

**Court of Justice EU, 7 December 2010, Pammer & Hotel Alpenhof**



**PRIVATE INTERNATIONAL LAW**

**“Directing” activity on website to Member State**

• In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be ‘directing’ its activity to the Member State of the consumer’s domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader’s overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer’s domicile, in the sense that it was minded to conclude a contract with them.

• The following matters, the list of which is not exhaustive, are 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, namely

- 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.

It is for the national courts to ascertain whether such evidence exists.

• On the other hand, the mere accessibility of the trader’s or the intermediary’s website in the Member State in which the consumer is domiciled is insufficient.

• The same is true of mention of an email address and of other contact details, or of 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.

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**Court of Justice EU, 7 December 2010**

(V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann and J.-J. Kasel, Presidents of Chambers, and A. Rosas, R. Silva de Lapuerta, P. Lindh (Rapporteur) and M. Safjan)

JUDGMENT OF THE COURT (Grand Chamber)

7 December 2010 (\*)

(Jurisdiction in civil and commercial matters – Regulation (EC) No 44/2001 – Article 15(1)(c) and (3) – Jurisdiction over consumer contracts – Contract for a voyage by freighter – Concept of ‘package travel’ – Contract for a hotel stay – Presentation of the voyage and the hotel on a website – Concept of activity ‘directed to’ the Member State of the consumer’s domicile – Criteria – Accessibility of the website)

In Joined Cases C-585/08 and C-144/09,

REFERENCES for a preliminary ruling under Articles 68 and 234 EC from the Oberster Gerichtshof (Austria), made by decisions of 6 November 2008 and 26 March 2009, received at the Court on 24 December 2008 and 24 April 2009 respectively, in the proceedings

Peter Pammer

v

Reederei Karl Schlüter GmbH & Co KG (C-585/08), and

Hotel Alpenhof GesmbH

v

Oliver Heller (C-144/09),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann and J.-J. Kasel, Presidents of Chambers, and A. Rosas, R. Silva de Lapuerta, P. Lindh (Rapporteur) and M. Safjan, Judges,

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2010,

after considering the observations submitted on behalf of:

– Mr Pammer, by C. Neuhuber, Rechtsanwalt,

– Hotel Alpenhof GesmbH, by M. Buchmüller, Rechtsanwalt,

– Mr Heller, by H. Hegen, Rechtsanwalt,

– the Austrian Government, by E. Riedl and G. Kunert, acting as Agents,  
– the Czech Government, by M. Smolek, acting as Agent,  
– the Italian Government (C-585/08), by G. Palmieri, acting as Agent, and L. Ventrella, avvocato dello Stato,  
– the Luxembourg Government, by C. Schiltz, acting as Agent,  
– the Netherlands Government (C-144/09), by C. Wissels and Y. de Vries, acting as Agents,  
– the Polish Government (C-585/08), by M. Dowiegiewicz, acting as Agent,  
– the United Kingdom Government, by H. Walker, acting as Agent, and J. Stratford, Barrister,  
– the Commission of the European Communities, by A.-M. Rouchaud-Joët, S. Grünheid and M. Wilderspin, acting as Agents,  
after hearing [the Opinion of the Advocate General at the sitting on 18 May 2010](#),  
gives the following

#### **Judgment**

1 These references for a preliminary ruling concern the interpretation of Article 15(1)(c) and (3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The references have been made (i) in proceedings between Mr Pammer and Reederei Karl Schlüter GmbH & Co KG ('Reederei Karl Schlüter') concerning the latter's refusal to reimburse Mr Pammer in full the cost of a voyage by freighter described on the internet which he did not undertake (Case C-585/08) and (ii) in proceedings between Hotel Alpenhof GesmbH ('Hotel Alpenhof') and Mr Heller concerning his refusal to pay his hotel bill for a stay booked on the internet (Case C-144/09).

#### **Legal context**

##### **Regulation No 44/2001**

3 Recital 13 in the preamble to Regulation No 44/2001 states that, in relation to consumer contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

4 In Section 1 ('General provisions') of Chapter II of Regulation No 44/2001, Article 2(1) provides:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

5 Article 5(1)(a) of the regulation lays down the following rule of special jurisdiction:

'A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

6 In Section 4 ('Jurisdiction over consumer contracts') of Chapter II of the regulation, Articles 15(1) and (3) and 16(1) and (2) are worded as follows:

'Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded

as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

...

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

#### **Article 16**

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.'

7 As is evident from its preamble, Regulation No 44/2001 is the successor to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and – amended version – p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention'). From its entry into force, on 1 March 2002, the regulation replaced the Brussels Convention in relations between the Member States, with the exception of the Kingdom of Denmark.

8 In recital 19 in the preamble to Regulation No 44/2001, the Council of the European Union underlined the need to ensure continuity between the Brussels Convention and the regulation, including as regards the interpretation already given by the Court to provisions of that convention which are equivalent to those of the regulation.

#### **Brussels Convention**

9 The first paragraph of Article 13 of the Brussels Convention is worded as follows:

'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this

Section, without prejudice to the provisions of Articles 4 and 5(5), if it is:

1. a contract for the sale of goods on instalment credit terms; or
2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
3. any other contract for the supply of goods or a contract for the supply of services, and:
  - (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and
  - (b) the consumer took in that State the steps necessary for the conclusion of the contract.'

**Regulation (EC) No 593/2008**

10 Recital 7 in the preamble to 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) (OJ 2008 L 177, p. 6) states that the substantive scope and the provisions of that regulation should be consistent with those of Regulation No 44/2001.

11 Recital 24 in the preamble to Regulation No 593/2008 is worded as follows:

'With more specific reference to consumer contracts, ... consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that "for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities". The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'

12 Article 6(4)(b) of Regulation No 593/2008 provides that the rules in Article 6(1) and (2) on the law applicable to consumer contracts are not to apply to:

'a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours'.

**Directive 90/314/EEC**

13 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59) defines 'package' in Article 2(1) as follows:

'For the purposes of this Directive:

1. "package" means the pre-arranged combination of not fewer than two of the following when sold or of-

ferred for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

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

The separate billing of various components of the same package shall not absolve the organiser or retailer from the obligations under this Directive'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

**Case C-585/08**

14 This dispute, between Mr Pammer, who resides in Austria, and Reederei Karl Schlüter, a company established in Germany, concerns a voyage by freighter from Trieste (Italy) to the Far East organised by that company which gave rise to a contract between it and Mr Pammer ('the voyage contract').

15 Mr Pammer booked the voyage through Internationale Frachtschiffreisen Pfeiffer GmbH, a company whose seat is in Germany ('the intermediary company').

16 The intermediary company, which operates in particular via the internet, described the voyage on its website, indicating that there was a fitness room, an outdoor swimming pool, a saloon and video and television access on the vessel. Reference was also made to three double cabins with shower and toilet, to a separate living room with seating, a desk, carpeting and a fridge, and to stopping at ports of call from which excursions into towns could be undertaken.

17 Mr Pammer refused to embark and sought reimbursement of the sum which he had paid for the voyage, on the ground that that description did not, in his view, correspond to the conditions on the vessel. Since Reederei Karl Schlüter reimbursed only a part of that sum, that is to say, roughly EUR 3 500, Mr Pammer claimed payment of the balance, roughly EUR 5 000, together with interest before an Austrian court of first instance, the Bezirksgericht (District Court) Krems an der Donau.

18 Reederei Karl Schlüter contended that it did not pursue any professional or commercial activity in Austria and raised the plea that the court lacked jurisdiction.

19 That plea was dismissed at first instance by judgment of the Bezirksgericht Krems an der Donau of 3 January 2008, the court holding that it had jurisdiction on the ground that the voyage contract was a consumer contract, namely a contract for package travel, and that the intermediary company had engaged in advertising activity in Austria on behalf of Reederei Karl Schlüter by means of the internet.

20 The appellate court, the Landesgericht (Regional Court) Krems an der Donau, on the other hand, declared by judgment of 13 June 2008 that the Austrian courts lacked jurisdiction, holding that the voyage contract constituted a contract of transport not covered by Section 4 of Chapter II of Regulation No 44/2001. The fact that the proposed voyage, namely a lengthy cross-

ing from Europe to the Far East, involved a degree of comfort did not transform the voyage contract into a consumer contract.

21 Mr Pammer appealed on a point of law against that judgment.

22 The Oberster Gerichtshof (Supreme Court) harbours doubts regarding the criteria applicable to the concept of ‘package travel’ and observes that in this instance the question arises as to whether the services offered are comparable to a cruise, which would justify the conclusion that there is a ‘package’ and, accordingly, a contract of transport covered by Section 4 of Chapter II of Regulation No 44/2001.

23 According to the Oberster Gerichtshof, if such a contract were involved, Article 15(1)(c) of Regulation No 44/2001 could be applicable and it would then be helpful to know what criteria must be met by a website in order for the activities engaged in by the trader to be capable of being regarded as ‘directed to’ the Member State of the consumer within the meaning of that provision. The Oberster Gerichtshof points out, however, that in the case in point, the first instance court and the appellate court have not made specific findings as to the way in which the voyage contract was concluded, the role played by the website or the links between Reederei Karl Schlüter and the intermediary company.

24 It is in those circumstances that the Oberster Gerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Does a “voyage by freighter” constitute package travel for the purposes of Article 15(3) of [Regulation No 44/2001]?’

2. If the answer to Question 1 is in the affirmative: is the fact that an intermediary’s website can be consulted on the internet sufficient to justify a finding that activities are being “directed” [to the Member State of the consumer’s domicile] within the meaning of Article 15(1)(c) of Regulation No 44/2001?’

#### **Case C-144/09**

25 Hotel Alpenhof, a company which operates the hotel bearing the same name located in Austria, is in dispute with a consumer, Mr Heller, who resides in Germany.

26 After finding out about the hotel from its website, Mr Heller reserved a number of rooms for a period of a week around 1 January 2008. His reservation and the confirmation thereof were effected by email, the hotel’s website referring to an address for that purpose.

27 Mr Heller is stated to have found fault with the hotel’s services and to have left without paying his bill despite Hotel Alpenhof’s offer of a reduction. Hotel Alpenhof then brought an action before an Austrian court, the Bezirksgericht Sankt Johann im Pongau, for payment of a sum of roughly EUR 5 000.

28 Mr Heller raised the plea that the court before which the action had been brought lacked jurisdiction. He submits that, as a consumer, he can be sued only in the courts of the Member State of his domicile, namely the German courts, pursuant to Article 15(1)(c) of Regulation No 44/2001.

29 The Bezirksgericht Sankt Johann im Pongau, by judgment of 14 July 2008, and the Landesgericht Salzburg, ruling on appeal by judgment of 27 November 2008, both dismissed the action before them, holding that the Austrian courts lacked jurisdiction to hear it. They stated that the concept of an activity ‘directed to’ the Member State of the consumer’s domicile covers both the operation of an interactive website enabling a contract to be concluded with the consumer on line, that is to say, electronically on the trader’s site itself, and a website not providing such a possibility and presenting only advertising. According to those courts, even in the latter situation the activity is directed to the consumer in other Member States, given the fact that internet advertising crosses borders. This ‘directing abroad’ can be excluded only by an express statement concerning the trader’s business contact with consumers domiciled in one or more other specified Member States. The activity is also directed to the Member State of the consumer where the latter finds out about the trader’s services through a website and the subsequent reservation is made by means of the email address, geographical address or telephone number indicated on that website.

30 Hotel Alpenhof appealed on a point of law to the Oberster Gerichtshof.

31 Since the Oberster Gerichtshof was not sure that the Court would answer its second question in Case C-585/08, an answer being dependent upon the answer given to the first question asked in that case, it considered it necessary to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being “directed” within the meaning of Article 15(1)(c) of [Regulation No 44/2001]?’

32 Given the similarity between the second question in Case C-585/08 and the only question in Case C-144/09, the two cases should be joined for the purposes of the present judgment pursuant to Article 43 of the **Rules of Procedure of the Court**.

#### **Consideration of the questions**

33 It should be stated first of all that, having regard to the date of the references for a preliminary ruling, the Court has jurisdiction to rule on the interpretation of Regulation No 44/2001 by virtue of Article 68 EC since the questions have been asked by the Oberster Gerichtshof, a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

34 By its first question in Case C-585/08, the referring court asks whether a contract concerning a voyage by freighter, such as that at issue in the main proceedings, is a contract of transport envisaged by Article 15(3) of Regulation No 44/2001.

35 Under Article 15(3) of Regulation No 44/2001, only contracts of transport which, for an inclusive price, provide for a combination of travel and accommodation

are subject to the rules of jurisdiction laid down in Section 4 of Chapter II of the regulation.

36 The contracts of transport thereby referred to are close to those corresponding to the concept of ‘package travel’ for the purposes of Directive 90/314, a concept which the Oberster Gerichtshof indeed expressly mentions in its order for reference. 37 As the Court has already held, for a service to qualify as a package within the meaning of Article 2(1) of Directive 90/314, it is enough if, first, it combines tourist services sold at an inclusive price including two of the three services referred to in that provision, namely transport, accommodation and other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, and second, it covers a period of more than 24 hours or includes overnight accommodation (see Case C-400/00 Club-Tour [2002] ECR I-4051, paragraph 13).

