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### European Private Law: Up in the Air?

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**Publication date**

2016

**Document Version**

Submitted manuscript

**Published in**

Air passenger rights: ten years on

[Link to publication](#)

**Citation for published version (APA):**

Luzak, J. (2016). European Private Law: Up in the Air? In M. Bobek, & J. Prassl (Eds.), *Air passenger rights: ten years on* (pp. 295-323). (EU law in the member states; No. 3). Hart Publishing. <http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849468244>

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# EUROPEAN PRIVATE LAW: UP IN THE AIR?

Joasia A. Luzak

Amsterdam Law School Legal Studies Research Paper No. 2015-03  
Centre for the Study of European Contract Law Working Paper No. 2015-03



# CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW

Centre for the Study of European Contract Law  
Working Paper Series  
No. 2015-03

## **European Private Law: Up in the Air?**

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## European Private Law: Up in the Air?

(working paper, forthcoming in the book “Air Passenger Rights. Ten Years On”, edited by M. Bobek & J. Prassl, published by Oxford: Hart Publishing)

### 1. Introduction.

In the past decade the European institutions placed the harmonization of European private law and more specifically of European contract law at the top of their priorities’ list.<sup>1</sup> Due to 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 the regulation of passenger transport services.<sup>2</sup> However, the main harmonization projects of the last few years have not or have barely addressed this issue. This holds true for the most recent European private law harmonisation project, the proposal of the Common European Sales Law. The European Commission chose not to develop an optional instrument applicable to services, but merely an instrument for sales contracts.<sup>3</sup> The other important measure introduced recently in European private law, the Consumer Rights Directive (hereafter, the “CRD”)<sup>4</sup>, applies to consumer contracts for both the sale of goods and the provision of services. However, Article 3 Paragraph 3(k) of the CRD excludes the application of most of this Directive’s provisions to passenger transport services and, therefore, the CRD barely grants any rights to air passengers. While the European institutions heavily debated in the past few years the improvement methods of the currently binding framework of the Package Travel Directive<sup>5</sup> (hereafter, the “PTD”) and

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<sup>1</sup> 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](http://europa.eu/rapid/press-release_SPEECH-11-742_en.htm?locale=en)> accessed 28 January 2015; 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](http://europa.eu/rapid/press-release_SPEECH-11-539_en.htm?locale=en)> accessed 28 January 2015; 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 28 January 2015.

<sup>2</sup> 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 28 January 2015; 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.

<sup>3</sup> 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 regulate 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](http://ec.europa.eu/justice/contract/files/common_sales_law/i11_1175_en.pdf)> accessed 28 January 2015.

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

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

of Regulation 261/2004<sup>6</sup> on air passengers' rights (hereafter, the "Regulation 261/2004"), this has not yet led to the improvement of the European regulation of transport services.<sup>7</sup> There seems to be a consensus that the existing rules need a thorough makeover, however, the form and the content thereof remain controversial.<sup>8</sup> Therefore, among other, the final version of the new European legislation with regard 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 Regulation 261/2004.<sup>9</sup> While the works on the new European rules on air passengers' rights are still ongoing it is important to examine what protection measures the air passengers are currently missing that European consumers may already be enjoying while concluding contracts other than for air transport services. Additionally, I will also discuss whether certain air passengers' rights in Europe and the methods of providing these rights could serve as a model for the further development of European consumer protection measures. The assumption underlying this comparison is that air transport services are just one of many services that European consumers purchase. Conceivably, consumers 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, however, justify the introduction of divergent rules with respect to air transport services. Therefore, where my research indicates such differences in the protection levels of air passengers and consumers concluding contracts other than for air transport services, I will consider whether these differences 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 I analyse, first, justifications for introducing special protection measures in European consumer law and in the field of air transport services. It is important to examine how the European institutions have set up the legal framework within European private law for the adoption of these measures and what similarities and differences are there. Within this section I also compare the notions of a 'passenger' and of a 'consumer', considering the possibility of either notion applying to natural persons purchasing goods or services at least partially for professional purposes. The following sections focus on specific rights that consumers have in European law when concluding other contracts than for air transport services. I begin with the illustration of consumers' information rights, followed by the

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<sup>6</sup> 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 261/2004) [2004] OJ L46/1.

<sup>7</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/com_2013_513_en.pdf)> accessed 28 January 2015; 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](http://europa.eu/rapid/press-release_IP-13-663_en.htm)> accessed 28 January 2015; 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 28 January 2015.

<sup>8</sup> 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](http://europa.eu/rapid/press-release_IP-14-119_en.htm?locale=en)> accessed 28 January 2015; 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 28 January 2015; Jeremias Prassl, 'Reforming Air Passenger Rights in the European Union' (2014) 39 *Air and Space Law* 59, 60.

<sup>9</sup> 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.

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 I present the European consumers' rights as established by the CRD, the Services Directive<sup>10</sup> and the PTD. The relevant provisions in these European consumer protection measures are compared to the rights granted to air passengers in Regulation 261/2004 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")<sup>11</sup> and as amended by the European Parliament (hereafter, the "Parliament's Proposal")<sup>12</sup>. This comparison will show that there are important differences in the framework of consumer and air passenger protection, not necessarily justified through differences in the services that consumers and air passengers respectively purchase. I will also consider other justifications for the adoption of divergent protection measures, such as the aim to improve the internal market or to strengthen the position of weaker parties in European private law. None of the above-mentioned justifications seems overly convincing upon closer look. Therefore, I argue in the conclusions for further harmonization of European private law in the area of provision of services, so that position of air passengers and consumers would be more similar. I consider both the extension of the air passengers' rights in the proposal for the new air passengers' rights regulation and the reduction of the scope of protection granted to European consumers concluding contracts for provision of other than air transport services. Finally, I will draw conclusions as to 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, some academics see the explanation for the introduction of an additional protection in European contract law in the lack of bargaining power of one of the contractual parties.<sup>13</sup> Both consumers as well as air passengers have been considered as such weaker contractual parties, whose lives could be improved through an intervention of the European legislator on their behalf.<sup>14</sup> 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.<sup>15</sup> In order to strengthen the internal market and to prevent its

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

<sup>11</sup> 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.

