vehicles as examples. Force majeure is an extrinsic, unpredictable and significant event that cannot be prevented by the parties, even where the most extraordinary reasonable care is exercised¹⁶. These include war, civil disturbance, natural disasters, and orders given by a superior authority, but not predictable events that are well known or occur regularly. A compensation claim for delay can be excluded if the railway company is not responsible for the situation, i.e. it is unavoidable even where extraordinary care is exercised, cf. Art. 32 § 2c) of the CIV. The com-

¹⁶ Cf. also Art. 4 Para. 6 clause 2 ii) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours; for German law cf. Staudinger/*Eckert* § 651 j Rn. 14 f.

plete exclusion of liability in the event of accidents affecting people or other vehicles and for situations that do not involve force majeure¹⁷ contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Compensation is also excluded where a delay has been previously announced. The information must however be provided sufficiently in advance in order to justify the exclusion of liability, i.e. at least 48 hours in advance, under Art. 2 Para. 15 of the proposed regulation. This clause, which is not specific as to the period of time, would therefore seem to be unfair as defined in Art. 3 Para. 1 of the Unfair Commercial Practices Directive. There is also a breach of the transparency requirement in Art. 5 of the Unfair Commercial Practices Directive, since the formulation does not specify the period of time in which the advance notice exonerating the company from liability must be given – the provision must make it clear whether one hour or 50 hours are sufficient for this purpose.

Furthermore, no claim may be brought where the customer is at fault. This results in a complete exclusion of liability on the part of the railway company, even where the customer is only partly at fault. Under the terms of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, this clause must be considered as unfair, regardless of the current relevant provisions of Art. 32 § 2b) of the CIV and Art. 11 a No. 2 of the proposed regulation (cf. under A. I. 1. e)).

e) Result

The above service guarantee contains several unfair clauses as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

¹⁷ Cf. also *Führich*, Reiserecht, 5th Ed., Rn. 1142.

V. Belgium: „Thalys compensation scheme“

1. Entitlement to Claim

This guarantee regulates the compensation for delayed international trains. A claim to compensation can only be made for holders of a Thalys Ticket on an international route.

2. Amount of Compensation

Compensation is paid for delays of more than 30 minutes, consisting of 20 % of the ticket price for more than 30 minutes delay, 50 % for more than 60 minutes and 100 % for a delay of more than 120 minutes.

Claims for compensation for consequential damages are however excluded, since no provision is made for them. No compensation is paid if accommodation or a taxi becomes necessary due to a delay. The exclusion of passengers' claims to compensation for consequential damages despite inadequate performance or non-performance by the railway company is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Art. 32 § 1 of the CIV and Art. 17 Para. 2 of the proposed regulation also prescribe compensation for consequential damages.

The amount of compensation must be at least 5 Euros. Smaller amounts are not paid out, so the clause contradicts the provisions of Art. 15 Para. 3 of the proposed regulation, which stipulates a minimum compensation amount of at least 4 Euros.

3. Form of Compensation

It is stated in the “Compensation Form”, that compensation from *Thalys International Customer Service* is made exclusively in the form of travel vouchers. A cash payment is not possible. *NS Thalysklantenservice* (The Netherlands) provides compensation only in the form of vouchers. *DB Kundendienst Thalys* makes such payments via direct transfer to a bank account. Further details as to the vouchers (periods of validity, areas in which they can be redeemed) are not included in the guarantee. If, under Art. 5 of the Unfair Commercial Practices Directive, the interpretation most favourable to the passenger is to apply, no restrictions apply to the use of the vouchers. If

the most unfavourable interpretation for the consumer is relied on, and the voucher is limited in terms of its period and place of validity, in contravention of Art. 15 Para. 2 of the proposed regulation, there is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The provision of exclusive compensation by means of vouchers also seems open to criticism. Under the terms of Art. 15 Para. 2 of the draft regulation, compensation must be paid in cash if the passenger so wishes. Art. 15 Para. 1a of the proposed regulation also specifies various compensation payments for passengers holding season tickets.

4. Exclusion of Liability

The CC exclude compensation for delays that are previously announced to passengers. It must be noted however, that under Art. 2 Paras. 15 and 16 of the proposed regulation, delays and train cancellations must be announced to passengers at least 48 hours in advance if the company is to be exonerated from liability. Since it does not specify the limits of the period of time involved in such cases, this provision is too imprecise and breaches Art. 3 Para. 1 of the Unfair Commercial Practices Directive.

5. Result

The guarantee contains breaches of the proposed regulation and the Unfair Commercial Practices Directive.

VI. Spain

1. Rail Regulation (Real Decreto 2387/2004)

It should first be noted that the Railway Regulation is not a set of general terms and conditions, but is in fact Spanish law and is therefore a so-called binding legal provision, which is not inherently subject to the benchmark established in the Unfair Commercial Practices Directive under

the terms of Art. 1 Para. 2 of that Directive.¹⁸ Recitals (Nos. 13, 14) make it clear that legal provisions may not contain unfair clauses. An examination of the Railway Regulation, based on the Unfair Commercial Practices Directive notwithstanding, leads to the following conclusion: The Spanish Railway Regulation is oriented towards the EU's proposed regulation and guarantees comprehensive benefits in the case of non-performance or inadequate performance accordingly. Passengers receive 50% for a delay of 60 minutes, and 100% of the fare is refunded for a delay of over 90 minutes. These compensation payments exceed the minimum specifications of Art. 15 Para. 1 of the proposed regulation. A customer can have his fare refunded if a journey is cancelled. Passengers can also claim compensation of double the amount of the fare if they are informed that a journey has been cancelled within four hours before it was due to start. Passengers also have a right to catering and accommodation if a journey is interrupted for longer than one hour.

It must be admitted that most detriments to customers' rights are compensated for by the claims mentioned above. The Railway Regulation does not however, cover all the possible consequential damages of a delay. No claim can be made for taxi costs incurred due to a missed connection, for example, so it contravenes Art. 3b) of the annex of the Unfair Commercial Practices Directive.

2. RENFE

The RENFE company guarantees its customers comprehensive rights if their journey is interrupted or cancelled, or if a train is delayed. Passengers are refunded a large part of their fare and it is also possible to accumulate guaranteed rights, such as the right of withdrawal, right to further transport, and a (partial) refund of the fare. The fare is however basically the upper limit of compensation. The only exception to this regulation is in Art. 89 Para. 2 a) of the Spanish Railway Regulation (Real Decreto 2387/2004)¹⁹, which states that a passenger may claim compensation of double the amount of the fare if he is informed that the journey has been cancelled only four hours before it was scheduled to start. Where this exception does not apply and the passenger incurs consequential costs that are not reimbursed through the refund of the fare, there is no compliance with Art. 3 Paras. 1 and 3b) of the annex of the Unfair Commercial Practices Directive,

¹⁸ Cf. *Nassall*, in: *Gebauer/Wiedmann*, chapter 5 Rn. 16.

¹⁹ Cf. also under A. VI. 1.

regardless of the fact that as in the Spanish Railway Regulation, most detriments to the customer's rights are compensated for by the rights outlined above.

It also seems questionable whether the exclusion of liability in the case of a strike by the company's own staff complies with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. This exclusion of liability is based on the notion that there should be no obligation to assume liability in the event of force majeure. Recital No. 14 of Regulation EC No. 261/2004 designates a strike as grounds for exoneration from liability²⁰ but this regulation has been criticized in the literature.²¹ It is declared in the Warsaw Convention²² (WC), and in the almost identical text version in the Montreal Convention²³ (MC), that a strike by airline staff does not constitute force majeure.²⁴ It would, against this background, seem appropriate to declare a release from liability for strikes by a company's own staff to be invalid under Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, because a carrier is fundamentally liable for its employees' behaviour.²⁵ The Labour Court in Frankfurt recently expressed a different opinion in respect of Regulation (EC) No. 261/2004, in rejecting an airline's liability for a strike by ground and cabin staff.²⁶ The exclusion of liability for strikes by a company's own staff therefore breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

VII. Sweden

1. SWE – SJ AB Swedish State Railways

The carrier provides for compensation for consequential damages and refunds for a journey that no longer serves any purpose. The exclusion of liability for business losses is however a restriction of claims for damages for non-performance or inadequate performance as defined by Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The limitation of reimbursement for the costs of alternative transport to cases where the traveller risks missing a very

²⁰ Cf. *Tommer*, in: *Gebauer/Wiedmann*, Chap. 13a Rn. 55 et sqq.

²¹ *Staudinger/Schmidt-Bendun*, NJW 2004, 1897, 1898.

²² Warsaw Convention on the unification of certain rules relating to international carriage by air, in the version of 28.5.1955; BGB (German Civil Code) I. II, P. 291.

²³ Warsaw Convention on the unification of certain rules relating to international carriage by air; OJ. EC 2001 No. L 194, P. 39 et sqq.

²⁴ LG Frankfurt a.M., TranspR 1989, 101, 102; *Giemulla/Schmid*, Art. 19 WC Rn. 59.

²⁵ See also *Staudinger/Eckert*, § 651j Rn. 21.

²⁶ AG Frankfurt a.M., RRa 2006, 230 f., cf. also AG Frankfurt a.M., RRa 2006, 181 ff.

important private occasion, (a wedding or a funeral are mentioned as examples) represents a further breach. The CC also require that the traveller – as proof of the futility of a journey partly undertaken but delayed – must start on the return journey within half an hour of arriving at the destination in order to be able to claim a refund of the whole ticket price. This restricts travellers in the exercise of their rights as defined in the Unfair Commercial Practices Directive, by making it more difficult for them to enforce them. The provision that customers can only claim compensation if they can show that the delayed arrival at their destination is the result of delayed departure is a further breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. There may also be a breach of Art. 3 Para. 1q) of the annex of the Unfair Commercial Practices Directive, because the clause places the burden of proof on the consumer, disregarding the relevant law on this issue.²⁷

2. Sweden- A-Train Travel Time Guarantee and Travel Conditions

The carrier offers neither care and assistance nor graduated compensation payments, although passengers do receive a new ticket for a delay of more than 2 minutes. Liability for business losses due to delay is rejected in principle and refunds are not provided for, contravening Art. 15 Para. 1 of the proposed regulation and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

VIII. Denmark

1. DK – Arriva Tog / DSB Railways

The CC breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive because they exclude a right of withdrawal and claims for damages for missed connections, train cancellations and delays.

A fixed compensation payment of 50 % for delay of one hour is not commensurate with the progressive increase in amounts specified in Art. 15 Para. 1 of the proposed regulation. Complete compensation for the partial completion of a journey that no longer serves any purpose in relation

²⁷ Wolf, in: *Wolf/Horn/Lindacher*, RiLi Anh No. 1 q.

to the passenger's travel plans is not guaranteed, and liability for any further consequential damages is also excluded.

The release from liability is also too comprehensive and breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive: The CC cite railway accidents, industrial action and other similar reasons as circumstances exonerating the company from liability. This regulation is too general, cf. Art. 32 § 2 b) of the CIV 1999 and Art. 11a of the proposed regulation. Railway accidents may also be caused by circumstances that are within the ambit of the carrier and a carrier is liable for industrial action by its staff, so the complete exclusion of liability breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since this situation is an inherent part of a carrier's business risk.²⁸ The general and incomplete formulation of an exclusion of liability for any other relevant reasons contravenes the transparency requirement in Art. 5 clause 1 of the Unfair Commercial Practices Directive, and there is also no special compensation arrangement for holders of season tickets.

2. DK-HUR

In case of delay, compensation is paid only to holders of a season ticket. The exclusion of liability for missed connections or other disruptions or cancellation breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since it comprehensively restricts claims for non-performance or inadequate performance. The refund and compensation provisions for season ticket holders, regardless of the scope of validity of the tickets and the number of areas affected, is also not transparent as defined in Art. 5 clause 1 of the Unfair Commercial Practices Directive and the exclusion of any claims for holders of single-journey tickets infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

IX. United Kingdom

Apart from a few railway companies, all carriers are members of the Association of Train Operating Companies, which in turn operates under the trade name of National Rail. The members have a joint fare system. National Rail's CC (Conditions of Carriage) apply to all carriers, so objec-

²⁸ For discussion on this in German law see: *Staudinger/Eckert*, § 651j BGB Rn. 21.

tions to National Rail's CC also apply to the other carriers. If a railway company is not a member of the association, it is separately identified as such. No. 42 of National Rail's CC state that the special provisions (Passenger's Charters) of individual carriers also apply.

1. National Rail CC (Conditions of Carriage)

a) General

(1) Exclusion of Liability

The CC admit liability in circumstances which must be controlled by the carrier. Acts of terrorism, extreme weather conditions, track closures due to the actions of third parties etc. are mentioned as counter-examples, in compliance with Art. 32 § 2b) of the CIV 1999, and Art. 11a of the proposed regulation.

The complete exclusion of liability for delays or cancellations due to industrial action by the company's own employees infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

(2) Form of Compensation

The provision of compensation exclusively in the form of vouchers contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (Art. 15 Para. 2 of the proposed regulation).

(3) Cut-off Period

In order to claim compensation, a passenger must make a claim at one of the carrier's ticket counters within 28 days after the journey, stating the scheduled times and submitting the ticket or other travel document. Measured against the terms of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, this cut-off period does not unduly restrict consumer rights since it is reasonable to expect that claims can be made within this period.

b) Delays

Where delays occur, travellers are guaranteed compensation payments and care and assistance in compliance with Arts. 15 and 17 of the proposed regulation.

(1) Compensation Payments

National Rail's CC provide for compensation of 20 % of the fare for delays of over an hour. Under the terms of Art. 15 Para. 1 of the proposed regulation, compensation payments must be progressively increased.

The CC include provisions for separate compensation for season ticket holders in accordance with Art. 15 Para. 1a of the proposed regulation.

(2) Care and Assistance

National Rail's CC generally state that all measures must be undertaken to ensure that travellers reach their destinations under comparable conditions and that they also receive care and assistance until they reach their destination where necessary, including hotel accommodation as required. Neither refreshments and meals, nor a transfer between hotel and railway station, or station and train, where the train has come to a stop on the rails, are explicitly mentioned. The CC offer care and assistance only to passengers who cannot continue their journey due to a disruption of the transport service. This means that travellers delayed at a station from which they are due to depart (delay also means a discrepancy between scheduled and actual departure, cf. Art. 2 No. 15 of the proposed regulation) cannot claim care and assistance. The care and assistance offered is therefore inadequate and breaches Art. 17 Para. 2 of the proposed regulation, as does the reliance on the exclusion of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

c) Delays and Cancellations causing Missed Connections

(1) Refunds under Art. 16 Para. 2 a) of the Proposed Regulation

If the train is late (regardless of a possible missed connection), and the traveller decides not to start the journey for this reason, his travel costs are refunded if he brings the ticket "at that time" to a ticket counter. Subsequent claims must be made within a 28-day cut-off period, which begins after the expiry of the ticket's validity, and they are also subject to the deduction of an administration fee. Objections may arise in respect of Art. 3 Paras. 1b), d) and f) of the annex of the Unfair Commercial Practices Directive, since this clause demands the prompt return of the ticket. A claim delayed by a few days may therefore incur an administration fee (without however excluding the possibility of a refund).

The deduction of a fee – including a fee for the making of a claim for compensation²⁹ – in the case of cancellation by the consumer, fundamentally discriminates against him in the exercise of his right of cancellation and right of withdrawal.³⁰

In this case, the demand that claims be made promptly if a refund is to be paid without the deduction of a fee is an unacceptable discrimination, as is the charging of an administration fee for subsequent claims. The vague specification (“at that time”) must also be interpreted in the manner most favourable to the consumer under Art. 5 clause 2 of the Unfair Commercial Practices Directive.

Measured against Art. 3 Para. 1 in connection with b) of annex of the Unfair Commercial Practices Directive, the 28-day final cut-off period does not unduly restrict consumers’ rights because it provides an adequate period for claims, so this provision is unobjectionable.

There is however, no provision consistent with Art. 16 Para. 2a) of the proposed regulation compensating travellers for travel costs incurred for a journey that no longer serves any purpose.

