OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 8 September 2005 [1]

I — Introduction

1. This reference for a preliminary ruling concerns, firstly, the validity of Articles 5, 6 and 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (hereinafter 'Regulation 261/2004'). [2] It concerns, secondly, the interpretation of the second paragraph of Article 234 EC.

II — Legal framework

The Montreal Convention

2. The Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter the 'Montreal Convention') [3] was signed by the European Community on 9 December 1999. It was approved by decision of the Council of 5 April 2001. [4] It entered into force, so far as the European Community is concerned, on 28 June 2004.

3. Article 19 of the Montreal Convention, headed 'Delay', provides:

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.'

4. Article 22(1) of the Montreal Convention limits the liability of the carrier for delay, as

1 — Original language: English.

2 — OJ 1991 L 46, p.1.

3 — OJ 2001 L 194, p. 39

4 — OJ 2001 L 194, p. 38.

specified in Article 19, to 4 150 Special Drawing Rights for each passenger. Article 22(5) provides that this limit is not to apply if the damage results from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result.

5. Article 29, headed 'Basis of claims', states as follows:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'

Regulation No 889/2002

6. Article 1(4) of Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents [5] replaces Article 3 of Regulation No 2027/97, with the following:

'1. The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.'

7. Article 1(10) of Regulation No 889/2002 adds an Annex to Regulation No 2027/97, which contains, inter alia, the following provisions under the heading 'Passenger delays':

'In case of passenger delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for passenger delay is limited to 4 150 SDRs (approximate amount in local currency)'.

5 — OJ 1997 L 140, p.2.

Regulation 261/2004

8. Article 5 of Regulation 261/2004, headed 'Cancellation', provides:

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

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.'

9. Article 6 of Regulation 261/2004, headed 'Delay', states as follows:

'1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

(a) for two hours or more in the case of flights of 1 500 kilometres or less; or

(b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or

(c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

(i) the assistance specified in Article 9(1)(a) and 9(2); and

(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.'

10. Article 7 of Regulation 261/2004 headed 'Right to compensation' provides:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked:

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

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

11. Under Article 8 of Regulation No 261/2004:

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

(a) reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price

at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,

— a return flight to the first point of departure, at the earliest opportunity;

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

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

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

12. According to Article 9 of Regulation No 261/2004:

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

(a) meals and refreshments in a reasonable relation to the waiting time;

(b) hotel accommodation in cases:

— where a stay of one or more nights becomes necessary, or

— where a stay additional to that intended by the passenger becomes necessary;

(c) transport between the airport and place of accommodation (hotel or other).

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

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

III — Facts, procedure and questions referred for preliminary ruling

13. The International Air Transport Association (hereinafter 'IATA') which represents the interests of 270 airlines from 130 countries, which carry 98% of scheduled international air passengers on flights worldwide, and the European Low Fares Airline Association (hereinafter 'ELFAA'), an association established in January 2004 which represents the interests of 10 European low-fares airlines from nine EU countries (hereinafter, together, 'the claimants'), brought before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) (United Kingdom) (hereinafter 'the High Court'), two sets of proceedings against the Department for Transport of the Government of the United Kingdom and Northern Ireland for judicial review relating to the implementation of Regulation No 261/2004.

14. Being of the view that the claimants' arguments are viable and hence not unfounded, the High Court decided to refer to the Court seven questions put forward by the claimants contesting the validity of Regulation No 261/2004. Since the Department for Transport doubted that a reference on six of the questions was necessary, as the questions raised did not raise any real doubt as to the validity of that Regulation, the High Court wished to know what test must be satisfied, or what threshold passed, before a question concerning the validity of a Community instrument must be referred to the Court of Justice on the basis of the second paragraph of Article 234 EC. It was in those circumstances that the national court referred the following questions to the Court:

'1. Whether Article 6 of Regulation No 261/2004 is invalid on grounds that it is inconsistent with the Montreal Convention 1999, and in particular Articles 19, 22 and 29 thereof, and whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

2. Whether the amendment of Article 5 of the Regulation during consideration of the draft text by the Conciliation Committee was done in a manner that is inconsistent with the procedural requirements provided for in Article 251 EC and, if so, whether Article 5 of the Regulation is invalid and, if so, whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

3. Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are inconsistent with the principle of legal certainty, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

4. Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are not supported by any or any adequate reasoning, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

5. Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are inconsistent with the principle of proportionality required of any Community measure, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

6. Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they discriminate, in particular, against the members of the second Claimant organisation in a manner that is arbitrary or not objectively justified, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

7. Is Article 7 of the Regulation (or part thereof) void or invalid on grounds that the imposition of a fixed liability in the event of flight cancellation for reasons that are not covered by the extraordinary circumstances defence is discriminatory, fails to meet the standards of proportionality required of any Community measure, or is not based on any adequate reasoning, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

8. In circumstances where a national court has granted permission to bring a claim in that national court, which raises questions as to the validity of provisions of a Community instrument and which it considers is arguable and not unfounded, are there any principles of Community law in connection with any test or threshold which the national court should apply when deciding under Article 234(2) EC whether to refer those questions of validity to the ECJ?'

15. The order of the High Court was received at the Court on 12 August 2004. Written observations were submitted by the claimants, the European Parliament, the Council, the Commission and the United Kingdom [Governement]. On 7 June 2005 a hearing was held.

IV — Assessment

16. In this request for a preliminary ruling, seven out of eight questions concern the validity of Regulation No 261/2004.

17. Regulation No 261/2004 covers denied boarding (Article 4), cancellation (Article 5) and delay (Article 6).

18. For each situation the carrier has certain obligations:

— In the case of denied boarding: compensation (Article 7), rerouting/reimbursement (Article 8) and care (Article 9).

— In case of cancellation of a flight: assistance in the form of rerouting or reimbursement (Article 8) and care, in the form of meals, etc. (Article 9), but no compensation (Article 7), provided the passengers were informed in good time or if the carrier can prove that cancellation is caused by extraordinary circumstances.

— In case of delay: only care under Article 9, except for delays of five hours or more. In that situation a passenger is also entitled to reimbursement in accordance with Article 8.

