

European ‘Private’ Law: Up in the Air?

(working paper)

1. Introduction.

In the past decade the harmonization of European private law and more specifically of European contract law has been on the top of the European institutions’ list of priorities.¹ With the growing importance of the tourism market in the European Union, we could expect that at least some of the harmonization effort in European Private Law would be directed at improving passenger transport services’ regulation.² However, the main harmonization projects of the last few years have not or have barely addressed this issue. This is true for the most recent European private law harmonisation project: the European Commission chose not to develop an optional instrument applicable to services, but merely an instrument for sales contracts, the proposal of the Common European Sales Law.³ The other important measure introduced recently in the European Private Law, the Consumer Rights Directive (hereafter, the “CRD”)⁴, applies to consumer contracts for both the sale of goods and the provision of services, however, its Article 3 Paragraph 3(k) excludes the application of most of its provisions to passenger transport services and, therefore, the CRD barely grants any rights to air passengers. While many debates have been conducted in the past few years on how to improve the currently binding framework of the Package Travel Directive⁵ (hereafter, the “PTD”) and of the Regulation 261/2004⁶ on air

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¹ Viviane Reding, ‘The optional Common European Sales Law – Seizing the opportunity!’ speech 11/742 <http://europa.eu/rapid/press-release_SPEECH-11-742_en.htm?locale=en> accessed 19 September 2014; Viviane Reding, ‘Opening trade and opportunities: From the Hanseatic League to European Contract Law’ speech 11/539 < http://europa.eu/rapid/press-release_SPEECH-11-539_en.htm?locale=en> accessed 19 September 2014; Viviane Reding, ‘The Next Steps Towards a European Contract Law for Businesses and Consumers’ in Reiner Schulze and Jules Stuyck (eds), *Towards a European Contract Law* (Sellier 2011) 9; Parliament, ‘Full harmonization no longer an option’ press release 20100317IPR70798 < <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100317IPR70798>> accessed 19 September 2014.

² Commission, ‘Europe, the world’s No 1 tourist destination – a new political framework for tourism in Europe’ COM (2010) 352 final < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0352:FIN:en:PDF>> accessed 19 September 2014; Jens Karsten and Gösta Petri, ‘Towards a Handbook on European Contract Law and Beyond: The Commission’s 2004 Communication “European Contract Law and the Revision of the *Acquis*: The Way Forward”’ (2005) 28 J Consum Policy 31, 43.

³ Commission, ‘Proposal for a Regulation on a Common European Sales Law’ (Common European Sales Law) COM (2011) 0635 final. Except that if agreed by the parties it may regulated services related to the sale of goods or digital content supplied on the basis of the Common European Sales Law, see: Common European Sales Law, recital 19, art 2(m) and art 3. Commission, ‘European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice’ press release IP/11/1175 <http://ec.europa.eu/justice/contract/files/common_sales_law/i11_1175_en.pdf> accessed 19 September 2014.

⁴ Directive 2011/83/EU on consumer rights (Consumer Rights Directive) [2011] OJ L304/64.

⁵ Council Directive 90/3014/EEC on package travel, package holidays and package tours (Package Travel Directive) [1990] OJ L158/59.

⁶ Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (Regulation on air passengers’ rights) [2004] OJ L46/1.

passengers' rights (hereafter, the "Regulation"), this has not yet led to the improvement of the European regulation of the transport services.⁷ There seems to be a consensus that the existing rules need a thorough makeover, however, the form and the content thereof remain controversial.⁸ Therefore, among others, the final version of the new European legislation with regards to air passengers' rights is still not in sight.

This paper compares the existing rights granted to consumers when they purchase services in the EU, whether in a shop or within a distance selling scheme, with the provisions of the Regulation.⁹ While the works on the new European rules on air passengers' rights are still ongoing it is important to examine what other protection measures could be granted to passengers that European consumers may already be enjoying while concluding other contracts than for air transport services. On the other hand, it will be discussed whether certain rights that have already been granted to air passengers in Europe and the methods of providing them could serve as a model for the further development of European consumer protection measures. This comparison is conducted from the assumption that air transport services are just one of many services that European consumers purchase and that they should enjoy similar, if not the same, protection regardless of the type of service they are interested in. Special justifications, e.g., of an economic nature, could justify the introduction of divergent rules with respect to air transport services, therefore, if such differences are found it will be considered whether they could be justified due to the need to protect interests of one of the contractual parties or due to the internal market's objectives.

To set the parameters for the intended comparison, first, the justifications for introducing special protection measures in European consumer law and in the field of air transport services are analysed. It is important to examine how the legal framework has been set up within European private law for the adoption of these measures and what similarities and differences are there. Within this section also the notions of a 'passenger' and of a 'consumer' will be compared. Following sections will focus on specific rights that consumers have in European law when concluding other contracts than for air transport services, starting with the illustration of their information rights, followed by the description of various consumer remedies in case of non-performance or improper performance of a contract and finally discussing their right of withdrawal. In these three sections the European consumers' rights are presented as established

⁷ Commission, 'Bringing The EU Package Travel Rules Into The Digital Age' COM (2013) 513 final <http://ec.europa.eu/justice/consumer-marketing/files/com_2013_513_en.pdf> accessed 19 September 2014; Commission, 'Commission acts to improve consumer rights for 120 million holiday makers' press release IP/13/663 <http://europa.eu/rapid/press-release_IP-13-663_en.htm> accessed 19 September 2014; Parliament, 'Resolution on the functioning and application of established rights of people travelling by air' INI (2011) 2150 <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0099&language=EN&ring=A7-2012-0053>> accessed 19 September 2014.

⁸ Commission, 'European Parliament votes on air passenger rights' press release IP/14/119 <http://europa.eu/rapid/press-release_IP-14-119_en.htm?locale=en> accessed 19 September 2014; BEUC, 'Air Passenger's Rights. Revision of Regulation 261/04 on the rights of air passengers in the event of denied boarding, cancellation and long delays' position paper (2013) 56 <<http://www.beuc.org/publications/2013-00505-01-e.pdf>> accessed 19 September 2014; Jeremias Prassl, 'Reforming Air Passenger Rights in the European Union' (2014) 39 *Air and Space Law* 59, 60.

⁹ Linking the air passengers' rights to European private law has already been argued for in the literature, see e.g.: Jens Karsten, 'Passengers, consumers, and travelers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy' (2007) 30 *J Consum Policy* 117, 120.

by the CRD, the Services Directive¹⁰ and the PTD. The relevant provisions in these European consumer protection measures will be compared to the rights granted to air passengers in the Regulation as well as in the Proposal for the new regulation on air passengers' rights, as presented by the European Commission (hereafter, the "Commission's Proposal")¹¹ and as amended by the European Parliament (hereafter, the "Parliament's Proposal")¹². This comparison will show that there are important differences in the framework of consumer and air passenger protection that are not necessarily justified by the differences in the services that are being purchased. Moreover, this justification for the divergent rules may be hard to find in the objective aims to improve the internal market or to strengthen the position of the weaker parties in European private law. Therefore, in the conclusions a claim will be made for further harmonization of European private law in the area of provision of services, so that position of air passengers and consumers could be more tantamount. A suggestion will be made as to whether air passengers' rights should still be enriched in the proposal for the new air passengers' rights regulation or whether rather it would be more justified to reduce the scope of protection granted to European consumers concluding contracts for provision of services other than air transport services. It will also be noted what European consumer law could learn from the current and from the forthcoming regulation of air passengers' rights in Europe.

2. Air passengers' rights vs. consumers' rights – legal framework and notions.

The introduction of specific air passengers' rights as well as of specific consumers' rights to the European private law system has been justified twofold. On the one hand, arguments have been made that weaker parties who lack bargaining power are in need of an additional protection in European contract law.¹³ Both consumers as well as air passengers have been considered as such weaker parties, whose lives could be improved through an intervention of the European legislator on their behalf.¹⁴ On the other hand, further development of certain sectors of the internal market, such as distance selling as well as air transport services, required the introduction of additional regulations with an aim to set fair rules for cross-border competitors.¹⁵ In order to strengthen the internal market and to prevent its failure, this additional protection aims also at counteracting existing information asymmetries between the parties.¹⁶

Interestingly, despite the fact that consumer law and air transport services share the same justifications for the introduction of special protection measures, the Regulation has been adopted on the basis of Article 100(2) of the Treaty on the Functioning of the European Union (hereafter,

¹⁰ Directive 2006/123/EC on services in the internal market (Services Directive) [2006] OJ L376/36.

¹¹ Commission, 'Proposal for a Regulation amending Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights' (Commission's Proposal) COM (2013) 130 final.

¹² European Parliament, 'Legislative resolution of 5 February 2014 on the Proposal for a Regulation amending Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights COM (2013) 0130 final' (Parliament's Proposal) P7_TA-PROV(2014)0092.