(2) Alternative transport, Art. 16 Paras. 2 b) and c) of the Proposed Regulation

Alternative transport at the next opportunity (Art. 16 Para. 2b) of the proposed regulation) or subsequently (Art. 16 Para. 2c) of the proposed regulation), as the passenger chooses, is also not offered.

d) Result

Since the CC are supposed to finally and conclusively regulate passengers’ rights, but are also at least partly inconsistent with the Unfair Commercial Practices Directive, and are partly inadequate under the terms of the proposed regulation, the CC contravene Community law.

2. Arriva Trains Wales – Passenger’s Charter

If it fails to comply with its punctuality standard, the carrier guarantees a compensation payment and restitution in the form of free tickets, price reductions and extended periods of validity for season ticket holders – as explicitly provided for in Art. 15 Para. 1a of the proposed regulation –

²⁹ *Wolf*, in: *Wolf/Horn/Lindacher*, RiLi Anh No. 1 f Rn. 87.

³⁰ *Wolf*, in: *Wolf/Horn/Lindacher*, RiLi Anh No. 1 f Rn. 85.

as well as a 100 % refund of the fare price of a delayed journey for a delay of at least an hour. The CC provide for compensation payments in cash only in exceptional circumstances, although under Art. 15 Para. 2 of the proposed regulation, compensation must be paid in cash at the passenger's discretion. The validity of vouchers for one year breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Care and assistance, alternative transport and refunds are basically provided for but no refund is granted for a journey that no longer serves any purpose due a delay leading to a missed connection.

3. Central Trains – Passenger's Charter

The carrier grants a fixed rate of compensation of 50 % for a delay of more than 30 minutes. Under the terms of Art. 15 Para. 1 of the proposed regulation, such payments should however be progressively increased. Compensation is provided only in the form of vouchers, so this clause infringes Art. 3 Para. 1b) of annex of the Unfair Commercial Practices Directive (cf. under I.1.d)). The care and assistance offered is, in contradiction to Art. 17 of the proposed regulation, limited to meals and refreshments. On the other hand, the CC do not include any provisions on refunds for journeys that no longer serve any purpose due to a cancelled train or a delay leading to a missed connection.

4. First Great Western – Terms and Conditions

Compensation is limited to vouchers (on this breach cf. under A. I. 1. d)). The guarantee does not include a refund for partially completed journeys that no longer serve any purpose.

5. First Scot Rail- Passenger's Charter

The compensation offered for damages suffered due to delay (of up to 1,000 Pounds) complies neither with Art. 32 § 1 of the CIV 1999 nor with Art. 17 Para. 2 of the proposed regulation. The form of compensation is restricted to vouchers. The details at A. IX. 2. deal with refunds for partially completed journeys that no longer serve any purpose.

6. Midland Mainline – Passenger’s Charter

Here too, the CC provide for compensation of 1,000 Pounds and the form of compensation is limited to vouchers. The railway company does however offer refunds for an uncompleted journey if the traveller misses a connection. The care and assistance offered does not include accommodation, although a refund of costs incurred due to extraordinary circumstances is basically not excluded.

7. Northern Rail Limited – Passenger’s Charter

Compensation is not progressively increased and is only provided in the form of vouchers. There is no refund for journeys that no longer serve any purpose, and care and assistance does not include free meals.

8. UK – One

The CC guarantee a refund if the customer refrains from starting a journey due to delay. Travelers can also receive compensation, in accordance with the requirements of European legislators, although only in the form of vouchers. There are no regulations covering refunds for journeys that no longer serve any purpose or for reimbursement of accommodation costs. Passengers have only a right to refreshments and alternative transport to their destinations after a delay of one hour. These provisions breach both the proposed regulation and the Unfair Commercial Practices Directive.

The guarantee does not distinguish between compensation claims made by holders of single-journey tickets and season ticket holders - the entitlement to claim is identical in both cases. The railway company must also provide further compensation payments for season ticket holders under Art. 15 Para. 1a of the proposed regulation.

9. UK – South Eastern

The CC grant only a minimum compensation payment of 20 % of the fare for a delay of more than one hour, which is less than the minimum specified in Art. 15 Para. 1 of the proposed regulation. In respect of the consequential regulations for delays leading to missed connections, or for train cancellation, the carrier must provide alternative transport to the destination and arrange for care and assistance and notification. The care and assistance does not however include hotel accommodation. Tickets not used due to a delay are refunded. The details at A. IX. 2. deal with compensation for journeys which no longer serve any purpose.

10. UK – Southernrail

Under the terms of the CC, only holders of daily and weekly tickets can claim compensation for delay. This inadmissibly restricts the rights of travellers holding single-journey tickets as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The provisions on care and assistance and refunds are also inadequate for the reasons described above.

11. UK – Virgin cross country

The provision of compensation only in the form of vouchers and refunds only for unused tickets, but not for journeys that no longer serve any purpose, as in other cases, is open to objection.

12. Northern Ireland - Translink Passenger Charter

The National Rail CC do not apply here.

Travellers receive a full cash refund in case of delay or cancellation, but compensation for journeys which no longer serve any purpose due to a missed connection/cancellation is not offered, nor is alternative transport, and in contradiction to Art. 17 Para. 2 of the proposed regulation and Art. 32 § 1 of the CIV 1999, no care and assistance is provided in the event of a missed connection, cancellation or delay.

A refund of travel costs of less than 1 pound 50 pence in cases where a customer refrains from using the carrier's services as a result of delay is likewise excluded. This value limit is however consistent with Art. 15 Para. 3 of the proposed regulation.

The company also excludes liability for delays caused by serious delays due to traffic. This type of exclusion is not provided for by the terms of Art. 32 § 2b) of the CIV 1999 and Art. 11a of the proposed regulation and is also not transparent. Railway company staff could, for example, be responsible for delays to traffic. This clause therefore also breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

X. Ireland

Irl – Irish Rail Customer Charter

The carrier provides no special compensation for season ticket holders and therefore is not in compliance with Art. 15 Para. 1a of the proposed regulation. Compensation for late trains is progressively increased in accordance with Art. 15 Para. 1 of the proposed regulation, but is only provided in form of vouchers, contrary to Art. 15 Para. 2 of the proposed regulation.

In case of delay (regardless of a missed connection) or a cancelled train, a full refund of fares is offered if the passenger returns the unused ticket immediately to the ticket counter. Subsequent claims may be subject to an administration fee. This is a breach of Art. 3 Paras. 1b), d) and f) of the annex of the Unfair Commercial Practices Directive, since this provision discriminates against the consumer in the exercise of his right of cancellation and right of withdrawal. The carrier also does not grant refunds for journeys that no longer serve any purpose due to a missed connection or cancellation, cf. Art. 16 Para. 2 subparagraph 2a) of the proposed regulation, nor does it offer travellers the option of alternative transport. This restricts the consumer's rights as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The generalised reference to compensation in the form of a voucher, regardless of the ticket price paid and length of delay also breaches the transparency requirement in Art. 5 clause 1 of the Unfair Commercial Practices Directive.

The CC also make no provision for care and assistance.

XI. Greece: Hellenic Railways Organisation (OSE)

The CC provide neither for compensation (Art. 15 Para. 1) nor for care and assistance in case of delay (Art. 17 Para. 2), but fundamentally exclude liability for delays and cancellations, infringing not only the proposed regulation, but also Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. There is also no separate provision for compensating season ticket holders (Art. 15 Para. 1a) of the proposed regulation). Passengers are only entitled to a refund of the ticket price if they do not begin their journey. Only the next train is designated as alternative transport; other alternatives as defined in Art. 16 Para. 2 b) and c) of the proposed regulation are available only for international journeys.

XII. Italy

1. FNMT

a) Entitlement to Claim

Only holders of an annual or a monthly season ticket can claim compensation. Holders of single-journey tickets are not mentioned. Holders of a monthly ticket can also not claim compensation if they do not buy a further monthly ticket at the time at which the Bonus is paid. The right to compensation is also excluded if season ticket holders use trains as well as busses, for example, as a means of public transport. This exclusion infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, because these passengers affected by the delay cannot assert a claim against the railway company and their rights are thereby denied.

Whether a claim for compensation can be made is determined every month using a special formula. The formula used is complicated on the one hand, and on the other hand customers do not have access to the information they need to be able to calculate a potential claim themselves, giving rise to objections in respect of the clause's clarity and comprehensibility as defined in Art. 5 of the Unfair Commercial Practices Directive. The railway company informs its customers through leaflets or announcements as to possible claims, but this does not satisfy the stipulations of the transparency requirement.

b) Amount of Compensation

In case of the delay and/or cancellation of a train, the railway company guarantees customers (i.e. holders of an annual or monthly ticket) compensation. Three months after the month in which the right to the Bonus has eventuated, monthly ticket holders receive a 20 % reduction in price when purchasing a new ticket from the railway company. The railway company grants holders of an annual season ticket a refund of 1/12 of 10 % of the season ticket price for every month in which delays and/or cancellations occur. These compensation payments for season ticket holders comply with the provisions of Art. 15 Para. 1a of the proposed regulation.

There is however, as stated above at a), no provision of compensation payments for delay for passengers who do not hold a season ticket. There is also no progressive increase in compensation as provided for in Art. 14 Para. 1 of the proposed regulation. The CC also do not provide for any further compensation or liability for consequential damages, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under A. I. 1. b)).

c) Exclusion of Liability

The CC exclude liability in case of force majeure, which also includes strikes (see Appendix 15), although strikes by FNMT's staff are explicitly excluded from this provision and liability for them apportioned to the railway company. Other circumstances that are not regarded as unforeseeable (force majeure) include scheduled maintenance work, accidents at a level crossing or obstacles on the rails. Such situations may however, be reasonably expected at any time, so they cannot be regarded as force majeure (cf. also under A. IV. 2. d)). These circumstances are therefore only unforeseeable where the railway company is not responsible for them, so the complete exclusion of liability infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

d) Result

The CC contain clauses that are defined as unfair in Art. 3 Para. 1b) annex of the Unfair Commercial Practices Directive.

2. Trenitalia (EuroStar and Intercity)

a) EuroStar

Passengers receive a voucher (“bonus”) of 50 % of the EuroStar ticket price for a delay of more than 25 minutes. Customers must submit the original ticket when applying for a refund. This is not an unreasonable requirement. It is usual and permissible to require submission of the original document in order to prevent abuses and customers are free to make a copy. It would also seem self-evident that the transport company returns the original where a compensation payment is denied.

The Bonus can be used within six months for the purchase of a new ticket. A cash payment is not possible. The lack of a progressive increase in compensation and the provision of compensation only in vouchers, which are valid only for a limited period, are inconsistent with the regulations in Art. 15 Paras. 1 and 2 of the proposed regulation. At the same time there is also breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under A.I.1.b) and d)) because consequential damages are not refunded.

Special compensation payments apply to an indivisible ticket price (e.g. season ticket) or international tickets. Here the Bonus is calculated from the price of the surcharge on the fare or 50 % of the value of the journey travelled with Eurostar (see No. 1.1. of the CC for details). The Bonus is not available to holders of a standard fare ticket or a standard fare season ticket. On the one hand, these clauses breach Art. 15 Para. 1a) of the proposed regulation, and on the other hand the restriction and exclusion of rights to compensation breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Compensation for missed connections consistent with the terms of Art. 16 Para. 2 a) of the proposed regulation is also not regulated.

b) Intercity

Passengers receive a Bonus of 30 % of the price of an IC Plus Ticket for a delay of more than 25 minutes. The railway company provides only the price of the surcharge on the fare or 30 % of the value of the journey travelled with the Intercity as a Bonus, but otherwise the CC correspond with those of EuroStar (cf. 2.a))

c) General

The Bonus must be applied for within 30 days of the journey. This cut-off period is not an unreasonable restriction as defined in Art. 3 Para. 1 b) of the annex of the Unfair Commercial Practices Directive, since it is possible for passengers to make claims within this period.

Liability is excluded for strikes causing a delay of up to three hours after the scheduled departure time from the station the passenger is departing from. The exclusion of liability for strikes by the company's own staff is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under A. VI. 2.).

XIII. Summary

Total examined	31
Unobjectionable	0
Defects identified:	
Compensation exclusively in the form of vouchers	17
No progressive increase in compensation payments consistent with Art. 15 Para.1 of the proposed regulation	13
Inadmissible exclusion of liability	10
No compensation or limited compensation for consequential damages	10
Vouchers only valid for one year	6
Distinction between compensation payments made for daytime and night trains	5
No compensation for season ticket holders	5
Restriction of possible claims to compensation	5
No regulation dealing with missed connections	4
Vouchers only valid for six months	1

All of the 31 service guarantees examined are open to objection.

The conditions of carriage contain infringements of Community law. A strikingly large number of guarantees do not provide for a progressive increase in compensation payments in compliance with Art. 15 Para. 1 of the proposed regulation, grant compensation only in the form of vouchers, exclude reimbursement for consequential damages, and restrict or exclude any obligation to assume liability.

Specifically:

Apart from one railway company, all companies voluntarily pay compensation for a late train. Hellenic Railways Organisation (Greece) on the other hand, excludes any liability for delay.

Most of the transport companies provide compensation of just 20 % of the ticket price for a delay of at least 60 minutes. The exceptions are: F_SNCF_Convention (France) with a refund of 1/3 for a delay of more than 30 minutes; DK Arriva Tog (Denmark) with a fixed compensation payment of 50 % for a delay of more than one hour; Arriva Trains Wales (UK) with 100 % compensation for a 60-minute delay, and Central Trains (UK), offering 50 % for a delay of over 30 minutes.

There is no provision for progressive compensation in case of longer delays as prescribed in Art. 15 Para. 1 of the proposed regulation in 13 of the guarantees examined, with the exception of: NS – Geld terug bij vertragen en (The Netherlands) which pays compensation of 50 % for a delay of between 30 and 60 minutes or a complete refund of the ticket price and the Thalys compensation scheme (Belgium) which pays 20 % for a delay of more than 30 minutes, and a complete refund for a delay of more than 120 minutes.

Five service guarantees inadmissibly differentiate between late daytime and night trains in determining liability, (the CC governing EU compensation, in Germany and NS International (The Netherlands)) which is also inconsistent with Art. 15 Para. 1 of the proposed regulation.

In 17 conditions of carriage, compensation is offered only in form of vouchers, the validity of which is limited in six cases to 1 year and in one case to 6 months. These clauses do not meet the requirements of Art. 15 Para. 2 of the proposed regulation.

In ten of the guarantees there is either no provision for compensation for consequential damages or claims for such compensation are restricted. Since such claims must therefore be regarded as excluded, this is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Art. 32 § 1 of the CIV and Art. 17 Para. 2 of the proposed regulation provide for the restitution of consequential damages.

A large number of provisions also include an inadmissible exclusion of liability. The complete exclusion of liability in case of strike in four of the conditions of carriage would seem to be open to objection because it infringes Art. 3 Para. 1b) of the annex of Unfair Commercial Practices Directive. Two service guarantees reject any obligation to assume liability in the case of contributory negligence on the part of the passenger, and another two exclude all liability for accidents and previously announced delays, therefore also infringing Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. It should be noted that the conditions of carriage of NS Internationaal (The Netherlands) contain three inadmissible clauses.

Some railway companies (e.g. FNMT [Italy] and NS-Internationaal [The Netherlands]) also exclude liability for force majeure, for collisions with persons or other vehicles, maintenance work or obstacles on the tracks, for example. These circumstances cannot however be completely subsumed under the term “force majeure”, so a complete exclusion of liability is an inadmissible clause as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Such an exclusion may only apply where the railway company is not responsible for the circumstances.

The CC partly restrict possible claims to compensation, either by excluding compensation for the price of a single-journey ticket worth less than 50 Euros (EU compensation) or by limiting the amount available (First Scot Rail and Midland Mainline (UK)). These limits breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and Art. 15 Para. 3 of the proposed regulation.

In five conditions of carriage there is no provision for compensation for season ticket holders in compliance with Art. 15 Para. 1a of the proposed regulation.