19. In addition, air carriers have an obligation to inform passengers of their rights, so

that they can effectively exercise their rights. [6] This information must include the contact details of the body entrusted with the task ensuring and supervising the general compliance by air carriers with the Regulation. [7]

20. Furthermore, these obligations vis-à-vis passengers may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage. [8]

21. The claimants' claims in the main procedure do not concern the legality of Article 4 and the obligation on air carriers to compensate or assist passengers who are denied boarding, but the obligations provided for by Article 5 and Article 6 to compensate, reimburse or re-route and to provide care to air passengers in case of cancellation and delay.

22. In a nutshell, their grounds of challenge are:

— inconsistency between Article 6 of the Regulation and the Montreal Convention;

— procedural irregularity (the amendment of Article 5 of the Regulation is in breach of the procedure set out in Article 251 EC);

— lack of legal certainty and inadequate reasoning;

— proportionality;

— breach of the principle of non-discrimination;

— payment of compensation in a fixed sum is disproportionate, discriminatory and lacks adequate reasons.

First question (inconsistency with the Montreal Convention)

23. By its first question the referring court asks whether Article 6 (delay) of the

6 — See recital 20 and Article 14.
7 — See recital 22 and Article 16.
8 — See Article 15.

Regulation is invalid as it is inconsistent with Articles 19, 22 and 29 of the Montreal Convention.

24. In case of delay of at least two hours an air carrier is obliged, under Article 6 of the Regulation, to offer care in accordance with Article 9. Where the delay is at least five hours, the passenger is also entitled to reimbursement/rerouting in accordance with Article 8. Article 6 does not give the air carriers any defence based on 'extraordinary circumstances'.

25. IATA and ELFAA submit that, owing to this lack of an 'extraordinary circumstances' defence, Article 6 of the Regulation is inconsistent with Articles 19, 22(1) and 29 of the Montreal Convention and is therefore invalid.

26. Such a defence is provided for in the Montreal Convention. In their view, it follows from Article 29 that in case of carriage of passengers by air, any action for damages, however founded, is subject to the conditions set out in the Convention. Thus, any provision on damage occasioned by delay in the carriage of passengers by air must comply with Articles 19 and 22 of the Convention.

27. They argue that the Montreal Convention is binding on the Community; that the Convention takes precedence over Article 6 of the Regulation; and that Article 19, 22(1) and 29 of the Montreal Convention are of direct effect.

28. The Parliament, the Council the Commission and the government of the United Kingdom take the view that there is no conflict between the Regulation and the Convention, because those measures relate to two different systems, with different aims. They argue that the requirement to provide care and assistance does not constitute compensation for damage within the meaning of Article 19 of the Montreal Convention.

29. They note that the requirements imposed on air carriers by Article 6 of the Regulation are rules of a public nature. Such an obligation has nothing to do with an action for damages brought before a court. It merely requires the provision of assistance to passengers in their immediate needs, on the spot, in case of delay.

30. At the hearing, IATA and ELFAA elaborated further on the observations submitted by the Parliament, the Council and the Commission. They state that the Community Institutions' arguments are based on

a restrictive interpretation of the notion of 'damage occasioned by delay' in Article 19 of the Montreal Convention. They also disagree with the arguments that the Convention only partially harmonises certain rules.

31. As regards the restrictive interpretation, they argue that it is contrary to consumers' interest, contrary to the case-law of this Court [9] and contrary to judgments of other jurisdictions (which, on the basis of Article 19 of the Montreal Convention, granted passengers compensation for hotel costs, etc.). Second, as a consequence of this restrictive interpretation, the Community felt free to fill the gap, although that gives rise to further confusion since, in their view, Regulation No 2027/97 and Regulation No 261/2004 both seek to establish uniform rules and both concern the liability of carriers for damage caused by delayed flights. In their opinion, it is impossible to reconcile the two regulations. They refer to the word 'compensation' which is used in both Regulations but apparently has different meanings: compensation for damage (Regulation No 2027/97) and compensation for lack of damage (Regulation No 216/2004). In their view this distinction, made by the Institutions, is rather confusing. It destroys the simplicity and clarity referred to in recital 12 of Regulation No 2027/97, it destroys the balanced system provided for by the Montreal Convention and it is in clear violation with that Convention. In their view, compensation for lack of damage is another way of saying non-compensatory damages. If that is the case, Article 6 of Regulation No 216/2004 conflicts with Article 29 of the Montreal Convention and with Article 3 of Regulation No 2027/97, as amended, absolving the carrier from any liability to make such payments.

Assessment

32. The Community is party to the Montreal Conventions and there is no doubt that the Community is bound by this Convention. The Convention was signed and concluded on the basis of Article 300 EC. Agreements concluded in accordance with Article 300 EC are binding on the institutions and the Member States and form an integral part of the Community legal order once they have

9 — The claimants refer to case C-336/03 *easyCar* [2005] ECR I-1947 and to Case C-168/00 *Leitner* [2002] ECR I-2631. It follows from the judgment in *easyCar* that derogations from the rules on consumer protection should be interpreted in a restrictive way. The claimants argue on the basis of the *Leitner* case that the notion damage includes non-material damages and that the same should apply to the notion of damage in the context of Article 19 of the Montreal Convention and in the context of Regulation No 2027/97.

entered into force.[10] The fact that the Regulation was adopted before the entry into force, for the European Community, of the Montreal Convention does not change the obligations of the Community institutions under international law. The Montreal Convention is an international agreement and as such is binding on the parties thereto and must be performed in good faith. Therefore, even though the Community has not yet formally deposited its instrument of ratification, the Community institutions may not act against international agreements. The institutions were obliged, as from 9 December 1999, the date of signature, to refrain from acts which would defeat the object and purpose of the Convention.[11]Thus, there was an obligation to refrain from adopting Community legislation which could be incompatible with the Montreal Convention.

33. The question is therefore whether the scope and object of the Convention are the same as the contested (provisions in) Regulation No 261/2004 and whether there is a conflict between the two.