<sup>12</sup> 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. I would like to remark here that while the air transport service providers have certain duties towards air passengers they may not necessarily have a contractual relationship with them. The majority of European consumer law applies only to contractual relationships between consumers and service providers. However, e.g. also the PTD places certain obligations on travel organizers even if the contract was concluded between a consumer and a travel retailer. Considering the current trend of purchasing air travel online directly from air transport service providers, it is also likely that the amount of concluded contracts is growing. Therefore, this difference will not further be discussed in this article.

<sup>13</sup> 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.

<sup>14</sup> Regulation 261/2004, recitals 1 and 4. See also: Karsten (n 9) 121–122.

<sup>15</sup> Consumer Rights Directive, recital 5; Regulation 261/2004, recital 4.

failure, this additional protection aims also at counteracting existing information asymmetries between the parties.<sup>16</sup>

Interestingly, despite the fact that the European legislator justified the introduction of special protection measures in the areas of both consumer law and air transport services in the same way, the legislative basis used for the adoption of these measures differs. Regulation 261/2004 has been adopted on the basis of Article 100(2) of the Treaty on the Functioning of the European Union (hereafter, the “TFEU”)<sup>17</sup>, which gives the Member States the 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. It could be argued that the use of a different legal basis for the adoption of rules on air passengers’ rights allowed the European institutions to interpret the notion of ‘passengers’ more broadly than what the traditional notion of a ‘consumer’ entails. In this way, the scope of application of air passengers’ rights could be broader than the scope of application of consumers’ rights. Moreover, it could lead to the creation of a stand-alone system of air passengers’ rights not centred on the need to benefit the internal market. It seems plausible, however, that the European legislator could have introduced similar protection measures 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.<sup>18</sup> And so, Recital 1 of Regulation 261/2004 clearly states that the aim thereof is not only to ensure a high level of air passengers’ protection but also to fully consider general consumer protection measures. The choice to set Regulation 261/2004 within the framework of European legal measures related to transport must have, therefore, been a political one. Aside Regulation 261/2004, the European legislator based also other measures that address passengers’ rights in other transport services, e.g. in rail or road transport, on Article 100(2) of the TFEU.<sup>19</sup>

As mentioned above, the European legislator may have made the decision to adopt Regulation 261/2004 on a different basis than other European consumer protection measures to broaden the scope of the notion of a ‘passenger’ in respect of that of a ‘consumer’. Interestingly though, Article 2 of Regulation 261/2004 does not contain the notion of a ‘passenger’ on its definitions’ list. It may only be certain that just like the notion of a ‘consumer’ a ‘passenger’

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<sup>16</sup> 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.

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

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

<sup>19</sup> 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 scope of protection of air passengers is the broadest. Currently, the European institutions are also considering harmonization of the whole area of passenger law, regardless the transportation method used, 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 28 January 2015; 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 28 January 2015.

refers to natural persons due to the character of the services offered.<sup>20</sup> No further limitations are, however, imposed on the notion of a ‘passenger’ in Regulation 261/2004. Neither the Commission’s Proposal nor the Parliament’s Proposal define the ‘passenger’ and for this reason I will briefly address the benefits and disadvantages of introducing such a definition to European consumer law, 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.<sup>21</sup> If the European legislator had introduced this definition to Regulation 261/2004, then air passengers traveling not only for business but also combining travel for business and pleasure would have been left out of its application’s scope, even if the latter purpose of travel was predominant.<sup>22</sup> After all, the Court of Justice of the European Union (hereafter, the “CJEU”) has decided in its judgment in the *Gruber* case that unless the professional purpose of a person’s action had a merely negligible character, this person could not qualify as a consumer.<sup>23</sup> It is hard to imagine that a court would attach such a qualification of negligibility to a mixed purpose travel, since in many cases the business opportunity determines the travel’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 thus be hardly practical to introduce in the area of air transport services.

The ‘consumer’ notion is not homogenous in European consumer law and, for example, the PTD, another travel-related European measure, 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 consumer’s travel has to be conducted only for personal purposes. Therefore, travellers could also enjoy the protection of the PTD if they purchased travel packages for professional purposes.<sup>24</sup> If the European legislator defined the ‘passenger’ in Regulation 261/2004 accordingly then any person who purchased air transport services regardless of their purpose would be encompassed by the scope of protection of Regulation 261/2004. 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 package travel.<sup>25</sup> 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

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<sup>20</sup> 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.

<sup>21</sup> See, however, Consumer Rights Directive, recital 17.

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

<sup>23</sup> 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 European substantive consumer law could be contested.

<sup>24</sup> Karsten (n 9) 129.

<sup>25</sup> 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 travellers 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 concluded with a trader specializing in the arrangement of business travel. See arguing for a harmonized definition of a ‘passenger’ also: Karsten (n 9) 126.



would help to achieve more clarity and consistency as to the scope of these notions. In this respect, the travel sector would be a step ahead from 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.<sup>26</sup> The European institutions have already made an attempt to broaden the scope of protection of European consumer law to mixed purposes transactions in the preparatory works on the CRD. In the end, however, the final version of the CRD still narrowly defines consumers in its Article 2 (1). Only Recital 17 of the CRD mentions a possibility to apply its provisions to dual purpose contracts where the professional purpose of the transaction is not predominant.<sup>27</sup>

Considering that the European legislator has set the same legal objectives for Regulation 261/2004 and for the European consumer protection measures, in the following sections I compare their provisions. I will indicate to what extent European consumer law measures could provide additional protection to air passengers by providing them with information rights, additional remedies and the right of withdrawal, if not for the fact that the European legislator explicitly excluded their application to passenger transport services. The European legislator supported some of these exclusions with the argument that air passengers are already protected by other European measures<sup>28</sup>. In order to verify this statement, I 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.

