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Summary

The travel industry has seen an overwhelming growth concerning air passenger numbers in recent decades. In the same period of time the European Community passed a series of legislative measures to provide air passengers with essential rights. In this thesis those different sets of rules accompanied by case law and literature shall be examined.

The first step taken was the Package Travel Directive 90/314. Although travel packages may comprise a number of different services, air transfer is usually included. The Directive establishes several duties for the organizer and/or retailer of a package. The most important measures are the requirement of a minimum standard of information, the stipulation of liability rules and the travelers' protection in case of insolvency of the tour operator. As more than 15 years have passed since the Directive has been adopted, initiatives have been started to reform the Directive. However, the main task is on the member states to make their implementing laws more water-tight.

During recent years the Montreal Convention replaced the old Warsaw Convention dealing with airline liability for damage to passengers, baggage and cargo. In the Community the Convention is applicable in conjunction with Regulation 2027/97. A system of liability has been established which provides for different limits of liability and options of exoneration depending on the kind of damage occurred. Besides some amendments that should be made some gaps remain in this system, which are to be filled by national courts. Therefore the creation of a comprehensive single standard for Europe is unlikely in the near future.

The Regulation 261/2004 presents a milestone in European air passenger protection. It has been in force for one year by now. The regulation deals with denied boarding, cancellation and delay. If the booked flight is heavily delayed the passenger should be assisted. In case of denied boarding and cancellations he may also claim fixed amounts of compensation from the airlines. The Regulation especially aims to punish deliberate overbooking practices of many airlines. In January the ECJ confirmed the validity of the regulation after it had been challenged by two major airline associations.

The author agrees with this judgment, but he also makes proposals for amendments which could lead to an even more balanced legislation.

The European Commission especially focused on the rights of persons with reduced mobility, including handicapped, old and very young passenger. Accordingly a regulation is already being processed and expected to enter into effect by 2008.

Regulation 2111/05 introduced a blacklist of such carriers that are considered to be unsafe. However, this blacklist seems to be incomplete as it includes exotic airlines only.

The last chapter is dedicated to the state of air passengers' data protection in the EC. European airlines collect data from their passengers, the so called passenger name records (PNR), which fall under the scope of the Data Protection Directive 95/46. Of special interest is the agreement between the U.S and the Community on transfer of such PNR. This agreement is likely to be declared void by the ECJ soon.

Concluding the level of air passenger rights in the European Community appears quite satisfactory and balanced. Therefore only minor amendments should be made to legislation. The author identifies the lack of information to be the main problem. Here it is the air passenger himself that needs to change his habits and collect more information prior to air transfer.

Preface

The situation of consumers within the European Community has been strengthened during the recent twenty years. However, many are still not properly informed on their rights even in their all-day-life. When it comes to their rights concerning air travel, the level of information is even worse¹. Moreover, the atmosphere at an airport is rather intimidating towards the average consumer. You have to pass through several security-checks, bring a series of documents and are expected to follow the rules as set by all kinds of authorities. So it is no surprise that we obey no matter what we were told by the “authorities”. This might include statements as “the flight has been overbooked, see you tomorrow maybe”, “there is going to be a long delay, just be patient” or “sorry, we lost your luggage, but we will have it shipped to you next week on your costs.” We may react with anger, we may even shout some threats, but finally we obey and certainly we do not ask for compensation afterwards, if it was not offered by the airline itself. Personally, I had several experiences and each time I felt uncertain about my rights and their applicability. Since my special legal interests are based in European Consumer Protection, I decided to focus on air passenger rights in the European Community for my master thesis within the Master of European Affairs program at the University of Lund, Sweden.

A thesis, which was supported by my supervisor: tack så mycket, Lars-Göran!

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Of course, such a year abroad would not be possible without emotional and financial support from home: Thanks to my parents and there never-ending

¹ According to a Commission survey 64 % of European citizens are not aware of their rights in air travel, *Passengers' Rights*, July 2005, p. 21, found at http://europa.eu.int/comm/consumers/topics/eurobarometer_passrights_en.pdf, last visited 25/04/2006.

efforts to support me in any way. Here I must also include my grandfather, a very wise and humorous man, who I owe a lot. Vielen Dank!
Most of all, thank you, Nadine, for your support and patience.

Abbreviations

BGB	Bürgerliches Gesetzbuch (German Civil Law Code)
DG	Directorate-General of the European Commission
CBP	U.S Bureau of Customs and Boarder Protection
DVT	Deep Vein Thrombosis
EC	European Community (Treaty)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Report
EEC	European Economic Community (Treaty)
EESC	European Economic and Social Committee
ELFAA	European Low Fares Airline Association
EP	European Parliament
EU	European Union (Treaty)
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
MS	Member state of the European Union
OJ	Official Journal of the European Communities
PNR	Passenger Name Record
PRM	People with Reduced Mobility
PTD	Package Travel Directive 90/314/EEC
PTSD	Post Traumatic Stress Disorder
SDR	Special Drawing Rights
SEC	Commission Staff Working Document
U.K.	United Kingdom
U.S	United States of America

1 Introduction

1.1 Background

"Too many times, air passengers are victims of practices which deserve that they receive a fair treatment and proper compensation²." On the other hand it is argued that "having successfully liberalized the air transport industry, the European Commission now appears determined to destroy that success by over regulating it³."

Over the last twenty years air travel attracted more and more passengers. In 2003 the number of passengers taking off within the European Community grew to an all-time-high of 590 million, a growth of 5% compared to 2002⁴. This was accompanied by the appearance of low-cost airlines, the opening of new routes and with the accession of new member states and their national carriers. Thus, this situation led to falling prices due to a higher level of competition amongst newcomers themselves and the "old" players in the market. In consequence, pressure is high on the competing airlines concerning cost effectiveness. One side-effect is delays and cancellations of flights which have become an every-day annoyance⁵. European passengers are not unaware of those nuisances and so only 21.2 % of them were satisfied with the service performance of the airlines⁶.

During the same span of time European Consumer Policy evolved. As the Treaties of Rome 1957 did not provide a basis for an independent consumer policy the Single European Act of 1987 formulated the goal of a high level of consumer protection while completing the European Common Market. In

² Loyola de Palacio, European Commission vice-president in charge of transport and energy, in: *New rights for air passengers approved by the European Parliament: "a major step ahead" says European Commission*, IP/03/1783, found at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1783&format=HTML&aged=0&language=EN&guiLanguage=en>

³ Jan Skeels, ELFAA's Secretary General in: <http://www.elfaa.com/documents/ELFAA%20release%20decision%20on%20DBC%2010Jan06.pdf>

⁴ Eurostat news release, 51/2005, 14 April 2005.

⁵ In 2004 17,7% of the flights were more than 15min delayed, some of them were even cancelled; 51% of the delays were caused by the airlines: http://www.eurocontrol.int/eCoda/codarep/2004/annual_report_2004_full.pdf.

⁶ Pierre Sparaco, *Europeans Demand Airline Accountability*, Aviation Week & Space Technology, New York (2000), 153:24:38.

the Treaty of Maastricht of 1992 finally Consumer Protection is considered a separate community policy with a basis within the treaty: Art. 3 I lit.(t) and Art. 153 EC (former Art. 129a EC⁷).

Air passenger rights, however, are not only of concern in consumer policy but in transport policy as well. According to Art. 80 (2) EC the European authorities are competent to legislate air transport issues.

The first major step taken concerning consumer policy in air travel was done in 1990 by issuing Directive 90/314 on package travel. This directive was not meant to provide complete protection to air travelers as its scope is limited to travel packages which may include transport by air only. Another step was taken soon after by publishing Regulation (EEC) No. 265/91 which dealt with compensation for denied boarding. Ultimately, this regulation has been amended by the Regulation (EC) No. 261/2004, which added compensation for cancellation and long delays. In 1997 Air carrier liability for accidents, damage or loss of baggage came into focus of European authorities for the first time by adopting Regulation (EC) 2027/97, later to be amended by Regulation (EC) No. 889/2002. Prior to those laws, only international conventions, the Warsaw Convention of 1929 and its successor, the Montreal Convention of 1999, covered air carrier liability. During recent years another directive came into the focus of air travel. There have been ongoing disputes between the U.S and the European Community about the transfer of passenger data which falls into the scope of Directive 95/46.

The European Court of Justice, too, had been involved in air passenger rights. After several seminal judgments concerning Package Travel in the 1990s, it dealt with the validity of Regulation 261/2004 as recently as January 10th of this year. Still pending are the cases of the EP v Commission and Council on the transfer of passenger data.

Besides adopting pieces of legislation, the European Authorities are willing to improve the air travelers' situation by providing information that is easily accessible by the public. Brochures on travelers' rights⁸ are distributed at

⁷ Numeration of articles changed after Treaty of Nice of 2001.

⁸ Find the English version at http://www.europa.eu.int/comm/transport/air/rights/doc/2005_01_19_apr_leaflet_en.pdf.

every major airport of the Community in all official languages and further information is given on official homepages⁹.

1.2 Purpose

This thesis is supposed to give an overview of air passenger rights in the European Union, which can be found in a variety of legislative rules and treaties. Special emphasis will be applied on actual developments and case-law.

In addition it aims to strike a balance between the often colliding interests of consumer protection on the one hand and the freedom of services on the other hand. I want to show, whether consumers are given a fair level of protection. Are there too many protective measures already as some airline officials argue those days? Is there a need for even more harmonization of national rules? Should amendments be made to certain pieces of legislation?

1.3 Delimitations

This thesis focuses on Community legislation. Whenever reference is made to international conventions or national law those will only be made in order to elaborate EC measures. An exception shall be made for the Montreal Convention of 1999 due to its overriding applicability in relationship with secondary Community legislation. However, the analysis shall be limited to liability for passenger and baggage damage and delays.

In general whenever I mention procedural aspects both in terms of legislative and judicative procedures I attempt to be as brief as possible since these are not the core of this thesis.

Focus is on the rights of air passengers. The economic situation for the airlines, political implications etc will only be used in examining and explaining the level of air passenger rights.

Concerning package travel, I focused on the 1990 Package Travel Directive, especially reviewing aspects of air travel. Other issues with no connection to air travel at all such as hotel overbooking, I left out completely.

⁹ E.g. homepage of the DG Energy and Transport at http://www.europa.eu.int/comm/transport/air/index_en.htm.

No more than a short background of data protection in general shall be provided. The chapter shall focus on the current case of transfer of passenger data to the U.S authorities.

1.4 Method and Material

This thesis is based on the most important sets of rules concerning air passengers' rights in the European Community. Starting from the text of the legislation I went more into detail by using literature and case law. Concerning literature I did not find many books, which may be due to the actuality of the topic. Nevertheless a great amount of magazine articles helped me in my research. Concerning case law I focused on cases decided by the ECJ, since judgments of the national courts have no binding force for courts of other member states at all. Not the least I depended on information provided on the internet. On both official and private homepages, statements and documentation could be found.

Besides researching it was attempted to state my own opinion. Usually it is added in the last paragraph of each chapter, but also whenever it appeared appropriate. Each chapter is concluded separately, the conclusion at the end is of more general nature.

For reasons of practicality I used the male form referring to consumers, tour organizers etc. Whenever the male form is used, the female form shall be included.

2 Package Travel

2.1 Introduction and history

The package travel directive was the first major step of European authorities to protect consumers in the field of travel law and especially air travel law since nowadays most travel arrangements include air transportation. By definition, package travel requires at least two out of three of the elements of transport, accommodation and other tourist services to be sold at an inclusive price¹⁰. In this thesis I shall restrict myself only to those cases including air transport as one of those elements.

The first package travel ever was organized by the Englishman Thomas Cook in 1841 providing rail transport and private entertainment for abstainers. Over time the customers may have changed their habits, but the business idea remained the same. It was not before the 1970s that national law systems introduced more specific laws on package travel contracts. Of course those laws differed to a great extent from one member state (MS) to another¹¹. In 1982 the Commission drafted guidelines for a Community policy on tourism, which included the outline of future rules on package travel. After the Economic and Social Committee (EESC) supported these intentions in an opinion¹², the European Parliament (EP) adopted said opinion¹³ and the invitation by the European Council of Ministers (the Council)¹⁴ the Commission published a first proposal for the directive in 1988¹⁵. Although this proposal was criticized by the EESC and the EP for lack of consumer protection and the travel industry condemned the strict liability and the detailed regime on insolvency matters, the Commission made only minor amendments to the first proposal and the directive was

¹⁰ Zahd Yaqub, in: *European Travel Law*, § 2 The Package Travel Directive, ed. by Z. Yaqub and b. Beckford, Chichester 1997, p. 48.

¹¹ Hans-W. Micklitz, in: *Europäisches Verbraucherrecht*, § 18 Reiserecht, ed. by N. Reich, H.-W. Micklitz, 4th edition, Baden-Baden 2003, p. 675.

¹² OJ 1983 C358/52.

¹³ OJ 1984 C10/281.

¹⁴ OJ 1984 C115/01.

¹⁵ OJ 1988 C 96/5.

adopted by the Council on 13 June 1990 already as Council Directive 90/314/EEC¹⁶.

The Package Travel Directive 90/314/EEC (PTD)¹⁷ provides the following three major improvements to the air traveler: minimum information requirements prior to the contract and the journey, a regime of strict liability in case of defective performance and protection in case of insolvency of the tour organizer or retailer.

2.2 Purpose of the Package Travel Directive

The PTD was based on the broad provision of Art. 100a EEC (now Art. 95 EC), which makes it a part of the common market policy and consumer policy¹⁸. The special paragraph on customer protection, Art. 153 EC was introduced later with the Maastricht Treaty and was therefore not applicable. Thus, Art.1 of the PTD states that the purpose of the directive is the approximation of national laws.

In the preamble, several other aims of the directive can be found. First it is emphasized that completion of the internal market is one of the major goals of the Community and that common rules, such as laid down in this directive, will help to fulfill this goal.

The PTD shall also stimulate further growth in the package travel industry, which seems to be “somewhat unrealistically¹⁹” in regard of all the burdens laid upon this branch.

Finally, it is consumer protection that should be achieved by this directive. Measures favoring consumers can be found in all the material provisions.

Concluding the PTD by approximating the laws of the MS shall help to complete the internal market and protect the consumers in this field.

¹⁶ OJ 1990 L 158/59.

¹⁷ Find an excerpt of the PTD in Supplement A.

¹⁸ Hans-W. Micklitz, id., pp. 675, 676.

¹⁹ Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law*, Aldershot 1997, § 7 Tourism, p. 231.

2.3 Definitions and scope of the directive

Art. 2 of the PTD lists a number of legal definitions which define the scope of the directive in terms of material and personal subject matter.

2.3.1 Material Scope

Concerning the definition of package travel services as stated above note must be taken of a restriction to the scope of the directive. The service must contain a pre-arranged combination of at least two elements sold or offered at an exclusive price *and* it must cover a period of at least 24 hours or include overnight accommodation.

There must be a travel package of at least two out of the elements of accommodation, transport and other tourist services. This means that a pure accommodation or flight arrangement for example would not fall within the PTD. The European Court of Justice (ECJ) scrutinizes the existence of those elements as it has shown in the case of half- to full year student exchange programs²⁰. Finnish students were sent abroad by plane, were provided accommodation with host families and access to foreign schools was arranged. The Court held that the element of transport existed, but there was no accommodation in the sense of the PTD due to the characteristics of free of charge long-term hosting²¹. Thus, such student exchange programs cannot be regarded as a travel package.

Unlike in many other fields covered by Community law, an Inter-MS element is not necessary. A package tour, which is of purely national nature falls within the scope of the directive.

The requirement of an “inclusive price” is qualified in the last sentence of Art. 2 (1): Travel operators shall not have the opportunity to elude the directive by separate billing.