¹³ Josep M Bech Serrat, 'Why is there a Separation between Distance Selling in EU Law and the Tourism Industry?' (2010) 33 J Consum Policy 75, 76.

¹⁴ Regulation on air passengers' rights, recitals 1 and 4. See also: Karsten (n 9) 121–122.

¹⁵ Consumer Rights Directive, recital 5; Regulation on air passengers' rights, recital 4.

¹⁶ See e.g.: Kati J Cseres, 'What Has Competition Done for Consumers in Liberalised Markets?' (2008) 4 Competition Law Review 77; Klaus G Grunert, 'The Consumer Information Deficit: Assessment and Policy Implications' (1984) 7 J Consum Policy 359.

the “TFEU”)¹⁷, which gives Member States authority to adopt provisions on air transport and not on the basis of Article 114 TFEU that allows for the adoption of consumer protection measures to strengthen the internal market. The use of a different legal basis for the adoption of rules on air passengers’ rights allowed the European institutions to define passengers more broadly than what the traditional notion of a ‘consumer’ entails, as well as to create a stand-alone system of air passengers’ rights not centred on the need to benefit the internal market. It seems likely, however, that similar protection measures could have been introduced based on the general competence of consumer protection, especially since Article 12 TFEU requires the European institutions to consider demands of consumer protection when developing policies and actions in all areas.¹⁸ And so, Recital 1 of the Regulation clearly states that the aim thereof is not only to ensure a high level of passengers’ protection but also to fully consider general consumer protection measures. The choice to set the Regulation within the framework of European legal measures related to transport was, therefore, a political one. Aside the Regulation also measures that address passengers’ rights in other transport services, e.g. in rail or road transport, have been introduced using this legal basis.¹⁹

As mentioned above, the decision not to adopt the Regulation on the same basis as other European consumer protection measures may have been made in order to broaden the scope of the notion of a ‘passenger’ in respect of that of a ‘consumer’. Interestingly though, Article 2 of the Regulation does not contain a notion of a ‘passenger’ on its definitions’ list. It may only be certain that just like the notion of a ‘consumer’ a ‘passenger’ refers to natural persons due to the character of the services offered.²⁰ No further limitations are, however, imposed on the notion of a ‘passenger’ in the Regulation. Neither the Commission’s Proposal nor the Parliament’s Proposal define the ‘passenger’ and for this reason we will briefly address the benefits and disadvantages of introducing such a definition, harmonised with the existing definitions of a ‘consumer’ either in the CRD or in the PTD.

European consumer law generally defines consumers narrowly, e.g., in Article 2 (1) CRD as: “*any natural person who (...) is acting for purposes which are outside his trade, business, craft or profession*”. The scope of this definition excludes from the consumer protection not only persons acting for professional but also for mixed purposes.²¹ If this definition would have been introduced to the Regulation, then air passengers traveling not only for business but also combining business and pleasure trips would be left out of its application’s scope, even if the

¹⁷ Treaty on the Functioning of the European Union [2007] OJ C326/1.

¹⁸ Norbert Reich, ‘A European Contract Law, or an EU Contract Law Regulation for Consumers?’ (2005) 28 J Consum Policy 383, 399.

¹⁹ Regulation (EC) 1371/2007 on rail passengers’ rights and obligations [2007] OJ L315/14; Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport [2011] OJ L55/1. The rights granted to passengers in these other European measures have not been harmonised and, generally, the protection given to air passengers reaches the furthest. Currently, the European institutions are also considering harmonizing the area of passenger law, see e.g.: Parliament, ‘Transport Committee calls for a fair deal for all passengers’ press release <<http://www.europarl.europa.eu/news/en/pressroom/content/20120227IPR39347/html/Air-travel-Transport-Committee-calls-for-a-fair-deal-for-all-passengers>> accessed 19 September 2014; Parliament, ‘Resolution on passenger rights in all transport modes’ (2012) INI 2067 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0371+0+DOC+XML+V0//EN>> accessed 19 September 2014.

²⁰ Joasia Luzak, ‘The quest for transparency of flight prices to enable passengers’ informed choice’ (2013) 3 Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht 170, 174; Karsten (n 9) 131.

²¹ See, however, Consumer Rights Directive, recital 17.

latter travel's purpose was predominant.²² After all, the Court of Justice of the European Union (hereafter, the "CJEU") has decided that unless the professional purpose of a person's action had a merely negligible character, this person could not be considered a consumer.²³ It is hard to imagine that such a qualification of negligibility could be attached to a mixed purpose trip, since in most cases it would be the business opportunity that would determine the trip's destination and timing. Therefore, if a lucky traveller managed to add some free time to her business trip, then still the main characteristics thereof would have been determined by the traveller's professional needs. This definition would be thus hardly practical to introduce in the area of air transport services.

The 'consumer' notion is not homogenous in European consumer law and for example, another travel related European measure – the PTD, in its Article 2 Paragraph 4 – defines a consumer as a: "*person who takes or agrees to take the package (...)*". This provision clearly does not refer to the requirement that the travel has to be conducted only for personal purposes and it is accepted that travellers could also enjoy the PTD's protection if they purchased travel packages for professional purposes.²⁴ If the 'passenger' in the Regulation would be defined accordingly then any person who purchases air transport services regardless of their purpose would be encompassed by the Regulation's scope of protection. Preferably, the Commission's Proposal would introduce the notion of a 'traveller' instead of a 'passenger' to harmonize it with the currently drafted proposal for the new rules on the package travel.²⁵ While the introduction of the notion of a 'traveller' to both the Commission's Proposal and the Proposal for the PTD would distinguish it further from the notion of a 'consumer', it would help to achieve more clarity and consistency as to the scope of these notions. In this respect, the travel industry would be a step ahead from the European consumer law where the definition of a 'consumer' instead of being related to a type of contract being concluded, depends on the purpose of the transaction, as well.²⁶ An attempt to encompass at least also mixed purposes transactions have already been made in the European consumer law, in the preparatory works on the CRD, but in the end the final version of the CRD still narrowly defines consumers in its Article 2 (1). Only Recital 17 CRD still mentions a possibility to apply its provisions to dual purpose contracts where the professional purpose of the transaction is not predominant.²⁷

²² On the effects of the introduction of such an artificial distinction see further: Karsten (n 9) 128.

²³ Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-439. Of course, whether this decision made by the CJEU to interpret rules of European private international law would apply in substantive consumer law could be contested.

²⁴ Karsten (n 9) 129.

²⁵ Commission, 'Proposal for a Directive on package travel and assisted travel arrangements' (Proposal for Package Travel Directive) COM (2013) 512 final, art 3(6). This provision introduces a new notion of a 'traveller', but it still allows both travelers for business or non-business related purposes to enjoy consumer protection measures of this directive. It excludes from its scope only persons traveling on the basis of a framework contract with a trader specializing in the arrangement of business travel. See arguing for a harmonized definition of a 'passenger' also: Karsten (n 9) 126.

²⁶ Especially if the notion of the 'traveller' would be introduced to other passenger regulations, mentioned in footnote (n 19), as well.

²⁷ It remains to be seen to what extent national courts and the CJEU will apply the CRD's rules to mixed purposes contracts in practice. Arguments have been raised that broadening the application's scope of the notion of the 'consumer' could lead to an overall reduction in the level of consumer protection and, therefore, the 'consumer' notion should continue to be applied narrowly.

Considering that the same legal objectives have been set for the Regulation and for the European consumer protection measures it seems reasonable to expect that air passengers and consumers would be protected through adoption of similar measures. Therefore, in the following sections the Regulation's provisions will be compared with the provisions of other European consumer law measures that could be applicable to air transport services with regards to the information rights, remedies and the right of withdrawal. It will be pointed out where these European consumer law measures could provide additional protection to air passengers, if not for the fact that their provisions explicitly exclude passenger transport services from their scope of application. The justifications for such exclusions are not always transparent or not always ring true. For example, some of these exclusions were supported with the argument that air passengers are already protected by other European measures. In order to verify this statement, we will compare the rights of respectively consumers and air passengers to establish whether air passengers indeed enjoy similar rights when they are not included in the scope of application of European consumer protection measures.