B. Local and Regional Bus Transport

I. Germany

1. DVG Duisburger Verkehrsgesellschaft

The company guarantees only certain connections after 8PM and reimburses taxi costs if a connection is missed, although there is no (even partial) refund of the fare for a missed connection or a delay. Since no taxi costs incurred before 8PM are reimbursed, the guarantee is inconsistent with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The general terms and conditions could also be deemed to be unfair under the terms of Art. 3 Paras. 1 and 3 o) of the annex of the Unfair Commercial Practices Directive, if they require the consumer to fulfil all his obligations, even where the operator refrains from performance. The prohibitive clause is designed to prevent the consumer being unilaterally held to his obligations where the operator does not fulfil its obligations.³¹ The result is that the general terms and conditions should not give rise to a unilateral obligation of performance on the part of the consumer. It is acknowledged in the literature that the phrase “not fulfilled” should be broadly interpreted, taking the protective intent into consideration, so that this exemplary clause also covers inadequate performance,³² regardless of whether the inadequate performance is the fault of the operator.³³ If the customer must still pay the full fare, even in case of non-performance and insufficient performance, there is a breach of Art. 3 Para. 1 and 3 o) of the annex of the Unfair Commercial Practices Directive.

2. HVG Heidenheimer Verkehrsgesellschaft

The HVG provides for “consideration” in the event of a delay of more than 10 minutes that is the company’s fault. The form of this consideration is not clear from the provisions. For this reason it cannot be determined whether the liability is appropriate and complies with European law. The lack of clarity about the consideration in the guarantee’s formulation contradicts the transparency

³¹ *Wolf*, in: *Wolf/Horn/Lindacher*, Anh No. 1o RiLi Rn. 191.

³² *Wolf*, in: *Wolf/Horn/Lindacher*, Anh No. 1o RiLi Rn. 192.

³³ *Wolf*, in: *Wolf/Horn/Lindacher*, Anh No. 1o RiLi Rn. 192.

requirement anchored in Art. 5 clause 1 of the Unfair Commercial Practices Directive, which states that the content of the clause must be specific.³⁴

3. NVG - Niederschlesische Verkehrsgesellschaft mbH

The NVG offers its customers a consideration to the value of up to 10 Euros if a delay of more than 20 minutes occurs and the NVG is responsible for the delay. This type of compensation enables a passenger to have part of his fare refunded, but the amount of compensation, e.g. in case of a missed connection, seems too low. Especially where a customer must take a taxi to continue his journey, 10 Euros may not cover such travel costs and a possible restitution for services is not provided for in accordance with the contract. The provisions therefore breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. There is also a breach of the transparency requirement anchored in Art. 5 clause 1 of the Unfair Commercial Practices Directive, which states that the content of the clause must be specific.³⁵ The formulation: “...,you will receive a consideration to the value of up to €10 from us.” does not make it clear in which cases smaller sums may be refunded.

4. PVG Personenverkehrsgesellschaft Schwedt/Angermünde

The bus company refunds its passengers taxi costs of up to 10 Euros if the traveller reaches his destination more than 20 minutes late and the company is to blame for the delay. This compensation provision is objectionable. The limitation may breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive if the clause unduly restricts the passenger's claims against the bus company. It should be taken into consideration that the service guarantee applies to local buses, i.e. it usually involves short trips, but it may be possible in individual cases that taxi costs exceed 10 Euros, so that further liability is excluded in that case. This regulation is prejudicial to the consumer's rights and constitutes a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

³⁴ Cf. *Ulmer*, in: *Ulmer/Brandner/Hensen*, Einl. Rn. 37.

³⁵ Vgl. *Ulmer*, in: *Ulmer/Brandner/Hensen*, Einl. Rn. 37.

If it is assumed, under the underlying premises, that the company believes that no further claims should lie, and the passenger must still pay the complete fare, even in the case of inadequate performance by the company which is the company's fault, so that the passenger is entitled neither to a reduction of the price nor to a right of withdrawal, the provisions breach Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive, because this represents an inadmissible exclusion of liability.

5. SHA Stadtbus Schwäbisch Hall

The SHA company offers only a cinema voucher as compensation if a bus is delayed by 20 minutes and the cause is not due to force majeure, a necessary detour or a closed-off road. The company therefore excludes the customer's basic rights to claims for non-performance of inadequate performance. The guarantee therefore breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

6. traffiQ - Lokale Nachverkehrs-Gesellschaft Frankfurt am Main mbH

No objections.

7. ESWE Verkehrs GmbH Wiesbaden

No objections.

8. Havelbus

See details at I. 4.

9. UVG Uckermärkische Verkehrsgesellschaft

See details at I. 4.

10. VBN Verkehrsverbund Bremen/Niedersachsen, Bremen – Customer guarantees

Passengers receive a day ticket from the transport company if the bus is 20 minutes late or leaves a stop early and the fault lies with the company. This ticket refunds the customer's fare, so the provision is unobjectionable. Consequential damages such as taxi costs are however only paid for individual so-called "Guaranteed stops" and only then for a missed connection, and not for a late bus. The exclusion of consequential damages for other stops and for delays infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The unrestricted use of vouchers is inconsistent with the intention of European legislators in respect of railway transport (see details on the proposed regulation under A. I. 1. d)). Since there is no basis for these two carriers to have different liability provisions, here too, even though it is a trifling sum, customers must be given a choice, enabling them to insist on a cash payment.

11. BSAG Bremer Straßenbahn AG

BSAG guarantees only certain connections (cf. the general terms and conditions) and refunds taxi costs of up to 15 Euros if a connection is missed due to the company's fault. This limited refund of taxi costs breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since it seems possible that actual taxi costs could exceed this amount and that the passenger can make no further claims. To the extent that there is no refund for damages due to delay, and no refund of a fare pursuant to a right of withdrawal, a breach of Art. 3 Para. 1b) and o) of the annex of the Unfair Commercial Practices Directive exists here too.

12. WVG - Gruppe Westfälische Verkehrsgesellschaft mbH

The WVG reimburses taxi costs of 25 Euros if a passenger reaches his destination 20 minutes later than scheduled, there is no alternative transport available, and the cause is not due to "extreme weather".

In respect of the limited refund of taxi costs, this regulation does not comply with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Here too, the usual rights applicable in cases of non-performance or insufficient performance are excluded, so customers still have to pay the full fare. The guarantee therefore infringes Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive. The connection guarantee also only applies to certain interchanges. Since liability for other connections is excluded, the CC are inconsistent with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

13. Padersprinter

Passengers receive compensation in the form of a 24-Hour ticket (value: 4.60 Euros) for a delay of 20 minutes. If the last journey of the day is cancelled, the company pays passengers taxi costs of 20 Euros. This limitation is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The customer must submit his claim within 8 days after the incident. Exclusive compensation in the form of vouchers for so-called “damages due to a defect” is inconsistent with the current proposed regulation on the rights and obligations of railway passengers (cf. Art. 15 Para. 2). Since a connection guarantee applies only in strictly limited exceptional cases and the time limit for applications for compensation of 8 days is too short, these provisions breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

II. Denmark

1. Nordjyllands Trafikselskab – Travel Guarantee

The CC refund passengers taxi costs for a bus delay of more than 20 minutes.

In case of a strike, the CC exclude the possibility of compensation. It is debatable whether the bus company is responsible for disruptions to its services caused by industrial action³⁶. Industrial action, especially strikes by the company’s own staff, is one of the fundamental business risks of a business operator. The clause excluding all liability in the case of strikes, i.e. for any form of

³⁶ For German law on this issue et sqq. *Brandner*, in: *Ulmer/Brandner/Hensen*, Anh. §§ 9-11 Rn. 100 et sqq.; *Wolf*, in: *Wolf/Horn/Lindacher*, § 9 Rn. A 124 et sqq.

fault, therefore breaches Community law under the terms of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The form of compensation, i.e. whether paid out in cash or made in the form of a voucher, is not specifically regulated, so it is assumed that the passenger has at least a choice of form of compensation.

There is no refund of the ticket price in case of delay or a missed connection. This provision infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. This clause completely excludes the claims of passengers for non-performance or inadequate performance, causing a significant and unjustifiable disparity between the rights and obligations of the customer and the bus company. The fact that the value of the tickets is usually small has no bearing on the legal judgement. A refund of taxi costs only reimburses passengers' actual additional costs, although in the case of denied boarding by the bus company, the customer is also entitled to claim for a refund of the ticket. This is a breach of Art. 3 Para. 1o) of the annex of Unfair Commercial Practices Directive. The passenger must fulfil his obligations by paying the fare, even though the bus company does not fulfil its obligations or does so inadequately.

2. Århus Amt Travel Guarantee

The bus company refunds the cost of a taxi for a delay of more than 20 minutes. Applications for compensation must be made within 14 days. This deadline is not an unreasonable restriction under the terms of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, because it is possible for passengers to make claims within this period.

The amount of compensation is limited to 300 DKK (about €40), or to 350 DKK (about €46) for compensation in the form of a voucher. This limitation breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Liability for strikes is excluded and a refund of the ticket price is not provided for in the CC. These provisions infringe Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under B. II. 1.).

3. Ringkjøbing Regional Council

Passengers receive compensation for taxi costs for delay of more than 20 minutes. The CC exclude liability for force majeure, which includes strikes, and do not provide for any refund of the value of tickets (cf. on breach under B. II. 1.).

Special regulations apply to adverse effects suffered by season ticket holders. Compensation is offered only if the disruption continues for at least 7 consecutive days and the customer holds a ticket that is valid for at least 7 days. The refund must also be at least ¼ of the price of the least expensive season ticket for an adult. These provisions apply in the absence of any other regulations than those providing for general compensation claims for delay and therefore do not constitute a breach.

4. Sydbus Travel Guarantee

The bus company reimburses passengers for the costs of a taxi to their destination if there is a delay of 20 minutes due to a cancelled bus or a missed connection.

The CC recognise no obligation to assume liability in case of strike, nor do they provide for any refund of the cost of the bus ticket. Both provisions can be regarded as unfair as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under B. II. 1.).

5. VAFT's travel guarantee

The bus company refunds its customers' taxi costs for a delay of more than 20 minutes, or more than 10 minutes in the case of City Buses. The form of compensation is not specifically regulated. The CC also do not provide for refunds of ticket costs (cf. on breach under B. II. 1.).

6. Vejle County Administration Travel Guarantee

The bus company reimburses taxi costs for a delay of more than 20-minutes. The passenger must document the time, place and the bus line involved.

The CC state that a claim for compensation is excluded in case of force majeure, which includes strikes, among other things. Since industrial action is fundamentally regarded as part of the business risk of the operator, strikes, or strikes by the company's own employees, do not constitute force majeure. The complete exclusion of liability therefore contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Compensation is paid by cheque or bank transfer. The bus company does not however, refund the ticket price, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under B.II.1.).

7. X-Bus Travel Guarantee (Long distance bus)

The bus company compensates passengers for taxi costs incurred due to a delay of more than 20 minutes. Liability for delay is excluded in the case of strikes, among other things. The bus company does not refund the value of the bus ticket (cf. on breach under B.II.1.).

III. Sweden

1. Luleå Local Transport – Travel Guarantee

The CC allow for a refund of taxi costs for a delay of more than 20 minutes. Compensation is however limited to 20 Euros, or to 25 Euros for a voucher. This maximum amount of compensation infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since it seems possible that the actual costs incurred for a taxi could exceed this amount and the passenger cannot make any further claims, so they are therefore excluded. The fact that the bus ticket is not refunded in case of delay or a missed connection is a further contravention.

The CC exclude compensation in case of force majeure, e.g. strikes. This complete exclusion of liability infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

2. Dalatrafik – Dalarna County Public Transport – Dalatrafiks Travel Guarantee

The bus company refunds its customers their taxi costs in the event of a delay of more than 20 minutes. The refund paid out in cash is up to 300 SEK (approx. 32 Euros), or in the case of a voucher up to 350 SEK (approx. 38 Euros). This limitation of claims for compensation represents a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Compensation is excluded in case of force majeure, which, according to the CC, also includes strikes. The conditions of guarantee also do not include a refund of ticket costs (cf. on breach under B. II. 1.).

3. Hallandstrafiken – Halland County Public Transport - Travel Guarantee

If a bus is more than 20 minutes late, passengers receive 200 SEK (approx. 21 Euros) in cash or a voucher worth up to 250 SEK (approx. 27 Euros) as compensation for taxi costs. This limitation infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The deadline for making claims of 30 days is unobjectionable. The complete exclusion of liability in case of strike is however a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

4. Jämtlands Länstrafik – Jämtlands County Public Transport – Travel Guarantee

Compensation can be claimed for a delay of more than 20 minutes, regardless of the value of the ticket. Consequential damages, such as those for taxi costs, are not reimbursed (cf. on breach under B. II. 1.).

If a customer misses a connection due to wrong information or early departure, he is entitled to claim corresponding transport to the value of up to 400 SEK (approx. €43). This limitation of compensation is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The fact that consequential damages are paid for a missed connection, but not for a delay also seems open to criticism, and compensation for delay that is made regardless of the value of the ticket may not cover all further losses. This exclusion of further claims is inconsistent with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. A further

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breach is constituted by the fact that only a general compensation for the transport is offered for a missed connection, but ticket costs are not refunded.

The CC exclude liability for strikes, among other things (cf. under B. II. 1.).

5. Länstrafiken travel guarantee in Västerbottens county

The bus company reimburses taxi costs for a missed connection. In the case of a delay of more than 20 minutes, compensation of the value of the ticket can also be claimed. These clauses exclude all further claims to compensation for consequential damages in the event of delay and do not allow for refunds of ticket costs for missed connections, resulting in a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The bus company does not accept liability for strikes (cf. on breach under B.II.1.).

6. Ultra – local transport in the city of Umeå – Ultra’s travel guarantee

Compensation for taxi costs is paid in case of a delay of over 20 minutes. The amount of compensation is either 200 SEK (approx. 21 Euros) in cash or 250 SEK (approx. 27 Euros) in the form of a voucher. Liability is excluded in the case of strikes and lockouts. This limitation of the amount of compensation and the exclusion of liability breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

IV. France: The Zéphir Bus Engagements

The bus company refunds customers the price of the journey in case of more than 5 minutes delay, although the details (e.g. form of compensation) are not specifically regulated. The guarantee contains no additional liability for possible consequential damages and excludes refunds in case of strike (cf. on breach under B. II. 1.).

V. United Kingdom: Arriva Customer Promise

The bus company declares itself prepared to pay travel costs for the next journey after a delay of more than 5 minutes. If this is assumed to settle all consumers' claims, the CC contravene Art. 3 Para. 1b) and o) of the annex of the Unfair Commercial Practices Directive, since claims for non-performance or inadequate performance and the payment of consequential damages are excluded. No compensation is paid, nor is any care and assistance or a refund provided for.

VI. Greece

1. KTEL

The CC dispense with compensation for damages due to delay, unreasonably restricting passengers' rights as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. At the same time, inadequate performance without compensation infringes Art. 3 Para. 1o) of the annex of the Unfair Commercial Practices Directive. A refund of three times the value of the fare is provided for in cases where a passenger cannot board the bus at a scheduled stop. There are however no regulations of any refund for delay, also constituting a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

2. O.A.S.TH

The complete exclusion of liability in case of industrial action or malfunction of the bus infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The generalised reference to a possible refund in case of a breach of the CC, which is also not transparent, inadequately regulates passengers' claims, because the obligation of punctuality and unconditional provision of a scheduled service in particular are not explicitly mentioned. The CC therefore contravene Art. 3 Paras. 1a) and o) of the Unfair Commercial Practices Directive.

VII. Summary

Total examined	30
Unobjectionable	2
Defects identified:	
No refund of fares	19
Limitation of compensation amounts / taxi costs	14
Exclusion of liability for strikes	13
No refund for consequential damages	7
Limited connection guarantee	5
Compensation only in the form of vouchers	2
Breach of transparency requirement in Art. 5 of Unfair Commercial Practices Directive	2
Deadlines for applications too short	1

A total of 30 service guarantees of bus companies from Germany, Denmark, Sweden, France, United Kingdom and Greece were examined.

Of these, only two guarantees were unobjectionable, those of traffiQ and ESWE (of Germany).

In the remaining 28 conditions of carriage, the most frequent and striking breaches were the lack of refunds of tickets, the limitation of taxi costs, and the exclusion of liability for strikes.

