Articles

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Overview of cases before the CJEU on European Consumer Contract Law (2008–2013) – Part II

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Abstract: During the last five years the CJEU had to decide on more than 50 preliminary references in the area of consumer contract law. As a consequence there are far more than 100 decisions available which represent the increasingly concrete basis for a European contract law. Particularly striking is the rising number of questions referred to the CJEU by the new Member States. With regard to quantity, two fields stand out: legal conflicts about financial services of all kinds and about passenger rights. Since the CJEU has developed independent dogmatics for some areas of contract law, it might be necessary to rethink legal categories on the national level.

Résumé: Durant les cinq dernières années, la CJUE a dû répondre à plus de 50 questions préjudicielles dans le domaine du droit des contrats de consommation. En conséquence, il y a bien plus de 100 décisions disponibles qui représentent une base concrète croissante pour un droit européen des contrats. L'accroissement du nombre de questions adressées à la CJUE par les nouveaux Etats membres est particulièrement frappant. Quantitativement, deux domaines se distinguent : les conflits juridiques relatifs aux services financiers de toutes sortes et ceux relatifs aux droits des passagers. Comme la CJUE a développé des inter-

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prétations propres dans quelques domaines du droit des contrats, il pourrait être nécessaire de repenser les catégories juridiques au niveau national.

Zusammenfassung: In den letzten fünf Jahren hatte der EuGH mehr als 50 Vorlageverfahren zu entscheiden. Per dato liegen damit weit mehr als 100 Entscheidungen vor, die in immer dichterer Form die Grundlagen für ein europäisches Vertragsrecht konkretisieren. Auffällig ist die steigende Zahl von Vorlagen aus den neuen Mitgliedstaaten. In der Sache dominieren in quantitativer Hinsicht zwei Bereiche: rechtliche Auseinandersetzungen um Finanzdienstleistungen jedweder Art und das Passagier- bzw. Reiserecht. Für Teilbereiche des Vertragsrechts entwickelt der EuGH eine eigenständige Dogmatik, die ein Überdenken nationaler rechtlicher Kategorien notwendig macht.

Keywords: Consumer law, travel law, financial services, legal protection

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Part I (last issue)

Part II

Part II

II Travel law

1 Passenger rights in air traffic (case 173/07 *Emirates Airlines*; case 549/07 *Wallentin-Hermann*; case 301/08 *Bogiatzi*; joined cases 402/07 and 432/07 *Sturgeon and Others*; case 63/09 *Walz*; case 294/10 *Eglītis and Ratnieks*; case 83/10 *Sousa Rodríguez and Others*; case 22/11 *Finnair*; case 321/11 *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor*; joined cases 581/10 and 629/10 *Nelson and Others*; case 139/11 *Cuadrench Moré*; case 12/11 *McDonagh*; case 11/11 *Folkerts*)

The case-law of the CJEU on passenger rights in air traffic has experienced a boom in the last five years. This is not only due to the effects of liberalisation and the increased mobility on the air transport market, but results also from the uncertainty of national courts in applying central concepts of the Regulation (EC) No 261/2004[1] *which entered into force on 17 February 2005. The Regulation raises a number of legal questions which lead to differences in interpretation between air passengers and air carriers. The legal disputes raise questions regarding the relationship between European and international provisions. It is the role of the CJEU to bring clarity and structure into the diffuse legal situation. The case-law is characterised by the aim of the Regulation to ensure a high level of consumer protection. The CJEU has clarified, among other matters, the scope of application of the Regulation, the distinction between 'cancellation' and 'delay', the concept of 'denied boarding', the event of 'extraordinary circumstances' and the concept of 'further compensation'. By way of the case-law of the CJEU, the area of passenger rights is developing into a self-standing branch of law.*[2] *Because of the high number of references for a*

1 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, *OJEC* 2004 L46/1.

2 See for an overall view including the case-law of the CJEU, S. Bergmann, 'Verbraucherschutz im Bereich Tourismus und Freizeit', in M. Tamm and K. Tonner (eds), *Verbraucherrecht* (Baden-Baden: Nomos, 2012) paragraphs 267–298; K. Tonner, 'Nach § 651: Personen-Beförderungsvertrag, III Luftbeförderung', in F.J. Säcker *et al* (eds), *Münchener Kommentar zum BGB*, Band 4

preliminary ruling, the integration in the case-law will be found at the end of the section.

a) Right to compensation in the event of the cancellation of a return flight from a third country by a non-European carrier (case 173/07 *Emirates Airlines*)

aa) Facts

The German Oberlandesgericht Frankfurt am Main asked whether the term 'flight' encompassed both the outward and return flight in accordance with Article 3(1)(a) of Regulation 261/04. If so, the Regulation had to be applied to passengers who have departed from an airport located in the territory of a Member State and return to that airport with a flight from a third country. The national court also asked whether the fact that the outward and return flights are the subject of a single booking affects the interpretation of that provision.

In this dispute the passenger booked a flight from Düsseldorf (Germany) to Manila (Philippines) with a non-European carrier. Because of a cancellation the passenger could depart for his return flight only two days later. The Amtsgericht Frankfurt am Main upheld the passengers' claim for compensation. The carrier appealed to the Oberlandesgericht Frankfurt am Main, submitting that the outward and return flights were to be regarded as two separate flights and that the return flight, which had not departed in a Member State but in Manila, did not fall within the scope of the Regulation in accordance with Article 3(1)(a). Moreover the carrier was not a 'Community carrier' in accordance with Article 3(1)(b).

bb) Main reasoning

Following the opinion of Advocate-General Sharpston, the CJEU ruled that Article 3(1)(a) does not apply to the case of an outward and return journey in which passengers travel back to the original airport in a Member State from a third-country airport. The CJEU defined the term 'flight' as a single air transport operation performed by an air carrier which fixes its itinerary.[3] Under the provisions and objectives of the Regulation a distinction had to be made between the parts 'outward flight' and 'return flight': a 'flight' could not be regarded as an

(6th ed, Munich: C H Beck, 2012) paragraphs 18–51; see also J. Janköster, *Fluggastrechte im internationalen Luftverkehr* (Tübingen: Mohr Siebeck, 2009).

3 Case 173/07 *Emirates Airlines – Direktion für Deutschland* v *Diether Schenkel* [2008] ECR I-05237 (CJEU), para 40.

'outward and return journey'.[4] Otherwise passengers on the same flight departing from a third country would be treated differently depending on whether they departed on their outward flight from a Member State or not.[5] The term 'journey' does not appear in the wording of Article 3(1)(a) of Regulation 261/04 and has no effect on the interpretation of that provision.[6] In accordance with Article 17, the Community legislature would possibly consider for the future to extend the scope of the Regulation to passengers on flights from a non-member country to a Member State operated by non-European carriers.[7] The fact that the outward and return flights are the subject of a single booking has no influence on that conclusion.[8]

b) Cancellation of a flight due to technical problems (case 549/07 *Wallentin-Hermann*)

aa) Facts

The reference for a preliminary ruling of the Austrian Handelsgericht Wien concerned the interpretation of the concept of 'extraordinary circumstances' in Article 5(3) of Regulation 261/04. The national court asked whether the concept of 'extraordinary circumstances' covers technical problems in an aircraft and whether the grounds of exemption must be interpreted in accordance with the provisions of the Montreal Convention. Moreover it was questioned whether the frequency of the technical problems which cause flight cancellations precludes them from being covered by 'extraordinary circumstances' and whether 'all reasonable measures' have been taken if the air carrier has met the minimum legal requirements with regard to maintenance work.

The family booked a flight from Vienna (Austria) to Brindisi (Italy). Five minutes before the scheduled departure time in Vienna the family was informed that their flight had been cancelled. The cancellation resulted from a complex engine defect in the turbine which had been discovered the day before during a check. The family reached its final destination Brindisi three hours and 50 minutes later than scheduled. The Austrian Bezirksgericht für Handelssachen Wien upheld the claim for compensation on the ground that the technical defects were

4 Case 173/07, n 3 above, paragraphs 32–37.
5 Case 173/07, n 3 above, paragraphs 38–39.
6 Case 173/07, n 3 above, paragraph 41.
7 Case 173/07, n 3 above, paragraphs 48, 49.
8 Case 173/07, n 3 above, paragraphs 50–52.

not covered by the 'extraordinary circumstances' provided for in Article 5(3) of Regulation 261/04. The air carrier lodged an appeal.

bb) Main reasoning

The derogation from the passengers' right to compensation in the case of 'extraordinary circumstances' in Article 5(3) has to be interpreted strictly.[9] The examples of events in recital 14 are not to be regarded themselves as extraordinary circumstances, but they may produce such circumstances.[10] The circumstances surrounding 'unexpected flight safety shortcomings' can be characterised as 'extraordinary' if that event is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.[11] In the light of the specific conditions of carriage by air and the degree of technological sophistication of aircraft, air carriers are confronted as a matter of course with various technical problems.[12] In general, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute 'extraordinary circumstances'.[13] Neither is the frequency of the technical problems experienced by an air carrier a factor from which the presence or absence of 'extraordinary circumstances' can be concluded.[14] The Montreal Convention[15] is not decisive for the interpretation of the grounds of exemption under the Regulation 261/04 since it does not refer to 'extraordinary circumstances'. Moreover, Article 19 of the Montreal Convention governs only the conditions for compensation for delayed flights by way of redress on an individual basis, while Article 5(3) of the Regulation provides for standardised and immediate compensatory measures in case of flight cancellations.[16] With regard to the last question of the referring court, the CJEU ruled that in the case of 'extraordinary circumstances' the air carrier must establish that, even if it had deployed all its resources in terms of staff or

9 Case 549/07 *Friederike Wallentin-Hermann* v *Alitalia – Linee Aeree Italiane SpA* [2008] ECR I-11061 (CJEU), paragraph 20.

10 Case 549/07, n 9 above, paragraphs 21, 22.

11 Case 549/07, n 9 above, paragraph 23.

12 Case 549/07, n 9 above, paragraph 24.

13 Case 549/07, n 9 above, paragraph 25.

14 Case 549/07, n 9 above, paragraph 37.

15 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001, *OJEC* 2001 L194/38. That Convention entered into force so far as concerns the Community on 28 June 2004.

16 Case 549/07, n 9 above, paragraphs 30–33.

equipment and the financial means at its disposal, it would not have been able to avoid the cancellation of the flight.[17] It is not sufficient that the air carrier has complied with the minimum rules on maintenance.[18]

c) Time-limits for actions for damages under Regulation (EC) No 2027/97[19] (case 301/08 *Bogiatzi*)

aa) Facts

The Luxembourgian Cour de cassation asked the CJEU whether the time-limit in Article 29 of the Warsaw Convention[20] is applicable even though Regulation 2027/97 makes no express provision to that effect. If the answer is in the affirmative, it was questioned whether that time-limit can be suspended, interrupted or waived.

Five years after the passenger suffered a fall on the tarmac at Luxembourg airport she brought proceedings for damages against Deutscher Luftpool Rückversicherungsgemeinschaft (German association of aviation insurers) and the air carrier before the Tribunal d'arrondissement de Luxembourg. The national court dismissed the action on the basis of the two-year limitation period provided for in Article 29 of the Warsaw Convention. The inadmissibility of the claim was confirmed on appeal and the passenger appealed on a point of law to the Cour de cassation.

bb) Main reasoning

Following the opinion of the Advocate-General Mazák, the Commission and the French Government, the CJEU made clear at the outset that the Court under Article 267 TFEU does not have jurisdiction to interpret the Warsaw Convention.[21] The Regulation 2027/97 does not preclude the application of Article 29 of the Warsaw Convention. The Regulation 2027/97 is intended to improve the level of protection for passengers involved in air accidents on flights between Member States by the

17 Case 549/07, n 9 above, paragraph 41.

18 Case 549/07, n 9 above, paragraph 43.

19 Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, *OJEC* 1997 L285/1.

20 Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975.

21 Case 301/08 *Irène Bogiatzi, married name Ventouras* v *Deutscher Luftpool and Others* [2009] ECR I-10185 (CJEU), paragraph 34.

introduction of provisions to increase a number of the limits of liability laid down by the Warsaw Convention.[22] In accordance with recitals 2 and 4 in the preamble and Article 2(2) of the Regulation, the protection of the Regulation and the protection of the Convention have to be regarded as being complementary and equivalent to each other where the Regulation does not preclude the application of the Warsaw Convention in order to raise the level of protection of passengers.[23] Article 29 of the Warsaw Convention simply governs a procedural rule for bringing an action for damages in the event of an accident and is not in the category of provisions whose application is precluded.[24] The jurisdiction of the CJEU does not cover the other question of the national court whether the time-limit laid down in Article 29 of the Convention could be suspended, interrupted or waived.[25]

d) Right to compensation in the event of delayed flights under Article 7 of Regulation 261/04 (joined cases 402/07 and 432/07 *Sturgeon and Others*)

aa) Facts

The references for a preliminary ruling of the German Bundesgerichtshof and the Austrian Handelsgericht Wien concern the distinction between the notions of 'cancellation' and 'delay' in Regulation 261/04. The CJEU took position with regard to the questions whether a long delay of a flight can be regarded as a cancellation and whether the passengers of delayed flights also have a right to compensation. The Handelsgericht Wien also asked whether a technical problem is covered by the concept of 'extraordinary circumstances'.

In both cases the passengers have been told shortly before the departure that their flight has been cancelled. The passengers reached their final destination more than 22 hours after the time of arrival originally scheduled and brought actions against the air carriers claiming compensation for the cancellation of their flight. The air carriers contested the claim arguing that there had been only a delay.

bb) Main reasoning

The CJEU ruled that the duration of the delay is not sufficient to regard a flight as cancelled if the flight is operated in accordance with the original planning. But if

22 Case 301/08, n 21 above, paragraphs 41, 42.
23 Case 301/08, n 21 above, paragraph 43.
24 Case 301/08, n 21 above, paragraph 44.
25 Case 301/08, n 21 above, paragraph 46.

the air carrier arranges for the passengers to be carried after the scheduled departure time on another flight, that means a flight whose original planning is different from that of the flight for which the booking was actually made by the passengers, it is possible, as a rule, to conclude that there is a cancellation.[26] However, passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation 261/04 when they reach their final destination three hours or more after the scheduled time of arrival. Passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations as passengers whose flight has been cancelled. Specifically, passengers of a flight cancelled at the very last moment are afforded under Article 5(1)(c)(iii) of Regulation 261/04 the right to compensation even where the carrier re-routes them to another flight when they suffer a loss of time of at least three hours in relation to the time of arrival originally scheduled. In accordance with the principle of equal treatment it cannot be justified to treat passengers of delayed flights differently when they reach their final destination with a delay of three hours or more.[27] The interests of air carriers are protected because the compensation may be reduced by 50% if the conditions laid down in Article 7(2)(c) of the Regulation are met,[28] the air carrier is released from its obligation in the case of 'extraordinary circumstances' under Article 5(3) of the Regulation[29] and Article 13 provides for the air carriers' rights to seek compensation from any person who caused the damage, including third parties.[30] Referring to its decision in *Wallentin-Hermann*[31] the CJEU states that, as in the case of a cancellation, a technical problem which leads to a delay is not covered by the concept of 'extraordinary circumstances' under Article 5(3), unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier and are beyond its actual control.[32]

26 Joined cases 402/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon* v *Condor Flugdienst GmbH* and 432/07 *Stefan Böck and Cornelia Lepuschitz* v *Air France SA* [2009] ECR I-10923 (CJEU), paragraphs 34–36.

27 Joined cases 402/07 and 432/07, n 26 above, paragraphs 53–61.

28 Joined cases 402/07 and 432/07, n 26 above, paragraph 63.

29 Joined cases 402/07 and 432/07, n 26 above, paragraph 67.

30 Joined cases 402/07 and 432/07, n 26 above, paragraph 68.

31 Case 549/07, n 9 above, paragraph 34.

32 Joined cases 402/07 and 432/07, n 26 above, paragraphs 70, 71.

e) Claim for compensation of material and non-material damage resulting from the loss of baggage under Article 22(2) of the Montreal Convention (case 63/09 *Walz*)

aa) Facts

The Spainish Juzgado de lo Mercantil n°4 de Barcelona asked the CJEU whether the limit of liability referred to in Article 22(2) of the Montreal Convention includes both material damage and non-material damage resulting from the loss of baggage.