More specifically, I will examine whether air passengers have the same rights as other consumers concluding distance selling contracts for provision of other than air transport services. Since nowadays air passengers often book their flights online, they conclude, therefore, more distance selling contracts. The applicability of provisions on consumer distance selling as currently regulated by the CRD to such contracts could provide air passengers with an additional layer of protection.<sup>29</sup> However, the European legislator has excluded passenger transport services 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.<sup>30</sup> 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, the prohibition for the service providers to charge fees resulting from a consumer’s choice of payment at a cost exceeding their actual expenses.<sup>31</sup>

Additionally, I will look into the 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) of the PTD. That is to say, 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

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<sup>26</sup> Especially if the notion of the ‘traveller’ would be introduced to other passenger regulations, mentioned in footnote (n 19), as well.

<sup>27</sup> 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.

<sup>28</sup> See e.g.: Consumer Rights Directive, recital 27.

<sup>29</sup> Bech Serrat (n 13) 76, 88.

<sup>30</sup> Consumer Rights Directive, recital 27. Critically about this: Bech Serrat (n 13) 77–79.

<sup>31</sup> See Consumer Rights Directive, art 19 together with art 3 para 3(k).

would need to be pre-arranged. The CJEU determined in its judgment in the *Garrido* case that if a consumer arranged the package together with a trip organizer prior to the contract's conclusion, the national court should still perceive such services as a pre-arranged package.<sup>32</sup> Regardless of certain flexibility thus added to the interpretation of the notion of 'package travel' in practice and even with the European institutions currently working on a more flexible notion of a 'package travel' for the new proposal for the PTD<sup>33</sup>, some air passengers would still fall outside this definition. Therefore, they could not enjoy the PTD's protection, e.g., with regard to the possibility to claim non-material damages due to the non-performance of air transport service providers.<sup>34</sup> Since the modern travel sector is very dynamic, it could be beneficial and more up-to-date to discard the notion of 'package travel' altogether. Instead, the European legislator could jointly regulate any travel-related contracts, whether they would concern transportation arrangements, accommodation, tourist services or any combination of the above-mentioned services, regardless whether offered or arranged through one or more service providers.<sup>35</sup> Therefore, the following comparison of the PTD's provision to the provisions of Regulation 261/2004 could also clarify existing differences in the protection granted to various travellers in Europe.

Finally, I will consider what impact the Services Directive could have had on the air passenger's protection if it had applied to passenger transport services. The Services Directive aims to benefit European consumers concluding contracts for the provision of services. At the moment, however, 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.<sup>36</sup> I will briefly examine what kind of rights air passengers could enjoy if the Services Directive applied to them as well.

### **3. Information rights.**

#### *Scope*

Regulation 261/2004 requires air service providers to fully inform air passengers about their rights in the event of cancellation, long delay or denied boarding.<sup>37</sup> Among other, air passengers should receive full disclosure on 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 Regulation 261/2004 aims to grant air passengers information rights with regard 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. Consequently, Regulation 261/2004 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 or to 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 information rights as provided in Regulation 261/2004 and in the other analysed here European consumer law

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<sup>32</sup> Case C-400/00 *Club-Tour v Garrido* [2002] ECLI:EU:C:2002:272.

<sup>33</sup> Proposal for Package Travel Directive, art 3(2).

<sup>34</sup> Case C-168/00 *Simone Leitner* [2002] ECLI:EU:C:2002:163 interpreting Package Travel Directive, art 5.

<sup>35</sup> See arguing at least partially for this: Commission, 'Bringing The EU Package Travel Rules Into The Digital Age' (n 7).

<sup>36</sup> Services Directive, recitals 17 and 21.

<sup>37</sup> Regulation 261/2004, recital 20.

measures. All three discussed-below European consumer law measures that could potentially apply to air transport services provide a longer, more detailed list of information that the service provider or a trader has to give to consumers.

The CRD specifies what information traders need to provide to consumers concluding either distance or off-premises contracts (Article 6), or any other contracts (Article 5). Contrary to the information provisions in Regulation 261/2004, 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. That is to say, they refer to all contractual rights and obligations of the parties, requiring definition of the main characteristics of purchased services, etc. Keeping this in mind, it surprises that the European legislator decided to exclude contracts for provision of air transport services from the CRD's scope of application. After all, air passengers may need extensive pre-contractual and contractual information just like customers of any other service transaction.<sup>38</sup> For example, if an air passenger books a flight online she 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 thus not have much knowledge about the air transport service provider and, consequently, could not be aware how to contact him when he improperly performs the service and when his representatives are not present at the airport.<sup>39</sup> Aside the better known, bigger air transport service providers, which even a first-time traveller should easily identify, there are many small, local air transport service providers operating in Europe. Therefore, especially a first-time air passenger could have difficulties with establishing their reputation and contact details, particularly since many flights are nowadays jointly performed by various airlines.

As has already been mentioned, also the Services Directive excludes air transport services contracts from its scope of application. Without this exclusion air passengers could have been entitled to the special protection granted to service users in the Services Directive. For example, Article 7 of the Services Directive ensures that service providers inform their consumers about the means of redress against such service providers, as well as of contact details of competent authorities responsible for the enforcement of these rules. Article 22 of the 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 Regulation 261/2004, 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.

An organizer or a retailer of a package travel needs to provide similar information to consumers concluding package travel contracts, pursuant to Articles 3 and 4 of the PTD. These provisions are, however, again unlikely to apply to air passengers unless they have purchased a whole 'package' travel, aside their air transport services. The scope of the information rights

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<sup>38</sup> Bech Serrat (n 13) 77.