34. The purpose of the Montreal Convention 1999, like that of its predecessor (the Warsaw Convention 1929, as amended), is to achieve uniformity on certain rules related to liability arising in the course of international carriage by air.

35. The relevant provisions for the present case are laid down in Chapter III of the Montreal Convention, dealing with the liability of the carrier and the extent of compensation for damage. Article 17 deals with damage sustained in case of death or injury of passengers and damage to baggage. Article 18 concerns damage to cargo. Article 19 deals with damage occasioned by delay in the carriage of passengers, baggage or cargo for which the carrier is liable. It follows from Article 19 that a carrier is presumed to be liable, but that it may reverse this presumption by proving that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

36. The subsequent Articles, beginning with Articles 20 to 28, deal with various issues, inter alia, with limitations on liability, like the limitation of the liability of the carrier to 4 150 SDRs for each passenger in case of delay of persons.

10 — See Case 181/73 *Haegeman* v *Belgium State* [1974] ECR 449 and Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641.

11 — See Article 18 of the Vienna Convention on the Law of Treaties. Article 18 codifies the principle of good faith of customary international law by providing that: 'A State is obliged to refrain from acts that would defeat the objective and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.'

37. Then, Article 29 determines that any action for damages before a court is to be subject to the conditions and such limitations as are set out in the Convention. Article 33 determines which courts have jurisdiction and provides that procedural questions are to be governed by the law of the court seised of the case. Furthermore, Article 35 sets out a two-year limitation period for the commencement of an action.

38. As far as the Community is concerned, the relevant provisions of the Convention have been incorporated into Regulation No 2027/1997 through its amendment by Regulation No 889/2002. The amended version has applied since 28 June 2004, the date of entry into force of the Montreal Convention for the Community. [12]

39. Thus, Regulation No 2027/97, as amended, has extended its field to include the civil liability of air carriers for damages in case of delay as well. This is for example reflected in Article 3(1) of this Regulation as well as in the Annex to the Regulation, which is de facto an information notice to be used by air carriers according to Article 6 of Regulation No 2027/97 and which summarises the liability rules applied by Community air carriers as required by Community legislation and the Montreal Convention.

12 — Article 2 of Regulation 889/2002.

40. In addition to the civil liability under the Montreal Convention and Community law of the air carrier for damages caused by delay, Regulation No 261/2004, the contested Regulation, contains specific obligations for an air carrier in case of denied boarding, cancellation and delay.

41. As far as delay is concerned, the carrier has to provide care (meals, hotels, etc.) and assistance during the delay. This obligation is not exempted by way of an 'extraordinary circumstances' defence. Therefore, the debate is not only focused on the scope and object of the Montreal Convention but also on the meaning of 'damage occasioned by delay' (the latter brought up by the claimants in the main proceedings,) since the Montreal Convention provides for a defence but the contested Regulation does not.

42. In my view, as will be explained below, the Montreal Convention and the Regulation are complementary and not in conflict.

43. First, it is beyond doubt that the Montreal Convention harmonises certain rules governing international carriage by air, like the civil liability of air carriers in the

event of damage occasioned by delay and subsequent actions for damages that individual passengers may bring before courts. However, this harmonisation does not relate to all aspects that may arise in the event of delay.

44. As the Commission and the Council have observed, the Montreal Convention regulates the types of claims which could be brought before the courts in case of damage as a result of the delay. In that regard, Article 29 of the Convention refers to 'any action for damages', but not to 'any action in respect of delay'.

45. Thus, as far as an action for damages in the event of delays is concerned, the Montreal Convention is exhaustive, but it does not preclude measures not related to an 'action for damages'. For instance, the Convention does not exclude measures which impose on air carries certain minimum requirements as regards the service which they must provide during the delay.

46. Second, it is clear that Article 6 of the Regulation does not deal with civil liability or actions for damages. An action for damages, as the Parliament, the Council and the Commission have also observed, requires consideration as to whether damage has occurred in the first place, whether there is a causal link between the delay and the damage, the amount of the damage and whether or not the carrier could put forward a defence. These considerations are relevant where an action (for damages) is brought before (one of) the competent courts (meant in Article 33 of the Convention.)

47. These considerations are not relevant in the context of Article 6 of the Regulation. The objective of Article 6 is to protect passengers by obliging carriers to provide care and to assist stranded passengers, regardless of whether there is damage. There is no need to show any damage, and any fault on the part of the air carrier is irrelevant for this purpose. Consequently, there is no need for a defence either.

48. The obligation to provide a minimum of service during the delay, and thus the protection afforded to passengers, constitute rules of a public nature.

49. Incidentally, it goes without saying that, where a passenger also suffers damage as a result of the delay, he can bring an action for

damages under Article 19 of the Montreal Convention before one of the competent courts mentioned in Article 33 of the Convention. Article 12 preserves such eventual damage claims.

50. To my mind it is clear that the obligations imposed on air carriers by Article 6 are not in conflict with the Montreal Convention. The Montreal Convention and Regulation No 2027/97 on the one hand and Regulation No 261/2004 on the other hand are of an entirely different nature. As we have seen above, the Montreal Convention deals with an individual passenger's right to bring an action before a court to claim damages caused to him by a delay, the situation governed by private international law, while Article 6 of the Regulation aims to establish certain obligations for the air carrier, thereby creating at the same time the right for all passengers to receive immediate care and assistance during the delay.

51. To my mind it is obvious that such a statutory obligation is not the same as civil liability for damage caused by delay (in the sense of loss occurring as a result of the delay) under the Montreal Convention.

52. Furthermore, the public nature of the obligations imposed on air carriers by Regulation No 261/2004 have a public character is further underlined, as the Parliament has also pointed out, by the fact that the enforcement mechanism is different. According to the Regulation, each Member State must designate a body responsible for the enforcement of the Regulation and 'where appropriate, this body shall take measures necessary to assure the rights of passengers are respected'. Where an air carrier does not fulfil its obligations under the Regulation, and thus denies passengers' entitlements, the passengers can file a complaint with that body. Moreover, Member States must also ensure — as a back up — that there is an effective, proportionate and dissuasive sanction mechanism in force.