The package must be pre-arranged by the tour operator. For a long time the doctrine existed that, if customers contact a travel agency asking it to combine her/his wishes, such a situation falls out of the scope of the directive²². In the year 2002 the ECJ affirmed the applicability of the Package Travel Directive in such a situation, the so called “Club Tour”

²⁰ Case C-237/97, AFS Intercultural Programs Finland ry, [1999] ECR 825.

²¹ Id. § 28.

²² Geraint Howells and Thomas Wilhelmsson, id., p. 233.

judgment²³. The judgment is based on two arguments. First, there would be nothing in the directive to exclude such consumers from the protection of the PTD²⁴ and second point (j) of the annex to the directive, providing that special requirements which were communicated by the consumer shall be included in the contract, supports the applicability in said circumstances²⁵.

2.3.2 Personal Scope

The directive deals with the relationship of consumers on the one side and travel organizers and retailers on the other. The concept of consumer is according to Art. 2 (4) somewhat broader than in general. There is no restriction whatsoever on the term “consumer”. It is the person who “takes or agrees to take the package”. Thus, the profession of the buyer is of no relevance²⁶; moreover legal persons can be consumers in the sense of the PTD as well.

Likewise the term of “organizer” as defined in Art. 2 (2) is not restricted to businessmen. Everyone can be considered an organizer who provides those services more than occasionally. A “retailer” is the person who sells the package arranged by the organizer. The distinction between the two is of relevance concerning Art. 4 (5) – 7.

2.4 Duty to inform

A typical element of consumer protection legislation is a long list of information which must be provided to the consumer. In the PTD Art. 3 as well as 4 (1) and (2) deal with the duty to inform. In general the package organizer or retailer is bound to truthfulness, Art. 3 (1). This principle is nothing new and is no more than a repetition of the truthfulness principle of the Misleading Advertising Directive²⁷, as any descriptive matter provided by tour operators may be qualified as advertising material.

Although a tour operator is not required to allocate brochures to the customer, if he chooses to do so, he is forced to include certain information according to Art 3 (2) of the directive. In addition, they must provide the

²³ Case C-400/00, *Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido*, [2002] ECR 4051.

²⁴ *Id.* § 14.

²⁵ *Id.* § 15.

²⁶ Geraint Howells and Thomas Wilhelmsson, *id.*, p. 234.

²⁷ Directive 84/450/EEC, OJ 1984 L 250/17.

information in a legible, comprehensible and adequate way. The content of the brochures are binding on the organizer or retailer unless changes have been made and agreed upon by the consumer. Nowadays many consumers book their travel packages online. The information appearing on a computer screen can hardly be described as a brochure. On the other side the situation of the consumer is comparable. He is looking for information provided by a tour operator prior to booking a holiday. Thus, there is no reason not to include such situations in analogy to “brochures”.

If no brochure was issued to the consumer²⁸, the organizer and/or the retailer is required to inform the consumer on passport and visa requirements as well as health formalities prior to the conclusion of the contract, Art. 4 (1)(a) and to inform about practical issues of the journey well before departure, Art. 4 (1)(b).

Most of the elements, which must be included in the contract according to Art. 4 (2) can be found in Art. 3 (2) as well. Nevertheless, a mere reference to the brochure is not sufficient²⁹.

All specifications must be made in writing or in another form which is equally comprehensive and accessible. That is why online bookings are possible as long as the consumer receives the necessary data and has the opportunity to file them permanently.

2.5 Later changes to the contract

2.5.1 Transferability of the booking

The consumer has the right to transfer his booking to another person, Art. 4 (3). Unlike the 1988 Commission Proposal a consumer does not need to prove that serious reasons hinder him from traveling. All that is needed is that the consumer is prevented from proceeding, which opens the door to all kind of excuses. However, the consumer and the replacing person are jointly liable to reimburse the provider for additional costs and the substitute must fulfill all requirements placed upon participants of the package. This way the directive serves the interests of the consumer and the package provider at the same time.

²⁸ In case of the existence of a brochure, this information would have been necessary according to Art. 3 (2e).

²⁹ Hans-W. Micklitz, id., p. 684.

2.5.2 Alterations to the price

The directive in Art 4 (4) recognizes the principle of “pacta sunt servanda”. However, there is the possibility to alter the price under certain circumstances, which are exhaustively listed in Art. 4 (4)(a). Those exceptions include only such reasons on which the parties usually have no influence at all: transportation costs, dues, fees, taxes, and exchange rates. For packages including air transport, the cost of fuel would be the most relevant element since the oil price varies a lot. There must be an expressed provision in the contract in order to change the price. It must be noted that the PTD allows for upward and downward revision. That is why even the consumer may ask to lower the price. In reality, this is unlikely to occur³⁰. If the price alteration is to be considered significant, Art. 4 (5), the consumer has the right to withdraw from the contract. The question is what is meant by “significant”? The drafts to the directive assumed that an increase in price of more than 10 % should be called significant³¹. In Germany this requirement is fulfilled if the price has been raised by more than 5 %³². There shall be a total ban of mark-ups for a 20-days period prior to departure, Art. 4 (4)(b).

2.5.3 Alterations to performance

According to Art. 4 (5), the tour operator is entitled to make changes to the package besides the price, if he feels constrained to do so. He must notify the consumer immediately. In case of major changes the customer is entitled to withdraw from the contract.

2.5.4 Right to withdrawal

As explained above the customer has a right to withdraw from the contract under certain circumstances. If the consumer chooses to do so, he/she is entitled to take a substitute package in case the organizer or retailer can offer such, or to re-claim all the money paid so far under the contract.

³⁰ An exception can be found in the case C-125/04, Denuit, Cordenier and Transorient – Mosaïque Voyages v Culture SA, which the ECJ refused to decide upon due to lack of competence.

³¹ Hans-W. Micklitz, id., p. 686.

³² § 651a Abs.4 BGB.

Exceptions to this right of withdrawal are force majeure and insignificance³³.

2.6 Liability of the organizer/ retailer

2.6.1 Difficulties, Discussions, Uncertainty

The organizer and/or retailer “is liable to the consumer for the proper performance of the obligations of the contract, irrespective....³⁴.” In consequence it is for the service provider to prove that the fault originated beyond his sphere of influence. This feature of strict liability has been discussed heavily during the legislation procedure for the PTD. Liability regimes differed prior to the implementation of the directive. Strict liability regimes existed in Germany, Denmark, Greece and Italy, whereas fault-based liability prevailed in countries in other countries and still others applied intermediary solutions³⁵. In order to solve this conflict, the directive applies a compromise: Art. 5 of the Package Travel Directive imposes strict liability for the performance of the package travel on tour organizers / retailers. An exception to this principle can be found in Art. 5 (2), which deals with the liability for damages, allowing the tour operators the opportunity to exculpate themselves in certain situations.

One of the main issues concerning this article is the uncertainty about who is liable, because Art. 5 gives two options: “organizer and/or retailer”. Therefore the member states have to make a choice. Problems arise, if the national rule allows for claims against the organizer only and not against the actual provider of the service. The traveler may have to sue abroad to get compensated. This would contradict the objective of the Directive to provide easy access to the contract partner³⁶.

2.6.2 Liability for defective performance, Art. 5 (1)

The provider is liable not only for his own performance but also for these of his subcontractors. An exculpation is not possible.

³³ Art. 4 (6) of the PTD.

³⁴ Art. 5 (1) of the PTD.

³⁵ Hans-W. Micklitz, id., p. 689.

³⁶ Id., p. 688.

2.6.3 Liability for damages, Art. 5(2)

Unsurprisingly the tour organizer or retailer is also liable in case of damages resulting from faulty performance, Art. 5 (2). However, the directive established three different circumstances which allow the service providers to dispose of their liability: The consumer caused the failure, it is attributable to force majeure or a third party beyond the package contract can be held responsible. Except for the case of the customers own faulty behavior the organizer or retailer is required to assist the consumer in difficulties.

The scope of the damages payable to the consumer has been discussed in the Leitner Case³⁷. The Austrian Simone Leitner was on a package journey with her parents and suffered salmonella poisoning which was attributable to the food at the hotel the Leitners were staying at. Returning from the journey the parents sued the tour organizer, the TUI GmbH, for compensation for pain and suffering and loss of enjoyment of the holidays. The ECJ finally held, that Art. 5 of the PTD conferred the right to consumers to ask for compensation for non-material damages³⁸.

The MS may limit liability in two cases: limitations due to international conventions and contractual limitations for damages excluding personal injury. Concerning air travel such a convention is the Montreal Convention³⁹, which was implemented into Community Law by the Regulation 889/2002⁴⁰. Among others the Convention limits liability in relation to delay, baggage and cargo⁴¹ (e.g. damage to baggage is limited to 1,000 Special Drawing Rights (SDR)⁴²), but there is no limitation in case the damage was caused recklessly or intentionally⁴³. Contractual limitations

³⁷ Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, [2002] ECR 2631.

³⁸ Id. §§ 22, 24.

³⁹ OJ 2001 L 194/39.

⁴⁰ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, OJ 2002 L 140/02.

⁴¹ Montreal Convention Art. 22.

⁴² Special Drawing right valuation is based on a currency basket, including the Euro, the Japanese Yen, the English pound sterling and the U.S dollar; for more detailed information see homepage of the International Monetary Fund at http://www.internationalmonetaryfund.com/external/np/fin/rates/rms_five.cfm, last visited 11/05/06; see also table 1 on page 30.

⁴³ Art. 22 (5).

may not be unreasonable⁴⁴, they may not refer to personal injury and they must obey liability rules as laid down in Art. 5 (1) and (2).

2.6.4 Liability for defective performance during the journey

Liability also stretches to defective performance during the journey, Art. 4 (7). It is for the tour operator to guarantee the proper realization of the journey. Whenever there are significant defects, he must make suitable alternative arrangements and if “appropriate” compensate the consumer. The directive does not define appropriate and leaves a gap, which to fill will be the obligation of the member states and the ECJ. If such alternatives not exist or are not accepted by the consumer, the organizer must provide the consumer the possibility to return to the place of departure at no additional costs.

2.7 Duties of the consumer

The duties of the consumer consist mainly in obligations to give notice to the travel organizer or retailer. Such can be found in almost every article. Art. 5 (4) of the directive must be considered as the most important obligation. The consumer has to notify the provider of any failure right away and on the spot in writing or any other appropriate form. However, this obligation exists only, if it is included in the contract. In theory any appropriate form could also include oral communication. Nevertheless, it is recommendable to the consumer to file a written complaint, so that he can prove the existence of the notification easier.

2.8 Protection against Insolvency

In one of the shortest articles of the Package Travel Directive the consumer is protected against the insolvency of the organizer and/or retailer. Art. 7 requires the MS to implement funding systems which guarantee monetary compensation and repatriation in case of insolvency of the service provider. The ideal is that the consumer is not affected by the insolvency at all. In the “normal” business life, business partners have to evaluate the risk of the other’s insolvency before entering into an agreement. The reason for the

⁴⁴ „reasonable“ to be defined by the MS.

special treatment of consumers is once again the weaker position of the consumer who is unlikely to spend any thoughts on the insolvency of the tour organizer⁴⁵.

Since a vast scope is left to the MS the ECJ has been addressed with three cases already. First, however, a comparison shall be made of the German and the English implementation of Art. 7 of the Package Travel Directive to document the different approaches member states took in order to transpose the directive into national law.

2.8.1 Comparison of the implementation of Art. 7 of the PTD in Germany and the U.K.

Germany transposed the PTD in 1994 by introducing §§ 651 a-l into the German BGB⁴⁶ and by a regulation concerning duties to inform⁴⁷. According to § 651 k BGB the tour organizer can choose between an insurance and a bank guaranty. It is prohibited to accept any payments of the consumer prior to handing over a certificate of insurance. The insurer or bank may limit its liability to a total of 110 million € a year⁴⁸. Thus, consumers might be refunded partially only, if the 110 m € has been exceeded. In comparison to a total turnover of 19.4 billion € of the German tour organizers⁴⁹, this amount appears to be rather small. Very much depends on how many travel operators choose the same insurance provider. Another disadvantage of this system is the fact that consumers will have to wait until the end of the year to be compensated since only then it can be determined whether the limit has been exceeded and which percentage of the originally claimed amount can be refunded to each consumer⁵⁰.

In Germany there is no need to apply for a concession in order to open a travel organizer's business. Thus there is no way of controlling the conduct

⁴⁵ Harald Halbhuber & Ewoud Hondius, *Guarantee funds for the travel industry: Protection of the Consumer against the Insolvency of His Organizer/Retailer*, in: *Journal of Consumer Policy*, Sep 1996, p. 306.

⁴⁶ Gesetz zur Durchführung der Richtlinie des Rates vom 13/06/1990 über Pauschalreisen vom 24/06/1994, *Bundesgesetzblatt I* vom 29/06/1994 Seite 1322.

⁴⁷ Verordnung über die Informationspflichten von Reiseveranstaltern vom 14/11/1994, *Bundesgesetzblatt I* Seite 3436.

⁴⁸ § 651 k (4) BGB.

⁴⁹ *Fakten und Zahlen zum deutschen Reisemarkt, eine Übersicht des deutschen Reiseverbandes*, Berlin 2006, p. 13.

⁵⁰ Bericht über die Durchführung der Richtlinie 90/314/EWG über Pauschalreisen in den innerstaatlichen Rechtsvorschriften der EG-Mitgliedstaaten, SEC (1999) 1800 final, p. 31.

of new established tour operators before the damage is done. It is for the consumer to check for the existence of an insurance or bank guaranty.

In the UK the Package Travel, Package Holidays and Package Tours Regulations⁵¹ were introduced in 1992 already. However, those regulations had to be amended according to a promise made in the infringement procedure 93/2182: the duty to inform concerning visa- and passport requirements had to be applicable not only towards British citizens but also towards citizens of other EU member states⁵². Contrary to German law, a license is mandatory in order to participate in the air travel organizing business⁵³. It must be stated that the vast majority of air travel providers had no problems to adjust to the new system, because it has been regulated in the early 70s already⁵⁴. The license is only issued after a deposit has been made to an authorized institution to be used in case of insolvency. This deposit may not be less than 10 % of the tour organizers estimated annual turnover, if the chosen institution possesses a reserve fund or insurance⁵⁵, if not the lowest sum would be 25 % of the annual turnover⁵⁶. Alternatively the tour organizer may conclude a contract with an insurance agency whereas there is no limit concerning liability, Art. 19 of the Package Travel Regulations. Yet another option is offered in Art. 20, 21: all payments of the consumer shall be made to a trustee chosen by the service provider. The money shall only be transferred to the organizer in case of complete performance of the package. However, those payments may not be sufficient to cover all the consumer's expenses in a case of the organizer's insolvency. Once again the consumer will only be partially compensated. Another issue of the trust system is the identity of the trustee. This could be just as well the organizer's spouse⁵⁷, leaving doubts to the handling of those trusts.

⁵¹ Statutory Instruments number 3288 of 1992.

⁵² The Package Travel, Package Holidays and Package Tours (Amendment) Regulations 1998, Statutory Instruments number 1208 of 1998, § 5.

⁵³ The Civil Aviation Regulations 1972, Statutory instruments number 223 of 1972; the license is called ATOL – Air Travel Operator's License.

⁵⁴ David Grant, *The Package Travel Regulations 1992 – Damp Squib or triumph of self-regulation?* In: *Tourism Management*, Vol. 17 (1996), No. 5, pp. 319-321.

⁵⁵ Art. 18 of the U.K. Package Travel Regulations.

⁵⁶ Id. Art. 17.

⁵⁷ *Bericht über die Durchführung der Richtlinie 90/314/EWG über Pauschalreisen in den innerstaatlichen Rechtsvorschriften der EG-Mitgliedstaaten*, SEC (1999) 1800 final, p. 43.

In conclusion, both countries offer different options to guarantee the consumers' compensation. However, neither of them can guarantee the full compensation in all situations as it has been demanded by the ECJ in its case-law.