The passenger brought an action against the air carrier claiming total damages of EUR 3,200 for the loss of his baggage. In this regard he claims for material and non-material damage. In accordance with Article 3(1) of Regulation 2027/97, the liability in respect of baggage is governed by the Montreal Convention which provides in Article 22(2) a limit of 1,000 Special Drawing Rights in the case of destruction, loss, damage or delay of baggage.

bb) Main reasoning

In accordance with Advocate-General Mazák the CJEU concluded that the concept of 'damage' in Article 22(2) of the Montreal Convention includes both material and non-material damage and that the limit of liability is an absolute limit. Since there is no given definition, the terms '*préjudice*' and '*dommage*' used in the French-language version of the Convention for the term damage must be given a uniform and autonomous interpretation in accordance with the rules of interpretation of international law.[33] It follows from the ordinary meaning of the term 'damage', that it must be construed as including both material and non-material damage.[34] That conclusion is supported by the objectives of the Montreal Convention to lay down a system of strict liability for air carriers with regard, more specifically, to damage sustained in case of destruction or loss of, or damage to, checked baggage under Article 17(2) of the Convention.[35] In accordance with the fifth recital in the preamble to the Convention, an 'equitable balance of interests' must be maintained, in particular as regards the interests of air carriers and of passengers.[36] Clear limits on compensation are required which, regardless of the nature of the damage caused to that passenger, relate to the total damage sustained by each passenger in the various situations in which a carrier is held liable pursuant

33 Case 63/09 *Axel Walz* v *Clickair SA* [2010] ECR I-04239 (CJEU), paragraphs 21, 22.
34 Case 63/09, n 33 above, paragraphs 28, 29.
35 Case 63/09, n 33 above, paragraphs 30–32.
36 Case 63/09, n 33 above, paragraph 33.

to Chapter III.[37] A limitation of the liability so designed enables passengers to be compensated easily and swiftly, yet without imposing a very heavy burden of damages on air carriers, which would be difficult to determine and to calculate, and would be liable to undermine the economic activity of those carriers.[38] That interpretation is confirmed by Article 22(2) which provides that a passenger may make a special declaration of interest at the time when the checked baggage is handed over to the carrier.[39]

f) Reasonable measures under Article 5(3) of Regulation 261/04 to avoid a cancellation of a flight (case 294/10 *Eglītis and Ratnieks*)

aa) Facts

The Latvian Augstākās Tiesas Senāts asked whether under Article 5(3) of Regulation 261/04 an air carrier has an obligation, in respect of the 'reasonable measures', to organise its resources in good time in order to provide a certain minimum reserve time after the scheduled departure time, so as to be able, if possible, to operate the flight after the extraordinary circumstances have come to an end. Moreover it was questioned whether that 'reserve time' may be determined with reference to Article 6(1) of the Regulation.

On the evening of 14 July 2006, Swedish air space in the Malmö region was closed as a result of failures in the power supply. After the passengers of a flight from Copenhagen (Denmark) to Riga (Latvia) boarded the aeroplane they had to wait there for a little more than two hours until the flight was cancelled. The Latvian courts concluded that the air carrier was not obliged to pay compensation since the cancellation occurred under extraordinary circumstances. The appellants submitted on the contrary that the reason for the cancellation was the permitted working time for the crew which was insufficient for the flight operated with delay.

bb) Main reasoning

The CJEU linked its decision to that in *Wallentin-Hermann*[40] and ruled that a reasonable air carrier must organise its resources in good time to provide for some reserve time, so as to be able, if possible, to operate that flight once the extra-

37 Case 63/09, n 33 above, paragraphs 34, 35.
38 Case 63/09, n 33 above, paragraph 36.
39 Case 63/09, n 33 above, paragraph 38.
40 Case 549/07, n 9 above.

ordinary circumstances have come to an end. If, in such a situation, an air carrier does not, however, have any reserve time, it cannot be concluded that it has taken all reasonable measures as required in Article 5(3).[41] There is not, however, an obligation to provide, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in situations where extraordinary circumstances arise. It is up to the national court to ascertain, in a flexible way and taking into account the circumstances of the particular case, whether all appropriate measures which at the time of the occurrence of the extraordinary circumstances were in particular technically and economically viable have been taken.[42] The assessment of the reasonable nature of the measures taken to provide for a reserve time must be carried out not with regard to the delay in relation to the scheduled departure time, but taking account of the delay that may exist at the end of the operated flight so as to take account of the secondary risks.[43] Article 6(1) is not applicable when assessing the reasonable nature of the measures in the event of extraordinary circumstances.[44]

g) Meaning of the terms 'cancellation' and 'further compensation' under Regulation 261/04 (case 83/10 *Sousa Rodríguez and Others*)

aa) Facts

The Spainish Juzgado de lo Mercantil n°1 de Pontevedra asked whether the term 'cancellation' in Article 2(l) of Regulation 261/04 includes the case in which the aeroplane takes off but is forced to return to the airport of departure because of a technical failure. Moreover the national court asked whether the air carrier under Article 12 is liable for all types of damage, including non-material damage, arising from the breach of a contract of carriage by air under national law or whether only damage caused by the air carriers' failure to comply with its duties to provide care and assistance under Article 8 or 9 is covered.

In the dispute at hand the applicants booked an Air France flight from Paris (France) to Vigo (Spain). The flight took off as planned, but after a few minutes had to return to the airport of departure because of a technical problem. With the exception of one passenger, none of the passengers of the flight received any assistance from the air carrier.

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41 Case 294/10 *Andrejs Eglītis and Edvards Ratnieks* v *Latvijas Republikas Ekonomikas ministrija* [2011] ECR I-03983 (CJEU), paragraph 28.

42 Case 294/10, n 41 above, paragraphs 29–31.

43 Case 294/10, n 41 above, paragraphs 32–34.

44 Case 294/10, n 41 above, paragraph 35.

bb) Main reasoning

Contrary to the opinion of the French Government and the United Kingdom, the CJEU concludes in accordance with the opinion of the Advocate-General Sharpston that the term 'cancellation' in Article 2(l) of the Regulation also covers the case in which an aeroplane takes off but subsequently returns to the airport of departure and the flight does not proceed further but the passengers are transferred to other independently planned flights. The reasons for the return to the airport of departure are irrelevant for the definition of the term 'cancellation' and assume relevance only for the assessment whether, depending on the circumstances, there had been 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken' within the meaning of Article 5(3).[45] Referring to *IATA* and *ELFAA*[46] the CJEU elaborates that Article 12 allows the national courts to order the air carrier to compensate loss arising from breach of the contract of carriage by air on a legal basis other than Regulation 261/04, in particular, under the conditions provided for by the Montreal Convention and national law.[47] As already specified in *Walz*,[48] the term 'damages' in Chapter III of the Montreal Convention includes both material and non-material damage.[49] The CJEU concludes that the air passengers' claims based on the rights conferred on them by Regulation 261/04, such as those set out in Article 8 and Article 9, cannot be considered as falling within 'further' compensation under Article 12. When a carrier fails to fulfil its obligations under Article 8 and Article 9, passengers are justified in claiming a right to compensation on the basis of the factors set out in those articles.[50] Advocate-General Sharpston pointed out that the duty to pay compensation and the duty to provide care and assistance are concurrent and cumulative. The obligation to provide care and assistance would be nugatory if the air carrier could escape it by offsetting it against the duty to pay compensation.[51] The Advocate-General and the CJEU agree in that Regulation 261/04 does not preclude the award of compensation in respect of a failure to fulfil the

45 Case 83/10 *Aurora Sousa Rodríguez and Others* v *Air France SA* [2011] ECR I-09469 (CJEU), paragraphs 26–34.

46 Case 344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association* v *Department for Transport* [2006] ECR I-403 (CJEU), paragraph 47.

47 Case 83/10, n 45 above, paragraphs 37–40.

48 Case 63/09, n 33 above, paragraph 29.

49 Case 83/10, n 45 above, paragraph 41.

50 Case 83/10, n 45 above, paragraphs 42–44.

51 AG Sharpston, opinion of 28 June 2011 – case 83/10, n 45 above, paragraph 64.

obligations provided for by Article 8 and Article 9 therein, if those provisions are not invoked by the air passengers.[52]

h) Denied boarding due to the rescheduling of flights following a strike by airport staff (case 22/11 *Finnair*)

aa) Facts

The Finnish Korkein oikeus asked the CJEU whether the concept of 'denied boarding', within the meaning of Article 2(j) and Article 4, covers only denied boarding caused by overbooking or whether it also includes other situations. Furthermore the national court asked whether the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances occurred can give grounds for denying boarding to a passenger on one of those later flights and for exempting that carrier from its obligation, under Article 4(3) of Regulation 261/04, to compensate that passenger.

Following a strike by airport staff the flight from Barcelona (Spain) to Helsinki (Finland) operated by Finnair had to be cancelled. In order to shorten the waiting time for the air passengers, the air carrier decided to reschedule subsequent flights for the next days. Due to the rescheduling, the applicant, who had duly presented himself for boarding, could depart to Helsinki only nine hours later on a special flight. The applicant claimed for compensation under Article 7(1)(b) taking the view that he was denied boarding for no valid reason within the meaning of Article 4 of Regulation 261/04.

bb) Main reasoning

The concept of 'denied boarding' is not limited to cases of overbooking but includes also other reasons, such as operational reasons. That interpretation is supported not only by the wording of Article 2(j) but also by the objective of the Regulation to ensure a high level of protection for passengers. All circumstances in which an air carrier might refuse to carry a passenger are covered. A passenger in the situation at hand would be deprived of all protection if he would be precluded from relying on Article 4 of the Regulation.[53] According to Article 2(j), the characterisation as 'denied boarding' may be precluded, for example, if the passenger presenting himself for boarding fails to comply with the conditions laid

52 Case 83/10, n 45 above, paragraph 45.

53 Case 22/11 *Finnair Oyj* v *Timy Lassooy* 4 October 2012 (CJEU), paragraphs 19–25.

down in Article 3(2) or where there are reasonable grounds to deny boarding 'such as reasons of health, safety or security, or inadequate travel documentation'. However, the denied boarding in the case at hand is not comparable to the grounds mentioned in Article 2(j) of Regulation 261/04, since the reason for the denied boarding is not attributable to the passenger.[54] The situation at hand is comparable to an 'initial' overbooking, as the air carrier had reallocated the applicant's seat in order to transport other passengers, and therefore chose itself between several passengers to be transported.[55] Finally, the CJEU clarified that the EU legislature did not intend that compensation under Article 4(3) may be precluded in the case of a 'denied boarding' on grounds relating to the occurrence of 'extraordinary circumstances'.[56] Consequently, an air carrier cannot be exempted from its obligation to pay compensation under Article 4(3) of Regulation 261/04 on the ground that the denied boarding followed the rescheduling of the flights as a result of 'extraordinary circumstances'. According to Article 13, the air carrier has the right to seek compensation from any person who has caused the 'denied boarding', including third parties.[57]

i) Right to compensation in the event of a refusal to allow boarding on a connection flight because the air carrier mistakenly expected the passengers not to arrive in time following the delay of the first flight (case 321/11 *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor*)

aa) Facts

The question referred for a preliminary ruling by the Spainish Juzgado de lo Mercantil n° 2 de Coruña was whether the concept of 'denied boarding' in Article 2(j) of Regulation 261/04, read in conjunction with Article 3(2) of that Regulation, includes a situation where an air carrier denies boarding on the ground that the first flight included in the ticket has been subject to a delay and the air carrier therefore mistakenly expected the passengers not to arrive in time for the second flight.

The passengers bought airline tickets for the journey from Corunna (Spain) to Santo Domingo involving two reservations on immediately connecting flights and a single check-in. Following the delay of the first flight from Corunna to Madrid the air carrier supposed that the two passengers would miss their connection and

54 Case 22/11, n 53 above, paragraph 33.
55 Case 22/11, n 53 above, paragraph 32.
56 Case 22/11, n 53 above, paragraph 36.
57 Case 22/11, n 53 above, paragraph 39.

cancelled their boarding cards for the second flight. In spite of the delay both passengers presented themselves at the departure gate in Madrid in time. The staff of the air carrier did not, however, allow them to board on the grounds that their seats had been allocated to other passengers. The passengers claimed for compensation for 'denied boarding' pursuant to Articles 4(3) and 7(1)(c).

bb) Main reasoning

The CJEU stated that the concept of 'denied boarding' in Article 2(j) of Regulation 261/04 is not limited to cases of overbooking but includes also situations in which boarding is denied for other reasons, such as operational reasons. The European Union legislature sought, by the adoption of the Regulation 261/04, to reduce the number of passengers denied boarding against their will, which was too high at that time. The scope of the definition of 'denied boarding' has been extended compared to Article 1 of the previous Regulation 295/91/EEC[58] by removing any reference to the reason for the denial of boarding.[59] Limiting the scope of 'denied boarding' exclusively to cases of overbooking would be contrary to the aim pursued by the legislature to ensure a high level of protection for passengers.[60] The CJEU refused to equate the operational reasons for the denied boarding in the case at hand, which were not attributable to the passenger, to the reasonable grounds to deny boarding mentioned in Article 2(j) of Regulation 261/04.[61] The denial of boarding is attributable to the air carrier, which either caused the delay to the first flight operated by it or mistakenly considered that the passengers would not be able to present themselves in time at the departure gate of the following flight or sold tickets for successive flights for which the time available for catching the following flight was insufficient.[62]

58 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, *OJEC* 1991 L36/5.

59 Case 321/11 *Germán Rodríguez Cachafeiro and María de los Reyes Martínez-Reboredo Varela-Villamor* v *Iberia, Líneas Aéreas de España SA* 4 October 2012 (CJEU), paragraphs 22–24.

60 Case 321/11, n 59 above, paragraphs 25, 26.

61 Case 321/11, n 59 above, paragraphs 30, 32.

62 Case 321/11, n 59 above, paragraph 34.

j) Confirmation of the right to compensation in the event of flight delays of three hours or more (joined cases 581/10 and 629/10 *Nelson and Others*)

aa) Facts

The German Amtsgericht Köln (581/10) and the High Court of Justice, Queen's Bench Division (629/10) wanted to know, in essence, whether the CJEU confirms its interpretation of Articles 5, 6 and 7 of Regulation 261/04 in *Sturgeon*[63] according to which passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and may thus rely on the right to compensation laid down in Article 7 where they reach their final destination three hours or more after the arrival time originally scheduled.

In the case 581/10 passengers brought an action before the Amtsgericht Köln claiming compensation because their flight from Lagos (Nigeria) to Frankfurt am Main (Germany) had a delay of more than 24 hours compared to the arrival time originally scheduled. In the case 629/10 two air carriers, an international leisure group and the International Air Transport Association requested confirmation from the Civil Aviation Authority that it would not interpret Regulation 261/04 as imposing an obligation on airlines to compensate their passengers in the event of delay. The Civil Aviation Authority refused that request, stating that it was bound to give effect to the ruling in *Sturgeon*. Consequently, they brought proceedings before the referring court in order to challenge the position of the Civil Aviation Authority.

bb) Main reasoning

The CJEU confirmed its decision in *Sturgeon* that passengers whose flights are delayed and those whose flights are cancelled must be considered as being in comparable situations, for the purposes of compensation under Article 7 of Regulation 261/04, because those passengers suffer similar inconvenience, namely, a loss of time equal to or in excess of three hours.[64] The referring courts had doubts with regard to the compatibility of the right to compensation in the event of delayed flights with the conditions and limits laid down in the Montreal Convention with regard to the right to compensation. Referring to its decisions in *IATA* und *ELFAA*[65] the CJEU stated that it does not follow from the Montreal

63 Joined cases 402/07 and 432/07, n 26 above.

64 Joined cases 581/10 *Emeka Nelson and Others* v *Deutsche Lufthansa AG*, and 629/10 *TUI Travel plc and Others* v *Civil Aviation Authority* 23 October 2012 (CJEU), paragraph 34.

65 Case 344/04, n 46 above, paragraph 45.

Convention that it intends to shield air carriers from further measures, in particular from such measures which could redress, in a standardised and immediate manner, the inconveniences caused by the delay.[66] Article 19 of the Montreal Convention implies that the damage arises as a result of a delay, that there is a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them. This is not the case regarding the right to compensation under the Regulation 261/04 which constitutes a standardised measure to compensate the loss of time.[67] Thus the obligation to pay compensation in the event of a delay does not fall within the scope of application of Article 29 of the Montreal Convention.[68] A breach of the principle of legal certainty is not given because the air carriers were able to know their rights and obligations unequivocally since the *Sturgeon*-decision.[69] The financial consequences for air carriers cannot be considered disproportionate to the aim of ensuring a higher level of protection for the air passengers.[70] The CJEU rejected the applications of the air carriers to limit the temporal effects of the *Sturgeon*-decision.[71]

k) Time-limit for bringing actions for compensation under Articles 5 and 7 of Regulation 261/04 (case 139/11 *Cuadrench Moré*)

aa) Facts

The Spain Audiencia Provincial de Barcelona asked the CJEU, whether the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation 261/04 are determined by Article 35 of the Montreal Convention or in accordance with some other provision, particularly the national rules on the limitation of actions.

The passenger booked a flight from Shanghai (China) to Barcelona (Spain). Since the flight was cancelled the passenger could only depart the day after. About three years after that event, the passenger brought an action claiming compensation.