<sup>39</sup> Bech Serrat (n 13) 76.

granted to consumers in the PTD is more travel-oriented. Therefore, if these provisions applied to air passengers, this could benefit them more than if only the provisions of the CRD applied to them. For example, while the CRD requires in general the identification of the main characteristics of services that consumers plan to purchase, the PTD specifies that an organizer or a retailer of a package travel needs to inform consumers about the travel's itinerary, a 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 air passengers need to receive. Additionally, both directives require that the consumer is informed about the contact details of the service provider (CRD) or of the travel organizer (PTD), so that she can easily refer to this information when the contract is improperly performed. Traveling consumers who may benefit from travel-specific information rights in the PTD could still, however, require the more general consumer protection granted to them by the CRD. After all, the European legislator specifically tailored certain provisions of the CRD 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) of the 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 a consumer could have expected.<sup>40</sup> If this provision applied to air transport services, then if an air passenger decided to book his flight on the phone and the use of the telephone line of the air transport service provider would occur at a special, higher than usual rate, the provider would need to clearly, in advance inform the air passenger thereof.

In general, the scope of the information rights in the analysed European consumer law measures is much broader than in Regulation 261/2004. Surprisingly, while the European legislator has repeatedly considered provision of certain information necessary for the proper conclusion of a consumer contract, it does not establish it as mandatory information for contracts 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*".<sup>41</sup> This right consists of information about the air passengers' rights in the case of the flight disruption as well as their right to be informed about the disruption's cause. However, it does not extend the air transport service provider's information duties such as to require the information on the parties' contractual rights and obligations or on the characteristics of the service.<sup>42</sup> Air passengers will thus 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.<sup>43</sup> Also when air passengers booked their tickets through an intermediary established in a Member State they are still supposed to receive this information.<sup>44</sup> 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

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<sup>40</sup> The same exclusion applies to package travel contracts, which are also often concluded at a distance and where consumers could benefit from this additional protection level, as well.

<sup>41</sup> Commission's Proposal, Explanatory Memorandum points 1.1 and 3.3.1.1.

<sup>42</sup> Commission's Proposal, recital 20.

<sup>43</sup> Commission's Proposal, recital 22 and art 16a para 1.

<sup>44</sup> Commission's Proposal, recital 20.

reimbursement. Therefore, the European Parliament calls for the introduction of further information duties that would be more specific.<sup>45</sup> It would also like to oblige air transport service providers to inform air passengers about the “*simplest and most rapid*” procedures for making claims and complaints.<sup>46</sup> 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.<sup>47</sup> This addition by the Parliament is interesting, since for the first time it exceeds the original scope of information duties as only informing air passengers about their rights when the air transport service is not properly performed. This suggests that the Parliament could supplement its Proposal with even further reaching information duties. For instance, it could follow the example set out in the above-discussed European consumer law measures and 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 of Regulation 261/2004 as to how to notify air passengers of their rights. This provision requires a notification to be displayed at the check-in desks: “*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, with this exact wording, has to constitute a part of a clearly legible notice displayed to consumers. As described below, other European consumer law measures limit themselves to demanding disclosures’ legibility and clarity, without dictating to service providers how to inform consumers that they have certain rights to obtain disclosures to begin with. The air transport service providers need to provide the information on air passengers’ rights in writing and have to list all air passengers’ rights, as well as contact details of the national designated body responsible for the enforcement of Regulation 261/2004, pursuant to its Article 14 Paragraph 2. 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 incentivized by Regulation 261/2004 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.<sup>48</sup>

The CRD entails a few provisions listing formal requirements applicable to the provision of information.<sup>49</sup> 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*”. The European legislator has not specified 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 Regulation 261/2004 in the CRD that would determine that traders and service providers need to clearly and in a standardized manner inform consumers about their information rights. Moreover, contrary to Regulation 261/2004, the

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<sup>45</sup> Parliament’s Proposal, amendment 13.

<sup>46</sup> Parliament’s Proposal, amendment 25.

<sup>47</sup> Parliament’s Proposal, amendment 116.

<sup>48</sup> Regulation 261/2004, recital 12. The incentive is further discussed in the paragraph on sanctions.

<sup>49</sup> Consumer Rights Directive, art 7 and 8.

provisions of the CRD do not set a specific timeframe for traders and service providers for giving consumers the information about changes in the service and do not attach specific consequences if this information is conveyed late. The only exception to this rule is the consequence determined in the CRD for the delay in providing the consumer with the information about her right of withdrawal.<sup>50</sup>

The organizer of a package travel has to notify consumers “*as quickly as possible*” that he intends to change the contractual essential terms, pursuant to Article 4 Paragraph 5 of the PTD. Other information he needs to provide to consumers “*in good time before the start of the journey*”, in writing or in any other appropriate form. Again, therefore, just like with the CRD, there is no specific timeframe given to service providers for provision of this information, nor an incentive to remain within this timeframe. Neither does the PTD determine how the consumer is to receive a notification about all information rights 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 of the Services Directive, service providers need to reveal the required information to consumers of their own initiative. They should also make sure that their customers can easily access this information in the place where the service is provided or the contract is concluded. This resembles the provision of Regulation 261/2004 in drawing the consumer’s attention to the fact that she has certain information rights, but, contrary to Regulation 261/2004, 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 of the Services Directive. Again, this provision just gives air transport service providers a general timeframe for conveying all the information to consumers without granting them any incentives to do so, nor does it instigate certainty between the parties as to how and when this information should be provided.

The formal requirements adopted in Regulation 261/2004 are, therefore, quite unique among the European consumer law measures and seem to grant more legal certainty to the contractual parties. Additionally, behavioural researchers showed previously that a trader could easier draw the consumer’s attention through the use of a standardized message, as well as that disclosures could be more effective if they separately informed consumers that they have certain information rights.<sup>51</sup> It could be interesting to conduct a study whether such standardized disclosures to air passengers indeed reach them more easily and maybe also leave them better informed than non-harmonised European consumer law disclosures. It needs to be mentioned here that 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 in European contract law. Although the Services Directive clearly states that provision of the information to consumers

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<sup>50</sup> Further discussed in the paragraph on sanctions.