38 In order to answer the question submitted, it should therefore be determined whether the concept of ‘package travel’, to which the referring court makes reference and which forms part of the subject-matter specified in Article 1 of Directive 90/314, is relevant in interpreting Article 15(3) of Regulation No 44/2001.

39 That term does not appear in Article 15(3) of Regulation No 44/2001, although the regulation postdates Directive 90/314. As the Advocate General has observed in point 47 of her Opinion, the terms used by the European Union legislature for the purposes of Regulation No 44/2001 are identical to those that were in the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1). In 2008, that convention was replaced by Regulation No 593/2008, which, in Article 6(4)(b), makes express reference to the concept of ‘package travel’ within the meaning of Directive 90/314.

40 Article 6 of Regulation No 593/2008 relates to the law applicable to consumer contracts and the purpose of Article 6(4)(b) is that consumer contracts should not include contracts of carriage, with the exception of those which correspond to the concept of ‘package travel’ for the purposes of Directive 90/314.

41 It follows from the parallel between the contracts of transport mentioned in Article 15(3) of Regulation No 44/2001 and the contracts of carriage referred to in Article 6(4)(b) of Regulation No 593/2008 that the European Union legislature intended to cover the same types of contracts, that is to say those that may be governed by the rules protecting consumers respectively laid down in those two regulations.

42 That objective is also apparent from recital 7 in the preamble to Regulation No 593/2008, which states that the substantive scope and the provisions of that regulation should be consistent with those of Regulation No 44/2001.

43 It is therefore appropriate to interpret Article 15(3) of Regulation No 44/2001 in the light of the corresponding provision in Regulation No 593/2008 and to refer to the concept of ‘package travel’ to which the latter regulation makes reference. Indeed, first, the con-

cept in question is contained in a directive designed specifically to protect consumers in relation to package travel in particular. Second, the more recent regulation, namely Regulation No 593/2008, makes express reference to that concept. Finally, in the explanatory memorandum accompanying the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final), the Commission of the European Communities used the term ‘package holiday’ and expressly referred to Directive 90/314 to explain its proposed Article 15(3), the wording of which remained unchanged in the final version of Regulation No 44/2001.

44 It must therefore be determined whether a voyage by freighter such as that at issue in the main proceedings corresponds to the concept of ‘package’ as defined in Directive 90/314.

45 It is not in dispute that, apart from transport, that voyage by freighter involved, for an inclusive price, accommodation too and that the voyage was for a period of more than 24 hours. Accordingly, such a service fulfils the necessary conditions for a ‘package’ within the meaning of Article 2(1) of Directive 90/314 and falls within the definition, set out in Article 15(3) of Regulation No 44/2001 read in the light of Article 2(1) of the directive, of a contract of transport at an inclusive price.

46 The answer to the first question in Case C-585/08 therefore is that a contract concerning a voyage by freighter, such as that at issue in the main proceedings, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation No 44/2001.

**The second question in Case C-585/08 and the only question in Case C-144/09**

47 By its second question in Case C-585/08 and its only question in Case C-144/09, the referring court asks, in essence, first, on the basis of what criteria a trader whose activity is presented on its website or on that of an intermediary can be considered to be ‘directing’ its activity to the Member State of the consumer’s domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, and second, whether the fact that those sites can be consulted on the internet is sufficient for that activity to be regarded as such.

48 As is apparent from the orders for reference, this question is asked in the context of two separate disputes.

49 In Case C-585/08, the dispute involves a trader, Reederei Karl Schlüter, which concluded a contract with a consumer, Mr Pammer, domiciled in a Member State other than that in which that company is established. It does not appear to be in dispute that the contract falls within the scope of the trader’s commercial activities.

50 According to the observations submitted to the Court by Mr Pammer, he found out that the voyage existed by consulting the intermediary company’s website on which various voyages were advertised. He ini-

tially contacted the intermediary company by email to obtain further information and subsequently booked the voyage by post.

51 In Case C-144/09, the dispute involves a trader, Hotel Alpenhof, which concluded a contract falling within the scope of its commercial activities with a consumer, Mr Heller, domiciled in a Member State other than that in which the hotel concerned is located. It is not in dispute that Mr Heller found out that the hotel existed and made and confirmed his reservation at a distance, by means of the internet.

52 In these two cases, the Oberster Gerichtshof is seeking to decide whether the trader directed its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, in order to determine which court has jurisdiction to give judgment on the disputes in the main proceedings.

53 Article 15(1)(c) of Regulation No 44/2001 constitutes a derogation both from the general rule of jurisdiction laid down in Article 2(1) of the regulation, which confers jurisdiction upon the courts of the Member State in which the defendant is domiciled, and from the rule of special jurisdiction for contracts, set out in Article 5(1) of the regulation, under which jurisdiction lies with the courts for the place of performance of the obligation in question (see, to this effect, Case C-464/01 Gruber [2005] ECR I-439, paragraph 34).

54 If the trader's activity were to be regarded as 'directed to' the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it would follow, in Case C-585/08 between Mr Pammer and Reederei Karl Schlüter, that the Austrian courts would have jurisdiction, in accordance with Article 16(1) of the regulation, should the consumer elect to bring the dispute before them and not before the courts of the Member State in which the defendant, Reederei Karl Schlüter, is established, that is to say, the German courts. In Case C-144/09, since the consumer, Mr Heller, is domiciled in Germany, the courts of that State would have jurisdiction, in accordance with Article 16(2) of the regulation, and not those of the Member State in which Hotel Alpenhof is located, which is Austria.

55 Regulation No 44/2001 does not define the concept in Article 15(1)(c) of activity 'directed to' the Member State of the consumer's domicile. This concept, like those in Article 13 of the Brussels Convention, which Article 15 of the regulation replaces, must be interpreted independently, by reference principally to the system and objectives of the regulation, in order to ensure that it is fully effective (see Case C-96/00 Gabriel [2002] ECR I-6367, paragraph 37).

56 It is necessary in this connection, as indicated in recital 19 in the preamble to Regulation No 44/2001, to have regard to the interpretation which the Court has placed on Article 13 of the Brussels Convention, whilst taking account of the changes which have been made to that article by the regulation.

57 The Court has already held that, in the system established by Regulation No 44/2001, Article 15(1)(c) oc-

cupies, as it is clear from recital 13 in the preamble to the regulation, the same place and fulfils the same function of protecting the weaker party as does point 3 of the first paragraph of Article 13 of the Brussels Convention (Case C-180/06 ILSINGER [2009] ECR I-3961, paragraph 41).

58 As regards the latter provision, the Court has indeed repeatedly held that the special rules introduced by the provisions of the Brussels Convention on jurisdiction over consumer contracts serve to ensure adequate protection for the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the other, commercial, party to the contract (see, *inter alia*, Gruber, paragraph 34, and Case C-27/02 Engler [2005] ECR I-481, paragraph 39).

59 However, the Court has also stated – in ILSINGER, paragraph 48 – that the wording of Article 15(1) of Regulation No 44/2001 is not identical in every respect to that of the first paragraph of Article 13 of the Brussels Convention. In particular, it held in paragraph 50 of that judgment that the conditions for application which consumer contracts must fulfil are now worded more generally than they were, in order to ensure better protection for consumers with regard to new means of communication and the development of electronic commerce.

60 The European Union legislature has thus removed the conditions requiring, first, the trader to have addressed a specific invitation to the consumer or to have advertised in the State of the consumer's domicile and, second, the consumer to have taken in that State the steps necessary for the conclusion of the contract, replacing them with conditions applicable to the trader alone. The trader must pursue its commercial activities in the Member State of the consumer's domicile or, by any means, direct such activities to that Member State or to several States including that Member State, and the contract must fall within the scope of such activities.

61 The wording of Article 15(1)(c) must be considered to encompass and replace the previous concepts of a 'specific invitation addressed' to the consumer and 'advertising', covering, as the words 'by any means' indicate, a wider range of activities.

62 This change, which strengthens consumer protection, was made because of the development of internet communication, which makes it more difficult to determine the place where the steps necessary for the conclusion of the contract are taken and at the same time increases the vulnerability of consumers with regard to traders' offers.

63 It is not clear, however, from Article 15(1)(c) of Regulation No 44/2001 whether the words 'directs such activities to' refer to the trader's intention to turn towards one or more other Member States or whether they relate simply to an activity turned *de facto* towards them, irrespective of such an intention.

64 The question which this raises is whether intention on the part of the trader to target one or more other Member States is required and, if so, in what form such an intention must manifest itself.

65 That intention is implicit in certain methods of advertising.

66 The Court has held that ‘advertising’ and ‘specific invitation addressed’ within the meaning of Article 13 of the Brussels Convention cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman (Gabriel, paragraph 44).

67 The classic forms of advertising expressly referred to in the previous paragraph involve the outlay of, sometimes significant, expenditure by the trader in order to make itself known in other Member States and they demonstrate, on that very basis, an intention of the trader to direct its activity towards those States.

68 That intention is not, on the other hand, always present in the case of advertising by means of the internet. Since this method of communication inherently has a worldwide reach, advertising on a website by a trader is in principle accessible in all States, and, therefore, throughout the European Union, without any need to incur additional expenditure and irrespective of the intention or otherwise of the trader to target consumers outside the territory of the State in which it is established.

69 It does not follow, however, that the words ‘directs such activities to’ must be interpreted as relating to a website’s merely being accessible in Member States other than that in which the trader concerned is established.

70 Whilst there is no doubt that the aim of Articles 15(1)(c) and 16 of Regulation No 44/2001 is to protect consumers, that does not imply that that protection is absolute (see, by analogy, with regard to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), Case C-215/08 E. Friz [2010] ECR I-0000, paragraph 44).

71 As the Advocate General has observed in point 64 of her Opinion, if that had been the intention of the European Union legislature, it would have laid down as a condition for the application of the rules relating to consumer contracts not the ‘directing of activities to a Member State’ but the mere existence of the website.

72 Whilst seeking to confer further protection on consumers, the European Union legislature did not go as far as to lay down that mere use of a website, which has become a customary means of engaging in trade, whatever the territory targeted, amounts to an activity ‘directed to’ other Member States which triggers application of the protective rule of jurisdiction referred to in Article 15(1)(c) of Regulation No 44/2001.

73 It is accordingly clear from the proposal for a regulation that is mentioned in paragraph 43 of the present judgment that the European Union legislature rejected a suggestion by the Commission seeking the insertion, in the preamble of Regulation No 44/2001, of a recital

according to which the marketing of goods or services by electronic means accessible in a Member State constitutes an activity ‘directed to’ that State.

74 This interpretation is also borne out by the joint declaration of the Council and the Commission at the time of the adoption of Regulation No 44/2001, reproduced in recital 24 in the preamble to Regulation No 593/2008, according to which the mere fact that a website is accessible is not sufficient for Article 15(1)(c) of Regulation No 44/2001 to be applicable.

75 Consequently, it must be held that, in order for Article 15(1)(c) of Regulation No 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, including that of the consumer’s domicile.

76 It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer’s domicile, in the sense that it was minded to conclude a contract with those consumers.

77 Such evidence does not include mention on a website of the trader’s email address or geographical address, or of its telephone number without an international code. Mention of such information does not indicate that the trader is directing its activity to one or more other Member States, since that type of information is, in any event, necessary to enable a consumer domiciled in the Member State in which the trader is established to make contact with it.

78 Furthermore, some of that information has become mandatory in the case of services offered on line. As the Court has already held, by virtue of Article 5(1)(c) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1), a service provider is required to supply to recipients of the service before the conclusion of a contract with them, in addition to its email address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner ([Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände \[2008\] ECR I-7841, paragraph 40](#)). That obligation applies whichever the Member State to which the trader directs its activity and even if its activity is directed solely to the Member State in which it is established.

79 It follows that the distinction drawn by certain governments and certain parties that submitted observations to the Court between websites enabling the trader to be contacted electronically, indeed even the contract to be concluded on line by means of an ‘interactive’ site, and websites not offering that possibility, a distinction according to which only the former are to be included in the category of sites that enable pursuit of an activity ‘directed to’ other Member States, is not deci-

sive. If a geographical address or other contact details for the trader are given, the consumer can in fact contact it in order to conclude a contract. This opportunity for contact exists, whether or not the trader has envisaged doing business with consumers domiciled in Member States other than that in which it is established.

80 Among the evidence establishing whether an activity is 'directed to' the Member State of the consumer's domicile are all clear expressions of the intention to solicit the custom of that State's consumers.

81 Clear expressions of such an intention on the part of the trader include mention that it is offering its services or its goods in one or more Member States designated by name. The same is true of the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various Member States, which likewise demonstrates the existence of such an intention.

82 However, a finding that an activity is 'directed to' other Member States does not depend solely on the existence of such patent evidence. In this connection, it should be noted that, by its legislative resolution on the proposal for a regulation that is referred to in paragraph 43 of the present judgment (OJ 2001 C 146, p. 101), the European Parliament rejected wording stating that the trader had to have 'purposefully directed his activity in a substantial way' to other Member States or to several countries, including the Member State of the consumer's domicile. Such wording would have resulted in a weakening of consumer protection by requiring proof of an intention on the part of the trader to develop activity of a certain scale with those other Member States.