66 Joined cases 581/10 and 629/10, n 64 above, paragraph 46.
67 Joined cases 581/10 and 629/10, n 64 above, paragraphs 49–54.
68 Joined cases 581/10 and 629/10, n 64 above, paragraph 55.
69 Joined cases 581/10 and 629/10, n 64 above, paragraphs 66–68.
70 Joined cases 581/10 and 629/10, n 64 above, paragraph 81.
71 Joined cases 581/10 and 629/10, n 64 above, paragraph 94.

bb) Main reasoning

The CJEU clarified that the time-limits for bringing actions for compensation under Articles 5 and 7 of the Regulation are determined by the national law of each Member State, provided that those rules observe the principles of equivalence and effectiveness.[72] As the compensation measures laid down in the Regulation fall outside the scope of the Warsaw and Montreal Conventions, the two-year limitation period laid down in Article 29 of the Warsaw Convention and in Article 35 of the Montreal Convention is not applicable.[73] That finding cannot be disproved by the decision in *Bogiatzi*,[74] since the Regulation 2027/97 concerns the liability of air carriers in the event of an accident, which is hence the subject of Article 17 of the Warsaw Convention.[75] Regulation 261/04 establishes an independent system to redress, in a standardised and immediate manner, the damage in cases of a delay or a cancellation which operates in addition to the Montreal Convention.[76]

l) Assistance to passengers in the event of cancellation of flights because of 'extraordinary circumstances' as the eruption of the Icelandic volcano Eyjafjallajökull (case 12/11 *McDonagh*)

aa) Facts

The questions of the Irish Dublin Metropolitan District Court arose in the context of the eruption of the Icelandic volcano Eyjafjallajökull in spring 2010 which caused the closure of airspace resulting in the cancellation of more than 100,000 flights and affecting almost 10 million air passengers. The reference for a preliminary ruling concerned the question, whether this event is covered by the notion of 'extraordinary circumstances' as used in Regulation 261/04, or whether it falls within a category of events above and beyond those extraordinary circumstances, thus releasing the air carrier from its obligation to provide care for passengers in accordance with Articles 5 and 9. For the first case the Irish court wants to know further, whether the obligation to provide care must be limited, in temporal or monetary terms. If that is not the case, the validity of the provisions is questioned in terms of the principles of proportionality and non-discrimination,

72 Case 139/11 *Joan Cuadrench Moré* v *Koninklijke Luchtvaart Maatschappij NV* 22 November 2012 (CJEU), paragraphs 25, 26.
73 Case 139/11, n 72 above, paragraphs 28, 29.
74 Case 301/08, n 21 above.
75 Case 139/11, n 72 above, paragraphs 30, 31.
76 Case 139/11, n 72 above, paragraph 32.

the principle of an 'equitable balance of interests' enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.

Following the closure of the Irish airspace as a consequence of the eruption of the Icelandic volcano Eyjafjallajökull, the flight from Faro (Portugal) to Dublin (Ireland) was cancelled. The applicant in the case at hand was not provided with care in accordance with Article 9 of Regulation 261/04 during the period from 17 April 2010, the original date for the return flight, to 24 April 2010, when she actually could travel back to Dublin. The applicant claims compensation in the amount of EUR 1,129.41, corresponding to the costs which she incurred for meals, refreshments, accommodation and transport. The air carrier claimed that the closure of airspace does not constitute 'extraordinary circumstances' within the meaning of Regulation 261/04 but 'super extraordinary circumstances', releasing it from its obligations to provide care.

bb) Main reasoning

In accordance with the opinion of Advocate-General Bot, the CJEU concluded, that circumstances as the closure of part of the European airspace after the eruption of the Icelandic volcano Eyjafjallajökull constitute 'extraordinary circumstances', which do not release the air carrier from its obligations to provide care in accordance with Articles 5(1)(b) and 9. In accordance with everyday language, the words 'extraordinary circumstances' relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity.[77] The Regulation does not contain any separate category of 'particularly extraordinary circumstances'.[78] To distinguish between 'extraordinary' and 'particularly extraordinary' circumstances would go against the aim of that Regulation of ensuring a high level of protection for passengers, because precisely those passengers who find themselves in a particularly vulnerable state after a flight cancellation would be denied the protection of the Regulation.[79] According to the CJEU the wording of the Regulation contains no limitation, whether temporal or monetary, of the obligations to provide care, not even where the cancellation of the flight has been caused by extraordinary circumstances.[80] It is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an

77 Case 12/11 *Denise McDonagh* v *Ryanair Ltd* 31 January 2013 (CJEU), paragraph 29.
78 Case 12/11, n 77 above, paragraph 30.
79 Case 12/11, n 77 above, paragraphs 31–33.
80 Case 12/11, n 77 above, paragraphs 40, 41.

air passenger can have access to essential goods and services throughout that period.[81] The costs linked to the obligation to provide care which the air carriers have to sustain are proportionate considering the intended high level of protection for passengers.[82] Nonetheless, an air passenger may only obtain, by way of compensation for the failure to comply with the obligation to provide care, reimbursement of the amounts which prove necessary, appropriate and reasonable to make up for the shortcomings in the provision of care. The assessment of this is a matter which is for the national court.[83] The validity of the obligation to provide care has not to be assessed in the light of the principle of an 'equitable balance of interests' referred to in the Montreal Convention, because these measures are not among those whose institution is governed by the Convention.[84] A breach of the principle of non-discrimination is not given because the different provisions for the various transport sectors are justified.[85] The obligations to provide care strike a fair balance between the various fundamental rights laid down in Articles 16, 17 and 38 of the Charter.[86]

m) Compensation in the event of delayed arrival at the final destination (case 11/11 *Folkerts*)

aa) Facts

The German Bundesgerichtshof referred to the CJEU the question for a preliminary ruling, whether a passenger has a right to compensation under Article 7 of Regulation 261/04 in the case where departure of the flight was delayed for a period which is below the limits specified in Article 6(1), but arrival at the final destination was at least three hours later than the scheduled arrival time.[87]

The passenger booked a flight from Bremen (Germany) to Asunción (Paraguay) via Paris (France) and São Paolo (Brazil). Since the flight from Bremen to Paris took off with a delay of about two hours, the passenger missed the connecting flights in Paris and São Paolo and arrived in Asunción with a delay of 11 hours

81 Case 12/11, n 77 above, paragraph 42.
82 Case 12/11, n 77 above, paragraphs 47, 48.
83 Case 12/11, n 77 above, paragraph 51.
84 Case 12/11, n 77 above, paragraphs 52, 53.
85 Case 12/11, n 77 above, paragraphs 54–56.
86 Case 12/11, n 77 above, paragraphs 59–64.
87 Since the CJEU answered that question affirmatively, it did not have to answer the question, whether, for the purpose of determining if there was a delay within the terms of Article 6(1), in the case of a flight consisting of several stages, reference should be made to the individual stages or to the distance to the final destination.

relating to the arrival time originally scheduled. At first instance and then on appeal, the air carrier was ordered to pay damages in the amount of EUR 600 under Article 7(1)(c) of Regulation 261/04. The air carrier then brought an appeal on a point of law before the Bundesgerichtshof.

bb) Main reasoning

First of all the CJEU explained that the Regulation contemplates two different types of flight delays, namely, first, the delay in the scheduled departure time (as eg in Article 6) and, second, the delayed arrival at the final destination (as eg in Article 5(1)(c) in the event of a cancellation of a flight and a re-routing).[88] As already stated in *Sturgeon*[89] and *Nelson*,[90] passengers whose flights have a delay equal to or in excess of three hours are entitled to compensation.[91] The delay must be assessed, for the purposes of the compensation provided for in Article 7, in relation to the scheduled arrival time at that destination. In the case of directly connecting flights, the concept of 'final destination' is defined in Article 2(h) as being the destination of the last flight.[92] The right to compensation is not dependent on the limits set out in Article 6 since that provision according to its wording concerns only the entitlement to the measures of assistance and care provided for in Articles 8 and 9. Otherwise the passengers arriving at their final destination with a delay of three hours or more would, depending on whether their flights were delayed beyond the scheduled departure time by more than the limits set out in Article 6, be subject to an unjustified difference in treatment.[93] The financial consequences for air carriers cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers. The financial consequences are likely to be mitigated in the light of the three factors: First of all, there is no obligation to pay compensation in the case of extraordinary circumstances which could not have been avoided and which are beyond the air carrier's actual control. Next, Article 13 provides the possibility to seek compensation from any person who caused the delay, including third parties. In addition, the amount

88 Case 11/11 *Air France SA* v *Heinz-Gerke Folkerts, Luz-Tereza Folkerts* 26 February 2013 (CJEU), paragraphs 28–31. The Court states that the reference to different types of delay is compatible with Article 19 of the Montreal Convention since the Convention refers to the concept of 'delay in the carriage by air of passengers', without specifying at which stage of such carriage the delay in question must occur.

89 Joined cases 402/07 and 432/07, n 26 above, paragraphs 60, 61.

90 Joined cases 581/10 and 629/10, n 64 above, paragraphs 34, 40.

91 Case 11/11, n 88 above, paragraph 32.

92 Case 11/11, n 88 above, paragraphs 33–35.

93 Case 11/11, n 88 above, paragraphs 36–39.

of compensation may still be reduced by 50% in accordance with Article 7(2)(c) where the delay is, in the case of a flight not falling under Article 7(2)(a) or (b), less than four hours.[94]

2 Integration into the case-law

In the case *Emirates Airlines*[95] the scope of application of the Regulation 261/04 was at stake. Regulation 261/04 applies to all passengers departing from an airport located in the territory of a Member State, irrespective whether the flight is operated by a European or non-European air carrier. Moreover, flights operated by a European carrier and departing from a third country to an airport situated in the territory of a Member State are covered. The question was raised whether a non-European air carrier had to pay compensation to a passenger in case that the outward flight departed from a Member State and the cancellation happened on the return flight from a third country. The CJEU answered in the negative. A journey has to be divided into the parts 'outward flight' and 'return flight'. The application of the Regulation has to be ascertained for both parts separately. The CJEU distinguished the terms referred to in the Regulation from the ones in the Montreal Convention, which under Article 1(3) considers a carriage performed by several successive carriers to be 'one undivided carriage' if it has been booked as a 'single operation'. In the literature, it is claimed that the result reached by the CJEU would not respect the primacy of the Montreal Convention and additionally, would lead to a deterioration of the legal position of passengers who booked a journey with a non-European air carrier and who on their return flight to the EU are affected by denied boarding, cancellation or delay. Questions regarding the applicability of the Regulation arise, if the concerned 'outward flight' or 'return flight' consists of different segments.[96]

The substantive application of the Regulation is divided into 'denied boarding' (Article 4), 'cancellation' (Article 5) and 'delay' (Article 6), each giving rise to different rights for air passengers. According to Article 4(3), if boarding is denied

94 Case 11/11, n 88 above, paragraphs 42–46.

95 Case 173/07, n 3 above.

96 K. Tonner, 'Kapitel 15: Haftung von Luftfahrtunternehmen', in M. Gebauer and T. Wiedmann (eds), *Zivilrecht unter europäischem Einfluss* (Stuttgart: Boorberg, 2010) paragraph 42; K. Tonner, case note (2008) 18 *Europäische Zeitschrift für Wirtschaftsrecht* 571, 572; R. Schmid and H. Hopperdietzel, 'Die Fluggastrechte – eine Momentaufnahme' (2010) *Neue Juristische Wochenschrift* 1905, 1906; regarding the conceptualisation of the notion of 'flight', see: M. Chatzipanagiotis, 'The Notion of "Flight" under Regulation (EC) No. 261/2004' (2012) 3 *Air and Space Law* 245.

to passengers against their will, the operating air carrier has to immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9. Article 2(j) defines 'denied boarding' as a refusal to carry passengers on a flight, although they have presented themselves for boarding, except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation. The previous Regulation 295/91[97] limited the application of its provisions to cases where passengers are denied access to an overbooked flight. The cases *Finnair*[98] and *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor*[99] raised the question of whether the scope of a 'denied boarding' under Regulation 261/04 is limited to cases of overbooking. The CJEU clarified with an identical reasoning that Regulation 261/04 covers also denied boarding for other reasons, such as operational reasons, in favour of a high level of protection of passengers. The CJEU disregards the different motivations of the air carriers in both cases. While in *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor* the air carrier tried to reduce its own damage by re-booking the places of the connecting flight since it mistakenly assumed that the passengers would not be on time, in *Finnair* the air carrier re-scheduled the flights in order to reduce the damage to its passengers caused by a strike of the airport stuff. It is doubted whether the undifferentiated treatment of both situations gives the right incentives to air carriers.[100]

The practical problems in distinguishing between a 'cancellation' and a 'delay' have been addressed by the CJEU in *Sturgeon*.[101] While a delay gives passengers the right to assistance by the operating air carrier in accordance with Articles 8 and 9, in case of a cancellation, under certain conditions, the air passenger is entitled to compensation in accordance with Article 7. The CJEU ruled firstly that a flight which is delayed, even if it is a long delay, cannot be regarded as cancelled, if the flight is operated in accordance with the original flight planning. If, however, the air carrier arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made, this has to be regarded as a cancellation.[102] The distinction between 'cancellation' and 'delay', however, has lost its

97 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, *OJEC* 1991 L36/5.

98 Case 22/11, n 53 above.

99 Case 321/11, n 59 above.

100 M. Schladebach and A. Mildenstein, 'Die Konturierung des Nichtbeförderungstatbestands im Fluggastrecht' (2012) 24 *Europäische Zeitschrift für Wirtschaftsrecht* 940, 942.

101 Joined cases 402/07 and 432/07, n 26 above.

102 Joined cases 402/07 and 432/07, n 26 above, paragraphs 34–36.

explosiveness with the further explanations of the CJEU, that also passengers of delayed flights have a right to compensation when they reach their final destination three hours or more after the arrival time originally scheduled. The judgement of the CJEU met with criticism not only from air carriers, but also from the national courts, the Member States and the literature.[103] As foreseen by Advocate-General Sharpston 'in seeking to avoid Scylla (obvious discrimination against passengers whose flights are inordinately delayed when compared to passengers who obtain automatic compensation for their cancelled flight), one is immediately swept into Charybdis (legal uncertainty).'[104] The uncertainty caused by the judgment is reflected in the two preliminary references in *Nelson*,[105] where the CJEU confirmed despite all critics the compatibility of the right to compensation in the event of a delayed flight with the right to compensation provided for by the Montreal Convention.[106] The loss of time inherent in a flight delay constitutes an inconvenience within the meaning of Regulation No 261/2004 and cannot be categorized as 'damage occasioned by delay' under Article 19 of the Montreal Convention. The CJEU therefore held that the obligation under Regulation No 261/2004 intended to compensate passengers whose flights are subject to a long delay

103 For an overview of the literature, see: S. Garben, 'Sky-high controversy and high-flying claims? The Sturgeon case law in light of judicial activism, euroscepticism and eurolegalism' (2013) 1 *Common Market Law Review* 15; Criticism regarding the ruling of the CJEU: K. Riesenhuber, 'Interpretation and Judicial Development of EU Private Law. The Example of the Sturgeon-Case' (2010) 4 *European Review of Contract Law* 384; J. Balfour, 'Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004' (2010) 1 *Air and Space Law* 71; K. Arnold and P.M. de Leon, 'Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!' (2010) 2 *Air and Space Law* 91; P.S. Dempsey and S.O. Johansson, 'Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage' (2010) 3 *Air and Space Law* 207; L. Giesberts and G. Kleve, 'Compensation for Passengers in the Event of Flight Delays' (2010) 4/5 *Air and Space Law* 293; R. Lawson and T. Marland, 'The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon – in Harmony or Discord?' (2011) 2 *Air and Space Law* 99.

104 AG Sharpston, opinion of 2 July 2009 – joined cases 402/07 and 432/07, n 26 above, paragraph 96; See in this regard also: K. Lenaerts and J.A. Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 6 *Common Market Law Review* 1629, 1637; The reference for a preliminary ruling of the Landgericht Köln submitted on 5 August 2011 explicitly asked if the case-law of the CJEU was consistent with the principle of the separation of powers. The CJEU decided by order of 18 April 2013 in 413/11 *Germanwings GmbH* v *Thomas Amend* (CJEU) that there is no breach.

105 Joined cases 581/10 and 629/10, n 64 above. For a background on the reference for a preliminary ruling by the High Court of Justice: C. van Dam, 'Air Passenger Rights after Sturgeon' (2011) 4/5 *Air and Space Law* 259.

106 Very critical on this: S. Radoševic, 'CJEU's Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention' (2013) 2 *Air and Space Law* 95.

is compatible with Article 29 of the Montreal Convention. If the passengers concerned suffer also individual damage, they are not precluded from bringing in addition actions to obtain, by way of redress on an individual basis, damages under the conditions laid down by the Montreal Convention. As ascertained in *Sousa Rodríguez*,[107] Article 12 of the Regulation is intended to supplement the application of measures provided for by that Regulation, so that passengers are compensated for the entirety of the damage that they have suffered due to the failure of the air carrier to fulfil its contractual obligations. That provision allows the national court to order the air carrier to compensate damage arising from the breach of the contract of carriage by air on a legal basis other than Regulation No 261/2004, being in particular the Montreal Convention and national law. In the literature it was wrongly assumed that in *Sturgeon* the CJEU made the right to compensation not only dependent on a delay in the time of arrival, but also on a delay of the departure time.[108] In *Folkerts*[109] the CJEU had the occasion to clarify that only the delay in relation to the scheduled time of arrival at the final destination, this means the destination of the last flight of the concerned passenger, was relevant. In *Cuadrench Moré*[110] the CJEU ruled further that the time-limits for bringing actions to claim compensation under Articles 5 and 7 of the Regulation are determined by the national law of each Member State and not by the Montreal Convention.

