

ASSESSMENT OF CONTRACT CONDITIONS AND PREFERENTIAL TARIFF SCHEMES

Final Report

Main report and appendices A-B

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EXECUTIVE SUMMARY

1. The objectives of this study were:
 - to review preferential tariff schemes available on public transport (excluding air transport) in all 27 Member States of the European Union, to identify in particular examples of unfair discrimination on grounds on nationality or residence;
 - to review the Conditions of Carriage of airlines operating within the EU to check compliance with the various EU Regulations that have been introduced to improve passengers' rights (Regulations 889/2002, 261/2004 and 1107/2006); and
 - to review the Conditions of Carriage of maritime operators serving EU ports to evaluate what rights are provided to passengers in the event of delays and cancellations, what liability provisions were made, and what provisions are made for passengers with reduced mobility.
2. We also identified where air carrier and maritime operator Conditions of Carriage contained terms which appeared likely to infringe the principles set out in the Unfair Contract Terms Directive (93/13/EEC).

Preferential tariff schemes

3. We sought to review the preferential tariff schemes available in all 27 Member States. Our approach used a mixture of data collection from public sources (such as the websites of the Transport Ministries), questionnaires to the appropriate government agencies, and telephone interviews. In practice, we encountered difficulties in obtaining information from the governments in four Member States and as a result we were able to complete full case studies in 23 Member States and partial case studies for two others.
4. We found a wide variety of preferential tariff schemes on public transport in Member States. Most commonly, discounted or free travel was offered to particular groups who would tend to have below-average earnings, such as children, students, pensioners and passengers with reduced mobility (PRMs). In some cases, discounted or free travel was available for more specific groups such as blood donors, war veterans and members of parliament.
5. Some schemes are defined in national legislation or negotiated at a national level with transport operators, whereas others are organised on a regional or local basis. This depends largely on how transport is managed and regulated within each Member State. There are a few other discount schemes which are provided by transport operators on a purely commercial basis.
6. The Commission's main concern relates to schemes which may directly or indirectly discriminate on grounds of nationality. Explicit discrimination by nationality is rare: our research only identified three such schemes in the EU. However, preferential tariff schemes indirectly discriminate on grounds of nationality in all of the Member States we reviewed, by discriminating on the basis of residence.
7. The limited case law in this area implies that discrimination by residence can in some cases be justified but there must be an overriding public interest objective and the

scheme must be a legitimate and proportionate means of achieving this objective. Schemes would usually have to be justified on the basis of social policy objectives, such as enabling disadvantaged groups to participate in society by facilitating their access to workplaces, educational institutions, or social services. In order to justify the discrimination inherent in limiting such schemes to those that live in a particular area, those eligible for the discount must be in an objectively different position when travelling from those that are not eligible.

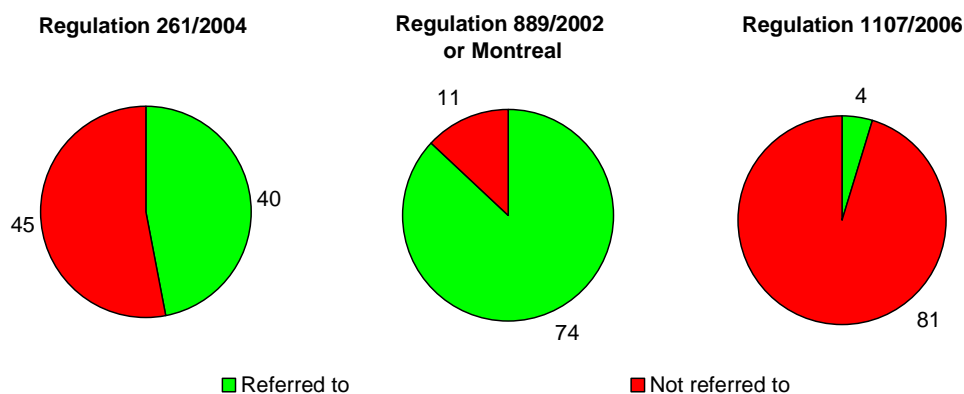
8. We found that there are a large number of schemes which discriminate on the basis of residence and where there was no such objective difference. We identified schemes in 18 Member States in which there was explicit discrimination which did not appear to be justified on the basis of objective differences between those that were eligible and those that were not. We also identified schemes in 8 Member States in which there was discrimination in practice because non-residents, whilst technically eligible for the preferential tariff, would find it difficult or impossible to meet the administrative requirements for the scheme. Schemes are most likely to be discriminatory where they apply on a national basis or in a large region, as a visitor from another part of the Member State or region would not be in an objectively different position from a visitor from another part of the EU.
9. In order to address such cases of discrimination, we concluded that there are two possible approaches. Eligibility for preferential tariff schemes could be restricted to residents in the immediate locality. This would be possible in most cases, but it might create practical difficulties where public transport is organised on a regional or national basis, and it would not be possible for national and interurban rail or bus services. Alternatively, eligibility for schemes could be expanded to all EU citizens regardless of their residence. This would increase the cost of providing the schemes and would also require some harmonisation of the documentation that is required in order to prove eligibility for schemes. In some cases (for example, schemes limited to PRMs or recipients of social benefits), this could raise issues that are much wider than issues of transport policy.

Air carrier Conditions of Carriage

10. The three Regulations we reviewed compliance with were:
 - **Regulation 261/2004** introduced common rules for compensation and assistance to air passengers in the case of denied boarding, cancellations, long delays and downgrading. The Regulation was strongly opposed by air carriers and research we undertook for the Commission in 2006-7 showed that compliance with the Regulation, and enforcement of it, were at best limited.
 - **Regulation 889/2002** implemented the Montreal Convention into EU law and thereby introduced common rules for air carrier liability in the event of death, personal injury, loss or damage to luggage, and delay to passengers or their luggage.
 - **Regulation 1107/2006** sets out common rules for treatment of passengers with reduced mobility (PRMs). Only two Articles of this Regulation had come into force at the time that we undertook our review.

11. We evaluated first whether carriers' Conditions of Carriage referred explicitly to each of the Regulations. We found that most of the air carriers referred to either Regulation 889/2002 or the Montreal Convention in their Conditions of Carriage. However, less than half referred explicitly to Regulation 261/2004 and only 4 out of 85 carriers reviewed referred explicitly to Regulation 1107/2006.

FIGURE 1 REFERENCES TO THE REGULATIONS



12. We evaluated the extent to which carriers' Conditions of Carriage were compliant with the Regulations, and if they were, the extent of the information the carriers provided on their obligations. We found that a significant proportion of air carriers' Conditions of Carriage were not compliant.
13. We found that 39% of air carriers' Conditions of Carriage were significantly non-compliant with Regulation 261/2004 and a further 12% of Conditions, whilst not explicitly breaching the Regulation, were misleading with regard to carriers' obligations, because they implied that the carrier had fewer obligations than it actually would have. Only 15% of carriers' Conditions set out their obligations under the Regulation accurately and in a reasonable level of detail.
14. We found that compliance with Regulation 889/2002 was better than compliance with Regulation 261/2004. Although we found that 40% of air carriers' Conditions of Carriage were significantly non-compliant with this Regulation and 7% were misleading about carriers' obligations, 48% of carriers' Conditions set out the carriers' obligations under this Regulation accurately and in detail.
15. Compliance with Regulation 1107/2006 appeared to be the worst out of the three Regulations. 24% of carriers' Conditions did not refer to the issue of PRMs at all and we found that the most common term in airline Conditions of Carriage regarding transport of PRMs appeared not to be compliant with the two Articles of this Regulation that applied. However, this is dependent on interpretation of the Regulation.
16. We also found that carriers' Conditions often contained a large number of terms which had previously been identified as unfair to the consumer and could therefore be considered invalid under the Unfair Contract Terms Directive. However, it is important to note that the Directive states general principles for consumer contracts

rather than precise rules which carriers must follow, and therefore it would ultimately be up to a court or other appropriate authority to determine whether or not a particular condition was acceptable. The most common such terms we identified were:

- a term which appeared to make the passenger responsible if he/she missed the check-in deadline, even if this was the fault of the carrier (for example because it staffed too few desks);
- a term which allowed the carrier to increase the fare after the ticket had been purchased and to reclaim the difference from the passenger; and
- a term which could enable the carrier to deny responsibility for the actions of its agents or employees.

17. Comparing different types of carrier, we found that the largest airlines were significantly more likely to have Conditions of Carriage that were compliant with the Regulations. There was relatively little difference in the extent of compliance between network carriers, charter carriers and low cost carriers, but regional carriers (which were generally the smallest carriers in our sample) and non-EU carriers were less likely to have Conditions which were compliant. Comparing carriers registered in different Member States, we found carriers registered in the UK were relatively compliant and those registered in Greece were the least compliant. Carriers registered in the new Member States were less likely to be compliant than carriers registered in the EU15 States.

Maritime operator Conditions of Carriage

18. We found that the maritime operators tended to have much less extensive Conditions of Carriage than the airlines and that many did not refer at all to the issues we were reviewing. Those that did refer to these issues tended to be much less generous to the passenger than the air carriers. Our main conclusions on each issue were:

- **Delay and cancellation:** 24% of maritime operators' Conditions of Carriage made no reference to this issue, and for 14% the only reference was to deny responsibility for the consequences of delay. Only 15% offered passengers the choice between a refund and re-routing.
- **Liability:** Over half of maritime operators' Conditions of Carriage explicitly stated that the carrier accepted some liability for death, personal injury and personal property. However, 21% of operators' Conditions either did not refer to liability at all, or referred to it only to deny that they had any.
- **PRMs:** Only 20% of operators' Conditions stated that the operator provided some form of provision for PRMs, either in the form of accessible facilities or offers of assistance. Over half of operators' Conditions made no reference to this issue.
- **Unfair Contract Terms:** We also found that Conditions often contained a large number of terms equivalent to terms which had been identified as unfair when included in air carrier Conditions of Carriage.

19. Comparing different types of operator, we found that, as with airlines, the larger operators were more likely to have Conditions of Carriage that made more generous provisions to passengers. However, the difference was less marked than for the

airlines. Operators registered in the North Sea tended to make more generous provisions than those registered elsewhere.

1. INTRODUCTION

Background

- 1.1 In recent years, there has been rapid growth in passenger transport within the European Union, in particular air transport but also in rail, road and maritime transport. In part this results from measures to liberalise the transport sector introduced by the European Union. Passengers often have a wide choice of mode of transport and operator and there is often intense price competition. However, once passengers have purchased their ticket, they are in a weak position relative to the operator, especially if something goes wrong with the journey.
- 1.2 In response to this, the European Commission has sought to improve the position of passengers travelling by all modes of transport. To this end, legislation has been introduced to provide assistance and in some cases compensation to air passengers in the event of long delays, denied boarding, cancellations or downgrading; implement the Montreal Convention into European law; and provide additional protection for passengers with reduced mobility. The Commission has also developed proposals to protect the rights of long distance rail passengers and to implement the Athens Convention (which defines limits on maritime operators' liability) into European law. The Commission has also sought to address tariff discrimination in air transport, to address the situation by which some carriers levied higher prices for residents of one Member State than others.
- 1.3 However, the Commission has received a number of complaints regarding tariff discrimination in surface transport. Most transport operators offer different prices to different passengers, including for example lower prices for students, senior citizens, or residents of a particular city or region. These discount schemes may be specific requirements of national or regional legislation or be negotiated directly between the Member State and the operator. In some cases, operators may choose to offer discounts to certain groups of passengers if they believe this to be in their own commercial best interests. The Commission's main concern is that some of these schemes directly or indirectly discriminate between passengers on the grounds of nationality or residence, which means that they could be in breach of the Treaty or other legislation.

This study

- 1.4 The Commission has received a number of complaints that preferential tariff schemes imposed by Member State governments or regional or municipal authorities, or other discount schemes offered by transport operators, infringe the requirements in the Treaty regarding non-discrimination on grounds of nationality between citizens of the European Union. In most cases, this discrimination is indirect, in the form of unjustifiable discrimination on grounds of place of residence, rather than direct discrimination on the basis of nationality. The extent to which discrimination on grounds of residence may be acceptable is in any case unclear due to the limited amount of case law in this area. In order to inform the development of policy in this area, and to inform the evaluation of individual schemes, the Commission wishes to have a detailed EU-wide assessment of this issue.

- 1.5 There are a number of Regulations regarding passenger rights in air transport, but recent work we have undertaken for the Commission regarding Regulation 261/2004¹ demonstrated that the extent of compliance by air carriers was, at best, partial. Although we previously found that the Terms and Conditions of Carriage of the largest European carriers generally are not explicitly non-compliant with the legislation, some do not refer to it at all, and there is anecdotal evidence that smaller carriers may be less likely to be compliant. We understand that the Commission also continues to receive complaints about non-compliance with other Regulations, in particular Regulation 889/2002, which introduced the Montreal Convention into European law, and there have been a number of complaints that some articles in air carrier Conditions of Carriage do not comply with the Unfair Contract Terms Directive. The Commission wishes to have a full assessment of this area in order to inform further measures it might take to improve enforcement in this area.
- 1.6 In the maritime sector, the Commission has previously proposed that the Athens Convention should be introduced into European law, but this has not occurred, and, in any case, the Athens Convention offers far more limited passenger protection than has been introduced for air passengers or international rail passengers. In order to inform the development of policy for the maritime sector, the Commission wishes to understand the current Conditions of Carriage of maritime operators in regard to how they treat passengers with reduced mobility and in the event of delays and cancellations. It also wishes to understand if these commonly contain any other unfair terms.
- 1.7 The Commission therefore contracted Steer Davies Gleave to undertake a review of preferential tariff schemes, air carrier Conditions of Carriage, and maritime operator Conditions of Carriage. This study has been led by Steer Davies Gleave's London office, supported by the offices in Bologna and Madrid. Steer Davies Gleave was also supported on the review of preferential tariff schemes by Kozlekedes Consulting Engineers and Helios Technology Ltd.
- 1.8 The Steer Davies Gleave Project Manager for this study was Simon Smith (simon.smith@sdgworld.net).

Disclaimer

- 1.9 This report is addressed to the European Commission (Directorate General Transport and Energy).
- 1.10 We understand that the Commission may wish to use the research that we have undertaken to identify where it may be necessary to take measures to encourage Member States to comply with their obligations under the Treaty regarding non-discrimination, and to ensure that air carriers registered in their State comply with the Regulations. We should emphasise that we are not in a position to provide legal advice to the Commission, and therefore if the Commission wishes to take further action, it should seek legal advice.

¹ Review of Regulation 261/2004, Steer Davies Gleave, 2007 (available on DG TREN website)

This report

- 1.11 This report is the Final Report for the study. The report reflects comments made by the Commission on the Draft Final Report, and those made at the meeting held to discuss the Interim Report, which set out the analysis of the key issues to be addressed and included pilot studies in each part of the study. Certain information has been deleted from the public version of the report.

Structure of this document

- 1.12 The rest of this document is structured as follows:
- Section 2 sets out the conclusions of the review of preferential tariff schemes;
 - Section 3 sets out conclusions from the review of Conditions of Carriage for air carriers; and
 - Section 4 sets out conclusions from the review of Conditions of Carriage for maritime operators.
- 1.13 The following information is provided as appendices:
- Appendix A describes how the air carriers we have analysed were selected;
 - Appendix B describes how the maritime operators we have analysed were selected; and
 - Appendix C provides the detailed studies of the preferential tariff schemes in the 25 Member States for which have completed case studies.
- 1.14 Appendix C is provided as a separate document.

2. PREFERENTIAL TARIFFS

Introduction

- 2.1 The scope for this element of the study is to review preferential tariff schemes in all 27 Member States, to identify cases of unfair discrimination on grounds of nationality or residence. This includes schemes offering discounts to particular groups on public transport, including bus, tram, light rail and metro, heavy rail, and ferry services. Air services were not in scope for this part of the study.
- 2.2 This section sets out the conclusions of our review of the preferential tariff schemes. We have completed case studies for 25 out of the 27 Member States and these can be found in Appendix A. For the remaining two (Denmark and Lithuania), the government agencies that we contacted did not provide the necessary information, despite numerous requests, and it was not possible to prepare a case study on the basis of public information as this was too limited. In addition, two of the other case studies, Estonia and Bulgaria, relied upon limited publicly available information from which we were only able to draw partial conclusions, again because the relevant organisations that we contacted did not respond to our requests for information.
- 2.3 We found that whilst explicit discrimination by nationality on preferential tariff schemes is rare, it is common for schemes to discriminate by residence. This includes a large number of cases where the residence requirement is national, either explicitly so, or as a result of practical constraints imposed by the application procedure. In these cases the discrimination may be considered disproportionate to any social objective, and hence the schemes may not be compliant with European legislation.
- 2.4 The remainder of this chapter contains the following:
- our approach to the study;
 - a discussion of the issues to be addressed;
 - analysis of the main schemes in each Member State; and
 - a summary of potential issues, and common themes.