Compensation is usually paid for a delay of more than 20 minutes. The exceptions to this rule are HVG (Germany) with 10 minutes, and Zéphir Bus (France) and Arriva CustomerPromise (United Kingdom) with 5 minutes, among others. Four bus companies exclude liability for delays: DVG and BSAG (Germany), and KTEL and OASTH (Greece).

Compensation is frequently made in the form of the restitution of taxi costs incurred. SHA (Germany) however, only offers compensation in the form of cinema vouchers; VBN (Germany) pro-

vides only a limited refund; HVG and NVG (Germany) only make provision for a “consideration”; Zéphir Bus (France) reimburses only travel costs, as does Arriva Customer Promise (UK). Compensation is generally concluded upon the restitution of taxi costs, thereby excluding further payments for consequential damages or refunds of tickets.

Nineteen bus companies do not refund tickets, which is a breach of Art. 3 Para. 1b) of the Annex of the Unfair Commercial Practices Directive. (Exceptions: VBN, Padersprinter, Zéphir and Arriva Customer Promise, although in the last two guarantees, only the cost of the journey, but not consequential costs, such as taxi costs, are reimbursed)

In the conditions of carriage of 14 bus companies compensation claims, i.e. refunds of taxi costs, are subject to an upper limit. The value of compensation is between 10 and approx. 46 Euros. This clause is unfair as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

13 bus companies exclude liability and claims for compensation in case of strike, which in some cases is declared to be force majeure, constituting a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

In seven cases the bus companies refuse to pay any consequential damages.

In five cases the bus companies accept only limited liability for missed connections.

C. Local and Regional Transport by Bus/Rail /Ship

I. Germany

1. NVV - Nordhessischer Verkehrsverbund

The NVV's conditions of carriage offer customers a connection guarantee and a money-back guarantee, but the event must be registered within three working days. This relatively short cut-off period represents an unreasonable restriction of customers' rights,³⁷ infringing Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

2. KVG Kasseler Verkehrsgesellschaft AG

No objections.

3. RMV

The amount of compensation seems problematic here. Proven taxi costs or IC/EC/ICE tickets to the value of up to 15 Euros are reimbursed in the event of delays of over 20 minutes (see nos. 1 and 2 of the PDF document). Only if the last scheduled connection is missed, is the refund increased to 30 Euros. Considering the fact that a delay or missed connection can lead to an overall delay of 1 to 2 hours or more, compensation payments that are not progressively increased have been shown to be too low. It must also be taken into consideration that the customer is not refunded the fare he has paid, either in whole or in part, and must pay the full fare. This regulation therefore breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

Exemption for liability for a strike by the company's own staff is also inconsistent with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under A.VI.2.).

³⁷ Vgl. *Wolf*, in: *Wolf/Horn/Lindacher*, RiLi Anh No. 1 b Rn. 26.

4. HEAG mobilo GmbH, Darmstadt

If customers have to wait more than 30 minutes for the next connection, HEAG pays part of the costs of a taxi of up to 5 Euros. Usually however, the taxi costs exceed this amount, but further liability is excluded in such cases. Customers are also not refunded their fares. Since this clause unduly restricts the claims of passengers against the bus company, it infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

5. SSB Stuttgarter Straßenbahn AG

The SSB reimburses taxi costs of up to 26 Euros if the passenger reaches his destination 20 minutes later than scheduled and the fault lies with the transport company. The provisions for the reimbursement of taxi costs may be deemed unfair under the terms of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Here too, the customary rights of customers in case of non-performance or inadequate performance are excluded, so the customer still has to pay the full fare. The 3-day cut-off period for claims is also too short so the guarantee infringes Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

6. VRR Verkehrsverbund Rhein-Ruhr

a) Exclusion of liability (No. 13)

The exclusion of all liability for deviation from timetables due to traffic obstructions, operational breakdown, malfunction or disruption is inconsistent with Art. 3 Para. 1b) and o) of the annex of the Unfair Commercial Practices Directive. The regulation also breaches the transparency requirement anchored in Art. 5 clause 1 of the Unfair Commercial Practices Directive because customers cannot know at this point that the transport company also accepts liability to a certain extent in the cases covered by the “Mobilitätsgarantie” (mobility guarantee) (No. 15).

b) Mobilitätsgarantie (mobility guarantee) (No. 15)

The Mobilitätsgarantie (mobility guarantee) grants the use of higher classes of train and a taxi if a train is more than 20 minutes late and the transport company is responsible for the delay. The guarantee does not apply in the case of strikes and also excludes the refund of travel costs, so the guarantee breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

7. RBG Rheinbahn AG

The company guarantees certain connections only after 8PM and reimburses taxi costs for a missed connection. There is no (partial) refund of the fare either for missed connections, or for delay, so the guarantee is, particularly since taxi costs incurred before 8PM are not reimbursed, inconsistent with Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

8. WSW Wuppertaler Stadtwerke

See the details above at C. I. 7.

9. VRS Verkehrsverbund Rhein-Sieg (Rhein-Sieg Transport Association)

a) Exclusion of Liability (No. 13)

See the details above at C. I. 6. a) and b).

b) Mobilitätsgarantie (Mobility guarantee)

The Mobilitätsgarantie (mobility guarantee) provides for the use of higher classes of train and for a taxi if the train is more than 20 minutes late and the transport company is responsible for the delay. According to the company's Internet site, the guarantee does not apply in the case of

strike³⁸ and it also excludes refunds of fares, so it breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive. The deadline of seven days for the submission of applications for refunds is too short and therefore inconsistent with Art. 3 Paras. 1 and 3b) of the annex of the Unfair Commercial Practices Directive.

10. Stadtwerke Munster

The Stadtwerke Munster reimburses taxi costs incurred if passengers reach their destinations 20 minutes late, there is no alternative travel, and the cause is not due to force majeure. In respect of the reimbursement of taxi costs, the regulation is unobjectionable. Here too however, the customary rights applicable in the event of non-performance or insufficient performance are excluded, since customers must still pay the full fare. The guarantee therefore breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

It is questionable whether the connection guarantee contravenes the Unfair Commercial Practices Directive. The connection guarantee applies to certain lines after 9PM. During the day the Stadtwerke refers customers to the option of continuing their journeys at intervals of 10 or 20 minutes. On first glance, this seems adequate, since passengers can take the next bus to continue their journey. In combination with the exclusion of the customer's other rights, such as the right of withdrawal, however, there is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. For passengers, there is no possibility of withdrawing from the contract at short notice, or of receiving a refund for the ticket already paid for and then taking a taxi, in order to reach a train in a railway station on time, for example.

Since liability for certain connections at night is excluded, the CC are also inconsistent with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive .

³⁸ The formulation in the conditions of carriage under no. 15 is however not objectionable, because there it is stated that: "Circumstances that are not the responsibility of the transport company, in particular force majeure, are not affected by the provisions of this clause." On the company's website however, it states that: "no claims can be brought for delays due to force majeure, such as accidents, extreme weather catastrophes, bomb threats, strikes etc.". Accidents and strikes do not necessarily however constitute force majeure, so the exclusion of liability on the website, at least in its current formulation, is too comprehensive and may deter passengers from asserting their rights.

11. AVV Aachener Verkehrsverbund

The AVV grants passengers a guarantee ticket if a bus or train is delayed by more than 20 minutes. They do not however accept liability for delays due to strikes and those arising during the journey. Applications for compensation must be made within a week. The provision of compensation in the form of vouchers contradicts Art. 15 Para. 2 of the proposed regulation and the exclusions of liability and the limited time allowed for making claims infringe Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

12. BVG Berliner Verkehrsbetriebe

Customers receive a free ticket for delays of over 20 minutes. Taxi costs of a maximum of 25 Euros are only reimbursed if they are incurred from 11PM to 5AM and if the passenger was obliged to take a taxi. This limited reimbursement of taxi costs and the refusal to recognise customers' rights during the remaining hours, and especially the right of withdrawal, breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (see the details on the connection guarantee above at No. 10).

13. EVAG Erfurter Verkehrsbetriebe AG

The EVAG does not refund fares, so its CC are not consistent with Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive. A connection guarantee is only given for some "guaranteed stops" from 9PM to 4AM. The failure to recognise customers' rights during the remaining hours and for other stops infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

14. MVG Münchner Verkehrsgesellschaft (Munich Verkehrsgesellschaft)

The MVG grants a refund of 4.80 Euros in cash for a delay of more than 20 minutes. If a passenger misses his last connection, the MVG refunds taxi costs of 25 Euros. Refunds are however

excluded in the case of a strike. This limitation of liability and refund breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The provision of compensation only in the form of vouchers contradicts Art. 15 Para. 2 of the proposed regulation. The cut-off period of 10 days for registering the incident is too short and therefore does not comply with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

15. Bogestra

The company guarantees connections for certain connections and reimburses taxi costs only if a connection is missed after 8PM. There is also no (partial) refund of fares either for a missed connection or for delay. The guarantee is therefore, especially since no taxi costs incurred before 8PM are reimbursed, inconsistent with Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

16. GVH - Großraum-Verkehr Hannover (Greater Hannover Transport Association)

The GVH offers its customers a day ticket for a delay of more than 20 minutes, if the delay is the fault of the transport company. Customers are reimbursed taxi costs of up to 20 Euros where the costs are incurred in the hours from 11PM to 5AM.

The exclusive compensation in the form of vouchers infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since in the case of an occasional traveller (e.g. a tourist) it would seem possible that liability is in fact virtually excluded where he cannot redeem the voucher. Under the terms of Art. 15 Para. 2 of the proposed regulation, compensation must be paid in cash at the customer's discretion.

The amount of compensation of 20 Euros is inadequate, and this compensation also only covers consequential damages. The customer must still pay the full fare. For transport in the hours from 5AM to 11PM there is also no reimbursement for consequential damages, so that taken all together, the provisions breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

17. NOB - Nord-Ostsee-Bahn

The NOB guarantees its customers a fare refund of 50% if the passenger reaches his destination with a delay of more than 30 minutes and this is due to the delay or cancellation of a NOB train. A claim for refund also requires that in determining the 30-minute cut-off period, no alternative public transport is available.

The company's general terms and conditions are inconsistent with Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since they do not provide for any refund of consequential damages, such as taxi costs. The amount of compensation is also lower than that prescribed under Art. 15 Para. 1 of the proposed regulation, so that a minimum compensation payment of 75% of the fare is paid in the event of a delay of more than 180 minutes.

18. ViP - Verkehrsbetrieb Potsdam GmbH

The ViP grants its customers a day ticket for Potsdam for a delay of more than 20 minutes, if the delay is the fault of the transport company. In the hours from 11PM until 5AM passengers are reimbursed the costs of a taxi up to a maximum of 10 Euros.

On the one hand, the exclusive compensation in the form of vouchers breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since in the case of an occasional traveller (e.g. a tourist) it would seem possible that liability is in fact virtually excluded where he cannot redeem the voucher. Under the terms of Art. 15 Para. 2 of the proposed regulation, the compensation payment must be made in cash if the passenger so wishes, even though it is only a small sum.

On the other hand, there is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, because the amount of compensation for a taxi journey made at night is too low and only compensation for consequential damages is paid. For transport between 5AM to 11PM there is also no refund for consequential damages.

19. moBiel – The mobility guarantee in Bielefeld

moBiel offers a consideration in the form of a 9AM daily ticket (price level 1 Bielefeld) for a delay of more than 20 minutes. The value of this ticket may however be lower than the actual value of the ticket used, so the complete fare is not reimbursed and the clause therefore contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Taxi costs of up to 25 Euros are refunded for a missed connection due to delay. This limitation is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

Passengers must make claims within 5 days. This cut-off period does not give the customer enough time to inform himself sufficiently, so this clause contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, because it unduly restricts passengers' ability to make claims.

II. Sweden

1. Hallandstrafiken – Halland County Transport – Travel guarantee special for rail

The CC grant compensation for delays of more than 20 minutes for journeys within the county, and for delays of more than 30 minutes for journeys within or outside the county.

Customers are paid compensation for taxi costs in cash of up to 200 SEK (approx. €21). The limitation of any further claims for compensation is a breach of Art. 3 Para. 1b) of the annex of the KlauselRL. Claims for consequential damages are not excluded, but in individual cases it is possible that passengers will not be reimbursed for costs in excess of the amount of the compensation, which amounts to an exclusion of claims.

Customers also receive a voucher to the value of 50 SEK (approx. €5) for delays of less than an hour occurring within the county, with compensation of 100 SEK (approx. €11) paid for a delay of more than an hour. The amount of the compensation payments seems open to criticism. Art. 15 Para 1 of the proposed regulation, which is also to apply to domestic railways, provides for a progressive increase in compensation payments for longer delays. If the train is more than an hour late, passengers are prevented from making further claims by the upper limit of 100 SEK.

There are also no provisions corresponding with Art. 16 Para. 2a) of the proposed regulation dealing with the refund of a full fare in the event of a missed connections or delay.

To receive compensation, the passenger must make a written application and submit a copy of a valid monthly ticket. The extent to which holders of single-journey tickets can assert claims is therefore questionable. Claims for compensation must basically be available to all passengers. If the clause only applies to monthly ticket holders it infringes Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive, since holders of single-journey tickets are thereby denied all claims to compensation.

2. Kalmar County Public Transport

Customers receive compensation of up to 350 SKR (ca. €38) for delays of more than 20 minutes as well as refunds for taxi costs and for the expense of the using a private car.

The compensation form must be sent to the transport company within 2 weeks after the event. This is unobjectionable, since it is possible for customers to inform themselves as to their rights and make claims within this period of time.

The amount of compensation is limited to 300 SEK (approx. €2) in cash or 350 SEK (approx. €8) in the case of a voucher. Although only local and regional transport is involved, in some cases, the use of a taxi for example, the actual costs incurred could exceed the amount of compensation. The upper limit of of 350 SEK may therefore prevent customers from claiming further costs, which constitutes a breach of Art. 3 Para. 1b) of the annex of the Directive on Unfair Commercial Practices.

Consequential damages (e.g. costs for a new ticket, parking costs, a missed doctors appointment, or loss of earnings) are not reimbursed. Since the CC also exclude liability for a culpable breach of contract, this clause would seem to be unfair as defined by Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The fact that the costs of the ticket are not refunded represents a further breach.

3. Skånetrafiken – Skåne County Public Transport – Travel Guarantee

This service guarantee deals with transport by bus and train in the county of Skåne.

In case of a delay of more than 20 minutes, the passenger receives either a day ticket for the entire region of the transport company or, if he has continued his journey by taxi or by car, the costs incurred to a maximum of up to 500 SEK (approx. €54).

If the passenger continues his journey by train, an additional progressive increase of compensation in accordance with Art. 15 Para. 1 of the proposed regulations would seem appropriate.

The limitation of compensation claims to 500 SEK, and the exclusion of liability in the case of strikes and lockouts breach Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

4. Uppland County Public Transport

In case of errors in the timetable or information that makes the journey difficult or impossible, the CC offer passengers a day ticket, which is valid for the entire county and for urban transport.

For a delay longer than 20 minutes, the transport company pays compensation for taxi costs in cash of up to 300 SEK (approx. €32) or in the form of a voucher for the purchase of a ticket to the value of up to 350 SEK (approx. €38). This limitation contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The fact that the CC do not grant any refunds of tickets and the transport company also accepts no liability in the case of a strike is a further breach of this standard.

If the passenger continues his journey by train, an additional progressive increase of compensation in accordance with Art. 15 Para. 1 of the proposed regulation would seem appropriate.

5. Västtrafik – Western Local and Regional Public Transport (Bus, Rail, Ship)

The CC grant compensation for taxi costs of €20 in cash, or a voucher for €25 in case of a delay of more than 20 minutes, even where the actual taxi costs exceed this amount. This limitation and the resulting restriction of passengers' claims is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, as is the provision that the transport company is not obliged to assume liability in the event of a strike.

6. Blekingetrafiken – Blekinge County Public Transport

The transport company reimburses passengers for taxi costs to the value of up to 200 SEK (approx. €21), or in case of a voucher to the value of 250 SEK (approx. €27) for a delay of more than 20 minutes. The transport company pays compensation amounting to restitution for the tax paid on the kilometres driven if a private car is used. If they have not used a taxi or a car, passengers receive compensation of 200 SEK or a voucher worth 250 SEK for the “inconvenience”.