<sup>51</sup> 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.

should occur on the service provider's initiative<sup>52</sup>, it still does not sanction non-performance of this obligation. With respect to the formal requirements regarding information rights Regulation 261/2004 might, therefore, be a step ahead in ensuring the information's effectiveness than other European consumer law measures.<sup>53</sup> Of course, whether these additional incentives and notifications actually work in practice and whether the European legislator should consider their adoption with respect to other disclosures to European consumers, should first be empirically tested.

The new Article 14 of the Commission's Proposal still provides for a standardized notice about the air passengers' information rights. The novelty is that the air transport service providers will now not only need to place this notice on check-in desks but also on self-service check-in machines. Considering the development of the airports' structure, including the possibility of air passengers checking-in for their flight online and never having to approach the check-in desk at the airport, this development follows at least partially these new trends. Some air passengers may still not check in their luggage and, therefore, will use neither the check-in desk nor the self-service check-in machine. For them, it could be handy to display general notices throughout the airport or to provide them on the air transport service provider's website during the air passenger's online check-in. Interestingly, the European Parliament suggested introducing an amendment that would oblige air transport service providers to set up contact points at airports where air passengers could obtain the necessary information.<sup>54</sup> 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.<sup>55</sup> The information duties rest no longer only on 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.<sup>56</sup> 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.<sup>57</sup>

Another amendment introduced by the Parliament addresses the issue of air passengers not always obtaining relevant information as to their flight's fate in time. Therefore, the amendment proposes that air transport service providers inform air passengers 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.<sup>58</sup> If the ticket was issued by a European

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<sup>52</sup> 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.

<sup>53</sup> 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.

<sup>54</sup> Parliament's Proposal, amendments 14, 68 and 106.

<sup>55</sup> 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.

<sup>56</sup> Commission's Proposal, art 14 para 4.

<sup>57</sup> Commission's Proposal, Explanatory Memorandum point 3.3.1.3. This information would explain, among other, the air carriers' claim and complaint handling procedures, provide electronic means to submit complaints and give information about competent handling bodies.

<sup>58</sup> Commission's Proposal, art 14 para 5.

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. The European Commission outlined that this consent might only be given on an “opt-in” basis.<sup>59</sup> 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 of 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. They are also obliged to confirm the reception of the air passenger’s complaint within 8 days thereof and to respond to the air passenger’s claim or complaint within two months.<sup>60</sup> The Parliament also argues for the introduction of a formal requirement that air transport service providers issue on the 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.<sup>61</sup> Another suggestion put forward by the Parliament is to oblige air transport service providers to procure accessible and effective telephone assistance for all air passengers that have booked their flight. Using this telephone line should not cost air passengers more than if they were making a local call.<sup>62</sup> 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 Regulation 261/2004.<sup>63</sup>

#### *Burden of proof*

Article 5 Paragraph 4 of Regulation 261/2004 specifies that the air transport service provider has the burden of proof that he informed the air passenger of the cancellation. The CRD also places the burden of proof that the trader provided the information to the consumer on the trader.<sup>64</sup> Equally, the Service Directive declares that the burden of proof that the information was provided to consumers rests on service providers.<sup>65</sup> 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.<sup>66</sup> This is one area where the discussed measures are similar.

#### *Sanctions for the breach of information duties*

Regulation 261/2004 tries to incentivize air transport service providers to timely notify their customers about the flight’s cancellation. Air transport service providers may avoid the necessity to compensate air passengers just by notifying them about the cancelled flight well in

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<sup>59</sup> Commission’s Proposal, art 14 para 6.

<sup>60</sup> 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).

<sup>61</sup> Parliament’s Proposal, amendment 107.

<sup>62</sup> 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.

<sup>63</sup> Parliament’s Proposal, amendment 117.

<sup>64</sup> Consumer Rights Directive, art 6 para 9.

<sup>65</sup> Services Directive, art 27 para 4.

<sup>66</sup> Parliament’s Proposal, amendment 127.



advance of the scheduled departure time.<sup>67</sup> The necessity to compensate air passengers if they are not timely informed about the flight's cancellation is a very clear sanction for the breach of the air transport service providers' information duties. It could serve as an example for other European consumer law measures since they often do not prescribe either a specific timeframe when a trader or a service provider has to give the information to consumers nor a specific sanction for non-performance of such information duties. Additionally, Regulation 261/2004 clearly prevents potential attempts of air transport service providers 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 of Regulation 261/2004 determines that this does not discharge her right to claim additional compensation that would normally be awarded to her. The CJEU has also decided in its judgment in the *Sousa Rodríguez* case that when the air transport service provider does not inform a consumer 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 costs she has made to provide herself with necessary assistance, e.g., in the form of meals and refreshments.<sup>68</sup>

The CRD does not contain any sanction for breach of the duty to inform consumers with two exceptions. If a service provider does not fully and properly inform a consumer about all additional charges or costs related to her purchase of a given service, or when she receives no information about the cost of returning this service when she chooses to use her right of withdrawal, then the consumer may not be charged these additional costs.<sup>69</sup> Secondly, if the service provider does not give consumer the information about her right of withdrawal, then the cooling-off period is prolonged by 12 months.<sup>70</sup> If the service provider then grants this information 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, the CRD contains a long list of information duties and the European legislator introduced sanctions with respect to the breach of only a few of these duties. A general conclusion as to the service provider's motivation to comply with these information duties has to thus be that it may vary depending on what sanctions the Member States introduce on a national level for the breach of these information duties.<sup>71</sup>

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 such sanctions to be determined by national laws of the Member States.<sup>72</sup>

Legal scholars have argued for the introduction of harmonised sanctions for the breach of information duties on a European level.<sup>73</sup> The lack of effective enforcement of consumer rights

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<sup>67</sup> If they follow the timeframe set in Article 5 Paragraph 1(c) of Regulation 261/2004.