Our approach

- 2.5 In order to undertake research across all of the Member States of the Union, it is necessary to use staff that are familiar with the transport markets of as many States as possible, and can work in the languages of as many States as possible. Therefore, the case studies were researched and written by staff based in Steer Davies Gleave's offices in London, Bologna and Madrid, and the offices of our sub-contractors in Budapest and Zilina (Slovak Republic). The staff involved in the research covered many of the nationalities and most of the languages of the EU. The staff undertaking each case study had clear guidance from the project management team on what was to be researched, and two pilot studies were undertaken, in order to ensure consistency. All of the case studies have been reviewed by the project management team and further changes have been made as required.
- 2.6 Where possible, information was taken from public sources such as government and

transport operator websites. Where the information available from public sources was not sufficient to address the issues covered by the study, we submitted a questionnaire to the appropriate government agency in the Member State (usually the Ministry of Transport or a nominated alternative), and when necessary followed these up with telephone interviews. In the majority of cases this was sufficient to complete a full analysis of preferential tariff schemes – except for the four Member States noted above.

- 2.7 Whilst every effort has been made to verify the accuracy of information contained in this report, for much of it we have been reliant on third parties. We can accept no responsibility for any errors which may arise as a result of this.

Background: the issues to be addressed

- 2.8 The Commission's primary concern relates to preferential tariff schemes which breach the principle of non-discrimination on grounds of nationality. However, we have found that relatively few schemes explicitly discriminate on grounds of nationality: the key issue is indirect discrimination. The legal situation with regard to this type of discrimination is not entirely transparent, partly because case law is currently insufficient in this area.

- 2.9 Direct discrimination on the grounds of nationality is an explicit breach of the Treaty. However, it is also recognised by the European Court of Justice (ECJ) that other forms of price discrimination, on the basis of factors which are likely to be correlated with nationality (such as residence), may constitute indirect discrimination on grounds of nationality. These forms of price discrimination would therefore also be a breach of the Treaty. The ECJ has also found that discrimination on the basis of region of residence (as well as State of residence) may also be in breach of the Treaty. However, it has qualified these findings, and has found that a residence requirement is not discriminatory if:

- it is based on objective criteria which are independent of nationality and proportionate to the legitimate objective being pursued by the State concerned; or
- it is justified by overriding considerations of general public policy interest.

- 2.10 There is however no clear case law which indicates what legitimate objectives or overriding considerations of public policy would be sufficient. It may be necessary to test:

- if the scheme is justified by overriding public interest objectives such as promotion of social integration or provision of education; and
- that the scheme is an appropriate and proportionate means of meeting these objectives.

- 2.11 A number of possible public interest objectives which might justify discrimination have been suggested. These are more likely to apply to regional/city based schemes, and although national schemes may be justified in some circumstances – for example, on the basis of a need to ensure maintenance of family links for low income people – this interpretation could be disputed. Possible criteria are:

1. **Social considerations:** These would apply where a scheme is aimed at low income groups (such as students or pensioners) and aims at their integration into society, for example through facilitation of access to workplaces or social services, or attendance on educational courses.
 2. **Environmental considerations:** This would mean promotion of public transport, for example in order to reduce emission from road vehicles. It is not immediately obvious why this applies any more to residents than visitors – each marginal trip by a visitor will cause as much pollution or congestion. However, residents may be more likely to travel at peak times when congestion (and hence the environmental impact of travel) is greatest. Off-peak discounts for residents may therefore be justified on this basis.
 3. **Societal/town planning:** This would apply to schemes which sought to keep cities an attractive place to live in, for example by limiting road congestion, facilitating high density urban development, and minimising the need for construction of new roads. Again, it is not clear why such measures should apply only to residents. One possible scenario is that of a new scheme or service (such as park and ride, or a new metro route) which has been funded through local taxation. In which case excluding non-residents from discounts would be a means of levying a contribution to the development of local public transport from visitors.
 4. **Unreasonable financial burden:** These would apply if a discount scheme would not be financially viable if it was not limited to residents. The case law as to whether this criteria is valid is mixed. The ECJ has previously upheld the right of the UK to make maintenance grants to students conditional on minimum residence requirements for example.
- 2.12 It appears likely therefore that schemes would have to be justified primarily on the basis of the first criteria, given the difficulties surrounding the others. However, it is difficult to envisage circumstances under which this criteria could apply to a national scheme (except perhaps in a very small Member State) because, although the position of a local resident using public transport to access local services or a workplace is objectively different to that of a visitor to the area, the position of someone who happens to be in (for example) Manchester does not seem to be objectively different depending on whether they live in London or Brussels.
- 2.13 A further qualification is that it is possible to read existing legislation as implying that all EU citizens are residents of every State they happen to be in at the time, even on the first day of tourist visits. However, this reading is not supported by any judgements of the ECJ. Although discrimination on grounds of residence is explicitly prohibited by certain European legislation, and has formed the basis for ECJ rulings in other sectors (for example regarding museum entrance fees), this does not apply to public transport.
- 2.14 A further issue relates to the means by which preferential tariffs are applied. In some cases passengers simply receive a discount at the point of purchase, but in other cases they may be reimbursed later through tax rebates or some other means (as is the case, for example, with commuters in the Netherlands). Where eligibility is on the grounds of where tax is paid rather than residence, this could be seen to discriminate against temporary workers from other EU States.
- 2.15 A summary of the legal position is provided in Table 2.1.

TABLE 2.1 SUMMARY OF LEGAL POSITION

Allowed	May be allowed	Not allowed
Discrimination by residence on grounds of: <ul style="list-style-type: none"> • social considerations 	Discrimination by residence on grounds of: <ul style="list-style-type: none"> • environmental considerations; • societal / town planning considerations; or • financial viability of scheme. 	Direct discrimination on grounds of nationality Discrimination on grounds of residence without further justification, or where there is no objective difference between groups

Summary of schemes

- 2.16 We found that in most cases, Member States seek to justify preferential tariff schemes on the basis of social considerations (explicitly or implicitly). Our analysis of the compliance of these schemes with legislation has therefore focussed on the question of whether they discriminate in favour of groups which are in an objectively different position from ineligible groups. This typically depends on the geographical scope of the scheme and of its residence requirements.
- 2.17 We have categorised the main schemes in each Member State as follows:
- i. no discrimination – accessible to all, regardless of residence or nationality;
 - ii. discrimination on the grounds of residence where the scope of the residence requirement is regional or local;
 - iii. indirect discrimination through administrative procedures or requirements, for example where it is difficult or impossible for a non-national to demonstrate eligibility for a discount;
 - iv. discrimination on grounds of residence where the scope of the residence requirement or discount is national;
 - v. any direct discrimination on grounds of nationality; and
 - vi. other forms of discrimination.
- 2.18 In our view, schemes which fit into categories **i** or **ii** are unlikely to raise issues of compliance with European legislation. Local residents can be considered to be in an objectively different position to visitors to an area, whether they be visitors from another part of the same Member State or from another Member State. Granting preferential tariffs only to certain local residents may therefore be considered proportional, provided there is a valid reason for giving the discount (for example, social inclusion).
- 2.19 However, schemes which fit into the remaining categories could be seen to raise issues of compliance with European legislation. Residents of a Member State travelling outside of their immediate localities are not in an objectively different position from those visiting from overseas. Therefore, when discounts apply nationwide to all local transport, or apply on long distance transport, this is likely to be unfair.
- 2.20 As shown in Table 2.2, we have found schemes from the full range of categories: from

those which are available to all, to a small number which include explicit nationality requirements.

TABLE 2.2 CATEGORISATION OF SCHEMES

	i) Available to everyone	ii) Restricted to local residents	iii) Available to anyone in theory, practical barriers for non-residents	iv) Explicitly restricted to national residents	v) Nationality condition	vi) Other
Austria		Pupils & students	PRMs & senior citizens			
Belgium		STIB & De STIB & De Lijn regional schemes	TEC regional schemes, SNCB schemes	Large families on SNCB, senior citizens on STIB, free travel for the blind		
Bulgaria						
Cyprus				All schemes		
Czech Republic	Children & pensioners		PRMs	Students		
Denmark						
Estonia						
Finland	Children in Helsinki	Majority of Helsinki schemes	PRMs & pensioners under 65	Students & pupils		
France	SNCF	Regional schemes				
Germany	DB student discounts	Pupils & students, regional schemes			Non-EU15 PRMs	
Greece	Senior citizens on Hellenic Railways		Students	Majority of schemes		
Hungary	Senior citizens		PRMs, pensioners, students	Unemployed		
Ireland	Students	School children	Possibly children on long-distance buses	Senior citizens & PRMs		
Italy		Majority of regional schemes				Sardinia ferries
Latvia	Pre-school children	Pupils, students of Latvian universities, Riga local schemes		Other students, children, PRMs		
Lithuania						
Luxembourg	Senior citizens			Students, PRMs, large families		
Malta	Children			Other bus & ferry schemes		
Netherlands	Senior citizens & children, PRM rail scheme	PRM local scheme		Students		
Poland	Pensioners & students in Warsaw	Unemployed in Warsaw			Discounts for students at foreign universities, PRMs	
Portugal	Children, young people, senior citizens on rail	Students		PRMs, senior citizens in Lisbon & Porto		
Romania				PRMs, pensioners, students		
Slovak Republic			PRMs on national services, PRMs & pensioners in Bratislava	Students & pupils	Senior citizens	
Slovenia	Commercial rail schemes			Regulated schemes		
Spain		Local schemes		PRMs and senior citizens on rail, large families		
Sweden		Majority of local schemes		PRMs, students and pensioners in some cases		
UK	Young person's & senior citizen's railcards	Some local schemes		Senior citizens & PRMs national scheme, PRM railcard		

2.21 In addition there are a few other small schemes which are likely to be limited in practice to the nationals of a Member State – for examples, schemes limited to members of national parliaments, war veterans and (in central/eastern Europe) those involved in the 1989 uprising; these are not included in the table above as the scope is likely to be quite limited, but they are outlined in the case studies. There are also a number of other schemes, with varying scope, which we would expect to have few recipients. The most unusual scheme we identified applies in Warsaw, where there is a specific life-long discount scheme for anyone who is born on board a public transport vehicle.

Potential issues arising

2.22 A summary of the potential issues found in each Member State is given in Table 2.3. A more detailed discussion of the potential issues can be found in the individual case studies.

TABLE 2.3 SUMMARY OF POTENTIAL ISSUES

Country	Potential issues
Austria	<ul style="list-style-type: none"> - Proving eligibility for free travel for pupils is harder for Austrian citizens than for citizens of other EU states (Austrian citizens have to prove their eligibility for the Family Allowance Scheme) - Unclear whether a foreign proof of PRM status would be accepted - The time taken to process applications from PRMs and senior citizens could exclude short term visitors
Belgium	<ul style="list-style-type: none"> - Large families scheme on SNCB and senior citizen discount in Brussels explicitly stated as applying only to Belgian residents - Regional schemes cover a large area, stretching the “objective difference” criteria - Practical difficulties for non-residents providing documentation for national discounts (for pregnant women, the unemployed and the blind)
Bulgaria	<ul style="list-style-type: none"> - Insufficient information
Cyprus	<ul style="list-style-type: none"> - Schemes appear to be restricted to national residents (though not explicitly stated)
Czech Republic	<ul style="list-style-type: none"> - Discounts for students on national bus and rail services are only available to residents - Individual operators’ contract conditions may place constraints on non-resident pensioners getting discounts - PRM discount card can only be obtained by someone paying health and social insurance in the Czech Republic
Denmark	<ul style="list-style-type: none"> - Insufficient information
Estonia	<ul style="list-style-type: none"> - Insufficient information
Finland	<ul style="list-style-type: none"> - Discounts for students of Finnish institutions available on all interurban travel - Some practical difficulties for non-resident PRMs and pensioners under 65 obtaining discounts
France	<ul style="list-style-type: none"> - French unemployed health insurance scheme may be closed to non-citizens, which would exclude non-national residents from some regional discount schemes

Country	Potential issues
Germany	- In order to be eligible for national free travel, non-national PRMs have more stringent eligibility requirements. EU15 citizens have to been working or looking for work for 6 months, citizens of the remaining EU27 countries are not eligible at all
Greece	- Majority of schemes only available to Greek residents - Nationwide discounts only available to students at Greek institutions
Hungary	- Non-residents are unable to access the majority of discounts on local and regional services. In the case of the unemployed this is explicitly stated. In the remaining cases, the law states EU citizens are eligible but it is not practically possible to obtain the discount
Ireland	- Free Travel for PRMs and senior citizens on all public transport is restricted to residents. For citizens, the scheme also extends to Northern Ireland - For non-resident under 16s, discounts on long distance bus services are granted at the discretion of the operator
Italy	- In addition to residents of Sardinia, people who were born on the island and their family members are also entitled to discounted ferry trips
Latvia	- Latvian residents studying at a Latvian university are entitled to free journeys home. Foreign students returning home from a Latvian university, or Latvian residents returning home from a foreign university, are not entitled to discounted travel for these journeys - PRMs and children are only entitled to discounts if they are residents
Lithuania	- Insufficient information
Luxembourg	- Documents required to prove eligibility mean in practise most schemes restricted to national residents, however this is equivalent to a region in other states
Malta	- None
Netherlands	- Discount for students on nationwide public transport is only available to Dutch residents
Poland	- Eligibility for discounts for PRMs on national rail/bus transport and on Warsaw city transport can only be proven by Polish citizens - Non-Polish students of foreign universities are entitled to less discounts on rail than Polish students of foreign universities
Portugal	- Discounts for senior citizens in Lisbon and Porto are available to all Portuguese residents (not just those that live in the cities), but not to non-residents - Discounts for PRMs locally and on national rail services are only available to national residents
Romania	- Schemes are generally only available to residents (including students of Romanian institutions) and yet provide discounts on services throughout the country

Country	Potential issues
Slovak Republic	<ul style="list-style-type: none"> - Discounts for senior citizens explicitly restricted to Slovak citizens only - Student & pupil discounts only available to those with a permanent address in the Slovak Republic - PRM pass requires evaluation of a doctor's statement by issuing bureau; unclear whether non-residents could get the discount - Bratislava discount for PRMs and pensioners restricted to Slovak residents (not just residents of the city) and not available to foreign visitors
Slovenia	<ul style="list-style-type: none"> - Regulated schemes are all restricted to Slovenian residents and apply nationally - In practise, PRM schemes could be difficult to access for non-nationals if a national ID is required, or for non-residents if their disability is classified using a different system
Spain	<ul style="list-style-type: none"> - The requirement for Spanish documents in some cases in theory does not exclude non-nationals, but in practise may do so - Some national schemes (rail cards for PRMs and senior citizens, discounts for large families) are only available to Spanish residents
Sweden	<ul style="list-style-type: none"> - The PRM scheme applies nationally, but is only available to residents - Foreign ID for students and pensioners under the age of 67 are not guaranteed to be accepted in order to gain discounts
UK	<ul style="list-style-type: none"> - Free travel scheme on local transport for senior citizens and PRMs applies nationwide but is available only to UK residents - PRM discounts on national rail only available to residents - Some schemes included in PSOs in Scotland are restricted to Scottish residents

2.23 We have identified a number of issues which occur with preferential tariff schemes in several Member States. These are discussed below:

National discount schemes

2.24 A large number of the Member States have nationally organised preferential tariff schemes which provide discounts on interurban public transport and/or on all local public transport throughout the country. These often provide discounts only to national residents (such as Free Travel in Ireland, the National Concessionary Fares schemes in the UK, and student schemes in the Czech Republic, Finland and the Slovak Republic).

2.25 There are other cases where specific local schemes are available to residents from outside the locality, but only to those resident in the same Member State (for example, PRMs in Brussels and senior citizens in Lisbon and Porto).

