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FORUM-SELECTION CLAUSES IN SUBORBITAL SPACE TOURISM CONTRACTS AND EU- LAW

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Suborbital space tourism flights open space to the wide public. Such flights will involve operators operating from different countries and carrying spaceflight participants (SFPs) of various nationalities. To minimize the cost and risk of litigation, operators will probably use forum-selection clauses in their contracts with SFPs. These clauses designate the courts of a particular State, mostly the State of the operator's main place of business, as competent to resolve any disputes arising from or in relation to the contract. This paper examines the European Union (EU) law on such clauses. The topics under examination include the scope, the validity requirements and the effects of jurisdictional clauses on operators and SFPs. The policies behind the relevant provisions, with special regard to the particularities of consumer protection are also considered. It is concluded that mandatory provisions of EU law on consumer protection could undermine the advantages that forum-selection clauses can have in determining the competent court. National courts will decide on the validity of forum-selection clauses. *De lege ferenda* it would be useful to introduce international uniform rules, which will also regulate jurisdictional issues, yet such possibility appears remote at present. Therefore, national courts will have to strike an appropriate balance between the interests SFPs and the interests of the nascent suborbital industry. The final word on the interpretation of EU rules on forum-selection clauses will have the ECJ. In the meantime, the effect of such clauses on space tourism contracts cannot be accurately foreseen

I. FORUM-SELECTION CLAUSES AND SUBORBITAL SPACE TOURISM CONTRACTS

Forum-selection clauses or jurisdiction agreements are contractual provisions stipulating that claims arising from a contract or in relation thereto can be presented before a particular court.¹ They may provide that the courts of a particular place are the only competent courts to hear the case excluding all other courts that would have jurisdiction under the applicable law (agreements on exclusive jurisdiction) or that they are also competent to hear the case beside the other courts (agreements on concurrent jurisdiction). Forum-selection clauses are widely used in business practice.

In many cases they are pre-formulated and have the form of an adhesion contract, which means that the other party to the contract can either accept them as they are or reject the whole contract.

Companies use forum-selection clauses for two major reasons: first, to limit the risk - and the associated cost - of litigating before multiple courts, which may also be situated in different States; second, to secure litigation in a legal environment favourable to their interests, e.g. where the material law applicable to the case will probably satisfy their legal positions in case of a contractual dispute.

Therefore, and given that the suborbital space tourism industry is young and uses largely experimental technology, it is expected that operators of suborbital space tourism vehicles will use such clauses in their contracts with spaceflight participants (SFPs).

Provisions on forum-selection clauses under the law of the European Union (EU) are generally permitted and can be found in the Regulation (EC) No 44/2001 (*Brussels I*).² They are referred to as contractual ‘prorogation of jurisdiction’. *Brussels I* was laid down to modernize the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.³ As many provisions of the Brussels Convention have been maintained, the case law and the commentaries developed under the Convention remain valid.

II. SCOPE OF THE PROVISIONS ON FORUM-SELECTION CLAUSES OF THE BRUSSELS I REGULATION

A) Territorial and material scope

The relevant provisions of the Regulation apply only if jurisdiction is conferred to the courts of an EU Member State,⁴ since the EU has no competence to regulate the competence of courts outside its boundaries.⁵

The Regulation does not apply to arbitration [Art. 1(2)(d)], which means that a forum-selection clause conferring jurisdiction to an arbitral tribunal will not be judged according to the Regulation.

B) Personal scope

As to the Regulation’s personal scope, the criterion of internationality must be fulfilled. It is necessary that the parties have their domicile in different Member States or that one party is domiciled in a Member State and the other party in a third State.⁶

If both parties are domiciled outside the EU, the Regulation is generally inapplicable.⁷ If a party was domiciled in the EU at the time of the conclusion of the contract but no longer domiciles therein when the legal proceedings are instituted, or vice versa, then *Brussels I* should remain applicable, in order to respect the will of the parties to choose the forum of their litigation in accordance with the Regulation.⁸ In no case is the nationality of the parties significant (Art. 2).

The domicile of physical persons is determined by the law of the forum [Art. 59 (1)]. But if a party is not domiciled in the Member State whose courts are seized of the matter, then, in order to determine whether that party is domiciled in another Member State, the court shall apply the law of that Member State [Art. 59 (2)]. For example, if a French court needs to determine whether the defendant is domiciled in Germany, it will apply German law.

A legal entity is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business [Art. 60 (1)]. For UK and Ireland statutory seat means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place [Art. 60 (2)]. The Regulation has adopted an autonomous definition of the domicile of a legal entity, in order to enhance legal certainty.

III. VALIDITY REQUIREMENTS

The requirements for the validity of a forum-selection clause are the agreement of the parties to establish the competence of a particular court and the form of such agreement.

A) Agreement

Prorogation of jurisdiction must have been agreed upon by the parties [Art. 23(1), 1st sentence]. The

forum-selection clause must have been in fact the subject of consensus between the parties, which has to be clearly and precisely demonstrated.⁹

A forum-selection clause need not be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause states the objective factors on the basis of which the parties have agreed to submit their dispute to a particular court. However, these factors must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction.¹⁰ For example, a forum-selection clause could provide that all disputes arising from the contract shall be brought before the courts of the place where the operator of the suborbital vehicle has its central administration.

The consensus of the parties must refer to a particular legal relationship. This requirement is intended to limit the scope of the jurisdiction agreement solely to disputes that arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes that may arise out of its relationship with the other party to the contract and stem from another relationship.¹¹ As a result, if a SFP signs a contract for a suborbital flight that contains a forum-selection clause, the clause will be valid only for disputes regarding that particular contract.