In accordance with Article 5(3) of Regulation 261/04 air carriers are relieved of their obligation to pay compensation in the event of 'extraordinary circumstances' which could not have been avoided even if all reasonable measures had been taken. In *Wallentin-Hermann*[111] the CJEU clarified that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures'. The CJEU favoured a strict interpretation. Only problems that stem from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual

107 Case 83/10, n 45 above.

108 Schmid and Hopperdietzel, n 96 above; S. Sendmeyer, 'Alle Jahre wieder: Europäische Fluggastrechte im Schneechaos' (2011) 12 *Neue Juristische Wochenschrift* 808, 811. For an overview of the German case-law: U. Steppler and M. Muennig, 'No Compensation for Long Delay in Spite of Sturgeon: Will This New Jurisprudence Prevail? '(2011) 4/5 *Air and Space Law* 339; U. Steppler and K.S. Meigel, 'Compensation for Delay further to Sturgeon only if Delay Occurs Cumulatively upon Departure and Arrival' (2012) 6 *Air and Space Law* 497.

109 Case 11/11, n 88 above.

110 Case 139/11, n 72 above.

111 Case 549/07, n 9 above, paragraphs 17–20.

control, are covered.[112] In *Eglītis and Ratnieks*[113] the CJEU clarified further that in order to show that all reasonable measures have been taken, an air carrier has to provide for some reserve time in order to be able to operate the flight once the extraordinary circumstances have come to an end. However, extraordinary circumstances do not release the air carrier from its obligation to provide care. In accordance with *McDonagh*[114] air carriers have even in the event of a closure of the European air space lasting several days an unlimited duty to provide care in accordance with Article 5(1)(b) and Article 9. The high level of consumer protection could have extensive financial consequences for air carriers and is criticized as being disproportionate.[115] As already signalled in *Sousa Rodríguez* and confirmed by *McDonagh*, the Regulation seems to provide for a right to financial compensation in the event of a wrongful omission of care.[116]

3 Travel marketing and travel insurance (case 134/11 *Blödel-Pawlik*; case 112/11 *ebookers.com Deutschland*)

a) Refund in the event of insolvency of the package organiser on account of its fraudulent use of the funds transferred by consumers (case 134/11 *Blödel-Pawlik*)

aa) Facts

The German Landgericht Hamburg asked the CJEU whether Article 7 of Directive 90/314/EEC[117] covers the situation in which the insolvency of the travel organiser is attributable to its own fraudulent conduct.

The consumer booked package travel with Rhein Reisen GmbH. Rhein Reisen GmbH informed the consumer before the start of the trip that it was obliged to declare itself insolvent. In accordance with the indications given by the Landgericht Hamburg, Rhein Reisen GmbH never really intended to organise the

112 J. Croon, 'Placing Wallentin-Hermann in Line with Continuing Airworthiness – A Possible Guide for Enforcers of EC Regulation 261/2004' (2011) 1 *Air and Space Law* 1; A. Milner, 'Regulation EC 261/2004 and 'Extraordinary Circumstances' (2009) 3 *Air and Space Law* 215.

113 Case 294/10, n 41 above.

114 Case 12/11, n 77 above.

115 A. Staudinger, case note (2013) 6 *Europäische Zeitschrift für Wirtschaftsrecht* 223, 227; A. Staudinger and M. Krüger, 'Die Entwicklung des Reiserechts in den Jahren 2011/2012' (2011) 39 *Neue Juristische Wochenschrift* 2853, 2856.

116 Staudinger, n 115 above, 227.

117 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *OJEC* 1990 L158/59.

booked trip and became insolvent because of its own fraudulent conduct. Hanse-Merkur, the insurer of the travel organiser, argues that it is not required to arrange a refund, since Article 7 of Directive 90/314 does not cover a situation where the travel has been cancelled solely because of fraudulent conduct on the part of the travel organiser.

bb) Main reasoning

With reference to its judgments in *Dillenkofer*[118] and *Rechberger*[119] the CJEU ruled that the consumer protection guaranteed by the Directive in the event of insolvency of the organiser of package travel is also applicable if the insolvency is attributable to the travel organiser's own conduct. Article 7 of the Directive specifically aims at the protection of consumers against the consequences of insolvency, whatever the causes of it may be.[120] In line with the objective of Directive 90/314 to ensure a high level of protection for consumers, the fact that the insolvency of the travel organiser is attributable to its own fraudulent conduct cannot constitute an obstacle to the refund of money paid for the travel under Article 7.[121]

cc) Integration in the case-law

The obligation of the travel organiser to provide sufficient evidence of security implies that a refund of the money paid for the travel must be actually available to the consumer in case of insolvency. The CJEU ruled that not even fraudulent conduct on part of the travel organiser could constitute a bar for securing repatriation and the refund of money to the consumers. It is questioned whether the CJEU has found a right balance between the aim of ensuring a high level of protection for consumers and the practical implications of such endeavor for travel organisers and their insurers.[122]

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118 Joined cases 178/94, 179/94, 188/94, 189/94 and 190/94 *Dillenkofer and Others* v *Bundesrepublik Deutschland* [1996] ECR I-4845 (CJEU).

119 Case 140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others* v *Republik Österreich* [1999] ECR I-3499 (CJEU).

120 Case 134/11 *Jürgen Blödel-Pawlik* v *HanseMerkur Reiseversicherung AG* 16 February 2012 (CJEU), paragraphs 21–23; discussed by I. Kull and M. Torga, (2012) 4 *European Review of Contract Law* 481.

121 Case 134/11, n 120 above, paragraph 24.

122 Kull and Torga, n 120 above, 486; for a positive view: A. Staudinger, 'Insolvenzabsicherung bei Pauschalreisen' (2012) 3 *ReiseRecht aktuell* 106.

b) Acceptance of travel cancellation insurance during the selling of flight tickets on 'opt-in' basis (case 112/11 *ebookers.com Deutschland*)

aa) Facts

The German Oberlandesgericht Köln referred to the CJEU the question whether costs for services provided by third parties (in this case, an insurer offering travel cancellation insurance) which are charged to the air traveller by the company organising the air travel together with the air fare as part of a total price constitute 'optional price supplements' within the meaning of Article 23(1) of Regulation 1008/08.[123] In the affirmative case, the acceptance by the customer has to be on an opt-in basis.

In this case, the Verbraucherzentrale Bundesverband eV (Federal Union of Consumer Organisations and Associations) brought an action against ebookers.com Deutschland to refrain from presetting the taking out of travel cancellation insurance in the procedure for booking flights set up on its internet portal. When a customer has selected a specific flight during the booking process, the costs relating to the reservation are listed in the top right-hand corner of the internet page under the heading 'your current travel costs'. This list includes the actual price of the flight, the amounts in respect of 'taxes and fees' and the costs for 'travel cancellation insurance'. There is a notice at the bottom of the website indicating how the customer should proceed – by means of an opt-out – should he not wish to take out travel cancellation insurance. The Oberlandesgericht Köln doubted whether the Regulation was applicable because the offer at issue did not originate from an air carrier, but from an economically and legally distinct insurance company.

bb) Main reasoning

First of all, the CJEU pointed out that Article 23(1) of Regulation 1008/08 seeks to ensure that there is information and transparency with regard to the prices for air services.[124] 'Optional price supplements' relate to services which, supplementing the air service itself, are neither compulsory nor necessary for the carriage of passengers or cargo. It is required that such price supplements are communicated in a clear, transparent and unambiguous way at the start of any booking process, and that their acceptance by the customer must be on an opt-in

123 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, *OJEC* 2008 L293/3.
124 Case 112/11 *ebookers.com Deutschland GmbH* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV* 19 July 2012 (CJEU), paragraph 13.

basis.[125] Thereby it shall be prevented that a customer is induced to purchase additional services which are not unavoidable and necessary for the purposes of the flight itself, unless he chooses them expressly.[126] That requirement corresponds to Article 22 of Directive 2011/83/EU[127] on consumer rights, which provides that the trader must seek the express consent of the consumer to any extra payment in addition to the remuneration for the main contractual obligation and that that consent cannot be inferred by using default options.[128] Referring to the opinion of Advocate-General Mazák, the CJEU clarified that it would be at odds with the purpose of Article 23(1) if the consumer protection were to depend on whether the optional additional service originates from an air carrier or from a company which is legally and economically separate from it.[129] Contrary to what ebookers.com claimed, what matters is only that the service and the corresponding price are offered in relation to the flight itself during the flight booking process, independent of the status of the provider of the optional additional service connected with the flight.[130] Consequently, the concept of 'optional price supplements' covers costs, connected with the air travel, arising from services supplied by a party other than the air carrier and charged to the customer by the person selling that travel, together with the air fare, as part of a total price.[131]

cc) Integration in the case-law

Article 23 of Regulation 1008/08 provides compulsory measures to increase price transparency and forbids price discrimination. It thereby addresses the abusive practice by air carriers of charging automatically optional services, which the consumer only realises when the booking is completed. In order to meet the objective of the Regulation it has to be ensured that all elements of the costs are clear to the customer so that he can make an informed decision about the service. The CJEU clarified that optional price supplements provided by parties other than

125 Case 112/11, n 124 above, paragraph 14.
126 Case 112/11, n 124 above, paragraph 15.
127 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repeating Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.
128 Case 112/11, n 124 above, paragraph 16.
129 Case 112/11, n 124 above, paragraph 17.
130 Case 112/11, n 124 above, paragraph 18.
131 Case 112/11, n 124 above, paragraph 20.

the carrier fall within the scope of the Regulation.[132] In the literature it is cautioned that service unbundling could lead to opacity resulting in little benefit for the consumer. The effective comparability of price for air services would need to be ensured.[133]

III Financial services

1 Consumer credit (case 509/07 *Scarpelli*; case 602/10 *SC Volksbank România*)

a) Consumer's right to terminate the credit agreement in case of breach of the contract of sale by the supplier and in the absence of an exclusive relationship between the supplier and the grantor of credit (case 509/07 *Scarpelli*)

aa) Facts

The Italian Tribunale di Bergamo asked the CJEU whether under Article 11(2) of Directive 87/102/EEC[134] an agreement between a grantor of credit and a supplier according to which credit is made available exclusively by that grantor of credit to customers of that supplier is a necessary condition for the right of the customer to terminate the credit agreement and claim reimbursement of the sums already paid to the grantor of credit where the supplier is in breach of contract.

The consumer signed a purchase contract for a motor vehicle and at the same time a form – provided by the supplier – applying for a loan from Finemiro SpA (the grantor of credit), whose rights were acquired by NEOS Banca. After the consumer had made 24 monthly repayments and the vehicle had still not been delivered to him, he ceased making the repayments and claimed the reimbursement of the sums already paid. NEOS Banca contested the consumer's claims on the ground that Article 11 of Directive 87/102 exempts the grantor of credit from liability in all cases where there is no exclusive relationship between the grantor of credit and the supplier.

132 H.J. Müggenborg and W. Frenz, 'Europäischer Verbraucherschutz bei Flugbuchungen' (2012) *Europäische Zeitschrift für Wirtschaftsrecht* 681.

133 A. Bochon, case note (2013) 1 *Revue européenne de droit de la consommation* 101, 108–111.

134 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, Regulations and administrative provisions of the Member States concerning consumer credit, *OJEC* 1987 L42/48.

bb) Main reasoning

The CJEU held that where the national legislation applicable to contractual relations provides that the consumer is entitled to pursue remedies against the grantor of credit in order to obtain the termination of the credit agreement and the reimbursement of the sums already paid, Directive 87/102 does not make the exercise of such remedies subject to the requirement of exclusivity in Article 11(2). With reference to its decisions in *Berliner Kindl Brauerei*[135] and *Cofinoga*,[136] the CJEU emphasized the objectives of the Directive to create a common consumer credit market and to ensure the protection of consumers who avail themselves of such a credit.[137] Article 11 of Directive 87/102/EEC provides that a consumer is entitled to pursue remedies against the grantor of credit in the event that the supplier fails to perform its obligations under the condition, inter alia, of the existence of an exclusive relationship between the supplier and the grantor of credit.[138] The CJEU interpreted Article 11(2) in the light of the 21st recital of the preamble to the Directive. Accordingly this provision provides further protection for the consumer vis-à-vis the grantor of credit, in addition to the remedies that the consumer is already entitled to pursue on the basis of the national provisions applicable to all contractual relationships. Consequently, the various conditions under Article 11(2) have to be satisfied only with regard to those additional rights.[139] With reference to the 25th recital of the preamble to the Directive and its decision in *Rampion and Godard*[140] the CJEU ruled that such a reading is consistent with the intended minimal harmonisation in matters of consumer credit.[141] The consumer is neither able to exert any influence on the relationship between the supplier and the grantor of credit nor has the consumer the possibility to amend the conditions of the credit agreement. Making the consumer's pursuit of remedies against the grantor of credit subject to the condition that there is a pre-existing exclusivity clause between him and the supplier would be at variance with the consumer protection aims of the Directive.[142] However, 'such a condition may need to be satisfied in order to assert other rights, not covered by national

135 Case 208/98 *Berliner Kindl Brauerei AG* v *Andreas Siepert* [2000] ECR I-01741 (CJEU), paragraph 20.

136 Case 264/02 *Cofinoga Mérignac SA* v *Sylvain Sachithanathan* [2004] ECR I-02157 (CJEU), paragraph 25.

137 Case 509/07 *Luigi Scarpelli* v *NEOS Banca SpA* [2009] ERC I-03311 (CJEU), paragraph 20.

138 Case 509/07, n 137 above, paragraph 21.

139 Case 509/07, n 137 above, paragraph 23.

140 Case 429/05 *Max Rampion and Marie-Jeanne Godard, née Rampion* v *Franfinance SA and K par K SAS* [2007] ECR I-08017 (CJEU), paragraphs 47, 48.

141 Case 509/07, n 137 above, paragraphs 24–26.

142 Case 509/07, n 137 above, paragraphs 27–29.

measures on contractual relations, such as the right to damages for loss caused by a breach of obligations by the supplier of goods or services in question.'[143]

cc) Integration in the case-law

Even thought the CJEU does not refer explicitly to Article 15 of Directive 87/102/EEC, the decision is seen to be consistent with the minimal harmonisation nature of the Directive. The Italian case-law, according to which the rights pursued by the consumer are not subject to the condition that there is a pre-existing exclusivity clause between the grantor of credit and the supplier, is consistent with the Directive.[144] The new Directive 2008/48/EC on consumer credit[145] which constitutes a full harmonisation instrument defines in Article 3(n) a linked credit agreement as an agreement where the credit serves exclusively to finance the purchase contract and the two agreements form an 'objective unit'. In accordance with the 10th recital of the preamble to the Directive, the Member States may expand the provisions of the Directive 2008/48/EC to further linked credit agreements which do not fall within the definition contained in the Directive.[146]

b) Scope of the harmonisation by Directive 2008/48/EC (case 602/10 *Volksbank România*)

aa) Facts

The questions submitted for a preliminary ruling by the Romanian Judecătoria Călăraşi concerned various aspects of Directive 2008/48/EC, in particular the material and temporal scope of the Directive, the obligations of credit institutes regarding the levying of bank charges and the role of out-of-court resolution procedures under the Directive.

The proceedings concerned the credit agreements between Volksbank România and its customers secured by rights in immovable property. The general

143 Case 509/07, n 137 above, paragraph 30.

144 V. Trstenjak and E. Beysen, 'European consumer protection law: Curia semper dabit remedium?' (2010) 1 *Common Market Law Review* 95, 111; for a critical view: C. Wendehorst, case note (2010) 1 *European Review of Contract Law* 66, 68.

145 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJEC* 2008 L133/66.

146 On the new regime under Directive 2008/48/EC, see: Wendehorst, n 144 above, 71–73; B. Bonnamour, 'Crédit à la consommation: interrogations sur le régime communautaire de la responsabilité du prêteur en cas de défaillance du fournisseur' (2009) 39 *Revue Lamy droit des affaires* 64, 67–68.

conditions provide that the customer is required to pay the bank a risk charge equal to 0.2% of the balance of the loan and that it must be paid monthly throughout the entire term of the agreement. The contracts had been concluded before the date when the Romanian measures implementing Directive 2008/48/EC entered into force. After the date of entry into force, the national consumer protection authority imposed a fine and ancillary penalties on the Volksbank România as it took the view that the levying of the risk charges was unlawful. Volksbank România challenged the measures before court.

bb) Main reasoning

The CJEU confirmed that Article 22(1) of Directive 2008/48/EC does not preclude including in the material scope credit agreements which are secured by immovable property, even though Article 2(2)(a) excludes them from the scope of the Directive. It follows from Article 22(1) of Directive 2008/48 that, so far as it concerns credit agreements which fall within the Directive's scope, the Directive provides for full harmonisation and that, as regards the covered matters, the Member States are not authorised to maintain or introduce different national provisions.[147] However, as it follows from recital 10 of the preamble, the Member States may, in accordance with European Union law, apply provisions of that Directive to areas not covered by its scope.[148] Therefore, it is also in principle for the Member States to determine the conditions for the extension of their implementing provision to credit agreements which do not fall within the harmonisation. Consequently, Article 30(1) does not preclude defining the temporal scope so that the national implementing measure also applies to credit agreements secured by immovable property which were existing on the date when that national implementing measure entered into force.[149] The Romanian implementing provision that contains an exhaustive list of admissible bank charges is compatible with Article 22(1) of the Directive. The Directive provides only for obligations relating to the information about bank charges, but does not contain substantive rules relating to the types of charges that the creditor may levy.[150] Moreover, recital 44 of the preamble requires that, in order to ensure market transparency and stability, Member States should ensure that appropriate mea-

147 Case 602/10 *SC Volksbank România SA* v *Autoritatea Naţională pentru Protecţia Consumatorilor – Comisariatul Judeţean pentru Protecţia Consumatorilor Călăraşi (CJPC)* 12 July 2012 (CJEU), paragraph 38.