The ticket price is not refunded. If a passenger takes a taxi or a car, any claim to a refund of the ticket price is excluded, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. If the customer does not use a taxi or a car, the refund of the ticket price usually represents final and conclusive compensation.

The cut-off period of 2 weeks for making claims is unobjectionable.

Liability is excluded in case of a strike, which contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

7. Stockholm Regional Public Transport (Bus, Rail, Tram)

Passengers receive compensation (only) for taxi costs of up to 400 SEK (approx. €43) for a delay of more than 20 minutes. This restriction of compensation claims fundamentally breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Should the actual taxi costs exceed 400 SEK, they are wholly or partly reimbursed by the company’s customer service. If compensation is paid in the form of a voucher, its value is increased by 25 SEK.

Liability is excluded in the case of strikes and lockouts. Consequential damages (e.g. the costs of a missed appointment) are not compensated, nor are the petrol costs incurred in the use of the passenger’s own car instead of a taxi. These general exclusions of liability breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

8. Public transport operators of several modalities (Samtrafiken i Sverige AB) – Resplus – Terms of Travel (all means of transport)

In event of a delay or a missed connection, the costs of transport with another means of transport are reimbursed only in the case of travel to a “personal event”, e.g. funeral or wedding, although travel to a place of work is not a sufficient ground for claim. The transport company is however fundamentally obliged to make restitution for damage caused by their non-performance or inadequate performance. The exclusion of liability infringes Art.3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

A passenger can claim a refund of the entire ticket if a (continued) journey no longer serves any purpose for the passenger due to delay or cancellation and he returns to the place of departure. Season ticket holders are however explicitly excluded from this provision. This complete refusal to compensate season ticket holders breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

If the passenger misses his last connection and is delayed by 30 minutes in arriving at his destination, he can claim a refund for the costs incurred due to the termination of his journey.

Further infringements of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive include no reimbursement of consequential damages such as loss of earnings, and no provision for a refund of the ticket price for delay or a missed connection or for any general compensation.

III. Denmark: DK – Metro Travel Guarantee

Metro pays taxi costs of up to 200 DKK (approx. 27 Euros) from a delay of a half an hour. No compensation is paid for delay, nor are fares refunded where a passenger refrains from travelling, so the CC breach Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive. The limitation of compensation for consequential damages is also an undue restriction of consumers’ rights as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, because despite the relatively short journeys made using the regional and local trans-

port, higher taxi costs are a distinct possibility, due to a high volume of urban traffic, for example. Care and assistance for delayed passengers is not provided for.

IV. Greece: Customer Charters of OASA, ETHEL, ILPAP, ISAP

The complete exclusion of liability for damage caused due to industrial action and the limitation of the amount of compensation in the case of a delay to a maximum of 15 Euros breaches Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive. A refund of the ticket price is also not provided for.

V. United Kingdom

1. UK – Tyne & Wear Metro Tram

The National Rail CC do not apply.

The CC explicitly exclude liability for consequential damages – missed connections and possible business losses are specifically mentioned – and thereby breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Progressively increased compensation payments are not paid, nor is there any reimbursement of the costs of journeys partially made that serve no further purpose, or any provision for care and assistance.

2. UK-SPT Subway

The National Rail CC do not apply.

The CC only grant a refund if the passenger refrains from travelling due to the cancellation of a circular line and where alternative transport would serve no purpose. The company accepts no further liability for compensation for a late train, and provides no refund of the ticket price for a missed connection or care and assistance. These CC therefore contravene Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

3. Condor Ferries

If a technical problem causes a delay of more than 5 hours, passengers can rescind their booking and receive the price repaid in full, or receive financial compensation of 50 % of the price paid for the inconvenience. The minimum length of delay specified is problematic here. The CC exclude customer claims for non-performance or insufficient performance for delays of less than five hours, constituting a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

In the case of a delay of more than one hour, the transport company guarantees a cash payment or a voucher/reimbursements for refreshments.

The company also refers to compensation for denied boarding due to overbooking. For passengers, it is unclear from this information which claims can be made against the transport company in case of denied boarding, so this clause is inconsistent with the transparency requirement of Art. 5 clause 1 of the Unfair Commercial Practices Directive.

VI. Spain: Metro de Valencia – Metrovalencia's Charter of Service

Only the ticket price is refunded in full for a 10-minute delay, where the traveller does not use the carrier's services. There is no provision for a refund of the costs of a journey partly made that serves no further purpose or for care and assistance. There is also no possibility of compensation for season ticket holders. A compensation payment for delay where the delayed service is still used, as prescribed in Art. 15 Para. 1 of the proposed regulation, is also not provided for.

Breaches therefore exist in respect of Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive.

VII. Summary

Total examined	33
Unobjectionable	1
Defects identified:	
No refund of fares	17
Restriction of claims to compensations / taxi costs	17
Exclusion of liability in case of strikes	11
Limited guarantee	7
No restitution for consequential damages	6
Cut-off period for applications too short	6
Limited connection guarantee	5
Compensation only made in the form of vouchers	4
General exclusion of liability in the case of traffic obstructions	2
Breach of transparency requirement in Art. 5 of Unfair Commercial Practices Directive	2
Compensation amount too low	2
Inadmissible distinction between single-journey ticket holders and season ticket holders	2

A total of 33 service guarantees of the various bus, rail, and ship transport companies from seven European countries were examined.

Only one of these guarantees is unobjectionable: that of the KVG Kasseler Verkehrsgesellschaft AG (Germany).

The other 32 service guarantees mainly breach Art. 3 Paras. 1b) and c) of the annex of the Unfair Commercial Practices Directive. It is mainly the limitation of compensation and taxi costs, the refusal to refund tickets and the exclusion of liability in case of strikes, which unreasonably disadvantage customers.

Specifically:

Transport companies usually reimburse the costs of a taxi where one is necessary due to a delay of more than 20 minutes. Exceptions to this are the compensation provided by NOB – Nord-Ostsee-Bahn (Germany), after a delay of more than 30 minutes; Metro de Valencia (Spain), after a 10-minute delay and Condorferries (UK), after a delay of more than 5 hours.

Compensation for taxi costs is limited in 17 cases, with the limitation ranging from 5 to approx. 43 Euros.

In 17 of the guarantees there is no provision for refunding fare costs. If the relevant transport company is a railway company, the regulation is, as well as a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, inconsistent with Art. 16 Para. 2 of the proposed regulation.

Seven transport companies limit their guarantees, so that in the case of a delay occurring during the day, only the ticket is refunded, but not consequential damages such as the taxi costs, whereas for delays occurring at night, the taxi costs are reimbursed but not the ticket price. This is the procedure of the BVG Berliner Verkehrsbetriebe, GVH – Großraum-Verkehr Hannover and ViP – Verkehrsbetrieb Potsdam GmbH (Germany), among others. The MVG Münchner Verkehrsgesellschaft and mobiel Bielefeld (Germany) provide similar guarantees – in case of delay only the ticket is refunded, whereas in the case of a missed connection the company reimburses only taxi costs.

Five transport companies, including the Stadtwerke Munster, EVAG Erfurter Verkehrsbetriebe AG and RBG Rheinbahn AG (all in Germany) provide a limited connection guarantee, i.e. after a certain hour and only for certain connections or stops.

Six transport companies do not make any restitution for consequential damages. UK - Tyne & Wear Metro Tram (UK), which excludes all liability for consequential damages, should be emphasised here.

Eleven transport companies' CC exclude all liability in the case of strike.

The clauses specifying a cut-off period for claims applied, which are present in six cases and range from 3 to 10 days, are also inadmissible.

Compensation made exclusively in the form of vouchers in four cases and unacceptably low amounts of compensation in two cases breach the Unfair Commercial Practices Directive and Art. 15 Paras. 1 and Para. 2 of the proposed regulation.

D. Airline companies

I. Austria: Austrian Airlines

Under No. 9.2.1 of its general terms and conditions, the air carrier guarantees customers their rights under the terms of Council Regulation (EC) No. 261/2004³⁹ by generally referring to them. The obligations specified in this secondary legal instrument are binding minimum conditions for the airline company (Art. 15 of Council Regulation (EC) No. 261/2004). Under the terms of No. 9.2.2 of the company's general terms and conditions, harmonisation measures should apply if a flight's departure is delayed by more than 5 hours. This information contradicts Art. 4 et seq. of Council Regulation (EC) No. 261/2004. Passengers can, under the terms of Art. 6 Para. 1 iii), assert their rights as defined in Art. 8 Para. 1 a) of Council Regulation (EC) No. 261/2004 from this point in time, but other benefits and care must be provided beforehand. This standard form agreement gives customers the impression that these rights apply only after a delay of more than 5 hours and are not available before this period. Such restrictions do not comply with Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

It should also be noted that the refund amounts specified in "Fluggastrechte (Passenger Rights) II" still refer to the previous Council Regulation (EEC) No. 295/91. The amounts were however increased in Council Regulation (EC) No. 261/2004, resulting in a further breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

II. Belgium

1. fly VLM Airlines (Conditions of Carriage VG)

a) Missed connections, cancellation

Art. 9.2.2 of the CC grants a claim to a continuation of the journey at the earliest opportunity, or via another route, in the event of a missed connection or cancellation, and Art. 10.2 of the CC provides for a refund of tickets, regardless of use. Under the terms of Art. 9.2.3 of the CC these are the only and exclusive options for air passengers, where not otherwise stipulated in the "Convention", which is defined in Art. 1 of the CC as the Montreal Convention (MC). The MC spe-

³⁹ OJ EC 2004, No. L 46, S. 1 et seq.

cifically deals with liability for late arrival. In contrast however, Council Regulation (EC) No. 261/2004 guarantees more comprehensive customer claims, extending to cover delayed departure, denied boarding and cancellation, and prescribing the provision of care and assistance. The references in the CC also lead to the application of Council Regulation (EC) No. 261/2004 and the consumer rights anchored in it being obscured, since in accordance with the premises of the report and the formulation of the CC, the provisions of the CC are regarded as final and conclusive. A breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 may therefore be affirmed.

b) Overbooking

Passengers who cannot board a flight due to overbooking receive general compensation in accordance with the Regulations and Service Information, as well as compensation for meals and accommodation until the next available flight, but the details are not specifically regulated. The CC refer to the MC, but not to Council Regulation (EC) No. 261/2004, for example.

The provisions may be understood by customers to mean that only those who do not fly involuntarily receive compensation. Art. 9.3.4 of the CC also gives the impression that a compensation payment excludes the possibility of any further compensation. The possible grounds for claims listed do not however correspond with those in Art. 4 of Council Regulation (EC) No. 261/2004, constituting a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

c) Delay

There is no provision for compensation payments or other benefits in case of delay. The CC merely state that the flight schedule may change at any time. In view of the detailed regulation of customer claims for denied boarding, missed connections or cancellation, this clause is final and conclusive, so that liability for delay must therefore be regarded as excluded, which is a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

d) Result

Several of the conditions of the CC breach Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

2. SN Brussels Airlines

a) Delay

Under No. 9.1.1 of the CC, the flight times specified in the flight schedule are not guaranteed and not an integral part of the contract of carriage, so flight times can be changed, even after tickets have been issued (No. 9.1.2 of the CC). This clause contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since the airline company is seeking to avoid its liability for special damages due to delay, even in the event of intent and gross negligence⁴⁰. By specifying times on the air ticket, the airline indicates that transport will take place at a certain time, and it cannot unilaterally release itself from its contractual obligations.

Complete exclusion of damages due to delay is however not intended. In the event of delay, passengers are carried on another scheduled flight, via another route, or are refunded in accordance with their use of the ticket (No. 9.2.3 of the CC). These are the “only and exclusive” legal remedies available to passengers, “where not otherwise specified in the Convention”. According to the definition in Art. 1 of the CC, the “Convention” means the Warsaw Convention, Montreal Convention and Council Regulation (EC) No. 889/2002, although this formulation specifically does not refer to Council Regulation (EC) No. 261/2004. Arrangements for compensation are also not commensurate with the airline company’s obligations under the terms of that Council Regulation. In case of delay, passengers have a right to care and assistance under Art. 9 and to a refund or alternative transport under the terms of Art. 8 of Council Regulation (EC) No. 261/2004, regardless of the length of the delay and length of the flight. In this service guarantee there are however no provisions for care and assistance (Art. 9) such as meals or hotel accommodation, nor are the options of a return flight to the place of departure or a complete refund, even for journeys partly made and journeys that no longer serve any purpose (Art. 8 Para. 1 a)) regulated. Such limitations

⁴⁰ cf. for German law: OLG Köln, Urt. Vom 12.9.2003 – 6 U 29/03, RRa 2003, 275, 278.

and a waiver of obligations vis-à-vis passengers breach Art. 15 Para. 1 Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

b) Cancellation

In the event of cancellation, the same benefits are provided as for delay. According to the wording, No. 9.2.3 does not apply to the circumstances mentioned in No. 9.2.2. The formulation and presentation give the impression however, that the benefits listed are final and conclusive. Under Art. 5 of Council Regulation (EC) No. 261/2004, passengers are entitled to compensation and benefits under the terms of Arts. 7, 8, 9 of Council Regulation (EC) No. 261/2004, which the service guarantee excludes, contravening Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

c) Overbooking

The regulations are not consistent with the provisions dealing with denied boarding under the terms of Art. 4 of Council Regulation (EC) No. 261/2004. This regulation states that volunteers willing to surrender their reservations on a flight may receive benefits under Art. 8 in the event of denied boarding, and where boarding is denied to passengers against their will, passengers are also entitled to compensation and other assistance under Arts. 7, 8 and 9 of Council Regulation (EC) No. 261/2004. Under Art. 16.2 of the CC however, volunteers receive only “appropriate compensation”. The compensation granted under Art. 16.3 (b) CC to a passenger to whom boarding is denied against his will, does not comply with the compensation payments specified under Art. 7 Para. 1 of Council Regulation (EC) No. 261/2004. There is also no right to a return flight to the place of departure under the terms of Art. 8 Para. 1a) of Council Regulation (EC) No. 261/2004. The assistance guaranteed under the terms of Art. 9 Paras. 1 and 2 of Council Regulation (EC) No. 261/2004 is restricted here (e.g. Art. 16.3 c) of the CC). Since passengers’ rights are significantly restricted and excluded, this service guarantee infringes Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

d) Result

The result is that the SN Brussels Airlines' service guarantee breaches Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

III. Cyprus

1. Cyprus Airways

The CC are unobjectionable.

2. Eurocypria Airlines

The CC contain no provisions as to compensation or claims for assistance if a journey is cancelled, as provided for in Art. 5 Para. 1, Art. 7 Para. 1 and Art. 8 Para. 1 of Council Regulation (EC) No. 261/2004. The CC exclude any right to care and assistance and communication in the event of delay, since such rights are not explicitly mentioned and the rights provided for are final and conclusive. Provisions for refund in the event of denied boarding and cancellation and a delay of at least 5 hours do not extend to cover journeys partly made that no longer serve any purpose. A return flight to the place of departure is also not granted.

In case of denied boarding due to overbooking, the CC refer generally to the company's own compensation guidelines. These regulations are not transparent as defined in Art. 5 clause 1 of the Unfair Commercial Practices Directive. In the event of denied boarding, the carrier must provide compensation, assistance and care under the terms of Arts. 7, 8 and 9 of Council Regulation (EC) No. 261/2004 (cf. Art. 4 Para. 3 of the secondary legal instrument). This also applies in the case of denied boarding against the passenger's will.

The provision in the CC stipulating a prior search for a passenger who will voluntarily forgo a flight is consistent with Council Regulation (EC) No. 261/2004, but lacks the obligatory provision of a right to compensation and a refund, cf. Art. 4 Para. 1 of Council Regulation (EC) No. 261/2004.

The rejection of all customer claims for refunds made after the ticket's validity has expired infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

IV. The Czech Republic: Czech Airlines

The CC are not consistent with Council Regulation (EC) No. 261/2004. No claims for care and assistance or compensation are recognised in the event of cancellation or denied boarding, and compensation for delay, involuntary denied boarding, cancellation, or for a flight made as part of a journey which no longer serves any purpose, is not granted. A return flight to the place of departure in such cases is also not offered and consequential damages are completely excluded. On the issue of involuntary denied boarding, a general reference is made to the compensation guidelines. Passengers must make claims within 30 days after expiry of the ticket's validity in order to receive a refund. The CC consequently breach Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1 and Art. 5 of the Unfair Commercial Practices Directive.