Since nowadays flights are often booked online, provisions on distance selling could provide air passengers with an additional layer of protection and they are currently regulated by the CRD.²⁸ However, passenger transport services have been excluded from the application's scope of the CRD's provisions in its Article 3 Paragraph 3(k), following the reasoning that they are already subject to other European legislation.²⁹ We will, therefore, examine whether air passengers have the same rights as other consumers concluding distance selling contracts for provision of other than air transport services. Only a few provisions of the CRD may still grant more protection to such air passengers who are travelling just for pleasure and could be considered as consumers. For example, such an air passenger could be additionally protected through the prohibition for the service providers to charge fees resulting from a consumer's choice of payment at a cost exceeding their actual expenses.³⁰

Additionally, we will look into PTD's provisions, since they could apply to air passengers, however, only when they purchased air transport services as part of the package travel as defined in Article 2 (a) PTD. This means that an air passenger would need to simultaneously book aside her air transportation also at least one other tourist service or her accommodation, the travel would need to be longer than 24 hours and the whole tourist package would need to be pre-arranged. The CJEU determined that if a consumer arranged the package together with a trip organizer prior to the contract's conclusion, this could still be perceived as a pre-arranged package.³¹ Still, even with certain flexibility added to the definition of the 'package travel' in practice and an even more flexible notion of a 'package' being currently prepared by the European institutions in the new proposal for the PTD³², some air passengers would still fall outside this definition and, therefore, would be devoid of the PTD's protection, e.g., with regards to the possibility to claim non-material damages due to the air transport service provider's non-performance.³³ Since the modern travel sector is very dynamic, it could be beneficial and more up-to-date to drop the notion of the 'package travel' altogether and instead to regulate separately

²⁸ Bech Serrat (n 13) 76, 88.

²⁹ Consumer Rights Directive, recital 27. Critically about this: Bech Serrat (n 13) 77–79.

³⁰ See Consumer Rights Directive, art 19 together with art 3 para 3(k).

³¹ Case C-400/00 *Club-Tour v Garrido* [2002] ECLI:EU:C:2002:272.

³² Proposal for Package Travel Directive, art 3(2).

³³ Case C-168/00 *Simone Leitner* [2002] ECLI:EU:C:2002:163 interpreting Package Travel Directive, art 5.

any travel-related contracts, whether they would concern transportation arrangements, accommodation, tourist services or any combination of the above-mentioned, regardless whether offered or arranged through one or more service providers.³⁴ Therefore, the comparison of the PTD's provision to the Regulation's provision could also clarify the existing differences in the protection granted to various travellers in Europe.

Finally, we will consider how the air passenger's protection would be impacted if the Services Directive were applicable to it, since this European consumer protection measure is supposed to benefit European consumers concluding contracts for the provision of services. At the moment, the Services Directive excludes in its Article 2 Paragraph 2 (d) its application to the services in the field of transport, without justifying this choice.³⁵ We will briefly consider what kind of rights air passengers could enjoy if the Services Directive applied to them as well, however, the rights provided in this instrument are very general and as we will see they would not greatly improve the air passengers' position.

3. Information rights.

Scope

The Regulation requires that air passengers should be fully informed about their rights in the event of cancellation, long delay or denied boarding.³⁶ Mostly, it is deemed as important that air passengers receive full disclosure about their rights to assistance and compensation. This disclosure should mention when air passengers obtain their rights, what is their scope and how to claim them. This disclosure's scope signifies that the Regulation is only concerned with granting air passengers information rights with regards to either the non-performance of the air transport service provider's main contractual obligations, in case of the flight's cancellation or denied boarding, or their improper performance, in case of the flight's long delay. Therefore, the Regulation does not address the issue of other disclosures that could be relevant for air passengers, e.g., with relation to the air transport service's characteristics, contractual rights and obligations of the parties in situations other than non-performance or improper performance by the air transport service provider. This is the main difference between the scope of the information duties as provided in the Regulation and in the other analysed European consumer law measures. As we will see all three European consumer law measures that could potentially apply to air transport services provide a longer, more detailed list of information that has to be given to consumers by their contractual counterparties.

The CRD specifies what information is to be provided to consumers concluding either distance or off-premises contracts (Article 6), or any other contracts (Article 5). Contrary to the information provisions in the Regulation, these two provisions not only aim to inform consumers about their rights in case of non-performance of the contract, but are more general in nature, referring to all contractual rights and obligations of the parties, requiring definition of the main characteristics of the purchased services, etc. Keeping this in mind, it is surprising that contracts for provision of air transport services are excluded from the CRD's scope of application since air

³⁴ See arguing at least partially for this: Commission, 'Bringing The EU Package Travel Rules Into The Digital Age' (n 7).

³⁵ Services Directive, recitals 17 and 21.

³⁶ Regulation on air passengers' rights, recital 20.

passengers may need this information just like customers of any other service transaction.³⁷ For example, if a flight is booked online an air passenger concludes a distance contract and could benefit from the mandatory information on the main characteristics of the provided air service, the information on the trader's identity and geographical address, etc. Just like any other customer of an online service provider such an air passenger will not be directly in touch with the air transport service provider, she may not have much knowledge about him and, therefore, could not be aware how to find and contact this air transport service provider when the service is improperly performed and the air transport service provider's representatives are not present at the airport.³⁸ Aside the better known, bigger air transport service providers, which could be easy to identify even for a first-time traveller, there are many small, local air transport service providers operating in Europe and it could be more complicated to establish their reputation and contact details for a first-time traveller.

As it has already been mentioned also the Services Directive excludes from its application's scope air transport services contracts. Since air transport services could otherwise be qualified as a service regulated by the Services Directive, passengers could have been entitled to the special protection granted to services' users therein. For example, Article 7 Services Directive ensures that consumers are informed about the means of redress against their service providers, as well as of contact details of competent authorities responsible for these rules' enforcement. Article 22 Services Directive prescribes what information service providers should reveal to consumers with respect to their respective contractual rights and obligations, e.g., the main features and price of the service, the insurance details, the existence of after-sale guarantees, the name and contact details of the service provider. These information requirements are, therefore, again more general than the information requirements of the Regulation, since they cover the whole contractual relationship between the parties and not only refer to the consequences of the non-performance or improper performance by the service provider. These information duties bind service providers alongside the information duties specified in the CRD, pursuant to Article 6 Paragraph 8 CRD.

Similar information is to be provided to consumers based on Articles 3 and 4 PTD with regard to consumers concluding package travel contracts. These articles are, however, again often inapplicable to air passengers when they have not purchased a whole 'package' travel, aside their air transport services. The scope of the information rights granted to consumers in the PTD is more travel-oriented. Therefore, if these provisions were applicable to passengers, this could be even more valuable to them than if only the CRD's provisions have been applied. For example, while the CRD requires in general the identification of the main characteristics of the services that are being purchased by consumers, the PTD specifies that consumers need to be informed about the travel's itinerary, meal plan, general passport and visa requirements, health formalities, insurance policies, etc. This specificity could grant more certainty to both parties of an air transport services' contract as to what information needs to be provided to air passengers. Additionally, both directives require that the consumer is informed about the contact details of the service provider, in case of the PTD – of the travel organizers, so that she can easily fall back on these details when something goes wrong with the performance of the contract. Traveling consumers who may benefit from the travel-specific information rights in the PTD could still,

³⁷ Bech Serrat (n 13) 77.

³⁸ Bech Serrat (n 13) 76.

however, require the more general protection granted to them by the CRD. For example, certain CRD's provisions are specifically tailored to the conclusion of distance contracts and to the uniqueness of providing information to consumers at a distance. For instance, Article 6 Paragraph 1 (f) CRD obliges service providers to inform consumers about the cost of using the means of distance communication for the contract's conclusion, whenever that cost differs from the basic rate that could be expected by a consumer. If this provision applied to air transport services, then if an air passenger would decide to call an air transport service provider to book his flight and the telephone line used by this provider would be set at a special, higher than usual rate, the air passenger would need to be informed thereof.³⁹

In general, the scope of the information rights in the analysed European consumer law measures is much broader than in the Regulation. It is surprising that information that has commonly been recognized as necessary for a proper conclusion of a contract by a consumer was not established as mandatory information to be provided during the conclusion of a contract for the provision of air transport services. The Commission's Proposal aims to "*proactively inform passengers about their rights*", but it still defines the air passengers' right to information as the "*right to information about the flight disruption*".⁴⁰ While this right covers both information about the air passengers' rights in the case of disruption as well as the right to be informed about the disruption's cause, it does not extend the information duties to encompass the parties' contractual rights and obligations or to the characteristics of the service.⁴¹ Air passengers will only receive information about complaint handling procedures of a given air transport service provider and about claims they have at their disposal, including necessary contact addresses to file a complaint, as well as information about competent complaint handling bodies.⁴² When air passengers booked their tickets through an intermediary established in a Member State they are still supposed to receive this information.⁴³ The European Parliament does not consider this draft to sufficiently clarify the matter as to who has the responsibility to inform stranded air passengers about their rights and who is then responsible for providing them with care, assistance and reimbursement and calls for further specifying these information duties.⁴⁴ It would also like to oblige the air transport service providers to inform air passengers about the "*simplest and most rapid*" procedures for making claims and complaints.⁴⁵ Furthermore, the Parliament suggests that air transport service providers should procure accurate and objective information about the environmental impact and energy efficiency of the air passengers' travel and share it with them.⁴⁶ This addition introduced to the draft Proposal by the Parliament is interesting, since it goes beyond the original scope of drafting only such information duties that would inform air passengers about their rights when the air transport service is not properly performed. This suggests that the Proposal could be supplemented with even further reaching information duties, following the example set out in the above-discussed European consumer law measures and it

³⁹ The same exclusion applies to the package travel contracts, which are also often concluded at a distance and where consumers could benefit from this additional protection level, as well.