148 Case 602/10, n 147 above, paragraph 40.

149 Case 602/10, n 147 above, paragraphs 52–54.

150 Case 602/10, n 147 above, paragraphs 62–65.

sures for the regulation or supervision of the activity of creditors are in place.[151] The prohibition of certain bank charges is compatible with the freedom to provide services.[152] Referring to *Alassini*[153] the CJEU states that it is for the Member States to lay down the details of out-of-court resolution procedures, including the question whether they are mandatory or not.[154] Out-of-court dispute resolution procedures have to be, however, adequate and effective. It is not possible to derive from Article 24(1) an obligation to require that those procedures are used before any recourse to the consumer protection authority is possible.[155] Consequently, the Directive does not preclude the Romanian rule that allows consumers to have direct recourse to the consumer protection authority, which may subsequently impose penalties on credit institutions, without having to use beforehand the out-of-court resolution procedures.[156]

cc) Integration in the case-law

The case *Volksbank România* concerns the division of legislative competences between the EU and the Member States when it comes to full harmonisation instruments. Full harmonisation is considered to be the new standard in the area of European consumer law. It was questionable whether a Member State may extend the rules of Directive 2008/48/EC to ancillary areas and whether the extended national legislation may diverge from the Directive. The CJEU clarified that under a full harmonisation instrument the Member States are allowed to extend its application to areas that do not fall within its scope, provided that compliance with the general framework of EU law as required by the TFEU and relevant secondary law is ensured.[157]

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151 Case 602/10, n 147 above, paragraph 66.

152 Case 602/10, n 147 above, paragraph 83.

153 Joined cases 317–320/08 *Rosalba Alassini* v *Telecom Italia SpA, Filomena Califano* v *Wind SpA, Lucia Anna Giorgia Iacono* v *Telecom Italia SpA and Multiservice Srl* v *Telecom Italia SpA* [2010] ERC I-02213 (CJEU), paragraphs 44, 45.

154 Case 602/10, n 147 above, paragraphs 95, 96.

155 Case 602/10, n 147 above, paragraph 97.

156 Case 602/10, n 147 above, paragraph 100.

157 R. Steennot, 'Case Volksbank România: Limits of the full harmonization approach of the Consumer Credit Directive' (2013) *Revue européenne de droit de la consommation* 87; C. Möller, case note (2012) *LMK Anmerkung* 337364; P. Bülow, 'Harmonisierter Bereich und Verbindlichkeit europäischer Rechtsakte' (2013) *Wertpapier-Mitteilungen* 245; for a critical view on extending the provisions of the Consumer Credit Directive to mortgage credit, see V. Mak, 'Stretching the borders of EU law? – Full harmonisation in the Consumer Credit Directive and mortgage credit' (2013) 1 *Journal of European Consumer and Market Law* 37.

2 Insurance law and consumer protection (case 577/11 *DKV Belgium*; case 442/12 *Sneller*)

a) Consumer protection against unexpected increases in insurance premium rates (case 577/11 *DKV Belgium SA*)

aa) Facts

The Belgian Cour d'appel de Bruxelles asked the CJEU whether the national system for premium rate increases is in compliance with Articles 29 and 39(2) and (3) of Directive 92/49/EEC,[158] Article 8(3) of Directive 73/239/EEC[159] and Articles 49 TFEU and 56 TFEU. The Belgian provision provides with regard to health insurance contracts not linked to professional activity that the premium, the excess payable and the benefit can be adapted annually only on the basis of the consumer price index or on the basis of the 'medical index' if it exceeds the consumer price index. Moreover, the administrative authority responsible for the supervision of insurance undertakings may, at the request of an insurance undertaking, authorise that undertaking to take measures in order to balance its premium rates where they give or risk giving rise to losses notwithstanding the adaptations calculated on the basis of those two types of indices.

The Belgian insurance undertaking DKV informed all its insured parties holding supplementary hospitalisation insurance for 'individual room' coverage that it would increase the premiums in 2010 by 7.84%. The administrative authority responsible for the supervision of insurance undertakings rejected DKV's request for an increase before. The Belgian consumer organisation Test-Achats brought an action for an injunction seeking to have DKV ordered to reverse its decision to increase premiums.

bb) Main reasoning

Contrary to the position of the European Commission and DKV, the CJEU ruled that the Belgian system of premium rate increases is not contrary to the principle of freedom to set rates in the non-life insurance sector provided for in Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239. Full harmonisa-

158 Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, Regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive), *OJEC* 1992 L228/1.

159 First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, *OJEC* 1973 L228/3.

tion in the field of non-life insurance rates cannot be presumed.[160] A technical framework for the calculation of the premiums is not contrary to the principle of freedom to set rates on the sole ground that that it affects premium rate changes.[161] The Belgian system that allows premium rate increases only on the basis of two types of indices functions as such a technical framework, which provides a structure for rate changes according to which insurance undertakings can freely set their premiums.[162] This conclusion cannot be questioned by the mere fact that the administrative authority may authorise an insurance undertaking to take measures in order to balance its premium rates where they give or risk giving rise to losses.[163]

Nevertheless, the Belgian system of premium rate increases constitutes a restriction on the freedom of establishment and the freedom to provide services since insurance undertakings, which are established in another Member State and want to enter the Belgian market, have to re-think their business policy and strategy when setting the rates for their premiums.[164] The restriction on the freedom of establishment and the freedom to provide services is, however, justified. The Belgian system of premium rate increases which prevents insurance undertakings from implementing sharp and unexpected increases in insurance premium rates is suitable and proportional for securing the attainment of the objective of consumer protection, which is an overriding requirement relating to the public interest.[165] In the case of hospitalisation insurance, the probability of involvement by insurers increases with the age of the insured parties. Consequently, supplementary hospitalisation insurance for 'individual room' coverage may be offered at low rates to young people, while with the increased age of the insured party, the costs tend to increase.[166] The Belgian system of premium rate increases provides for a guarantee 'that the insured party, precisely at an age when he needs that insurance, will not be faced by a sharp, unexpected increase in his insurance premium rates which will deprive him of the benefit of that insurance if he is unable to meet the costs thereof.'[167] The insurance undertaking is not prevented, at the time of setting the basic premium, from taking into

160 Case 577/11 *DKV Belgium* v *Association belge des consommateurs Test-Achats ASBL* 7 March 2013 (CJEU), paragraphs 20–22.
161 Case 577/11, n 160 above, paragraphs 23, 24.
162 Case 577/11, n 160 above, paragraph 26.
163 Case 577/11, n 160 above, paragraph 27.
164 Case 577/11, n 160 above, paragraphs 34–36.
165 Case 577/11, n 160 above, paragraphs 40–42.
166 Case 577/11, n 160 above, paragraph 43.
167 Case 577/11, n 160 above, paragraph 44.

account the higher costs when the insured party becomes older or to make a request for an increase before the administrative authority.[168]

b) Insured persons' freedom to choose a lawyer under Directive 87/344/EEC[169] (case 442/12 *Sneller*)

aa) Facts

The Dutch Hoge Raad asked the CJEU whether a legal expenses insurer may stipulate in its insurance contracts that legal assistance will in principle be provided by its employees and that the costs of legal assistance provided by a lawyer or legal representative chosen freely by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer.

Mr Sneller, who took out legal expenses insurance, wished to bring legal proceedings against his former employer in order to claim damages on the ground of unfair dismissal. In this regard, he intended to be assisted by a lawyer of his choosing and to have the costs of legal assistance covered by his legal expenses insurer. The insurer has indicated its agreement to such legal proceedings being brought, but considers that the insurance contract does not provide, in such a case, cover for the costs of legal assistance provided by a lawyer chosen by the insured person, but only through one of its own employees.

bb) Main reasoning

By relying on its case-law in *Eschig*[170] and *Stark*,[171] the CJEU held that Article 4(1)(a) of Directive 87/344/EEC precludes a legal expenses insurer to stipulate in its insurance contracts that legal assistance will in principle be provided by its employees and that the costs of a freely chosen lawyer or legal representative will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer.[172] However, the Member States are not obliged to require insurers, in all circumstances, to cover in full the costs incurred

168 Case 577/11, n 160 above, paragraphs 45, 46.

169 Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, *OJEC* 1987 L185/77.

170 Case 199/08 *Erhard Eschig* v *UNIQA Sachversicherung AG* [2009] ECR I-08295 (CJEU).

171 Case 293/10 *Gebhard Stark* v *DAS Österreichische Allgemeine* [2011] ECR I-04711 (CJEU).

172 Case 442/12 *Jan Sneller* v *DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV* 7 November 2013 (CJEU), paragraph 29.

in connection with the defence of an insured person, on condition that that freedom is not rendered meaningless. The insured person must be given a *de facto* reasonable choice of representative.[173] The ruling of the CJEU is not dependent on whether legal assistance is compulsory under national law in the inquiry or proceedings concerned.[174]

cc) Integration in the case-law

The CJEU confirmed its previous case-law that the insured persons' freedom to choose a lawyer under Directive 87/344/EEC is unconditional and only subject to the exceptions in Article 5 of the Directive. The financial interests of the insurer can be only protected through a limitation of the costs covered by the insurance.[175]

IV Anti-discrimination law and consumer protection (case 236/09 *Test-Achats*; case 394/11 *Belov*)

a) Sex as a factor in the assessment of insurance risks (case 236/09 *Test-Achats*)

aa) Facts

The Belgian Cour constitutionnelle asked the CJEU whether Article 5(2) of Directive 2004/113[176] which derogates from the general rule requiring unisex insurance premiums is compatible with the principle of equal treatment for men and women.

The Belgian consumer organisation Test-Achats and two private individuals brought an action before the Belgian Cour constitutionnelle for annulment of the Belgian Law transposing the Equal Treatment Directive 2004/113/EC. The applicants claimed that the Belgian Law is contrary to the principle of equality between

173 Case 422/12, n 172 above, paragraph 27.

174 Case 422/12, n 172 above, paragraph 32.

175 K. Purnhagen, 'Einschränkung der freien Anwaltswahl bei Rechtsschutzversicherungen' (2014) *Neue Juristische Wochenschrift* 374.

176 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJEC* 2004 L373/37.

men and women because it implements the derogation provided for in Article 5(2) of Directive 2004/113/EC.

bb) Main reasoning

The CJEU ruled that the exemption without temporal limitation from the rule of unisex premiums and benefits laid down in Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012 because it is incompatible with Article 21 and Article 23 of the European Charter of Fundamental Rights.[177] The EU legislature must contribute, in a coherent manner, to the achievement of the intended objective of equal treatment for men and woman.[178] Since at the time when the Directive was adopted the use of actuarial factors related to sex was widespread in the provision of insurance services, it was permissible for the EU legislature to implement the application of the rule of unisex premiums and benefits gradually with appropriate transitional periods.[179] Article 5(1) provides that the differences in premiums and benefits based on sex must be abolished by 21 December 2007 at the latest.[180] Article 5(2) provides for the option for Member States to permit without temporal limitation proportionate differences in individuals' premiums and benefits where sex is, based on relevant and accurate actuarial and statistical data, a determining risk factor.[181] Contrary to the Council, which argued that Article 5(2) was intended to make it possible not to treat different situations in the same way, the CJEU ruled that the Directive is based on the premise that the respective situations of men and women with regard to insurance premiums and benefits are comparable.[182] Article 5(2) must therefore be considered to be invalid upon the expiry of an appropriate transitional period.[183]

cc) Integration in the case-law

Under reference to the higher-ranking rights in Article 21 and 23 of the European Charter of Fundamental Rights, the CJEU declared Article 5(2) of Directive 2004/113/EC invalid and introduced a European-wide prohibition to offer insurance

177 Case 236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others* v *Conseil des ministres* [2011] ECR I-00773 (CJEU), paragraphs 32–34.
178 Case 236/09, n 177 above, paragraph 21.
179 Case 236/09, n 177 above, paragraphs 22, 23.
180 Case 236/09, n 177 above, paragraph 24.
181 Case 236/09, n 177 above, paragraphs 25, 26.
182 Case 236/09, n 177 above, paragraphs 27–30.
183 Case 236/09, n 177 above, paragraph 33.

products which differentiate premiums and benefits according to sex.[184] The terse reasoning of the CJEU caused criticism. The CJEU refrains from dealing with the scope of the principle of equal treatment in relation to insurance contracts more deeply.[185] The CJEU based its decision merely on the recitals 18 and 19 in the preamble of the Directive according to which Article 5(2) is a 'derogation' from the rule of unisex premiums and benefits. Contrary to this, Advocate-General Kokott tries to explain in her opinion why uniform premiums should be required based on the principle of equal treatment. While the Advocate-General recognises that recourse to prognoses via group examination is indispensable in actuarial calculations of premiums and benefits in order to make the risk calculable, the use of a person's sex as a substitute criterion for other distinguishing features is incompatible with the principle of equal treatment.[186] Nevertheless, her argument that social and economic criterions would be more significant is said not to be convincing.[187] The consideration of the freedom to conduct a business under Article 16 of the Charter of Fundamental Rights and of possible justifications for differentiation is missing.[188]

b) Application of the principle of equal treatment to the right of the consumer to read his individual electricity consumption (case 394/11 *Belov*)

aa) Facts

The Bulgarian Commission for Protection against Discrimination (KZD) referred to the CJEU a number of questions on the interpretation of Directive 2000/43/EC.[189] Essentially, the main issue was whether it constitutes indirect discrimination if in districts which are inhabited predominantly by a certain ethnic group, access to electricity meters is more difficult than in other districts where this is not the case.

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184 On the use of the Charter by the CJEU in the context of this case, see A. Peripoli, 'Is the ECJ finally putting the Charter to work?' (2012) *The Law Quarterly Review* 212; C. Tobler, case note (2011) 6 *Common Market Law Review* 2041, 2050–2056.

185 C. Armbrüster, case note (2011) *LMK Anmerkung* 315339; K. Koldinská, 'Case law of the European Court of Justice on sex discrimination 2006–2011' (2011) 5 *Common Market Law Review* 1599, 1636.

186 AG Kokott, opinion of 30 September 2010 – case 236/09, n 177 above, paragraphs 46, 62.

187 J.D. Lüttringhaus, 'Europaweit Unisex-Tarife für Versicherungen!'(2011) *Europäische Zeitschrift für Wirtschaftsrecht* 296, 298.

188 Lüttringhaus, n 187 above, 298.

189 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJEC* 2000 L180/22.

In the Bulgarian city of Montana, in two areas mainly inhabited by members of the Roma community, electricity meters had been attached to electricity poles at a height of 7 m. Outside of these districts the electricity meters are placed at a height of up to 1.70 m, usually in the consumer's home or on the outside walls of the building. For the concerned inhabitants it is only possible to make a direct visual check if they have an inspection meter installed in their home, for which a fee has to be paid. An indirect visual check free of charge, which is not used in practice, is possible by an employee of the ChEZ Raspredelenie Balgaria, the owner of the electricity distribution network, which on written request by the consumer by means of a lifting platform reads the electricity meter. A concerned inhabitant made a complaint against the energy supplier ChEZ Elektro Balgaria AD (CEB) claiming that the placing of electricity meters at a height of 7 m discriminates against him on the basis of his ethnic origin.

bb) Main reasoning

Contrary to the opinion of Advocate-General Kokott, the views of the European Commission and the Bulgarian Government, the CJEU ruled that the KZD could not be regarded as a 'court' or 'tribunal' within the meaning of Article 267 TFEU and that the CJEU does not have jurisdiction to rule on the questions referred by this institution. The decisions of the KZD do not have a judicial nature, but have to be qualified as administrative decisions.[190] A reference for a preliminary ruling is not excluded since the decision of the KZD is subject to appeal before an administrative court and the person concerned has the possibility to initiate civil proceedings instead of administrative proceedings before the KZD.[191]

Advocate-General Kokott confirmed the applicability of Directive 2000/43/EC. It was in question whether Article (3)(1)(h) concerning the access to and supply of goods and services which are available to the public includes, in addition to electricity supply, the provision of electricity meters. The Advocate-General explained that not only the electricity supply *per se* is covered by the scope of Directive 2000/43, but also the conditions under which that electricity supply is provided, including the provision of electricity meters.[192] Contrary to the submissions of CEB that consumers have no entitlement to the installation of a

190 Case 394/11 *Valeri Hariev Belov* v *ChEZ Elektro Balgaria AD and Others* 31 January 2013 (CJEU), paragraph 51. See in this regard: Case 53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others* v *GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ERC I-4609 (CJEU), paragraph 29.