V. Denmark, Sweden, Norway

1. SAS (General Conditions of Carriage)

Measured against Council Regulation (EC) No. 261/2004, the benefits granted in the event of delay are incomplete. The clauses give customers the impression that they can claim no further rights, so the resulting restriction of liability infringes Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The compensation and benefits provided for in the event of cancellation are generally commensurate with the rights of air passengers under the terms of Art. 7 et seq. of Council Regulation (EC) No. 261/2004, but are very general. No concrete compensation amount or type of care and assistance offered is specified, for example, and there is also no mention of Council Regulation (EC) No. 261/2004, so air passengers cannot determine their exact rights from the CC alone. The rights specified are also final and conclusive (Art. 9.2.5 of the CC). The resulting restriction of liability contravenes Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

In the event of overbooking, passengers are reimbursed and receive adequate compensation for accommodation and meals until the next possible departure. A "compensation policy" is referred

to but not defined, so passengers cannot determine their specific rights in case of overbooking. This provision is therefore not transparent as defined in Art. 5 clause 1 of the Unfair Commercial Practices Directive. The regulations are also incomplete and therefore infringe Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

2. Scandinavian Airlines SAS (Notice on passenger rights in the event of long delay or cancellation of flights or denied boarding)

The CC do not regulate the legal consequences of missed connections. The detailed and correct statement of air passengers' rights in the event of delay, cancellation and denied boarding give the impression that everything is conclusively regulated, so liability for missed connections must be regarded as excluded, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. The complete exclusion also infringes Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

VI. Estonia

1. EST - Estonian Airlines

a) Cancellation of a Flight

If a scheduled flight for which at least one seat was reserved is cancelled, Council Regulation (EC) No. 261/2004 – cf. Art. 2 j) of Council Regulation (EC) No. 261/2004 – prescribes the provision of benefits, assistance and compensation under the terms of Art. 5 Para. 1 of Council Regulation (EC) No. 261/2004. The assistance Estonia Airlines offers in the event of a cancelled flight is limited to alternative transport or a refund of the ticket for the route involved. Neither financial compensation, in compliance with Art. 7 of the Council Regulation, nor a claim for care and assistance under Art. 9 of the Council Regulation is provided for. The ticket costs of journeys partially made that no longer serve any purpose due to a cancelled flight are also not refunded, contravening Art. 8 Para. 1 a) of the Council Regulation and a return flight to the place of departure as soon as possible specified by the Council Regulation is also not offered, infringing Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

Clause 10.5.1 of Estonia Airlines' CC, under which the carrier reserves the right to refuse to refund tickets after their validity has expired, constitutes a further inadmissible deviation from Council Regulation (EC) No. 261/2004. Since tickets are normally valid for one year, the possibility of a refund under the terms of Art. 8 Para. 1 a) of Council Regulation (EC) No. 261/2004 is excluded after one year. This unreasonably restricts passengers' rights in the case of non-performance or insufficient performance on the part of the carrier as defined in Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

b) Delay

Council Regulation (EC) No. 261/2004 provides for care and assistance after a delay of at least two hours (Art. 9), and for a refund for a delay of more than five hours (Art. 8 Para. 1 a). Estonia Airlines' CC however grant refunds only to an inadequate extent. Any further care and assistance is also excluded, which is a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004. The complete exclusion of liability for consequential damages infringes Art. 19 of the MC, which specifies fundamental liability for all damages due to delay, unless the carrier can prove that it has undertaken all reasonable and possible measures to avoid the damage.

c) Denied boarding

The generalised reference to the compensation guidelines in case of denied boarding due to overbooking is not transparent as defined in Art. 5 clause 1 of the Unfair Commercial Practices Directive (cf. also under D. III. 2.).

d) Miscellaneous

The carrier cannot, at least in respect of compensation and refunds, reserve the right to pay compensation only in the original method of payment. The CC therefore breach Art. 7 Para. 3 of Council Regulation (EC) No. 261/2004, which provides for compensation in cash, cheque or bank transfer, or alternatively – with the passenger's written consent – in the form of travel vouchers.

2. EST - Aero Airlines

The CC breach Council Regulation (EC) No. 261/2004, because the provisions governing cases of cancellation, delay and denied boarding are inadequate (cf. also the examination above at D. VI. 1.). Claims to compensation and assistance in case of a cancelled flight are excluded. The conditions of carriage also grant no reimbursement for journeys partly made that no longer serve any purpose, nor do they cover the option of a return flight to the place of departure and the compensation for a delayed flight is inadequate. The generalised reference to the compensation guidelines breaches the transparency requirement and the complete exclusion of consequential damages is a breach of Art. 19 of the MC. The form of compensation may also not generally be made in the form of the original method of payment.

VII. Finland

1. Finnair

The CC breach Art. 5 Para. 1, Art. 7 Para. 1, and Art. 8 Para. 1 of Council Regulation (EC) No. 261/2004, because they do not allow any claims for compensation or care for a cancelled journey. In contradiction to Art. 6 Para. 1 and Art. 9 Paras. 1 and 2 of Council Regulation (EC) No. 261/2004, no claim for assistance and communication can be made in the event of delay. The provision granting refunds in the event of denied boarding and cancellation, or of a delay of at least five hours, does not extend to include compensation for journeys only partly completed that no longer serve a purpose in relation to the passenger's original travel plans. The carrier also does not bear the costs of a return flight to the initial place of departure where a journey no longer serves any purpose. The generalised reference to the compensation guidelines in the event of denied boarding is inadequate (cf. under D. VI. 1.). The exclusion of refunds claimed after the ticket's validity has expired infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and the complete exclusion of liability for consequential damages breaches Art. 19 of the MC.

2. Finncomm Airlines

No objections.

3. Air Finland

The CC are coextensive with Finnair's and therefore open to objection for the same reasons (cf. under D. VII. 1.).

VIII. France: Air France

Air France grants only those rights stipulated in Art. IX No. 2 (b) of its CC in the event of a cancelled or delayed flight. Further claims cannot, according to Art. IX No. 2 (c) of the CC, be brought, where the MC does not rule otherwise, which illegitimately excludes claims to care and assistance for air passengers as specified in Council Regulation (EC) No. 261/2004 (cf. Art. 15 Para. 1 of the Council Regulation), so that these provisions breach Council Regulation (EC) No. 261/2004.

IX. Germany

1. Lufthansa AG

No objections. The CC are particularly consistent with Council Regulation (EC) No. 261/2004.

2. Air Berlin

a) Restricted Liability for Indirect and Consequential Damages

Under the terms of provision No. 8 of its standard business conditions, Air Berlin is only liable for indirect and consequential damages if these are caused intentionally or through gross negligence. Damages to person are excepted from this regulation. The MC does not however allow airlines to exclude liability for direct and consequential damages caused by negligence, so the provision infringes Art. 26 of the MC.

b) Exclusion of Liability within the Framework of Council Regulation (EC) No. 261/2004

Air Berlin precedes its statement of exclusion of liability in extraordinary circumstances, which is designed to cover all claims arising from the Council Regulation, with a reference to Council Regulation (EG) No. 261/2004. In Art. 5 Para. 3 of the Council Regulation, this exclusion is however restricted to the case of cancellation. Recital No. 14, under which obligations arising from the Council Regulation may be waived if an event is due to extraordinary circumstances, may be adduced to justify the restricted liability. Its evolutionary history however, results in the application of liability under the terms of Arts. 8 and 9 of the Council Regulation in any case⁴¹. Since under the terms of Art. 15 Para. 1 of the Council Regulation, the Council Regulation may not be waived to the detriment of consumers, this exclusion of liability breaches the Council Regulation.

3. Condor

No objections.

4. LTU (General booking and reservation conditions for LTU flights for flight-only bookings made online for flights departing after 01.11.2005)

The CC include neither regulations on delay, cancellation, missed connections or overbooking (only general booking and booking conditions). Since any liability is therefore excluded, this is a final and conclusive regulation in breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, Art. 15 Para. 1 Council Regulation (EC) No. 261/2004, and Art. 26 of the MC.

⁴¹ Cf. *Staudinger/Schmidt-Bendun*, NJW 2004, 1897, 1898 and the plenary session document A5-0464/2003., P. 8.
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5. Hapag-Lloyd Express

a) Delay, denied boarding, cancellation

In the event of delay, denied boarding or cancellation, HLX grants compensation and benefits under the terms of Council Regulation (EC) No. 261/2004. Liability is excluded in the event of strike, which contravenes Art. 15 of Council Regulation (EC) No. 261/2004, which states that obligations vis-à-vis air passengers may not be not limited or waived. Not every non-performance or inadequate performance can be attributed to the airline company. Whether a strike counts as grounds for an admissible exclusion of liability is debatable. Industrial action is one of the fundamental business risks of the operator, so strikes, particularly those by an airline company's own crewmembers, are basically the responsibility of the company⁴². Since the general formulation "strike" must also include actions by the company's own employees, this exclusion of liability breaches Art. 15 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

HLX refers in its CC to the annex to Council Regulation (EC) 2027/1997 in the form of Council Regulation (EC) 889/2002 and thus to liability for delays in the carriage of airline passengers, but declares at the same time that this reference is neither a basis for claims nor part of the contract of carriage. Under the terms of No. X. 24. Para. 1 of the CC, Council Regulation (EC) No. 2027/1997 and the MC apply in respect of liability, so the reference is neither correct nor clearly and comprehensibly formulated and therefore breaches Art. 5 of the Unfair Commercial Practices Directive.

b) Missed connections

The airline company does not accept liability for a missed connecting flight. HLX only flies non-stop flights, so customers basically do not rely on connecting flights to reach their destination. The CC state that combinations with flights of other airlines are undertaken at the customer's own risk.

The airline company wishes thereby to indicate that it will not take any responsibility for further damages arising from the failure to comply with advertised flight times, even in the case of inten-

⁴² Schmid, in: *Giemulla/Schmid*, Art. 19 MC, Rn. 57.

tion and gross negligence. However damages for delay (e.g. accommodation and catering costs) include damages caused if the only connecting flight is missed due to delayed arrival⁴³. If a passenger allows for “sufficient time between flights” but still misses the connecting flight, the airline company is liable for the consequent damages, even if the passenger wants to continue his journey with another airline. With this clause, the airline company is seeking to exclude liability for special damages for delay. This complete exclusion contravenes Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and is therefore null and void under the terms of Art. 26 of the MC. It also contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive⁴⁴.

c) Result

The exclusion of liability for strikes and missed connections is a breach of Art. 15 of Council Regulation (EC) No. 261/2004, and of Art. 3 Para. 1b) and Art. 5 of the Unfair Commercial Practices Directive.

6. Hapag Lloyd

a) Delay, Cancellation

There are no provisions concerning liability for delay, cancellation and denied boarding. The service guarantee must be regarded as final and conclusive, but the mere absence of regulation on these issues does not represent an exclusion of liability, since the provisions of the MC and Council Regulation (EC) No. 261/2004 apply in the absence of any other regulation.

The reference in the CCs to the annex to Council Regulation (EC) 2027/97 in the form of Council Regulation (EC) 889/02 contravenes Art. 5 Unfair Commercial Practices Directive.

b) Missed connections

HLX explicitly rejects any liability for missed connections, including connecting flights and feeder flights. This complete exclusion breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

⁴³ Schmid, in: *Giemulla/Schmid*, MC, Art. 19 MC, Rn. 2.

⁴⁴ cf. on whether RyanAir's contractual conditions comply with German law: OLG Köln, Urt. V. 12.9.2003 – 6 U 29/03, RRa 2003, 275, 278.

c) Result

The provisions breach Art. 3 Para. 1, 5 of the Unfair Commercial Practices Directive and Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

7. dba Luftfahrtgesellschaft mbH

No objections.

8. Germanwings (General conditions of carriage for passengers and luggage)

a) Delay

Germanwings does not guarantee flight times. Changes can be made at any time. This clause is inadmissible (cf. under D. II. 1.). The airline company does not intend to completely exclude liability for damages for delay through this provision however, since the CC refer further on in Art. 9.2.2 to liability for compensation and benefits in the event of delay under the terms of Council Regulation (EC) No. 261/2004.

b) Missed connections

Germanwings does not accept liability for missed connecting flights, since the airline offers only direct intercity services and does not provide connecting flights. Customers combine their flights with flights from other airline companies at their own risk. This complete exclusion of compensation for any consequential damages contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and Art. 15 of Council Regulation (EC) No. 261/2004 (cf. under D. IX. 5. b)).

X. Greece

1. Olympic Airlines

a) Delay

The airline company does not guarantee compliance with advertised flight times, which can be changed without previous announcement. This clause breaches Art. 3 Para. 1b) of the annex of

the Unfair Commercial Practices Directive, because the airline company thereby excludes liability for special damages due to delay, even in the case of intention and gross negligence. There are no provisions governing compensation and benefits in case of delay. The conditions of carriage refer only to the Warsaw Convention (WC) in respect of the exclusion of liability⁴⁵. The reference to the Convention does not however mean that the provisions of Council Regulation (EC) No. 261/2004 apply, especially since the formulation in the CC is to be regarded as final and conclusive and therefore as a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

b) Missed Connections

The airline company also accepts no liability for the provision of connecting flights, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and Art. 15 of Council Regulation (EC) No. 261/2004.

c) Denied Boarding due to Overbooking, Cancellation

The CC include no provisions on denied boarding, e.g. in case of overbooking and cancellation. The lack of regulation alone does not give rise to a fundamental exclusion of liability, although from the fact that the airline company seeks to avoid liability for a missed connecting flight nor for delay, air passengers may assume that no liability is accepted for denied boarding or cancellation either. The CC therefore contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

d) Result

The result is a breach of Art. 15 of Council Regulation (EC) No. 261/2004 and of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

⁴⁵ Convention on the unification of certain rules relating to international carriage by air, in the version of 28.5.1955 (Warsaw Convention in version of Den Haag of 28 September 1955).

2. Aegean Airlines

a) Delay, Overbooking, Cancellation

The CC state that the airline company does not guarantee compliance with advertised flight times for national and international flights. The company may change the departure and arrival times on its flight schedules (cf. under D. II. 1. a)).

The CC do not mention compensation and benefits in case of delay, which, in connection with the “failure to grant guarantees” (clause 1) gives passengers the impression that the airline company intends to completely exclude damages for delay. The CC also exclude all claims made by passengers in the event of delay, which is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004. There are no provisions for refund in the event of denied boarding due to overbooking or cancellation. Since the CC are considered to be final and conclusive, compensation must be regarded as excluded, so the CC breach Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

b) Missed Connections

The airline company also accepts no liability for missed connections. This complete exclusion of liability breaches Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 (cf. under D. IX. 5. b)).

XI. Hungary: Malév

Under the provisions of Arts. 4-6 of Council Regulation (EC) No. 261/2004 and Art. 9 Para. 1b) of Council Regulation (EC) No. 261/2004, the airline company must provide free hotel accommodation if a stay of one or more nights, or a stay in addition to that intended by the passenger, is necessary. Malév, in Nos. 14.4.3., 14.5.5. and 14.6.1., precludes the provision of this care and assistance for passengers with a residence in the city where the accommodation would be provided. The Council Regulation does not allow any such restriction of liability, so this is an inadmissible deviation from the Council Regulation under the terms of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

Although it is the goal of the provisions covering care and assistance in Art. 9 Council Regulation (EC) No. 261/2004 to ensure that a detriment typically suffered by passengers in the event of the delayed departure of a flight does not occur,⁴⁶ and although passengers living near the airport from which they are to depart fundamentally do not suffer any detriment in the form of accommodation costs if their flight is delayed, this is an inadmissible discrimination against air passengers who happen to live in the same city as the airport from which they are departing. It must also be noted that it may be advisable for reasons of time to stay in an airport hotel and not have to put up with a journey of several hours - and that twice - to your own home. The provision therefore breaches Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

XII. Ireland: Ryanair

Ryanair grants no compensation for the delay and cancellation of flights for reasons beyond their control. This apparently contradicts the Council Regulation, since carriers can be obliged to provide of accommodation and catering costs, regardless of fault. The formulation also deviates from Art. 5 Para. 3 of Council Regulation (EC) No. 261/2004, under which liability (for damages) is only excluded if “*the cancellation is caused by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken.*” This exclusion of liability applies only to cancelled, not to delayed flights.