⁴⁰ Commission's Proposal, Explanatory Memorandum points 1.1 and 3.3.1.1.

⁴¹ Commission's Proposal, recital 20.

⁴² Commission's Proposal, recital 22 and art 16a para 1.

⁴³ Commission's Proposal, recital 20.

⁴⁴ Parliament's Proposal, amendment 13.

⁴⁵ Parliament's Proposal, amendment 25.

⁴⁶ Parliament's Proposal, amendment 116.

surprises that the European Parliament does not attempt to introduce more generic and important information duties to the Commission's Proposal.

Formal requirements

A novelty in comparison with other European consumer laws is a formal requirement introduced in Article 14 Paragraph 1 Regulation as to how to notify air passengers of their rights. This provision dictates a mandatory wording of a notification that is to be displayed at the check-in in a visible way to air passengers: "*If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance*". This statement has to constitute a part of the clearly legible notice displayed to consumers. As described below, other European consumer law measures limit themselves to demanding disclosures' legibility and clarity, without dictating how to inform consumers that they have certain rights to obtain disclosures to begin with. The information on air passengers' rights needs to be provided in writing and has to list all air passengers' rights, as well as contact details of the national designated body responsible for the Regulation's enforcement, pursuant to Article 14 Paragraph 2 Regulation. Air passengers should, therefore, know what information they are entitled to and who to complain to if they do not receive it or do not receive it timely. Currently, air service transport providers are encouraged by the Regulation to inform air passengers of flights' cancellations or long delays before the scheduled departure time as well as of re-routing possibilities in such circumstances.⁴⁷

The CRD entails a few provisions listing formal requirements applicable to the provision of information.⁴⁸ How the information is to reach consumers depends on the contract's type, in general, however, all information needs to be drafted in "*plain and intelligible language*" and, e.g., in case of distance contracts it has to be provided to consumers "*in a way appropriate to the means of distance communication used*". It has not been considered in the CRD how the consumer's attention should be drawn to the fact that she has certain information rights. There is no provision similar to Article 14 Paragraph 1 of the Regulation in the CRD that would determine that consumers need to be clearly and in a standardized manner informed about their information rights. Moreover, contrary to the Regulation, the CRD's provisions do not set a specific timeframe for providing information about the change in the service and do not attach specific consequences to the non-timely conveying of this information. The only exception to this rule is the consequence determined in the CRD for the delay in providing the information about the right of withdrawal to the consumer.⁴⁹

The organizer of a package travel has to notify consumers "*as quickly as possible*" that the contractual essential terms need to be changed, pursuant to Article 4 Paragraph 5 PTD. Other information needs to be provided to consumers "*in good time before the start of the journey*", in writing or any other appropriate form. Again, therefore, just like with the CRD, there is no specific timeframe given to the service providers nor an incentive to remain within it. Neither does the PTD provide how the consumer is to receive a notification about all information rights

⁴⁷ Regulation on air passengers' rights, recital 12.

⁴⁸ Consumer Rights Directive, art 7 and 8.

⁴⁹ Further discussed in the paragraph on sanctions.

she is entitled to. Furthermore, the PTD does not even require that the information would be provided in a legible and clear form.

Pursuant to Article 22 Paragraph 2 Services Directive service providers need to reveal the required information to consumers of their own initiative. They should also make sure that this information is easily accessible to their customers in the place where the service is provided or the contract is concluded. This resembles the Regulation's provision on drawing the consumer's attention to the fact that she has certain information rights, however, and contrary to the Regulation, the language of the notification was not standardized in the Services Directive. The required information has to be provided "*in clear and unambiguous manner, and in good time before conclusion of the contract or, where there is no written contract, before the service is provided*", pursuant to Article 22 Paragraph 4 Services Directive. Again, this provision just gives a general timeframe for conveying all the information to the consumers without granting any incentives to the service providers to do so, nor does it instigate certainty between the parties as to how and when this information should be provided.

Formal requirements adopted in the Regulation are, therefore, quite unique among the European consumer law measures and seem to grant more legal certainty to the contractual parties. The air passengers' attention could be easier drawn to a standardized message and considering all the information from behavioural research on consumers' inattention to disclosures, it could be more effective to separately inform them that they have certain information rights.⁵⁰ Also the introduction of an economic incentive for the air transport service providers to timely provide their customers with the mandatory information is a novelty. Only the Services Directive clearly states that provision of the information to consumers should occur on the service provider's initiative⁵¹, but it still does not sanction non-performance of this obligation. With respect to the formal requirements of information rights the Regulation seems, therefore, to be a step ahead in ensuring the information's effectiveness than other European consumer law measures.⁵² Of course, whether these additional incentives and notifications actually work in practice and should be considered for adoption with respect to other disclosures to European consumers, should first be empirically tested.

The Commission does not intend to undermine the above-mentioned benefits to the formal requirements that have been introduced in the Regulation and so the notice about the air passengers' information rights will still need to be given in a standardized manner pursuant to the new Article 14 of the Commission's Proposal. The novelty is that this notice will now need to be placed not only on the check-in desks but also on the self-service check-in machines. Considering the development of the airports' structure, including the possibility of air passengers checking-in

⁵⁰ On drawing attention through repetitive, standardized message display see e.g.: Candida Castro and others, 'Worded and Symbolic Traffic Sign Stimuli Analysis Using Repetition Priming and Semantic Priming Effects' (2007) 53 *Advances in Psychology Research* 17; James R Bettman, Mary F Luce and John W Payne, 'Constructive Consumer Choice Processes' (1998) 25 *Journal of Consumer Research* 187; Cornelia Pechmann and David W Stewart, 'Advertising Repetition: A Critical Review of Wearin and Wearout' (1990) 11 *Current Issues and Research in Advertising* 285.

⁵¹ For the Consumer Rights Directive this has been clarified in the CJEU's judgment in the Case C-49/11 *Content Services* [2012] ECLI:EU:C:2012:419.

⁵² Of course, this will only then hold true if these information obligations will be properly and timely performed by the air transport service providers and when enforcement of the compliance with the Regulation's provisions will be efficient.

for their flight online and never having to approach the check-in desk at the airport, this development follows at least partially the new trends. There will still be air passengers who will not need to check in their luggage and, therefore, will use neither the check-in desk or the self-service check-in machines. For them it could be handy to display general notices throughout the airport or to provide them on the website during the air passenger's online check-in. Interestingly, the Parliament suggested introduction of the amendment that would oblige air transport service providers to set up contact points at the airports where air passengers could obtain the necessary information from.⁵³ These contact points should be open not only during the air transport service provider's operating hours but also until the last air passenger disembarks from the last plane.⁵⁴ The information duties rest no longer only on the air transport service providers but also on the airport managing body, which needs to ensure that information on air passengers' rights is clearly displayed in the air passengers' area of the airport.⁵⁵ Furthermore, in order to ensure that passengers' complaints and claims are handled more effectively in the future, the Commission's Proposal establishes a duty for air transport service providers to disclose certain information to passengers already at the time of making the reservation.⁵⁶ Another amendment introduced by the Parliament addresses the issue of the air passengers not always obtaining relevant information as to their flight's fate in time. Therefore, the amendment proposes that air passengers should be informed about their flight's cancellation or delay at the latest 30 minutes after the scheduled departure time and as soon as possible about the new estimated departure time.⁵⁷ If the ticket was issued by a European intermediary and not directly by the air transport service provider, then the air passenger needs to explicitly consent in writing to the transfer of her contact details to the air transport service provider. It has been outlined that this consent may only be given on an "opt-in" basis.⁵⁸ The air transport service provider may use such acquired contact details to inform these air passengers about any flight's changes, but is required to delete the acquired data of the air passenger within 72 hours after the completion of the contract of carriage. Under the Commission's proposal air transport service providers would need to provide air passengers with electronic means to submit a complaint, as well as they are obliged to respond to the air passenger's claim or complaint within two months.⁵⁹ The confirmation of the reception of the air passenger's complaint needs to be issued within 8 days thereof. The Parliament also argues for the introduction of a formal requirement for air transport service providers to issue on electronic tickets and on all versions of boarding cards clearly legible and transparent information about the air passengers' rights and about the contact details that are necessary to ask for help and assistance.⁶⁰ Another suggestion put forward by the Parliament was to oblige air transport service providers to procure an accessible and effective telephone assistance for all air passengers that

⁵³ Parliament's Proposal, amendments 14, 68 and 106.

⁵⁴ Parliament's Proposal, amendment 106. This amendment still could be improved by obliging the contact point's employees to await the moment when the last passenger collects her checked-in baggage and leaves the airport, since only then may the air transport service provider be reasonably sure that no more assistance would be necessary.