83 Other items of evidence, possibly in combination with one another, are capable of demonstrating the existence of an activity 'directed to' the Member State of the consumer's domicile. In cases such as those in the main proceedings, the following features, which have been invoked before the Court and the list of which is not exhaustive, would, subject to the relevant national court ascertaining that they are present, constitute evidence of an activity 'directed to' one or more other Member States within the meaning of Article 15(1)(c) of Regulation No 44/2001: the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.

84 So far as concerns the language or the currency used, the joint declaration of the Council and the Commission mentioned in paragraph 11 of the present judgment and reproduced in recital 24 in the preamble to Regulation No 593/2008 states that they do not con-

stitute relevant factors for the purpose of determining whether an activity is directed to one or more other Member States. That is indeed true where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, on the other hand, the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States.

85 In a case such as that between Hotel Alpenhof and Mr Heller, there would appear to be several items of evidence amongst those set out in paragraphs 83 and 84 of the present judgment such as to demonstrate that the trader directed its activity to one or more Member States other than the Republic of Austria. It is, however, for the relevant national court to ascertain that that is the case.

86 Hotel Alpenhof contends, however, that the contract with the consumer is concluded on the spot and not at a distance, as the room keys are handed over and payment is made on the spot, and that accordingly Article 15(1)(c) of Regulation No 44/2001 cannot apply.

87 In that regard, the fact that the keys are handed over to the consumer and that payment is made by him in the Member State in which the trader is established does not prevent that provision from applying if the reservation was made and confirmed at a distance, so that the consumer became contractually bound at a distance.

88 In Case C-585/08, between Mr Pammer and Reederei Karl Schlüter, the referring court has been able to provide only a small amount of information concerning that company's activity, the intermediary company's site and the relationship between the two companies.

89 The fact that the website is the intermediary company's and not the trader's site does not preclude the trader from being regarded as directing its activity to other Member States, including that of the consumer's domicile, since that company was acting for and on behalf of the trader. It is for the relevant national court to ascertain whether the trader was or should have been aware of the international dimension of the intermediary company's activity and how the intermediary company and the trader were linked.

90 The international nature of the activity in question, namely the organisation of voyages by freighter from Europe to the Far East, constitutes relevant evidence, but does not in itself enable it to be concluded that the trader directed its activity to other Member States, including that of the consumer's domicile. The trader's activity would involve such a feature even if the trader, by itself or through the intermediary company, pursued its activity only in Germany and did not direct it to other Member States. Consequently, other evidence, in particular from among the evidence referred to in paragraphs 83 and 84 of the present judgment, must necessarily be present, such as mention of telephone numbers with the international code, the use of a language

other than German or mention of an international clientele composed of customers domiciled in various Member States, in order to establish that the trader was envisaging doing business with customers domiciled in the European Union, whatever the Member State.

91 On the other hand, mention of the email address or geographical address of the intermediary company or the trader does not constitute relevant evidence, as is clear from paragraph 77 of the present judgment. The same is true of use of the German language and the ability to book a voyage in that language when that is the trader's language.

92 In view of the foregoing considerations, the answer to be given to the referring court is that, in order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

93 The following matters, the list of which is not exhaustive, are 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, namely 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. It is for the national courts to ascertain whether such evidence exists.

94 On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of 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.

#### Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to

the Court, other than the costs of those parties, are not recoverable.

#### On those grounds, the Court (Grand Chamber) hereby rules:

1. A contract concerning a voyage by freighter, such as that at issue in the main proceedings in Case C-585/08, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2. In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

The following matters, the list of which is not exhaustive, are 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, namely 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. It is for the national courts to ascertain whether such evidence exists.

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of 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.

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#### Opinion of Advocate General Trstenjak

delivered on 18 May 2010 (1)

Case C-585/08

Peter Pammer

v

Reederei Karl Schlüter GmbH & Co KG  
and  
Case C-144/09  
Hotel Alpenhof GesmbH  
v

Oliver Heller

(References for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Regulation (EC) No 44/2001 – Article 15(1)(c) and (3) – Jurisdiction over consumer contracts – Directing of activities to the Member State of the consumer’s domicile – Ability to consult a website on the internet – Contract which, for an inclusive price, provides for a combination of travel and accommodation – Voyage by freighter)

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3. Conclusion

VII – Conclusion

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## I – Introduction

1. These cases concern the interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (2) The essential issue raised here is how to interpret Article 15(1)(c) of Regulation No 44/2001, more specifically the wording requiring that a party to a contract who pursues commercial or professional activities ‘directs’ (dirige, ausrichtet) such activities to the Member State of the consumer’s domicile or to several States including that Member State. In both Hotel Alpenhof and Pammer the national court raises the question whether the fact that a website can be consulted on the internet in the Member State of the consumer’s domicile is sufficient to justify a finding that commercial or professional activities are being directed to that Member State within the meaning of Article 15(1)(c) of Regulation No 44/2001. In Pammer another question is also raised, namely whether a (tourist) voyage by freighter can be considered a contract which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation No 44/2001.

2. The present cases are nevertheless not the first ones in which the Court of Justice has been called upon to interpret Article 15(1)(c) of Regulation No 44/2001, (3) although it is the first time that it has had occasion to consider the concept of ‘directing’ commercial or professional activities to the consumer’s Member State of domicile. Academic writers have for some time drawn attention to the problem of interpretation of this term, (4) whilst the courts in some of the Member States have already had occasion to interpret it. (5) The interpretation of this term is of particular importance in the case of the directing of activities to the consumer’s Member State via the internet as such activities display certain specific features that have to be taken into account when interpreting Article 15(1)(c) of Regulation No 44/2001. The specific feature of the internet is that consumers are generally able to consult a company’s website worldwide and that a very wide interpretation of the term ‘directing’ of activities would have the effect that the very setting up of a website means that an undertaking is directing its activities to the consumer’s State of domicile. When interpreting this term it is therefore necessary to achieve a balance between protection of the consumer, who is entitled to call upon the special rules of jurisdiction under Regulation No 44/2001, and the consequences for the undertaking, to which these special rules of jurisdiction can only apply once it has made a conscious decision to direct its activities to the consumer’s Member State.

3. I would like to stress, by way of introduction, that the development of new means of communication and concluding contracts also raises new legal questions. Article 15(1)(c) of Regulation No 44/2001 is a good example of a response to that development because, in contrast to Article 13, first paragraph, point 3, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention'), (6) it was adopted to ensure more comprehensive consumer protection with regard to new means of communication and the development of electronic commerce. Since Regulation No 44/2001 enables consumers to sue and be sued in their Member State of domicile also where a contract is concluded by internet, that provision has been adapted to developments in new technology; however, this also means that new questions of interpretation have arisen at the same time. It is one of these questions regarding the interpretation of Regulation No 44/2001 that the Court of Justice has to answer in the present cases.

## II – Legal framework

### A – Regulation No 44/2001

4. In Section 1 ('General provisions') of Chapter II ('Jurisdiction') of Regulation No 44/2001, Article 2 provides:

'1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.  
...'

5. In Section 2 ('Special jurisdiction') of Chapter II of Regulation No 44/2001, Article 5 provides:

'A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;  
...'

6. In Section 4 ('Jurisdiction over consumer contracts') of Chapter II of Regulation No 44/2001, Articles 15 and 16 provide:

'Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.  
...

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

### Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.  
...'

### B – Rome I Regulation

7. Recital 24 in the preamble to 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) (7) ('the Rome I Regulation') states:

'With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that "for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities". The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."

### C – Directive 90/314

8. Article 2 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (8) provides:

'For the purposes of this Directive:

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

(a) transport;

(b) accommodation;

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

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

### III – Facts, main proceedings and questions referred

#### A – Pammer

9. The main proceedings are being conducted between Mr Pammer (the claimant), who is domiciled in Austria, and Reederei Karl Schlüter GmbH & Co KG (the defendant), which has its place of establishment in Germany, and concern repayment of the balance of an amount that Mr Pammer paid for a voyage by freighter which he did not undertake.

10. Mr Pammer made a booking with Reederei Karl Schlüter GmbH & Co KG for a voyage by freighter from Trieste to the Far East for two persons, with a departure date at the end of January 2007 and at the overall price of EUR 8 510. He did so through Internationale Frachtschiffreisen Pfeiffer GmbH, an intermediary company which has its place of establishment in Germany and also offers such voyages on the Austrian market via a website.

11. The description of the vessel and of the trip on the intermediary company's website was inconsistent with the facts. Instead of the double cabin which had been booked, only a single cabin was available, in which the ventilation system did not work. Contrary to the details on the website, there was, amongst other things, no outdoor swimming pool, no fitness room, no working television and no seating or lounging facilities on deck on the vessel. Excursions on land were possible only very occasionally. Mr Pammer therefore declined to undertake the voyage. As Reederei Karl Schlüter GmbH & Co KG reimbursed him only part of the sum paid for the trip, he brought legal proceedings for payment of the balance in the sum of EUR 5 294 in an Austrian court. In the proceedings, the defendant objected that the court lacked international and territorial jurisdiction.

12. The court of first instance held that it had both international and territorial jurisdiction. It ruled that the subject-matter of the proceedings was a consumer contract or package-travel contract and that the intermediary, Internationale Frachtschiffreisen Pfeiffer GmbH had carried out advertising activities in Austria via its website on behalf of the defendant as well. The appeal court allowed the appeal by Reederei Karl Schlüter GmbH & Co KG, ruled that it did not have jurisdiction and dismissed the action. Mr Pammer appealed against the decision by the appeal court to the Oberster Gerichtshof ('the referring court') on a point of law.

13. In the order for reference, the referring court expresses doubts concerning the criteria to be applied when categorising a contract as a contract for 'package travel' and stresses that in the present case it is not clear to what extent the facts are comparable with a cruise, which is overwhelmingly regarded as a 'package'. If the present case involves a package travel contract and jurisdiction must be determined under Article 15(1)(c) of Regulation No 44/2001, it is necessary to clarify the circumstances in which it is to be considered that a contracting party who pursues commercial or professional activities directs such activities to the Member State of the consumer's domicile. The refer-

ring court states that in the present case the lower courts did not make any detailed findings as to how the contract was concluded. Nor did they make any findings as to the manner and intensity of the cooperation between the defendant and the intermediary.

14. In these circumstances the referring court stayed the proceedings by an order of 6 November 2008 and referred the following questions to the Court of Justice for a preliminary ruling:

'Does a "voyage by freighter" constitute package travel for the purposes of Article 15(3) of [Regulation No 44/2001]?'

If the answer to Question 1 is in the affirmative: is the fact that an intermediary's website can be consulted on the internet sufficient to justify a finding that activities are being "directed" within the meaning of Article 15(1)(c) of Regulation No 44/2001?'

#### B – Hotel Alpenhof

15. The main proceedings are being conducted between Hotel Alpenhof GesmbH (the claimant), which has its place of establishment in Austria, and Mr Heller (the defendant), who is domiciled in Germany, and concern payment of a sum of EUR 5 248.30 for the provision of hotel services.

16. The defendant was informed of the hotel on offer via its website, which can also be consulted in Germany. The defendant's enquiry about a room reservation for several people for the period from 29 December 2007 to 5 January 2008, the offer made by the claimant and the acceptance of that offer by the defendant were all effected by email, and it is not a matter of dispute between the parties that the email address was given on the website. The defendant received the hotel services during the said period but then departed without paying for them; he had only made an advance payment in the sum of EUR 900. The claimant therefore brought legal action for payment of the balance.

17. In the main proceedings the defendant raised the plea that the court did not have international or territorial jurisdiction because he, as a consumer, could not be sued anywhere other than in Germany. The courts at both first and second instance ruled that they did not have international jurisdiction and dismissed the action. The claimant then appealed to the referring court on a point of law.

18. In these circumstances the referring court stayed the proceedings by an order of 26 March 2009 and submitted the following question to the Court of Justice for a preliminary ruling:

'Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being "directed" within the meaning of Article 15(1)(c) of Regulation (EC) No 44/2001?'

#### IV – Procedure before the Court of Justice

19. The order for reference in Pammer was received by the Court of Justice on 24 December 2008 and the order for reference in HotelAlpenhof was received on 24 April 2009. The Austrian, Czech and Luxembourg Governments and the Commission have submitted written observations in both cases. Mr Pammer and the

Polish and Italian Governments have submitted observations in Pammer only, whilst Hotel Alpenhof and the Netherlands and United Kingdom Governments have submitted observations in Hotel Alpenhof only. At the hearing on 16 March 2010 Mr Pammer, Hotel Alpenhof, Mr Heller, the Austrian, Czech, Netherlands and United Kingdom Governments and the Commission presented oral argument and answered the Court's questions.

#### **V – Arguments of the parties**

##### **A – Contract which, for an inclusive price, provides for a combination of travel and accommodation (first question in Pammer)**

20. In the opinion of Mr Pammer, the Austrian, Czech, Italian, Luxembourg and Polish Governments and the Commission, a contract that includes accommodation and other services in addition to travel lasting several days falls within the scope of 'contracts which, for an inclusive price, provide for a combination of travel and accommodation' within the meaning of Article 15(3) of Regulation No 44/2001.