2.26 In both cases these schemes discriminate between visitors and residents in situations where there is no objective difference between the two groups. For example, a senior citizen resident in Manchester is entitled to free travel when visiting London, but a senior citizen resident in Paris is not.

Size of region or Member State

- 2.27 The limited case law available, set out at the start of this section, implies that schemes with national residence requirements may be of concern, but those restricted to local or regional residents are likely to be acceptable. The rationale for this is that the recipients of a regional or local preferential tariff are likely to be in an **objectively different** position from other people. For example, someone living in Madrid who needs to access schools, hospitals or other facilities may need to travel across the city, and therefore it is reasonable that the preferential tariff scheme covers the whole region; they are in an objectively different position for these trips from any visitor. This has been interpreted to mean that regional schemes are acceptable whereas national schemes are not. However, this does not necessarily follow in the case of the largest regions and the smallest States.
- 2.28 There are some very large regions (such as Scotland, Catalonia or Bavaria) which are bigger than many Member States. Residents from one part of the region travelling to another are arguably not in an objectively different position to visitors from another region or Member State. For example, a resident of Girona travelling in Tarragona (nearly 200km away) does not seem to be in an objectively different position from a resident of Lisbon or Madrid travelling there. Nonetheless, in many cases there are schemes which apply throughout large regions. In our view discrimination on the basis of a regional residence requirement may be unfair in these cases, and a local residence requirement would be better.
- 2.29 Conversely, some Member States (particularly Malta and Luxembourg) are smaller than even many smaller regions in other Member States. In our view, the criteria of objective difference may allow national schemes in these States, because a resident of any part of the State is likely to be in an objectively different position to any visitor even when undertaking ‘national’ journeys. However, it is unclear beyond what point a national scheme would cease to be acceptable (for example, whether it would be acceptable in Cyprus or Estonia).

Difficulties in proving eligibility for schemes

- 2.30 In the majority of States, non-resident PRMs would have difficulty proving their eligibility for discount schemes, even where they may be eligible in theory. This is sometimes due to an explicit requirement that documentation is supplied from a medical commission or social services in that Member State. In other cases, such as Poland and Slovenia, PRMs have to meet the specific requirements of that State’s system for classifying disability. Judging whether a non-resident meets these requirements will often be left to the discretion of the individual operator, or even a particular ticket inspector.
- 2.31 Similar issues arise with schemes for pensioners under the age of 65, who may have to provide national social security documentation in order to prove eligibility (for example, discounts on local and national public transport in Hungary). Where the beneficiaries of schemes are senior citizens (and hence age, rather than being in receipt of a pension, is the key criterion) any proof of age is usually accepted, including a passport. This means that the scheme is accessible to resident and non-residents alike. The main exception to this that we have identified is the Slovak

Republic's scheme for over 70s, which explicitly states only Slovak citizens are eligible.

Discounts for students and young people

- 2.32 There are two main types of preferential tariff scheme provided for students and young people. Firstly, there are those which provide general discounts on local and interurban public transport. In order to prove eligibility for these schemes it is more common for a variety of forms of ID to be accepted, including an ISIC card or a passport to prove age (such as on national rail services in France, Germany and Portugal). However, there are also examples where discounts are only available to students studying at institutions within the Member State (for example, in Finland and Greece).
- 2.33 The second type of scheme is one designed specifically to support students travelling to and from school or university. These are usually restricted to students of institutions in the Member State, for example in Latvia, and sometimes form part of the direct support granted to students (see the following section for more detail on this issue). Discounts are limited to a fixed number of journeys between their university and residence, but only where both of these are within (or at least only as far as) the country's borders. This tends to discriminate against nationals studying abroad, and against overseas students of national institutions.

Direct social support

- 2.34 Several preferential schemes are part of Member States' wider social security programmes. These programmes are generally only available to national residents, and even if they could be accessed by visitors, the length of the application process deems them unsuitable for short stays. The student schemes in the Netherlands and Sweden provide examples of this – in the case of Sweden, the only student ID which is guaranteed to be accepted in all the regions is the one issued on application for a student loan.
- 2.35 Discounts for the unemployed, or other socially disadvantaged groups, are also difficult or impossible to access for non-residents in the majority of cases. In Romania, discounts on national rail services are provided through tickets issued by the Ministry of Labour, Family and Equal Opportunities to registered beneficiaries of the welfare system. Where EU15 countries are exempted from providing social security to citizens of the new Member States, this raises the possibility of preferential tariff schemes which discriminate by nationality. This is the case for the PRM scheme in Germany.

Public Service Obligations

- 2.36 Where public transport is provided through PSOs, the agreements typically require the operator to participate in the existing preferential tariff schemes for the Member State. Examples include ferry services operated in Malta, Scotland, and Finland. Details of the contracts are often commercially confidential, and so it is not possible to investigate the extent to which preferential tariffs are requirements of the contracts.

- 2.37 In the majority of cases, discounts on PSO ferry services are granted to all residents of the island served. This does not raise an issue of unfair discrimination, because the residents are in an objectively different position to visitors to the island – residents may need to make regular trips to the mainland in order to access basic amenities. The only case of unfair discrimination we identified was on ferry services to Scotland’s northernmost islands, where a discount is available to blind passengers, but only where they are Scottish residents.

Conclusions

- 2.38 The case studies in Appendix C highlight a number of cases of discrimination. Whilst these could be addressed by targeting the schemes at objectively distinct groups, this is often difficult in practise. There are two distinct approaches to addressing discrimination:

- **Restricting eligibility solely to local residents:** Local residents are the only group where there is a clear objective difference, and hence discrimination can be justified.
- **Widening eligibility to all EU citizens:** This would ensure that local residents, visitors from within the Member State, and visitors from elsewhere in the EU are all treated equally.

- 2.39 Restricting eligibility to local residents is not necessarily straightforward. Regional schemes in large regions are often implemented by a single transport company or regional government, making further differentiation by residence difficult. However, this could be considered an argument for delegating authority to local rather than regional government. Indeed, in some countries (such as Sweden) local municipalities are free to define their own local schemes, but in practise jointly delegate authority to a regional Public Transport Authority.

- 2.40 This solution does not address discrimination on interurban travel, where no one group of local residents is in an objectively different position to any other. In these cases, the only option to avoid discrimination may be to widen access to the schemes to all EU citizens. However, we have also identified a number of constraints to this approach:

- **The lack of universally accepted ID card for PRMs** (equivalent of the ISIC for students): Each country has its own means of identifying PRMs. Even in countries which nominally accept ID from other EU States (such as Austria), it is left to the discretion of the operator whether or not to accept the card.
- **The lack of any universally used system for classifying degree of disability²:** Many countries (for example, Spain) have a system which assigns a PRM a “percentage disability”. However, it is not clear to what extent these systems correspond with one another, or how a resident of a country without such a scheme is able to prove their classification. We have noted, for example, that the percentage system in Slovenia is quite different from that used elsewhere.
- Many **schemes are dependent on receipt of social security benefits**, which are

² Although the World Health Organisation’s International Classification of Functioning, Disability and Health (ICF) offers one possible such system, this has not been universally adopted.

organised on local or national lines. Therefore, it is difficult to prove receipt of pensioner or unemployment benefit in other Member States. However, a common (voluntary) document which provides this proof could be introduced.

- The **financial burden may be too great** if the scope of the scheme was extended. However, the proportion of the total discounted journeys which are made by non-residents is likely to be small, and so the cost increase of providing discounted travel to all visitors may not be large. This is with the possible exception of major tourist destinations.

2.41 A further difficulty arises from determining at what point the geographical scope of a scheme becomes too great, and therefore that it should be modified (by widening or restricting those who are eligible). This could prove particularly difficult if it means that some Member States are required to modify their national preferential tariff schemes, whereas others are not.

2.42 Nonetheless, as our report has demonstrated, there are many cases where legitimate complaints of unjustified discrimination can be made. Indeed, the only two countries where we found no significant issues with the current schemes were Italy (with the exception of discounts to people born in Sardinia) and France (where changes to the social security system introduce discrimination).

2.43 In summary, of the 23 Member States which we were able to assess in detail:

- 3 include schemes which including discrimination by nationality;
- 18 include schemes which are restricted to national residents only;
- 8 also include schemes where in practise only national residents could access them.

3. AIR CARRIER CONTRACT CONDITIONS

Introduction

3.1 This section describes our review of the Conditions of Carriage of air carriers. It outlines the issues that have been addressed and how the sample of carriers was selected, and sets out the main conclusions from the review.

Background: the issues to be addressed

3.2 There are three EU Regulations relating to passenger rights which air carriers' Conditions of Carriage should be consistent with:

- **Regulation 261/2004** on compensation and assistance to passengers in the event of denied boarding, cancellations, long delays and downgrading;
- **Regulation 889/2002** (amending Regulation 2027/97), which implemented the Montreal Convention into EU law and which therefore determines airlines' liability for death, personal injury, loss of and damage to luggage, and delays;
- **Regulation 1107/2006** on the rights of air passengers with reduced mobility³.

3.3 In addition, the Unfair Contract Terms Directive (EC 93/13) is also relevant for our assessment. This Directive states a number of general principles which all consumer contracts, including air tickets, should comply with, but it does not specifically refer to transport.

3.4 We have identified whether carriers refer specifically to the Regulations in their Conditions of Carriage and evaluated whether the Conditions of Carriage are compliant with the key elements of these Regulations. The detailed terms, with which we have assessed compliance, are set out below.

Regulation 261/2004

3.5 The key relevant requirements of Regulation 261/2004 are given in Table 3.1.

TABLE 3.1 RELEVANT REQUIREMENTS OF REGULATION 261/2004

Area	Requirement
Scope	This Regulation covers all flights from EU airports, and also flights to EU airports operated by EU carriers unless benefits or compensation are provided in the third country.
Denied boarding	When a carrier is to deny boarding to passengers, it must first call for volunteers to surrender reservations, under conditions to be agreed between passenger and carrier.
	Passengers denied boarding involuntarily must be compensated as follows:

³ Note that only two Articles of this Regulation had come into effect at the time the research for this study was undertaken, and therefore the requirements of other Articles would not necessarily be reflected in air carriers Conditions of Carriage. The remainder of the Regulation will come into effect in July 2008.

Area	Requirement
	<ul style="list-style-type: none"> • €250 for flights of 1,500 km or less; • €400 for all i ntra-Community flights over 1,500 km and all other flights between 1,500 and 3,500 km; and • €600 otherwise. <p>Compensation may be reduced by 50% if the delay to the journey is less than 2, 3 or 4 hours respectively.</p> <hr/> <p>Passengers denied boarding (voluntarily or involuntarily) must be offered the choice between:</p> <ul style="list-style-type: none"> • reimbursement (within 7 days) of full cost of the ticket for the parts of the journey not made, and those parts already made if the flight no longer serves any purpose, and a return flight to the first point of departure; • re-routing to final destination at earliest opportunity; and • re-routing to final destination at later date agreed with passenger. <hr/> <p>Passengers denied boarding involuntarily must be given, free of charge:</p> <ul style="list-style-type: none"> • meals and refreshments; • hotel accommodation where necessary; • transport between airport and accommodation; and • two telephone calls/telexes/faxes/emails.
Cancellation	<p>If a flight is cancelled, the carrier must compensate the passenger according to the guidelines above (see Denied Boarding), except where the carrier:</p> <ul style="list-style-type: none"> • informs the passenger at least 14 days in advance • informs the passenger less than 14 days in advance but the change in timing of departure/arrival is small; or • can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. <hr/> <p>Passengers on the cancelled flight must be offered reimbursement or re-routing according to the guidelines given above (see Denied Boarding).</p> <hr/> <p>Passengers on the cancelled flight must be offered care according to the guidelines given above (see Denied Boarding).</p> <hr/> <p>When informed of the cancellation, passengers must also be informed of possible alternative transport.</p>
Delay	<p>When a carrier expects a flight to be delayed by:</p> <ul style="list-style-type: none"> • 2 hours or more for flights of 1,500km or less; • 3 hours or more for intra-Community flights over 1,500km or all other flights between 1,500 and 3,500km; or • 4 hours or more for all other flights; <p>passengers must be offered care according to the guidelines above (see Denied Boarding).</p> <hr/> <p>If the delay is over 5 hours, passengers must be offered reimbursement if they decide not to travel.</p>
Up/downgrading	<p>A carrier cannot require a passenger to pay more for travel in class higher than that which they booked a ticket for.</p>

Area	Requirement
	<p>If a carrier places a passenger in a class lower than that for which the ticket was purchased, it must reimburse:</p> <ul style="list-style-type: none"> • 30% of ticket price for flights of 1,500km or less; • 50% of ticket price for intra-Community flights over 1,500km (except to French overseas departments) and all other flights between 1,500 and 3,500km; and • 75% of ticket price for all other flights.
Information	<p>Carriers must ensure a notice informing passengers of the existence of these rights is displayed at check-in desks.</p> <p>When a carrier denies boarding, cancels a flight or delays a flight by at least 2 hours, it must give passengers a written notice setting out rules for compensation and assistance under this legislation.</p>

3.6 In particular, we checked for a number of common misinterpretations of the Regulation, which we identified in our 2007 study for the Commission on the operation and results of the Regulation:

- **Assistance in the case of cancellation:** Even if the cancellation is due to extraordinary circumstances out of the control of the airline, the airline is obliged to pay for hotel accommodation, refreshments etc. Therefore any statement that there is no liability in these circumstances would be inconsistent with the Regulation.
- **Definition of extraordinary circumstances:** Extraordinary circumstances should not be defined any more broadly than the definition in the Regulation, which is “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken” and as defined in Recitals 14 and 15 (see below).
- **Burden of proof:** It is for the airline to prove that there were extraordinary circumstances and that it informed the passenger about the cancellation.
- **Amount refunded in the case of downgrading:** The amount to be refunded is as specified in the Regulation – the difference in ticket price is not sufficient. In addition, Premium Economy (where provided) is a distinct class from Economy and therefore downgrading from Premium Economy does entitle the passenger to the compensation specified in the Regulation.

Recitals 14 and 15 to Regulation 261/2004 – Extraordinary circumstances

14. As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

15. Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

Montreal Convention

- 3.7 Table 3.2 gives the key requirements of Regulation 889/2002 and the Montreal Convention.

TABLE 3.2 RELEVANT REQUIREMENTS OF REGULATION 889/2002 (MONTREAL CONVENTION)

Area	Requirement
Scope	<p>Applies to all Community air carriers on all routes.</p> <p>For non-community carriers, the Montreal Convention applies to international carriage from the EU, but only on other routes if the State is a signatory to the Montreal Convention.</p> <p>If carriage is to be performed by successive different carriers, each carrier is subject to the rules in the Convention. A passenger may only take action against the carrier which performed the carriage during which the damage or delay occurred.</p>
Liability for death or injury	<p>The carrier is liable for damages resulting from death or injury to passengers, in the case of accidents occurring on board or while embarking/ disembarking from the aircraft.</p> <p>Up to 100,000 Special Drawing Rights (SDR) per passenger, the carrier cannot limit its liability. Above 100,000SDR, a carrier is not liable if it can prove that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents.</p> <p>A carrier must make an advance payment to cover the immediate requirements of the passenger within 15 days of a passenger being killed or injured, which must be at least 16,000 SDR.in the case of death.</p>
Liability for delay	<p>Carrier is liable for damage occasioned by delay to passengers (up to 4,150 SDR) unless it can prove that it took all reasonable measures to avoid it, or it was impossible to take such measures.</p> <p>A baggage identification tag must be provided for each item of checked baggage.</p>
Liability for damage to baggage	<p>The carrier is liable for any delay, loss or damage to checked baggage up to 1,000SDR (unless the damage is due to inherent fault in the design of the baggage) and for any damage to unchecked baggage resulting from fault of the carrier or its agents.</p> <p>If the carrier can be proved to have acted recklessly or intentionally to cause damage, the limits above do not apply.</p> <p>Damage to checked baggage must be notified to the carrier within 7 days of receipt. Damage resulting from delay must be notified within 21 days.</p>
Timing	<p>After 21 days checked baggage that has not been delivered is assumed to be lost.</p> <p>Any claims must be brought within a period of 2 years from scheduled date of arrival.</p>

- 3.8 Previous misinterpretations of the Convention which we are aware of, and which we sought to identify, include:

- **Application:** Under Regulation 889/2002, the liability limits in the Montreal

Convention apply to all flights operated by Community carriers, **including** domestic flights or flights to non-signatory States.