191 Case 394/11, n 190 above, paragraphs 52, 53.

192 AG Kokott, opinion of 20 September 2012 – case 394/11, n 190 above, paragraph 64.

free electricity meter, Advocate-General Kokott explained that national rules which make the existence of discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43.[193] Considering the circumstances of the main proceedings, the Advocate-General assumed that there is a 'prima facie case' of indirect discrimination based on ethnic origin within the meaning of Article 2(2)(b) of Directive 2000/43 and consequently, the burden of proof is reversed in accordance with Article 8(1) of Directive 2000/43.[194] The measure at issue may be justified if it prevents fraud and abuse and contributes to ensuring the quality of the electricity supply in the interest of all consumers, provided that the measure taken is proportionate.[195]

cc) Integration in the case-law

As pointed out by Advocate-General Kokott, the case was 'particularly sensitive'. The Roma community, which is concerned by the alleged discrimination in the main proceedings, is Europe's largest minority group.[196] The CJEU escaped the assessment of the merits of the referred questions by a strict interpretation of the conditions for the admissibility of the reference for a preliminary ruling under Article 267 TFEU. The differences in the interpretation of the CJEU and the opinion of Advocate-General Kokott relating the question whether the Commission for Protection against Discrimination can be regarded as 'court' or 'tribunal' are considerable.[197] It remains to be seen whether the problem will be referred another time to the CJEU by the Bulgarian courts. The opinion of the Advocate-General brings up difficult questions. The risk of an ethnic group being stigmatised and the interests of the electricity consumers affected in monitoring regularly their individual electricity consumption have to be assessed with regard to ensuring the security and quality of the energy supply in the general interest.[198]

193 AG Kokott, n 192 above, paragraph 83.

194 AG Kokott, n 192 above, paragraph 99.

195 AG Kokott, n 192 above, paragraph 124.

196 AG Kokott, n 192 above, paragraph 3.

197 M. Möschel, case note (2013) *Common Market Law Review* 1433, 1442–1446. For the previous case-law of the CJEU regarding this matter, see M. Broberg, 'Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?' (2009) 2 *European Public Law* 207.

198 For a critical reading of the opinion of the Advocate-General on the concept of discrimination, see Möschel, n 197 above, 1447–1449.

V Legal protection

1 Jurisdiction over consumer contracts (case 180/06 *Ilsinger*; case 204/08 *Rehder*; joined cases 585/08 *Pammer* and 144/09 *Hotel Alpenhof*; case 327/10 *Hypoteční banka*; case 190/11 *Mühlleitner*; case 419/11 *Česká spořitelna*; case 218/12 *Emrek*; case 478/12 *Maletic*)

a) Jurisdiction in the case of an action seeking payment of the prize which the consumer appears to have won on the basis of a misleading advertisement (case 180/06 *Ilsinger*)

aa) Facts

The Austrian Oberlandesgericht Wien asked whether the legal proceedings by which a consumer seeks an order requiring a mail-order company to award a prize apparently won by him are contractual in nature within the meaning of Article 15(1)(c) of the Regulation 44/2001,[199] if necessary, on condition that the consumer has placed an order, even though the award of that prize was not dependent on an order of goods.

The applicant, an Austrian national domiciled in Austria, received a notification which was addressed personally to her, stating that she had won a prize of EUR 20,000 from Schlank & Schick GmbH, established in Aachen (Germany). The payment was not made conditional upon ordering goods or placing a trial order. The parties disagree as to whether the applicant ordered goods. Since her request for payment by returning the 'prize claim certificate' attached to the letter failed, the applicant brought an action for the payment of the prize ostensibly promised.

bb) Main reasoning

Although the CJEU ruled in its previous case-law that the application of Article 13 of the Brussels Convention is limited to contracts which give rise to reciprocal and interdependent obligations between the parties, the scope of Article 15(1)(c) of Regulation No 44/2001 appears, by contrast, to be no longer being limited to those situations in which the parties have assumed reciprocal obligations.[200]

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199 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJEC* 2001 L12/1.

200 Case 180/06 *Renate Ilsinger* v *Martin Dreschers* [2009] ECR I-03961 (CJEU), paragraph 51.

However, in order to ensure, in accordance with recital 19 of the preamble to the Regulation, continuity in the interpretation of the two instruments, the case-law in *Gabriel*[201] and *Engler*[202] relating to Article 13 of the Brussels Convention must be transposed to Article 15 of Regulation 44/2001.[203] Consequently, the application of Article 15(1)(c) depends on whether the professional has assumed a legal obligation to pay the prize to the consumer. If this is not the case, such a situation would at most be liable to be classified as pre-contractual or quasi contractual and, where appropriate, be covered by Article 5(1) of the Regulation, if the consumer has not in fact placed an order with that professional vendor.[204]

cc) Integration in the case-law

Ilsinger gave the CJEU the opportunity to further develop its case-law relating to the question whether the claim for the fulfilment of a prize notification is covered by the jurisdiction over consumer contracts. In *Gabriel* the CJEU made clear that the rules on jurisdiction over consumer contracts under the Brussels Convention are applicable if the prize notification was intimately linked to an order for goods and such an order had in fact been placed.[205] In *Engler* the jurisdiction over consumer contracts under the Brussels Convention was not given because the prize notification was not made conditional upon ordering goods and, in fact, no order had been placed by that consumer.[206] Since Regulation 44/2001 intends to enhance the protection of the consumer interests compared to the Brussels Convention, the CJEU ruled in *Ilsinger*, contrary to its previous case-law, that Article 15 is not limited to cases in which the parties have assumed reciprocal obligations.[207] In this way, it is possible to ensure better protection for consumers with regard to new means of communication and the development of electronic commerce.[208] Unilateral consumer contracts are covered by Article 15 of the Regulation.[209]

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201 Case 96/00 *Rudolf Gabriel* [2002] ECR I-6367 (CJEU), paragraphs 48–60.

202 Case 27/02 *Petra Engler* v *Janus Versand GmbH* [2005] ECR I-00481 (CJEU), paragraphs 36–40.

203 Case 180/06, n 200 above, paragraph 58.

204 Case 180/06, n 200 above, paragraphs 54–59.

205 Case 180/06, n 200 above, paragraphs 42–44.

206 Case 180/06, n 200 above, paragraph 45.

207 Case 180/06, n 200 above, paragraph 51.

208 Case 180/06, n 200 above, paragraph 50.

209 Critical on the decision from the point of view of consumer protection, D. Beig and P.M. Reuß, 'Schlank & (nicht mehr ganz so schick) Schick III – Gewinnzusagen als Verbraucherverträge i.S. des Art. 15 Ic EuGVVO' (2009) 3 *Europäische Zeitschrift für Wirtschaftsrecht* 489; more positive, E.B. Crawford, case note (2009) *Revue européenne de droit de la consommation* 861.

Advocate-General Trstenjak proposed to assess the question whether an offer has been made from the standpoint of the offeree.[210]

b) Jurisdiction over claims for compensation of air passengers (case 204/08 *Rehder*)

aa) Facts

The German Bundesgerichtshof referred to the CJEU the question whether under the second indent of Article 5(1)(b) of Regulation 44/2001, in the case of intra-Community flights, the single place of performance for all contractual obligations must be the place of the main provision of services, determined according to economic criteria. If the answer is affirmative, it was questioned whether the single place of performance is determined by the place of departure or the place of arrival.

The applicant, who resides in Munich, booked a flight from Munich (Germany) to Vilnius (Lithuania) with Air Baltic, the registered office of which is in Riga. Following a flight cancellation, he arrived six hours after the scheduled time of arrival of the flight which he had initially booked. The passenger claimed compensation for the amount of EUR 250 in accordance with Articles 5(1)(c) and 7(1)(a) of Regulation 261/2004.

bb) Main reasoning

Firstly, the CJEU confirmed that transport contracts are to be regarded as service contracts within the meaning of the second indent of Article 5(1)(b) of Regulation 44/2001. Regarding the determination of the place of performance, the referring court pointed to its uncertainty regarding the applicability of the decision of the CJEU in *Color Drack*[211] to the dispute at hand. The CJEU explains that in this case the place of performance had to be determined for a purchase contract in which several places of delivery had been foreseen.[212] Following *Color Drack*,[213] in order to reinforce the objectives of unification of the rules of jurisdiction and predictability, also in a case where there are several places of delivery within a single

210 AG Trstenjak, opinion of 11 September 2008 – case 180/06, n 200 above, paragraph 51.

211 Case 386/05 *Color Drack GmbH* v *Lexx International Vertriebs GmbH* [2007] ECR I-3699 (CJEU).

212 Case 204/08 *Peter Rehder* v *Air Baltic Corporation* [2009] ECR I-06073 (CJEU), paragraphs 29, 30.

213 Case 386/05, n 211 above, paragraphs 36, 38.

Member State, only one court must have jurisdiction to hear all the claims arising out of the contract.[214] The factors in *Color Drack* are transferable to contracts for the provision of services, also if the provision of services is not effected in a single Member State.[215] In accordance with this, it is necessary to identify the place with the closest linking factor between the contract and the court having jurisdiction, in particular the place where the main provision of services is to be carried out.[216] A direct link to the object of the contract is only given at the place of departure and the place of arrival of the aircraft, which are determined in the air transport contract.[217] Since it is impossible to determine a place of the main provision of services on the basis of economic criterions, the applicant may choose between the place of departure and the place of arrival.[218] Such a choice granted to the applicant, apart from respecting the criterion of proximity, also satisfies the requirement of predictability.[219]

cc) Integration in the case-law

In the case of contracts for services the CJEU granted the applicant the right to choose between the possible courts having international and territorial jurisdiction, if a number of services are provided and none of these service can be qualified as the main provision of services on the basis of economic criterions. The decision reinforces the rights of air passengers without burdening air carriers in an unpredictable way. It is said that the risk of forum shopping can be regarded as low in cases of requests for compensation under Regulation 261/04.[220] Moreover, the decision of the CJEU is said to be in line with the aim to ensure a jurisdiction with a close link to the matters and proofs.[221] For cases, however, in which the contract for services is not an air transport contract, it is considered that the decision does not provide for a sufficient degree of legal certainty.[222]

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214 Case 204/08, n 212 above, paragraph 34.
215 Case 204/08, n 212 above, paragraph 36.
216 Case 204/08, n 212 above, paragraph 38.
217 Case 204/08, n 212 above, paragraph 41.
218 Case 204/08, n 212 above, paragraphs 42–44.
219 Case 204/08, n 212 above, paragraph 45.
220 D. Schnichels and U. Stege, 'Die Rechtsprechung des EuGH zur EuGVVO und zum EuGVÜ – Übersicht über die Jahre 2008 und 2009 – Teil B' (2010) *Europäische Zeitschrift für Wirtschaftsrecht* 846, 847.
221 S. Leible, 'Zuständiges Gericht für Entschädigungsansprüche von Flugpassagieren' (2009) *Europäische Zeitschrift für Wirtschaftsrecht* 571; see also, P. Delebecque, case note (2010) *Revue européenne de droit de la consommation* 345.
222 Leible, n 221 above, 571.

c) Directing of activities to the Member State of the consumer's domicile (joined cases 585/08 *Pammer* and 144/09 *Hotel Alpenhof*)

aa) Facts

The Austrian Oberster Gerichtshof referred to the CJEU in both cases the question whether the fact that a website, which presents the activity of the trader, can be consulted on the internet is sufficient for the finding that an activity is being 'directed' to the Member State of the consumer's domicile within the meaning of Article 15(1)(c) of Regulation 44/2001. In case 585/08 it had to be firstly clarified whether a 'voyage by freighter' constitutes package travel for the purposes of Article 15(3) of Regulation 44/2001.

In the case 585/08 the applicant, who resides in Austria, booked a voyage by freighter with Reederei Karl Schlüter GmbH & Co KG, a company which is established in Germany. The voyage was booked through Internationale Frachtschiffreisen Pfeiffer GmbH, an intermediary company which is established in Germany and offers its voyages on the Austrian market via a website. Since the description on the website did not correspond to the conditions on the vessel, the applicant refused to embark. The Reederei reimbursed only a part of that sum paid for the voyage.

In the case 144/09 the defendant, who resides in Germany, found out about the Hotel Alpenhof GesmbH, which is established in Austria, via the hotel's website. The enquiry about a room, the offer made by the hotel and the acceptance were effected by email. The email address of the hotel was given on the website. The defendant received the hotel services but then departed without paying the bill in full.

bb) Main reasoning

With regard to the first question in *Pammer*, the CJEU, referring to its ruling in *Club-Tour*[223] and Article(6)(4)(b) of Regulation 593/2008[224] read in conjunction with Article 2(1) of Directive 90/314,[225] stated that a contract concerning a voyage by freighter constitutes a contract of transport which provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation

223 Case 400/00 *Club-Tour, Viagens e Turismo SA* v *Alberto Carlos Lobo Gonçalves Garrido, and Club Med Viagens Ldª* [2002] ECR I-04051 (CJEU), paragraph 13.

224 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJEC* 2008 L177/6.

225 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *OJEC* 1990 L158/59.

44/2001.[226] With regard to the joint question of both cases, the CJEU first of all clarified that the fact that the website of the trader or the website of an intermediary can be consulted on the internet abroad is not sufficient for the finding that an activity is being 'directed' to the Member State of the consumer's domicile within the meaning of Article 15(1)(c) of Regulation 44/2001.[227] In order for Article 15(1)(c) of Regulation 44/2001 to be applicable, the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States.[228] The following matters are, inter alia, capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile:

> *'[...] the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.'*[229]

The mere mentioning of an email address or of other contact details or the use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established are insufficient.[230]

cc) Integration in the case-law

The CJEU had to decide for the first time when an undertaking directs its activities to the Member State of the consumer's domicile by operating a website. The Grand Chamber of the CJEU elaborated criterions which allow the conclusion that a trader has manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile. The criteria established by the CJEU, however, did meet in part fierce criticism.[231]

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226 Joined cases 585/08 and 144/09 *Peter Pammer* v *Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH* v *Oliver Heller* [2010] ECR I-12527 (CJEU), paragraph 46.

227 Joined cases 585/08 and 144/09, n 226 above, paragraphs 71–74.

228 Joined cases 585/08 and 144/09, n 226 above, paragraph 75.

229 Joined cases 585/08 and 144/09, n 226 above, paragraph 93.

230 Joined cases 585/08 and 144/09, n 226 above, paragraph 94.

231 J. Clausnitzer, 'Gerichtsstand bei Verbraucherverträgen via Internetangebot' (2011) *Europäische Zeitschrift für Wirtschaftsrecht* 104; A.H. Van Hoek, case note (2012) *European Review of*

d) Jurisdiction in the case of an unknown domicile of the defendant consumer (case 327/10 *Hypoteční banka*)

aa) Facts

In the reference for a preliminary ruling from the Czech Okresní soud v Chebu the CJEU determined whether the conditions for the applicability of Regulation 44/2001 are met if one of the parties to the court proceedings is a national of a Member State other than the one in which those proceedings are taking place. Furthermore, the CJEU answered the question whether Regulation 44/2001 precludes the use of provisions of national law which enable proceedings to be brought against persons of unknown address.

In the dispute at hand a German national and a Czech bank entered into a mortgage loan contract. At the time when the contract was concluded, the borrower was domiciled in the Czech Republic. The bank brought an action against the borrower to pay to it a certain amount by way of arrears on the mortgage loan before the 'court with general jurisdiction over the defendant'. The court stated that the defendant was not staying at the address indicated in the contract and that it was impossible to establish any other place of residence in the Czech Republic. In application of the Czech Rules of Civil Procedure, the court assigned a guardian *ad litem* to the defendant, who was considered to be a person whose domicile was unknown.

bb) Main reasoning

With reference to *Owusu*[232] the CJEU held that the application of Regulation 44/2001 requires the existence of an international element that may derive from the fact that the proceedings raise questions relating to the determination of international jurisdiction. Such a situation arises in a case, in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.[233] Regulation 44/2001 does not contain a provision which defines jurisdiction in a case where the domicile of the defendant is unknown.[234] Under Article 16(2) of the Regulation, consumer contract

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Contract Law 93; see also E. Alvarez Armas and M. Dechamps, case note (2011) *Revue européenne de droit de la consommation* 447.