21. In the opinion of Mr Pammer, the Austrian, Czech and Italian Governments and of the Commission the words 'contract which, for an inclusive price, provides for a combination of travel and accommodation' mean a 'package' as referred to in Article 2(1) of Directive 90/314. They base their view on the Rome I Regulation, Article 6(4)(b) of which contains a corresponding provision that makes express reference to the definition in Directive 90/314. In its explanatory memorandum accompanying the proposal for Regulation No 44/2001, (9) the Commission similarly referred, with regard to the interpretation of Article 15(3), to the definition of 'package' for the purposes of Directive 90/314.

22. In the opinion of the Luxembourg and Polish Governments, however, there are no grounds for such a link to the definition in Directive 90/314 as the legislature could also have directly referred to that directive or assumed its terminology in Regulation No 44/2001.

##### **B – Directing of activities to the Member State of the consumer's domicile (second question in Pammer; only question in Hotel Alpenhof)**

23. Mr Pammer, Mr Heller, the Austrian, Czech, Italian and Polish Governments and the Commission stress that the purpose of Article 15(1)(c) of Regulation No 44/2001 is to protect consumers and they recommend a wide interpretation of the concept of activities directed to that Member State.

24. Mr Heller is of the opinion that the term 'direct' should be given a wide interpretation. He says that this follows from the very wording of Article 15(1)(c) of Regulation No 44/2001, according to which an undertaking can direct activities to the Member State of the consumer's domicile 'by any means'. He argues that, irrespective of whether the website is interactive or passive, an undertaking can use it to direct its activities if it presents its goods and services on it and thereby impliedly offers them to the consumer. Nor would a wide interpretation of the concept of the directing of activities have any negative consequences on the internal market; indeed, consumers would be encouraged to

enter into cross-border internet transactions because they would know that they could sue and be sued in the Member State in which they were domiciled.

25. The Austrian Government considers that it is not necessary for information available on the internet to have been the origin of conclusion of the contract. It may possibly be difficult to adduce evidence to prove a causal connection and to demand this may conflict with consumer protection. The manner in which a contract is concluded (by distance selling or in person) should not play any role. An undertaking should expect to be open to legal action in all Member States unless it expressly makes it clear that it will not conclude contracts with consumers who are domiciled in particular Member States. In contrast to what is stated in the joint declaration of the Council and the Commission, (10) the specific conclusion of a contract is not a prerequisite for the establishment of jurisdiction under Article 15(1)(c) of Regulation No 44/2001 as this is not apparent from the wording of that article; what is more, this would be inconsistent with the objectives of the regulation.

26. In the opinion of the Czech Government, the mere fact that an undertaking's website can be consulted on the internet is not sufficient to establish jurisdiction under Article 15(1)(c) of Regulation No 44/2001; the contract must also fall within the scope of the undertaking's activities.

27. In the opinion of the Italian Government, the mere fact that an undertaking's website can be consulted on the internet does not amount to the directing of its activities to the Member State of the consumer's domicile; in order for that criterion to be satisfied, an offer to conclude a contract must be made to the consumer and it must also actually be concluded. This is to be determined in accordance with the principle of good faith.

28. In the opinion of the Polish Government, it is necessary for the national court, when determining whether an undertaking directs its activities to the consumer's Member State, to examine whether the undertaking's website has prompted the consumer to conclude a contract and whether a contract can be concluded online. The mere existence of a website is not sufficient to establish the directing of activities to the consumer's Member State. It argues that when interpreting Article 15 of Regulation No 44/2001 it is necessary – as can be seen from Gabriel(11) in connection with the interpretation of Article 13, first paragraph, point 3, of the Brussels Convention – to examine whether the conclusion of the contract in the Member State of the consumer's domicile was brought about by advertising published in the press, on the radio, on television, in the cinema or in a catalogue or by an offer made individually to the consumer.

29. In the opinion of the Commission, the mere availability of a website in the Member State of the consumer's domicile is not enough for it to be concluded that activities that are directed to that Member State are involved. Nor is the mere inclusion of an email address on the website sufficient to establish the directing of activities within the meaning of Article 15(1)(c) of Regulation No 44/2001. If that article were to be inter-

preted in such a way that the inclusion of an email address would be sufficient to establish the directing of activities, jurisdiction could be determined in accordance with that article in relation to all websites as Article 5(1)(c) of the Directive on electronic commerce (12) makes it mandatory for email addresses to be given. The Guidelines on Vertical Restraints, (13) in which a distinction is drawn between 'active' and 'passive' sales, is of no significance to an interpretation of the concept of the directing of activities within the meaning of Article 15(1)(c) of Regulation No 44/2001.

30. The Commission also emphasises that the national court must decide in the light of all the circumstances of the individual case whether an undertaking directs its activities to the Member State in which the consumer is domiciled. It argues that the following circumstances, amongst others, are of importance: (i) the type of business activities conducted and the appearance of the website, (14) (ii) the provision of a telephone number with the international dialling code, (iii) a link to a route planner and (iv) the ability to select 'look-and-book' whereby it is possible to enquire as to the availability of rooms during a particular period.

31. In the opinion of Hotel Alpenhof and the Luxembourg, Netherlands and United Kingdom Governments, the concept of the directing of activities should not be afforded a wide interpretation.

32. Hotel Alpenhof is of the opinion that its activities are not directed to another Member State within the meaning of Article 15(1)(c) of Regulation No 44/2001. Its website is not interactive and does not permit direct reservations to be made. Account should be taken of the characteristics of the internet, which makes it impossible to restrict information to Austrian territory.

33. The Luxembourg Government warns of the risks of a wide interpretation of Article 15(1)(c) of Regulation No 44/2001. Such an interpretation would lead to undertakings being deterred by potential legal action in all Member States from offering goods and services on the common market, thereby inhibiting the exercise of fundamental freedoms. If, in such circumstances, undertakings had to make it clear that their goods or services were not intended for consumers domiciled in certain Member States, this would result in a territorial limiting of its offer and fragmentation of the internal market. An obligation to provide exact details as to the consumers of which Member States the offer of goods or services applies to may also be in breach of Article 20 of Directive 2006/123/EC on services in the internal market, (15) which prohibits discrimination against recipients of services based on nationality or place of residence. It argues that the application of Article 15(1)(c) of Regulation No 44/2001 should be confined to special cases in which undertakings actively, individually and purposefully address a particular consumer or a group of consumers. Putting data online, the accessibility of an offer and the possibility of undertaking cross-border transactions in the internal market on a website are not such a special case.

34. The Netherlands Government stresses that when interpreting Article 15(1)(c) of Regulation No 44/2001

the interests of the consumer, who wants the court that has jurisdiction to be the court of the place where he is resident, have to be balanced against the interests of the undertaking, in whose interests it would be for that court not to have jurisdiction unless it has made a conscious decision to direct its activities also to that Member State or to undertake such activities there. The following criteria are pivotal for the classification of activities as activities directed to the consumer's Member State: (i) the setting-up of an interactive website in contrast to a passive website, on which the undertaking's email address is given, (ii) the sending of an email to the consumer making him aware of the undertaking's website, (iii) the charging of additional costs to consumers from certain Member States (for example, shipping costs), (iv) the conferral of a quality label that is used in a particular Member State, (v) directions from certain Member States to the place at which the undertaking does business, and (vi) direction to a customer service telephone number for foreign consumers. The national court must assess in each individual case whether an undertaking is directing its activities to the Member State of the consumer's domicile.

35. Conversely, however, in the opinion of the Netherlands Government, the use of a particular language or currency or the setting-up of several websites with different domain names (e.g. '.nl' or '.co.uk') are not criteria of relevance.

36. The United Kingdom Government has stated criteria which, in its view, should be taken into account when determining whether activities are being directed to the Member State of the consumer's domicile, namely (i) use of websites to target advertising to nationals of other Member States, or a specific mention of nationals of other Member States (for example, through testimonials), (ii) payment to search engines to display the undertaking's website as one of a number of links in particular countries, and (iii) websites targeted at consumers in other Member States using pan-European portals – in such cases consumers are usually asked where they reside and are directed to the relevant website.

#### **C – The role of the intermediary (in Pammer)**

37. As Mr Pammer booked the trip through an intermediary, some of the parties involved have also submitted observations on the role of that intermediary. The Czech, Luxembourg, Austrian and Polish Governments are of the opinion that it is immaterial whether the website is operated by the intermediary or by the undertaking itself. The Commission takes the view that the conclusion of a contract through an intermediary does not preclude the application of Article 15(1)(c) of Regulation No 44/2001 where the intermediary acts in the name of the party to the contract and the latter has agreed to the contract being concluded with the consumer.

#### **VI – Advocate General's appraisal**

##### **A – Introduction**

38. The present cases raise two legal problems. First, Pammer raises the question how the concept of a contract which, for an inclusive price, provides for a com-

combination of travel and accommodation in Article 15(3) of Regulation No 44/2001 is to be interpreted. The consumer here concluded a contract for a voyage by freighter to the Far East, which comprised not only travel but also accommodation; this raises the question whether that contract falls within the concept of a contract which, for an inclusive price, provides for a combination of travel and accommodation.

39. Secondly, in both of the cases, Pammer and Hotel Alpenhof, the question is raised of how the concept of the directing of activities to the Member State of the consumer's domicile within the meaning of Article 15(1)(c) of Regulation No 44/2001 is to be interpreted. In the present cases the Court of Justice will, for the first time, interpret a provision that triggered heated discussion at the legislative stage, and later in the economic sector and amongst academic writers, particularly with regard to the question of how far-reaching the concept of 'directing' should be.

40. I will deal in my Opinion, first, with the question of interpretation of Article 15(3) of Regulation No 44/2001, which is raised only in Pammer, and will then deal with the question of interpretation of the concept of the directing of activities to the Member State of the consumer's domicile within the meaning of Article 15(1)(c) of Regulation No 44/2001.

**B – Contracts which, for an inclusive price, provide for a combination of travel and accommodation (first question in Pammer)**

41. By the first question in Pammer, the referring court wishes to ascertain whether a contract concerning the organisation of a voyage by freighter such as that concluded in the present case constitutes a contract which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation No 44/2001. The answer to this question has consequences of significance to the consumer, as under Article 15(3) of Regulation No 44/2001 the provisions in that regulation on jurisdiction over consumer contracts do not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation. In my view, this question must be answered in the affirmative on the basis of a literal and teleological interpretation of that article.

42. Simply on the basis of a literal interpretation of Article 15(3) of Regulation No 44/2001 the conclusion is reached that a contract concerning the organisation of a voyage by freighter such as the one entered into in the present case constitutes a contract which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation No 44/2001. It is indeed apparent from the order for reference that the claimant booked a voyage by freighter from Trieste to the Far East that comprised not just travel but also accommodation and that he paid an inclusive price for the package.

43. In my view, the same conclusion can also be reached via a teleological interpretation of that article. The purpose of Article 15(3) is to exclude determination of jurisdiction in accordance with the provisions on

consumer contracts in the case of contracts the main purpose of which is transportation. In the present case, however, the consumer did not conclude the contract so as to be transported by freighter to the Far East and back on one occasion only, but in order – as observer or tourist – to experience events onboard the freighter (everyday happenings onboard and the loading and unloading of freight) and to see the places where the freighter docked. Moreover, the organiser of such a trip is responsible not just for the standard of transportation but also for the quality of the accommodation.

44. In my view, therefore, the answer to the first question in Pammer should be that a contract concerning the organisation of a voyage by freighter such as the one concluded in the present case constitutes a contract which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation No 44/2001.

45. Although this question referred has already been answered on the basis of a literal and teleological interpretation, I consider that it is also necessary to look at the argument submitted by some of the parties involved in the present case that the words 'contracts which, for an inclusive price, provide for a combination of travel and accommodation' in Article 15(3) of Regulation No 44/2001 should be interpreted in precisely the same way as the term 'package' in Article 2(1) of Directive 90/314. (16) According to Article 2(1) of Directive 90/314, the term 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation: (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package. In determining the question whether the two provisions are to be interpreted in the same way, account should be taken of the travaux préparatoires for Regulation No 44/2001 and the broader context of Union legislation in which this term is also used.

46. When interpreting the phrase 'contract which, for an inclusive price, provides for a combination of travel and accommodation', account should, first, be taken of the explanatory memorandum accompanying the proposal for Regulation No 44/2001, in which the Commission expressly termed contracts covering both travel and accommodation for an all-in price as package holiday contracts and referred in this context to Directive 90/314. (17) The explanatory memorandum accompanying the proposal for Regulation No 44/2001 therefore indicates that the phrase 'contract which, for an inclusive price, provides for a combination of travel and accommodation' is to be interpreted in exactly the same way as the term 'package' in Directive 90/314.