- **Luggage:** Luggage cannot be accepted on a ‘limited release’ basis – if the airline accepts the luggage, it is liable for loss and damage to it, subject only to the limits specified in the Convention.
- **Complaints about lost luggage:** The passenger is required to make one complaint within 21 days but there should be no obligation to make a further report (so if the passenger submits a PIR report at the airport that should be enough)

3.9 A further issue is that the 11th Recital to the Regulation implies that the exemption from unlimited liability for death/injury in Article 21(2)(b) of the Montreal Convention (such damage was solely due to the negligence or other wrongful act or omission of a third party) does not apply to Community carriers, and hence that only the exemption in Article 21(2)(a) applies. However, there is nothing in the text of the Regulation that implies this, and the Recitals are not binding in themselves, so carriers’ Conditions cannot be held to be non-compliant purely on the basis of this Recital.

Regulation 1107/2006

3.10 Table 3.3 gives details of the requirements of Regulation 1107/2006 regarding passengers with reduced mobility.

TABLE 3.3 RELEVANT REQUIREMENTS OF REGULATION 1107/2006 (PRMS)

Area	Requirement
Scope	These conditions apply to passengers departing from, in transit through, or arriving at airports within the EU, and except where stated, to passengers flying into the EU from outside the EU on a Community carrier.
Prevention of refusal	The carrier may not refuse to accept a reservation or to embark the passenger, except to meet applicable safety requirements or where it is physically impossible to comply. In the event of refusal on these grounds, the carrier must make reasonable efforts to propose an acceptable alternative, and offer reimbursement or rerouting.
Information*	The carrier must take all necessary measures to be able to receive information from passengers’ on their needs for assistance. The carrier is responsible for informing airports or operating air carrier of the needs of the passenger.
Assistance*	The air carrier may not charge for assistance, and must provide: <ul style="list-style-type: none"> • carriage of recognised assistance dogs in the cabin, subject to national regulations; • transport of up to two pieces of mobility equipment per passenger, including electric wheelchairs subject to limitations of space; • communication of information during the flight; • reasonable efforts to arrange seating; • assistance in moving to toilet facilities, if required; and • reasonable efforts to place any accompanying person next to the

passenger.

Compensation* The carrier must compensate the passenger for lost of or damage to wheelchairs or other mobility equipment or assistive devices.

This provision only applies at EU airports.

* These requirements are set out in Articles of the Regulation that had not taken effect at the time our research was undertaken and therefore would not necessarily be reflected in air carrier Conditions of Carriage. They are provided here for information only.

Unfair Contract Terms Directive

3.11 There are no specific requirements which we could check that airline Conditions of Carriage are consistent with, and therefore we had to adopt a different approach to evaluating airlines' compliance with this Directive. Our approach was to check that airlines' Conditions of Carriage do not contain terms which have previously been identified as unfair, through the following:

- **Changes airlines have been required to make in order to be consistent with the Directive:** Further to a number of investigations by the UK Office of Fair Trading (OFT), certain airlines have been required to change common terms in order to comply with this Directive. In 2000, further to an investigation by the OFT, IATA agreed to amend its recommended Conditions of Carriage for member airlines (Recommended Practice 1724), which the OFT considered to be inconsistent with the Directive. Further action by the OFT led to a number of IATA carriers changing their Conditions of Carriage in 2003 and to Ryanair changing its Conditions of Carriage in 2006.
- **Previous study by the Commission:** In 1997 the Commission procured a review of standard IATA Conditions of Carriage which evaluated their consistency with the Directive. The new Conditions of Carriage agreed between IATA and the OFT do not reflect this review in all respects, and in some respects the revised Conditions are more generous to passengers. Nonetheless, this review provides helpful guidance on typical terms which may be considered unfair.

3.12 On the basis of the above, we have identified the following terms which may be unfair:

- **Rescheduling:** Ticket purchasers should be told of a flight time change as soon as possible, and passengers have the right to a refund if there is a significant change in the flight time and the airline is not able to book an acceptable alternative flight.
- **Transfer/refund of tickets:** Anyone who has purchased a non-flexible ticket who is prevented from travelling by 'force majeure' (unusual and unforeseeable circumstances beyond his or her control) should be entitled to a credit note in respect of any non-refundable travel. The credit can also be used to buy a flight for another person.
- **Agents and employees:** Airlines cannot evade responsibility for what their agents and employees have agreed. For example, if an airline's agent or employee informed the passenger that they could take three bags on board when they bought the ticket, this is binding on the airline, even if the normal limit is two bags.
- **Codeshare flights:** Where an airline operates a code share (where a flight is sold under the code of one airline but is operated by another), passengers have the

right to be told this at the time of buying the ticket.

- **Hidden clauses and transparency:** The conditions applying to a contract should be transparent, written in plain language, and readily available to the passenger at the time that they make a booking. The same applies to any other conditions which are applicable: for example, some Conditions of Carriage have terms to the effect that the Carriers Regulations will also apply.
- **Check-in times:** In order to be fair, the deadline for check-in should be based on when the passenger arrives to check in, not the time at which the process is completed. The airline is responsible if it causes the passenger to miss the deadline due to its failure to (for example) staff sufficient desks.
- **Taxes and charges:** It is probably reasonable for the airline to recover any increases in government taxes from the passenger after the booking has been made, but it is not reasonable to recover increases in other costs which should be a normal element of its business, such as fuel costs. Recovering increases in other external charges, such as airport charges, might also be considered unreasonable.

- 3.13 In addition we have identified where there are other terms which are so transparently unfair that there appears a significant probability that they would not be compliant with the Directive.
- 3.14 It should be noted that any issues identified as potentially being in conflict with the Directive would not automatically render the relevant Condition illegal/invalid, but would be subject to a test of whether it was fair under the relevant circumstances.
- 3.15 The Directive applies to consumer contracts only, not to business/trade contracts. As a result of this, we are aware that some carriers limit certain rights, such as the right to transfer or refund a ticket when a passenger cannot travel due to circumstances outside their control, to leisure passengers. Although this might be considered unreasonable by some passengers, it is consistent with the requirements of the Directive.

Selection of carriers

- 3.16 Our review covers all of the largest 20 European carriers in terms of number of passengers; all European carriers which we have identified as largely following a 'low cost' business model; and a sample of non-EU carriers and smaller European carriers. In total, we selected 88 carriers for review. Appendix A describes why they were selected.
- 3.17 For the vast majority of airlines, Conditions of Carriage were available in English. However, given the complex, technical nature of air carriers' Conditions we did not seek to review Conditions which were not available in the languages covered by our core team (English, Spanish and Italian). Three carriers were therefore excluded. We have therefore reviewed 85 carriers' Conditions of Carriage.

Our approach

- 3.18 A small team reviewed the Conditions of Carriage of each of the carriers. In order to ensure that consistent and accurate results were produced, reviewers used a detailed spreadsheet checklist to verify carriers' Conditions against, and the Project Manager checked the Conditions of each carrier and reviewed our results in each case. We identified a number of terms which appear in the Conditions of multiple air carriers,

and we have sought to use a consistent approach in describing these.

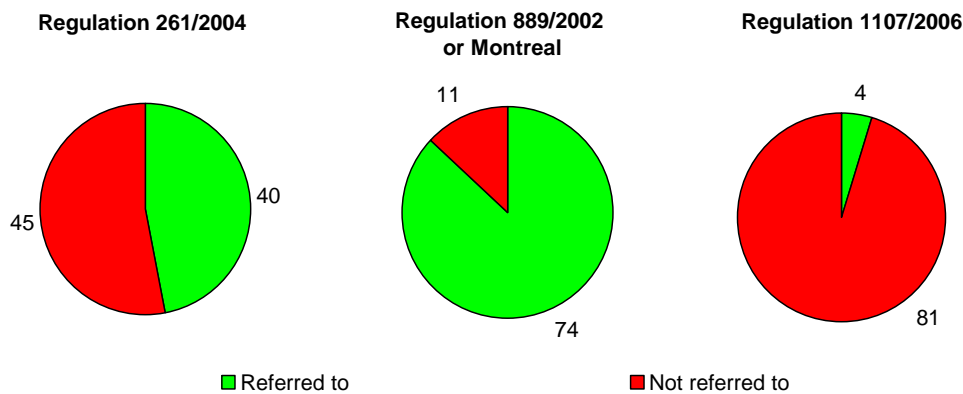
Results of the analysis

3.19 This section summarises the conclusions of our review.

References to the legislation

3.20 Figure 3.1 below shows the number of airlines referring to the title of each of the Regulations within their Conditions of Carriage (some also referred to the Regulations within other information notices provided on their website). 47% of the sample referred to Regulation 261/2004. Although only 39% referred to Regulation 889/2002, most referred to the Montreal Convention, and 87% referred to at least one of Regulation 889/2002 and the Montreal Convention. Most of the remainder referred to Regulation 2027/1997 and/or the Warsaw Convention. Only four of the sample (5%) referred to Regulation 1107/2006, but this probably reflects the fact that this Regulation was approved relatively recently and that only two Articles were in force at the time we undertook our review.

FIGURE 3.1 REFERENCES TO THE REGULATIONS



Our approach to evaluating compliance with the Regulations

3.21 In order to evaluate the extent to which carriers’ Conditions complied with Regulation 261/2004 and 889/2002, we characterised the approaches used according to Table 3.4 below.

TABLE 3.4 CHARACTERISATION OF AIR CARRIERS’ COMPLIANCE WITH LEGISLATION

Characterisation	Definition
Broad compliance – detailed	Conditions cover requirements of legislation in detail, with no significant non-compliances.
Broad compliance – will comply with Regulation	Conditions state that carrier will comply with the Regulation in the relevant circumstances (delay, loss of luggage etc), but do not provide further details. No significant non-compliances.
Broad compliance – will comply with applicable law	Conditions state that carrier will comply with applicable law in the relevant circumstances, but do not provide

	further details. No significant non-compliances.
Compliant but misleading	The Conditions do not actually contravene the Regulation but the wording is such that a passenger is likely to be misled about the carriers obligations.
Some significant non-compliance	At least one significant non-compliance, or at least two minor non-compliances.
Extensive/severe non-compliance	Non-compliance with a large number of terms of the legislation, or non-compliance with at least one term that is so important that this negates the requirement for a large number of non-compliances.
No reference	No reference is made to the issue.

3.22 For the purposes of this summary analysis of the extent to which Conditions are compliant, we have only assessed the documents which are described by the carrier as regulating carriage of passengers. This includes documents which are directly referred to in the Conditions of Carriage, but does not include other information notices which the carrier may provide on its website. Nonetheless, these other information notices often provide material which relates to these issues.

3.23 We have distinguished between ‘significant’ and ‘minor’ non-compliances with the Regulations (had we not done so, most carriers would have been shown in this analysis as non-compliant). For the purpose only of the summary analysis presented here, we have only classified Conditions as non-compliant on the basis of ‘minor’ non-compliances where we identify at least two. We have classified non-compliance as ‘minor’ where either it rests on interpretation of the Regulation or Convention rather than being a specific contradiction, or where the number of passengers affected would be a very small proportion of those affected by the Regulation. For example, we have classified the following as ‘minor’ non-compliance:

- **Acceptance of certain pieces of luggage on a limited release basis:** This is not specifically prohibited by the Montreal Convention but the view of the UK Office of Fair Trading was that, if carriers accept luggage, under the Convention they must be liable for it.
- **Denial of liability for damage to wheels or handles of baggage:** The Montreal Convention does not appear to allow any exemption for this, so if carriers accept baggage with wheels or handles, they must be liable for it; however again this does rest on an interpretation of the Convention.
- **Provisions for denied boarding only apply where overbooking has occurred:** This is unambiguously non-compliant with Regulation 261/2004 but few passengers are affected as denial of boarding for reasons other than overbooking is rare.
- **Scope of Regulation 261/2004:** The Regulation is unclear as to the extent it applies to journeys on EU carriers from a non-EU airport to the EU. We have classified statements that imply it is not applicable as a minor non-compliance.

3.24 In addition, in the case of Regulation 261/2004, many carriers adopted a different approach for different circumstances covered by the Regulation – for example, full details provided for the carriers’ obligations in the event of cancellations, but for denied boarding, only a statement that the carrier would comply with applicable law. We have based this classification on the approach adopted for cancellations, because

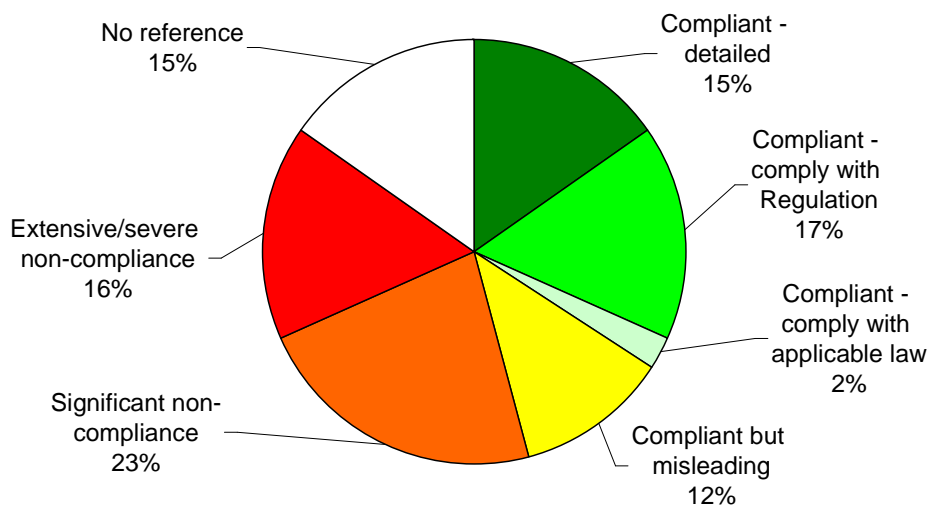
as our previous research showed that these were the basis of most passenger complaints about non-compliance with this Regulation.

3.25 This distinction is made only for the purposes of the conclusions set out here. The detailed analysis of individual carriers’ Conditions provided at the end of this section sets out all of the non-compliances that we have identified.

Summary of results: the Regulations

3.26 Figure 3.2 sets out the results of this analysis for Regulation 261/2004. 85% of Conditions of Carriage at least refer to the issue of delays, cancellations and denied boarding, but 39% were significantly non-compliant with the Regulation.

FIGURE 3.2 COMPLIANCE WITH REGULATION 261/2004



3.27 In addition, 12% of carriers’ Conditions included terms which, whilst not in direct breach of the Regulation, in our view had the potential to be misleading. Most of these arose where carriers’ had based their Conditions on IATA Recommended Practice 1724 (which pre-dates Regulation 261/2004), which states:

IATA Recommended Practice 1724 (Sections 9.2.2 and 9.2.3: Cancellation, Rerouting, Delays etc)

9.2.2 Except as otherwise provided by the Convention, if we cancel a flight, fail to operate a flight reasonably according to the schedule, fail to stop at your destination or Stopover destination, or cause you to miss a connecting flight on which you hold a confirmed reservation, we shall, at your option, either:

9.2.2.1 carry you at the earliest opportunity on another of our scheduled services on which space is available without additional charge and, where necessary, extend the validity of your Ticket; or

9.2.2.2 within a reasonable period of time re-route you to the destination shown on your Ticket by our own services or those of another carrier, or by other mutually agreed means and class of transportation without additional charge. If the fare and charges for the revised routing are lower than what you have paid, we shall refund the difference; or

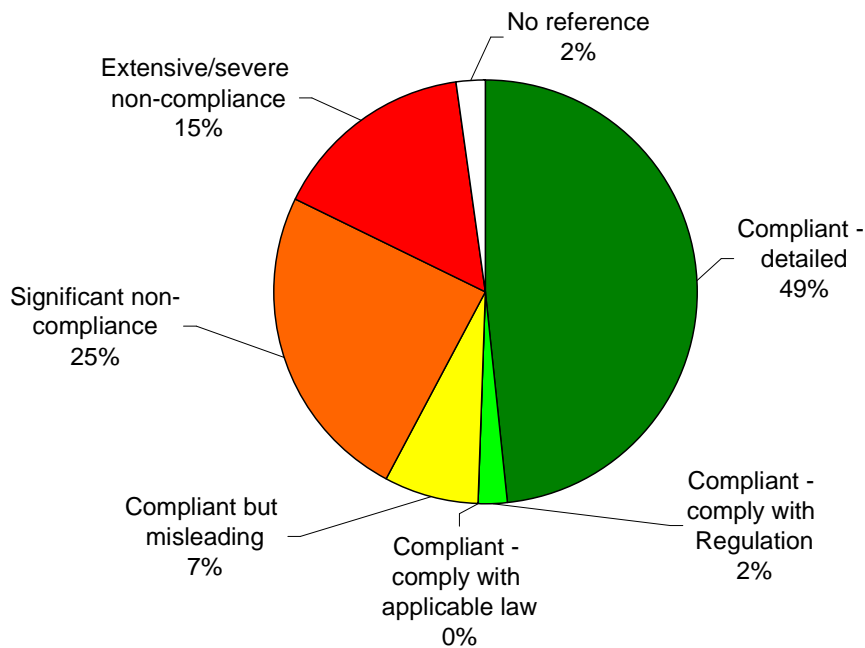
9.2.2.3 make a refund in accordance with the provisions of Article 10.2.