2.8.2 Case “Konsumenteninformation”

In 1996 an Austrian couple booked a package to Crete including a flight and half-board accommodation with Karthago-Reisen GmbH and all payments were made in advance⁵⁸. After having heard of the insolvency of Karthago-Reisen the owner of the hotel demanded the full costs from the Austrian couple physically hindering them from leaving. The ECJ was asked to answer on the question, whether Art. 7 of the PTD includes the obligation for the security system to cover such cases of double payment for accommodation. The ECJ acknowledged the obligation under reference to the objectives of the directive⁵⁹.

2.8.3 Case “Rechberger”

In a 1997 case⁶⁰ subscribers of the Austrian daily newspaper “Neue Kronenzeitung” were invited to go on a trip organized by Arena-Club-Reisen. They only had to pay for airport taxes and single-room surcharges if applicable and were promised a package including transport, accommodation and entertainment. The tour organizer went into bankruptcy even before the tours commenced, but after payments were received from the consumers. For some of the consumers no security fund existed since Austria had not implemented the directive at the time of the booking. For others the security fund applied but it was not sufficient to cover the entire amounts paid by the consumers since the amount of consumers to be compensated exceeded the fund. The ECJ was asked whether Art. 7 of the PTD applies even to those cases where the consideration from the consumer party does not correspond to the worth of the package. The ECJ held that there is no limit to the scope of the directive concerning “packages which are offered to a potentially

⁵⁸ Case C-364/96, Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG, [1998] ECR 2949.

⁵⁹ Id. § 23.

⁶⁰ Case C-140/97, Rechberger a.o. v Republik Österreich, [1999] ECR 3499.

unlimited number of consumers⁶¹.” Thus, Art. 7 of the directive is even applicable in those cases.

2.8.4 Case “Dillenkofer”

Even before these two cases the Court had to deal with the “famous” Dillenkofer case⁶². Several consumers purchased travel packages from two tour organizers which became insolvent soon after the booking and left the travelers either stranded at their destination, so they had to travel back at their own expense or the consumers never left for the journey. In both cases the plaintiffs accumulated costs which they could not claim back from the tour organizers. At the time of the booking, 1993, Germany had not implemented the directive yet. Concerning Art 7 of the PTD the Landgericht Bonn submitted two questions to the ECJ: Are consumers protected sufficiently in the sense of Art. 7 if they have to pay a deposit (no more than DM 500) prior to receiving any documents of value, which would be uncovered by the security fund? The Court answered that the only way such a deposit payment would conform with the PTD would require the guaranty of the refund of the deposit in case of insolvency of the organizer. Answering another question the ECJ held that even if the traveler had received documents of value, the requirement of sufficient provision of security is not satisfied. In such a case third parties would not be obligated to honor such vouchers as this would expose themselves “to the risks consequent on insolvency⁶³”.

2.9 Implementation into national law

“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods⁶⁴”. Therefore, directives can be seen as the frame for national legislation which differs more or less depending on the scope the directive allows. The MS were required to implement the directive into national law prior to 31.12.1992⁶⁵. However,

⁶¹ Id. § 31.

⁶² Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, “Dillenkofer” [1996] ECR 4845.

⁶³ Id. § 64.

⁶⁴ Art. 249 (3) EC.

⁶⁵ Art. 9 (1) Package Travel Directive.

many countries had difficulties to transpose the PTD on time and especially the refund system requirement of Art. 7 turned out to be rather problematic. Thus, it is no surprise that the Commission started several procedures of infringement against several MS⁶⁶. The two most prominent ECJ cases concerning failure to implement the directive on time and correctly are “Dillenkofer” and “Rechberger”, as mentioned above. In the case “Dillenkofer” Germany was bound to compensate stranded travelers for the delayed implementation of the package travel directive. In Rechberger the ECJ held, that Austria did not fulfill its obligations correctly by introducing limits of liability in case of insolvency which were held contrary to the PTD.

2.10 Need for reform?

More than 15 years have passed since the directive was drafted in 1990. Therefore the question is legitimate whether a reform of the directive is needed or whether other steps could be taken to catch up with the practical work in the package travel business. The European Commission contemplated the situation as well. It published a report on the implementation of the PTD and organized a round-table on package travel contracts. Those two initiatives shall be reviewed first before taking a closer look of what else needs to be done.

2.10.1 The Report on the Implementation⁶⁷

In 1999 the DG Health and Consumer Protection published the Report on the Implementation of Directive 90/314/EEC in order to give an overview, but also to start a discussion on the need for a reform of the directive. Thereby the ECJ judgments, which were mentioned before, were taken into consideration. The report makes several proposals of improvements. The requirement of “pre-arranged” packages⁶⁸ should be deleted, since it is

⁶⁶ Germany: case 98/2163; ECJ joined cases “Dillenkofer”, see reference above; Greece: case 98/2275; France: ECJ case C-410/96 “Ambry”; Italy case 96/2155; Luxembourg case 98/2388; Netherlands: case 93/2183; Austria: ECJ cases C-364/96 “Verbraucherinformation” and C-140/97 “Rechberger; Finland: case 96/2181; ECJ case C-237/97 (“Student exchange”); UK: case 93/2182.

⁶⁷ Report on the Implementation of Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic Legislation of EC Member States, SEC (1999) 1800 final.

⁶⁸ Art. 2 (1) Package Travel Directive.

“artificial and of unclear meaning⁶⁹”. Further a clarification for the notion of an “inclusive price” is needed, because due to the ambiguous wording of Art. 2 (1) of the PTD. First it seems to be mandatory in regards of the definition of “package”, later it seems to be indicative only in view of the last sentence which deals with separate billing. Another option could be to extent the scope of the directive in terms of deleting the 24-hour-duration requirement. Unlike in the early 1990s one day return air travel to sport events for instance have become more popular. Thus the directive should expand to cover such situations as well.

2.10.2 The Round Table⁷⁰

The European Commission organized a Round Table on Package Travel Contracts consisting of legal experts from the travel industry, consumer associations and independents. The conclusion found by the expert group must be considered as “soft law”, meaning that it has no more than a character of non-binding recommendations. It proposes a code of conduct for tour organizers concerning their standard contract terms.

They are supposed to give more information than required under the directive to the consumers, no false promises should be made in brochures and travel organizers should avoid asking consumers for more travel insurance coverage than necessary. An important point discussed upon by the round table is the case of unjustified cancellation or withdrawal from the contract by consumers. In many cases travel package contracts require the consumer to pay the full amount of the package price. However, this is not always fair since it does not necessarily correspond to the costs incurred by the travel organizers who are in a rather strong position in relation to their subcontractors like airlines and hotel owners. Thus, they can often cut down their own penalties whereas asking the consumers for a far higher share. The expert group recommends that the tour organizers should make a fair estimation of their losses before charging the consumers⁷¹. In case of a disaster like terrorist attacks or natural catastrophes both parties should be allowed to withdraw from the contract. Finally, the tour organizer should

⁶⁹ *Report on the Implementation of Directive 90/31/EEC*, p. 8; see also point 2.3.1 on the material scope of the PTD.

⁷⁰ *Round Table on Package Travel Contracts : Conclusions of the Expert Group*, 13 February 2001, found at http://europa.eu.int/comm/consumers/cons_int/safe_shop/pack_trav/index_en.htm, 17/04/2006.

⁷¹ *Id.* p. 5.

not exclude liability to a greater extent than allowed by the directive and consumers should receive exactly what they expected, so that wide terms should be avoided.

2.10.3 Further Amendments?

Although the Commission made those steps, there have been voices among experts that ask for a further review of the Package Travel Directive. Professor Tonner⁷², who participated in the round table as an expert sent by the consumer associations, agrees with the actions taken by the Commission in the 1999 implementation report, but suggests taking further steps. Travel agencies, in case they did not fall under the scope of the directive already, should be bound to comply with the insolvency protection rule according to Art. 7 of the directive in order to facilitate compensation procedures. This issue seems to be solved after the ECJ included travel agencies in its “Club Tour” judgment⁷³. Soft-law like the recommendations made by the round table concerning cancellation by the consumer he regards as not sufficient⁷⁴. European consumers are not bound by their domestic travel organizers as they are free to choose whatever service provider they want to. However, parallel to the diversity of implementing laws, certificates of security have different content and appearance throughout the Community⁷⁵. The unification of those certificates would help the consumers identifying them as authentic. Finally a duty to repatriate rather than a duty to bear the costs of repatriation should be included in amending the PTD. This would adapt the directive to life in practice.

It must not be forgotten that the Package Travel Directive provides no more than minimum standards of consumer protection in the field of travel packages. Of course, some wording must be reviewed and the quintessence of the ECJ judgments should be implemented into the directive. On the other hand, further approximation of laws seems to be an almost impossible task in regard of the wide variations of national laws. Moreover it is for the

⁷² Klaus Tonner, *10 Jahre EG-Pauschalreise-Richtlinie – eine Bilanz*, in: *Europäisches Wirtschafts- & Steuerrecht*, Heft 11, November 2000, pp. 473-478.

⁷³ Case C-400/00, *Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido*, [2002] ECR 4051.

⁷⁴ *Id.* p. 476.

⁷⁵ Find the official German model for such a certificate, Attachment 1 (to §9 BGB-Info Verordnung), under http://bundesrecht.juris.de/bgb-infov/anlage_1_23.html, last visited 21/04/2006.

member states to make their laws “watertight”. As shown above giving the examples of British and German legislation implementing Art. 7 of the PTD, there are still major flaws in national legislation⁷⁶.

Thus, consumers will profit the most, if minor amendments are made to the Package Travel Directive and the member states do their homework and are more consequent in the implementation of the directive.

⁷⁶ Further gaps and omissions in national legislation are listed in the *Report of the Implementation of Directive 90/314/EEC*, pp. 28-41.

3 Passenger and Baggage Damage

The most important system of rules concerning air travel law had been drafted as early as 1929. The Warsaw Convention⁷⁷ covered all cases of airline liability for damage to passengers, baggage and cargo (Chapter III). In addition, it laid down uniform rules on documents of carriage (Chapter II). It was amended twice in 1955 in The Hague and 1975 in Montreal. However, not all member states to the Convention signed the modifications as well, so that there are different levels of adoption worldwide. By the late 1990s the so-called Warsaw system comprised of “at least 44 permutations in what aspires to be a system of international uniform law⁷⁸”. Thus the International Civil Aviation Organization (ICAO) invited to an international conference taking place in Montreal in order to create a new convention to consolidate and modernize the old Warsaw Convention. On May 28th 1999 the Montreal Convention⁷⁹ was drafted. It acknowledges the importance of consumer protection, but nevertheless aims to strike a balance of conflicting interests in air travel through further harmonization. After ratification by the 30th member to the convention, it entered into force on 4 November 2003. By 28 June 2004 all member states of the European Community had become members of the Montreal Convention.

Concerning Community air carriers⁸⁰ the Council had adopted Regulation 2027/97⁸¹. It was amended by the Regulation No 889/2002⁸² which adjusts

⁷⁷ Convention pour l'unification de certaines règles relatives au transport aérien international, Warsaw, 1929, in force 1933 (ICAO Doc 7838, 9201) ; English text can be found at <http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/legal/file/warsaw.pdf>, last visited 07/05/06.

⁷⁸ Bin Cheng, *The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention*, in: *Zeitschrift für Luft- und Weltraumrecht* (2000), 49:295.

⁷⁹ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal 1999, OJ 2001 L 194/39, text found at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_194/l_19420010718en00390049.pdf, last visited 07/05/06.

⁸⁰ Community air carriers are those which have an operating license granted by a MS as laid down in Regulation (EEC) No 2407/92; definition taken from Art. 2 (b) Regulation 2027/97.

⁸¹ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, OJ (1997) L 285/01.

liability after the EC and its member states joined the Montreal Convention. According to Art. 300 (7) EC the Montreal Convention is of a higher legal rank than secondary EC legislation. The Regulation (EC) No. 2027/97 in the form of Regulation (EC) No. 889/2002 only extends the applicability of the Montreal Convention to all flights operated by the Community's carriers⁸³. It is applicable alone in case a Community carrier transports passengers from or to a country, which is not a member to the convention or in case of domestic flights⁸⁴. This exception is of minor importance only since the standards of the Montreal Convention were implemented into the Regulation as described above.

In this chapter, focus shall be on air carriers' liability concerning passenger and baggage damage only. Liability for delay of flights will be dealt with in the next chapter in order to show the interaction of the Montreal Convention and the Regulation 261/2004.

3.1 Death and Injury of Passengers

Without a doubt the worst event that could happen in civil aviation is the injury or death of passengers on board an aircraft. Although flying must be considered a safe means of transport, accidents happen and just like in every-day-life the question is: Who is responsible for the accident? Since it would be hard for passengers or even for experts to prove the fault of the air carrier – the precise cause of an accident often remains unsolved – Art. 17 of the Montreal Convention introduces a system of strict liability in case of accidents leading to an injury or death of a person.

3.1.1 The Scope of Art. 17 (1) Montreal Convention⁸⁵

There are several restrictions to air carrier liability. First of all, the accident has to occur on board of the aircraft or during the process of embarking or

⁸² Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, OJ 2002 L 140/02.

⁸³ Art. 3 Regulation (EC) No. 2027/97.

⁸⁴ Ernst Führich, *Reiserecht*, 5th edition, Heidelberg 2005, no 946.

⁸⁵ If applicable, Art. 3 (1) of the Regulation 2027/97 refers to the Montreal Convention.

disembarking. The injury suffered at the baggage claim does not fall under the Convention⁸⁶.

The personal damage must be related to an “accident”. A definition is still missing in the Convention and in the Regulation 2027/97. However, national courts have proceeded to interpret the meaning. According to them, an accident is “an unexpected or unusual event or happening that is external to the passenger⁸⁷”.

In addition, the injuries have to be related to the operation of the aircraft⁸⁸. Thus, there are two diseases whose applicability has been discussed in the past: Post traumatic stress disorder (PTSD) and deep vein thrombosis (DVT). PTSD or psychic damage appeared to be recoverable under Art. 17 of the Warsaw Convention which stated in its only official French text “blessure ou de toute autre lésion corporelle.”⁸⁹ In the “new” Art. 17 of the Montreal Convention recoverable injuries only cover bodily injuries. Therefore it is common ground that only those PTSD are recoverable which are related to a physical injury⁹⁰. Another issue is the deep vein thrombosis. The question is, whether DVT falls under the scope of an accident. According to the U.S Supreme Court in the “Saks” case⁹¹ it is quite contrary to the definition given above: an injury “resulting from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft”. As European courts have not diverged from this ruling either, it is unlikely that airlines will be held responsible for DVT in the future. However, a duty to warn passengers of the dangers would be very welcome at least in those countries where such a duty does not exist yet.

⁸⁶ Ernst Führich, id., no 1066.

⁸⁷ U.S. Supreme Court, *Air France v. Saks*, 105 S.Ct. 1338 (1985);, OLG Oldenburg, *Neue Juristische Wochenschrift – Rechtsprechungsreport*, 1990, 992 (“ein auf einer äußeren Einwirkung beruhendes, plötzlich, örtlich und zeitlich bestimmtes Ereignis”); Cour de Cassation, *Sanchez c. Air France*, *Revue française de droit aérien et spatial*, 1989, 539 (“un quelconque événement extérieur à sa personne”); reference found in: Edgar Ruhwedel, *Das Montrealer Übereinkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr vom 28.5.1999*, *Transportrecht* 2001, 5:193.

⁸⁸ Ernst Führich, id., no 1064; Edgar Ruhwedel, id..

⁸⁹ Both the U.K and the U.S translated the words as follows: “wounding...or any other bodily injury”; Bin Cheng, *A new era in the law of international carriage by air: from Warsaw (1929) to Montreal (1999)*, *International and Comparative Law Quarterly* (2004), 53:850.

⁹⁰ Malcolm Clarke, *Will the Montreal Convention be able to replace the Warsaw System and what will the changes be?* In: *Transportrecht* (2003), 11/12:440; Ernst Führich, id., no 1072; Edgar Ruhwedel, id..