⁵⁵ Commission's Proposal, art 14 para 4.

⁵⁶ Commission's Proposal, Explanatory Memorandum point 3.3.1.3.

⁵⁷ Commission's Proposal, art 14 para 5.

⁵⁸ Commission's Proposal, art 14 para 6.

⁵⁹ Commission's Proposal, Explanatory Memorandum point 3.3.1.3. and art 16a para 2. Interestingly, recital 22 only mentions the obligation to respond to passengers' complaints within a reasonable time period, while the Parliament's amendment changes it to "*the shortest period possible*", without further specifying this deadline either (amendment 28).

⁶⁰ Parliament's Proposal, amendment 107.

have booked their flight. Using this telephone line should not cost air passengers more than if they were making a local call.⁶¹ Furthermore, any electronic communication made to the air passenger to notify her about the flight's cancellation, long delay or change of schedule shall in a prominent manner state that the air passenger is entitled to compensation and assistance under the Regulation.⁶²

Burden of proof

Article 5 Paragraph 4 Regulation specifies that the burden of proof that the air passenger has been informed of the cancellation rests with the air transport service provider. The burden of proof that the information was provided to the consumer according to the CRD rests on the trader, as well.⁶³ Also the Service Directive declares that the burden of proof that the information was provided to consumers rests on the service providers.⁶⁴ Only the PTD does not expressly address the issue of the burden of proof, but it is hard to imagine why a different division of the burden of proof should apply with respect to the fulfilment of these information duties. The new Proposal does not change this default.⁶⁵ This is one area where the discussed measures are similar.

Sanctions for breach of information duties

It has already been mentioned that the Regulation tries to incentivize air transport service providers to timely notify their customers about the flight's cancellation. If they follow the timeframe set in Article 5 Paragraph 1(c) Regulation, they may avoid the necessity to compensate air passengers by notifying them about the cancelled flight well in advance of the scheduled departure time. The necessity to compensate air passengers if they are not timely informed about the flight's cancellation is a very clear sanction for breach of the air transport service providers' information duties, which could serve as an example for other European consumer law measures since they often do not prescribe either a specific timeframe when the information is to be provided to the consumers nor a specific sanction for non-performance of information duties. Additionally, the Regulation clearly prevents potential air transport service providers' attempts at undermining it with regard to their obligation to pay compensation to air passengers. When an air passenger receives incorrect information about the compensation due to her as a result of a cancelled or a delayed flight and accepts a compensation lower than the one she is entitled to, Article 15 Paragraph 2 Regulation determines that this does not take away her right to claim additional compensation that would normally be awarded to her. The CJEU has also decided that when the consumer is not informed about the assistance that she is entitled to in the case of a flight's cancellation or a long delay, she does not have an obligation to inquire about that assistance with the air transport service provider. Instead she may claim the reimbursement of the costs she has made to provide herself with necessary assistance, e.g., in the form of meals and refreshments.⁶⁶

⁶¹ Parliament's Proposal, amendment 113. This amendment is consistent with the general trend of obliging service providers not to overcharge their customers for using telephone helpdesks provided by these service providers, see e.g. Consumer Rights Directive, art. 21.

⁶² Parliament's Proposal, amendment 117.

⁶³ Consumer Rights Directive, art 6 para 9.

⁶⁴ Services Directive, art 27 para 4.

⁶⁵ Parliament's Proposal, amendment 127.

⁶⁶ Case C-83/10 *Sousa Rodríguez* [2011] ECLI:EU:C:2011:652, para 45.

The CRD does not contain any sanction for breach of the duty to inform consumers with two exceptions. If a consumer is not fully and properly informed about all the additional charges or costs related to her purchase of given services, or when she receives no information about the cost of returning the services when she chooses to use her right of withdrawal, then the consumer may not be charged these additional costs.⁶⁷ Secondly, if the consumer is not given information about her right of withdrawal, then the cooling-off period is prolonged by 12 months.⁶⁸ If this information is then later provided to the consumer within this 12 months' timeframe, the cooling-off period starts running as of the day that the consumer receives this information. These sanctions may bring about significant economic consequences for service providers unless they comply with the relevant information duties. However, considering the long list of information duties established in the CRD and the introduction of sanctions with respect to the breach of only a few of these duties, the general conclusion as to the service provider's motivation to comply therewith has to be that it may vary depending on what sanctions the Member States introduce on a national level for the breach of these information duties.⁶⁹

Unfortunately, neither the PTD nor the Services Directive specify any sanctions for breach of any of the information duties set in these directives. The Service Directive clearly leaves any sanctions for breach of the information duties to be determined by national laws of the Member States.⁷⁰

The introduction of harmonised sanctions for the breach of information duties on a European level has long been argued for in the academic literature.⁷¹ The lack of effective enforcement of consumer rights often results from the lack of specificity and certainty with regards to either the scope of the rights that have been granted to consumers or, indeed, the gap in defining consequences for non-performance of the professional parties' obligations towards consumers.⁷² In this respect, while it has traditionally been left to the Member States to introduce sanctions for the breach of contractual information duties towards consumers so that they could adjust them to fit within their national legal systems, this flexibility should only accompany and not substitute more general European sanctions.

The Commission's Proposal leaves in place the above-described sanctions that are already binding under the current Regulation. The Parliament's amendments to the Proposal introduce a new sanction for the air transport service provider when he fails to respond timely and thoroughly to the air passenger's complaint. In such a situation the air transport service provider will be deemed to have accepted the air passenger's claims.⁷³ This measure could raise the efficiency of the enforcement of the air passengers' claims, since the air passenger will be able to use a presumption of her claims' acceptance in a case against the air transport service provider.

⁶⁷ Consumer Rights Directive, art 6 para 6.

⁶⁸ Consumer Rights Directive, art 10.

⁶⁹ Article 24 of the Consumer Rights Directive obliges the Member States to introduce effective, proportionate and deterrent sanctions but their scope and effectiveness may differ.

⁷⁰ Services Directive, art 27 para 4.

⁷¹ See e.g.: Christian Twigg-Flesner and Daniel Metcalfe, 'The Proposed Consumer Rights Directive – Less Haste, More Thought?' (2009) 5 *European Review of Contract Law* 368, 380–381; Willem van Boom and Marco Loos, 'Effective Enforcement of Consumer Law in Europe' (2008) < <http://ssrn.com/abstract=1082913> > accessed 19 September 2014, 6–7; Cseres (n 16) 87.

⁷² See e.g.: Anthony Ogus, Michael Faure and Niels Philipsen, 'Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes' (2006) OECD DSTI/CP(2006)21/FINAL.

⁷³ Parliament's Proposal, amendment 128.

Moreover, the Parliament argues that the air transport service provider should be obliged to issue to the air passenger a written notice about the reason for the existence of extraordinary circumstances that have caused the flight's cancellation or delay. If such a written notice would not be provided to air passengers, they would be entitled to claim compensation from the air transport service provider.⁷⁴ The adoption of this provision could also improve the air passengers' protection by minimizing the air transport service provider's possibility to change the reason for the flight's cancellation or delay after the air passenger has raised her claim by suddenly bringing up extraordinary circumstances as an excuse.⁷⁵

4. Remedies.

Since the Regulation's main focus is to grant rights to air passengers in case of non-performance or improper performance of the air transport service provider's obligations, it does not surprise that at its core it has the regulation of air passengers' remedies. When air passengers are denied boarding, when their flight is cancelled or when it is delayed for a long time they may have four general rights: reimbursement, re-routing, assistance and care, as well as compensation.⁷⁶ Pursuant to Article 8 Regulation the right to reimbursement obliges air transport service providers to return to air passengers the full cost of the ticket at the price at which it was bought for the part of the journey not made. Since the air transport service provider does not fulfil his part of the contract, then he should not benefit from the fact that the air passenger performed her contractual obligation to pay the full price of the air transport service. This rule prevents unjust enrichment of air transport service providers and leads to the termination of a contractual relationship between the parties together with returning these benefits they have received during its duration for which no counter-performance has been provided. Re-routing, defined in the same article of the Regulation, obliges air transport service providers to continue with the performance of their contractual obligation to help the air passenger reach her originally chosen destination. When the air transport service provider does not perform or improperly performs his original contractual obligation, the air passenger has a choice between claiming reimbursement and thus terminating the contract or re-routing, which gives air transport service providers an additional chance to perform their obligations. Additionally, in certain cases of non-performance or improper performance by the air transport service provider of his obligations, the air passenger may acquire a right to compensation.⁷⁷ This right aims to abstractly compensate air passengers at least for some inconvenience they have experienced due to the non-performance or improper performance of the air transport service provider's obligations. At the same time, this right does not prevent air passengers from raising other claims they may have against the air transport service provider if they had suffered any damage as a result of the breach of his contractual obligations.⁷⁸ Finally, due to the fact that on the one hand it is not always immediately obvious whether the air transport service provider will have a chance to perform his contractual obligations and on the other hand since the air passenger as a result of cancellation or long delay

⁷⁴ Parliament's Proposal, amendment 65.