<sup>68</sup> Case C-83/10 *Sousa Rodríguez* [2011] ECLI:EU:C:2011:652, para 45.

<sup>69</sup> Consumer Rights Directive, art 6 para 6.

<sup>70</sup> Consumer Rights Directive, art 10.

<sup>71</sup> 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.

<sup>72</sup> Services Directive, art 27 para 4.

often results from the lack of specificity and certainty with regard 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.<sup>74</sup> In this respect, while the European legislator has traditionally left it to the Member States to introduce sanctions for the breach of contractual information duties towards consumers so that they could adjust them to better fit in 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 261/2004. 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.<sup>75</sup> This measure could increase the efficiency of the enforcement of the air passengers' claims, since the air passenger could then use a presumption of her claims' acceptance in a case against the air transport service provider. 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 he does not provide such a written notice to air passengers, they would be entitled to claim compensation from him.<sup>76</sup> 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 already raised her claim by suddenly bringing up extraordinary circumstances as an excuse.<sup>77</sup>

#### **4. Remedies.**

Since the main focus of Regulation 261/2004 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 enjoy four general rights: reimbursement, re-routing, assistance and care, as well as compensation.<sup>78</sup> Pursuant to Article 8 of Regulation 261/2004 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 yet made. Since the air transport service provider does not fulfil his part of the contract, 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 partial

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<sup>73</sup> 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 28 January 2015, 6–7; Cseres (n 16) 87.

<sup>74</sup> 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.

<sup>75</sup> Parliament's Proposal, amendment 128.

<sup>76</sup> Parliament's Proposal, amendment 65.

<sup>77</sup> See for references to such practices e.g.: Prassl (n 8) 62; Sacha Garben, 'Sky-high Controversy and High-flying Claims? The *Sturgeon* Case Law in Light of Judicial Activism, Europceptism and Eurolegalism' (2013) 50 *CMLR* 15, 17.

<sup>78</sup> Regulation 261/2004, art 7–9.

termination of a contractual relationship, since the parties need to return those benefits that they have received during the contract's duration for which no counter-performance has been provided. Re-routing, defined in the same article of Regulation 261/2004, obliges air transport service providers to continue with the performance of their contractual obligations 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 the air transport service provider an additional chance to perform his obligations. Additionally, in certain cases of non-performance or improper performance by the air transport service provider, the air passenger may acquire a right to compensation.<sup>79</sup> 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.<sup>80</sup> 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 a flight's cancellation or a long delay may be unexpectedly stranded in a foreign place, the air passenger receives certain additional rights to assistance and care.<sup>81</sup>

While Regulation 261/2004 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 of the 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 package travel, when this contract is then subsequently improperly or not at all performed. However, the few rights that the European legislator has specified in the PTD correspond with the rights that air passengers have under Regulation 261/2004. 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 reimbursement pursuant to Article 4 Paragraph 6 of the 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 performance or lack thereof of the package travel contract. However, the European legislator has not further determined the scope of this right to assistance, contrary to what we find in the provisions of Regulation 261/2004. Finally, Article 5 of the PTD specifies that the organizer and/ or retailer of package travel is liable for damages that the consumer has suffered as the result of the improper performance or lack thereof of the package travel contract. As of the CJEU's judgment in the *Simone Leitner*<sup>82</sup> 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*

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<sup>79</sup> See for details as to the amounts of compensation: Regulation 261/2004, art 7. Due to the CJEU's judgment in case *Sturgeon*, this compensation is due to air passengers not only in case of flight's cancellation but also delay. See: case C-402/07 *Sturgeon and Others* [2009] ECLI:EU:C:2009:716.

<sup>80</sup> Regulation 261/2004, art 12. See also *Sousa Rodriguez* (n 68).

<sup>81</sup> See for description of these rights: Regulation 261/2004, art 9. See also: Case C-12/11 *McDonagh* [2013] ECLI:EU:C:2013:43.

<sup>82</sup> *Simone Leitner* (n 34).

*abstracto*, unrelated to the damage that the consumer has suffered. In this respect, the protection's scope granted in Regulation 261/2004 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 give traders another chance to perform their original contractual obligations<sup>83</sup> or whether they allow consumers to terminate the contractual relation and to claim damages or repayment of (a part of) the price.<sup>84</sup> If a consumer has more than one remedy at her disposal, she usually has the choice between them.<sup>85</sup> 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, 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 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 Regulation 261/2004 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.<sup>86</sup> The CJEU has further confirmed the distinction between the compensation in Regulation 261/2004 and the air passenger's right to claim damages in its judgment in the *Sousa Rodrigues and Others* case<sup>87</sup>. There, the CJEU interpreted Article 12 of Regulation 261/2004 and clarified that the air passengers' right to claim damages is not in any way influenced by their right to compensation as set in Article 7 of Regulation 261/2004. 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 computer when the non-conforming computer is being repaired, intends to compensate any inconvenience that consumers may experience related to the remedying of the

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<sup>83</sup> 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.

<sup>84</sup> Consumer Sales Directive, art 3 para 2 prescribes here a possibility to terminate the contract or to demand price reduction (partial termination).

<sup>85</sup> 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.

<sup>86</sup> Unless, however, we follow the CJEU's reasoning that the compensation should be granted to air passengers in case of a flight's delay or cancellation due to their loss of freedom to manage their own time rather than due to the non-performance or improper performance of the service. See *Sturgeon and Others* (n 79) para 52-54.