⁹¹ See footnote 87.

3.1.2 The System of Liability

The liability system of the Montreal Convention is an exclusive system. Art. 29 expresses that any claim brought in a member state to the Convention dealing with the carriage of passengers, baggage and cargo is bound to the provisions of this treaty. Specifically punitive damages are excluded. However, the same article does not specify who is eligible for bringing actions. Consequently, the question of standing is referred to the national laws. The addressee to such claims is the air carrier, be it the contracting carrier (Art. 17-19 Montreal Convention) or the actual carrier (Art. 29 Montreal Convention). “Contracting” carriers are those, which enter into a contract with the passenger, whereas “actual” carriers are those, which take over the passenger’s transfer in accord with the contracting carrier; the predominantly addressed are “code-sharing” agreements.

Concerning damage to passengers the Montreal Convention includes a two-tier system⁹².

Up to 100,000 Special Drawing Rights (SDR)⁹³ the air carrier is liable independent of fault⁹⁴. The only excuse the airline can refer to is contributory negligence of the passenger, Art. 20 Montreal Convention.

If the damage exceeds 100,000 SDR, the airline bears the burden of proof to rebut the presumption of fault in two different cases laid down in Art. 21 (2) (a) and (b). First the airline may escape liability if it is able to show that the damage was not caused by the airline and those acting on behalf of the

Table 1: Conversion Special Drawing Right/Euro*	
SDR	Euro €
1000	1170
4150	4854
16000	18712
100000	116951

dated 11/05/2006

airline, second if the damage was due to the wrongful act or omission of a third party.

The second defense was added in order to cover terrorist attacks, hijacking and the like on board aircrafts. Should the air carrier succeed in exonerating itself, it is not exempt from its liability not exceeding 100,000 SDR⁹⁵.

The different kinds of damage to be compensated, e.g. funeral costs, healing

⁹² Bin Cheng, id. pp.849-850.

⁹³ Find explanation above at footnote 42.

⁹⁴ Art. 21 (1) Montreal Convention.

⁹⁵ Ernst Führich, id., no 1070.

costs, solatium, are not dealt with in the Montreal Convention. Thus it is another issue for the national legislator to regulate⁹⁶.

3.1.3 Advance Payment

As an amendment to the Warsaw Convention Art. 28 of the Convention of 1999 provides for advance payments in case of death or injury of a passenger. According to Art. 5 of Regulation 2027/97 the air carrier has to pay a reasonable amount of money in order to cover the immediate economic needs. In case of an accident resulting in the death of a passenger the advance payment may not be less than 16,000 SDR⁹⁷. In all other cases, national law is applicable to find minimum amounts⁹⁸.

3.2 Loss, damage or delay of Baggage

Claims concerning baggage are by far the more usual in air travel. The Montreal Convention covers the liability for loss, damage, destruction and delay of baggage. The Montreal Convention sets up liability rules for checked-in baggage as well as luggage taken on board. Treatment of both only differs concerning exculpation opportunities.

3.2.1 Damage, destruction or loss

Compared to Art. 17 (1) dealing with damage to passengers, Art. 17 (2) contains two major differences. First it does not mention “accident” at all. Thus, the event that results in the damage, destruction or loss of the baggage does not need to involve an accident. Second the damage does not have to be related to the operation of the aircraft; even theft is included⁹⁹.

The term “damage” comprises all impairments to the substance of the baggage. The damage turns into a “destruction” if the baggage cannot be used as supposed to. Finally baggage is “lost” if the carrier has lost the

⁹⁶ In Germany §§ 35,36 and 38 Luftverkehrsgesetz Luftverkehrsgesetz vom 01.08.1922 in der Fassung der Bekanntmachung vom 27.03.1999, zuletzt geändert am 21.06.2005, Reichsgesetzblatt I 1922, 681 address this matter.

⁹⁷ Art. 5 (3) of Regulation No 2027/97.

⁹⁸ Ronald Schmid, Wolf Müller-Rostin, *In-Kraft-Treten des Montrealer Übereinkommens von 1999: Neues Haftungsregime für internationale Lufttransporte*, in: Neue Juristische Wochenschrift (2003), 49:3518.

⁹⁹ Ernst Führich, id., no 1082.

possession of the piece and is unable to retrieve it¹⁰⁰. Similar to lost baggage is the situation of missing items from the baggage. Therefore the same rules apply for those items. However, it will be hard to prove for the passenger that the specific object had been in the baggage in the first place.

The period the carrier is in charge of the baggage differs. Concerning checked-in baggage the airline is liable for all damage occurring from the time the passenger delivers his piece at the check-in counter until he receives it at the baggage reclaim. Concerning hand-luggage the period of the carrier's liability is restricted to the limits set in Art. 17 (1). This is due to the fact that passenger is in control of the baggage prior to boarding and retains it as soon as he disembarks the aircraft¹⁰¹.

For his own sake the passenger should report all damages to his luggage immediately after reclaiming it. He is barred from any claims if no complaint has been filed within seven days from the date of receipt, Article 31 (2) Montreal Convention.

3.2.2 Delayed baggage

Art. 19 of the Convention deals with delayed passengers and baggage. Here only the latter shall be of interest¹⁰². There are no specific rules on how to assist and compensate missing luggage. Airlines treat this situation in different ways. Some provide immediate cash-payments for the passenger in order to purchase the most necessary articles; others reimburse the passenger after seeing the receipts. The delay turns into a loss of the luggage if it has not arrived within 21 days or the airline admits the loss. The passenger is forced to make complaints within 21 days after receiving his delayed piece(s), Art. 31 (2).

3.2.3 System of liability

In all cases, hand luggage or checked-in baggage, damaged, lost or delayed baggage, liability is restricted to 1,000 SDR¹⁰³. The passenger may claim compensation for checked and unchecked baggage separately, if damage was caused to both at the same time. The only way for the passenger to increase this limit is to negotiate a higher sum prior to the carriage with the

¹⁰⁰ Definitions taken from Ernst Führich, id., no 1081.

¹⁰¹ Ronald Schmid, Wolf Müller-Rostin, id. p. 3519.

¹⁰² See subchapter 4.6 on passenger delays with further general information covering both subjects.

¹⁰³ Art. 22 (2) of the Montreal Convention.

carrier. Another situation where the liability limit is inapplicable is stipulated in Art. 22 (5). The airline, and its servants or agents respectively, can be held liable without a limit in case of reckless or intentional acts or omissions causing the damage.

The opportunities for the carrier to escape liability differ relating to the various situations. The burden of proof concerning delay and all cases of checked baggage is on the air carrier. In respect of checked baggage the airline avoids the obligation to compensate by showing that the damage was inherent in the baggage, Article 17 (2). If baggage is delayed the carrier will have to prove that it undertook all reasonable means to prevent the occurrence of the delay, Art. 19. In addition it is always free to provide proof for contributory negligence, Art. 20. For hand-luggage the burden of proof, except for delay, is on the passenger. He must prove that the carrier's fault caused the damage.

3.3 Criticism

It took a long time to amend the Warsaw Convention System finally. The Montreal Convention covers a variety of topics, whereas filling the gaps and determining the details is left for the national courts. The Regulation 2027/97 does not help much further as most of the time it refers to the Montreal Convention and remains silent concerning more issues than it should. For example a precise definition of bodily injury would be desirable in order to have one binding (European) standard.

The system of Convention and regulation cannot be regarded equally passenger friendly in comparison with the regulations I will focus on later in this thesis. On the other hand, as can be seen in the preamble, it never intended to be, but is supposed to be balanced. Nevertheless, at least one amendment in favor of the passenger appears to be necessary: the maximum compensation for baggage is 1,000 SDR. Whereas this seems to be fair in respect of hand-luggage which remains under control of the passenger even during the flight, concerning checked baggage it seems not to be the case. In many cases 1,000 SDR will not even cover the actual costs of the baggage, not to mention the indirect damage.

Moreover, neither Convention nor Regulation undertakes any steps to support out-of-court settlements. There are no fixed compensation rates concerning personal and baggage damage, which is comprehensible taken into account that a case by case calculation is necessary in this field.

However, it would help tremendously if the text was clearer at some points. “Bodily injury”, length of delay and “accident” are just a few examples. Maybe such improvements become dispensable – at least concerning European carriers – the more cases are brought to the Community courts, just as the ECJ had succeeded in the past to provide European standards.

Table 2: Compensation according to the Montreal Convention of 1999

Claim	Maximum Compensation*	Burden of Proof	Exoneration Art. 20	Further Excuses
Passenger Injury/Death	100,000 SDR	Airline	possible	none
	indefinite	Airline	possible	(+) if no fault or fault of third party (Art. 21(2))
Delay of Passenger	4,150 SDR	Airline	possible	all measures taken, Art. 19
Damage, loss, destruction of Checked Baggage	1,000 SDR	Airline	possible	inherent defect, Art. 17 (2)
Damage, loss, destruction of hand-luggage	1,000 SDR	Passenger must show fault	possible	inherent defect, Art. 17 (2)
Delay of baggage	1,000 SDR	Airline	possible	all measures taken, Art. 19

* no limits in case of carrier's recklessness or intent

4 Denied Boarding, Cancellation and Delay

In parallel to passenger protection in case of accidents, the Commission initiated procedures concerning a regulation covering denied boarding, cancellation and delay of flights. In 2004 the Regulation (EC) 261/2004¹⁰⁴ (in this chapter referred to as “the regulation”) establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, known as Overbooking Regulation, was adopted¹⁰⁵. Since different set of rules concerning air carrier liability exist, there is the question of collision of law. As mentioned earlier, the Regulation 2027/97 was amended by the Regulation 889/2002 in order to implement the Montreal convention. Therefore, those two measures are harmonized. What remains is the relationship of these rules with Regulation 261/2004. Cancellations and denied boarding are only dealt with in the Regulation 261/2004. The case of cancellation cannot be defined as a special case of delay, because when the passenger is re-routed, he is boarded on a different flight¹⁰⁶. However, in all three measures the issue of delays is treated. This relationship shall be scrutinized in a special subparagraph later on.

In the field of denied boarding, cancellation and long delay of flights only the Regulation 295/91¹⁰⁷ of 4 February 1991 existed, which was restricted to denied boarding only. In 1998 the Commission made a proposal¹⁰⁸ to amend said regulation in terms of better information of the consumers. However, this proposal was rejected due to political issues concerning the airport of Gibraltar¹⁰⁹. In the year 2000 the Commission recognized that the

¹⁰⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46/01.

¹⁰⁵ All Articles without special notice refer to the Regulation (EC) No. 261/2004.

¹⁰⁶ Ronald Schmid, *Die Verordnung (EG) Nr. 261/2004 – Europäischer Verbraucherschutz mit Nachbesserungsbedarf*, in: *Zeitschrift für Luft- und Weltraumrecht* (2005), 54:3:376.

¹⁰⁷ Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, OJ 1991 L 36/5-7.

¹⁰⁸ OJ 1998 C 351/07.

¹⁰⁹ Birgit Rumersdorfer, *Rechtsgrundlagen im Gemeinschaftsrecht zur Overbooking-Compensation*, Linz 2004, p. 16.

enormous growth of the airline sector was accompanied by increasing numbers of complaints from customers. Thus, it pronounced a series of measures to deal with the situation¹¹⁰. In the same working paper, it was acknowledged that a fair balance should be found, since overregulation bears the risk of increasing costs, which could endanger competition and would finally harm the consumers as well. That is why voluntary agreements should conduct regulations in order to improve service quality. The core of the legislation was a draft of a regulation which amends the 1991 denied boarding regulation, but takes one step further by including compensation for cancellations and long delays¹¹¹. Remarkably, this act was not based upon Art. 153 EC on consumer law but on Art. 80 EC, transport law. The reason for this choice might base in the fact that the Community's competence is restricted to "measures which support, supplement and monitor the policy pursued by the Member States"¹¹². Thus, the EC may not dispose of a consumer policy of its own¹¹³ and recourse to Art. 80 EC opened up a wider range of competence. In consequence procedures according to Art. 251 EC, known as "co-decision" procedure, commenced¹¹⁴. As the European Parliament demanded several changes to the proposal of the commission an amendment was made¹¹⁵. After several changes were made to this proposal on request of the EP, especially concerning definitions like force majeure finally a common position was found among the Council and the EP. Therefore the Regulation (EC) No 261/2004 of the European Parliament and of the Council was published on 11 February 2004 and entered into force on 17 February 2005 thereby repealing Regulation (EEC) No 295/91. According to Art. 249 (2) EC the regulation is directly applicable in the MS of the Community; any additional measures by the states are not necessary in general. It was immediately

¹¹⁰ Communication from the Commission to the European Parliament and the Council Protection of air passengers in the European Union, COM/2000/0365 final.

¹¹¹ Proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, OJ 2002 C 103/225-229E.

¹¹² Art. 153 (3b) EC.

¹¹³ Birgit Rumersorfer, id., p. 37.

¹¹⁴ For the procedure in general see Paul Craig and Grainne De Burca, *EU Law*, 3rd edition, New York 2003, p. 144-147; concerning adoption of Regulation 261/2004: Birgit Rumersdorfer, id., pp. 20-21.

¹¹⁵ Amended proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights (presented by the Commission pursuant to Article 250 (2) of the EC Treaty), OJ 2003 C 071/188E.

under attack of airline associations, but its validity has been confirmed by the ECJ in the case C-344/04¹¹⁶. In the following paragraphs focus shall be on the Regulation 261/2004. The Montreal Convention will only be dealt with more deeply in the subparagraph on delays and for interpretation matters.

4.1 Purpose of the Regulation 261/2004

The Regulation's main purpose is, although it was based on the rules relating to transport law, the improvement of air travelers' rights. It aims to amend the "old" regulation on denied boarding, since the level achieved in this field had been found unsatisfactorily. Therefore the scope of the "new" regulation is wider. In addition, the Regulation (EC) No. 261/2004 comprises compensation for cancellations and long delays as well. The passenger who suffered from such malpractice of the airlines is eligible to a minimum standard of compensation regardless of the fact of an actual damage. The passengers shall retain the right for further claims beyond this minimum standard. The goal of harmonized standards for all airlines operating in the common market must be considered as secondary only. It is no more than a consequence that is inherent in the instrument of a regulation. This conclusion also follows the study of the preamble of the regulation which deals with the improvement of passenger rights to a major degree whereas harmonization of conditions is only mentioned in paragraph 4 of the preamble. As the Regulation provides for minimum standards only and is restricted to the fields of denied boarding, cancellations and delay only the national legislators are free to go beyond those compensation rules. Those laws, however, shall not be part of this thesis.

4.2 Scope

4.2.1 Material Scope

Art. 3 determines the scope of the regulation. It applies to all passengers departing from or arriving to an airport within the territory of the EC. Thereby the seat of the airline does not matter concerning flights originating from Community territory¹¹⁷. Passengers departing from a third country,

¹¹⁶ Case C-344/04, IATA, ELFAA v Department for Transport, ECR [2006].

¹¹⁷ Art. 3 (1a) of the Reg. No. 261/2004.

however, only fall under the scope of the regulation, if the carrier has its seat in one of the EC member states and the passenger has not been compensated in the third country already¹¹⁸. This includes all domestic flights too, an Inter-MS element is not needed. Unlike in the Regulation No. 225/91, which was restricted to scheduled flights only, it has been acknowledged that a distinction between scheduled flights and true charter flights has become almost impossible¹¹⁹. Therefore even non-scheduled flights are included in the regulation. Furthermore the flight may even form a part of a package. In this case the rights mentioned above according to the Directive 90/314 remain unaffected. A restriction to the scope can be found in paragraph (4): helicopters or non-motorized aircrafts are not included under this regulation.

4.2.2 Personal Scope

A passenger may be everyone regardless of a consumer identity who have a confirmed reservation and appeared to the check-in in due time, Art. 3 (2)(a).