232 Case 281/02 *Andrew Owusu* v *N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-1383 (CJEU), paragraph 26.

233 Case 327/10 *Hypoteční banka a s* v *Udo Mike Lindner* [2011] ECR I-11543 (CJEU), paragraphs 32–35.

234 Case 327/10, n 233 above, paragraph 38.

proceedings may be brought only in the courts of the Member State in which the consumer is domiciled.[235] Thus, firstly, the national court must determine whether the defendant is domiciled in the Member State of that court by applying that Member State's own law (Article 59(1) of Regulation 44/2001).[236] If this is to be answered in the negative, it must examine whether the consumer is domiciled in another Member State by applying the national law of the other Member State (Article 59(2) of Regulation 44/2001).[237] If this is neither the case, it has to be ascertained whether there is evidence to support the conclusion that the defendant is in fact domiciled outside the European Union, so that Article 4 of Regulation 44/2001 is applicable. If this is also not the case, the national court may consider the consumer's last known domicile.[238] The criterion of the consumer's last known domicile 'ensures a fair balance between the rights of the applicant and those of the defendant precisely in a case such as that in the main proceedings, in which the defendant was under an obligation to inform the other party to the contract of any change of address occurring after the long-term mortgage loan contract had been signed'.[239] With reference to *Gambazzi*[240] the CJEU held that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions corresponding to the objectives of public interest as avoiding situations of denial of justice.[241] In order to ensure the rights of the defence, Article 26(2) of Regulation 44/2001 requires that a court having jurisdiction 'may reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests.'[242] The court seised of the matter must be satisfied that all investigations required by the principle of good faith have been undertaken with diligence in order to trace the defendant.[243] The restriction of the defendant's rights of defence by the notification of the action being served on a guardian *ad litem* is justified in the light of an applicant's right to effective protection.[244]

235 Case 327/10, n 233 above, paragraph 39.
236 Case 327/10, n 233 above, paragraph 40.
237 Case 327/10, n 233 above, paragraph 41.
238 Case 327/10, n 233 above, paragraph 42.
239 Case 327/10, n 233 above, paragraph 46.
240 Case 394/07 *Marco Gambazzi* v *DaimlerChrysler Canada Inc and CIBC Mellon Trust Company* [2009] ECR I-2563, paragraphs 29–33.
241 Case 327/10, n 233 above, paragraphs 50, 51.
242 Case 327/10, n 233 above, paragraph 52.
243 Case 327/10, n 233 above, paragraph 52.
244 Case 327/10, n 233 above, paragraph 53.

cc) Integration in the case-law

In line with the opinion of Advocate-General Trstenjak, the CJEU answered in the affirmative the applicability of the Regulation 44/2001 in cases in which the defendant is a national of another Member State. As pointed out by Advocate-General Trstenjak, although the Regulation takes no account of nationality, a distinction must be drawn between the question of applicability of the Regulation and the question of the jurisdiction of the courts.[245] However, contrary to Advocate-General Trstenjak, the CJEU sees no reason to answer the fourth question of the national court, whether the international jurisdiction for the purposes of Article 17(3) of Regulation 44/2001 can be established by an agreement on the territorial jurisdiction. The Advocate-General explained that agreements on international jurisdiction can arise implicitly from agreements on territorial jurisdiction where this is consistent with the intention of the parties.[246] Only in so far as the referring court is unable to base its jurisdiction on an agreement on international jurisdiction, it will have to have regard for the requirements of Article 16(2) of Regulation 44/2001.[247] In this context the Advocate-General also explained that the non-binding nature of an agreement on local jurisdiction by reason of unfairness within the meaning of Articles 3(1) and 6 of Directive 93/13[248] can affect the validity of such an agreement on international jurisdiction only where this is the intention of the parties.[249]

e) No requirement of a distance contract for the application of Article 15(1)(c) Regulation 44/2001 (case 190/11 *Mühlleitner*)

aa) Facts

The Austrian Oberster Gerichtshof asked the CJEU whether the application of Article 15(1)(c) of Regulation 44/2001 requires that a distance contract has been concluded between the consumer and the undertaking.

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245 Case 327/10, n 233 above, paragraph 31; AG Trstenjak, opinion of 8 September 2011 – case 327/10, n 233 above, paragraph 65; consenting D. Schnichels and U. Stege, 'Die Entwicklung des europäischen Zivilprozessrechts im Bereich der EuGVVO im Jahr 2011' (2012) *Europäische Zeitschrift für Wirtschaftsrecht* 812, 816.

246 AG Trstenjak, n 245 above, paragraph 111.

247 AG Trstenjak, n 245 above, paragraph 113.

248 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEC* 1993 L95/29.

249 AG Trstenjak, n 245 above, paragraph 112.

The consumer, who resides in Austria, purchased a motor vehicle from Autohaus Yusufi, a motor vehicle retail business established in Hamburg (Germany). The consumer found the offer on a German search platform in the internet. The consumer went to Hamburg in order to sign the purchase contract and to take possession of the vehicle. On her return to Austria she discovered that the vehicle was defective. When the defendants refused to repair the vehicle, the consumer brought proceedings before the Austrian court for rescission of the purchase contract.

bb) Main reasoning

In accordance with Advocate-General Cruz Villalón the CJEU determines that Article 15(1)(c) of Regulation 44/2001 does not require that the contract between the consumer and the undertaking has been concluded at a distance. The CJEU referred to the wording of the provision which does not presuppose a contract concluded at a distance but that the trader pursues commercial or professional activities in the Member State of the consumer's domicile or directs such activities to that Member State and that the contract at issue falls within the scope of its activities.[250] While Article 13 of the Brussels Convention required that the consumer must have taken the necessary steps in the State of its domicile, Article 15(1)(c) of Regulation 44/2001 is limited to conditions applicable to the trader alone.[251] The CJEU emphasised further that the additional requirement of the conclusion of the contract at a distance would, regarding a teleological interpretation, run counter to the objective of that provision to ensure the protection of consumers as the weaker parties to the contract.[252] The referring court brought up the question whether it can be inferred from paragraphs 86 and 87 of the judgment *Pammer* and *Hotel Alpenhof* that Article 15(1)(c) of Regulation 44/2001 is applicable only to consumer contracts which have been concluded at a distance. The CJEU clarifies that the Court in the paragraphs at issue merely dismissed the arguments of Hotel Alpenhof GesmbH that the contract had not been concluded at a distance because, on the facts, the hotel room had been reserved and the reservation confirmed at a distance.[253] The significance of the paragraphs at issue cannot be extended beyond the particular circumstances of that case. The essential condition for the application of Article 15(1)(c) is that relating to a commercial or

250 Case 190/11 *Daniela Mühlleitner* v *Ahmad Yusufi and Wadat Yusufi* 6 September 2012 (CJEU), paragraphs 35, 36.

251 Case 190/11, n 250 above, paragraphs 37–39.

252 Case 190/11, n 250 above, paragraph 42.

253 Case 190/11, n 250 above, paragraph 43.

professional activity directed to the State of the consumer's domicile. In that respect, 'both the establishment of contact at a distance, as in the present case, and the reservation of goods or services at a distance, or *a fortiori* the conclusion of a consumer contract at a distance, are indications that the contract is connected with such an activity.'[254]

cc) Integration in the case-law

There had been no consensus in the German case-law and literature on the question whether Article 15(1)(c) of Regulation 44/2001 requires the conclusion of a contract at a distance or not.[255] As already proposed by Advocate-General Trstenjak in *Pammer* and *Alpenhof*, the CJEU now clarified that a contract concluded at a distance was not required.[256] It is said that the decision of the CJEU protects the active consumer who travels to another Member State to purchase a good or to obtain a service.[257]

f) Clarification of the concepts 'consumer' in Article 15(1) and 'matters relating to a contract' in Article 5(1)(a) of Regulation 44/2001 (case 419/11 *Česká spořitelna*)

aa) Facts

The Czech Městský soud v Praze asked the CJEU about the application of Articles 15(1) and 5(1)(a) of Regulation 44/2001 in the case of judicial proceedings by which the payee of a promissory note brings claims under that note, which was incomplete at the date of its signature and was subsequently completed by the payee, against the giver of a guarantee, domiciled in another Member State.

The managing director of the entity Feichter-CZ s r o ('the Borrower') assumed as an individual with the mention 'per aval' a guarantee for a promissory note which was supposed to serve as guarantee for an overdraft agreement with the Česká spořitelna ('the Lender'). At the date of the signature the promissory note

254 Case 190/11, n 250 above, paragraph 44.

255 B. Sujecki,case note (2012) *Europäische Zeitschrift für Wirtschaftsrecht* 917, 919, 920, with further references.

256 AG Trstenjak, opinion of 18 May 2010 – joined cases 585/08 and 144/09, n 226 above, paragraph 55.

257 M. Brkan, case note (2013) *Revue européenne de droit de la consommation* 113, 120; see also A. Staudinger and B. Steinrötter, 'Kein Erfordernis eines Fernabsatzvertrags bei Verbrauchergerichtsstand' (2012) *Neue Juristische Wochenschrift* 3227.

was not issued in completed form, but was, as agreed upon, completed later. The note was presented at the due date at the place of payment but was not paid. Consequently, the lender brought proceedings against the managing director before the Prague Municipal Court. The managing director entered the objection that the court did not have jurisdiction, given that he is resident in Austria.

bb) Main reasoning

The CJEU explained that the application of Article 15(1) of Regulation 44/2001 presupposes that a party to a contract is a consumer and that the contract falls within one of the categories referred to in Article 15(1)(a) to (c).[258] With regard to the first condition, the CJEU established that the definition of the concept of consumer within Regulation 44/2001 has the same scope as in Article 13 of the Brussels Convention.[259] As pointed out in *Gruber*[260] and *Benincasa*[261] only contracts 'concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption' are covered.[262] With reference to the opinion of Advocate-General Sharpston, the CJEU points out that this condition is not met, since the guarantee of a natural person, given on a promissory note issued in order to guarantee the obligations of a commercial company, cannot be regarded as having been given outside of any trade or professional activity if that individual has close professional or commercial links with that company, such as being its managing director or majority shareholder.[263] Under the circumstances of the case the giver of the guarantee cannot be regarded as a consumer within the meaning of Article 15(1) of Regulation 44/2001.[264] With reference to its case-law relating to Article 5(1)(1) of the Brussels Convention, the CJEU answered the question whether the legal relationship between the payee of a promissory note and the giver of a guarantee falls within the concept of 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation 44/2001.[265] By analogy with *Engler*,[266] the establishment of a legal obligation freely consented to by one person

258 Case 419/11 *Česká spořitelna a s* v *Gerald Feichter* 14 March 2013 (CJEU), paragraph 30.
259 Case 419/11, n 258 above, paragraph 31.
260 Case 464/01 *Johann Gruber* v *BayWa AG* [2005] ECR I-439 (CJEU), paragraph 36.
261 Case 269/95 *Francesco Benincasa* v *Dentalkit Sr* [1997] ECR I-3767 (CJEU), paragraph 17.
262 Case 419/11, n 258 above, paragraph 34.
263 Case 419/11, n 258 above, paragraph 37; AG Sharpston, opinion of 20 September 2012 – case 419/11, n 258 above, paragraph 33.
264 Case 419/11, n 258 above, paragraph 38.
265 Case 419/11, n 258 above, paragraphs 42–44.
266 Case 27/02, n 202 above, paragraph 51.

towards another and on which the action at issue is based is required.[267] With reference to the opinion of Advocate-General Sharpston, the CJEU ruled that the condition is satisfied since the giver of the guarantee, by signing the promissory note on its face under the indication 'per aval', voluntarily consented to act as the guarantor of the obligations of the maker of that promissory note.[268] The fact that that signature was made on a blank promissory note is not relevant since the giver of the guarantee also signed the agreement on the right to complete the note.[269] With regard to the concept of the 'place of performance of the obligation' within the meaning of Article 5(1)(a) of the Regulation, the CJEU ruled that the place of performance of the obligation which was expressly indicated on the promissory note has to be taken into account by the referring court, in so far as the applicable law permits that choice of the place of performance of the obligation.[270]

cc) Integration in the case-law

Advocate-General Sharpston pointed out that the facts in the case at hand are a 'perfect example' of a guarantee obligation that is not covered by the provisions relating to consumers of the Regulation.[271] It cannot be assumed that the giver of the guarantee is economically weaker and less experienced in legal matters than its co-contractor.[272] The Advocate-General explained that even though the giver of the guarantee is not a contracting party, the giving of the guarantee under the promissory note still represents a legal obligation. The giver of the guarantee is bound in the same manner as the borrower.[273] Given that Article 5(1)(a) of the Regulation 44/2001 must be interpreted independently, the Czech law, which classifies a bill of exchange as an abstract security which does not have the character of a contract, does not affect the position.[274] The Czech court, in particular, raised the issue whether the fact that the promissory note was blank when issued and subsequently completed by the lender has any effect on the position, since the possibility is given that the place of payment was inserted in breach of the terms of the Supplemental Agreement or that that agreement was

267 Case 419/11, n 258 above, paragraph 47.
268 Case 419/11, n 258 above, paragraph 48; AG Sharpston, n 263 above, paragraph 45.
269 Case 419/11, n 258 above, paragraph 49.
270 Case 419/11, n 258 above, paragraphs 55–57.
271 AG Sharpston, n 263 above, paragraph 37.
272 AG Sharpston, n 263 above, paragraphs 38, 39.
273 AG Sharpston, n 263 above, paragraph 44.
274 AG Sharpston, n 263 above, paragraph 47.

void for uncertainty or on other grounds.[275] The CJEU ruled that the place of performance had to be established taking into account only the information on the promissory note. Even though there was no dispute as to the place of performance, Advocate-General Sharpston explained for the contrary case that the national court should first consider the defendant's objection in that regard and, if that objection is well founded, it should decline jurisdiction, unless there are other substantiated grounds on which it might proceed to determine the case. Next it should consider the ground on which the applicant bases his claim of jurisdiction and, if that ground is unfounded, decline its jurisdiction. If the true position is more difficult to ascertain, the court should accept jurisdiction when the applicant has made out a prima facie case as regards the applicability of the relevant provision of the Regulation.[276]

g) Requirement of a causal link between the directing of the commercial activity and the conclusion of the contract (case 218/12 *Emrek*)

aa) Facts

The German Landgericht Saarbrücken referred to the CJEU the question whether Article 15(1)(c) of the Regulation 44/2001 requires, as a 'further unwritten condition', that there is a causal link between the commercial activity 'directed' to the Member State in which the consumer is domiciled and the decision of the consumer for the conclusion of the contract.

In the dispute at hand, the consumer, who resides in Germany, concluded a purchase contract for a second-hand motor vehicle with a trader at the latter's business premises in France. The consumer learned from acquaintances, and not from its Internet site, of the business of the trader. The consumer brought an action before the German Amtsgericht Saarbrücken making claims under the warranty. The Amtsgericht dismissed the claim as inadmissible holding that it had no international jurisdiction. The defendant had not directed its professional activity to the Member State in which the consumer is domiciled, which is Germany. The consumer appealed. The German Landgericht Saarbrücken referred to the case-law of the CJEU in *Pammer* and *Hotel Alpenhof* and affirmed the existence of the condition of a commercial activity of the defendant directed to Germany. In particular, the mention of the French international dialling code and in addition of a German mobile telephone number gives the impression that

275 AG Sharpston, n 263 above, paragraph 51.

276 AG Sharpston, n 263 above, paragraph 57.

consumers residing in Germany shall be canvassed as clients. However, the CJEU did not take any position relating to the requirement of a causal link between the directing of the activity of the trader and the conclusion of the contract with the consumer. In the view of the German Bundesgerichtshof, the condition that the commercial activity is 'directed' to the Member State in which the consumer is domiciled requires that the consumer was at least induced to enter into the contract by the website, even if the conclusion of the contract itself did not take place in the Member State of the consumer's domicile.

bb) Main reasoning

The CJEU pointed out that the requirement of a causal link cannot be derived from the wording of Article 15(1)(c) of the Regulation 44/2001 nor from a teleological interpretation of the provision in view of the aim of protecting consumers.[277] In particular, 'difficulties related to proof of the existence of a causal link between the means used to direct the activity, that is an Internet site, and the conclusion of a contract, would tend to dissuade consumers from bringing actions before the national courts under Articles 15 and 16 of Regulation No 44/2001 and would weaken the protection of consumers which those provisions seek to achieve.'[278] This is particularly the case if the contract was not concluded at a distance through the site. However, a causal link may constitute strong evidence in the assessment of whether the activity is in fact directed to the Member State in which the consumer is domiciled.[279] The situation of a trader established in one Member State close to the border of another Member State, in an urban area extending on both sides of the border, who uses a telephone number allocated by the other Member State, may constitute evidence that his activity is 'directed to' that other Member State. The final assessment of the circumstances is left to the referring court.[280]

cc) Integration in the case-law

The preliminary reference of the German Landgericht Saarbrücken gave the CJEU the opportunity to answer the question whether a causal link between the directing of the commercial activity and the conclusion of the contract is

277 Case 218/12 *Lokman Emrek* v *Vlado Sabranovic* 17 October 2013 (CJEU), paragraphs 22, 24.
278 Case 218/12, n 277 above, paragraph 25.
279 Case 218/12, n 277 above, paragraph 26.
280 Case 218/12, n 277 above, paragraphs 30, 31.

required, which has been subject to discussions since its decision in *Mühlleitner*.[281]

h) Concept of 'the other party to a contract' laid down in Article 16(1) of Regulation No 44/2001 (case 478/12 *Maletic*)

aa) Facts

The Austrian Landesgericht Feldkirch asked whether the concept of 'the other party to a contract' laid down in Article 16(1) of Regulation No 44/2001 covers the contracting partner (here, a travel agent having its seat abroad) of the travel operator with which the consumer concluded that contract, which has its registered office in the Member State in which the consumer is domiciled.