53. In addition, the passenger can initiate court proceedings if the carrier did not perform its public-law obligations. Such a claim evidently is aimed at forcing air carriers to comply with their obligations, irrespective of whether a passenger has suffered damages as a result of this non-compliance. In other words, the object of the action and the obligations of a carrier is identical.

Second question (Article 251 EC)

54. By its second question, the referring court seeks to ascertain (a) whether Article 5

(cancellation) is invalid because it was amended by the Conciliation Committee contrary to Article 251 EC and (b) if so, whether this fact and any other relevant fact affect the validity of the regulation as a whole.

55. According to IATA and ELFAA, the deletion by the Conciliation Committee of the carrier's 'extraordinary circumstances' defence in respect of Article 9 (care) claims in the event of cancellation, although there was no disagreement between the Council's common position and the Parliament's second reading in that regard, is unlawful.

56. Essentially, they submit that the Conciliation Committee cannot modify any provision of the proposed measure unless the Parliament and the Council had previously disagreed on the matter in the second reading. On this point, they refer to the clear wording of Article 251(4) EC, which provides that the Conciliation Committee is to address the common position on the basis of the amendments proposed by the Parliament. They also submit that another interpretation equals an implicit grant of power to the Committee, which would undermine the institutional balance of the legislative process and create a greater democratic deficit than the one that Article 251 was intended to remedy.

57. They argue that if the Conciliation Committee could introduce new amendments to the Council's common position, members of the Parliament participating in the Conciliation Committee could effectively by-pass the will of the plenary of the Parliament. They refer to the difference between the voting procedures in the second and third readings. During the second reading, the Parliament votes separately on each proposed amendment, so that each member can approve or reject individually any proposed amendment, while in the third reading the Parliament can only adopt or reject the joint text as a whole.

58. The introduction in conciliation of new amendments which had not previously been discussed would also hamper the legislative powers of the Commission.

59. The Council, the Parliament, the Commission and the United Kingdom Government take the view that the Conciliation Committee did not exceed its competence. In their opinion, the wording of Article 251(4) does not support the restrictive view of IATA and EELFA.

Assessment

60. Within the framework of co-decision, recourse to the Conciliation Committee

procedure occurs only where the Parliament and the Council disagree on the text of the proposed measure after two readings each.

61. In the present case, the Parliament, in its second reading, had adopted several amendments to the Council's common position. The Council did not approve all of the amendments. Therefore, a Conciliation Committee was convened pursuant to Article 251(4) EC.

62. The Conciliation Committee reached agreement on 14 October 2003. Part of this agreement was that air carriers have to provide care, without the possibility to invoke an 'extra-ordinary circumstances' defence. The vote in the European Parliament on the agreement reached in conciliation took place on 18 December 2003, resulting in 467 votes in favour, 4 against and 13 abstentions. On 26 January 2004 the Council, by a qualified majority, adopted the joint text approved by the Conciliation Committee.

63. I shall begin with a brief outline of Article 251 EC

64. The co-decision procedure, introduced by the Treaty of Maastricht and amended by the Amsterdam Treaty, its application being further extended by the Treaty of Nice, is nowadays the main legislative procedure of the European Community. It is designed to prevent a measure from being adopted without the approval of both the Council and the European Parliament. Thus, the emphasis is placed on reaching a jointly-agreed text, placing the Council and Parliament on an equal footing.

65. The procedure consists of three stages (first reading, second reading and third reading with conciliation), but the procedure may be concluded at any of these stages, if an agreement between the Parliament and Council is reached.

66. A co-decision procedure always begins with a proposal from the Commission. The Commission submits its proposal to the Parliament and the Council at the same time.

67. The Commission's proposal receives its first reading before the Parliament, with or without amendments. It is adopted by a majority of the members participating in the vote.

68. Where the Parliament adopts amendments, the Commission will give an opinion and send it, together with an (amended)

proposal, to the Council. If the Council approves all the amendments of the Parliament, or if the Parliament does not propose any amendments, the Council may adopt the act. Otherwise, the Council will conclude its first reading when it adopts what is known as a common position.

69. The common position, accompanied by the reasons which led the Council to adopt that position, will be communicated to the European Parliament, as will the Commission's opinion on the common position. Within three months (or four, if extended) the Parliament may approve the common position (act is adopted) [13], reject it (in which case the procedure is closed) or amend it at its second reading. A rejection of the common position or the adoption of amendments to it, are voted by an absolute majority of members (a minimum of 367 votes).

70. The Parliament's position in the second reading will be sent to the Council, which then has three months (or four if extended) for its second reading. Where the Council accepts all the amendments, the act is adopted. Where the Commission has given a negative opinion on at least one amendment, the Council can only adopt the Parliament's position overall by unanimity. If the Council is unable to adopt all the amendments then the conciliation procedure will be set in train. This will be done by the President of the Council in agreement with the President of the Parliament.

71. Conciliation is the third and final phase of the co-decision procedure.

72. The Conciliation Committee is composed of the members of the Council or their representatives and an equal number of representatives of the Parliament. The Commission also takes part in this Committee.

73. According to Article 251(4) EC:

— the Conciliation Committee's task is 'reaching agreement on a joint text', and in fulfilling this task, the Conciliation Committee is to 'address the common position on the basis of the amendments proposed by the European Parliament'

— the Commission's role is to be to 'take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council'.

13 — The same applies where the Parliament did not take a decision by the deadline.

74. Where the Conciliation Committee fails to approve a joint text, the proposed act is deemed not to have been adopted. Thus, an approved joint text of the Conciliation Committee is a precondition for final adoption, that is to say, a joint text approved by the representatives of the European Parliament (voting by a majority) and the representatives of the Council (voting by qualified majority) within this Committee.

75. Where there is an approved joint text, the Parliament (voting by an absolute majority of the votes cast) together with the Council (voting by a qualified majority) have the final say. Only if both legislatures agree is the act deemed to be adopted.