Although those passengers are excluded who those traveling free of charge or at a special reduced fee, which is not available by the public, travelers exercising their benefits from a frequent flyer program are included according to Art. 3 (3).

The Regulation obliges the operating air carrier. This means that the consumer may address his service provider directly even if he had booked the flight at a travel agency. Naturally, the operating carrier is not restricted to redress third parties for their faults leading to the compensation obligation¹²⁰.

4.3 Information Requirements

Besides the issue of incomplete air passenger rights European travelers were often ignorant of these rights. According to the new regulation it is the duty of the airlines to inform their passengers of their rights, Art. 14. They have to provide information in two ways: first there must be a legible notice at the check-in counter where to find the text of the rights in case of a long delay, cancellation or denied boarding. Second, in case such inconvenience

¹¹⁸ Id. Art. 3 (1)(b).

¹¹⁹ Point of consideration (5) to the Regulation No. 261/2004..

¹²⁰ Art. 13 of Regulation No. 261/2004

occurs, the air carriers must provide a notice containing the rights to compensation and assistance according to the Regulation to the passengers. In addition, the European Commission distributes its leaflet concerning air passenger rights¹²¹ at every airport within the Community.

4.4 Denied Boarding

The most essential right of the passenger is the right to be transferred to the destination as agreed upon in the contract with the air carrier. However, it is common use in the airline industry to overbook flights and in consequence boarding must be denied to some passengers.

4.4.1 Art. 4 of the Regulation

Art. 4 of the regulation deals with cases where passengers who have a reservation, appeared to check-in in time, and are not subject to denial due to health, safety or security reasons and do not lack adequate travel documentation such as e.g. means of identification¹²². In other words, such situations are excluded from compensation in which the passenger itself caused the denial of boarding. Under “security” reasons it might appear possible to include force majeure, but it is quite obvious, if the word is seen in its context that this means nothing else but the dangers which originate in the passenger¹²³. If more passengers with valid reservations show for boarding, the airlines are obligated to find enough volunteers willing to sacrifice their seats. Such volunteers are usually offered a financial benefit to be agreed upon by both parties; there are no special rules concerning those agreements. What is dealt with, however, in this regulation is the obligation to reimburse or re-route the passenger according to Art. 8.

Example:

Airline A overbooked a flight from Copenhagen to Cologne scheduled for 9 a.m. A therefore offers passenger P 200 € in order to step back from the flight. P has then the choice to ask for transportation to Cologne at a later

¹²¹ Find the English version at http://www.europa.eu.int/comm/transport/air/rights/doc/2005_01_19_apr_leaflet_en.pdf, last visited 10/04/06.

¹²² Art. 2 (j) of the Regulation (EC) No.261/2004.

¹²³ Ansgar Staudinger and Rüdiger Schmidt-Bendun, *Neuregelung über Ausgleichs- und Unterstützungsleistungen für Fluggäste*, in: Neue Juristische Wochenschrift 2004, p. 1898.

time or to be reimbursed, whereas the 200 € benefit would not be deductible by A.

Art. 8 (3) describes the case, where the airline offers the volunteer air transport to another city in the vicinity of the final destination. This is likely to happen wherever major airlines serving various cities within one region are concerned. Referring to the example given, it shall be assumed that a later flight to Düsseldorf, which is about 60 km north of Cologne, is offered by A. Further transport to the final destination, Düsseldorf Airport, would be by train, the duration of this connection would be additional 45 minutes. This would comply with Art. 8 (3) of the regulation. Emphasis must be made upon the fact that the airline must bear the costs of such a transfer like the train trip here.

If not enough volunteers can be recruited, the airline is allowed to deny passengers boarding against their will whereas they must be compensated according to Art. 7 and assisted to terms stipulated in Art. 8 and 9.

It appears that deliberate overbooking by airlines is sanctioned with compensation, on the other hand it is not forbidden by the regulation. Therefore, consumer protection seems to be incomplete. If gains from overbooking are higher than the losses due to compensation, no airline will abandon such a custom and passengers will still be denied boarding deliberately. To discuss this matter in length at this stage would be too early. The discussion shall be conducted later on in order to see the entire picture and to strike a balance.

4.4.2 The Economics behind Overbooking

About 10 -15 % of travelers with confirmed reservations do not appear to check-in¹²⁴. As most of those passengers have refundable tickets, those empty chairs would cause the airlines great losses. In order to cope with this situation airlines sell more seats than physically available on board of their airplanes. In consequence, sometimes more passengers show up for boarding than seats are available and some have to be denied to board the carrier. As has been shown before, however, those passengers are eligible to compensation. Such amounts especially since they have been increased by the new regulation in 2004 cannot be neglected either. The goal is to use full

¹²⁴ Yoshinori Suzuki, *The net benefit of airline overbooking*, Transportation Research Part E 42 (2006), p. 1.

capacity and not to have many “bumped” passengers on the other hand in order to optimize revenues. In order to calculate the benefit of overbooking the difference of the loss of revenues caused by passengers not showing for check-in and the loss due to compensation when practicing overbooking has to be compared¹²⁵. Suzuki criticizes this way of calculation¹²⁶. He maintains that there are two different kinds of passengers: First there are the “new customers” who would rather book another flight with another airline if the flight of his choice has been fully sold-out. The second group contains “flight-switchers”. Those passengers would stick with the same airline – due e.g. to frequent flyer programs or other promotional measures taken by the airline – even if they had to change to a later flight of the same airline. The point is that revenue calculations will always be lower than estimated if no account is taken of such “flight-switchers” since by filling up otherwise empty seats consequential to “no-shows” the airline does not attract new customers, but their faithful customers get their preferred flights.

4.5 Cancellation

Cancellation is defined under Art. 2 (1) of the regulation. It means the non-operation of a flight for which at least one seat has been reserved. Art. 5 of the Regulation provides for several remedies for the passenger. Always the airline in question must assist the passenger according to Art. 8 (see under point 3.4.1) and Art. 9. The latter article provides for meals, refreshments and means of communication free of charge to the consumer. Should the cancellation result in an overnight-stay at the departure airport, the airline must allocate accommodation including transfer to the hotel or other. Compensation according to Art. 7 is granted automatically as well, unless the airline can exonerate itself.

4.5.1 Exoneration due to prior information

Art. 5 (1c) provides that Art. 7 is not applicable if the airline can show that one of the following three settings applies:

- the passenger was informed of the cancellation more than two weeks prior to scheduled departure (Art. 5 (1ci))

¹²⁵ Jens Alstrup, Sven-Eric Andersson, Søren Boas, Oli B. G. Madsen, René Victor V. Vidal, *Booking Control Increases Profit at Scandinavian Airlines*, in: *Interfaces* 19, pp. 10-19.

¹²⁶ Suzuki, id. pp. 2-3.

- information was submitted between 14 and 7 days prior to departure and re-routing has been offered that is scheduled no earlier than two hours prior to the cancelled flight and arriving no more than four hours later than originally planned (Art. 5 (1cii))
- less than seven days prior to departure the airline does not have to compensate according to Art. 7 if the re-routed flight takes off no more than one hour early and may not arrive more than two hours delayed in comparison to the scheduled flight (Art. 5 (1ciii))

The last option raises the question of the latest possible opportunity to inform the passenger. Nothing can be found in the regulation itself. Taking into consideration, that from the passengers' perspective being placed on another flight, which takes off just one or two hours *late* is comparable to the situation of a delay. Thus, short notice seems to be acceptable. However, this cannot be the case for flights taking off one hour *prior* to scheduled departure. Here the airline must inform the passenger earlier; considering the context of this provision, time limits are set in weeks and days, this would suggest that such information should be submitted no later than one day prior to scheduled departure. This would give the passenger a minimum time span to adjust to the new departure time. The burden of proof concerning the information of the customer bears the airline, Art. 5 (4).

4.5.2 Extraordinary Circumstances

Another opportunity to avoid compensation is to show that the cancellation is caused by “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken¹²⁷”.

In recital 14 of the preamble to the regulation several circumstances are listed which are to be considered extraordinary: political instability, severe meteorological conditions, security risks and strikes. This recital 14 draws a parallel to the Montreal Convention. However, the regulation goes beyond the reasons provided for by the international contract and some differences can be found too. In recital 14 reference is made to strikes only without making any differentiation. As this recital refers to the Montreal Convention it must be interpreted in the same way. Art. 19 s.2 of the Montreal

¹²⁷ Art. 5 (3) of the Regulation (EC) No. 261/2004.

Convention has been read as including only the strikes of third parties¹²⁸ only. Strikes of the airlines own personnel are therefore not included. An additional extraordinary cause has been included by recital 15 of the regulation's preamble: decisions of the air traffic management concerning one aircraft in particular causing the flight to be cancelled without a fault by the airline. Neither Art. 5 (3) nor recital 15 of the preamble to the regulation include servants and agents of the airline as Art. 19 s.2 of the Montreal Convention does. Here it appears to be questionable whether the airline is liable for its own actions and omissions only¹²⁹. Any analogue application of national rules to fill this possible gap can not be accepted, since this would open the gate to different applications in the MS of the Community. As praxis has shown, that the reason the airlines refer to the most when claiming extraordinary circumstances is bad weather at the point of departure or destination. This is acceptable, as long as this applies to all carriers flying from/to these airports as well. The excuse fails to apply when the airline refers to the insufficient equipment of its plane¹³⁰ – the equipment differs, making it possible for some planes to endure more severe metrological conditions than others.

4.6 Delay

The delay of flights has been dealt with in various pieces of legislations. It can be found in the Montreal Convention, the Regulation (EC) No. 2027/97 as amended by Regulation (EC) No. 889/2002 and in the Regulation 261/2004. Therefore it is important to know, how those rules interact.

4.6.1 The Interaction of the Montreal Convention and Regulation 261/2004 concerning delays

The Montreal Convention is applicable in all MS of the community. In Art. 19 of the convention the carrier is liable for damages to persons, baggage and cargo caused by delay. The Regulation adds assistance obligations as

¹²⁸ Ernst Führich, id., no 1024.

¹²⁹ Ansgar Staudinger and Rüdiger Schmidt-Bendun, *Neuregelung über Ausgleichs- und Unterstützungsleistungen für Fluggäste*, in: Neue Juristische Wochenschrift 2004, p. 1898.

¹³⁰ Ronald Schmid, *Die Verordnung (EG) Nr. 261/2004 – Europäischer Verbraucherschutz mit Nachbesserungsbedarf*, in: Zeitschrift für Luft- und Weltraumrecht (2005), 54:3:378.

laid down in Art. 8 and 9 in cases of long delays. All those rules are not contradictory and are supposed to complement each other. As long as his flight falls under the scope of Art. 3 of the Regulation, the passenger is in the comfortable situation of enjoying the applicability of both, the Montreal Convention and the Regulation 261/2004 at the same time. If he fulfils all the requirements as set in both rules, he can claim damages according to Art. 19 of the convention even after receiving the assistance performance according to Art. 6 of the regulation.

4.6.2 Art. 6 of the Regulation (EC) No. 261/2004

In the event of a long delay, the airline has to provide some assistance to the passenger. When a delay is considered to be “long” depends on the distance of the delayed flight:

- At least 2 hours after scheduled departure in the case of short flights under 1,500 km (concerning calculation of distances see subparagraph 4.11)
- At least 3 hours in the case of all other intra-community flights and those between 1,500 and 3,500 km
- At least 4 hours for all other flights

Should those requirements be met is the passenger entitled to the services as listed in Art. 9 (1) and (2). Assistance has to be provided as soon as a long delay can be reasonably foreseen¹³¹ and according to Art. 6 (2) within the time limits as set in Art. 6 (1); e.g. if a flight of 2,000 km distance is delayed, the services shall be provided as soon as it is foreseeable and no later than 3 hours after scheduled departure. In the case of an extremely long delay (more than 5 hours) the customer is also entitled to the right of reimbursement according to Art. 8 (1)(a). The carrier has no opportunity to exonerate itself, despite recitals (14) and (15) of the preamble to the regulation. According to recital (14) obligations of the air carriers should be limited or excluded in case of extraordinary circumstances. Recital (15) mentions long and overnight delays. On the other hand unlike in Art. 5 dealing with cancellations no reference is made to the opportunity to exonerate. Nevertheless there has been uncertainty ever since until the ECJ ruled that, although a certain ambiguity exists, recitals to a preamble

¹³¹ Ansgar Staudinger and Rüdiger Schmidt-Bendun, id., p. 1899.

“cannot be relied upon as ground for derogating from the actual provisions of the measure in question¹³²,” and that there is no ambiguity in Art. 6 itself. No matter how long the delay may be, Art. 7 is not applicable to delays. The only way for the passenger to claim compensation would be to prove the existence of damage under the Montreal Convention (see next subchapter).

4.6.3 Art. 19 of the Montreal Convention

According to Art. 19 of the Montreal Convention airline carriers are liable for all damage caused by delay. There is no definition for delay in the convention itself. Unlike in the Regulation 261/2004 the delay at the final destination is meant¹³³. Delays must go beyond a mere nuisance in order to be eligible for compensation¹³⁴. According to general consent the scope of Art. 19 should be restricted to delays which are typical to air travel such as bad weather¹³⁵. All other causes should be subject to national laws. It is assumed that a fault exists, unless the airline can provide evidence to prove otherwise. The liability is limited according to Art. 22: 4,150 SDR in case of damage due to a delayed person¹³⁶, 1,000 SDR for delayed baggage¹³⁷. Those limits do not apply in case of reckless or intentional behavior by the airline or its employees and servants.

4.7 Compensation, Art. 7 Regulation 261/2004 and further claims

4.7.1 Art. 7 of the Regulation

As described above, passengers may claim compensation in cases of denied boarding and cancellation. Depending on the distance of the flight those amounts vary from 250 € to 600 € (see Table 1). These amounts are due regardless of any actual damage to the passenger. Therefore, one could refer to compensation in the form of “punitive damages”. This form of compensation, however, is not known in many European law systems and taking a closer look the character of Art.7 compensation is different. When

¹³² Case C-344/04, IATA, ELFAA v Department for Transport, § 76.

¹³³ Ernst Führich, id., no 1042.

¹³⁴ OLG Düsseldorf, Neue Juristische Wochenschrift Rechtsprechungsreport 1992, 1330.

¹³⁵ Ernst Führich, id., fn. 1043.

¹³⁶ Art. 22 (1) Montreal Convention.

¹³⁷ Art. 22 (2) Montreal Convention.

deciding upon punitive damages, a court is free to decide if and how much to award¹³⁸. Here the sums are fixed. The carrier may reduce compensation by half if it manages to offer a re-routing, which would not be delayed more than 2-4 hours (see Table 1) in comparison to the flight originally booked (Art. 7 (2)). Unlike in the preceding Regulation 295/91, compensation is not limited to the price of the flight paid by the passenger. In times of low-cost carriers, this is an important issue and it shall be discussed later.

The amount of compensation, as mentioned above, depends on the flight's distance. How can we calculate the distance? Art. 7 (4) provides for the "Great circle route" method¹³⁹. In most cases the passenger might be able to calculate a distance between airport of departure and destination. Problems appear in boarder-line cases where experts are needed to determine the distance¹⁴⁰. In order to perform such a calculation, the starting and ending point of the voyage have to be defined. Concerning the point of destination it shall be the "last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time¹⁴¹". The regulation remains silent on the point of departure and there is no difficulty in finding such a point in trips involving but one flight. In journeys with several flights (e.g. Copenhagen – Amsterdam – New York) the determination of the starting point becomes decisive and more difficult. According to the intention of the European regulator it has to be the place at which the passenger is denied boarding or where his flight is cancelled. If the passenger in my example is denied boarding in Copenhagen, this would extend to the entire connection as the passenger will either not show or be delayed to the second flight from Amsterdam to New York¹⁴².

¹³⁸ *Black's Law Dictionary*, edited by Bryan A. Garner, 1996 edition: "damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit...which are intended to punish and thereby deter blameworthy conduct...".