At the same point, the CC state that passengers’ rights under the terms of Council Regulation (EC) No. 261/2004 remain unaffected, although the Council Regulation’s provisions also apply without reference being made to them in the CC. The statement and formulation could however give customers the impression that they can only claim the explicitly mentioned rights, which may possibly deter them from making further claims available to them under the provisions of Council Regulation (EC) No. 261/2004. The clause therefore contravenes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive and Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

⁴⁶ Cf. *Staudinger/Schmidt-Bendun*, NJW 2004, 1897, 1900.

XIII. Italy: Alitalia

No objections.

XIV. Latvia: Air Baltic

The CC do not provide for any compensation or care if a journey is cancelled under Art. 5 Para. 1, Art. 7 Para. 1 and Art. 8 Para. 1 of Council Regulation (EC) No. 261/2004. In case of delay – in contradiction to Art. 6 Para. 1 and Art. 9 Paras. 1 and 2 – claims to care and assistance and communication are excluded, since these are not explicitly mentioned and the rights specified are to be regarded as final and conclusive. Refunds for cases of denied boarding, cancellation, and a delay of at least 5 hours do not cover journeys already partly undertaken that no longer serve any purpose in relation to the passengers original travel plans. The CC also do not grant refunds connected with a return flight to the place of departure.

The generalised reference to the compensation guidelines covering denied boarding is inadequate and does not meet the transparency requirement in Art. 5 clause 1 of the Unfair Commercial Practices Directive. The provisions of the CC on a prior search for a passenger who will voluntarily forgo a flight are consistent with Council Regulation (EC) No. 261/2004, but lack the obligatory regulation of a claim for compensation and refund, cf. Art. 4 Para. 1 of Council Regulation (EC) No. 261/2004.

The exclusion of refunds after the validity of tickets has expired infringes Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

XV. Lithuania: flyLAL

FlyLAL's CC are consistent with Council Regulation (EC) No. 261/2004, although not completely: the carrier grants only a refund for unused tickets for delays of more than 5 hours, instead of also offering compensation for parts of a journey begun which no longer serves any purpose and a possible return flight to the place of departure the earliest opportunity in contradiction of

Art. 6 Para. 1iii), 8 Para. 1a) of Council Regulation (EC) No. 261/2004. The CC also exclude claims for compensation payments for a cancelled flight where the carrier can prove that the cancellation was due to extraordinary circumstances, whereas Art. 5 Para. 3 of the Council Regulation (EC) No. 261/2004 only permits an exclusion of liability where “cancellation is caused by extraordinary circumstances, which could not have been avoided even if all reasonable measures had taken.” The Regulation therefore defines such circumstances more narrowly, so that a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 exists.

XVI. Luxemburg: Luxair (General Conditions of Carriage – Passenger and Baggage)

Compensation for denied boarding due to overbooking is only provided in the form of a travel voucher or as credit, in contradiction to Art. 7 Para. 3 of Council Regulation (EC) No. 261/2004, which breaches Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

Ticket costs are refunded for missed connections, but no further consequential damages, which breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

XVII. Malta: Air Malta

Air Malta’s CC are unobjectionable.

XVIII. The Netherlands

1. KLM

The carrier’s CC are consistent with Council Regulation (EC) No. 261/2004 for passengers departing from Europe.

Special provisions in the CC apply to passengers from non-EU countries. This distinction does not correspond with Art. 3 Paras. 1 a) and b) of the Regulation, under which “passengers departing from an airport located in a third country to an airport situated in the territory of one of the Member States to which the Treaty applies, unless they received benefits or compensation and were given assistance in the third country,” are expressly included in the Regulation’s scope of

application. This does not apply if the operating air carrier is an airline company from within the Community. The special provisions for passengers arriving from outside Europe with an airline company from within the EU are open to objection if they restrict the rights of passengers as defined in the Regulation. This affects cancellations, for which the CC grant no compensation corresponding with the terms of Art. 7 of the Regulation. Flights which no longer serve any purpose are also not refunded, nor is return transport offered (Art. 8 Para. 1a) of the Regulation) and the airline company also provides no further care and assistance (Art. 9 Paras. 1 and 2 of the Regulation). The last two points also apply to delayed flights. A progressively increased compensation payment is provided for denied boarding, but it turns out to be much lower than specified. Care and assistance is provided at the carrier's discretion, so the CC breach Council Regulation (EC) No. 261/2004, because they restrict the scope of application of the CC in respect of the Regulation too comprehensively.

The airline company also restricts liability and damages for delay and/or cancellation to an amount of 4,150 SDR, although Art. 22 Para. 1 of the MC, No. 10 of Council Regulation (EC) No. 889/2002 allows this only in the case of damages for delay.

2. Transavia airlines C.V.

The benefits offered for a cancelled flight are consistent with those in Art. 5, 7 et sqq. of Council Regulation (EC) No. 261/2004.

Liability is excluded in case of force majeure that impacts the carrier's work, which is defined in the general conditions of carriage, with a strike mentioned as an example. A strike, particularly one by the company's own staff, does not however, constitute force majeure, but is an inevitable occurrence. This complete exclusion of liability infringes Art. 15 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive (cf. under D. IX. 5. a)).

3. Martinair

The airline company guarantees compensation and benefits in case of delay and cancellation in accordance with Arts. 5 and 6 et sqq. of Council Regulation (EC) No. 261/2004. Liability for cancellation is however excluded in the event of force majeure, which also includes strikes ac-

ording to the definition in Art. 1 of the CC. This is a breach of Art. 15 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

XIX. Poland

1. LOT

LOT's CCs are not consistent with Council Regulation (EC) No. 261/2004. Denied boarding and flight cancellation is only insufficiently or not at all regulated. Neither care nor refunds in the event of delay are provided for.

2. Centralwings

In the event of overbooking, the airline company undertakes to provide the passenger with written information as to his rights upon request. This does not however satisfy the requirements of the obligation to inform under Art. 14 Para. 2 of Council Regulation (EC) No. 261/2004. Art. 14 Para. of 2 Council Regulation (EC) No. 261/2004 requires the unsolicited provision of written information as soon as boarding is denied, so this clause breaches Art. 15 Para. 1 of Council Regulation (EC) No.261/2004. The same applies to § 23 No. 2 of the CC regarding cancellation and delay.

Refunds (for cancellation, delay, overbooking and missed connections) are regulated separately in § 24 of the CC. These provisions are however incomplete and inconsistent with Art. 8 Para. 1 of Council Regulation (EC) No. 261/2004, and so breach Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

3. Wizzair

Wizzair's CCs are insufficiently consistent with Council Regulation (EC) No. 261/2004. In the event of delay, two telephone calls, e-mails, telexes or faxes (Art. 9 Para. 2) are provided in addition to care and assistance, and accommodation and transfer costs (Art. 6 Para. 1ii) if the flight's departure is anticipated for the day after the originally scheduled flight departure. Under the

terms of Art. 8 Para. 1a), the carrier also must also provide compensation and replacement flights in event of a delay of more than 5 hours. Travel vouchers may only be issued, in contradiction to the company's CC, with passengers' written consent. The validity of these vouchers, which is limited to 6 months, also breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

The carrier does not refund the cost of flights that no longer serve any purpose, in contrast to Art. 8 Para. 1a) of Council Regulation (EC) No. 261/2004. Restitution of other costs (hotel accommodation) is subject to an upper limit. The compensation also does not extend to a third level, as defined in Art. 7 of the Regulation.

There is also no regulation of passengers' claims in case of denied boarding due to overbooking, so that these conditions infringe Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

XX. Portugal

1. TAP

Under No. 9.2.11, the costs of benefits such as drinks, e-mails etc. are borne "only by us (TAP), if "the same were not made after the third hour before the departure time of the delayed flight, rerouting or return flight on which the Passenger has been reserved." This formulation could be interpreted to mean that such costs will not be reimbursed if the benefits are provided within three hours before the departure of the flight. In this case, the provision breaches Art. 15 Para 1 of Council Regulation (EC) No. 261/2004 because under the terms of Art. 6 Para. 1a) of Council Regulation (EC) No. 261/2004, the benefits specified under Art. 9 Paras. 1a) and Para. 2 of Council Regulation (EC) No. 261/2004 must be provided if it is reasonably foreseeable that the departure of any flight of a distance of more than 1,500 km or less than two hours or more will be delayed. The air carrier must therefore provide benefits within three hours of departure in certain cases.

2. TAP Passenger Rights

In its information, the airline company excludes liability for the costs of care and assistance under Art. 9 Para. 1a) and Para. 2 of Council Regulation (EC) No. 261/2004 if the expenses are in-

curred “after the third hour before the departure time of the delayed flight” of the return flight (under Art. 8 Para. 1a) of Council Regulation (EC) No. 261/2004) or the alternative flight (under Art. 8 Paras. 1b) and c) of Council Regulation (EC) No. 261/2004). This is a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 (cf. under D. XX. 1.).

Passengers’ claims are thus restricted in the event of delay and as a consequence of the provision on denied boarding due to overbooking, which is a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

There are also no provisions covering missed connections, so the obligation to assume liability is excluded, infringing Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

3. PGA - Portugália Airlines (General Conditions of Carriage, Passenger and Baggage)

a) Delay

Flight times are not guaranteed and are subject to change. This clause breaches Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, since the airline company is attempting to avoid its liability for special damages for delay, even in case of intent and gross negligence. Legal consequences in case of delay are not dealt with in the CC. The airline company does not seek to completely exclude liability for delay, since it also refers to Council Regulation (EC) No. 261/2004. Under the terms of the Regulation, passengers may receive information as to their rights after a delay of 2 hours, but only on request, as stated in the wording. This course of action is not consistent with Art. 14 Paras. 1 and 2 of Council Regulation (EC) No. 261/2004, which specifies that in the event of a delay of at least two hours, the airline company must provide the relevant information to passengers without being asked to do so. The necessity to request this information restricts the customer in the exercise of his rights, which is a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

b) Cancellation, Denied Boarding

In the case of cancellation, passengers have the choice of continuing their journey at the earliest opportunity, or later, or via another route, or of compensation. No. 9.2.3 of the CC states that these claims are final and conclusive, where the Convention does not specify otherwise. The air-

line company does not accept any further liability, which is a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004, because under Art. 5 of the Regulation, further benefits are the legal consequence of cancellation. Under No. 9.2.4 of the CC, air passengers can request information as to their rights under Council Regulation (EC) No. 261/2004. However this clause is also inconsistent with Art. 14 Paras. 1 and 2 of Council Regulation (EC) No. 261/2004 and is therefore a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 (cf. under a)).

Passengers' rights in case of denied boarding are only briefly outlined and customers receive further information from the airline company only upon request. This clause is inconsistent with Art. 14 Para. 2 of Council Regulation (EC) No. 261/2004 and therefore infringes Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 (cf. under a)).

c) Result

There are breaches of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

XXI. Slovakia

1. Slovak Airlines (Passenger Notice – Cancelled flights; Delayed flights; Denied Boarding)

a) Cancellation, Delay, Denied Boarding due to Overbooking

The provisions on liability for cancellation, delay and denied boarding due to overbooking are generally consistent with Art. 4 et sqq. of Council Regulation (EC) No. 261/2004. It must be noted however, that in respect of the care and assistance specified under Art. 9 Para. 2 of Council Regulation (EC) No. 261/2004, air passengers are granted only a “short” telephone call (up to 3 min) or a fax “of up to a page”, and among the alternatives to a phone call, e-mail is not mentioned. These discrepancies, although slight, limit the company's obligations vis-à-vis passengers under the terms of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004

In case of overbooking, basically all benefits are provided, although explicitly only to volunteers. Passengers who are denied boarding against their will are not mentioned. The CC grant volunteers more benefits than are legally prescribed, while providing none at all to passengers involuntarily denied boarding. The resulting exclusion of liability infringes Art. 15 Para. 1 of Council

Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive.

b) Missed Connections

There are no provisions governing liability for missed connections. Contrasting with the detailed statement of customers' rights in case of cancellation and denied boarding, the customer must assume that he has no claim against the airline company if he misses a connection. This means that liability may be regarded as excluded, which is inconsistent with Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004 and Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive is also breached (cf. details under D. IX. 5. b)).

2. Skyeurope

The CC do not give rise to any legal objections.

XXII. Slovenia: Adria Airways

In case of cancellation or delay, Adria Airways' CC guarantee no care and assistance, no refunds for flights that no longer serve any purpose and no return transport. No compensation is paid if a flight is cancelled.

In case of denied boarding due to overbooking or flights that no longer serve any purpose, no refunds are paid, in contradiction of the terms of the Regulation, and no return transport is provided for. Under the terms of Art. 8 Para. 1 and 7 Para. 3 of Council Regulation (EC) No. 261/2004, vouchers may only be issued with the passenger's written consent. The exclusion of refunds after the brief period of the ticket's validity expires is a breach of Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive. Arts. 19 and 22, Para. 1 of the MC only limit liability for damages due to delay, beyond adequate hotel, meal, communication and alternative transport costs as formulated in the CC, to compensation amounts over 4,150 SDR. The amount of compensation offered here therefore depends either on the relevant law or the company's own compensation guidelines and is not transparent.

XXIII. Spain

1. Iberia

The company's "general terms and conditions" as provided are not really the airline company's conditions of carriage, but are rather an information handout for passengers. They refer only generally to the implementation of passengers' rights in EU law or in the laws of individual nations and to a "right to certain compensation and assistance" if boarding is denied.

It should be noted here that information material or application forms – even if they are not a standard form agreement – can obscure customers' rights or make their practical implementation more difficult.

2. Spanair Punctuality Guarantee

The airline company grants passengers in its Business Avant Class a free ticket for another flight on the same route in the same class if a flight is delayed by more than 15 minutes. Economy Class passengers receive a 25 % discount on the purchase of a ticket on the same route and the same class. The voucher or discount must be used within 60 days of the originally booked flight. This seems problematic because on the one hand a refund is made only in the form of a voucher. Under the terms of Arts. 19 and 22 Para. 1 of the MC, compensation must be paid in cash⁴⁷, so the provision breaches the mandatory legal provisions of the MC (cf. Art. 49 MC). There is however no inconsistency with Art. 7 Para. 3 of Council Regulation (EC) No. 261/2004, since no compensation is paid for delay. For a long delay of more than 5 hours, the cost of the flight is refunded (Art. 6 Para. 1iii) and Art. 8 Para. 1a) of Council Regulation (EC) No. 261/2004). Under the terms of Art. 8 Para. 1a) and Art. 7 Para. 3 of Council Regulation (EC) No. 261/2004 this refund may only be made in the form of travel vouchers with the written consent of the air passenger, so the CC are inconsistent with Art. 6 Para. 1iii) and Art. 8 Para. 1a) and Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004. On the other hand, the cut-off period for using the

⁴⁷ Where German law applies and no special regulations exist, the extent of the damages to be compensated is regulated by §§ 249 et sqq. BGB (German Civil Code). Cf. *McIler-Rostin*, in: *Giemulla/Schmid*, Art. 18 WC Rn. 44.

voucher or discount is too short, which unreasonably restricts customers' rights. This deadline therefore breaches Art. 3 Paras. 1 and 3b) of the annex of the Unfair Commercial Practices Directive. Whether the amount of compensation provided for Economy Class passengers is adequate is also doubtful. 25 % may not be proportionally adequate for long delays and may not cover all the costs of the necessary rebooking or substitute flight, which is a breach of Art. 3 Paras. 1 and 3b) of the annex of the Unfair Commercial Practices Directive.