9.2.3 Upon the occurrence of any of the events set out in Article 9.2.2, except as otherwise

provided by the Convention, the options outlined in Article 9.2.2.1 through 9.2.2.3 are the sole and exclusive remedies available to you and we shall have no further liability to you.

- 3.28 In our view, when used in Conditions of Carriage without amendment, this Article may be non-compliant, because it states that the carrier has no obligations in the event of cancellation other than offering re-routing or a refund and anything else required by the Montreal Convention – whereas Regulation 261/2004 also places significant other obligations on the carrier. However, many carriers substitute the words ‘the Convention’ with ‘applicable law’ or in some cases ‘EU Regulations’. In this case, the term is not non-compliant, but in our view it is still has the potential to mislead, because it implies that the carrier usually would not have other obligations, when in fact it often would.
- 3.29 Other common examples of non-compliant terms include:
- statements that obligations to provide re-routing or assistance do not apply if the carrier is not at fault;
 - statements limiting or excluding obligations in the case of denied boarding for reasons other than overbooking (for example, if aircraft size is reduced due to a technical problem); and
 - statements which seek to limit carriers’ costs, for example by stating that hotel accommodation will not be provided in a passengers’ home city or limiting the amount that will be paid.
- 3.30 Although a number of carriers’ Conditions did state that compensation was not payable in the case of cancellations caused by extraordinary circumstances, relatively few sought to define extraordinary circumstances. The Regulation does not provide an exhaustive list of all possible extraordinary circumstances, but it does give a number of examples and states that extraordinary circumstances must mean circumstances that could not have been avoided even if all reasonable measures had been taken. Where carriers did seek to define this, in some cases the definition went beyond the examples in the Regulation and included events which might be considered to be within the control of the carrier. Terms which carriers sought to define as extraordinary circumstances included:
- failure by suppliers and the carriers’ sub-contractors;
 - problems with ground handling (which is usually contracted by the carrier); and
 - delays to flight crew.
- 3.31 The treatment of Regulation 889/2002 and the Montreal Convention was generally better (Figure 3.3). Almost all Conditions of Carriage cover the issue of liability and although a similar proportion (40%) were significantly non-compliant as for Regulation 261/2004, nearly half set out the full requirements of the legislation in detail. Many of the carriers included the summary of carriers’ liability provided in the Annex to Regulation 889/2002 within their Conditions.

FIGURE 3.3 COMPLIANCE WITH REGULATION 889/2002



3.32 The most common non-compliant terms that we identified were:

- statements that the limits on liability in the Montreal Convention and Regulation 889/2002 only applied for international carriage, and that lower limits apply for domestic carriage;
- statements in which the quoted liability limits were wrong (most commonly because they were out of date); and
- statements that some types of baggage would be carried only on a ‘limited release’ (no liability) basis.

3.33 In addition, we found a number of terms in which the wording was subtly different to that in the Convention, to the advantage of the carrier. The most common related to damage to baggage. The Montreal Convention states that, if a passenger does not complain about damage to checked baggage at the time it is collected, this is **prima facie evidence** that it was provided undamaged; a number of carriers instead state that this is **proof** that the baggage was provided undamaged unless the passenger subsequently proves otherwise. This wording seems to place more burden on the passenger than the Convention does.

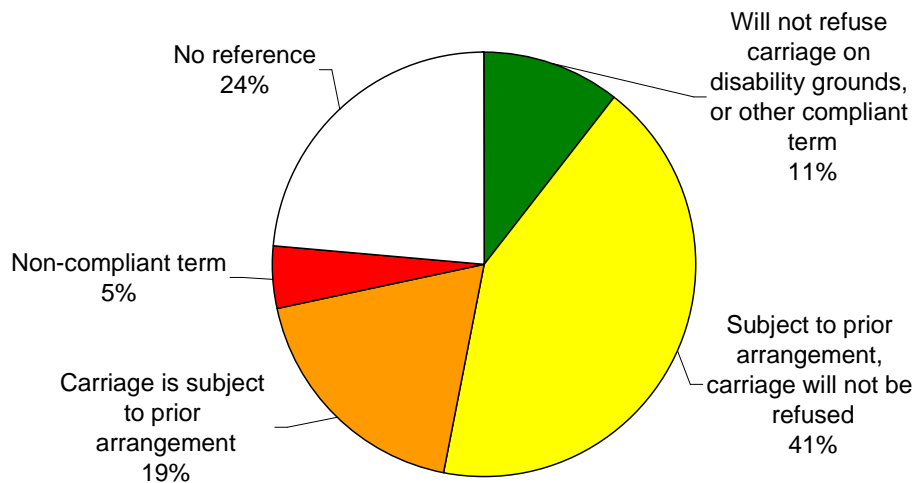
3.34 There were fewer misleading statements in carriers’ Conditions than in relation to Regulation 261/2004, but nonetheless 7% of carriers Conditions were found to be misleading. The most common misleading term was a statement of both the Montreal and Warsaw Convention liability limits, and a statement that the carrier’s liability depended on which Convention was in force for the particular journey. In fact, under Regulation 889/2002, the Montreal Convention liability limits apply to all carriage by EU carriers (even on some non-EU journeys to which the Montreal Convention itself would not apply).

3.35 Although nearly half of carriers’ Conditions set out the obligations under this

Regulation in reasonable detail, the extent of the information provided varied. A significant number of carriers provided full details of liability for death, injury and damage/loss to baggage, but omitted any reference to their liability for delay.

- 3.36 Coverage of Regulation 1107/2006 was the least extensive the three Regulations we examined. 24% of carriers did not refer at all to this issue, while 65% stated terms which were either explicitly non-compliant or which might be regarded as non-compliant.

FIGURE 3.4 COMPLIANCE WITH REGULATION 1107/2006



- 3.37 However, this depends on interpretation of the Regulation. The most common term is based on RP1724, which states:

IATA Recommended Practice 1724, Section 7.2 (Special Assistance)

Acceptance for carriage of unaccompanied children, incapacitated persons, pregnant women, persons with disabilities who have advised us of any special requirements they may have at the time of ticketing, and been accepted by us, shall not subsequently be refused carriage on the basis of such disability or special requirements.

- 3.38 41% of the sample used a term equivalent or similar to this. In our view, this raises issues of compliance with Article 3 of the Regulation (prevention of refusal of carriage). The Regulation does not seem to allow for an airline to require passengers' to seek agreement from them in advance, and therefore a passenger who did not comply with the carriers' requirement to do this would still seem to be protected by this Article, and therefore the carrier would still not be able to refuse carriage.

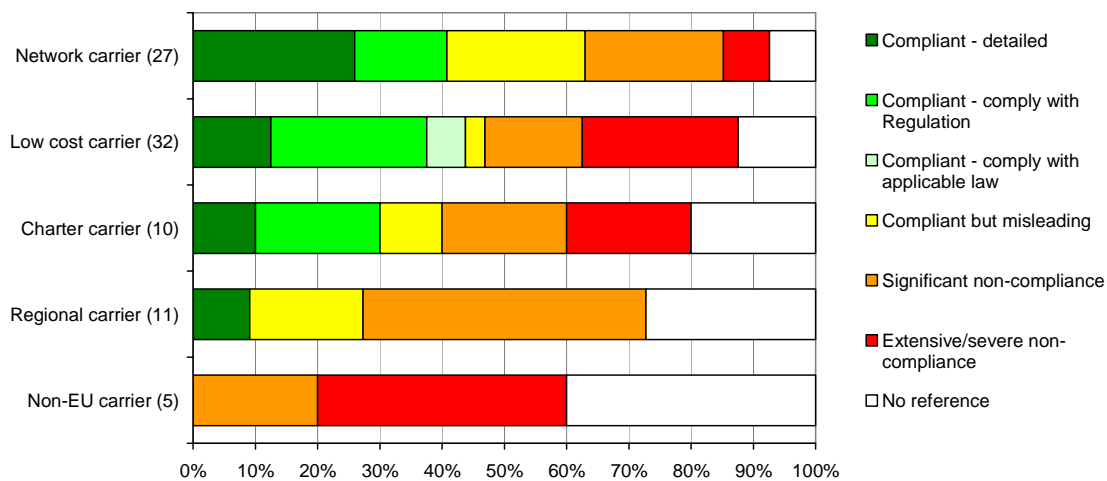
Variation in compliance by carrier and State

- 3.39 This section sets out variation in compliance depending on the type of carrier and on which Member State the carrier was registered in.
- 3.40 We have classified all of the carriers according to their main business model (low cost, network, charter or regional). It should be noted that there is inevitably some

judgement in this, for example because many charter carriers also provide some scheduled ‘low cost’ services, and many regional carriers now market themselves as low cost. Figure 3.5-Figure 3.7 show the extent to which Conditions varied depending on the type of carrier.

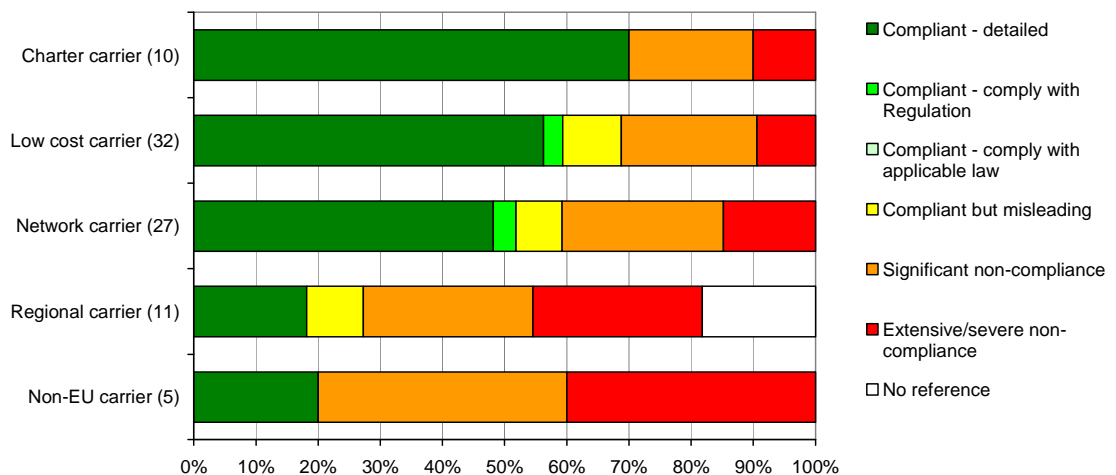
3.41 For Regulation 261/2004, a higher proportion of network carrier Conditions of Carriage were compliant than those of other types of carrier, and the network carriers were more likely than other carriers to set out their obligations in detail in their Conditions. However, network carriers Conditions were most likely to contain compliant but misleading terms. Excluding carriers with Conditions that were misleading, the low cost carriers were most often compliant, but they also had the highest incidence of extensive/severe non-compliance (other than the non-EU carriers). Charter, regional and non-EU carriers were significantly worse.

FIGURE 3.5 COMPLIANCE WITH REGULATION 261/2004 BY AIRLINE TYPE



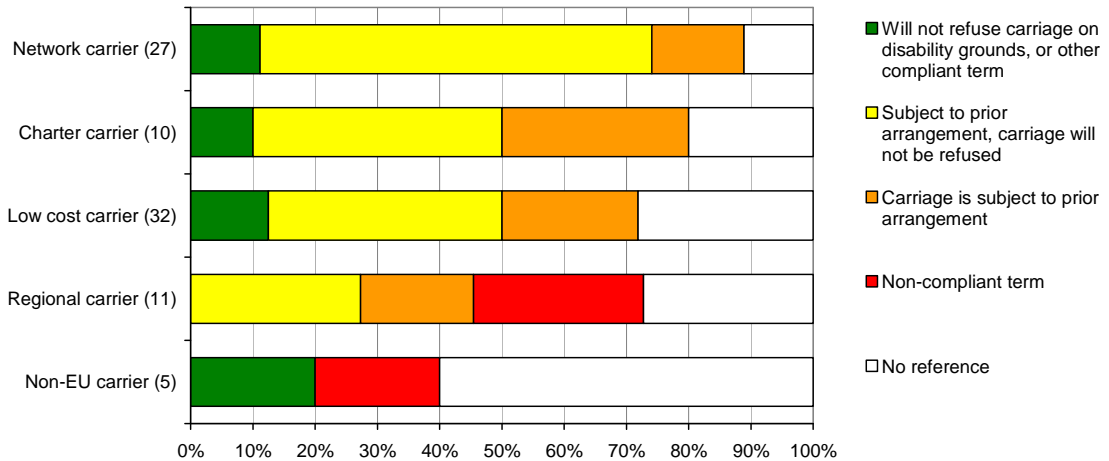
3.42 With regard to liability, the charter carriers were most likely to be compliant and the majority of low cost and network carriers were also compliant. However, perhaps surprisingly, 41% of network carriers were not compliant. All but one the sample of non-EU carriers were all found to be non-compliant to a greater or lesser extent.

FIGURE 3.6 COMPLIANCE WITH REGULATION 889/2002 BY AIRLINE TYPE



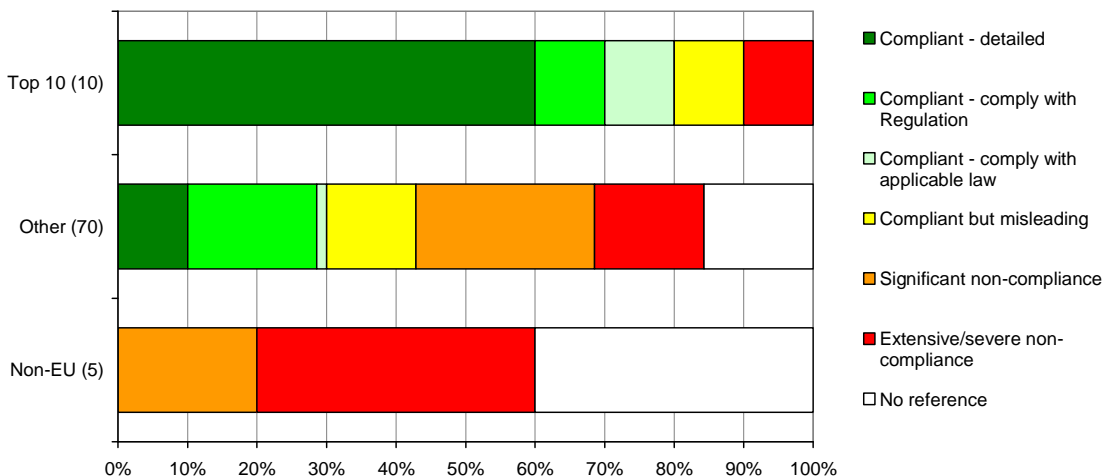
3.43 There were less significant differences in the handling of PRMs in the Conditions of Carriage although network carriers were most likely to use the standard term that carriage if agreed at the time of booking would not subsequently be refused. Regional carriers and non-EU carriers were most likely to have explicitly non-compliant terms or not to refer to this issue at all.