In the dispute, the Maletics domiciled in Bludesch (Austria) booked a package holiday on the website of a travel agent established in Munich (Germany), while the trip was to be operated by an Austrian company having its registered office in Vienna (Austria). Because of a booking mistake, the consumers had to pay a surcharge upon arrival at the hotel. In order to recover the surcharge paid and to be compensated for the inconvenience, they initiated an action before the Bezirksgericht Bludenz seeking payment from the travel agent and the operator. The national court dismissed the action in as far as it was brought against the operator on the ground that it lacked local jurisdiction. It held that Regulation No 44/2001 was not applicable and that according to domestic law, the courts in Vienna have jurisdiction.

281 P. Mankowski, 'Verbrauchergerichtsstand auch ohne Kausalität zwischen Ausrichten der unternehmerischen Tätigkeit auf den Mitgliedstaat des Verbrauchers und dem Vertragsschluss ("Emrek")' (2013) *Entscheidungen zum Wirtschaftsrecht* 717; T. Schultheiß, 'EuGVVO: Kein Kausalzusammenhang zwischen Ausrichten der gewerblichen Tätigkeit auf Verbrauchermitgliedstaat und Vertragsschluss' (2013) *Europäische Zeitschrift für Wirtschaftsrecht* 945; H. Ofner, 'Verbrauchergerichtsstand – neue Entscheidung des EuGH' (2013) *Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung* 241; G. Rühl, 'Kausalität zwischen ausgerichteter Tätigkeit und Vertragsschluss: Neues zum situativen Anwendungsbereich der Art. 15 ff. EuGVVO' (2014) *Praxis des internationalen Privat- und Verfahrensrechts* 41; S. Keiler and K. Binder, 'Der EuGH lässt ausrichten: kein Zusammenhang von Ursache und Wirkung beim Verbrauchergerichtsstand – zugleich eine Besprechung der Rs C-218/12 (Emrek)' (2013) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 230.

bb) Main reasoning

The CJEU held that the concept of 'other party to the contract' laid down in Article 16(1) of Regulation No 44/2001 covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled. In line with the objectives of Regulation 44/2001 to protect the consumer and to avoid concurrent proceedings, the second contractual relationship with the travel operator cannot be classified as 'purely' domestic since it was inseparably linked to the first contractual relationship which was made through the travel agency situated in another Member State.[282] Indeed, 'those objectives preclude a solution which allows the Maletics to pursue parallel proceedings in Bludenz and Vienna, by way of connected actions against two operators involved in the booking and the arrangements for the package holiday.'[283]

cc) Integration in the case-law

The judgment of the CJEU aims for a high level of consumer protection. However, the reasoning of the Court is subject to criticism. In particular, the question remains open whether the outcome would be different in case the consumer decides to bring an action only against the operator and not the travel agent or when the travel agent is situated in a third country. Also, it is uncertain on what basis the relationship between the consumer and the travel agent can be classified as contractual.[284]

282 Case 478/12 *Marianne Maletic* v *lastminute.com GmbH, TUI Österreich GmbH* 14 November 2013 (CJEU), paragraph 29.

283 Case 478/12, n 282 above, paragraph 31.

284 M. Müller, 'EuGVVO: Begriff des anderen Vertragspartners beim Verbrauchergerichtsstand' (2014) *Europäische Zeitschrift für Wirtschaftsrecht* 34; B. Sujecki, 'Begriff des anderen Vertragspartners beim Verbrauchergerichtsstand nach der EuGVVO' (2014) *Neue Juristische Wochenschrift* 531; A. Staudinger, 'Der Schutzgerichtsstand im Sinne des Art. 15 Abs. 1 lit. c Brüssel-VO bei Klagen gegen Reiseveranstalter und Vermittler' (2014) *Reise-Recht aktuell Zeitschrift für das Tourismusrecht* 10.

2 Alternative dispute settlement (case 317/08 *Alassini*)

a) Compatibility of a mandatory settlement procedure with the principle of effective judicial protection (case 317/08 *Alassini*)

aa) Facts

In the reference for a preliminary ruling of the Italian Giudice di pace di Ischia the CJEU answered the question whether Article 34 of the Directive 2002/22/EC[285] and the principle of effective judicial protection preclude national legislation under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers is conditional upon an attempt to settle the dispute out of court.

In the dispute the applicants claimed compensation from their providers of telecommunications services for damages they allegedly suffered as a result of a breach of their telephone contracts. The telephone companies claimed that the actions are inadmissible since the applicants did not first attempt a mandatory out-of-court settlement of the dispute.

bb) Main reasoning

The CJEU ruled that Article 34 of the Universal Service Directive does not preclude national legislation under which the admissibility before the courts of actions relating to consumer contracts is conditional upon an attempt to settle the dispute out of court. The procedures referred to by the Universal Service Directive for dealing with disputes must not merely involve an attempt to bring the parties together to convince them to find a solution by common consent, but must lead to the settling of the dispute through the active intervention of a third party who proposes or imposes a solution.[286] In accordance with recital 47 in the preamble to the Directive, when making available the procedures referred to in that Directive for dealing with disputes, Member States should take due account of Recommendation 98/257.[287, 288] Since neither Article 34 of the Directive nor the Recommendation 98/257 make more detailed provision as regards the precise content or

285 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive), *OJEC* 2002 L108/51.

286 Case 317/08, n 153 above, paragraph 35.

287 Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, *OJEC* 1998 L115/31.

288 Joined cases 317–320/08, n 153 above, paragraphs 33, 39.

the nature of the out-of-court procedures, it is for the Member States to define the nature of those procedures.[289] The CJEU emphasised that national legislation, which ensures that out-of-court procedures are systematically used for settling disputes, does not compromise but rather strengthens the effectiveness of the Universal Service Directive.[290]

Under the principle of effectiveness, the mandatory settlement procedure at issue is not such as to make it in practice impossible or excessively difficult to exercise the rights which individuals derive from the Universal Service Directive.[291] The following aspects are decisive: (1) The outcome of the settlement procedure is not binding on the parties concerned and thus does not prejudice their right to bring legal proceedings;[292] (2) There is no substantial delay for the purposes of bringing legal proceedings since the parties may bring legal proceedings after the expiry of a 30-day time-limit;[293] (3) For the duration of the settlement procedure, the period for the time-barring of claims is suspended;[294] (4) There are no significant fees for the settlement procedure;[295] (5) In order to not render the exercise of rights in practice impossible or excessively difficult for certain individuals, in particular, those without access to the Internet, the access to the settlement procedure cannot be possible only by electronic means;[296] (6) In exceptional cases it must be possible to adopt interim measures.[297]

The mandatory attempt of a settlement introduces an additional step for access to the courts, which might prejudice the principle of effective judicial protection, in particular Article 47 of the Charter of Fundamental Rights.[298] Under the above mentioned aspects the imposition of an out-of-court settlement procedure is not disproportionate in relation to the pursued objectives of a quicker and less expensive settlement of disputes and a lightening of the burden on the court system.[299] As pointed out by Advocate-General Kokott, the introduction of an out-

289 Joined cases 317–320/08, n 153 above, paragraph 44.
290 Joined cases 317–320/08, n 153 above, paragraph 45.
291 Joined cases 317–320/08, n 153 above, paragraph 53.
292 Joined cases 317–320/08, n 153 above, paragraph 54.
293 Joined cases 317–320/08, n 153 above, paragraph 55.
294 Joined cases 317–320/08, n 153 above, paragraph 56.
295 Joined cases 317–320/08, n 153 above, paragraph 57.
296 Joined cases 317–320/08, n 153 above, paragraph 58.
297 Joined cases 317–320/08, n 153 above, paragraph 59.
298 Joined cases 317–320/08, n 153 above, paragraph 62.
299 Joined cases 317–320/08, n 153 above, paragraphs 64–65.

of-court settlement procedure which is merely optional is not as efficient as a mandatory one.[300]

cc) Integration in the case-law

It is considered that *Alassini* implies a significant upgrading of the out-of-court settlement procedures within the EU.[301] The CJEU has assigned the seven minimum requirements in the Recommendation 98/257/EC (impartiality, transparency, adversarial principle, efficiency, principle of legality, principle of liberty, principle of representation) a 'quasi binding character' for mandatory settlement procedures.[302] The decision has effects for all sector-specific legislation which provide for the promotion and implementation of settlement procedures by the Member States.[303] In view of the fragmented stock of EU-law provisions at the moment of the *Alassini*-decision, comprehensive 'horizontal' legislation was to be welcomed.[304] Regulation 524/2013[305] on online dispute resolution for consumer disputes and Directive 2013/11/EU[306] on alternative dispute resolution for consumer disputes have been published in the Official Journal on 18 June 2013. Both legislative instruments establish a completely new level of enforcement with an unclear scope. Directive 2013/11/EU classifies the previous non-binding Recommendation 98/257 with its quasi binding character after *Alassini* as definitively binding.

300 Joined cases 317–320/08, n 153 above, paragraph 65; AG Kokott, opinion of 19 November 2009 – case 317/08, n 153 above, paragraph 47.

301 N. Reich, *Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht* (Baden-Baden: Nomos, 2012).

302 H.-W. Micklitz, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts? Gutachten A zum 69. Juristentag* (Munich: C H Beck, 2012) A 94.

303 As, inter alia, in the Energy Directives 2009/72–73/EC (art 3(13) and art 3(9)), Telecommunication Directive 2009/134/EC (art 34), Postal Services Directive 2008/6/EC (art 19(6)) and in all financial service areas, as eg in the MIFID-Directive 2004/39 (art 53(1)).

304 Reich, n 301 above.

305 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, *OJEC* 2013 L165/1.

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

VI Overview in tabular form

1 Decisions of 2008

Date	Case	Parties	Subject	Source
10 July 2008	C-173/07	Emirates Airlines – Direktion für Deutschland v Diether Schenkel	Reg 261/2004	[2008] ECR I-5237
16 December 2008	C-205/07	Lodewijk Gysbrechts and Santurel Inter BVBA	Dir 97/7/EC; Art 34–36 TFEU	[2008] ECR I-9947
22 December 2008	C-549/07	Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA	Reg 261/2004	[2008] ECR I-11061

2 Decisions of 2009

Date	Case	Parties	Subject	Source
23 April 2009	C-509/07	Luigi Scarpelli v NEOS Banca SpA	Dir 87/102/EEC	[2009] ECR I-3311
14 May 2009	C-180/06	Renate Ilsinger v Martin Dreschers	Reg 44/2001	[2009] ECR I-3961
4 June 2009	C-243/08	Pannon GSM Zrt v Erzsébet Sustikné Győrfi	Dir 93/13/EEC	[2009] ECR I-4713
9 July 2009	C-204/08	Peter Rehder v Air Baltic Corporation	Reg 44/2001	[2009] ECR I-6073
3 September 2009	C-489/07	Pia Messner v Firma Stefan Krüger	Dir 97/7/EC	[2009] ECR I-7315
6 October 2009	C-40/08	Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira	Dir 93/13/EEC	[2009] ECR I-9579
22 October 2009	C-301/08	Irène Bogiatzi, married name Ventouras v Deutscher Luftpool and Others	Reg 2027/97; Warsaw Convention	[2009] ECR I-10185
19 November 2009	Joined C-402/07 and C-432/07	Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA	Reg 261/2004	[2009] ECR I-10923

17 December 2009	C-227/08	Eva Martín Martín v EDP Editores SL	Dir 85/577/EEC	[2009] ECR I-11939

3 Decisions of 2010

Date	Case	Parties	Subject	Source
18 March 2010	Joined C-317–320/08	Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA	Dir 2002/22/EC	[2010] ECR I-2213
15 April 2010	C-215/08	E. Friz GmbH v Carsten von der Heyden	Dir 85/577/EEC	[2010] ECR I-2947
15 April 2010	C-511/08	Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV	Dir 97/7/EC	[2010] ECR I-3047
6 May 2010	C-63/09	Axel Walz v Clickair SA	Montreal Convention	[2010] ECR I-4239
3 June 2010	C-484/08	Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)	Dir 93/13/EEC	[2010] ECR I-4785
9 November 2010	C-137/08	VB Pénzügyi Lízing Zrt v Ferenc Schneider	Dir 93/13/EEC	[2010] ECR I-10847
7 December 2010	Joined C-585/08 and C-144/09	Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller	Reg 44/2001	[2010] ECR I-12527

4 Decisions of 2011

Date	Case	Parties	Subject	Source
1 March 2011	C-236/09	Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres	Dir 2004/113/EC	[2011] ECR I-773
12 May 2011	C-294/10	Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija	Reg 261/2004	[2011] ECR I-3983
16 June 2011	Joined C-65/09 and C-87/09	Gebr Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH	Dir 1999/44/EC	[2011] ECR I-5257
13 October 2011	C-83/10	Aurora Sousa Rodríguez and Others v Air France SA	Reg 261/2004	[2011] ECR I-9469
17 November 2011	C-327/10	Hypoteční banka a s v Udo Mike Lindner	Reg 44/2001	[2011] ECR I-11543

5 Decisions of 2012

Date	Case	Parties	Subject	Source
16 February 2012	C-134/11	Jürgen Blödel-Pawlik v HanseMerkur Reiseversicherung AG	Dir 90/314/EEC	nyr
1 March 2012	C-166/11	Ángel Lorenzo González Alonso v Nationale Nederlanden Vida Cía de Seguros y Reaseguros, SAE	Dir 85/577/EEC	nyr
15 March 2012	C-453/10	Jana Pereničová and Vladislav Perenič v SOS financ spol s r o	Dir 93/13/EEC; Dir 2005/29/EC	nyr
26 April 2012	C-472/10	Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt	Dir 93/13/EEC	nyr
14 June 2012	C-618/10	Banco Español de Crédito SA v Joaquín Calderón Camino	Dir 93/13/EEC	nyr

5 July 2012	C-49/11	Content Service Ltd v Bundesarbeitskammer	Dir 97/7/EC	nyr
12 July 2012	C-602/10	SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor – Comisariatul Judeţean pentru Protecţia Consumatorilor Călăraşi (CJPC)	Dir 2008/48/EC	nyr
19 July 2012	C-112/11	ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV	Reg 1008/2008	nyr
6 September 2012	C-190/11	Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi	Reg 44/2001	nyr
4 October 2012	C-22/11	Finnair Oyj v Timy Lassooy	Reg 261/2004	nyr
4 October 2012	C-321/11	Germán Rodríguez Cachafeiro and María de los Reyes Martínez-Reboredo Varela-Villamor v Iberia, Líneas Aéreas de España SA	Reg 261/2004	nyr
23 October 2012	Joined C-581/10 and C-629/10	Emeka Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority	Reg 261/2004	nyr
22 November 2012	C-139/11	Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV	Reg 261/2004	nyr

6 Decisions of 2013

Date	Case	Parties	Subject	Source
31 January 2013	C-12/11	Denise McDonagh v Ryanair Ltd	Reg 261/2004	nyr
31 January 2013	C-394/11	Valeri Hariev Belov v ChEZ Elektro Balgaria AD and Others	Dir 2000/43/EC	nyr

21 February 2013	C-472/11	Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai	Dir 93/13/ EEC	nyr
26 February 2013	C-11/11	Air France v Heinz-Gerke Folkerts and Luz-Tereza Folkerts	Reg 261/ 2004	nyr
7 March 2013	C-577/11	DKV Belgium v Association belge des consommateurs Test-Achats ASBL	Dir 92/49/ EEC	nyr
14 March 2013	C-415/11	Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)	Dir 93/13/ EEC	nyr
14 March 2013	C-419/11	Česká spořitelna a s v Gerald Feichter	Reg 44/2001	nyr
21 March 2013	C-92/11	RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV	Dir 93/13/ EEC	nyr
30 May 2013	C-488/ 11	Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV	Dir 93/13/ EEC	nyr
30 May 2013	C-397/11	Erika Jőrös v Aegon Magyarország Hitel Zrt	Dir 93/13/ EEC	nyr
3 October 2013	C-32/12	Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA	Dir 99/44/EC	nyr
17 October 2013	C-218/12	Lokman Emrek v Vlado Sabranovic	Dir 99/44/EC	nyr
7 November 2013	C-442/ 12	Jan Sneller v DAS Nederlandse Rechtsbijstand Verzekerings-maatschappij NV	Dir 87/344/ EEC	nyr
14 November 2013	C-478/ 12	Armin Maletic and Marianne Maletic v lastminute.com Gmbh and TUI Österreich GmbH	Reg 44/2001	nyr
5 December 2013	C-413/12	Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL	Dir 93/13/ EEC	nyr

7 Cases in which the Opinion of the Advocate-General is available

Date	Case	Parties	Subject	Source
21 November 2013	C-482/12	Peter Macinský, Eva Macinská v Getfin s r o, Financreal s r o	Dir 93/13/EEC	nyr
12 December 2013	C-470/12	Pohotovosť s r o v Miroslav Vašuta	Dir 93/13/EEC	nyr