



The Consumer Voice in Europe

# Unfair terms in air transport contracts

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## Enforcement of consumer rights in the EU – the role of consumer organisations

- BEUC runs the COJEF (Consumer Justice Enforcement Forum) project (2011 – 2013); funded partially by EU civil justice programme;
- New dimension of enforcement: EU wide unfair business practices require a European approach to enforcement

=>Co-ordinated action by national consumer organisations – each association acts in its own country, but in a coordinated way; Workstreams under the COJEF project:

- ✓ Legal guarantees ( Apple)
- ✓ Unfair terms in air transport ( airlines, IATA)
- ✓ Surcharges in on-line payment transactions - (AEA, Low Fare Airlines Association)

## Enforcement actions against airlines

- Injunctions instigated by many BEUC members
- Coordinated action started in 2009:
  - \*Test Achats ( Belgium), UFC (France), DECO (Portugal), OCU (Spain)
- Each consumer association decided to sue “national” airlines in their own country (to avoid cross-border injunctions) for the use of unfair contract terms
- Other BEUC members are also involved in court cases against unfair terms (e.g. VZBV (Germany), VKI (Austria), AT (Italy))

## BEUC's initiative regarding IATA

- BEUC's analysis of court judgements: many unfair clauses are based on IATA's RP 1724
- BEUC's letter to IATA 5th February 2013
- IATA's response: « ... we agree that RP 1724 would benefit from a fresh review ..... Your letter will provide valued input in the IATA recommendations with respect to revising or revoking RP 1724. »
- Meeting BEUC/IATA 21 May 2013: IATA does not signal any intention to take the European court judgements into account nor to revise RP 1724

## Court judgments initiated by BEUC members under co-ordinated action

1. **Test Achats/Brussels airlines**, 10 March 2010, *Tribunal de Commerce de Namur*
2. **Test Achats/Ryanair**, 10 March 2010, *Tribunal de Commerce de Namur*
3. **Test-Achats/Easyjet**, 29 September 2010, *Tribunal de Commerce de Namur*
4. **Test-Achat/Easyjet**, 24 April 2013, *Cour d'Appel de Liège*
5. **UFC Que Choisir/Easyjet**, 31 January 2012, *Tribunal de Grand instance de Paris*
6. **UFC Que Choisir/Air France**, 26 April 2013, *Tribunal de Grande Instance, Bobigny (Paris)*
7. **OCU/Vueling**, 23 May 2012, *Juzgado de lo Mercantil, Barcelona*
8. **OCU/Spanair**, 31 July 2012, *Juzgado de lo Mercantil, Barcelona*
9. **OCU/Iberia**, 11 September 2012, *Juzgado de lo Mercantil, Barcelona*
- ...

## Terms ruled unfair - grounds for unfairness

1. Lack of transparency/accessibility of contract terms and of websites
2. (significant) imbalance between the rights/obligations of the parties
3. (unfair) limitation or exclusion of liability of the airline
4. Violation of legal texts
5. Unilateralism, wide leeway to the company

## Terms ruled UNFAIR

- **Structure of terms: lack of transparency and/or accessibility:**

- Overlapping of terms and conditions, Unclear fees for baggage excess (Brussels Airlines)
- Unclear fees due in case of cancellation (Brussels Airlines)
- Lack of clarity of language, overlapping of terms and conditions, unclear fees for baggage excess, force majeure etc (Ryanair)
- Non accessibility of contracts terms off line (Ryanair)
- No access to information on fees for baggage excess (Ryanair)
- “Package holiday”: unclear liability of the airline as regards additional services offered; unclear amount of compensation in case of modification of the “package” by the airline; No access to information on fees if modification/cancellation of the “package” (Easyjet, Air France)
- Unclear terms and conditions of additional providers (Easyjet)
- Unclear fees to pay in case of cancellation for force majeure reasons (Spanair)
- Unclear price increases (charges) after the booking (Spanair)
- Unclear fees for storage of luggage (Spanair)

## Terms ruled Unfair

- **Code share agreements without the consent of the passenger** (Brussels Airlines, Iberia)
  - The passenger has to be informed of the operating carrier *at the latest* at check-in (Regulation 2111/2009)
  - But the consent of the passengers is not required
  - **Unfairness:** code-share agreements can entail a limitation of the contractual guarantees: the consent of the passengers is needed
- **No show clause-sequential use of coupons** (Spanair, Iberia, Luthansa, British Airways etc)
  - The passenger loses the return flight if he does not take (show-up at) the outgoing flight
  - Once the price is paid, the air company cannot proof any damage; the passenger is not obliged to take the flight under the contract but to pay the price
  - Unfairness:** significant imbalance between the rights and obligations of the parties



## Terms ruled Unfair

- **Obligation to reconfirm bookings** (Brussels airlines, Spanair, Air France)
  - Unfairness: it entails a significant imbalance between the rights and obligations of the parties
  
- **No right to refund in case of force majeure** (Easyjet, Spanair, Vueling)
  - Instead of refunding the ticket in case of force majeure of the passenger, the company offers a credit
  - The credit is subject to an administrative fee which is imprecise
  - Unfairness: lack of reciprocity, significant imbalance, unlawfulness