⁷⁵ See for references to such practices e.g.: Prassl (n 8) 62; Sacha Graben, 'Sky-high Controversy and High-flying Claims? The *Sturgeon* Case Law in Light of Judicial Activism, Euroscepticism and Eurolegalism' (2013) 50 CMLR 15, 17.

⁷⁶ Regulation on air passengers' rights, art 7–9.

⁷⁷ See for details as to the amounts of compensation: Regulation on air passengers' rights, art 7.

⁷⁸ Regulation on air passengers' rights, art 12. See also *Sousa Rodriguez* (n 66).

of a flight may become unexpectedly stranded in a foreign place, the air passenger receives certain additional rights to assistance and care.⁷⁹

While the Regulation grants a very specific set of remedies to air passengers, other European travellers may be less certain of their rights. For example, when we look at Article 5 PTD we may notice that the PTD leaves it to the Member States to determine what remedies should be granted to consumers who have purchased a package travel, when this contract is then subsequently improperly or not at all performed. However, the few rights that have been specified in the PTD correspond with the rights that air passengers have under the Regulation. Accordingly, if the organizer cancels the package before the agreed date of departure, the consumer has the right either to a substitute package of equivalent or higher quality or to the reimbursement pursuant to Article 4 Paragraph 6 PTD. These two rights correspond to the air passengers' rights of re-routing or reimbursement. The choice between these rights is left to the consumer, as well. A consumer is also supposed to be promptly assisted when she finds herself in difficulties due to the improper or lack of performance of the package travel contract. However, the scope of this right to assistance has not been determined in the European provisions, contrary to what we find in the Regulation. Finally, Article 5 PTD specifies that the organizer and/ or retailer of the package is liable for damages that the consumer has suffered as the result of the improper or lack of performance of the package travel contract. As of the CJEU's judgment in the *Simone Leitner*⁸⁰ case we know that this damages' scope encompasses both material and non-material damage that the consumer might have experienced. This provision does not, however, provide for a compensation *in abstracto*, unrelated to the damage that the consumer has suffered. In this respect, the protection's scope granted in the Regulation is broader than in the PTD.

The Consumer Rights Directive and the Services Directive do not provide any remedies to consumers and leave it to the Member States to regulate issues related to the non-performance or improper performance of a given contract. Traditionally, consumer law remedies in case of non-performance or improper performance of a contract have been divided into two groups, depending on whether they gave traders another chance to perform their original contractual obligations⁸¹ or whether they allowed consumers to terminate the contractual relation and to claim damages or repayment of (a part of) the price.⁸² If more than one remedy is offered to consumers, they usually have the choice between them.⁸³ Of the remedies mentioned above it is clear that only re-routing enables air transport service providers to perform anew their contractual obligations and that, on the other hand, the reimbursement signifies the end of a contractual relationship. The air passenger's free choice between these two remedies complies with the general default used in European consumer law. At first glance, the air passenger's right to

⁷⁹ See for description of these rights: Regulation on air passengers' rights, art 9. See also: Case C-12/11 *McDonagh* [2013] ECLI:EU:C:2013:43.

⁸⁰ *Simone Leitner* (n 33).

⁸¹ For example, in case of non-conforming goods this would be the right to repair or replacement, pursuant to the Consumer Sales Directive, see: Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive) [1999] OJ L171/12.

⁸² Consumer Sales Directive, art 3 para 2 prescribes here a possibility to terminate the contract or to demand price reduction (partial termination).

⁸³ See e.g. Consumer Sales Directive, art 3. However, the Consumer Sales Directive prescribes a certain hierarchy of remedies, since traditionally in civil law systems preference is given to the right to cure of contractual parties and to the remedy of specific performance rather than to the right to terminate the contract and to claim damages.

compensation could be compared to the consumer's right to claim damages resulting from non-performance or improper performance of other contracts. However, this right is not related to any actual damage that an air passenger has suffered, to the contrary, the air passenger retains the right to claim compensation in the amount prescribed by the Regulation just as a result of the non-performance of the air transport service provider's contractual obligation. This right to compensation resembles then more a penalty fee for the air transport service provider for improper or lack of performance of his contractual obligations and intends to provide him with an incentive to prevent such situations from happening. It could also be compared to a price reduction, since the air passenger receives not an agreed service but a service of a lesser quality, e.g., due to the prolongation of the travelling time. The distinction between the compensation in the Regulation and the air passenger's right to claim damages is further confirmed by Article 12 Regulation and the CJEU's judgment in the *Sousa Rodrigues and Others* case⁸⁴ clarifying that passengers' rights to claim damages is not in any way influenced by their right to compensation as set in Article 7 Regulation. Finally, the right to assistance and care also falls outside one of the above-described categories. If we compared this last right to consumer law remedies, then the closest in resemblance to it would be a right of a consumer for a replacement good during the time that the product purchased by her is being repaired. Providing consumers with a replacement product, e.g., a substitute television set when the non-conforming television is being repaired, intends to compensate any inconvenience that consumers may experience related to the remedying of the originally improperly or not at all performed contractual obligation. However, whether this right to a replacement good exists in European consumer law has been debated. In many situations traders would grant it to consumers out of their own initiative. However, it could also be argued that when the trader would know or could expect that the consumer would need to take measures for the time between handing over the goods for repair and receiving back the goods and the repair would take more than just a few days, the duty to provide a replacement good could be inferred from Article 3 Paragraph 3 *in fine* of the Consumer Sales Directive, that is the obligation to repair the goods without significant inconvenience to the consumer.⁸⁵ Moreover, even though the purpose of the right to care is the same as of the right to a replacement good, that is to make consumers more comfortable and diminish their inconvenience resulting from the improper or lack of performance of the service provider's contractual obligations, still this right does not provide air passengers with a 'replacement' for the air transport service they were supposed to receive.

This comparison clarifies that the remedies provided to air passengers in the Regulation follow the patterns used in introducing remedies for non-performance or improper performance of other consumer contracts. Additionally, the adoption of a very detailed right to assistance and care places air passengers in a privileged position, e.g., in comparison with other travellers who may be less certain what the scope of this right would be under the PTD's provisions. The fact that this right is not granted in case of a breach of other consumer contracts could be justified due to the specific character of a transport services contract and the fact that in case of its non-performance or improper performance the traveller may find herself stranded in a foreign place. The air passengers' right to compensation unrelated to any actual damage is even more unusual in European consumer law since it has certain qualities of a penalty fee that generally is left to the

⁸⁴ *Sousa Rodríguez* (n 66) para 37–38.

⁸⁵ See e.g. Marco Loos, *Consumentenkoop* (Monografie BW B-65b, 3rd ed, Kluwer 2014) 83–84.

contractual parties to determine. Considering often grave consequences that may follow from the non-performance or improper performance of air transport services contract, the introduction of an economic incentive for air transport service providers to properly and timely fulfil their contractual obligations could be justified.

The Commission's Proposal introduces even more specific provisions on the air passengers' right to assistance and care, mentioning among others in its revised Article 6 Paragraph 5 their rights during the delay on the tarmac, e.g., free of charge access to drinking water and toilet facilities, as well as the right to disembark if the delay lasts longer than 5 hours.⁸⁶ Additionally, the new Article 6a grants air passengers rights to assistance and care when they have missed their connecting flights and are awaiting the new connection. Due to the heavy economic burden placed on the air transport service provider when he needs to provide his customers with hotel accommodation for any delay, even if it was caused by the long-lasting extraordinary circumstances⁸⁷, the European Commission introduces a limit to this assistance obligation in the new Article 9 Paragraph 4. The air transport service provider would only need to provide accommodation for up to 3 nights and may limit its cost to 100 Euro per night and if the flight was for less than 250 km or was to occur on an aircraft smaller than 80 seats, this right would be excluded altogether.⁸⁸ Additionally, when the air passenger decides to choose reimbursement or re-routing at a later date, then she relents her right to assistance and care, pursuant to Article 9 Paragraph 6. The right to compensation has been adjusted to lessen the financial burden on the air transport service providers and, therefore, would be applicable to fewer cancelled or delayed flights.⁸⁹ However, it has been determined in the Regulation that also in case of long delays this right should benefit air passengers.⁹⁰ Moreover, the Commission's Proposal allows the air transport service providers to conclude voluntary agreements with their passengers to replace the statutory compensation, however, only when the agreement lists the air passenger's right to compensation under the Regulation.⁹¹ The Parliament's Proposal suggests an addition of a specific provision addressing the issue of the air transport service provider's insolvency.⁹² It states that the air passenger retains all her rights in such circumstances aside the right to compensation. The air transport service provider needs to take an insurance policy or create a sufficient guarantee fund for this purpose. Furthermore, if the air transport service provider fails to offer his passenger the choice of re-routing, air passengers may arrange such re-routing themselves and claim corresponding costs thereof.⁹³ As we may see the new provisions limit air passengers' rights to compensation under certain circumstances that proved in practice to be quite burdensome to air transport service providers. At the same time, the right to assistance

⁸⁶ The European Parliament suggests to change this timeframe to two hours. See: Parliament's Proposal, amendment 76.

