

OPINION OF ADVOCATE GENERAL
TRSTENJAK
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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 — OJ 2001 L 12, p. 1.

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

3 — See, for the first interpretation of Article 15(1)(c) of Regulation No 44/2001, Case C-180/06 *Ilsinger* [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: Šeliškar 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).

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.

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

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

A — Regulation No 44/2001

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

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).

'1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their

nationality, be sued in the courts of that Member State.

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:

...'

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

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

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

(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

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

(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.

...'

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

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

and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)⁷ ('the Rome I Regulation') states:

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

'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,

7. Recital 24 in the preamble to Regulation (EC) No 593/2008 of the European Parliament

⁷ — OJ 2008 L 177, p. 6.

the language or currency which a website uses does not constitute a relevant factor.”

(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;

C — Directive 90/314

...’

8. Article 2 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours⁸ provides:

III — Facts, main proceedings and questions referred

‘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 — *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.

(a) transport;

(b) accommodation;

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,

⁸ — OJ 1990 L 158 p. 59.

an intermediary company which has its place of establishment in Germany and also offers such voyages on the Austrian market via a website.

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.

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

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 referring 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?’

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.

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),

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:

Czech, Netherlands and United Kingdom Governments and the Commission presented oral argument and answered the Court's questions.

'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?'

V — Arguments of the parties

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

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 *Hotel Alpenhof* 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,

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

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).

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.

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/civil-justice/homepage/homepage_ec_en_declaration.pdf.

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

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 interpreted 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 commerce¹² 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

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.

reservations to be made. Account should be taken of the characteristics of the internet, which makes it impossible to restrict information to Austrian territory.

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.

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

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)

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').

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.

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.

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.

C — The role of the intermediary (in Pammer)

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

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

regard to the question of how far-reaching the concept of 'directing' should be.

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 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

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.

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.

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.

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.

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

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.

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.

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.

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 (O) 1980 L 266, p. 1).

Article 5(5) of the Rome Convention provides for the same exception as in Article 153) 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

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.

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.

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

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.

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.

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.

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

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

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

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

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 Commission²⁶ 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.

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

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.

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

Article 15(1)(c) of Regulation No 44/2001 are fulfilled.³¹

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

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

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 undertaking³⁰). The referring court will have to determine in relation to this condition too whether the factual circumstances under

(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

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.

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

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.

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.

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.

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

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

34 — See, to this effect, Case C-128/94 *Hönig* [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.

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 concluded³⁸ and,

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; Gaudemet-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).

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

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.

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 regulation⁴⁴ 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

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.

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

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 judgments 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 (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.

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.

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

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

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 website 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

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.

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

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

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.

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, Euln-sVO, 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.

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 case⁵⁵ 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.

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.

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.

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.

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

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,

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.

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

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).

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 language⁶⁵ 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

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'.

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 State⁷⁰ 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 goods⁷¹ or provide

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.

services⁷² 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.

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.

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

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

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.

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.

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 procedure⁷⁷ and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for

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 2000, 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 2000 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).

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 thereof⁸⁰ or to facilitate the free circulation of orders for payment, judgments, court settlements and authentic instruments.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?

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 (O) 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.

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 all⁸³ — 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

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, 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 EuGVU 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.

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 *Hotel Alpenhof* 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.'