¹³⁹ The shortest connection between two points on the globe.

¹⁴⁰ Problems discussed by Ronald Schmid, *Die Berechnung der Großkreis-Entfernungen zur Bestimmung der Höhe des Ausgleichsanspruchs nach der Verordnung (EG) Nr. 261/2004 vom 11. Februar 2004*, in: *Zeitschrift für Luft- und Weltraumrecht*, (2006) 55:1:81-86.

¹⁴¹ Art. 7 (1) Regulation 261/2004.

¹⁴² Ronald Schmid, *id.*, p. 83.

Table 3: Compensation and Assistance according to Regulation (EC) No.261/2004

Claim	Denied Boarding	Cancellation	Long delay*
Compensation, Art. 7			
Distance ≤ 1,500 km	250 € < 2 h 50 %	250 € < 2 h 50 %	-
1,500 - 3,500 km	400 € < 3 h 50 %	400 € < 3 h 50 %	-
> 3,500 km	600 € < 4 h 50 %	600 € < 4 h 50 %	-
Exceptions	-	extraordinary circumstances or alternative, informed re-routing	-
Assistance, Art. 8			
Withdrawal/Reimbursement	√	√	√ (reimbursement if delay > 5 h)
Return flight to origin			-
Later transfer			-
Assistance, Art. 9			
Food	√	√	√
Accommodation			
Communication			

* 2,3 or 4 hour delay depending on flight distance

4.7.2 Further Claims and Regress

In Art. 12 is stipulated that passengers may are not hindered from further claims, if the damage occurred exceeds the compensation awards as under Art. 7. The latter may be deducted from such further claims according to Art. 12, but the air carrier may not waiver such rights in its terms and conditions, Art. 15. On the other hand the airlines are not restricted to ask for regress from third parties, Art. 13.

4.8 Limitation

The Regulation 261/2004 does not contain any rules concerning limitation. However, it would not be acceptable, since it would be contra productive to legal certainty, if there would be no limitation at all for actions under this regulation. The question is how this gap can be closed. In Art. 35 of the Montreal Convention a limitation of 2 years after the incident exists for cases of delay. As the Convention does not deal with cancellation, denied boarding as well, and as the legal consequence for delay differs (see above), the Convention cannot be used as an analogy. The only possibility remaining therefore is the regress to national laws. Even this solution cannot satisfy: Although civil law and civil procedure law belongs to the competences of the MS, a European regulation should not differ and depend on national law in such an important issue; furthermore this is not the ideal of a regulation according to Art. 249 (2) EC. Only an amendment to the regulation could provide a solution.

4.9 Jurisdiction and Enforcement

It is for the MS to install authorities to monitor the airlines' conduct in regard of the regulation, Art. 16 (1). In addition those or other national authorities shall hear passenger complaints as well¹⁴³.

4.10 The Case of IATA and ELFAA¹⁴⁴

Soon after the Regulation 2004/261 was adopted by the Council and the European Parliament in 2004, two airline associations, IATA and ELFAA brought proceedings before the English High Court of Justice, Queen's Bench division (Administrative Court) against the Department for Transport in order to review the validity of the implementation of Art. 5 to 7 of the Regulation 261/2004 (cancellation, long delay and compensation).

The International Air Transport Association (IATA) is an organization operating worldwide and comprising almost all airlines, whereas the European Low Fares Airline Association (ELFAA) represents only ten

¹⁴³ A list of the responsible national authorities can be found under http://europa.eu.int/comm/transport/air/rights/doc/2005_01_31_national_enforcement_bodies_en.pdf, last visited 30/04/2006.

¹⁴⁴ Case C-344/04, IATA, ELFAA v the English Department for Transport.

European low fares carriers. The English High Court decided to stay proceedings and refer eight questions to the ECJ, which finally decided the case on 10 January 2006. Since the second and eighth question are merely on procedural matters concerning Art. 251 and Art. 234 (2) EC, only the six remaining questions will be dealt with here.

4.10.1 Opinion of the Advocate General¹⁴⁵

Advocate General Geelhoed gave his opinion on 8 September 2005. Since the judgment of the ECJ does not differ in its main points of argumentation, there is no need to go further into detail at this stage.

4.10.2 Consistency of Art. 6 of the Regulation with the Montreal Convention¹⁴⁶

The Montreal Convention prevails over the Regulation 261/2004 according to Art. 300 (7) EC. Thus all measures provided for in the Regulation must comply with the Convention interpreting the latter in the light of its wording and intentions. The claimants argue that the regulation is incompatible since unlike the Montreal Convention's Art. 19 it does not allow the airlines to escape liability for long delays due to extraordinary circumstances in its Art. 6. According to the ECJ, there are two different types of damage¹⁴⁷, which may occur in the case of a delay: First all passengers will be confronted with almost the same inconveniences which may be dealt with standardized assistance (refreshment, communication etc.) as stipulated in the Regulation. Second there may be individual damage which has to be dealt with on a case-by-case basis as addressed in the Montreal Convention. Since the Convention does not preclude legislature concerning the other type of damage and the Regulation does not prevent the passengers from applying for satisfaction under Art. 19 of the Convention, Art. 6 of the Regulation is not inconsistent with the Montreal Convention.

¹⁴⁵ Found at: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62004C0344:EN:HTML> , last visited: 01/05/2006.

¹⁴⁶ Id., §§ 34-48.

¹⁴⁷ Id., § 43.

4.10.3 The obligation to state reasons and legal certainty¹⁴⁸

The claimants argued that in the implementation of Art. 5, 6 and 7 of the Regulation neither the principle to state reasons nor the principle of legal certainty were obeyed. Concerning the obligation to state reasons as formulated in Art. 253 EC, the ECJ observed that there is no requirement to go into detail especially if the measure in question has general application like the Regulation No 261/2004. The essential objectives pursued by the regulation are disclosed to a satisfactory degree in the preamble's recitals 12, 13 and 17. The Court acknowledges the ambiguity inherent in the recitals 14 and 15¹⁴⁹, where the exculpation opportunity in cases of extraordinary circumstances is included for both, cancellation and delay, although Art. 6 (delay) lacks such a provision. However, since Articles 5 and 6 themselves are sufficiently precise and clear and a preamble cannot be relied upon as a ground for derogating from the substantial articles of the regulation, the regulation does not lack legal certainty.

4.10.4 The Principle of Proportionality¹⁵⁰

The ECJ continued by ascertaining that the EC authorities act with broad discretion in all matters involving political, economic and social matters at the same time. IATA and ELFAA maintain that Art. 5-7 of the regulation are not suitable to achieve the objectives set and are disproportionate concerning the sums of compensation. Briefly, the Court affirms the suitability of the measures Art. 5 and 6 to achieve a high level of consumer protection. A voluntary delay and cancellation insurance purchased by the passengers cannot be accepted as an immediate remedy to the passengers and that is why it cannot be considered as an equally effective measure on a lower level. The question of compensation is not related to the ticket fare. The claimants have not provided for statistics proving their argument that the number of cancelled and delayed flight has not been diminished by the regulation. In addition the regulation does not preclude the air carriers from taking regress of third parties, thereby lessening their financial burden. That is why the amounts of compensation appear to be reasonable and the measures apply in a proportionate way.

¹⁴⁸ Id., §§ 64-77.

¹⁴⁹ Id., § 76.

¹⁵⁰ §§ 78-92.

4.10.5 Principle of equal treatment¹⁵¹

ELFAA brings forward, that the regulation discriminates low fares carriers as there is no distinction to other airlines applying different pricing policies and other means of transportation do not have to obey to similar measures. Those arguments are rejected by the ECJ: Whereas other forms of transport are not comparable to the situation in air transport and therefore there is no requirement for similar measures, the passengers' situation experiencing a cancellation or long delay is the same regardless of the fare paid. Thus the low fare carriers are not discriminated.

4.10.6 Result

The ECJ affirmed the validity of Art. 5-7 of the Regulation No 261/2004.

4.11 Discussion

The immediate challenge of the Regulation No. 261/2004 shows, how discussed this legislation is. Whereas airline representatives excoriate it, the commission defends it and most legal experts are quite satisfied and offer proposals for minor amendments only. In this subchapter, those opinions shall be presented and wherever applicable the author's opinion shall be added as well.

European airlines' and their associations' officials dismiss unanimously the regulation as an "incredibly poor piece of legislation"¹⁵². They base their criticism on several arguments.

One of them, which had been introduced before the ECJ as well, is that the compensation stipulated in Art. 7 are discriminatory in two ways: In comparison of air travel and other modes of transport and – of course this argument is only brought by low cost carriers – comparing low cost airlines with "regular" airlines. Both arguments must be rejected. It is true that similar compensation rules have not existed for other modes of transport. However, as the ECJ pointed out, other modes of transport are not comparable to air transport. Even if one considers rail travel to be in a

¹⁵¹ §§ 93-99.

¹⁵² Statement by Easyjet, *easyJet calls for immediate review of EU compensation rules for air passengers*, found at http://www.easyjet.com/EN/News/immediate_review_of_eu_compensation_rules.html, last visited: 01/05/2006.

comparable situation and there are good reasons to do so as passengers are in roughly the same situation concerning cancellation and denied boarding as air passengers, the legislator always has to start with one issue at a time and has to set priorities. As a matter of fact, the Commission already proposed the adoption of a regulation concerning rail passenger rights¹⁵³.

Moreover, the airlines are discontent with being held responsible for events outside their control¹⁵⁴. Whereas this is not true concerning cancellations, as Art. 5 (3) allows the airlines to avoid compensation by proving the existence of extraordinary circumstances, no such opportunity is provided for in cases of long delays after the conciliation council removed it from the text. This point must be taken. It seems unfair to put the burden of assisting the passengers in cases of bad weather on the airlines, because they cannot influence it and have no one else to have regress from. Whereas the economic impact of the services stipulated in Art. 9 (1)(a) and (2) appears to be rather negligible and should be self-evident, the obligation to reimburse passengers (Art. 8 (1)(a)) and to pay for hotel accommodation and transfer (Art. 9 (1)(b) and (c)) are not. The airlines should be allowed to exonerate themselves at least in cases of bad weather. In all other circumstances it would be detrimental for passengers to be forced to ask the responsible third parties for immediate assistance; the right to claim for regress still remains with the airlines.

Another point was that prior to the regulation only few passengers complained to the commission about poor airline performance¹⁵⁵. Thus there was no necessity to regulate this sector in the first place. As is has been shown before, the level of information of passengers is low. So most do not know where to complain. Second, there are other recipients for complaints such as the airlines themselves or to national authorities. In consequence, the low amount of complaints to the commission does not necessarily mean that satisfaction with airline service is high and that there is no need for a regulation.

The airlines are, however, not completely mistaken in stating that the leaflet on air passenger rights¹⁵⁶ is misleading to a certain degree¹⁵⁷. It omits the

¹⁵³ Proposal for a Regulation of the European Parliament and of the Council on International Rail Passengers' Rights and Obligations, COM (2004) 143 final.

¹⁵⁴ Easyjet id..

¹⁵⁵ Cathy Buyck, *A Right Mess*, in: Air Transport World, March 2006, p. 32.

¹⁵⁶ Find the English version at http://www.europa.eu.int/comm/transport/air/rights/doc/2005_01_19_apr_leaflet_en.pdf

airlines' opportunity to refer to extraordinary circumstances in cases of cancellation; on the other hand this referral should be the exception and not the rule¹⁵⁸.

The Commission acknowledges some problematic issues, but blames others for lack of cooperation. As “the National Enforcement Bodies have an important role to play to make sure that citizens can fully enjoy these rights¹⁵⁹”, the MS have been slow to install those authorities and in some countries they are not equipped sufficiently. Thus several letters of reasoned opinion were sent to the member states and an action was brought to the ECJ against four states¹⁶⁰. The Commission criticizes the airlines for the regular use of the “extraordinary circumstances-excuse”. In both cases the Commission is perfectly correct. What it should do is review their information policy and see how it can be optimized.

Legal experts like Ronald Schmid agree with the Commission concerning the criticism of the airlines. The event of a passenger claiming his rights and bringing them to court is unlikely and that is what the air carriers speculate upon¹⁶¹. According to alleviate access to the courts, special jurisdiction shall be given to consumers in the courts where he is domiciled¹⁶². So the passenger would not have to translate his claims and would not have to bear the inconveniences of bringing an action abroad. Special jurisdiction for consumers is nothing new to European private international law. Section 4 of the Regulation 44/2001 (“Brussels I”)¹⁶³ already provides for it.

As described above, the calculation of the distances stipulated in Art. 6 and 7 of the regulation is not clear enough. It is proposed to abandon compensation based on the distance of the flight and to let amounts of

¹⁵⁷ Cathy Buyck, id. ; easyJet, id..

¹⁵⁸ Commission Press Release, First anniversary of Air Passenger Rights, IP/06/177.

¹⁵⁹ Jacques Barrot in : Commission Press Release, id..

¹⁶⁰ Austria, Belgium, Luxembourg and Sweden ; reasoned letter of opinion to Slovakia, IP/05/1587.

¹⁶¹ Ronald Schmid, *Europäische Fluggastrechte: Unehrliches Lamentieren der Airlines*, in: Neue Juristische Wochenschrift, preface to issue 5, 2006.

¹⁶² Ronald Schmid, *Die Verordnung (EG) Nr. 261/2004 – Europäischer Verbraucherschutz mit Nachbesserungsbedarf*, in: Zeitschrift für Luft- und Weltraumrecht (2005), 54:3:382-383.

¹⁶³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2000 L 12/1.

compensation depend on the fares paid by the passenger¹⁶⁴. This proposal cannot be accepted. First it would be discriminatory to airlines with high fares which would have to pay higher compensation, although, second, the damage to the passenger is always the same and is not dependent on the price. If the risk of financial loss for low fare carriers appears too great, they will have to make adaptations based on commercial calculation. After all the ECJ held the compensation to be proportionate. Another system keeps the distance/compensation relation but aims to alleviate the calculation of the distance by introducing three different zones: domestic flights, intra-EC flights and flights from/to third countries¹⁶⁵. This might work out for MS in the centre of the Community, but appears to be rather unbalanced in those countries at the edge of the EC. According to this model a cancellation of a flight from Strasbourg to Basel would require the airline to pay 600 € in compensation, whereas the compensation due for a cancelled flight from Strasbourg to Helsinki would be only 400 €. The best solution as far as the author is concerned, would be to attach a list including the distances of as many intra-EC connections as possible and the most common connections to third countries.

So far the regulation has not changed much. Low cost carriers are still able to offer their discount fares and the regular airlines undertook further efforts to compete with those airlines. The Regulation (EC) No. 261/2004 is to be reviewed in 2007 for the first time. This would be a great opportunity to correct some initial flaws in the regulation as mentioned above. The exception of extraordinary circumstances should extend to delays, there should be legal standing for passengers in the country of their domicile and a list of distances between airports should be attached.

However, it is not only the Community that has homework to do, but the airlines as well. Lack of information on the rights and the unwillingness of airlines to provide these still present the main problem. As long as the airlines do not comply with the rules set up by the regulation there will be no improvement to passengers' rights. The member states too could double efforts in supporting their national enforcement bodies. However, consumers will only profit if the airlines can run their business on a profitable basis. This means that the EC and the MS do it utmost to improve air traffic control and make certain that the carriers have the legal

¹⁶⁴ easyJet, id..

¹⁶⁵ Ronald Schmid, id., p. 382.

opportunity to claim for regress from third parties for delays and cancellations.

The Regulation 261/2004 has been an improvement to air passenger rights and can be seen as the starting point for more (binding) passenger protection in other modes of transport.