## Terms ruled Unfair

- **Exclusion of the carrier liability for non compliance to the timetable** (Easyjet, Ryanair)
  - Unfairness: against EU Regulation 261/04.
- **Exclusion of liability incase of death or disease of the passenger** (Easyjet, Ryanair)
  - Unfairness: against the Montreal Convention (the airline is liable as long as the death/disease occurred during the flight)
- **Non-automatic refund of undue taxes** (Spanair, Easyjet, Air France)
  - If the passenger does not fly, the undue taxes have to be claimed by the consumer, reimbursement is not automatic
  - Unfairness: significant imbalance, lack of reciprocity, unjust enrichment

## Terms ruled UNFAIR

- **Price increase charged after the booking without the consent of the passenger** (Easyjet, Vueling, Spanair)
  - The passenger cannot rescind the contract if the increase is disproportionate
  - Unfairness: Significant imbalance
- **Exoneration of liability for third parties additional services -“Packages”** (Easyjet, Air France)
  - Airline offering additional service (car rental, accomodation...) is subject to the package travel law
  - Unfairness: exclusion/limitation of liability, illegality
- **Limitation of the rights of persons with reduced mobility** (Air France, Ryanair)
  - Unfairness: against EU Regulation 1107/2006

## Terms ruled UNFAIR

- **Unilateral modification of contract conditions at any time** (Brussels Airlines, Ryanair, EASYjet)
  - Unfairness: Unilateralism, significant imbalance
- **Exemption of liability for errors in dates and numbers of flights and in the timetable** (Easyjet)
  - Unfairness: exclusion of liability
- **Limitation of liability for damaged luggage** (Ryanair)
  - Unfairness: against EU Regulation 889/2002)
- **Limitation of liability for consequential damages** (Vueling)
  - Unfairness: illegal (beyond rights under Regulation 261/04, the passengers can invoke extra- contractual law)
- **Exoneration of liability for technical problems, labor strikes** (Easyjet, Vueling)
  - Unfairness: against EU Regulation 261/04

## Terms ruled UNFAIR

- **Carriage of baggage in another flight** (Brussels airlines, Spanair, Easyjet)
  - The company unilaterally decides to carry the luggage of the passenger in another flight
  - Unfairness: Violation of some laws, unilateralism
- **Fees for storage of luggage** (Easyjet, Spanair)
  - If the passenger does not collect the baggage an administrative fee is charged for storage
  - Unfairness: unilateralism (to set up the amount of the fee)

# Main judgments on the “no-show” clause

## “No show” clause

(non exhaustive list of rulings declaring unfairness)

*Under the so-called “no-show” clause, the airline reserves the right to deny boarding on the return flight if the customer does not show up at the outgoing flight*

1. AG of Köln (Germany), 05/01/2005
2. AG of Frankfurt (Germany), 21/02/2006.
3. Langericht Frankfurt Am Aim (Germany), 14/12/2007
4. Commercial Court n. 2 Barcelona (Spain), 22 March 2010
5. *Audiencia Provincial* (Court of appeal) of Madrid (Spain), 27/11/2009
6. Commercial court of Bilbao (Spain), 7 July 2008  
Commercial court of Bilbao (Spain), 25 July 2008
7. Commercial court of Bilbao (Spain), 3 July 2009
8. *Oberlandesgericht* (Higher Regional Court) of Frankfurt (Germany), 18 December 2008
9. *BGH* (Federal Court of Justice, Germany), 29 April 2010  
(in a case brought to Court by our member BZBV)
10. *Handelsgericht* of Viena (*Austria*), March 2010
11. *VKI v Luthansa*, Oberster Gerichtshof (Austria), 24 January 2013

## The Unfair Contracts Terms Directive

- A horizontal Directive: the air sector is not specifically tackled
- But: Airlines' passenger contract terms are very specific to this sector
- Difficult to assess the terms on the basis of a horizontal , principle based law
- Pricing policies (yield management) are often the « excuse » for unfairness
- Pricing policies of airlines are not transparent
- Pricing policies of airlines encroach into consumers' right to fair contract terms

## Conclusions

- Big European/cross-border dimension: many airlines operate in several countries, using the same contract terms across the EU
- At the initiative of our members, court judgments were rendered in many countries; and more will come...>> but consumer organisations cannot sue every airline in every country ...
- BEUC's members private enforcement initiatives alone cannot stop the proliferation of unfair terms in air transport.
- We need the support of public enforcement authorities, the European Commission and the EU legislator.





## The Consumer Voice in Europe

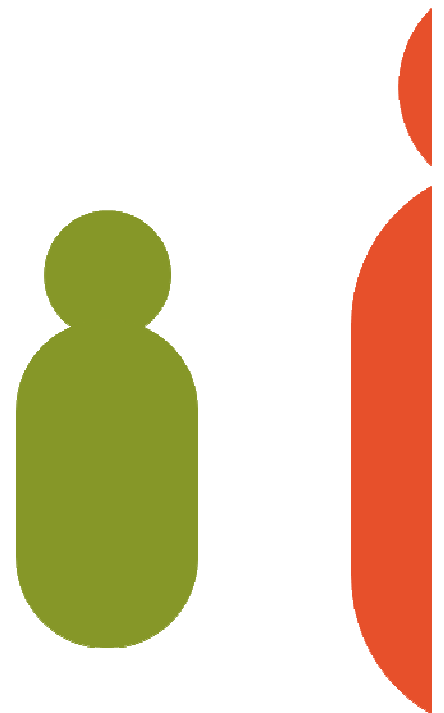
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