FIGURE 3.7 COMPLIANCE WITH REGULATION 1107/2006 BY AIRLINE TYPE



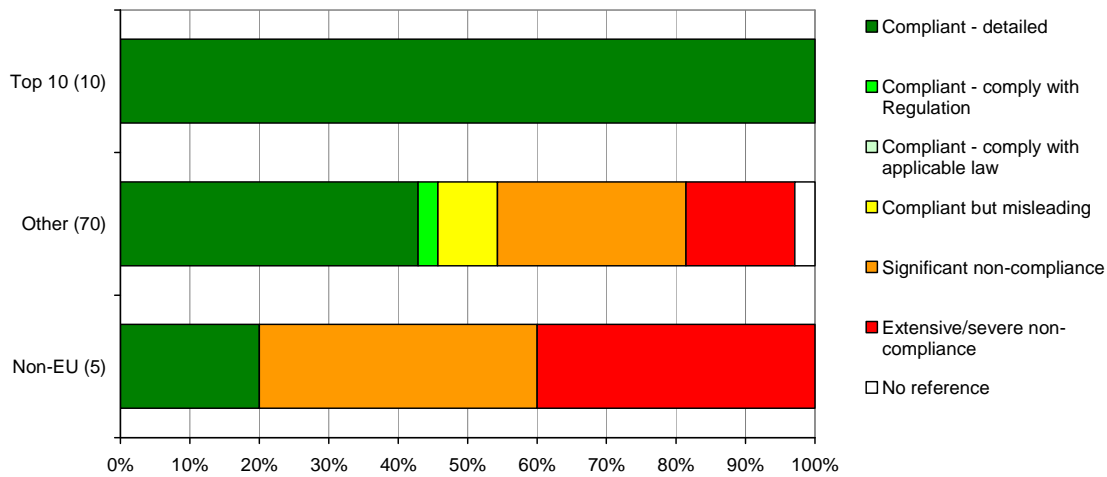
3.44 The strongest factor we found determining whether carriers’ Conditions were compliant with the Regulations was the size of the carrier. The top 10 European airlines (in terms of passenger numbers) were much more likely to have Conditions which were compliant with the Regulations. This may reflect the fact that they tend to have larger legal departments. 90% of the top 10 airlines were broadly compliant with Regulation 261/2004, compared to 41% of the other EU carriers.

FIGURE 3.8 COMPLIANCE WITH REGULATION 261/2004 BY AIRLINE SIZE



3.45 All of the top 10 airlines were broadly compliant with Regulation 889/2002, compared to 52% of the other EU carriers.

FIGURE 3.9 COMPLIANCE WITH REGULATION 889/2002 BY AIRLINE SIZE



3.46 Consistent with this, as shown above, the regional airlines, which were generally the smallest airlines in our sample in terms of passenger numbers, were the least likely to have Conditions which were compliant with the Regulations.

3.47 We also evaluated the extent to which compliance with each Regulation varied by the Member State in which the carrier was registered. This analysis shows some patterns in terms of compliance between the Regulations. The carriers registered in the UK were relatively likely to have Conditions of Carriage that were compliant. This probably reflects the investigations of carriers’ Conditions of Carriage undertaken by the Air Transport Users Council (AUC), to which there is no equivalent organisation in other Member States, and the actions taken by the Office of Fair Trading (OFT). In contrast, the Conditions of Carriage for the carriers based in Greece that we reviewed all tended not to be compliant with Regulations 261/2004 and 889/2002 or refer at all to PRMs. This reflects the fact that they tended to have separate Conditions for domestic travel, based on the Greek Air Code, which were not consistent with either Regulation. Overall, carriers registered in the new Member States were less likely to be compliant than carriers registered in the EU15 States.

Unfair contract terms

3.48 When reviewing the Conditions of Carriage, we identified terms which had previously been identified as unfair under the Unfair Contract Terms Directive, or which were so transparently unfair that there seemed to be a significant probability that the term would be considered non-compliant with the Directive. However, as explained above, it should be noted that the Directive imposes general principles for all consumer contracts, rather than precise requirements that carriers have to follow. Therefore, even where we have identified here that a term may be unfair, it would ultimately be up to a court to determine this in each case. This would also take into account how an airline applied the term in practice.

3.49 We found that the unfair terms occurred relatively frequently: on average we identified 2.7 unfair terms in each carriers’ Conditions, and there were only six carriers’ Conditions in which we found no unfair terms. In addition, 8 out of the 85

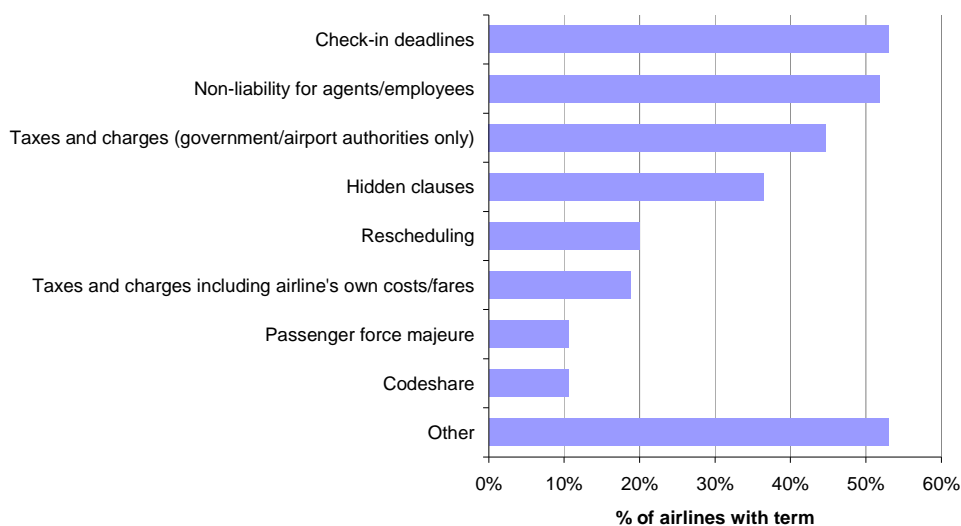
carriers examined had Conditions which were so limited that the lack of clarity for the passenger as to the basis of the contract might in itself be regarded as unfair.

3.50 The most common unfair terms which were identified, occurring in over half of the Conditions of Carriage that we reviewed, were:

- **Check-in deadlines:** This term typically states that passengers will be denied boarding without refund if they do not meet the check-in deadline, which is defined in IATA RP1724 as “the time limit specified by the airline by which you must have completed check-in formalities and received your boarding pass”. This potentially makes the passenger responsible for failure by the airline – for example, if the check-in system is not working, or it inadequately staffs the check-in desks resulting in a long queue.
- **Non-liability for agents and employees:** This term typically states that “No agent, servant or representative of the carrier has authority to alter, modify or waive any provision of this contract.” This potentially means that if a carriers’ employee provides information to the passenger (for example regarding what luggage may be taken onto the aircraft), this has no validity and therefore if it is incorrect, the carrier is not liable for costs the passenger may incur as a result.
- **Taxes and charges:** Almost two-thirds of Conditions included terms specifically allowing carriers to recover additional taxes and airport charges from passengers, if these increased after the ticket was purchased, and 19% of carriers’ Conditions (implicitly or explicitly) allowed increases in the carriers’ direct operating costs, such as insurance and fuel, to be recovered from passengers after the date at which they had bought the ticket.

3.51 Figure 3.10 shows the unfair terms we observed most often.

FIGURE 3.10 MOST FREQUENTLY OCCURRING UNFAIR TERMS



3.52 These terms are all ones that had previously been identified as unfair, either by the OFT or in the previous study undertaken for the Commission, and are all explained in paragraph 3.11 above. We also identified some other terms which we regarded as transparently unfair to the passenger:

- One low cost carrier provides a priority boarding service for an additional fee, but this is non-refundable, apparently even if the service is not provided by the carrier.
- One non-EU carrier states that if it takes any action, including refusal of carriage, for reasons it believes to be justified at the time but which subsequently turn out to be incorrect, its decision is still binding on the passenger.
- A number of carriers' stated that their Conditions change periodically and enter into force immediately, implicitly therefore affecting existing bookings and therefore changing the contractual basis on which they are made.
- Another low cost carrier states that the passenger must pay for delayed baggage to be sent by courier from the airport.

3.53 Low cost and non-EU carriers' Conditions tended to include slightly more unfair terms than those of other carriers, but the difference was small. On average, the highest number of unfair terms were found in the Conditions of airlines registered in Greece (3.3 per carrier), and, despite the actions taken in the UK regarding unfair terms in airlines' Conditions, UK carriers had slightly more unfair terms than average (2.9). The fewest unfair terms were found in the Conditions of carriers registered in the Scandinavian countries.

Conclusions and next steps

3.54 Our main conclusions with regard to each piece of legislation were:

- **Regulation 261/2004:** 39% of air carriers' Conditions of Carriage were significantly non-compliant and a further 12% of Conditions were misleading with regard to carriers' obligations. Only 15% set out carriers' obligations accurately and in detail.
- **Regulation 889/2002:** 40% of air carriers' Conditions of Carriage were significantly non-compliant and 7% were misleading. However, 48% of carriers' Conditions set out carriers' obligations under this Regulation in detail.
- **Regulation 1107/2006:** We also found that the most common term regarding transport of PRMs had the potential not to be compliant with the part of Regulation 1107/2006 that had taken effect at the time our research was undertaken, but this depends on interpretation of the Regulation.
- **Unfair Contract Terms Directive:** We found that Conditions often contained a large number of terms which had previously been identified as unfair to the consumer.
- **Differences between carriers:** Comparing different types of carrier, we found that the largest airlines were much more likely to have Conditions of Carriage that were compliant with the Regulations. There was relatively little difference in the extent of compliance between network carriers, charter carriers and low cost carriers, but regional carriers (which were generally the smallest carriers in our sample) and non-EU carriers were less likely to have Conditions which were compliant.
- **Differences between States:** Carriers registered in the UK were relatively compliant and those registered in Greece were the least compliant. Carriers registered in the new Member States were less likely to be compliant than carriers registered in the EU15 States.

3.55 A possible explanation for the fact that carriers' Conditions were most likely to be

compliant with the Montreal Convention, and least likely to be explicitly compliant with Regulation 1107/2006, is that some of the Conditions of Carriage had not yet been updated to reflect the more recent legislation.

- 3.56 The fact that the smallest carriers' Conditions were less likely to be compliant could be explained by the fact that they do not have large legal departments that are able to ensure that their Conditions are appropriate. An alternative explanation could have been that one of the airline associations had issued guidance on Conditions of Carriage (along the lines of IATA RP1724) which was not compliant, but we do not believe this to be the case, because there were significant differences in the non-compliances identified with different carriers' Conditions.
- 3.57 We understand that the Commission may wish to use the research that we have undertaken to identify where it may be necessary to take measures to encourage Member States to ensure that air carriers registered in their State comply with these Regulations. We should emphasise that we are not in a position to provide legal advice to the Commission, and therefore if the Commission wishes to take further action, it should seek legal advice.

4. MARITIME OPERATOR CONTRACT CONDITIONS

Introduction

4.1 This section describes our review of the Conditions of Carriage of maritime operators. It outlines the issues that have been addressed, the selection of operators, and sets out the main conclusions from the review.

Background: the issues to be addressed

4.2 There is currently no specific European legislation applicable to maritime operators that relates to passenger rights. Therefore, our assessment of the contract conditions of maritime operators has focussed on their provisions for:

- treatment of passengers in the case of delay or cancellations;
- considerations of liability; and
- treatment of passengers with reduced mobility.

4.3 In addition to this, while reviewing the documents we have recorded a number of contract terms which we believe could be regarded as unfair. Although there is no specific European maritime legislation for the issues we have addressed, the Unfair Contract Terms Directive would apply to tickets for maritime travel purchased by consumers.

4.4 We have identified how operators address each of these issues in their Conditions of Carriage.

Unfair Contract Terms Directive

4.5 Unlike our review of the airline operators, there are no specific legislative requirements against which we could check the consistency of maritime operators' Conditions of Carriage. Our approach, therefore, has been to check that operators' Conditions of Carriage do not contain terms equivalent to those identified as unfair in the Conditions of Carriage of airlines.

4.6 Most of the terms that we have identified are equivalent to those we identified for the airlines (and are described in section 3 above), but we have also identified the following terms which appear in the Conditions of Carriage of a number of maritime operators:

- **Transparency of jurisdiction:** The conditions applying to a contract, including the law to which it is subject, should be clear to the passenger at the time of booking. Some Conditions of Contract state that the applicable law is that of the flag of the vessel; it is not clear to the passenger where the vessel is registered, and conceivably this could be outside the EU.
- **Lien:** Some terms and conditions state that the operator has the right to seize a passenger's property if it believes it is owed money (lien), while the passenger has no reciprocal power. In our view, this is likely to contradict the principle of balance in the Unfair Terms Directive.

4.7 In addition we have identified where there are other terms in individual operator's

Conditions which are so transparently unfair that there appears a significant probability that they would not be compliant with the Directive.

- 4.8 It should be noted that where we have identified issues as potentially being in conflict with the Directive, the relevant Condition would not necessarily be rendered illegal/invalid, but would be subject to a test of whether it was fair under the relevant circumstances.

Selection of operators

- 4.9 We selected operators to give, as far as possible, a representative geographic mix of the ferry operators serving EU ports, and to include a representative number of small and medium size enterprises (SMEs) and non-EU operators providing services to/from EU ports. The selection includes most significant passenger ferry operators providing intra-EU and international services to/from EU ports.

- 4.10 In total, we selected 95 operators for review. Appendix B describes how these operators were selected. During the course of the review, we discovered that Conditions of Carriage or equivalent documents were not available for three operators. The number of maritime operators under consideration in this study is therefore 92.

Our approach

- 4.11 Our team reviewed the Conditions of Carriage of each of the operators. As a result of the range of languages used for the Conditions of Carriage (approximately one third were not available in English), we had to use a relatively large team. In order to ensure consistent results were produced, reviewers were given a detailed spreadsheet checklist to verify operators' Conditions against, and the Project Manager reviewed the results in each case.

Results of the analysis

- 4.12 This section summarises the conclusions of our review.

Our approach to evaluating treatment of passengers

- 4.13 A wide range of different approaches are used by maritime operators in addressing the three issues covered by the study. In order to allow comparisons to be made, we categorised their approaches on the basis of Table 4.1 below.

TABLE 4.1 CHARACTERISATION OF MARITIME OPERATORS' APPROACHES TO ISSUES

Issue	Options for approach
Delay and cancellation	Passenger offered choice between refund and re-routing, at least under certain circumstances
	Refund or rerouting offered, at least under certain circumstances, but the passenger does not have a choice
	Provisions for delay and cancellation will be made according to applicable law (no details given)
Only reference is that the operator denies responsibility for delay or	

	cancellation
	No reference made
Liability	Liability accepted for death, personal injury, baggage and vehicles
	Liability accepted for death and personal injury only
	Liability accepted for baggage and vehicles only
	Liability is referred to in general terms, but not specified
	Only reference is accept valuables for safe-keeping
	Only reference is to deny liability for one or more of the areas of concern
	No reference made
Passengers with reduced Mobility	Vessel is fully or partly accessible
	Vessel is not stated to be accessible, however assistance is offered
	Passenger must inform operator of condition on booking, assistance not stated to be offered
	Operator claims right to deny carriage / assistance / facilities to PRMs
	No reference made ⁴

4.14 For delay and cancellation, we also recorded whether the operator offered care to the passenger in the event of delay or cancellation, or explicitly stated that care would not be offered.

4.15 For the purposes of this summary analysis of the approaches of operators to these issues, we have only assessed the documents which are described by the operator as regulating carriage of passengers. This includes documents which are directly referred to in the Conditions of Carriage, but does not include other information notices which the operator may provide on its website. Nonetheless, these other information notices often provide material which relates to these issues.

4.16 This distinction is made only for the purposes of the conclusions set out here. The detailed analysis of individual operators' Conditions provided at the end of this section sets out our assessment of all the documents we found for each operator.