5 Persons with reduced mobility

Not all passengers are the same and some need special care when traveling by plane. Who falls into this category? Meant are those passengers who need assistance when traveling due to handicaps or age. The latter includes both, children and those of high age¹⁶⁶. The level of assistance necessary, however, varies greatly. These special needs have long been recognized by the airlines and most airlines have their own policy in dealing with those passengers¹⁶⁷. However, passengers with reduced mobility did not always profit from those rules as different legal actions show. As an example the case of an English citizen shall be given who was charged by an airline for the allocation of a wheelchair needed to proceed to the check-in counter. The English court held that such a fee is unlawful whereas the airline defended itself by referring to the airports' obligation to provide wheelchairs to disabled passengers.

The European Commission started to introduce new measures in this field along with the other new regulations which were dealt with before. In fact Art. 11 of the Regulation 261/2004 deals with the rights of people with reduced mobility (PRM), but since this rule applies only to the subject matter under the regulation more specific rules were needed. On February 16th the Commission drafted a proposal "concerning the rights of persons with reduced mobility when traveling by air¹⁶⁸". The goal is to offer those people -- about 45 million in the Community¹⁶⁹ -- the same opportunities in air traveling as other passengers.

¹⁶⁶ See also definition in Art. 2 (i) of the Regulation 261/2004.

¹⁶⁷ E.g British Airways, found at http://www.britishairways.com/travel/spneedpolicy/public/en_gb , last visited 03/05/06; LTU, found at <http://www.ltu.de/takeltu/index.html?SiteID=3030800&LangID=9> , last visited 03/05/06.

¹⁶⁸ Commission Proposal for a Regulation of the European Parliament and of the Council concerning the rights of persons with reduced mobility when travelling by air, COM(2005) 47 final.

¹⁶⁹ Commission, id., p. 9.

5.1 Art. 11 of Regulation 261/2004

Art. 11 of the Regulation 261/2004 provides for the priority of passengers with reduced mobility and unaccompanied children. The first paragraph applies to cases of overbooked flights. Thus it is unlikely that PRM belong to those bumped from a flight. The second paragraph grants priority in assistance according to Art. 9. These paragraphs must be considered as rule of common sense and should be self-evident to airline carriers anyway.

5.2 The PRM Regulation

Far more substantial would be those rights granted to PRM according to the Proposal to a regulation dealing specifically with their rights in air travel. This regulation, based on Art. 80 (2) EC once more, is still in the procedure according to Art. 251 EC. It is expected to enter into force in 2008, if it is accepted by the Council and the European Parliament. Thus, the precise content cannot be foreseen, but reviewing the Commission's proposal shall give an outline of what can be expected¹⁷⁰. The regulation will probably include clauses on:

1. Fair treatment
 - The airlines shall be prevented from refusing passengers based on their reduced mobility at booking as well as embarkation
 - Exception shall be granted for safety reasons – the evacuation of an aircraft is slowed down when too many PRM travel on the same flight and need special assistance
2. Assistance at airports
 - The regulation shall contain a standard list of assistance services offered free of charge to the passengers which suit all the needs due to different disabilities and to age
 - Standard shall be provided by the airport management bodies, paid by all airlines using the airports
3. Assistance on-board aircraft

¹⁷⁰ The UK government launched a consultation paper in May 2005 and published a summary of the responses in August 2005 giving helpful insights into the opinions of the actors effected by this regulation: UK Department for Transport, Summary of Consultation responses on EC proposal for PRM Regulation.

- The air carrier shall provide assistance on board the aircrafts (e.g. transport of wheelchairs and guide dogs) free of charge at least for flights departing in the Community
4. Notification of need for assistance
 - Passengers shall be encouraged to give prior notice of what kind of assistance is needed
 5. Enforcement
 - The member states shall adopt sanctions for infringements and shall install authorities which deal with passengers' complaints

A parallel can be drawn to the Regulation 261/2004, as this new regulation is supposed to have the identical geographical scope as set in Art. 3 (1) and the MS are supposed to designate bodies to deal with complaints. As stated above, the proposal is still in the mills of European Legislation. A final draft of EP and Council can be expected soon.

6 The Airlines Blacklist

Although flying is considered a rather safe way of transport, accidents happen. Of course, standards differ and some airlines or aircrafts are safer than others. In Europe until 2005 it was for the member states to decide upon refusing landing rights for those airlines they considered unsafe. This amounted in great discrepancies as some airlines were allowed to land in one country of the EC and not in another.

6.1 The Regulation 2111/2005

The Commission reacted in proposing a regulation that would establish a so called “black list” of unsafe airlines¹⁷¹, which was adopted by the European Parliament and the Council on 14 December 2005¹⁷². Regulation 2111/2005 pursues one major goal: the protection of the passengers’ safety. This shall be achieved by banning “dangerous” airlines and by informing the passenger about the actual carrier. According to the Commission it is supposed to have a punitive effect as well as an encouraging effect. Airlines will have to comply with Community safety standards in order to operate within the EC area¹⁷³.

In consequence an airline which is on the list of one particular MS will be on the list of all member states, Art. 3 (1) of the Regulation 2111/2005. In the annex to the regulation criteria for banning an airline are published. These are:

1. aircrafts not satisfying minimum safety standards
2. inability or unwillingness to correct such grievances
3. responsible authorities are unable to oversee the compliance with safety standards

¹⁷¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the information of air transport passengers on the identity of the operating carrier and on communication of safety information by Member States, COM (2005) 48 final.

¹⁷² Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC, OJ (2005) L 344/15-22, text can be found at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2005&nu_doc=2111, last visited 12/05/2006.

¹⁷³ Commission Press Release, European sky protected against unsafe airlines, IP/06/359.

Article 4 stipulates that the list be updated at least every three months. Carriers are eligible for removal from the list if they can show that they manage to comply with the safety standards set¹⁷⁴. On the other side, airlines maybe added to the list on initiative of the Commission or the member states based on the criteria described above¹⁷⁵.

All passengers starting their carriage, which involves air carriage at some point, in the Community according to Art. 10 of the Regulation, shall be informed on the identity of the operating airline as soon as possible¹⁷⁶. In case the operating airline is on the Community's blacklist, the carriage contractor shall offer reimbursement or rerouting as laid down in Art. 8 of Regulation 261/2004 to the passenger, Article 12 of Regulation 2111/2005.

6.2 The blacklist = sufficient protection?

On March 22nd 2006, the Commission published the first blacklist based on said regulation¹⁷⁷. It includes 95 airlines, of which three face a partial ban meaning that they are restricted to certain types of aircrafts only. Strikingly, the list comprises 50 airlines from the Democratic Republic of Congo. Most of the other airlines are based in Africa as well or the Far East. Surprisingly airlines from Russia, Turkey or even EC member states cannot be found.

Does this mean that all aircrafts coming from those countries are perfectly safe? This appears to be doubtful. The crash of an aircraft of the Cyprian carrier Helios in August 2005 is not forgotten. By that time Cyprus had been a MS to the Community for one year already. Aircrafts of the Turkish air carrier Onur Air were prohibited from landing in Germany. After political implications this ban was abandoned.

The absence of European carriers from the list shows, that the European authorities have been under heavy political pressure drafting the list. As such a list cannot be considered complete, it is not of much help to the European passenger. To the contrary, the passenger is left in the belief to board a safe aircraft when in fact he is not. In addition those airlines on the list are not those the average passenger would use for travel every day. Thus this black list, established with much publicity, is not satisfactory.

¹⁷⁴ Art. 4 (1) (b) of Regulation 2111/2005.

¹⁷⁵ Art. 4 (2), id..

¹⁷⁶ Art. 11, id..

¹⁷⁷ The list can be found at http://ec.europa.eu/transport/air/safety/doc/flywell/2006_04_25_flywell_list_en.pdf, last visited 12/05/2006.

Are there any other measures that could be more useful? Some demand an EC-wide airline safety authority overseeing the standards¹⁷⁸. Others propose a “positive” list comprising those airlines, which overachieve the standards¹⁷⁹. However, the best way for the passenger to make sure he is flying with a comparably safe airline is to inform himself about the carrier he intends to contract with.

¹⁷⁸ German Pilots' Association Cockpit, "Schwarze Liste" – VC fordert verbesserte Sicherheitskultur, found at <http://www.vcockpit.de/pressearchiv.php?artikel=147>.

¹⁷⁹ Ronald Schmid, Die "schwarze Liste" der EU: Eine Scheinbare Transparenz! Found at http://www.luftrecht.de/aktuelles_schwarzeliste.html, last visited 12/05/2006.

7 Air passengers' data protection

„Everyone has the right to respect for his private and family life, his home and his correspondence¹⁸⁰“

A pending case before the European Court of Justice concerns the transfer of air passenger data to U.S authorities. This case shall be used to show how passengers of Community air carriers are protected from abuse of their personal data which may amount into a violation of the human right of protection of privacy as cited above. Prior to reviewing the case, a brief background shall be given, underlining the importance of transfer and protection of personal data.

7.1 Background to Data Protection in the EC

In the age of high-speed internet and global trade data flows are vast and very often it includes personal data. This data can be of value to any kind of private and public organization. E.g. it is of great commercial value to many companies. An internet store keeps a record of what the consumer bought before; it might have data on gender, age, credit card etc., which enables it to personalize its advertisement. The police keep record of fingerprints and pictures of suspects and convicted delinquents that helps to find the perpetrator of an offense. There would be many more examples of how people benefit from using personal data. So why must the use of personal data be restricted? There are certain dangers emanating from the abuse of information. First there is the danger of inaccurate data. Referring to the last example, the police might mix up a fingerprint and accuse the wrong person of a crime. Another danger lies in the impact on an individual's privacy. A terrifying example are the U.S records of sex offenders' addresses that are open to the public and which have led to several incidents where those convicts were murdered after their place of domicile was discovered. In

¹⁸⁰ Art. 8 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, text to be found at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> .

consequence, legislation on data protection has the task of facilitating data transfer while protecting personal data from abuse.

Concerning air travel, protection of passenger data is of particular interest. The airlines save the passenger name records (PNR). These contain “all information necessary to enable reservations to be processed and controlled by the booking and participating airlines¹⁸¹”. Such information is the flight numbers, connections, special needs on board and so on.

Personal data falls under the scope of Art. 8 of the ECHR. According to Art. 6 (2) EU, the European Union has to respect the European Human Rights Convention (ECHR). Therefore in 1995 the Community passed a directive on data protection¹⁸² which is supposed to serve the twin goals mentioned above. The directive shall guarantee the free flow of data while protecting the rights of the data subjects, individuals to whom the data refers to. Applying the directive the MS are not allowed to hinder the flow of personal data through the Community. In consequence it is characteristic for the directive to allow the processing of personal data while at the same time restricting this admission or to prohibit certain acts, but to approve exceptions.

Of special interest is Article 8 of Directive 95/46 dealing with sensitive data. The processing of data containing information on racial or ethnic origin or on the political, religious, philosophical and sexual orientation as well as the membership in a workers-union are prohibited in general. Exceptions are the most restrictive here, admitting process only if absolutely necessary or if there is consent of the data subject.

Concerning air passengers and their relation to their carrier Chapter VI of the directive has come into the focus during recent years¹⁸³. It deals with the transfer of personal data to third countries. As the directive provides protection within the territory of the community only there is the danger to the privacy of individuals whenever data is transferred to countries with a relatively low standard of data protection. An additional issue is that

¹⁸¹ Maarten Peeters, *Security Policy vs. Data Protection – Transfer of Passengers’ Data to U.S. Authorities*, in: *Multimedia und Recht* (2005), Heft1, p.11.

¹⁸² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

¹⁸³ See in the following subchapter.

controllers¹⁸⁴ could avoid the restrictions of the Community by storing data outside the Community¹⁸⁵. Art. 25 (1) therefore requires that the third country the data is transferred to dispose of an adequate level of protection. The adequacy of the level of protection applied to by U.S authorities was the topic of the following case.

7.2 Transfer of PNR to the U.S

Besides air traffic within the European Community, connections to the U.S have always been of major importance as it affects millions of travellers. The following case review¹⁸⁶ will deal with data transfer agreements between the U.S and the Community. As this case has not been decided yet, the advocate general's opinion shall be scrutinized and a comment made afterwards.

7.2.1 Background to the joined cases

According to U.S legislation passed soon after the terrorist attacks on 11 September 2001 all airlines operating flights to, from or passing the U.S territory must provide the United States Bureau of Customs and Border Protection (CBP) with detailed PNR. After the U.S authority threatened to impose sanctions on airlines which do not comply with the U.S measures by 5 March 2003, major European air carriers allowed the CBP access to passenger name records. The European Commission assessed the compliance of this requirement made by the U.S authorities with Community law. After negotiations, the Commission adopted a decision¹⁸⁷ on 14 May 2004 (the "adequacy decision") holding that the CBP provided for an adequate level of protection under Art. 25 (6) of the Directive 95/46. Only three days later, the Council adopted a decision¹⁸⁸, which affirmed the

¹⁸⁴ Defined in Art. 2 (d) of Directive 95/46.

¹⁸⁵ David Bainbridge, *EC Data Protection Directive*, London 1996, p.70.

¹⁸⁶ Pending joined cases C-317/04, *European Parliament v Council of the European Union*, and C-318/04, *European Parliament v Commission of the European Communities*.

¹⁸⁷ Commission Decision 2004/535/EC: Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, OJ 2004 L 235/11.

¹⁸⁸ Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004 L 183/83.

conclusion of an agreement between the Community and the United States. The decision was based on Art. 95 EC in conjunction with Art. 300 (2) first sentence of the first subparagraph. The European Parliament brought to actions of annulment under Article 230 EC before the Court, holding that both decisions infringed EC law.

7.2.2 Advocate general's opinion

On 22 November 2005, the Advocate General Philippe Léger delivered his opinion concerning the compliance of both decisions with Community law. This opinion is not binding on the court. However, it got indicative character since in most cases the ECJ follows the AGs' opinions.

He commenced with scrutinizing the adequacy decision of the Commission. Thus, he had to examine whether the Decision complied with Directive 95/46. The Parliaments argument that giving access to data to third countries is not the same as transferring data as stipulated in Art. 25 is rejected. Limiting the scope of said article would make it easy to circumvent the provision altogether¹⁸⁹. The parliament argued further that the decision covers activities, which fall outside the scope of the Directive. AG Léger holds that the Decision's wording, aims at supporting the U.S in security matters, whereas "PNR data will be used strictly for purposes of preventing and combating: terrorism and related crimes; other serious crimes, including organised crime, that are transnational in nature; and flight from warrants or custody for those crimes¹⁹⁰". However, this aim does not correspond with Art. 3 (2) of the Directive which explicitly excludes operations concerning public security, defense and state security. As the Directive 95/46, and Article 25 thereof in special, cannot be the appropriate basis for adopting the Decision, the Advocate General proposes to annul the Decision¹⁹¹.

The Advocate General goes on in examining the Decision of the Council. The EP had pleaded that the Council chose the wrong legal basis (Art. 95

¹⁸⁹ Advocate General Léger's opinion on joined cases C-317/04 and C-318/04, § 91.

¹⁹⁰ Commission Decision 2004/535/EC: Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, recital 15.

¹⁹¹ Advocate General Léger's opinion on joined cases C-317/04 and C-318/04, § 105.

EC) for the decision on the agreement with the U.S. Art. 95 EC allows for the adoption of measures concerning the approximation of National provisions which aim to establish and complete the internal market. According to AG Léger, the agreement with the United States has two objectives¹⁹². The first is the protection of data, which complies with Art. 95 EC. The second objective consists of the fight against terrorism and serious crime. The latter objective is not covered by Art. 95 EC. As both objectives have to be seen together, the Council chose the wrong legal basis. All other pleas of the parliament were rejected by the AG. However, this does not change his opinion that the Council's decision needs to be annulled too.

7.2.3 Comment

As the Advocate General made clear both decisions should be annulled. His call cannot be considered a question of his interpretation of the provisions concerned since those are clear and precise in wording. Both the Commission and the Council infringed the respective provisions obviously. The actions by both European institutions reveal several issues.