47. In the wider context of European Union legislation, however, account is to be taken of an analogy with the Rome Convention on the law applicable to contractual obligations ('the Rome Convention') (18) or the Rome I Regulation, which has replaced that Convention. Article 5(5) of the Rome Convention provides for the same

exception as in Article 15(3) of Regulation No 44/2001. Article 5 of the Rome Convention, which governs the question of which law is to apply to consumer contracts, provides in paragraph 5 that this special rule applies to contracts which, for an inclusive price, provide for a combination of travel and accommodation, although contracts of carriage are excluded from this special rule by Article 5(4)(a). The fact that the same terminology is used in the Rome Convention and in Regulation No 44/2001 that was adopted later undoubtedly indicates that it was the intention of the legislature that the phrase ‘contract which, for an inclusive price, provides for a combination of travel and accommodation’ should be afforded a uniform interpretation in the context of both provisions. (19)

48. This need for a uniform interpretation exists even after the adoption of the Rome I Regulation. Article 6(4)(b) of the Rome I Regulation provides that the special provisions applicable to consumer contracts do not apply to contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314. The Rome I Regulation therefore goes one step further than Regulation No 44/2001 which was adopted earlier, in which Directive 90/314 is not mentioned. However, regard should be had to two principles of interpretation. First, continuity of interpretation between the Rome Convention and the Rome I Regulation has to be observed. Although the Rome I Regulation makes express reference to Directive 90/314, both provisions are to be uniformly interpreted as Directive 90/314 had not yet been adopted when the Rome Convention was concluded. Secondly, the need for a uniform interpretation of Regulation No 44/2001 and the Rome I Regulation also has to be heeded. The concept of a contract of carriage that falls within the scope of consumer contracts has to be uniformly interpreted in both provisions. Recital 7 in the preamble to the Rome I Regulation states that the substantive scope and the provisions of that regulation are to be consistent with Regulation No 44/2001.

49. In my view, therefore, the phrase ‘contract which, for an inclusive price, provides for a combination of travel and accommodation’ in Article 15(3) of Regulation No 44/2001 has to be interpreted in exactly the same way as the term ‘package’ in Article 2(1) of Directive 90/314. (20)

50. Irrespective of the question whether these two terms are to be interpreted in the same way, the answer to the first question referred in Pammer – as already stated in point 44 of this Opinion – is that a contract concerning the organisation of a voyage by freighter such as the one concluded in the present case constitutes a contract which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Regulation No 44/2001.

**C – Directing of activities to the Member State of the consumer’s domicile (second question in Pammer; only question in Hotel Alpenhof)**

51. By the second question in Pammer and the question in Hotel Alpenhof, the referring court wishes to ascer-

tain whether the fact that the website of a person who pursues commercial or professional activities and with whom a consumer concludes a contract can be consulted on the internet in the consumer’s Member State of domicile is sufficient to justify a finding that an activity is being ‘directed’ within the meaning of Article 15(1)(c) of Regulation No 44/2001. This is linked to the question of how broadly this term in Article 15(1)(c) of Regulation No 44/2001 – which refers to the undertaking directing activities to the Member State of the consumer’s domicile or to several States including that Member State – is to be interpreted. In the context of internet transactions it will be important in this regard to establish the criteria according to which a distinction is to be drawn between websites by which an undertaking directs activities to the Member State of the consumer’s domicile and those by which it does not direct its activities to that State.

52. Before I begin my examination of the questions referred I shall consider the conditions that have to be fulfilled to determine jurisdiction under Article 15(1)(c) of Regulation No 44/2001.

**1. Conditions for the application of Article 15(1)(c) of Regulation No 44/2001**

53. Four conditions have to be met in order for Article 15(1)(c) of Regulation No 44/2001 to apply.

**a) Conclusion of a contract**

54. The first condition requires a contract to be concluded between the consumer and the undertaking. This is apparent, first of all, simply from the wording of Article 15(1) of Regulation No 44/2001, which applies ‘... [i]n matters relating to a contract concluded by a ... consumer’. (21) It is also apparent from Ilsinger (22) in which the Court of Justice stressed that Article 15 of Regulation No 44/2001 is applicable only if the legal proceedings concerned relate to a contract which has been concluded between a consumer and an undertaking. (23) A condition for the conclusion of a contract under this article is that, on the basis of an offer and the acceptance of that offer, the two parties reach a concordance of intentions to conclude a contract. (24) As the Court of Justice stated in Ilsinger, the contract does not have to be one involving reciprocal obligations. (25)

55. It is also necessary, in connection with the condition requiring the conclusion of a contract, to deal with the question whether jurisdiction is determined under Article 15(1)(c) of Regulation No 44/2001 only if the contract is concluded at a distance. Although the conclusion of a contract at a distance is mentioned in connection with the application of that article in the joint declaration of the Council and the Commission (26) and also in recital 24 in the preamble to the Rome I Regulation, which summarises that joint declaration, (27) the wording of Article 15(1)(c) of Regulation No 44/2001 does not lay down such a condition. In my view, such a condition may be problematic in particular in cases such as the present ones. (28) A consumer can, for example, just book hotel or tourist services from a distance, and the contract is then concluded at the place where the services are rendered. In my view, in this

case too jurisdiction is to be determined under Article 15(1)(c) of Regulation No 44/2001.

56. The national court will therefore have to assess in connection with the present cases whether the condition for the conclusion of a contract within the meaning of Article 15(1)(c) of Regulation No 44/2001 is fulfilled. (29)

**b) Conclusion of a consumer contract which falls within the scope of the undertaking's commercial or professional activities**

57. The second condition for the application of Article 15(1)(c) of Regulation No 44/2001 consists of the conclusion of a contract between a consumer and a person who pursues commercial or professional activities (an undertaking (30)). The referring court will have to determine in relation to this condition too whether the factual circumstances under Article 15(1)(c) of Regulation No 44/2001 are fulfilled. (31)

58. The third condition for the application of Article 15(1)(c) of Regulation No 44/2001 is that the contract falls within the scope of the undertaking's commercial or professional activities. It is also for the national court to determine whether this condition is fulfilled. (32)

**c) Pursuit of activities in the consumer's Member State or the directing of activities to that Member State**

59. The fourth condition for the application of Article 15(1)(c) of Regulation No 44/2001 is that the undertaking pursues its commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State. The crux of the question referred concerns when that condition is fulfilled. This requires in-depth examination, which I shall undertake below.

**2. Interpretation of the concept of the directing of activities within the meaning of Article 15(1)(c) of Regulation No 44/2001**

60. The essential matter to be examined in the present cases is therefore the determination as to whether the undertaking directs its activities to the Member State of the consumer's domicile or to several States including that Member State. Various aspects have to be taken into consideration when interpreting the concept of the directing of activities under Article 15(1)(c) of Regulation No 44/2001. First, it is necessary to establish by various methods of interpretation how widely that concept is to be interpreted and then it is necessary to ascertain what criteria are relevant to an assessment as to whether the undertaking directs its activities to the Member State of the consumer's domicile via a website.

61. When examining how widely to interpret the concept of the directing of activities in Article 15(1)(c) of Regulation No 44/2001 it is necessary, above all, to take up a position on two questions. First, it is necessary to clarify whether the mere fact that a website can be consulted is sufficient for the directing of activities within the meaning of Article 15(1)(c). Secondly, it is necessary to examine whether a distinction has to be drawn between so-called 'interactive' and 'passive'

websites when interpreting that concept. Interactive websites enable a contract to be directly concluded via the internet, whereas passive websites do not. (33)

**a) Literal, teleological, historical and systemic interpretation of the concept of the directing of activities within the meaning of Article 15(1)(c) of Regulation No 44/2001**

62. Regulation No 44/2001 does not contain any definition of the concept of the directing of activities. It is settled case-law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, whilst also taking into account the context in which they occur and the purposes of the rules of which they are part. (34) In the light of this case-law and the statements made by the parties involved in the present cases it will, in my view, be necessary to base the interpretation on four approaches: first, a literal interpretation or the customary meaning of the concept of the directing of activities and, secondly, a teleological interpretation, thirdly, a historical interpretation, and fourthly a systemic interpretation of this concept.

63. It can be established from a literal interpretation that the customary meaning of the concept of the directing of activities to a Member State or several Member States is that the undertaking actively endeavours to conclude contracts with consumers from that Member State or those Member States. (35) It is therefore essential for there to be active conduct on the part of the undertaking, the objective and outcome of which is to win customers from other Member States. (36) An interpretation whereby mere access in the Member State of the consumer's domicile to a website would suffice for the directing of activities to that State would ultimately undermine the significance of the concept of 'directing'. It can therefore be established on the basis of the normal meaning of the concept of the directing of activities that the mere fact that a website can be consulted on the internet is not sufficient to justify a finding that the undertaking is directing its activities to the Member State of the consumer's domicile. Nor, on a literal interpretation, can any support be found for the view that, when interpreting this concept, a distinction is to be drawn between interactive and passive websites, as the wording of this article does not make any mention of different kinds of websites.

64. In the context of a teleological interpretation of the concept of the directing of activities, as correctly pointed out by the Netherlands Government the interests of the consumer, who would like jurisdiction to lie with the courts of the place in which he has his domicile, have to be balanced against the interests of the undertaking, which endeavours to ensure that that court does not have jurisdiction unless the undertaking has consciously decided to direct its activities also to the Member State concerned or to pursue its activities there. The objective of this article is therefore to secure special rules of jurisdiction for the consumer if the consumer contract indicates a sufficient connection with the Member State of the consumer's domicile. At the

same time, however, it must be accepted when interpreting this article that the undertaking can avoid the possibility of suing and being sued in the Member State of the consumer's domicile by not directing its activities to the consumer's Member State so that there is no sufficient connection with that State. If the legislature had wanted jurisdiction to be determined by the special rules governing consumer contracts simply on the ground that a website can be consulted on the internet, it would have made the mere existence of a website a condition for the application of those provisions rather than the directing of activities. (37) It may therefore be concluded on the basis of a teleological interpretation that the mere fact that a website can be consulted on the internet is not sufficient for activities to be 'directed' within the meaning of Article 15(1)(c) of Regulation No 44/2001.

65. I also consider that a teleological interpretation militates against a distinction between interactive and passive websites in the context of Article 15(1)(c) of Regulation No 44/2001, first, because the directing of activities must not depend on the technical means by which a contract is concluded (38) and, secondly, because it is difficult in practice to distinguish between interactive and passive websites. (39)

66. A historical interpretation shows that Article 15(1)(c) of Regulation No 44/2001 has replaced the provision in Article 13, first paragraph, point 3, of the Brussels Convention, which applies to contracts for the supply of goods or the supply of services where in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and the consumer took in that State the steps necessary for the conclusion of the contract. Article 15(1)(c) of Regulation No 44/2001 was worded differently from Article 13, first paragraph, point 3, of the Brussels Convention so as to ensure wider consumer protection in relation to new means of communication and the development of electronic commerce. (40) This article in the regulation was drafted more widely than the aforementioned article in the convention inasmuch as the provision is no longer confined to just contracts for the supply of goods or services, but covers all contracts, and also abolishes the requirement that the consumer has to take the steps necessary for the conclusion of the contract in the Member State of his domicile. It is sometimes difficult to ascertain the place where such steps have been taken, especially in the case of contracts concluded on the internet. To create a connection between the contract and the State of the consumer's domicile it is therefore decisive that the undertaking either pursues its activities in the State of the consumer's domicile or that it directs its activities to that State. The concept of the directing of activities in Article 15(1)(c) of Regulation No 44/2001 thus comprises, in addition to the traditional forms of advertising for the undertaking's activities in the Member State of the consumer's domicile that already fell within the scope of Article 13, first paragraph, point 3, of the Brussels Convention, (41) the

directing of activities to the consumer's Member State via websites. (42)

67. Although Article 15(1)(c) of Regulation No 44/2001 was worded in such a way as to cover contracts concluded by electronic commerce too, it is not possible, on a historical interpretation, to come to an unequivocal conclusion as to the meaning and scope of the concept of the directing of activities via websites. Even during the course of the legislative procedure the wording of Article 15(1)(c) of Regulation No 44/2001 was a matter of dispute, with the institutions being unable to agree on how widely the concept of the directing of activities should be understood. Also, the response was unfavourable above all in the business sector, due to the concern that an interpretation of the concept of the directing of activities that was too wide could deter small and medium-sized undertakings from using the internet to advertise or to promote sales. (43)

68. In the original proposal for the regulation (44) Article 15(1)(c) read as it does in the regulation now applicable. In its explanatory memorandum accompanying that proposal, the Commission states that the concept of activities pursued in or directed towards a particular Member State is used so that this article applies to consumer contracts concluded via an interactive website in the State of the consumer's domicile. (45) It is also stated in that explanatory memorandum that the fact that a consumer simply had knowledge of the possibility of calling on services or buying goods via a passive website is not sufficient to establish jurisdiction on the basis of that article. (46) It might therefore be concluded from the explanatory memorandum accompanying the proposal for the regulation that the dividing line between websites that fall within the scope of the concept of the directing of activities and websites to which this does not apply is to be drawn according to the interactivity of a website, that is to say, it depends upon whether the website permits a contract to be concluded directly.