<sup>87</sup> *Sousa Rodríguez* (n 68) para 37-38.

originally improperly or not at all performed contractual obligation. However, whether this right to a replacement good exists in European consumer law could be debated. In many situations traders could 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 repaired 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 to say, the obligation to repair the goods without any significant inconvenience to the consumer.<sup>88</sup> 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 to diminish their inconvenience resulting from the improper or lack of performance of the service provider's contractual obligations. However, the right to care 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 Regulation 261/2004 follow the patterns used by the European legislator 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 provisions of the PTD.<sup>89</sup> The fact that the European legislator does not grant this right to consumers in case of 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. However, this justification would then call for the European legislator to extend the scope of application of this right to passengers other than air passengers, as well. 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 contractual parties to determine. Considering the often grave consequences that may follow from the non-performance or improper performance of the 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., a 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.<sup>90</sup> Additionally, the new Article 6a grants air passengers the right 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 a hotel accommodation for any delay, even if it was caused by the long-lasting extraordinary circumstances<sup>91</sup>, the European Commission introduces a limit to this assistance

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<sup>88</sup> See e.g. Marco Loos, *Consumentenkoop* (Monografie BW B-65b, 3rd ed, Kluwer 2014) 83–84.

<sup>89</sup> It should be considered here that some consumers who have purchased package travel could also be air passengers and their rights may overlap here and confuse them due to the varied scope of these rights.

<sup>90</sup> The European Parliament suggests to change this timeframe to two hours. See: Parliament's Proposal, amendment 76.

<sup>91</sup> See e.g.: *McDonagh* (n 81).

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. Moreover, if the flight was supposed not to be longer than 250 km or was to occur on an aircraft smaller than 80 seats, this right to accommodation would be excluded altogether.<sup>92</sup> Additionally, when the air passenger decides to choose reimbursement while being at the departure airport of her journey or re-routing at a later date over continuation of her travel plans at the earliest opportunity, then she waives her right to assistance and care, pursuant to Article 9 Paragraph 6. The European legislator adjusted thus the right to compensation to lessen the financial burden on the air transport service providers. As a result, this right is likely to apply in the future to fewer cancelled or delayed flights.<sup>93</sup> However, the Regulation also clearly determines that air passengers who suffered a long delay of their flight have a right to claim compensation, which will thus extinguish the controversies related to the CJEU's judgment in the *Sturgeon* case.<sup>94</sup> Furthermore, 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 Regulation 261/2004.<sup>95</sup> The Parliament's Proposal suggests the addition of a specific provision addressing the issue of the air transport service provider's insolvency.<sup>96</sup> 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 passengers the choice of re-routing, air passengers may arrange such re-routing themselves and claim corresponding costs thereof.<sup>97</sup> As we may see the new provisions limit the 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 European institutions broaden the scope of the right to assistance and care and specify it in even more detail. It remains to be seen what measures the final version of the Proposal will introduce. However, from the above analysis follows that the current rights of air passengers should be overall strengthened by the amendments, even though they still will not equal air passengers' remedies to consumer remedies.

## 5. Right of withdrawal.

While Regulation 261/2004 grants 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 to say, 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

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<sup>92</sup> 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.

<sup>93</sup> There is, however, a dispute between the European Commission and the European Parliament in what precise circumstances air passengers should be granted these rights, e.g., whether compensation should apply only with three or five hours long flight's delay.

<sup>94</sup> Commission's Proposal, art 6 para 2; see also Garben (n 77) 15; see also *Sturgeon and Others* (n 79).

<sup>95</sup> 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.

<sup>96</sup> Parliament's Proposal, amendment 69.

<sup>97</sup> Parliament's Proposal, amendment 90.

while concluding certain transactions, the character of which is deemed to justify the introduction of the right of withdrawal.<sup>98</sup> 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, the European legislator has already introduced exceptions to this rule, for example, in the Consumer Rights Directive and it is important to consider whether he should not give also air passengers the same or a similar protection measure.

Since the sector of air transport services is an industry similar to package travel, it helps to look at measures that the European legislator has adopted in the PTD. And so, Article 5 of the 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. First, it is not limited in time from the moment of the contract's conclusion. Second, it sets a condition for its use, in the form of the travel organizer having significantly changed the essential contractual terms. This right should then rather be characterized as the consumer's right to terminate the contract without having to pay the penalty.<sup>99</sup> 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'.<sup>100</sup> 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 European legislator aimed to balance the contractual parties' interests by allowing consumers who have made early reservations to terminate the contract before their trip starts, if they have a need for it. Such consumers still need to consider the organizer's interests and agree to reasonably compensate him for the cancellation of their contracts. 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 of the PTD. Again, if a consumer would be hindered in using the package travel she has booked in advance, she would have an option not to lose her money by finding a replacement traveller for the package travel's organizer. The European legislator has not given this option to air passengers in Regulation 261/2004.

Article 9 of the CRD provides for the right of withdrawal for distance and off-premises contracts. The European legislator justified the adoption of the right of withdrawal in distance contracts due to the lack of physical contact between consumers and traders prior to the contract's conclusion. Legal scholars perceive this method of concluding contracts as often hindering consumers in their ability to fully and properly assess the value of the services they are purchasing,

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<sup>98</sup> 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.

<sup>99</sup> 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.

<sup>100</sup> Proposal for Package Travel Directive, art 10.

which disadvantage may leave them distrustful both as to the trader and the transaction.<sup>101</sup> Scholars have also argued that without the right of withdrawal's introduction to distance contracts, consumers would be less willing to participate in cross-border transactions, which often occur at a distance.<sup>102</sup> 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, where the quality of goods and services offered to consumers would gradually drop due to the consumers' unwillingness to pay higher prices when they could not easily verify the goods' or services' quality.<sup>103</sup> With regard 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.<sup>104</sup> If a door-to-door salesman ambushes a consumer in her own house and she then signs a contract just to get rid of this pestering salesman, she will have a possibility to reverse the legal situation she found herself in due to the undue pressure having been exercised.