First those reactions must be seen in their political environment that existed after the terrible events of 11 September 2001 which generated a wave of all kinds of security measures taken by the U.S in particular, but by the European member states as well. In addition there was heavy economic pressure as major European airlines were involved which often present symbols of national pride. In consequence both Commission and Council felt forced to act immediately disregarding that the decisions lack a legal basis and the institutions exceeded their powers.

Second the political and economic relations to the U.S have been paramount for the EC and its member states ever since the Community was founded. Apparently this relationship proceeded over the interests of air passengers, which "are running a risk of being caught up in a judicial system that encompasses the Guantanamo Bay prisoners' camp¹⁹³". Not less than 34 specifications have to be included in PNR to which the CBP has access.

¹⁹² Id., § 129.

¹⁹³ Maarten Peeters, id. p. 17.

Concerning sensible data the CBP commits not to use it¹⁹⁴. However, there are no means installed for controlling the fulfillment of this promise.

The action brought to the Court by the EP has lasted for two years already, the agreement was not meant to last more than three and a half years anyway and it is still in force as of today. However, this is likely to change: according to the Court's schedule the judgment in cases C-317/04 and C-318/04 is due on 30 May 2006¹⁹⁵.

Even if the ECJ should annul the decisions, this would not prevent the Commission and the Council to enter into new agreements with the U.S. Doing this it would be advisable to act without a rush. There needs to be a proper balance between the conflicting legitimate interests¹⁹⁶.

¹⁹⁴ Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection (CBP), as attached to the Commission Decision 2004/535/EC, § 9.

¹⁹⁵ Author's note: after completion of this thesis, the case was decided as assumed above. Please find judgment under <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-317/04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>, last visited 13/06/06.

¹⁹⁶ Maria Verónica Pérez Asinari and Yves Pouillet, *Airline passengers' data : adoption of an adequacy decision by the European Commission. How will the story end?* In: Computer Law & Security Report, Vol. 20 no. 5 2004, p.375.

8 Conclusion

Just like air travel has changed the protection of air passengers' rights has developed during the recent decades. This was made possible through the process of European integration which allows for more and more topics to be covered by Community law. European institutions recognized the need for more legislation coinciding with ever rising passenger numbers. As I mentioned in all the preceding chapters, there may always be some amendments necessary – sometimes the level of protection must even be considered as a little bit too high. Nevertheless those measures, the Package Travel Directive, the Regulation 227/97 in conjunction with the Montreal Convention and the Overbooking Regulation 261/2004, to name just the most important, must be seen in a positive light. The only measure that is of no great assistance is the airlines blacklist. The motives behind it are honorable for certain. The list as such, however, is more or less useless.

The protection of air passengers in the European Community appears to be comprehensive after all. During the work on this thesis I often thought about important fields that are not covered in one or the other way. I could not find any. However, it is not the case that the rights the European consumer enjoys are excessive. They appear to be fairly balanced, although there will always be the necessity to adapt legislation to the conditions of the future.

Many European airlines argue that the best they can do for their customers is low prices. It cannot be denied that passengers benefit from low prices a lot and probably most decide in favor of the air carrier offering the best fares. However, there is another side to the medal: What good does it do, if the passenger ends up stranded at an airport due to cancellations long delays or even bankruptcy of the carrier. At the end of the day he will end up with additional costs and lots of trouble because of missed appointments, connecting flights and so on. During the last five years the European Community has implemented a series of measures improving passengers' rights. The airlines were upset and predicted that the measures taken, especially Regulation 261/2004, would result in higher costs. In consequence passengers would have to pay the bill as fares would have to be raised dramatically. So far at least the latter has not occurred. Moreover,

the European carriers have not been able to show, that the “new” air passenger rights left a great impact on their business. It seems that other factors such as hard competition – not at least among and emanating from the high number of low cost carriers – high costs for fuel, SARS, terrorism and wars are of far greater concern.

Another reason for the small impact of the new legislation surely is the low level of information among European consumers. As statistics show¹⁹⁷, most do not know about the rights they could enjoy. The question is who is responsible for the lack of information? As has been shown above, the European institutions provide a number of materials freely accessible to the public. It must be admitted that the airlines do not always comply to with the requirements to provide information whereas they cannot be blamed for not being overly enthusiastic. It is the European consumer himself that needs to be more active. In times where more and more passengers stop visiting their travel agent and book their flights on the internet it is the passengers’ responsibility to obtain as much information as possible.

¹⁹⁷ See http://europa.eu.int/comm/consumers/topics/eurobarometer_passrights_en.pdf , last visited 25/04/2006.

Supplement A – The Package Travel Directive (Excerpt)

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours¹⁹⁸

Official Journal L 158 , 23/06/1990 P. 0059 - 0064

Finnish special edition: Chapter 6 Volume 3 P. 0053

Swedish special edition: Chapter 6 Volume 3 P. 0053

COUNCIL DIRECTIVE of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC)
THE COUNCIL OF THE EUROPEAN COMMUNITIES, [...]
HAS ADOPTED THIS DIRECTIVE:

Article 1

The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community.

Article 2

For the purposes of this Directive:

1. 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;

(b) accommodation;

(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

The separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive;

2. 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;

3. 'retailer' means the person who sells or offers for sale the package put together by the organizer;

4. 'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee');

5. 'contract' means the agreement linking the consumer to the organizer and/or the retailer.

Article 3

1. Any descriptive matter concerning a package and supplied by the organizer or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information. 2. When a brochure is made available to the consumer, it shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning:

(a) the destination and the means, characteristics and categories of transport used;

(b) the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;

(c) the meal plan;

(d) the itinerary;

(e) general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;

¹⁹⁸ Source: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31990L0314:EN:HTML>.

(f) either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;

(g) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.

The particulars contained in the brochure are binding on the organizer or retailer, unless:

- changes in such particulars have been clearly communicated to the consumer before conclusion of the contract, in which case the brochure shall expressly state so,
- changes are made later following an agreement between the parties to the contract.

Article 4

1. (a) The organizer and/or the retailer shall provide the consumer, in writing or any other appropriate form, before the contract is concluded, with general information on passport and visa requirements applicable to nationals of the Member State or States concerned and in particular on the periods for obtaining them, as well as with information on the health formalities required for the journey and the stay;

(b) The organizer and/or retailer shall also provide the consumer, in writing or any other appropriate form, with the following information in good time before the start of the journey:

(i) the times and places of intermediate stops and transport connections as well as details of the place to be occupied by the traveller, e.g. cabin or berth on ship, sleeper compartment on train;

(ii) the name, address and telephone number of the organizer's and/or retailer's local representative or, failing that, of local agencies on whose assistance a consumer in difficulty could call.

Where no such representatives or agencies exist, the consumer must in any case be provided with an emergency telephone number or any other information that will enable him to contact the organizer and/or the retailer;

(iii) in the case of journeys or stays abroad by minors, information enabling direct contact to be established with the child or the person responsible at the child's place of stay;

(iv) information on the optional conclusion of an insurance policy to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.

2. Member States shall ensure that in relation to the contract the following principles apply:

(a) depending on the particular package, the contract shall contain at least the elements listed in the Annex;

(b) all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract; the consumer is given a copy of these terms;

(c) the provision under (b) shall not preclude the belated conclusion of last-minute reservations or contracts.

3. Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package. The transferor of the package and the transferee shall be jointly and severally liable to the organizer or retailer party to the contract for payment of the balance due and for any additional costs arising from such transfer.

4. (a) The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:

- transportation costs, including the cost of fuel,
- dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports,
- the exchange rates applied to the particular package.

(b) During the twenty days prior to the departure date stipulated, the price stated in the contract shall not be increased.

5. If the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:

- either to withdraw from the contract without penalty,
- or to accept a rider to the contract specifying the alterations made and their impact on the price.

The consumer shall inform the organizer or the retailer of his decision as soon as possible.

6. If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:

(a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer;

(b) or to be repaid as soon as possible all sums paid by him under the contract.

In such a case, he shall be entitled, if appropriate, to be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:

(i) cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the package description; or

(ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.

7. Where, after departure, a significant proportion of the services contracted for is not provided or the organizer perceives that he will be unable to procure a significant proportion of the services to be provided, the organizer shall make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package, and where appropriate compensate the consumer for the difference between the services offered and those supplied.

If it is impossible to make such arrangements or these are not accepted by the consumer for good reasons, the organizer shall, where appropriate, provide the consumer, at no extra cost, with equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed and shall, where appropriate, compensate the consumer.

Article 5

1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:

- the failures which occur in the performance of the contract are attributable to the consumer,
- such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,
- such failures are due to a case of force majeure such as that defined in Article 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

In the cases referred to in the second and third indents, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.

4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity.

This obligation must be stated clearly and explicitly in the contract.

Article 6

In cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions.

Article 7

The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.

Article 8

Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer.

Article 9

1. Member States shall bring into force the measures necessary to comply with this Directive before 31 December 1992. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive. The Commission shall inform the other Member States thereof.

Article 10

This Directive is addressed to the Member States.

Done at Luxembourg, 13 June 1990.

Supplement B – The Regulation 261/2004 (excerpt)

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement¹⁹⁹

Official Journal L 046 , 17/02/2004 P. 0001 - 0008

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004

establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, [...]

HAVE ADOPTED THIS REGULATION:

Article 1

Subject

1. This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

- (a) they are denied boarding against their will;
- (b) their flight is cancelled;
- (c) their flight is delayed.

2. Application of this Regulation to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

3. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 enter into operation. The Governments of Spain and the United Kingdom will inform the Council of such date of entry into operation.

Article 2

Definitions

For the purposes of this Regulation:

- (a) "air carrier" means an air transport undertaking with a valid operating licence;
- (b) "operating air carrier" means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;
- (c) "Community carrier" means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers(5);
- (d) "tour operator" means, with the exception of an air carrier, an organiser within the meaning of Article 2, point 2, of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours(6);
- (e) "package" means those services defined in Article 2, point 1, of Directive 90/314/EEC;
- (f) "ticket" means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent;
- (g) "reservation" means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

¹⁹⁹ Source: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004R0261:EN:HTML> .

(h) "final destination" means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;

(i) "person with reduced mobility" means any person whose mobility is reduced when using transport because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause of disability, and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers;

(j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

(k) "volunteer" means a person who has presented himself for boarding under the conditions laid down in Article 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits.

(l) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.

Article 3

Scope

1. This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

2. Paragraph 1 shall apply on the condition that passengers:

(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,

- as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,

or, if no time is indicated,

- not later than 45 minutes before the published departure time; or

(b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

3. This Regulation shall not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it shall apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator.

4. This Regulation shall only apply to passengers transported by motorised fixed wing aircraft.

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.

6. This Regulation shall not affect the rights of passengers under Directive 90/314/EEC. This Regulation shall not apply in cases where a package tour is cancelled for reasons other than cancellation of the flight.

Article 4

Denied boarding

1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.

Article 5

Cancellation

1. In case of cancellation of a flight, the passengers concerned shall:

- (a) be offered assistance by the operating air carrier in accordance with Article 8; and
 - (b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
 - (c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
 - (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
 - (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
 - (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.
2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.
3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.

Article 6

Delay

1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:
- (a) for two hours or more in the case of flights of 1500 kilometres or less; or
 - (b) for three hours or more in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 and 3500 kilometres; or
 - (c) for four hours or more in the case of all flights not falling under (a) or (b),
- passengers shall be offered by the operating air carrier:
- (i) the assistance specified in Article 9(1)(a) and 9(2); and
 - (ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and
 - (iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).
2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.

Article 7

Right to compensation

1. Where reference is made to this Article, passengers shall receive compensation amounting to:
- (a) EUR 250 for all flights of 1500 kilometres or less;
 - (b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;
 - (c) EUR 600 for all flights not falling under (a) or (b).
- In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.
2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked
- (a) by two hours, in respect of all flights of 1500 kilometres or less; or
 - (b) by three hours, in respect of all intra-Community flights of more than 1500 kilometres and for all other flights between 1500 and 3500 kilometres; or
 - (c) by four hours, in respect of all flights not falling under (a) or (b),
- the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.
3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.

Article 8

Right to reimbursement or re-routing

1. Where reference is made to this Article, passengers shall be offered the choice between:

- (a) - reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
 - a return flight to the first point of departure, at the earliest opportunity;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
- (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

Article 9

Right to care

1. Where reference is made to this Article, passengers shall be offered free of charge:

- (a) meals and refreshments in a reasonable relation to the waiting time;
- (b) hotel accommodation in cases
 - where a stay of one or more nights becomes necessary, or
 - where a stay additional to that intended by the passenger becomes necessary;
- (c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.

Article 10

Upgrading and downgrading

1. If an operating air carrier places a passenger in a class higher than that for which the ticket was purchased, it may not request any supplementary payment.

2. If an operating air carrier places a passenger in a class lower than that for which the ticket was purchased, it shall within seven days, by the means provided for in Article 7(3), reimburse

- (a) 30 % of the price of the ticket for all flights of 1500 kilometres or less, or
- (b) 50 % of the price of the ticket for all intra-Community flights of more than 1500 kilometres, except flights between the European territory of the Member States and the French overseas departments, and for all other flights between 1500 and 3500 kilometres, or
- (c) 75 % of the price of the ticket for all flights not falling under (a) or (b), including flights between the European territory of the Member States and the French overseas departments.

Article 11

Persons with reduced mobility or special needs

1. Operating air carriers shall give priority to carrying persons with reduced mobility and any persons or certified service dogs accompanying them, as well as unaccompanied children.
2. In cases of denied boarding, cancellation and delays of any length, persons with reduced mobility and any persons accompanying them, as well as unaccompanied children, shall have the right to care in accordance with Article 9 as soon as possible.

Article 12

Further compensation

1. This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.

2. Without prejudice to relevant principles and rules of national law, including case-law, paragraph 1 shall not apply to passengers who have voluntarily surrendered a reservation under Article 4(1).

Article 13

Right of redress

In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.

Article 14

Obligation to inform passengers of their rights

1. The operating air carrier shall ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: "If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance".

2. An operating air carrier denying boarding or cancelling a flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. It shall also provide each passenger affected by a delay of at least two hours with an equivalent notice. The contact details of the national designated body referred to in Article 16 shall also be given to the passenger in written form.

3. In respect of blind and visually impaired persons, the provisions of this Article shall be applied using appropriate alternative means.

Article 15

Exclusion of waiver

1. Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.

2. If, nevertheless, such a derogation or restrictive clause is applied in respect of a passenger, or if the passenger is not correctly informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation.

Article 16

Infringements

1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complain to any body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.

Article 17

Report

The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and the results of this Regulation, in particular regarding:

- the incidence of denied boarding and of cancellation of flights,
- the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour" to which Directive 90/314/EEC applies and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,
- the possible revision of the amounts of compensation referred to in Article 7(1).

The report shall be accompanied where necessary by legislative proposals.

Article 18

Repeal

Regulation (EEC) No 295/91 shall be repealed.

Article 19

Entry into force

This Regulation shall enter into force on 17 February 2005.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 11 February 2004.

For the European Parliament

The President

P. Cox

For the Council

The President

M. McDowell

(1) OJ C 103 E, 30.4.2002, p. 225 and OJ C 71 E, 25.3.2003, p. 188.

(2) OJ C 241, 7.10.2002, p. 29.

(3) Opinion of the European Parliament of 24 October 2002 (OJ C 300 E, 11.12.2003, p. 443), Council Common Position of 18 March 2003 (OJ C 125 E, 27.5.2003, p. 63) and Position of the European Parliament of 3 July 2003. Legislative Resolution of the European Parliament of 18 December 2003 and Council Decision of 26 January 2004.

(4) OJ L 36, 8.2.1991, p. 5.

(5) OJ L 240, 24.8.1992, p. 1.

(6) OJ L 158, 23.6.1990, p. 59.

Commission Statement

The Commission recalls its intention to promote voluntary agreements or to make proposals to extend Community measures of passenger protection to other modes of transport than air, notably rail and maritime navigation.

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