76. The Commission's role in this final stage is different from that in the previous stages, in which it gives its opinion on the Parliaments' first reading, the Councils' first reading and the Parliaments' second reading. The fact that the Commission is no longer able to withdraw its proposal or to prevent the Council from acting by a qualified majority without its agreement in the third stage does not mean that its function is less important. On the contrary, its function is of substantial importance. It participates in all meetings and has the delicate task of facilitating and promoting the negotiations between both branches of the legislature, by taking all the necessary initiatives, for example by drafting compromise proposals, [14] and doing so in an impartial way.

77. This short outline clearly shows that the essential feature of the co-decision procedure is parity between the Council and the Parliament. The Parliament is in direct dialogue with the Council and vice versa. Both branches of the legislature have to agree which each other on the Commission's legislative proposal. It is inherent in the nature of the procedure that the Council's and the Parliament's political opinions are not always identical. A conciliation procedure, in which both branches of the legislature can examine whether it is possible to find common grounds, acceptable to both institutions, is therefore essential. [15]

78. In other words, because neither the Council nor the Parliament can adopt legislation on its own without the agreement of the other, both are obliged to find ways to overcome their differences.

14 — See also Point III.2 of the Joint Declaration on practical arrangements for the new co-decision procedure, OJ 1999 C 148, p. 1.

15 — In practice this will be preceded by the so-called 'trialogue', an informal, tripartite meeting between the Parliament, the Council and Commission in the interest of efficiency, each delegation acting on a mandate.

79. This implies that the mandate of the representatives in the Conciliation Committee needs to be sufficiently flexible to bridge the initial difference. If the representatives had to negotiate with their hands tied behind their backs the conciliation procedure would serve no purpose at all.

80. It also means that neither institution can consider its initial position to be unassailable.

81. The *raison d'être* of a conciliation procedure is to prevent the co-decision procedure, in the event of differences in view between the Council and the Parliament, from reaching an impasse capable of harming the interests of the Community.

82. Trying to reach agreement entails making compromises. In order to reach a compromise, it may be necessary to reconsider provisions which had previously not given rise to disagreement. Furthermore, an agreed amendment may provoke another amendment to ensure that the measure as a whole is coherent when it is adopted.

83. The flexibility offered by the wording of Article 251(4) EC is also reflected in the constructive role the Commission has to play in the conciliation procedure. Its role is to take *all* necessary initiatives with a view to *reconciling* the position of the Parliament and the Council.

84. These initiatives are not limited to matters on which the other institutions disagree.

85. To summarise: it is correct that Article 251(4) requires that the Committee address the common position on the basis of the amendments proposed by the European Parliament; but that does not mean that the Committee may only consider provisions of the proposed measure on which the Parliament and the Council disagree, or that a provision of the common position which the Parliament has not amended in second reading must be accepted without modification in the text finally adopted. That result would be contrary to the objective of the conciliation procedure itself, namely to find common grounds for both branches of the legislature. Such an interpretation would also hamper the Commission in playing its impartial role as mediator.

86. It is clear, too, that the scope of the power of the Conciliation Committee is not unlimited. First, the logical starting point for

seeking agreement is the outstanding disagreement between the Council and the European Parliament. Second, the scope of the measure proposed may not be fundamentally altered.

87. It is in the light of the foregoing that the arguments of IATA and EELFA must to be seen.

88. Their first argument is that the Conciliation Committee may only address the amendments adopted by the Parliament in the second reading on which there is disagreement between the Council and the Parliament.

89. For the reasons set out above, it is clear that the strict interpretation of the claimants in the main proceedings could seriously hamper the attainment of an agreement. Nor is there any support for their view in the wording of Article 251(4) EC, or in the *raison d'être* of the conciliation procedure. Article 251(4) EC requires that the Committee 'address the common position on the basis of the amendments proposed by the European Parliament'. The words 'on the basis of' indicate precisely that these amendments are not binding on the Committee. These amendments should only be the starting point for the negotiations in the context of the conciliation procedure. Therefore, Article 251(4) EC does not provide that the Committee may only consider provisions on which there is disagreement, or that any provision of the common position which the Parliament has not amended in the second reading must be accepted without modification in the text finally adopted.

90. Second, IATA and EELFA claim that the possibility to add 'new' amendments during conciliation disturbs the institutional balance, leads to a lack of transparency and undermines the democratic legitimacy of Community acts.

91. IATA and EELFA have referred to case-law in which the Court has ruled that a breach of the rules in the Treaty or secondary legislation on Community decision making that are intended to ensure the Community's institutional balance constitutes a violation of an essential procedural requirement and that the Parliament's role in the decision-making procedure reflects a fundamental democratic principle. They argue on the basis of the institutional balance that the role of the Conciliation Committee must be limited to finding a compromise on the Parliament's proposed amendments. Furthermore, in their submission, the amending power of the Conciliation Committee undermines the Commission's exclusive right to initiate legislation.

92. It seems to me that the case-law [16] referred to has no relevance to the present case. It is clear that in a co-decision procedure the Parliament is fully involved. As I have said several times before, the conciliation procedure forms an intrinsic part of the procedure under Article 251 EC to be followed after failure to reach agreement after second reading. An agreement on a joint text between the representatives of both branches of the legislature is *a conditio sine qua non* for the adoption of a Community act. That implies a certain scope for flexibility on both sides.

93. This conciliation procedure as described and explained above, is by its nature an essential element of the institutional balance. This procedure provides for the full involvement of both branches of the legislature on an equal footing and allows the Commission to carry out to the full its function as a mediator. Therefore, the argument that the representatives of the Parliament in the conciliation procedure are restricted to considering those amendments in the second reading fails. I have already remarked that this would be an undesirable situation and shall return to this point below

16 — In this context they refer, inter alia, Case C-392/95 *European Parliament* v *Council* [1997] ECR I-3213; Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, Case 139/79 *Maizena* [1980] ECR 3393; Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333.

94. Second, as said before, in conciliation the Committee cannot alter the scope of the proposed act.

95. As far as the voting within the European Parliament is concerned, the fact that each Member of the Parliament can vote on each proposed amendment in the second reading, while in the third round Members can only accept or reject the joint text as a whole, does not mean that it leads to a 'hostage' situation or to less democracy. It is inherent to the procedure that it cannot last *ad infinitum*. Eventually a decision must to be taken, be it an approval or a rejection.