69. During the course of the legislative process, the Economic and Social Committee came down in favour of retaining the wording in Article 13, first paragraph, point 3, of the Brussels Convention, whilst the European Parliament recommended defining the concept of the directing of activities in such a way that the trader should have to direct his activities to the other Member State purposefully and in a substantial way (47) and the national court, when establishing whether a trader has directed his activities in such a manner, should have regard to all the circumstances of the case, including any attempts by the trader to ring-fence his trading operation against transactions with consumers domiciled in particular Member States. (48) The Commission did not use that definition in the amended proposal for the regulation. (49)

70. Because of numerous inconsistencies and lack of clarity regarding the interpretation of Article 15(1)(c) of Regulation No 44/2001, the Council and the Commission adopted a joint declaration after the adoption of Regulation No 44/2001, in which it was stated that the mere fact that a website is accessible is not sufficient

for Article 15 of Regulation No 44/2001 to be applicable, although a factor will be that this website solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. It was also stated that, in this respect, the language or currency which a website uses does not constitute a relevant factor. (50)

71. It can therefore be established also from a historical interpretation of Article 15(1)(c) of Regulation No 44/2001 that the mere fact that a website can be consulted on the internet in the Member State of the consumer's domicile is not sufficient for activities to be directed to that Member State. However, a historical interpretation is less clear with regard to the distinction between interactive and passive websites.

72. In the context of a systemic interpretation it is necessary to take into account that Regulation No 44/2001 and the Rome I Regulation are to be uniformly interpreted. (51) Recital 7 in the preamble to the Rome I Regulation states that 'the substantive scope and the provisions of this Regulation' have to be consistent with Regulation No 44/2001. When interpreting the concept of the directing of activities in Article 15(1)(c) of Regulation No 44/2001, therefore, the Court of Justice will have to take care not to interpret this concept in a manner contrary to the spirit and purpose of the Rome I Regulation.

73. According to recital 24 in the preamble to the Rome I Regulation, consistency with Regulation No 44/2001 requires 'that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule' and that the concept be interpreted harmoniously in both Regulation No 44/2001 and the Rome I Regulation. Express reference is made in that recital to the joint declaration of the Council and the Commission on Article 15 of Regulation No 44/2001, which states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence ..., a contract must also be concluded within the framework of its activities', that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means', and that 'the language or currency which a website uses does not constitute a relevant factor'. It is therefore absolutely clear from this recital that the mere fact that a website can be consulted on the internet is not sufficient for Article 15 of Regulation No 44/2001 to apply. Furthermore, no distinction is drawn in that recital between interactive and passive websites, which allows the conclusion to be drawn that an undertaking can direct its activities to the Member State of a consumer's domicile using both kinds of website. (52)

74. In my view there are two conclusions to be drawn from a literal, teleological, historical and systemic interpretation of the concept of the directing of activities in Article 15(1)(c) of Regulation No 44/2001. First, it can be clearly established that the mere fact that a web-

site can be consulted in the Member State of the consumer's domicile is not sufficient to justify a finding that activities are being directed to that State within the meaning of that article. (53) Secondly, it can be established – except on a historical interpretation – that when determining whether there is directing of activities within the meaning of that article it is of no significance whether the website is interactive or passive. (54) 75. I shall define below the criteria applicable for determining when an undertaking directs its activities to the Member State of the consumer's domicile using websites.

**b) Criteria for establishing whether an undertaking directs its activities within the meaning of Article 15(1)(c) of Regulation No 44/2001**

76. The concept of the directing of activities is therefore not so wide as to encompass the mere fact that a website can be consulted on the internet; at the same time, activities can be 'directed' using an interactive or a passive website. Where the dividing line runs between websites through which an undertaking directs its activities to the Member State of the consumer's domicile and those through which it does not so direct its activities has to be determined in each specific instance taking all of the circumstances of the case into account. It is for the national court to undertake such an assessment in each individual case (55) but the Court of Justice must provide it with clear criteria in accordance with which it can determine whether an undertaking is directing its activities to the Member State of the consumer's domicile.

77. In my view there are a number of relevant criteria when determining whether an undertaking is directing its activities to the Member State of a consumer's domicile.

78. First, the content of the website at the time when the contract was concluded must be taken into account. It must be determined whether it is apparent from the website that the undertaking consciously worked towards concluding distance contracts with consumers from other Member States, whether it therefore offered to conclude distance contracts with them and brought the same about. The following information on the website is important here, for example: the provision of an international dialling code with a telephone or fax number, or indication of a special customer service number for consumers from abroad; (56) description of the itinerary from other Member States to the place at which the undertaking pursues its activities (for example, directions by road, international rail connections, details of the nearest airports); a facility to enquire whether goods are in stock or a service can be rendered; (57) and the facility for consumers from other Member States to subscribe to a newsletter about the goods and services offered by the undertaking. In the case of interactive websites one relevant factor will be, for example, whether the consumer, when giving his address on concluding the contract, has a choice between several Member States, including the Member State of his domicile.

79. Conversely – as correctly stated by the Commission – the mere provision of an email address on a website is not sufficient to find that activities are being directed within the meaning of Article 15(1)(c) of Regulation No 44/2001. Email address details also have to be given under Article 5(1)(c) of the Directive on electronic commerce. Similarly, the provision of other information enabling contact to be made quickly and facilitating direct and efficient communication does not in itself signify that activities are being directed to the Member State of the consumer's domicile, as these are also mandatory details. (58) If these details alone were sufficient to find that activities are being directed, every website would ultimately fall within this category, which would be contrary to the objective of Article 15(1)(c) of Regulation No 44/2001.

80. Account should also be taken of transactions that the undertaking has conducted with consumers from other Member States in the past. Consideration should be given to whether the undertaking has already concluded contracts with consumers from other Member States in the past. (59) The question that, of course, arises in connection with this criterion is how many customers (consumers) an undertaking must have in a Member State or what proportion they have to comprise in order to warrant the conclusion that it is directing its activities to that State. In my view this will depend upon the circumstances of the individual case. Where an undertaking customarily concludes distance contracts with consumers from a particular Member State, there can be no doubt that it is directing its activities to that Member State. The question becomes more difficult to resolve where an undertaking has concluded a contract with only one consumer from another Member State. The conclusion of a contract with only one consumer from a particular Member State will not, in principle, on its own and independently of other criteria, suffice to find that activities are being directed to that Member State. (60) If Article 15(1)(c) of Regulation No 44/2001 were to be interpreted in such a way that the mere conclusion of a contract constitutes the directing of activities, (61) this would undermine the significance of the concept of the directing of activities, which requires an undertaking to work actively towards concluding contracts with consumers from other Member States. However, if other criteria corroborate the directing of activities to a particular Member State, it can be argued that, by being aware that it is concluding a contract with a consumer from another Member State, the undertaking has demonstrated its willingness to direct its activities also to the Member State of the consumer's domicile.

81. As for the language in which the website is written, it is stated in the joint declaration by the Council and the Commission concerning Article 15 of Regulation No 44/2001, (62) which is summarised in recital 24 in the preamble to the Rome I Regulation, that the language which a website uses does not constitute a relevant factor. It may nevertheless be argued that in some restricted cases language can be an indication that activities are being directed to a particular Member State

or several Member States. In my view, language can be a relevant criterion in two respects.

82. First, the fact that a website is written only in a language that is not very widespread and is the official language only in one particular Member State can be an indication that the undertaking is directing its activities to that Member State alone. (63) This criterion could admittedly be problematic since the question arises whether such a website is directed only at consumers in the Member State in which that language is the official language or whether it is also directed to people who live in other Member States and also speak that language. (64) This argument can nevertheless be answered by a literal interpretation of Article 15(1)(c) of Regulation No 44/2001: according to that article an undertaking must direct its activities to a particular Member State and not to a particular group of consumers who speak a particular language. Conversely, in the case of a website that is written in a widespread language (65) or in a language that is the official language in several Member States, (66) the conclusion cannot automatically be drawn that the undertaking's activities are also directed to Member States other than the Member State of its place of establishment. In this case too an assessment has to be undertaken on the basis of all available information.

83. Secondly, I consider it to be significant whether a website that is written in a particular language provides a facility whereby another language can be selected. This fact is of relevance because it indicates that the undertaking is also directing its activities to other Member States. By providing a language selection facility it is consciously indicating that it would also wish to conclude contracts with consumers from other Member States. (67)

84. Consideration should also be given to whether the use of the top-level domain name of a State can be a relevant criterion. (68) Unlike the Netherlands Government, I am of the opinion that this criterion can be relevant to the question whether an undertaking is directing its activities to a Member State, but two circumstances should be noted. First, the mention of the internet domain name of a Member State is a clear indication that the undertaking is directing its activities to the Member State with that domain name. If the undertaking – such as Internationale Frachtschiffreisen Pfeiffer in Pammer, for example – sets up a website with the domain name '.de', this must necessarily mean that it is directing its activities to the German market. Secondly, the use of a Member State's internet domain name does not preclude the directing of activities to other Member States. If, for example, an undertaking sets up a website with the domain name '.de' and other criteria clearly indicate that the undertaking is also directing its activities to other Member States it must be assumed that its activities are not confined to Germany.

85. The criterion concerning indication of the internet domain name of a Member State is primarily of relevance in practice where an undertaking with its place of establishment in one Member State uses the domain name of another Member State in which it does not

have a place of establishment. (69) If, for example, an undertaking with its place of establishment in the United Kingdom sets up a website with the domain name '.es', it is apparent that it is directing its activities in whole or in part to the Spanish market. It should also be noted that some undertakings set up several national websites to advertise their activities; a consumer will often be redirected from a main website to a website with the domain name of his Member State of domicile. In that case, the undertaking will generally be directing its activities via the website with the domain name of a given Member State only to the market in that State; it will nevertheless be necessary to determine in each individual case whether it is also directing its activities to other Member States.

86. Correspondingly, the use of domain names not linked to any State (70) can be an indication that the undertaking is directing its activities not only to the Member State of its place of establishment but also to other Member States, although this is not sufficient to justify the conclusion that the undertaking is directing its activities to all Member States. In this case too, it will be necessary to have regard to the content of the website and to determine on the basis of all of the criteria to which Member States the undertaking is directing its activities.

87. Consideration must also be given to whether – as argued by the Commission – account should be taken of the nature of the activities pursued by the undertaking when determining whether activities are being directed to a Member State. The Commission states, for example, that a craft activity that is typically carried out in a local environment is not directed to other Member States. In my view, this argument cannot be accepted. An undertaking may decide, for example, to sell goods (71) or provide services (72) to consumers from other Member States too notwithstanding the nature of its activities. In my view, therefore, the type of activity cannot be crucial.

88. Account should also be taken of whether, by using various technical facilities offered by the internet, an undertaking has worked towards the provision of information on its offers to consumers from particular Member States and the conclusion of contracts with them. This would include, for example, advertising links on websites that are shown in the hit list of a search engine in a Member State, or windows that pop up on the opening of a website in a Member State (pop-up windows). Account should also be taken of whether an undertaking has sent consumers from particular Member States a link to its website by email or has offered to conclude a distance contract with them without the consumers having requested it to do so. (73) In my view, it will not be important when such emails are sent whether the undertaking knew in which Member State the consumer was domiciled; if an undertaking sends unsolicited emails it must, in my opinion, bear the risk of being sued or having to sue in any Member State.

89. It is also relevant whether an undertaking that has a website has directed its activities to the Member State of the consumer's domicile by means of other forms of

advertising, for example by registering its website with an internet directory or advertising its activities in the press, on the radio, on television or by any other means. In that eventuality the activities are, of course, not being directed via a website but by other means; however, as already stated, (74) Article 15(1)(c) of Regulation No 44/2001 is also applicable in that case.

90. Finally, I should also like to stress that the criteria stated are not exhaustive and that all the criteria and not just some of them always have to be taken into account when determining whether an undertaking is directing its activities to the Member State of the consumer's domicile.

**c) The question whether it is permissible for the directing of activities to certain Member States to be expressly excluded**

91. Finally, it should be briefly considered whether an undertaking can expressly state on its website that it does not direct its activities to certain Member States or directs them only to certain Member States ('disclaimer'). (75) This question does not strictly arise in the present cases because no such statements were made on the undertakings' websites. I will therefore attempt only to provide a possible guideline as to the treatment of this comparatively complex issue.

92. First, if it is accepted that by designing its website in a certain manner an undertaking impliedly excludes (or confirms) the directing of its activities to certain Member States, I see no reason why it should not be allowed also to exclude (or confirm) expressly the directing of activities to certain Member States. It is important here that the undertaking does also in fact adhere to the statement on the website. If an undertaking states on its website that it does not direct its activities to certain Member States but does nevertheless conclude contracts with consumers from those Member States, it cannot rely upon the express statement that it does not direct its activities to those Member States.

93. Secondly, it seems to be too narrow a viewpoint to say that undertakings must be allowed to exclude expressly the directing of their activities to certain Member States above all in order to avoid legal action in those Member States because the possibility of such legal action would deter them from internet trading.