⁸⁷ See e.g.: *McDonagh* (n 79).

⁸⁸ The European Parliament intends to raise these limits to five nights and 125 Euro and to cancel the introduced exceptions for short flights or small aircrafts. See Parliament's Proposal, amendments 96 and 97.

⁸⁹ There is, however, a dispute between the European Commission and the European Parliament in what precise circumstances air passengers should be granted their rights, e.g., whether compensation should apply with three or five hours long flight delays.

⁹⁰ Commission's Proposal, art 6 para 2.

⁹¹ Commission's Proposal, art 7 para 5. The European Parliament adds that this agreed compensation should contain benefits of at least equivalent value to the monetary compensation but could be issued in a non-monetary form, e.g. through issuing air travel vouchers without expiration date. See: Parliament's Proposal, amendment 83.

⁹² Parliament's Proposal, amendment 69.

⁹³ Parliament's Proposal, amendment 90.

and care is broadened and specified in even more details. It remains to be seen what the final version of the Proposal will provide for, however, it needs to be encouraged that the current rights of air passengers are strengthened by the amendments.

5. Right of withdrawal.

While the Regulation gives air passengers certain information rights and remedies when the air transport service they purchased is hindered, it does not empower them with the right of withdrawal, that is the right to terminate the contract within days of its conclusion without having to justify this termination and without having to pay any penalty. Granted, the right of withdrawal is a special consumer protection measure that European consumers enjoy only while concluding certain transactions, the character of which is deemed to justify the introduction of the right of withdrawal.⁹⁴ After all, the general contractual rule of *pacta sunt servanda* obliges contractual parties to carefully consider before the contract's conclusion whether they want to be bound by the given transaction's terms and conditions. If they decide to conclude a contract, they are held to the decision they have made. Still, exceptions to this rule have been introduced in the European contract law, for example, in the Consumer Rights Directive and it is important to consider whether air passengers should not be given the same or similar protection measure.

In a way similar to air transport services industry of package travel, Article 5 PTD allows consumers to 'withdraw' from the contract if prior to the trip the travel organizer significantly alters essential terms of the contract, such as price. Clearly, this is not a typical right of withdrawal since it is not limited in time from the moment of the contract's conclusion and it requires a justification for its use, in the form of essential contractual terms having been significantly changed by the travel organizer. This right should then rather be characterized as the consumer's right to terminate the contract without having to pay the penalty.⁹⁵ The new proposal for the revised Package Travel Directive renames this right from the right to withdraw to the right to terminate the contract before the start of the package against payment of a reasonable cancellation fee.⁹⁶ Consumers concluding package travel contracts are, therefore, also not capable of changing their minds free of any consequences as to the contract's conclusion a few days thereafter. However, at least in the case of package travel contracts the contractual parties' interests are aimed to be balanced by allowing consumers who have made early reservations to terminate the contract before their trip starts, if they have a need for it, provided they consider the organizer's interests, as well, and reasonably compensate him for their cancellation. Moreover, consumers concluding a package travel contract have a right to transfer their package to another person who satisfies all conditions applicable to the package on the basis of Article 4 Paragraph 3 PTD. Again, if a consumer would be hindered in using the package travel she has booked in

⁹⁴ See e.g.: Joasia Luzak, 'To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' (2014) 37 J Consum Policy 91; Horst Eidenmüller, 'Why Withdrawal Rights?' (2011) 1 European Review of Contract Law 1; Christian Twigg-Flesner and Reiner Schulze, 'Protecting rational choice: information and the right of withdrawal' in Geraint Howells and others (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 145; Peter Rott and Evelyne Terryn, 'The Right of Withdrawal and Standard Terms' in Hans W Micklitz, Jules Stuyck and Evelyne Terryn, *Consumer Law* (Hart Publishing 2010) 239; Marco Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 241.

⁹⁵ Even if in practice travel organizers often introduce provisions requiring a certain cancellation fee to be paid, contrary to the PTD's provisions. See: Bech Serrat (n 13) 85.

⁹⁶ Proposal for Package Travel Directive, art 10.

advance, she would have an option not to lose her money by finding a replacement traveller for the organizer. This option has not been given to air passengers in the Regulation.

Article 9 CRD provides for the right of withdrawal for distance and off-premises contracts. The right of withdrawal's adoption in distance contracts has been justified due to the lack of physical contact between consumers and traders prior to the contract's conclusion. This method of concluding contracts is perceived as often hindering consumers in their ability to fully and properly assess the value of the services they are purchasing, which disadvantage may leave them distrustful as to the trader and the transaction.⁹⁷ It has been argued in the academic literature that without the right of withdrawal's introduction to distance contracts, consumers would not be as willing to participate in cross-border transactions, which often occur at a distance.⁹⁸ After all, since consumers would not be able to familiarize themselves with the quality of the services they were purchasing at a distance, they would not be willing to pay higher prices for better quality services. This could lead to the creation of the 'market for lemons' phenomenon.⁹⁹ With regards to the off-premises contracts, the right of withdrawal is seen as an effective instrument to protect consumers from often surprising and aggressive sales techniques that are coupled with this method of concluding contracts.¹⁰⁰ If a consumer is ambushed by a door-to-door salesman in her own house and signs a contract just to get rid of this pestering salesman, she will then have a possibility to reverse the legal situation she found herself in due to the undue pressure having been exercised.

Due to the derogation introduced in Article 3 Paragraph 3(k) CRD also the CRD's provisions on the right of withdrawal do not apply to air transport services.¹⁰¹ Air transport services may be and often are sold through various distance communication schemes and could also be sold off-premises, e.g., when a travel agent visits air passenger's home, at a travel fair, at the airport itself.¹⁰² An air passenger may be induced into concluding an air transport services contract too hastily, without considering all the consequences of her decision and without having been granted all the necessary information to compare the offer made to her off-premises with other available offers. Emotional, hasty purchasing may even occur at a distance, for example, when the consumer purchases air transport services online led by the discount price thereof offered on one website without having time or skills to compare the offered price with other websites, or even without examining her finances to check whether she would be able to afford a trip at all.¹⁰³ Why would then air passengers not be given the same protection that customers of other services enjoy when concluding distance or off-premises contracts? After all, the same biases and detriments of distance and off-premises selling should apply also in these cases. The reasons given for such a derogation may be twofold.

⁹⁷ See e.g.: Luzak (n 94) 96; Omri Ben-Shahar and Eric A Posner, 'The right to withdraw in contract law' (2011) 40 *The Journal of Legal Studies* 115, 121.

⁹⁸ See e.g.: Bech Serrat (n 13) 82–83; Loos (n 94) 246–247.

⁹⁹ See e.g.: Luzak (n 94) 96; Eidenmüller (n 94) 7–9; Cseres (n 16) 80–81; Pamela Rekaiti and Roger van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Approach' (2000) 23 *J Consum Policy* 371, 380.

¹⁰⁰ See e.g.: Bech Serrat (n 13) 82; Loos 2009 (n 94) 244–245.

¹⁰¹ Moreover, even despite this exemption there is an additional provision in the CRD that disallows application of the right of withdrawal to transport services that would fall under the application's scope of the CRD, see Consumer Rights Directive, art 16.

¹⁰² Bech Serrat (n 13) 82.

¹⁰³ Bech Serrat (n 13) 83.

First, it needs to be considered that the air transport services create a flexible, rapidly price-changing market, where prices of air tickets fluctuate from day to day, only partially remaining within the trader's control.¹⁰⁴ The CRD excludes in any case the application of the right of withdrawal to such markets in its Article 16 (b). It is imaginable that if an air passenger would book in advance air transport services for a certain trip she has in mind and days later the price of these services would drop, given the opportunity she would choose to withdraw from a contract only to subsequently purchase air transport services for the same date at a lower price. This could, of course, be detrimental to the marketing strategies of an air transport service provider who may want to boost the sale of the last few available seats by lowering the price last minute. However, when the difference in price is dependent on the air transport service provider's marketing strategy and the special promotion introduced by him could motivate air passengers to use their withdrawal rights, this should come at the air transport service provider's risk. He should be able to calculate in his strategy the amount of potential withdrawals from the contract, which would be limited to the most recently concluded contracts, and their impact on his business. If the drop in air transport services' prices would not depend on the air transport service provider, e.g., the fuel prices would significantly decrease, then the air passenger's withdrawal should not in any way harm the trader, since his costs would be lower, as well. Of course, the change in the price of the services after the contract's conclusion would not normally allow for the contract's termination, therefore, only in cases when it would occur within the cooling-off period it could be indirectly related to the air passenger's withdrawal from a contract. This occurs due to the air passenger's possibility to use her right of withdrawal for any reason. Again, this right should not overly burden the trader since its use would be predictably and, additionally, the cooling-off period could be limited in time to appropriately fit the situation of air transport service providers. It seems, therefore, that this justification to exclude the application of the right of withdrawal to air transport services could be questioned.