96. In addition, it will be recalled that the representatives of the Parliament in the Conciliation Committee receive their mandate from the Parliament, that the composition of the members in the Committee constitutes a fair reflection of the parties in the Parliament and that their task is to try to reach an agreement in good faith. Once the joint text is agreed, it cannot be reopened by allowing each member to vote on each element of the compromise reached.

97. As a side issue, I observe that the members of the Council, who do not represent the Council as an institution, but

express their opinion as members of the Council, are members of their respective Governments too, Governments which are democratically controlled in their respective Member States.

98. Lastly, the Commission's right of initiative is not at stake either. Indeed, in its negotiations the Committee is not restricted to the amendments on which the Council and the Parliament disagree, but in the end the joint text should have the same subject-matter as the original Commission proposal. [17]

99. In the present case the amendments agreed in the Conciliation Committee remain within the scope of the act proposed. It is true that the Parliament did not propose a specific amendment to Article 5 as regards the 'extraordinary circumstances' defence. It did so only in the context of Article 6. It is clear, however, that there is a parallelism between the two provisions. It is a fact that these provisions formed part of the discussion in the phases preceding conciliation. I share the opinion of the Parliament, the Council and the Commission that the modification made during the conciliation procedure was clearly within the scope of the preceding legislative procedure.

Third and fourth questions (legal certainty and reasoning)

100. In the third question, the referring Court asks whether Article 5 (cancellation) and 6 (delay) of the Regulation are invalid on the ground that they are inconsistent with the principle of legal certainty. The fourth question deals with the absence of adequate reasoning and/or factual justification.

101. IATA and ELFAA submit that wording of Article 5 and 6 is in contradiction with recitals 14 and 15 of the Regulation, and thus gives rise to legal uncertainty.

102. It is settled case-law that the principle of legal certainty requires that rules imposing obligations on persons must be clear and precise so that they may know without ambiguity what are their rights and obligations and take steps accordingly [18]. It is settled case-law too that the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogation from the actual provisions of the act in question. [19]

17 — The requirement to stay within the scope of the preceding legislative procedure is also reflected in the inter-institutional Joint declaration on practical arrangements for the new co-decision procedure. See Chapter III point 4.

18 — C-439/01 *Libor Cipra et Vlastimil kvasnick v Bezirkshauptmannschaft Mistelbach* [2003] ECR I-745, paragraph 47, and Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17.

19 — Case C-162/97 *Nilsson a.o* [1998] ECR I-7477, paragraph 54.

103. In the present case, the wording of Article 5 and 6 is wholly unambiguous. As I have already said, in the event of cancellation the air carrier always has to provide care and re-imbursement/rerouting. The passenger is also entitled to compensation, unless the air carrier can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. As regards delay, the passengers do not have the right to compensation under Article 7, although the carrier is still obliged to provide care and re-imbursement/rerouting.

104. Therefore, I see no basis for the allegation of breach of legal certainty. Moreover, the recitals, read in conjunction with Articles 5 and 6, are abundantly clear. Even disregarding the fact that the preamble to a Community act has no binding force, the recitals are clear too.

105. Recitals 12-16 cover cancellation, while recitals 17 and 18 deal with delay. Recital 12 states that air carriers should compensate passengers if they fail to inform passengers of cancellations before the scheduled time of departure and offer them reasonable re-routing, except when the cancellation occurs in extraordinary circumstances. Recital 13 mentions the other rights of passengers (reimbursement or re-routing and care). Recital 14 gives examples of extra-ordinary circumstances. Reference is made to the Montreal Convention. However, it is also clear, that the Regulation and the Montreal Convention cover different issues, as the latter does not deal with obligations such as care or rerouting/reimbursement. It is therefore clear that the defence mentioned in recital 14 refers to the carrier's obligation to provide compensation in the event of cancellation. It is true that recital 15 also envisages delay, however, since there is no obligation to provide compensation in the case of delay, the reference in recital 15 to delay is superfluous.

106. EELFA also submits, basing its complaint on the alleged disjunction between the recitals and Article 5 and 6 of the Regulation, that the obligations imposed by the Regulation to provide reimbursement, re-routing, and care in the event of cancellations and delays due to extraordinary circumstances lack adequate reasoning. In its view, the Community legislature did not present any evidence on the number of passengers per year affected by cancellation or by long delays. Second, the obligations imposed by the Regulation will not help to achieve the objective of reducing the trouble and inconvenience caused to passengers by

cancellation or delay; and, third, the Community legislature failed to explain why it decided to impose disproportionate obligations on carriers, in particular low fares airlines.

107. To my mind, there is no disjunction capable of having any legal effect.

108. According to Article 253 EC, regulations, directives and decisions are to state the reason on which they are based.

109. It is established case-law that the scope of the obligation to state reasons depends on the nature of the measure in question and that where a measure is intended to have a general application, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. [20] If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made. [21]

110. The 25 recitals to the Regulation clearly disclose the essential objectives pursued by its finally adopted corpus. According to the opening recitals, actions by the Community in the field of transport should aim, among other things, at ensuring a high level of consumer protection (recital 1). Next, it is stated that denied boarding, cancellation or long delays cause serious trouble and inconvenience to passengers. Furthermore, despite Regulation No 295/91, the number of passengers denied boarding against their will remains too high, as does that affected by cancellation without prior warning and that affected by long delays, and the Community should therefore raise the standards of consumer protection (recitals 3 and 4). As far as cancellation and delay are concerned, these are to be found, in particular, in recitals 12, 13 and 17. For example, recital 12 clearly indicates that the inconvenience caused by cancellation of flights should by reduced, by, inter alia, inducing carriers to inform passengers of cancellations before the scheduled time of departure.

111. Therefore, there is to my mind no doubt that the requirements of Article 253 EC are satisfied.

20 — See Case 5/67 *Beus* [1968] ECR 83.

21 — See, inter alia, Case 80/72 *Lassiefabrieken* [1973] ECR 635 and Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235.