94. It should be noted that many instruments have already been adopted in the field of European Union law to facilitate the resolution of cross-border legal actions and cross-border enforcement, for example, Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, (76) Regulation (EC) No 1896/2006 creating a European order for payment procedure (77) and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; (78) last but not least, Regulation No 44/2001 also contains provisions on the recognition and enforcement of court judgments. (79) These regulations are intended to make it quicker and easier to resolve disputes in cross-border legal actions and to reduce the costs thereof (80) or to facilitate the free circulation of orders for payment, judgments, court settlements and authentic in-

struments. (81) I therefore consider it an exaggeration to say that it is feared that small and medium-sized undertakings would decide against internet trading only because of the possibility of being sued in other Member States and for that reason alone should be permitted to exclude the directing of activities expressly. (82)

95. It should also be noted that the reasons for an undertaking wanting to exclude the directing of its activities to other Member States can vary greatly and may justify the possibility of such exclusion. An undertaking might perhaps not want to direct its activities to other Member States because it has a loyal customer base in its Member State of establishment and does not want to expand its activities. It might want to restrict the provision of services to its own Member State because the cost of transportation to other Member States is too high and it would simply not be economic for it to do so. An undertaking might, for example, have a clear business plan to improve its competitiveness in a particular region – in the Benelux countries, for instance – and might therefore wish to conduct business only with consumers from those States. Is the decision to restrict the directing of activities not an individual business decision by the undertaking, which it must be allowed to take – although, of course, subject to compliance with the provisions on the protection of competition? Can undertakings really be required to potentially conduct business with consumers from other Member States too by depriving them of the possibility of expressly stating on their websites to which Member States they direct their activities?

96. Thirdly, the argument of the Luxembourg Government that an express statement on the website that activities are not directed to certain Member States may be in breach of Article 20 of the Services Directive, which prohibits discrimination against recipients of services based on nationality or residence, must be treated with a certain degree of caution.

97. Consideration should be given – in addition to the question of the extent to which the Services Directive can be relevant at all (83) – to the fact that this directive, including Article 20, is addressed to the Member States. It is therefore possible to examine only whether that article precludes national legislation that expressly permits a statement on a website that activities are not directed to certain Member States.

98. It should also be noted that Article 20(2) of the Services Directive allows for the possibility of providing for differences in the conditions of access to a service that are based on the nationality or place of residence of the recipient where the differences are directly justified by objective criteria. Article 20 of the Services Directive therefore permits unequal treatment to be based on the nationality or place of residence of the recipient of the service where such treatment is objectively justified, which is to be ascertained in each individual case. (84)

99. I am therefore of the view that undertakings must, in principle, be able to expressly state on their websites the States to which they direct or do not direct their activities, (85) and that it is necessary to examine on

the basis of the specific circumstances of each individual case whether such an exclusion might be incompatible with other provisions of European Union law.

### 3. Conclusion

100. On the basis of the reasoning in points 51 to 99 of the present Opinion, the second question in Pammer and the only question in HotelAlpenhof should, in my view, be answered to the effect that the fact that the website of the contracting party that pursues commercial or professional activities can be consulted on the internet in the Member State of the consumer's domicile is not sufficient to justify a finding that activities are being 'directed' within the meaning of Article 15(1)(c) of Regulation No 44/2001. The national court must determine, in the light of all of the circumstances of the case, whether the contracting party that pursues commercial or professional activities is directing its activities to the Member State of the consumer's domicile. Important factors in its assessment are, in particular, the content of the website, the business activities hitherto of the contracting party that is pursuing commercial or professional activities, the type of internet domain name used and the use made of the possibilities of advertising on the internet or in other ways.

### VII – Conclusion

101. In the light of the foregoing considerations, I propose that the answers that the Court should give to the questions referred by the Oberster Gerichtshof are as follows:

1) A contract concerning the organisation of a voyage by freighter such as the one concluded in the present case constitutes a contract which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2) The fact that the website of the contracting party that pursues commercial or professional activities can be consulted on the internet in the Member State of the consumer's domicile is not sufficient to justify a finding that activities are being 'directed' within the meaning of Article 15(1)(c) of Regulation No 44/2001. The national court must determine, in the light of all of the circumstances of the case, whether the contracting party that pursues commercial or professional activities is directing its activities to the Member State of the consumer's domicile. Important factors in its assessment are, in particular, the content of the website, the business activities hitherto of the contracting party that is pursuing commercial or professional activities, the type of internet domain name used and the use made of the possibilities of advertising on the internet or in other ways.

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1 – Original language: Slovenian.

2 – OJ 2001 L 12, p. 1.

3 – See, for the first interpretation of Article 15(1)(c) of Regulation No 44/2001, Case C-180/06 *Ilse* [2009] ECR I-3961.

4 – See, for example, Øren, Joakim S.T., ‘International jurisdiction over consumer contracts in e-Europe’, *International and Comparative Law Quarterly*, No 3/2003, p. 665 et seq.; Montero, E., ‘À propos d’un contrat de voyage formé par hybridation (web + télécopie)’, *Revue internationale du droit des affaires*, No 91/2009, p. 332 et seq.; Mankowski, P., ‘Neues zum “Ausrichten” unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO’, *Praxis des internationalen Privat- und Verfahrensrechts*, No 3/2009, p. 238 et seq.; Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe. Règlement n° 44/2001, Conventions de Bruxelles et de Lugano*, 3rd edition, Librairie générale de droit et de jurisprudence, Paris 2002, p. 229 et seq.; Galič, A., ‘Mednarodna pristojnost za reševanje potrošniških sporov v pravu EU’, in: Seliškar Toš, M. (ed.), *Mednarodna konferenca Slovensko pravo in gospodarstvo ob vstopu Slovenije v Evropsko unijo*, Pravna fakulteta, Ljubljana, 2004, p. 125; Gillies, L.E., ‘Jurisdiction for Consumer Contracts’, *Computer Law & Security Report*, No 6/2001, p. 395.

5 – See, for example, in Belgium, the judgment of the Tribunal de première instance de Liège of 1 October 2009 (R.D.C., 2009, p. 610); in Austria, the judgment of the LG Feldkirch of 20 October 2003 (3R259/03s); in Germany, the order of the Bundesgerichtshof of 17 September 2008 (III ZR 71/08); and, in France, the judgment of the Cour d’appel de Montpellier of 16 November 2009 (No 09/04838).

6 – Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and – amended version – p. 77), the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1).

7 – OJ 2008 L 177, p. 6.

8 – OJ 1990 L 158 p. 59.

9 – Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final).

10 – Joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001, which is available in English, for example, at [http://ec.europa.eu/civiljustice/homepage/homepage\\_en\\_en\\_declaration.pdf](http://ec.europa.eu/civiljustice/homepage/homepage_en_en_declaration.pdf).

11 – Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 44.

12 – Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1).

13 – OJ 2000 C 291, p. 1.

14 – The Commission argues in this connection that the website of a craftsman’s business providing services locally would not constitute the directing of activities to other Member States, whilst a hotel that offers tourism services on the international market is intended to address consumers from other Member States and is presented on the website accordingly.

15 – Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36; ‘the Services Directive’).

16 – See point 21 of this Opinion. It should be added that the question whether these two terms are to be afforded the same interpretation would primarily be relevant if the contract were only to cover travel and other services, without accommodation. According to Article 2(1) of Directive 90/314 a ‘package’ is involved if the contract combines at least two of the three following services: transport, accommodation and other non-ancillary services. This means that there is a package where such services exist in the following combinations: transport and accommodation; accommodation and other services; transport and other services, or all three types of services. If the words ‘contract which, for an inclusive price, provides for a combination of travel and accommodation’ in Article 15(3) of Regulation No 44/2001 are interpreted in exactly the same way as the term ‘package’ in Article 2(1) of Directive 90/314, this has the following consequences. The first possibility (transport and accommodation) is already included in the wording of Article 15(3) of Regulation No 44/2001, which is why the question whether this provision should be interpreted in the same way as Article 2(1) of Directive 90/314 does not ultimately arise with this combination. In the case of the second possibility (accommodation and other services) the question of falling within the scope of Article 15(3) of Regulation No 44/2001 does not arise at all because the travel element – which is essential in order for the exception in Article 15(3) to apply – is not present. With the third possibility (transport and other services) one of two of the elements mentioned in Article 15(3) of Regulation No 44/2001 is missing, namely accommodation. Hence, the question whether the terms in Article 15(3) of Regulation No 44/2001 and Article 2(1) of Directive 90/314 are to be afforded the same interpretation is principally of relevance to this third possibility, as such an interpretation would ultimately be at variance with the wording of Article 15(3) of Regulation No 44/2001.

17 – See the explanatory memorandum accompanying the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (cited in footnote 9), p. 16 of the English language version.

18 – Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1).

19 – Regulation No 44/2001 was admittedly adopted ten years after Directive 90/314 and could have referred to Directive 90/314 in Article 15(3) but instead employed the terminology used in the Rome Convention; a direct link was therefore created between the two and the need for identical interpretation was brought about.

20 – For this conclusion see, in legal literature, for example Nielsen, P.A., in: Magnus, U., Mankowski, P. (ed.), *Brussels I Regulation*, Sellier, Munich, 2007, p. 318, paragraph 39; Rauscher, T. (ed.), *Europäisches Zivilprozessrecht. Kommentar*, 2nd edition, Sellier, European Law Publishers, Munich 2006, p. 291, paragraph 20; Kropholler, J., *Europäisches Zivilprozessrecht. Kommentar zu EuGVO und Lugano-Übereinkommen*, 8th edition, Verlag Recht und Wirtschaft, Heidelberg 2005, p. 233, paragraph 30.

21 – Emphasis added.

22 – Ilsinger (cited in footnote 3).

23 – Ilsinger (cited in footnote 3), paragraphs 52 and 53.

24 – For the conditions for the conclusion of consumer contracts as referred to in Article 15(1)(c) of Regulation No 44/2001, see my Opinion delivered in Ilsinger, point 46 et seq.

25 – Ilsinger (cited in footnote 3), paragraph 51. See too my Opinion in that case, point 40.

26 – It is expressly stated in the joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001 (cited in footnote 10) that the contract has to be concluded at a distance.

27 – This view is also taken by the Commission in paragraph 31 of its written observations in Hotel Alpenhof.

28 – The similarly problematical case may be imagined of a clinic that provides health services and through its website undoubtedly causes consumers from other Member States to decide to take up its services; however, they have to be examined before any medical intervention can take place. Consumers are therefore only able to agree a date for an examination at a distance (for example, by telephone) whilst the contract for the services (for medical intervention) will be concluded at the place of establishment of the service provider. The case can also be envisaged of a consumer who decides not to buy over the internet because he fears credit card fraud, whilst the undertaking does not accept payment on delivery or by bank transfer. In that case the consumer will perhaps obtain all information via the internet but only the conclusion of the contract will take place in the other Member State in which the undertaking pursues its activities.

29 – It is apparent from the order for reference in Hotel Alpenhof that the offer in relation to the reservation was made and accepted by email and that the defendant did also indeed take up the hotel services (see point 16 of this Opinion). In Pammer it is not expressly stated in the order for reference how the contract was concluded, just that Mr Pammer booked a voyage by freighter for

two people from Trieste to the Far East with Reederei Karl Schlüter GmbH & Co KG through the agency of Internationale Frachtschiffreisen Pfeiffer GmbH (see point 10 of this Opinion). Mr Pammer's representative did say at the hearing, however, that Mr Pammer first obtained information from the intermediary by email but sent the signed contract to the intermediary by post.

30 – Article 15 of Regulation No 44/2001 does not use the term 'undertaking' but just refers to a contract concluded with a person 'who pursues commercial or professional activities'. For the sake of simplicity, in this Opinion I use the term 'undertaking' for that person.

31 – This condition is in all probability fulfilled in the present cases. In Pammer the consumer concluded a contract with a company through an intermediary; the company undertakes freighter transportation and can therefore be considered a person pursuing commercial activities. Through an intermediary that company enables consumers to experience freighter transportation as passengers – thereby pursuing an ancillary activity in the tourism sector. The fact that the contract was concluded via an intermediary does not affect this. In Hotel Alpenhof the contract was concluded with the hotel which provides the hotel services and which can also be considered a person who pursues commercial activities.

32 – It is apparent from what is said in the order for reference that this condition is also fulfilled. In Pammer, although it is not the primary commercial activity of Reederei Karl Schlüter GmbH & Co KG to enable consumers to experience freighter transportation but an ancillary activity, it is nevertheless one of that undertaking's commercial activities. In Hotel Alpenhof it can likewise be accepted that the hotel services fall within the scope of that hotel's commercial activities.

33 – For the definition of the terms 'interactive' and 'passive' websites, see, for example, Øren, loc. cit. (footnote 4), p. 684. See also Kropholler, loc. cit. (footnote 20), p. 230, paragraph 23; Gillies, loc. cit. (footnote 4), p. 397; Gaudemet-Tallon, H., 'Le juge compétent', in: Fasquelle, D., Meunier, P., *Le droit communautaire de la consommation: Bilan et perspectives*, La documentation française, Paris, 2002, p. 228.

34 – See, to this effect, Case C-128/94 Hönl [1995] ECR I-3389, paragraph 9; Case C-164/98 P DIR International Film and Others v Commission [2000] ECR I-447, paragraph 26; and Case C-336/03 easyCar [2005] ECR I-1947, paragraph 21.

35 – See Øren, loc. cit. (footnote 4), p. 686, who says that the concept of the directing of activities in Article 15(1)(c) of Regulation No 44/2001 means that the seller consciously arranges his commercial activities in such a way that he reaches customers in particular States. In the opinion of that author (p. 687) the concept means that the seller endeavours to conclude transactions with customers from specific Member States.

36 – I should like to add that assessment of an undertaking's active conduct should be on an objective basis rather than consideration being given to his subjective intentions not given expression by his concrete actions. See Øren, loc. cit. (footnote 4), p. 687.