Pursuant to the derogation introduced in Article 3 Paragraph 3(k) of the CRD also the provisions of the CRD on the right of withdrawal do not apply to air transport services.<sup>105</sup> This, while air transport service providers may and often do sell their services through various distance communication schemes, as well as off-premises. For example, a travel agent may visit air passenger's home; air transport service providers may sell air travel at a travel fair or at the airport itself.<sup>106</sup> An air transport service provider may also induce a passenger into concluding a 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 a 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.<sup>107</sup> Why then would the European legislator not grant air passengers 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 are twofold.

First, 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 air transport service provider's control.<sup>108</sup> The CRD excludes in any case the application of the right of withdrawal to

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<sup>101</sup> See e.g.: Luzak (n 98) 96; Omri Ben-Shahar and Eric A Posner, 'The right to withdraw in contract law' (2011) 40 *The Journal of Legal Studies* 115, 121.

<sup>102</sup> See e.g.: Bech Serrat (n 13) 82–83; Loos (n 96) 246–247.

<sup>103</sup> See e.g.: Luzak (n 98) 96; Eidenmüller (n 98) 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.

<sup>104</sup> See e.g.: Bech Serrat (n 13) 82; Loos 2009 (n 98) 244–245.

<sup>105</sup> 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.

<sup>106</sup> Bech Serrat (n 13) 82.

<sup>107</sup> Bech Serrat (n 13) 83.

<sup>108</sup> 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 28 January 2015; Scott McCartney, 'Whatever you



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 their 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 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 predictable 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 we could question this justification to exclude the application of the right of withdrawal to air transport services.

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.<sup>109</sup> The CJEU decided in its judgment in the *easyCar*<sup>110</sup> case that, e.g., car hire companies should fall within the scope of the derogation introduced for the transport sector in the Distance Selling Directive.<sup>111</sup> The CJEU reminded that the purpose of this derogation was to protect these industries where late cancellations could have disproportionate effects, such as the passenger transport industry.<sup>112</sup> Clearly, this reasoning could apply to air transport service providers accordingly. Advocate General Stix-Hackl argued in her opinion in that case that if the CJEU allows passengers of car hire companies to cancel reservations at a short notice, this would economically weaken these traders who needed to incur increased costs and liability associated with greater unused capacity.<sup>113</sup> The travel industry used this reasoning when they lobbied in the European institutions for the right of withdrawal not to

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Do, Don't Buy an Airline Ticket On...' (*The Wall Street Journal*, 27 January 2011) <<http://online.wsj.com/articles/SB10001424052748704062604576105953506930800>> accessed 28 January 2015.

<sup>109</sup> Bech Serrat (n 13) 84.

<sup>110</sup> Case C-336/03 *easyCar* [2005] ECLI:EU:C:2005:150.

<sup>111</sup> 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.

<sup>112</sup> *easyCar* (n 110) 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.

<sup>113</sup> *easyCar* (n 110), opinion of the Advocate General Stix-Hackl, para 61 .

apply to air transport services on the basis of the “empty chair” syndrome.<sup>114</sup> 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 the European legislator could avoid this “empty chair” syndrome and introduce the right of withdrawal to protect air passengers with, e.g., an additional time limit as to when it could be performed. Air passengers often purchase air transport services months prior to their 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 European legislator could exclude the use of the right of withdrawal for air passengers purchasing their tickets, e.g., within just one month from their intended travel date. After all, 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 variation that the European legislator could introduce to the right of withdrawal in order to make it more attractive for air transport service providers would be through the introduction of 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 are an example of such other services that could be harmed by the “empty chair” syndrome.<sup>115</sup> If service providers in these markets are capable of operating successfully with the right of withdrawal protecting their customers, why would this 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.<sup>116</sup>

Unfortunately, neither the Commission’s nor the Parliament’s Proposal mentions a possibility to provide air passengers with either the 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.

While the European legislator continues to harmonise European private law and gives it more attention overall, the regulation of air passengers’ rights indeed seems ‘up in the air’ rather than securely established, as the title of this paper suggest. The air passengers’ rights are not yet

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<sup>114</sup> Bech Serrat (n 13) 84.

<sup>115</sup> Bech Serrat (n 13) 87.

<sup>116</sup> 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 28 January 2015.

safely grounded not only as the result of the unfinished legislative process on the new rules that would govern this area of European private law. The careful analysis of Regulation 261/2004 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. This, while the justifications for 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. Of course, the European legislator could insist on limiting the application of the notion of a 'consumer' to 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. However, then at least the European legislator should consider the introduction of the common terminology in Regulation 261/2004 and in the PTD. Therefore, the European legislator should consider incorporation of the newly prepared notion of a 'traveller' from the proposal for the new PTD 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.

Generally, the European institutions have granted consumers concluding contracts other than for air transport services a higher standard of protection, 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.<sup>117</sup> 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 demand an addition of a whole new list of information duties to Regulation 261/2004. It could suffice to, e.g., extend the application's scope of the CRD so that it covered also air transport services contracts. 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 contracts also seem 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 passenger's 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.

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<sup>117</sup> Bech Serrat (n 13) 88.

Nevertheless, it needs to be observed here that certain air passengers' protection measures that Regulation 261/2004 has introduced go beyond the scope of protection that European consumers enjoy. This applies specifically in the case of air passengers having to receive a standardized notification that they have certain information rights, clear sanctions established for breach of information duties by air transport service providers that may further incentivize them to properly inform their customers, as well as providing air passengers with the detailed remedy of the right to assistance and care. These measures either completely lack within European consumer law or the European legislator drafted them in an inferior way in comparison with the provisions of Regulation 261/2004. Any drafters of the future European consumer law measures should, therefore, take a better look at these provisions since they may find some useful inspiration in them.