Fifth question (proportionality)

112. By its fifth question, the referring court asks whether Articles 5 and 6 of the Regulation breach the principle of proportionality.

113. IATA and EELFA submit that the absence of an 'extraordinary circumstances' defence to a claim based on Article 8 and 9 in respect of cancellation (Article 5) and delay (Article 6) cannot serve to reduce the number of delays and cancellation and thus that the condition that a measure must be an appropriate method for the attainment of a legitimate objective is not met. In their view, the second condition, that the measure should not be excessive, is not met either. They maintain that the financial implications are disproportionate for air carriers, in particular for low fares airlines.

114. As is well known, and IATA and EELFA have already referred to the relevant conditions, the principle of proportionality requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it. [22] Thus, where there is a choice between several appropriate measures, recourse must be had to the least onerous.

115. It is also settled case-law that, in areas of complex policy choices where the Community legislature enjoys a broad discretionary power, substantive judicial review of the legislative acts is limited. In such cases a legislative act should be annulled only if the act manifestly exceeded the limits of the legislature's competence. [23]

116. In order to carry out the — limited — judicial review, it is necessary to identify the aim of the contested provisions.

117. As noted above, the objectives of the Regulation are to ensure a high level of protection of passengers, and to reduce the trouble and inconvenience caused by cancellation at short notice and delays. It does so

22 — Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health*, [2005] ECR I-6451, Case C-434/02 *Swedish Match* [2004] ECR I-11893, Case C-491/01 *BAT* [2002] ECR I-11453 and Joined Cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-2569.

23 — See the case-law cited in the previous note.

by providing [compensation and] assistance in the form of re-imbursement or re-routing and care for passengers in particular circumstances.

118. Furthermore, Article 153(2) requires that the Community legislature take the consumer protection requirements into account in other policy areas, like in the present case, transport policy.

119. Therefore consumer protection is undoubtedly a legitimate aim expressly provided for in the Treaty. A reference to consumer protection is made not only in Article 153(2) EC, but also in Article 95(3) EC, which explicitly requires a high level of consumer protection.

120. The next question is whether the contested measure constitutes an appropriate means of achieving this aim and whether the measure does not go beyond what is necessary to achieve its aim.

121. As has already been said many times, the objective of the Regulation is to reduce the trouble and inconvenience to passengers who are stranded owing to delay (of two hours or more) or cancellation at the last minute.

122. Indeed, recital 3 mentions that the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delay. While it may be true that the measure as such does not directly contribute to a decrease in the number of cancellations and delays, that, however, is not the key objective of the Regulation. The key objective is that passengers receive immediate and on-the-spot attention, irrespective of the price of the ticket and irrespective of whether or not the air carrier is responsible for the delay or cancellation. In both cases the inconvenience for passengers is the same.

123. In my view, there is no doubt that the obligations imposed on air carriers to provide assistance and care are a suitable means of reducing the trouble and inconvenience to passengers resulting from delays and cancellations.

124. Furthermore, in striking a balance between the different interests at stake, that is to say, those of the air carriers and those of the passengers, the Community legislature

took into account that passengers are heavily dependent on the efficiency and good will of the airline when things go wrong, that carriers are better informed about flight operations than passengers when stranded, and that carriers are better placed to give assistance and provide care.

125. To my mind, it is also logical that there is no exception to the obligation to provide assistance and care in situations where passengers are confronted with delays or cancellation. As the Community institutions have pointed out, lack of information could easily lead to an abuse of the extraordinary circumstances derogation, leaving the passengers uncared. The same is true in situations where the cause of a delay is uncertain or where the delay is attributable to more than one cause.

126. Thus, the Community legislator did not go beyond the scope of its margin of discretion by judging that an extra-ordinary circumstance defence would undermine the achievements of the objectives of the Regulation.

Sixth question (discrimination)

127. This question covers two aspects: (1) an alleged discrimination between low-fare carriers in the air transport sector as against other modes of (low-fare) passenger transport; and (2) the alleged discrimination between low-fare carriers and premium-fare carriers.

128. With regard to the first part of the question, ELFAA alleges that no mode of transport other than air transport is subject to similar rules as those provided for in the Regulation.

129. As far as the second part, ELFAA submits that the business model of its members and other similar cost airlines is based on the premise that they offer low fares (on average EUR 50) on all flights, all of the time. The business model of premium fare carriers, although some of them will on occasion sell seats at lower prices, is based on the premise that the bulk of their income will be derived from much more expensive tickets and so they are better placed to absorb the consequences of an Article 5 and 6 liability on any particular flight. The same cannot be said of ELFAA members, which, consequently, are treated in a discriminatory way by the Regulation.

130. The principle of non-discrimination or equal treatment, a fundamental principle of Community law, requires that comparable situations must not be treated differently and that different situations must not treated in the same way, unless the differentiation is objectively justified. [24]

131. It is obvious that there is a difference between air transport and other transport sectors such as road, rail and sea. The different transport sectors are subjected to different sets of rules under international law, and that is also the case in the context of Community law.

132. Furthermore, the transport services, by different modes of transport are carried out under different circumstances, which as such justify different regulatory approaches. These differences do not amount to discrimination.

133. Incidentally, I note that the Commission has recently submitted a proposal [25] in respect of rail transport containing similar provisions on consumer protection to those in the Regulation.

134. As regards the alleged discrimination between low-fare carriers and premium-fare carriers, my remarks are the following. As the Commission correctly pointed out, all Community air carriers are subject to the same regulatory framework and in particular to Regulation No 2407/92 [26] on the licensing of air carriers, Regulation No 2408/92 [27] on access for Community air carriers to intra-Community air routes and Regulation No 2409/92 [28] on fares and rates for air services. According to the latter, carriers shall freely set their prices.

135. Thus, airline companies are at liberty to set their own prices. They are also free to use this price policy to enter certain markets. However, despite this economic freedom, they are not exempt from complying with provisions of a public law character imposed in the interest of consumer protection.

136. The idea that economic differences which are the direct result of market behaviour and strategies would mean that the companies are subject to other condi-

24 — See for example Joined Cases C-154/04 and C-155/04 *Alliance for National Health*, [2005] ECR I-6451, paragraph 115.