The second reason that has been used to justify the exclusion of the right of withdrawal from travel-related contracts pertains to the potential inability of the service provider to fill in the capacity that he has set aside for the air passenger purchasing an air transport service, if this air passenger later decided to withdraw from the contract.¹⁰⁵ In the CJEU's judgment *easyCar v. OFT*¹⁰⁶ it was stated that, e.g., car hire companies should fall within the scope of the derogation introduced for the transport sector in the Distance Selling Directive¹⁰⁷, since the purpose of that derogation was to protect these industries where late cancellations could have disproportionate effects, such as the passenger transport industry.¹⁰⁸ Clearly, this reasoning could apply to air transport service providers accordingly. Advocate General Stix-Hackl argued in her opinion in that case that if passengers of car hire companies are allowed to cancel reservations at a short

¹⁰⁴ See e.g.: Erica Gornall, 'Low-cost air fares: How ticket prices fall and rise' (*BBC*, 21 June 2013) <<http://www.bbc.co.uk/news/business-22882559>> accessed 19 September 2014; Scott McCartney, 'Whatever you Do, Don't Buy an Airline Ticket On...' (*The Wall Street Journal*, 27 January 2011) <<http://online.wsj.com/articles/SB10001424052748704062604576105953506930800>> accessed 19 September 2014.

¹⁰⁵ Bech Serrat (n 13) 84.

¹⁰⁶ Case C-336/03 *easyCar* [2005] ECLI:EU:C:2005:150.

¹⁰⁷ Directive 97/7/EC on the protection of consumers in respect of distance contracts (Distance Selling Directive) [1997] OJ L144/19, art 3 para 2.

¹⁰⁸ *easyCar* (n 107) para 28 and 29 related to the interpretation of the exclusion of the application of the right of withdrawal to contracts concluded among other for transport services pursuant to art 3 para 2 Distance Selling Directive.

notice, this would economically weaken these traders who needed to incur increased costs and liability associated with greater unused capacity.¹⁰⁹ The travel industry used this reasoning when they lobbied in the European institutions for the right of withdrawal not to apply to air transport services on the basis of the “empty chair” syndrome.¹¹⁰ They argued that if the air passenger’s cancellation would come at a short notice, the air transport service provider would be unable to find another customer without a cost to the air passenger and as such this practice should not be allowed. It seems, however, that this “empty chair” syndrome could be avoided and the right of withdrawal introduced to protect air passengers if, e.g., it would be established with an additional time limit as to when it could be performed. Air transport services are often purchased months prior to the intended travel date. If the introduced cooling-off period was no longer than 14 days, it should not weaken the air transport service provider’s capacity to find another customer to take the seat of the air passenger who would decide to withdraw from the contract that she has concluded, e.g., six months in advance of the flight. To protect air transport service provider’s interests the right of withdrawal could be prohibited for air passengers purchasing their tickets, e.g., within just one month from their intended travel date. The short timeframe between the conclusion of the contract and the intended travel date could leave air transport service providers with insufficient time to find a substitute for the air passenger withdrawing from a contract. Another adjustment that could be introduced to the right of withdrawal in order to make it more attractive for air transport service providers would be to introduce cancellation fees dependent on the time left between the time of the contract’s cancellation and the intended travel date. Such cancellation fees could compensate the air transport service provider’s risk of not being able to find a substitute air passenger. This practice would, of course, weaken the right of withdrawal’s significance since it is supposed to facilitate the air passengers’ cancellation of the contract without them having to bear any financial burdens related thereto. The introduction of cancellation fees would, however, be preferable to the existing *status quo* where once the air transport services are purchased air passengers are often unable to cancel the contract without having to pay the whole ticket’s price. Additionally, it could be argued that air transport services are not the only ones that depend on reservations and could be harmed by short notice cancellations. Medical or legal services could be given as an example of such other services that could be harmed by the “empty chair” syndrome.¹¹¹ If service providers in these markets are capable of operating successfully with the right of withdrawal protecting their customers, it would be surprising if this would not be a possibility for the air transport services industry. It may also be noticed here that nowadays many air transport service providers enable such cancellations to their air passengers of their own initiative, while including cancellation fees in their prices.¹¹²

Unfortunately, neither the Commission’s nor the Parliament’s Proposal mentions a possibility to provide air passengers with either a right to withdraw or the right to terminate the contract before the air transport service is performed upon paying a reasonable cancellation fee.

6. Conclusions.

¹⁰⁹ *easyCar* (n 107), opinion of the Advocate General Stix-Hackl, para 61 .

¹¹⁰ *Bech Serrat* (n 13) 84.

¹¹¹ *Bech Serrat* (n 13) 87.

¹¹² See e.g.: Scott McCartney, ‘Your Bad Luck Is a Windfall For Airlines’ (*The Wall Street Journal*, 30 July 2009) <<http://online.wsj.com/articles/SB10001424052970204563304574318212311819146>> accessed 19 September 2014.

While the harmonization of the European Private law increases and more attention is given to it overall, the regulation of the air passengers' rights indeed seems 'up in the air' rather than securely established, as the title of this paper suggest. This uncertainty as to the air passengers' rights is not only the result of the unfinished legislative process on the new rules that would govern this area of European Private law. The careful analysis of the Regulation in comparison with other measures adopted in European consumer law that apply to contracts similar to air transport services contracts shows us that many divergences exist between these measures and the justifications of these differences are often quite ambiguous.

One thing that astonishes when we take a look at the Commission's Proposal is the continuity of the infamous tradition not to define the notion of the 'passenger'. It does not seem necessary to differentiate this notion from the broadly interpreted notion of a 'consumer' as applied, e.g., in the PTD. If, however, the European legislator would insist on limiting the application of the notion of a 'consumer' to the situations in which it applies in its narrow meaning, that is to a natural person that does not act even partially for professional purposes when concluding a contract, then at least it should be argued for the introduction of the common terminology in the Regulation and in the PTD. Therefore, the newly prepared notion of a 'traveller' in the proposal for the new PTD should potentially be considered to be attached to the Commission's Proposal, as well. The adoption of the common nomenclature could reduce the air passengers' uncertainty as to what other European consumer law measures could apply to them.

Consumers concluding contracts other than for air transport services have been granted a higher standard of protection by the European institutions, as we could observe especially on the example of information duties and the right of withdrawal. The justifications for exempting air passengers from the scope of these European consumer law measures are unconvincing, especially since it seems that air passengers may be quite vulnerable when concluding air transport services online, which method of contracting is nowadays used on a regular basis.¹¹³ These air passengers who purchase air transport services online may also have a difficulty with locating the online service provider when they want to raise certain claims against him or could use more detailed information about the characteristics of the service provided to them, etc. The expansion of the information duties for air transport service providers does not necessarily need to demand an addition of a whole new list of information duties to the Regulation, as long as, e.g., the application's scope of the CRD would be extended to cover also air transport services contract. Aside the inferior information rights that air passengers have in comparison to other European consumers, the above-analysed reasons for excluding the right of withdrawal from applying to air transport services contract also seem to be far-fetched. The problems listed as standing in the way of efficient use of the right of withdrawal in this market could be reduced or prevented if the right of withdrawal was modified so as to fit to the air transport services industry. For example, it could be limited in time or could be phrased more like a right to terminate the contract upon paying a reasonable cancellation fee, dependent on the time between the contract's cancellation and the intended travel date, proportional to the risk of the air transport service provider in finding a substitute air passenger. All in all it seems warranted to call for a more careful review of the Commission's Proposal in light of the existing consumer protection measures with an aim to raise the level of air passengers' protection to the same standard that other European consumers enjoy.

Nevertheless, it needs to be observed here that certain air passengers' protection measures that have been adopted in the Regulation go beyond the scope of the protection that consumers enjoy.

¹¹³ Bech Serrat (n 13) 88.

This applies specifically in the case of air passengers having to receive a standardized notification that they have certain information rights, clear sanctions having been established for breach of information duties by air transport service providers that may further incentivize them to properly inform their customers, as well as to the detailed remedy of the right to assistance and care that air passengers enjoy. These measures either completely lack within the European consumer law or have been drafted in an inferior way in comparison with the provisions of the Regulation. A better look at these provisions could be, therefore, also encouraged for the drafters of the future European consumer law measures who may find some useful inspiration there.