37 – I should like to add that it is stated in recital 13 in the preamble to the original proposal for Regulation No 44/2001 (cited in footnote 9) that electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State and, where that other State is the State of the consumer's domicile, the consumer must be able to enjoy the protection available to him when he enters into a consumer contract by electronic means from his domicile. This recital could be understood to mean that the mere fact that a website can be consulted in the Member State of the consumer's domicile is sufficient to determine jurisdiction under the special provisions applicable to consumer matters. However, this recital was deleted during the further course of the legislative procedure, which a fortiori suggests that the mere fact that a website can be consulted on the internet is not sufficient for an activity to be 'directed' within the meaning of Article 15(1)(c) of Regulation No 44/2001.

38 – In legal literature, see Montero, *loc. cit.* (footnote 4), p. 335, who stresses that the fact that a contract has not been concluded using the means by which the consumer became informed about the offer does not change the fact that the consumer enjoys protection under Article 15(1)(c) of Regulation No 44/2001. Similarly, Mankowski, *loc. cit.* (footnote 4), p. 242; Gaudeмет-Tallon, H., *loc. cit.* (footnote 33), p. 228.

I should like to add that a distance contract can be concluded by any technical means that facilitates the conclusion of such a contract. Under Article 2(4) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) means of distance communication 'means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties.' According to Annex I to the directive such means of communication include, for example, telephone, electronic mail or facsimile machine (fax).

39 – See in legal literature, for example, Mankowski, *loc. cit.* (footnote 4) p. 239. See also Rauscher, *loc. cit.* (footnote 20), p. 288, paragraph 15.

40 – See the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (cited in footnote 9). See also Ilsinger (cited in footnote 3), paragraph 50.

41 – It must be emphasised in connection with the requirement that an activity be directed to the Member State of the consumer's domicile that Article 15(1)(c) of Regulation No 44/2001 – like Article 13, first paragraph, point 3, of the Brussels Convention – still encompasses traditional forms of advertising for an undertaking's activities in the Member State of the consumer's domicile, for example advertising in the press, on the radio or on television in that Member State. See, with regard to the various forms of advertising, the interpretation of Article 13, first paragraph, point 3, of the Brussels Convention in Gabriel (cited in footnote

11), paragraph 44. See also, in legal literature, Nielsen, *loc. cit.* (footnote 20), p. 316, paragraph 33.

42 – Article 15(1)(c) of Regulation No 44/2001 makes express mention of the directing of activities 'by any means'. Similarly, in legal literature, Mankowski, *loc. cit.* (footnote 4), p. 239.

43 – See the Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final – 99/0154(CNS)), paragraphs 4.2.1 and 2.2.2. The Economic and Social Committee indicated in that opinion that the arrangement proposed in the regulation ('by any means, directs ... to that State') was not clear enough to foster trust between the parties and favoured retaining the wording in Article 13 of the Brussels Convention.

44 – Cited in footnote 9.

45 – See the proposal cited in footnote 9 (p. 16 in the English language version).

46 – See the proposal cited in footnote 9 (p. 16 in the English language version).

47 – For criticism in legal literature of the criterion that activities be directed purposefully and in a substantial way see, for example, Farah, Y., Allocation of jurisdiction and the internet in EU law, *European Law Review*, No 2/2008, p. 267.

48 – Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 – C5-0169/1999 – 1999/0154(CNS)) (OJ 2001 C 146, p. 94), Amendment 37 to Article 15. Initially a much wider version of the wording was suggested in the Parliament, under which the criterion of the directing of activities was to be replaced by the criterion that the contract be concluded at a distance with a consumer having his domicile in another Member State; see the Report on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 – C5-0169/1999 – 1999/0154 (CNS)), proposed Amendment 23 to Article 15. This proposed amendment was not accepted by the Parliament however; see the result of the vote on proposed Amendment 23 (OJ 2001 C 146, pp. 41 and 42).

49 – The Commission's explanatory memorandum states that the very existence of a consumer contract is a clear indication that the supplier of the goods or services has directed his activities towards the State where the consumer is domiciled (see the Amended proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, COM(2000) 689 final, p. 6 in the English language version). This explanatory memorandum of the Commission indicates that the very existence of a (passive) website would in itself suffice for jurisdiction to be determined in accordance with the special rules applicable to consumer contracts. Criticised in legal literature by Øren, *loc. cit.* (footnote 4), p. 682 et seq.

50 – See the joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001 (cited in footnote 10).

51 – In the context of a systemic interpretation I would add that – as correctly pointed out by the Commission – when interpreting the concept of the directing of activities within the meaning of Article 15(1)(c) of Regulation No 44/2001 no significance is to be attached to the Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1, or the Draft Guidelines on Vertical Restraints (SEC(2009) 946)) under which advertising and sales promotion on the internet are deemed ‘passive’ sales (see paragraphs 50 and 51 of the guidelines and paragraphs 51 and 52 of the draft guidelines in conjunction with Article 4(b) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21) or with Article 4(b) of the draft amendment to the regulation (C(2009) 5365/2)). The purpose of categorising a sale as ‘passive’ is in fact to prevent a supplier from restricting that type of sale to a particular territory or a particular group of customers, thereby infringing Article 81 EC. The purpose of Article 15(1)(c) of Regulation No 44/2001 is quite different, however, namely to make more favourable rules determining jurisdiction available to the consumer as the weaker party to the contract.

52 – I should like to add that the explanatory memorandum accompanying the proposal for the Rome I Regulation states that websites by which an undertaking directs its activities to the Member State of the consumer’s domicile ‘are not necessarily interactive sites’ and a website that invites buyers to fax an order also aims to conclude distance contracts. This supports the argument that the directing of activities should not be confined to interactive websites and that this concept should be construed more widely.

53 – In legal literature see to this effect, for example, Gaudemet-Tallon, loc. cit. (footnote 4), p. 230, paragraph 286; Geimer, R., Schütze, R.A., *Europäisches Zivilverfahrensrecht: Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, EuInsVO, EuVTVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, 3rd edition, Beck, Munich, 2010, p. 335, paragraph 38; Droz, G., Gaudemet-Tallon, H., ‘La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale’, *Revue critique de droit international privé*, No 4/2001, p. 638, paragraph 45; Sinay-Cytermann, A., ‘La protection de la partie faible en droit international privé’, in: *Mélanges en l’honneur de Paul Lagarde - Le droit international privé : esprit et méthodes*, Dalloz, Paris, 2005, p. 743.

54 – In legal literature see to this effect, for example, Kropholler, loc. cit. (footnote 20), p. 231, paragraph 24, who stresses that a passive website which contains not only advertising but also offers the conclusion of a contract by post, email, fax or telephone should be treated

in law in exactly the same way as an active website. See also Mankowski, loc. cit. (footnote 4), p. 239 et seq.; Montero loc. cit. (footnote 4), p. 334; Geimer/Schütze, loc. cit. (footnote 53), p. 335, paragraph 38; Gaudemet-Tallon, H., loc. cit. (footnote 33), p. 228.

55 – In preliminary ruling proceedings, which are based on a clear division of responsibilities between the national courts and the Court of Justice, the facts must in any event be appraised by the national court. See, to this effect, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 45; Joined Cases C-261/08 and C-348/08 *Zurita García and Others* [2009] ECR I-10143, paragraph 34; and Case C--537/07 *Gómez-Limón Sánchez-Camacho* [2009] ECR I-6525, paragraph 24.

56 – For example, where the undertaking sets up a premium number for domestic consumers whilst giving consumers from abroad the normal telephone number with an international dialling code.

57 – In the case of hotel services, for example, this would be the ‘look-and-book’ selection facility whereby it is possible to enquire about the availability of rooms during a particular period.

58 – According to Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-7841, paragraph 40 and the operative part, Article 5(1)(c) of the Directive on electronic commerce must be interpreted as meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner.

59 – It is conceivable, for example, that an undertaking might state on its website that it has already had customers from numerous Member States or publish testimonials from customers from various Member States on its website.

60 – Similarly, in legal literature, Geimer/Schütze, loc. cit. (footnote 53), p. 335, paragraph 38.

61 – This interpretation is supported in legal literature by, for example, Farah, loc. cit. (footnote 47), p. 267.

62 – See the joint declaration by the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001 (cited in footnote 10).

63 – See also, to this effect, Nielsen, loc. cit. (footnote 20) p. 317, paragraph 35, who states that a website written in Swedish is directed towards Sweden and not Spain. See also Vasiljeva, K., ‘1968 Brussels Convention and EU Council Regulation no 44/2001: jurisdiction in consumer contracts concluded online’, *European Law Journal*, No 1/2004, p. 133.

64 – This is also mentioned in legal literature, by Øren, loc. cit. (footnote 4), p. 690.

65 – English, for example.

66 – German in Germany and Austria, for example.

67 – If, for example, an Estonian undertaking provides a facility on its website written in Estonian making it possible to select Finnish, this is an indication that it is also directing its activities to Finland. The question

which naturally also arises in connection with the language criterion is whether an undertaking that provides a facility to select English instead of the language of the website is automatically directing its activities to all other Member States because of the widespread use of English as a foreign language. In my view, the possibility of selecting English instead of the language of the website, whilst being a strong indication that the undertaking is also directing its activities to all other Member States, would nevertheless not be sufficient on its own. Other criteria would have to be taken into account, in any event, when determining whether an undertaking is directing its activities to other Member States.

68 – That is to say, country-code top-level domain names, for, example, ‘.at’, ‘.fr’, ‘.de’, or ‘.co.uk.’

69 – See to this effect, in legal literature, Øren *loc. cit.* (footnote 4), p. 690, footnote 105.

70 – For example, ‘.com’, ‘.net’, ‘.org’, or ‘.eu’.

71 – For example, even a confectioner who traditionally provides his services within a limited geographical area can sell certain products over the internet and send them abroad.

72 – A hairdresser’s services, for example, are basically provided locally but in a few areas it is quite conceivable that the service provider also regularly has customers from abroad.

73 – Similarly, Øren, *loc. cit.*, (footnote 4), p. 687.

74 – See point 66 and footnote 41 of this Opinion.

75 – In addition to the directing of activities to certain Member States being expressly excluded, there is also a possibility of the undertaking taking technical measures to prevent consumers in certain Member States from gaining access to its website. See, in legal literature, Nielsen, *loc. cit.* (footnote 20), p. 317, paragraph 35; Gaudemet-Tallon, H., *loc. cit.* (footnote 33), p. 227.

76 – Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ 2007 L 199, p. 1). Although the scope of this regulation is restricted, under Article 2(1), to cases where the value of the claim does not exceed EUR 2 000, excluding interest, so that the regulation would not apply in the present cases, it is nevertheless possible, in my view, to apply it to most other legal actions in relation to consumer contracts. In legal actions in which the value of the claim, excluding interest, does not exceed EUR 2 000 the procedure is considerably simplified as it is generally conducted in writing (under Article 5(1) of the regulation the court or tribunal will hold an oral hearing only if it considers it to be necessary or if a party so requests); representation by a lawyer or another legal professional is not mandatory (Article 10).

77 – Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

78 – Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15).

79 – Articles 32 to 56 of Regulation No 44/2001.

80 – See, to this effect, Article 1 of Regulation No 861/2007 and Article 1(1)(a) of Regulation No 1896/2006.

81 – See, regarding the free circulation of orders for payment, Article 1(1)(b) of Regulation No 1896/2006. See, for the free circulation of judgments, court settlements and authentic instruments, Article 1 of Regulation No 805/2004. See, with regard to the objectives of Regulation No 44/2001, the second recital in the preamble to that regulation, which states that ‘[c]ertain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market’, so that ‘[p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential’.

82 – Nielsen, *loc. cit.* (footnote 20), p. 316, paragraph 30, also justifiably states that consumers will be more prepared to buy over the internet if they enjoy reasonable legal protection through the courts – that is to say, when they know that they are able to take legal action in their Member State of domicile.

83 – According to Article 3(2) of the Services Directive that directive ‘does not concern rules of private international law, in particular rules governing the law applicable to contractual and non-contractual obligations, including those which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member States’. Although it could be concluded from the wording of that article that it refers only to provisions governing the law applicable to contractual and non-contractual obligations, the Commission does nevertheless state in its document ‘Handbook on the Implementation of the Services Directive’ ([http://ec.europa.eu/internal\\_market/services/services-dir/proposal\\_en.htm#handbook](http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm#handbook), p. 16 of the English language version) in connection with this article that the directive also does not concern the jurisdiction of courts as these questions are regulated by Regulation No 44/2001.

84 – I should like to add that recital 95 in the preamble to the Services Directive gives *inter alia* the following examples of such objective reasons: additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment.

85 – In legal literature this view is shared, for example, by Geimer/Schütze, *loc. cit.* (footnote 53), p. 335, paragraph 38; Micklitz, H.-W., Rott, P., ‘Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001’, *Europäische Zeitschrift für Wirtschaftsrecht*, No 11/2001, p. 331; Beraudo, J.-P., ‘Actualité: le règlement (CE) du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et

l'exécution des décisions en matière civile ou commerciale', JurisClasseur procédure civile, 2002, fasc. 52, paragraph 32; Fawcett, J.J., Harris, J.M., Bridge, M., International Sale of Goods in the Conflict of Laws, Oxford University Press, Oxford, 2005, p. 501, paragraph 10.16.