25 — COM(2004) 143 def.

26 — Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ 1992 L 240, p. 1.

27 — Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ 1992 L 240, p. 8.

28 — Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rated for air services, OJ 1992 L 240, p. 15.

tions or less restrictive conditions would stand the system on its head and completely disregard the fact that rules on consumer protection must be of general application irrespective of the price paid for the ticket.

137. In other words, low fares do not give entitlement to a privileged position under the law.

138. Such a privileged position would not only undermine the protection of consumers, it would also amount to discrimination. It is clear that the Community legislature cannot take into account the strategies chosen by the different air line companies when enacting legislation.

Seventh question

139. By its seventh question, the referring court asks whether Article 7 of the Regulation, which fixes a flat-rate compensation payable where the Regulation provides for payment of compensation, is invalid on the grounds that it is discriminatory, disproportionate or not based on adequate reasoning.

140. It will be recalled that compensation is payable only in cases of denied boarding and cancellation of flights. The obligation to compensate passengers in case of denied boarding is not questioned by EELFA in the main proceedings and as such is not an issue in these preliminary ruling proceedings.

141. As regards cancellation, compensation is only an issue if the carrier failed to inform a passenger of a flight cancellation sufficiently in advance of the scheduled time. A carrier is not liable to pay compensation at all if he can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

142. Thus the invalidity pleaded by the claimants refers only to the limited situations in which the carrier failed to inform the passengers sufficiently in advance and where the 'extraordinary circumstances 'derogation is not available.

143. As regards the invalidity pleaded on the basis of proportionality and discrimination, I refer to my remarks under question 5 and question 6.

144. In addition, I should like to state that the provision of three different levels of compensation depending on the length of the flight is designed to ensure that the compensation is proportionate to the inconvenience suffered by the passengers. That seems to me to be fair.

145. Furthermore, the figures finally adopted are essentially an update of the level of compensation taking into account inflation since the entry into force of Regulation No 295/91, which granted passengers compensation in the event of denied boarding.

146. It seems that EELFA's primary concern relates to the figure of EUR 250. As the Parliament observes, this figure is close to the figure of EUR 225 which was proposed as a minimum level for compensation for denied boarding by the Association of European Airlines in 2002. It seems to me that the Community legislature is not obliged to provide such a detailed statement of its reasons for finally opting for a figure of EUR 250 and not EUR 50 more or less.

Eighth question

147. By its eighth question, the referring Court seeks guidance on what test should apply in deciding whether a particular question or questions concerning the validity of the Community legislative measure should be referred to the Court.

148. According the European Parliament this question is inadmissible, because the national court already decided to refer to the Court a number of questions concerning the validity of the Regulation, and has done so. In its view the answer to this question has no impact at all on the national court's decision or on the outcome of the case.

149. I admit that that the Court has held in several cases that it cannot give an preliminary ruling on a question referred by a national court where, inter alia, it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical. [29] It is not the function of the Court, in the context of a preliminary ruling procedure, to deliver advisory opinions on general or hypothetical questions.

150. To my mind, there might be exceptions in which it could be useful to help a national judge in deciding whether and under what

29 — See, for example, Case 491/01 *British America Tobacco* [2002] ECR I-11453 and the case-law referred to in that judgment.

circumstances he may or must refer questions. For a recent example, I refer to the *Gaston Schul* case, not yet decided by this Court. In his Opinion [30] Advocate General Ruiz-Jarabo Colomer proposes that the Court should not adopt a formalistic approach in that case, because that would conflict with certain tasks of the Court too. That case concerns the question whether a national court or tribunal as referred to in the third paragraph of Article 234 EC is also required to refer a question concerning the validity of provisions of a regulation where the Court of Justice has ruled that analogous provisions of another, comparable regulation are invalid, or whether it may refrain from the duty to request a preliminary ruling in view of the clear analogies between the provisions in question and the provisions declared invalid.

151. Although in the present case there is no need to answer the question, I am none the less of the opinion that it might be useful.

152. The reply can be derived from the wording of Article 234 EC as further clarified by the Court in *CILFIT* [31] and *Foto-Frost* [32].

153. From the *CILFIT* case, we know that the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC. It also follows from the wording of Article 234 EC and the *CILFIT* case that it is for the national courts to decide whether it needs a preliminary ruling in order to resolve the case, although the court of last resort is obliged to request a preliminary ruling it, unless the question is irrelevant or the community provision in question has already been interpreted by the Court of Justice or the correct application of community law is so obvious as to leave no scope for any reasonable doubt. From the *Foto-Frost* case we know that a national court is not obliged to refer a question if it considers that the grounds put forward before it by the parties in support of invalidity are unfounded, it may reject them, concluding that the measure is completely valid. Where it shares the opinion it has to refer, since a national court does not have the power to declare acts of the Community institutions invalid.

154. It is apparent from the observations of the United Kingdom Government that the rules governing standing are relatively liberal in England and Wales, that any person may bring a claim for judicial review if he has a sufficient interest in the matter and that the competent court has interpreted the test of what constitutes a sufficient interest very

30 — Case C-461/03 *Gaston Schul*, Opinion of 30 June 2005.

31 — Case 283/81 *CILFIT* [1982] ECR 3415.

32 — Case 314/85 *Foto-Frost* [1987] ECR 4199.

broadly, with the possible consequence that a large number of claims concerning the validity of Community legislative instruments could be brought before the national court.

155. While that may be true, it remains solely for the national court to decide whether there is any doubt as to the validity of the Community measure that merits a referral to this Court.

V — Conclusion

156. On the basis of the foregoing considerations, I propose that the Court should reply as follows to the question referred by the High Court of Justice of England and Wales:

— Examination of the first seven questions has disclosed nothing that would affect the validity of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

— In the context of judicial cooperation established by Article 234 of the Treaty, it is for the national court or tribunal to assess the need to refer a question for to the Court of Justice for a preliminary ruling, taking into account, where appropriate, the principles established by the Court in *CILFIT* and *Foto-Frost*.