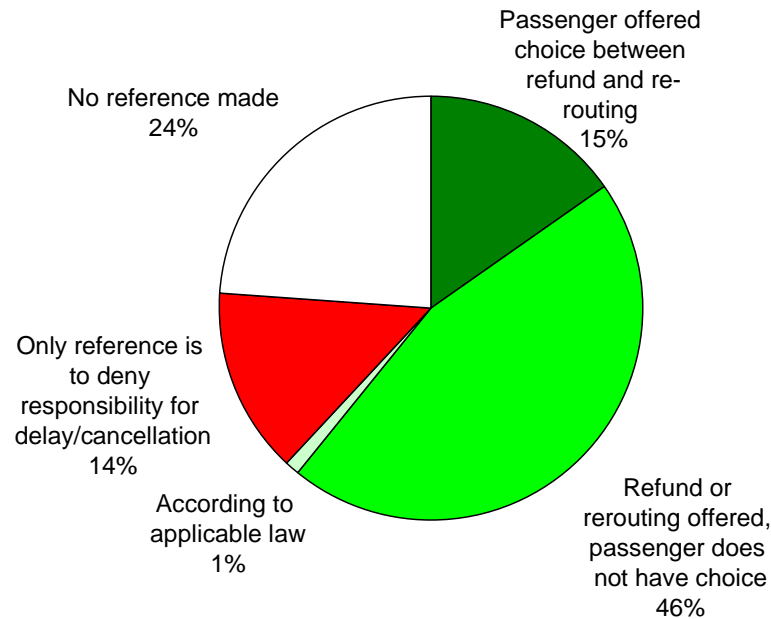
Summary of results

4.17 Figure 4.1 sets out the results of this analysis regarding delay and cancellation. 61% of Conditions of Carriage offer some provisions (either a refund or re-routing) in the event of delays and cancellations, although only a quarter of these operators offered a choice to passengers. Operators only rarely offered compensation in excess of a refund of the fare. For 14% of operators, the only reference to this issue was to state that they denied liability for direct or indirect costs resulting from delays or cancellations. A quarter of operators made no reference to this issue, reflecting the brief nature of the Conditions of Carriage of most maritime operators relative to those of most air

⁴ Where the only reference made is to guide dogs, we have classified this as 'No reference made'.

carriers.

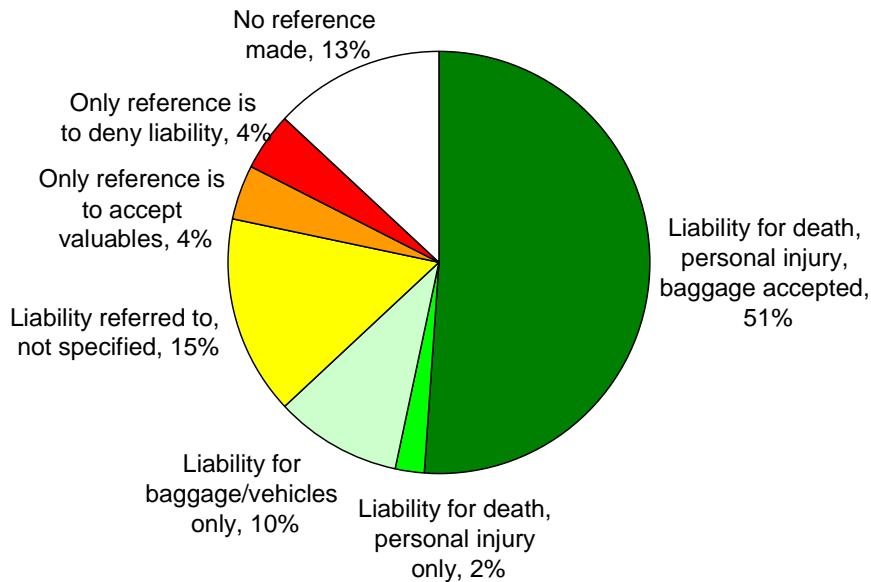
FIGURE 4.1 APPROACH TO DELAY AND CANCELLATION



- 4.18 Of those operators that did offer either a refund or rerouting, a fifth limited or excluded these provisions if the delay or cancellation was caused by circumstances beyond the operator's control: either reducing the benefits to passengers, or explicitly denying these benefits under such circumstances. However, 26% of operators offering refund or rerouting only referred to them in the context of circumstances beyond the operator's control, and made no reference to circumstances *within* the operator's control. Just over half of these operators offered refund or rerouting under all circumstances.
- 4.19 It was very common for operators to deny liability for any delay or cancellation beyond its control. Many operators stated that they had the right to vary the timetable or cancel sailings without notice, on the grounds of poor weather conditions or other force majeure, or in some cases for any reason.
- 4.20 In addition, only 4 out of the 92 operators examined offered any care to passengers, while 6 operators explicitly denied care to passengers. Where care was offered, only one operator appeared to offer it under all circumstances. The remaining operators limited provision of care to circumstances in which the ferry operator was responsible for the delay, or to particular types of passengers, for example those whose ticket also included the provision of meals.
- 4.21 The Athens Convention regulates the liability of maritime operators for death, injury and damage to or loss of baggage. The Convention has not yet been ratified in

European law and less than half of EU Member States have ratified it (9⁵ out of 22 coastal Member States). Possibly as a result of the Athens Convention, a higher proportion of operators' Conditions explicitly refer to liability. Half of operators that we reviewed explicitly acknowledged liability for death, personal injury and damage to or loss of baggage, and significantly fewer made no reference at all to this issue than do to delay and cancellation (13% compared to 24%).

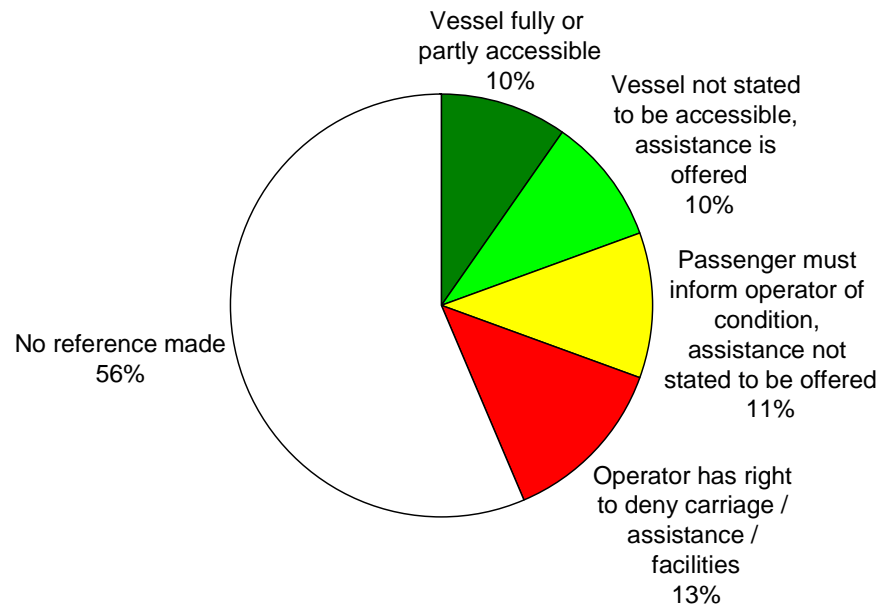
FIGURE 4.2 APPROACH TO LIABILITY



- 4.22 However, compared to airlines, the level of detail provided on operators' liability was limited. 70% of operators' Conditions explicitly stated that liability was accepted according to the Athens Convention and/or other applicable law (often national maritime codes), but only 13% stated what the limits of these liabilities were.
- 4.23 Four of the operators denied liability which in our view they should reasonably have accepted: one denied liability for injury to passengers; one for wilful damage to luggage; and two for damage to luggage apparently even when resulting from the negligence of the operator. A substantial proportion denied any liability for damages due to delay.
- 4.24 As for the air carriers, coverage of PRMs was the most limited out of the three issues we examined. Over half of operators did not refer at all to this issue, while 13% claimed the right to deny PRMs some part of the service. Only 20% provided accessible vessels or stated that assistance for PRMs was available.

⁵ International Maritime Organisation: http://www.imo.org/Conventions/mainframe.asp?topic_id=248.

FIGURE 4.3 APPROACH TO PRMS



4.25 The terms denying service to PRMs included:

- PRMs must inform the operator of their condition when boarding, and if they do not then carriage may be denied;
- PRMs travelling alone may be denied boarding;
- the crew is not permitted to assist PRMs transferring from a wheelchair to a stairlift;
- vessels or berths may not be suitable for PRMs; and
- the operator may refuse carriage to a passenger on the basis of their physical or mental condition.

Variation in approach by region and operator type

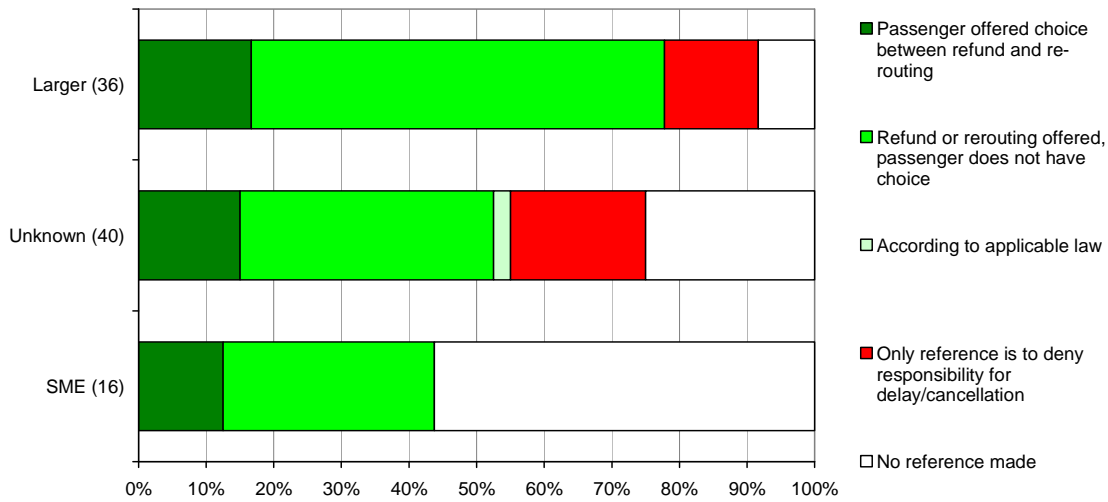
4.26 This section sets out the degree of variation in approach we have observed, depending on the size of the operator and on the area of Europe in which the operator provides services.

4.27 We have classified the operators according to their size, distinguishing between Small and Medium-sized Enterprises (SMEs, defined to be companies with less than 250 employees), and larger operators. This allocation is based on information provided to us by the Commission. However, the information on size of operator was not complete, and so a number of the operators are classified as 'unknown'. Figure 4.4- Figure 4.6 show the extent to which Conditions varied depending on the size of operator.

4.28 A higher proportion of the larger maritime operators had Conditions of Carriage which at least made some reference to delay or cancellation, although in some cases this was only to deny any responsibility. Over half of the SME operators in the study made no reference at all to this issue, reflecting the fact the Conditions of Carriage of the

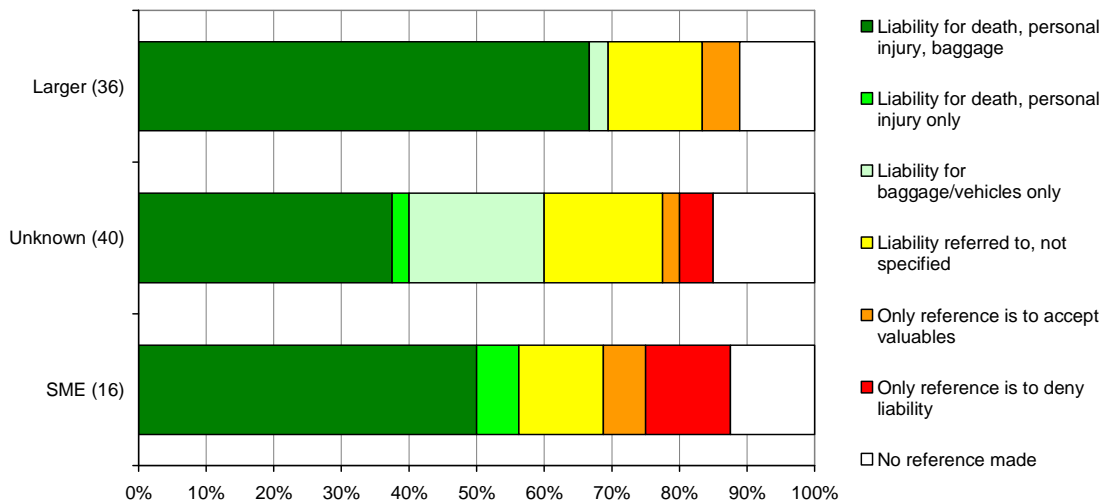
smaller operators were often much less detailed.

FIGURE 4.4 APPROACH TO DELAY AND CANCELLATION BY SIZE OF OPERATOR



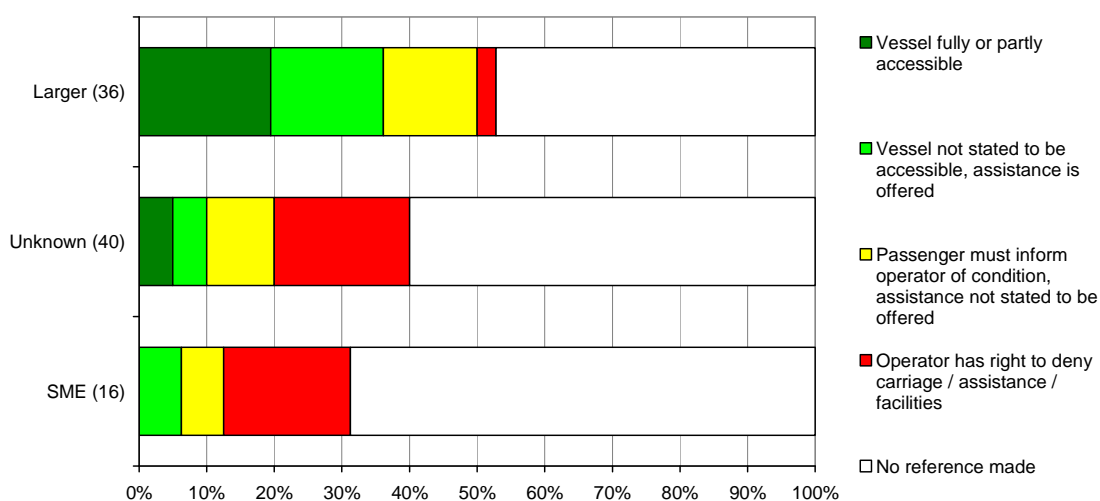
4.29 Regarding liability, there is a similar trend for larger operators to state more generous provisions for passengers, however it is less marked. 67% of larger operators' Conditions explicitly accept liability for death, personal injury and property, compared to only 50% of SMEs.

FIGURE 4.5 APPROACH TO LIABILITY BY SIZE OF OPERATOR



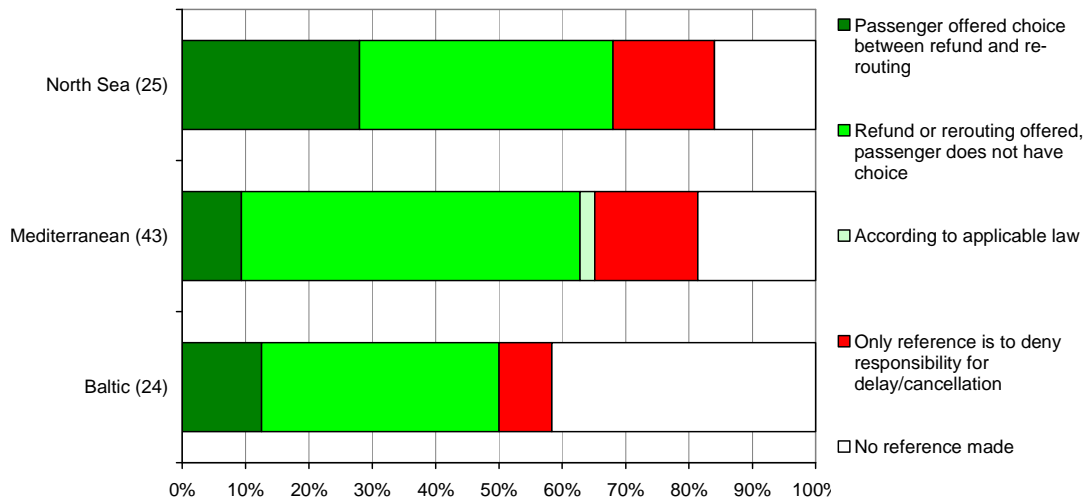
4.30 The differences between SME operators and the others were more marked in terms of the handling of PRMs. 36% of larger operators offered accessible vessels or assistance to PRMs, compared to only 5% of SMEs. This is unsurprising given the larger ships and resources employed by the larger operators.