The CC do not regulate the provision of information on passengers' rights under the terms of Council Regulation (EC) No. 261/2004. This is a secondary legal instrument, which in view of its priority in application, will apply regardless of any such references, but the airline company obscures its liability by mentioning only some claims available to passengers, giving the impression that no further rights are available. This restriction must therefore be deemed a breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

XXIV. Sweden

1. SAS (cf. under „Denmark“ at D. V.)

2. Swedline express service commitment

a) Delay

The CC state that passengers can reserve another flight only after a delay of more than 6 hours and receive a voucher for a free flight. This regulation is inconsistent with Art. 6 Para. 1iii) and Art. 8 Para. 1 a) of Council Regulation (EC) No. 261/2004, which stipulate that passengers may demand a complete refund of the costs of their ticket after a delay of five hours, possibly also in connection with a return flight to the place of departure at the earliest possible opportunity. Passengers are also not granted free transport from the airport to the hotel if a flight is delayed until the next day, which is required under the terms of Art. 6 Para. 1ii) and Art. 9 Para. 1c) of Council Regulation (EC) No. 261/2004. Since obligations vis-à-vis passengers may not be restricted or excluded, the provisions breach Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

The airline company denies customers any further rights and thereby corresponding claims for damages, which is also a breach of Art. 22 Para. 1, 49 of the MC, since in accordance with Art.

22 Para. 1, 19 of the MC, an air carrier transporting persons is liable for a sum of up to 4,150 Special Drawing Rights for damages due to delay.

b) Overbooking

The amounts the airline company refunds its passengers in case of overbooking are too low and breach Art. 7 of Council Regulation (EC) No. 261/2004, which stipulates that air passengers must be paid 250 to 600 Euros, depending on the distance involved. The airline also pays no refunds, nor does it provide passengers with alternative travel under Art. 8 of Council Regulation (EC) No. 261/2004. Since these provisions restrict or exclude obligations in respect of passengers as specified in Council Regulation (EC) No. 261/2004, they are in breach of Art. 15 Para. 1 of Council Regulation (EC) No. 261/2004.

XXV. United Kingdom: British Airways

No objections.

XXVI. Summary

Total examined	47
Unobjectionable	12
Defects identified:	
Regulation on benefits and care for delayed flights inadequate or lacking	26
Regulation of compensation, care and assistance for denied boarding inadequate or lacking	25
Regulation of compensation, care and assistance for cancelled flights inadequate or lacking	24
No provisions for missed connections	9
No refunds for consequential damages	7
Inadequate regulation of the form of compensation	6
Exclusion of liability for strikes	3
Other inadmissible exclusions of liability	2
1	

A total of 47 service guarantees from airline companies in 25 countries were examined. Of these, the following 12 companies' conditions of carriage are unobjectionable:

- Austrian Airlines (Austria)
- Cyprus Airways (Cyprus)
- Finncomm Airlines (Finland)
- Lufthansa (Germany)
- Condor (Germany)
- dba (Germany)
- Malev (Hungary)
- Ryanair (Ireland)
- Alitalia (Italy)

- Air Malta (Malta)
- SkyEurope (Slovakia)
- British Airways (United Kingdom)

The “Iberia” (Spain) document contains no conditions of carriage as such, but only information, so this guarantee was not examined in the report. Otherwise there are no contraventions

Of the other 35 airline companies examined, 24 companies’ regulation of compensation and of care and assistance for cancelled flights are inconsistent with Council Regulation (EC) No. 261/2004. The same applies to the provisions for delayed flights in 26 cases (Art. 6 of Council Regulation (EC) No. 261/2004) and to provisions on denied boarding in 25 guarantees (Art. 4 of Council Regulation (EC) No. 261/2004).

The individual companies either do not take the Regulation into consideration at all, or their CC deviate from them in various ways: for example, provisions dealing with refunds as a legal consequence of denied boarding, cancellation or a delay of more than five hours, in contradiction to Art. 8 Para. 1a) of Council Regulation (EC) No. 261/2004, frequently do not include reimbursement for journeys partly made that no longer serve any purpose (cf. e.g. Aero Airlines, Finnair, flyLAL or KLM), care and assistance under the terms of Art. 9 Paras. 1 and 2 of Council Regulation (EC) No. 261/2004 are inadequately provided (cf. e.g. Wizzair, TAP, Swedline express commitment) or the compensation paid in accordance with Art. 7 of Council Regulation (EC) No. 261/ is too low or too imprecisely calculated (cf. e.g. Wizzair, Swedline express commitment, SAS).

The airline companies also partly exclude further claims by incompletely formulating their CC, thereby giving the impression of final and conclusive regulations (e.g. Malev and Spanair), even where reference is made to Council Regulation (EC) No. 261/2004.

In six cases the CC, in contradiction to Art. 7 Para. 3 Council Regulation (EC) No. 261/2004, reimburse the costs of airline tickets or provide other compensation only in the form of vouchers, or link such restitution to the validity of tickets.

A further nine airline companies exclude liability for missed connections implicitly or explicitly, (cf.e.g. FlyVLM Airlines, Scandinavian Airlines, HLX or Germanwings), thereby unreasonably restricting passengers' rights under Art. 3 Para. 1b) of the Annex of the Unfair Commercial Practices Directive.

E. Does RyanAir's Passenger Charter contravene EU Directive 2005/29 ?

The issue to be examined is the extent to which RyanAir's Passenger Charter contravenes EU Directive 2005/29. To constitute a contravention, the provisions of the Charter must represent illegitimate and unfair business practices under the terms of Art. 5 Para. 1.

The Charter cannot be included in the class of business practices detailed in annex I, which are considered unfair in all circumstances under Art. 5 Para. 5, but there may be a breach of the exemplary cases specified in the general clause of Art. 5 Para. 4. These exemplary cases include misleading (Arts. 6, 7) or aggressive (Arts. 8, 9) business practices. If a breach of these examples cannot be shown, the question of whether the duty of professional care is contravened should be examined on the one hand, and of whether consumers' economic behaviour is unduly influenced, on the other.

In RyanAir's "Passenger Service and Lowest Fares Charter", RyanAir compares its services with those of the "high fare airlines". RyanAir presents itself as Number One in Europe in terms of customer service and punctuality (confirmed by the Association of European Airlines). The "Airline Passenger Service Commitment" is described as a misleading document and as mere advertising. The "high fare airlines" are presented as being more preoccupied with increasing prices than with the needs of their customers. RyanAir views its Charter in terms of its price regulation, punctuality and service as a much better set of commitments than the "Airline Passenger Service Commitment". The number of lost pieces of baggage is claimed to be the lowest in the European airline industry and RyanAir is said to be possibly the only airline in Europe that does not overbook flights.

The information in the Charter may constitute an unfair business practice or misleading business practice in the form of a misleading action under the terms of Art. 6. A "business practice" is defined in Art. 2d) as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing by a trader directly connected with the promotion, sale or supply of a product to consumers." RyanAir foregrounds the advantages (Para. 1b)) of its Charter, including, under paragraph d) the price, method of price calculation, and the existence of a particular price advantage. RyanAir is not thereby making any false or untrue representations, but it may still however – even though correct representations of fact have been made – be misleading the average consumer as to the advantages of the company's services, causing him

to make a business decision that he otherwise would not have made. The average consumer is, according to Recital 18 of the Unfair Commercial Practices Directive, “reasonably well-informed and reasonably observant and circumspect”. RyanAir presents itself as “number one” in the airline industry, citing the Association of European Airlines to this effect. The actual “improvements” of RyanAir’s Charter are however limited to the answering of written complaints within 7 instead of 28 days. Otherwise, the Charter generally relies on issues such as overbooking, which apparently never happens with RyanAir, the lowest number of pieces of luggage lost, and the fastest check-in, and presents itself as the airline with the lowest prices. On the other hand, the airlines that have signed the “Airline Service Passenger Commitment” also have compliance with these issues as their goal. Since the Charter consists more of superlatives than real benefits, the method of its presentation could be viewed as a misleading business practice. Consumers may decide to fly with RyanAir instead of the “high fare airlines” because RyanAir seems to offer much better customer service.

This business practice is not misleading under the terms of Art. 6 Para. 2. a) and comparative advertising is only inadmissible if it gives rise to a likelihood of confusion with another product. RyanAir however, wants to set itself apart and not to give the impression of similarity with other airlines.

The Directive on misleading and comparative advertising (Directive 84/450/EEC of 10.9.1984) previously dealt with misleading advertising. In Art. 14 Para., Directive 2005/29 limits the scope of application of the previous Directive on misleading and comparative advertising in terms of protecting traders from misleading advertising. Directive 2005/29 now exclusively applies to consumers in cases of misleading practices.

This misleading business practice results in a breach of Directive 2005/29, Art. 6 Para. 1.

F. How is the formulation “non-legally binding” in the Airline Passenger Service Commitment to be interpreted?

The formulation⁴⁸ makes it clear that the ECAC Airline Passenger Service Commitment is a so-called “voluntary commitment” by the signatory companies. Such so-called “soft-law” agreements⁴⁹ typically use formulations such as “non binding” or “non-legal” and avoid the word “contract”.⁵⁰ In respect of their content, such codes of behaviour can however involve consumer interests.⁵¹ Binding effect, in the sense of an individual, enforceable obligation to perform by the liable party in respect of an action for compliance with a service standard, could develop out of a contract of carriage. Given its intention of explicitly excluding any legal obligation, the significance of the “commitment” is therefore more political. The services and benefits can be, but do not have to be provided. The airline companies are bound to the consumer at best on the basis on good faith,⁵² but entering through the gateway of general clauses on unfair competition, private transnational standards could become legally relevant in certain cases. Non-compliance with voluntary commitments is not per se an unfair business practice, but further circumstances may well give rise to a violation of the law of competition, which may in turn invoke the respective sanctions anchored in national law.

Measured against Directive 29/2005, a violation of the law of competition could arise if a company deceives consumers as to the legal enforceability of a voluntary commitment, presents legally prescribed rights as a special feature of its services, or invokes the “commitment” without having signed it.

The fact remains however, that an enforceable claim for performance cannot be derived from recourse to the law of competition, so self-declared “soft law” cannot replace proof of a substantive claim.

⁴⁸ Which may best be translated as “not legally binding”. Partly also ambiguously translated by the airline companies, such as KLM with: “extrajudicially binding”.

⁴⁹ Further examples: The VW Declaration on Social Rights, AuR (Arbeit und Recht) 2002, 343 or Deutsche Post’s voluntary commitment declaration AG, BT-Ds. 15/3186; Ritter/Fuchs, VuR (Verbraucher und Recht) 2004, 391 on Deutsche Post’s “voluntary commitment”; on the term “voluntary commitment” and its meaning generally Frenz, ZG (Zeitschrift für Gesetzgebung), 2002, 233.

⁵⁰ Cf. Ballreich, GRURInt 1989, 383.

⁵¹ Kocher, GRUR 2005, 647.

⁵² Ehrlicke, NJW 1989, 1906, 1907; Kocher, GRUR 2005, 647, 648.

Part 3: Conclusion

Only 15 of the total of 141 examined service guarantees - only 10.6 % - comply with the provisions of European Community law.

I. Long-distance railways

Among the railway conditions of carriage, most breaches consist in a failure to comply with the provisions of the proposed regulation on the rights and obligation of railway passengers, including the lack of a progressive increase in compensation under Art. 15 Para. 1 of the proposed regulation and the inadmissible differentiation between daytime and night trains, exclusive compensation in the form of vouchers and their limited validity in terms of time (breach of Art. 15 Para. 2 of the proposed regulation) and a lack of compensation for season ticket holders (breach of Art. 15 Para. 1a of the proposed regulation) among other things.

This may be due to the fact that this is an as yet inoperative draft regulation. It is assumed that a future regulation will extend customers' rights. From the point of view of the consumer, it would however seem preferable that the railway companies adjust their conditions of carriage in anticipation of this higher protective level.

Many clauses also breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, including the exclusion of refunds for consequential damages and a lack of provisions for missed connections, the restriction of claims to compensation and the exclusion of liability in case of strikes. In some cases only one provision is lacking (e.g. for consequential damages or missed connections), but in some cases there is also an explicit exclusion of liability for compensation (e.g. in case of strikes). Both must be regarded as contraventions.

The railway companies must unambiguously formulate their conditions of carriage and a complete or partial lack of regulation, giving the impression that only the specified rights apply, must be avoided.

II. Local and Regional Bus Transport

Among the bus companies, there were contraventions only of Art. 3 Paras. 1b) and o) of the annex of the Unfair Commercial Practices Directive, which were based either on an explicit regulation (e.g. limitation of taxi costs), or on a lack of regulation (e.g. no refund of fares and the exclusion of compensation for consequential damages).

III. Local and Regional Transport Bus/Rail /Ship

The conditions of carriage of transport companies involved in local and regional transport by bus/rail/ship mainly breach Art. 3 Para. 1b) or o) of the annex of the Unfair Commercial Practices Directive. Here too, passengers' rights are frequently not regulated (e.g. no refund of fares), leading to inadmissible inconsistencies with the minimum provisions of the Unfair Commercial Practices Directive.

Among the regional railways, there were also contraventions of Art. 15 Paras. 1 and 2 and Art. 16 Para. 3 of the proposed regulation (e.g. no refund of of fares, compensation exclusively made in the form of vouchers and inappropriately low amounts of compensation).

IV. Airline Companies

Among the airline companies, the high number of the conditions of carriage that are consistent with Community law must be emphasised. One in four service guarantees is consistent with European law. This may be due to the high degree of industry regulation at a supranational level, which in turn is due to the number of EU regulation that serve as benchmarks for the airline industry (four Regulations, one Convention).

It seems open to criticism however, that $\frac{3}{4}$ of service guarantees still deviate from the provisions of the secondary legal instrument. The overwhelming number of breaches are in respect of Council Regulation (EC) No. 261/2004. The lack of conformity with Community law is partly a consequence of the fact that companies formulate their general terms and conditions as apparently conclusive and final provisions. In those cases in which regulation is incomplete or entirely ab-

sent, this is an exclusion of liability and therefore must be regarded as a breach. It follows from the premisses of the report, that with such standard form agreements there is a danger that claims arising in reliance on Council Regulation (EC) No. 261/2004 will be obscured or at least hindered in their practical, effective implementation. The conditions of carriage in some cases obviously contradict the abovementioned legal instrument.

The companies' provisions also in many cases breach Art. 3 Para. 1b) of the annex of the Unfair Commercial Practices Directive, concerning the exclusion of liability in the case of strikes, missed connections and consequential damages.

V. Conclusion

This report demonstrates some of the deficits in the control of standard form agreements as compared with Community law. The *aquis communautaire* diverges in respect of the various means of transport, so the Unfair Commercial Practices Directive is in this respect an overarching harmonisation measure. Methodologically, it can be assumed that this legal instrument is a general benchmark, in addition to further protective instruments such as Council Regulation (EC) No. 261/2004. The result is that a standard form agreement that contradicts this Regulation must be deemed to be unfair as defined in the Directive. This type of automatism does not apply vice versa, so that such an agreement may be consistent with Council Regulation (EC) No. 261/2004. This does not however mean that tests based on the terms of Unfair Commercial Practices Directive can be dispensed with. Such tests also do not exclude the possibility of such agreements appearing to be inadmissible in the light of the abovementioned harmonisation measure.

In respect of means of transport such as local and regional transport especially, to which only the Unfair Commercial Practices Directive currently applies as a benchmark, there arises the difficulty that the general circumstances provided for in Art. 3 Para. 1 of the Directive cannot be rendered concrete with recourse to Community law itself, but only in respect of member states' diverse bodies of law.

This leads to the legal policy conclusion that the Unfair Commercial Practices Directive should be flanked by further secondary legal instruments, as it is for air transport, in order contribute to the strengthening of railway passengers' consumer rights.

The analysis shows that the Commission must, pursuant to the promulgation of a secondary legal instrument, ensure the enforcement of the instrument within the domestic market. Apart from the possible modification of a Directive by member states, this especially applies to sets of provisions that apply horizontally. With standard form agreements in particular, there is a danger that the rights established in a Regulation will be denied to insufficiently informed consumers, or that they will at least be prevented from being effectively implemented. This report illustrates the risk, which is not to be underestimated, that valid Community law can be undermined in the companies' contract design. It is not only companies' terms and conditions that risk counteracting a protective standard. It must also be taken into consideration that the information material or formulation of application forms anchored in EU law can also in fact obscure customer claims or make their practical implementation more difficult.

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