FIGURE 4.6 APPROACH TO PRMS BY SIZE OF OPERATOR



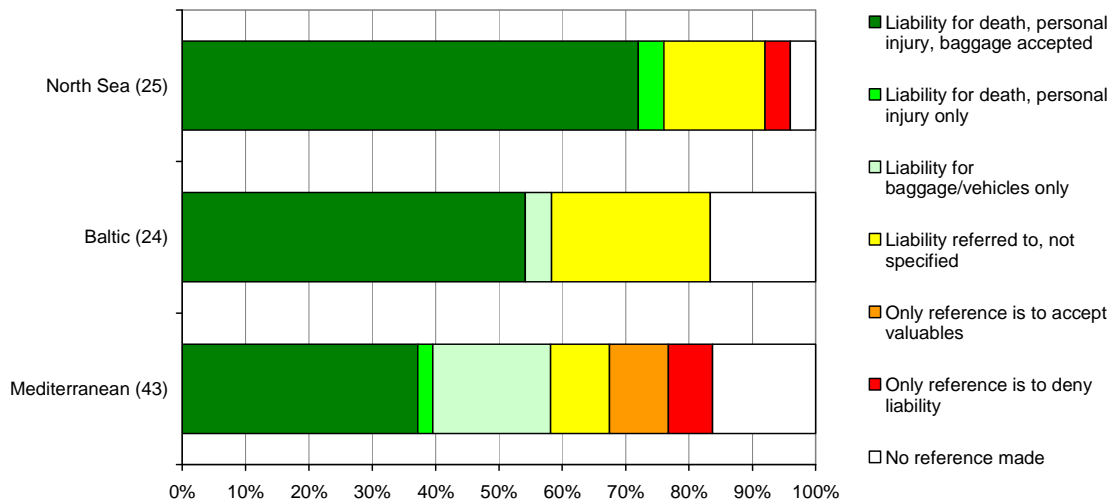
- 4.31 We have also checked whether there was any difference in approach depending on the region in which the operator was based. Figure 4.7-Figure 4.9 show the variation between in approaches according to geographical area. For the purposes of this analysis, we have classified operators based in the Azores and Canary Islands as Mediterranean.
- 4.32 In terms of approach to delay and cancellation, we found little difference between the North Sea and the Mediterranean operators. Between 60% and 70% of North Sea and Mediterranean operators' Conditions offered some form of refund or re-routing to passengers (although North Sea operators were much more likely to offer passengers a choice), and in both regions 16% of operators' Conditions only referred to the issue to deny responsibility for the consequences of delay. However, of Baltic sea operators' Conditions only 50% offered some form of compensation or assistance to the passenger, and 42% made no reference to this issue.
- 4.33 Our sample of operator included a relatively high number of Italian operators (13), and from their Conditions of Carriage it appears that the Italian Navigational Code places requirements on them in the event of delay or cancellation. This contributes to the high proportion of Mediterranean operators which provide a refund.

FIGURE 4.7 APPROACH TO DELAY AND CANCELLATION BY REGION



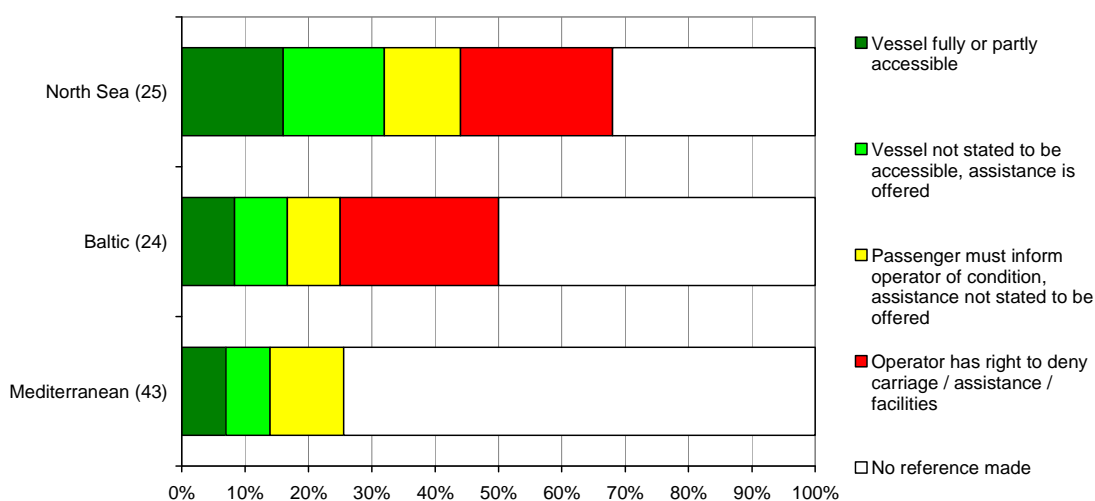
4.34 A higher proportion of North Sea than Baltic or Mediterranean operators’ Conditions explicitly accept at least some liability. 72% of North Sea operators’ Conditions explicitly accept liability for death, personal injury and baggage, compared to 54% (Baltic) and 37% (Mediterranean).

FIGURE 4.8 APPROACH TO LIABILITY BY REGION



4.35 Similarly, more North Sea operators’ Conditions made provisions for PRMs than Mediterranean or Baltic operators. 32% of operators based in the North Sea offered either accessible vessels or assistance to PRMs, compared to only 17% of operators in the Baltic and 14% in the Mediterranean. 74% of Mediterranean operators’ Conditions made no reference to this issue, compared to 32% in the North Sea.

FIGURE 4.9 APPROACH TO PRMS BY REGION



Unfair contract terms

4.36 As with the airlines, when reviewing the Conditions of Carriage, we identified terms which had previously been identified as unfair under the Unfair Contract Terms Directive, or which were so transparently unfair that there seemed to be a significant probability that the term would be considered non-compliant with the Directive. However, as explained above, it should be noted that the Directive imposes general principles for all consumer contracts, rather than precise requirements that operators have to follow. Therefore, even where we have identified here that a term may be unfair, it would ultimately be up to a court to determine this in each case. This would also take into account how an operator applied the term in practice.

4.37 We found that the unfair terms occurred less frequently than with airlines: on average we identified 1.7 unfair terms in each operators' Conditions, and 16 of the operators' Conditions contained no unfair terms. This is primarily due to the much more limited nature of the maritime operator's Conditions: although some of the operators provided Conditions with detail comparable to those of the airlines (typically 8-10,000 words), many were extremely brief.

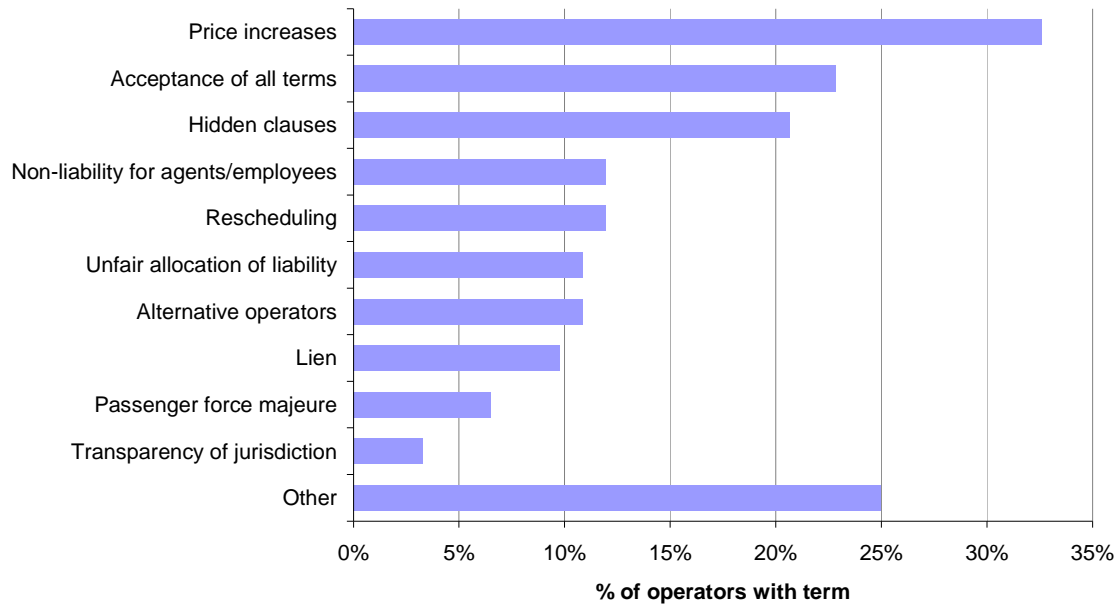
4.38 The most common unfair terms which we identified were:

- **Price increases (occurring in 34% of terms):** This term typically allows operators to recover any increases in their direct costs due to changes in fuel costs or exchange rates from passengers, after the date at which they had bought the ticket. However a number of operators (8% of total) stated terms which allowed them to retrospectively increase fares.
- **Acceptance of all terms (23%):** This term typically states that "By purchasing a ticket, the passenger is deemed to have understood and accepted all terms in these Conditions of Carriage." Terms such as this require passengers to accept terms which are unfair, and have been held to be unfair themselves by the UK Office of Fair Trading.
- **Hidden clauses (21%):** Many Conditions of Carriage state that the contract is also governed by other documents, such as Carrier's Regulations. If these are

difficult to access (e.g. by being available only on application to the operator’s offices) then this presents a lack of transparency to the passenger.

4.39 Figure 4.10 shows the unfair terms we observed most often.

FIGURE 4.10 MOST FREQUENTLY OCCURRING UNFAIR TERMS



4.40 These terms are all ones that we identified as unfair for airline passengers (as discussed above). We also identified two terms which are specific to maritime operators:

- **Lien:** Typically, an operator will state “The operator shall have a general lien on the luggage and/or vehicle of the passengers for all charges owed”. This means that the operator claims to have the right to retain, and if necessary sell, the property of the passenger when it considers that the passenger owes it money (the right of lien). Since the passenger has no reciprocal power, in our view this might be considered to contradict the principle of balance in the Directive and therefore be unfair.
- **Transparency of jurisdiction:** A number of operators’ Conditions state that “the applicable law is that of the flag of the vessel”. Since it is not necessarily clear to the passenger where the vessel is registered, this presents a lack of transparency.

4.41 In addition, the following terms were identified as being transparently unfair:

- Two operators’ Conditions stated that they had the right to move a passenger’s vehicle entirely at the passenger’s risk and expense.
- A number of operators’ Conditions stated that the operator was not liable for damage it caused, even when the damage was wilful or negligent.

4.42 Larger operators tended to include slightly more unfair terms than SMEs (1.8 compared to 1.3), but this reflects the fact that most had more detailed and longer Conditions of Carriage, rather than the overall fairness of the terms. Operators in the North Sea tended to have slightly more unfair terms than those in other regions, which

again reflects the greater detail in North Sea operators' Conditions of Carriage.

Conclusions and next steps

- 4.43 Our main conclusions with regard to each of the relevant issues were:
- **Delay and cancellation:** 24% of maritime operators' Conditions of Carriage made no reference to this issue, and for 14% the only reference was to deny responsibility for the consequences of delay. Only 15% offered passengers the choice between a refund and re-routing.
 - **Liability:** Over half of maritime operators' Conditions of Carriage accepted some liability for death, personal injury and personal property. However, 21% of operators' did not refer to liability, or referred to it only to deny it.
 - **PRMs:** Only 20% of operators made some form of provision for PRMs, either in the form of accessible facilities or offers of assistance. Over half of operators assessed made no reference to this issue.
 - **Unfair Contract Terms:** We found that Conditions often contained a large number of terms equivalent to terms which had been identified as unfair when included in air carrier Conditions of Carriage.
- 4.44 Comparing different types of operator, we found that, as with airlines, the larger operators were more likely to have Conditions of Carriage making more generous provisions to passengers. However, the difference was less marked than for the airlines, and a lack of clarity on the size of some of the operators in the study means that our conclusions on this comparison are less certain. Operators registered in the North Sea tended to make more generous provisions than those registered elsewhere.

APPENDIX A
SELECTION OF AIR CARRIERS

A1. SELECTION OF AIR CARRIERS

Background

A1.1 It was agreed that the study would cover most significant EU carriers and a small sample of other carriers, and that in total around 80 carriers would be included.

Selection of carriers

A1.2 Airlines have been selected on the following basis:

- members of AEA;
- members of ELFAA;
- members of IACA;
- a sample of members of ERAA, including all members of ERAA that are low cost carriers;
- all major EU low cost carriers;
- at least one airline from each of the 27 Member States;
- all of the 20 largest airlines, by number of passengers, within the European Union (in most cases these are covered from the previous categories); and
- a sample of other airlines to cover airline types that are not represented within the previous categories.

A1.3 The other airlines include 5 non-EU carriers, one from each of North America, Latin America, Middle East, Africa and Asia (deliberately including some second/third tier carriers).

A1.4 Airlines were excluded for a number of reasons:

- except for the sample of five non-EU carriers, airlines were not included if they were registered outside the EU;
- being wholly cargo carriers; and
- only providing services on behalf of other companies (carriers or tour operators), and therefore having no terms and conditions of their own.

A1.5 Overall, the selection includes 88 carriers of which 37 we consider to be low cost carriers. Carriers were reviewed subject to it being possible to obtain Conditions of Carriage: these are available on the websites for virtually all of the EU carriers but not all of the non-EU carriers (in a few cases we approached the airline directly to obtain Conditions of Carriage).

APPENDIX B
SELECTION OF MARITIME OPERATORS

B1. SELECTION OF MARITIME OPERATORS

Background

B1.1 It was originally proposed that the study should focus on the 100 main European maritime operators. However, the Commission requested at the kick-off meeting that one third of the operators should be small and medium sized enterprises (SMEs) and that the operators should be split between three regions in the following proportions:

- the Baltic Sea (25%);
- the North Sea, Channel and Irish Sea (30%); and
- the Mediterranean plus the Canary Islands and the Azores (45%).

B1.2 It was also noted that there is likely to be a stronger case for European-level measures to protect passengers travelling on intra-EU and international services, rather than short distance domestic services and therefore, as far as possible, the selection should focus on these. Non EU operators should also be included when operating to/from EU ports.

Selection of operators

B1.3 Operators were selected from the Thomas Cook European Rail Timetable, which lists all of the main operators providing passenger scheduled services within the European Union, supplemented by the list of European maritime operators provided by the Commission, particularly for information on SMEs.

B1.4 However, we found it was necessary to exclude a number of operators. Operators were excluded where they:

- are non-EU operators which do not provide a service to an EU port;
- no longer provide a service;
- do not have a website from which Conditions of Carriage could be obtained;
- have a website, but do not provide Conditions of Carriage on it;
- provide local public transport only;
- only convey freight or convey freight only on their services to the European Union; and
- are companies which are part of, or operate services only on behalf of, other operators and therefore do not have their own Conditions of Carriage.

- B1.5 These conditions tend to result in the exclusion of SMEs more than other operators: in particular the SMEs were more likely to provide a very short distance service only. As a result, only 19 the proposed operators are SMEs. However, the list also includes 40 operators whose size is unknown and at least some of which would be SMEs – for example, the sample included one operator which operated one catamaran only and is therefore almost certainly an SME, but this could not be confirmed because it does not publish the number of employees it has.
- B1.6 The coverage of the three geographical regions is shown in APPENDIX: TABLE B1.1. This division between the regions is in line with that requested by the Commission.

APPENDIX: TABLE B1.1 GEOGRAPHIC COVERAGE OF OPERATORS

Region	Number of operators
North East Europe (Baltic Sea)	25
North West Europe (North Sea, Channel and Irish Sea)	26
Southern Europe (including Mediterranean, Canary Islands and Azores)	44

APPENDIX C
PREFERENTIAL TARIFFS CASE STUDIES
(PROVIDED AS A SEPARATE DOCUMENT)

CONTROL SHEET

Project/Proposal Name: ASSESSMENT OF CONTRACT CONDITIONS
AND PREFERENTIAL TARIFF SCHEMES

Document Title: Main report and appendices A-B

Client Contract/Project Number: TREN/A5/197/2007-S07.79336

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