The validity of the jurisdiction agreement is independent of the validity of the contract. A forum-selection clause serves a procedural purpose, which is distinct from the substantive provisions of the main contract. Furthermore, one of the Regulation's objectives is to provide legal certainty by unifying the rules on jurisdiction. This objective would be jeopardized if one party to the contract could simply claim that the whole contract is void on grounds derived from the applicable substantive law.¹²

B) Form

The agreement must be in writing, or evidenced in writing, or in a form that accords with commercial practices that the parties have established between themselves [Art. 23(1), 2nd sentence]. An agreement in writing has the meaning that the will of each party to establish jurisdiction of a particular court must be incorporated in a paper, whose author must be recognisable.¹³ An agreement evidenced in writing is an agreement concluded orally and confirmed in writing.¹⁴ The form that accords with commercial practices of the parties depends on the circumstances of the particular case; yet such form will have no practical importance in commercial suborbital tourism contracts with SFPs, in which there is no continuous commercial relationship between the operator of the vehicle and the SFP.

Moreover, to take into account the needs of modern electronic transaction the Regulation stipulates that any communication by electronic means that provides a durable record of the agreement is equivalent to "writing" [Art. 23(2)]. This would be the case of electronic files saved in hard discs drives or portable storage systems (USB sticks, DVDs etc.) or even in online servers ('cloud'). Also an exchange of e-mails between the parties, in which they agree on the competent court amounts to "writing".

If the forum-selection clause is included in the general terms and conditions of one party, the requirement of a 'writing' is fulfilled under two conditions. First, there must be an express reference to those general conditions in the contract signed by both parties.¹⁵ Second, the general terms must have been communicated to the other party prior to the conclusion of the contract.¹⁶ These conditions serve to ensure that the other party has indeed consented to the clause waiving the normal rules of jurisdiction. In general, the validity of a pre-formulated forum-selection clause is assessed only according to the Regulation; any other

considerations not referred therein, such as the link between the chosen court and the dispute in question, the intention of the party that inserted the clause or the substantive liability rules applicable in the chosen court, are not to be considered.¹⁷

The form requirements must be met when the legal proceedings are initiated. Only at that time does a jurisdiction agreement produce legal effects.¹⁸ This is underlined by Art. 66 of the Regulation, which stipulates that the Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force.¹⁹

IV. EFFECTS

A valid forum-selection clause confers exclusive jurisdiction to the designated court, which cannot decline its jurisdiction; however, it exercises no influence on issues of provisional measures.

A) Exclusive jurisdiction

The effects of a forum-selection clause depend on the place where the parties to the contract are domiciled. If at least one of the parties is domiciled in an EU Member State, then the designated court has exclusive jurisdiction, unless the parties have otherwise agreed [Art. 23(1), 1st sentence]. For example, if a forum-selection clause in a contract between Virgin Galactic and a SFP designates the courts of London as competent mentioning nothing else, then only these courts are competent to resolve disputes arising out of the contract.

If none of the parties is domiciled in an EU Member State, the Regulation's provisions are generally inapplicable and the courts of the Member States decide on the validity of the forum-selection clause and their jurisdiction according to their national law.²⁰ Nevertheless, to ensure respect of the forum-

selection clause throughout the EU,²¹ the Regulation prohibits courts of other Member States from accepting jurisdiction over the case, unless the court chosen has declined jurisdiction [Art. 23(3)]. This provision regards cases in which courts of other EU Member States would normally have jurisdiction. For example, suppose that Blue Origin, which has its headquarters in Washington and has no branches or other commercial establishments in the EU, offers flights from Kiruna, Sweden. In its contracts, English courts are designated as competent to hear any claims arising from the contract. If a SFP who is resident in Japan brings an action before Swedish courts, then these may not accept jurisdiction, unless English courts have declined jurisdiction according to English law.

B) Mandatory acceptance of jurisdiction

The designated court must accept jurisdiction, even if it would otherwise lack jurisdiction.²² Furthermore, the court chosen may not decline jurisdiction on the basis of *forum non conveniens*, which is inapplicable under the Regulation.²³ Nonetheless, if the court of another Member State has been seized first, the designated court must stay proceedings (Art. 27), until the former decides on its jurisdiction according to the Regulation.²⁴

C) Provisional Measures

Pursuant to Art. 31 of the Regulation, an application for provisional measures may be brought before the courts of any Member State, also when those courts lack jurisdiction under the Regulation as to the substance of the matter. Consequently, a valid forum-selection clause does not influence the competence of other courts falling in the territorial scope of the Regulation to order, suspend, revoke or modify provisional measures according to their national law.

This does not prevent the court seized for provisional measures to deny jurisdiction based on its national law.

V. SPECIAL RULES ON FORUM-SELECTION CLAUSES IN CONSUMER CONTRACTS

The Regulation foresees special rules on forum-selection clauses in consumer contracts.

A) Scope of the special rules

The special rules apply ‘consumer contracts’; yet, not all consumer contracts are subject to the special rules.

a. Notion of ‘consumer contract’

Consumer contracts are concluded between two persons, only one of whom is acting outside his/her trade or profession [Art. 15(1)]. Thus, a contract between a suborbital operator, which is a commercial company, and a SFP who flies for recreational purposes is a consumer contract. However, a scientist who takes a suborbital flight to conduct experiments for the company or organization he/she works for is not a ‘consumer’ under the Regulation.

The consumer’s contractual partner must pursue commercial or professional activities in the Member State of the consumer’s domicile or direct by any means such activities to that Member State, and the contract must fall within the scope of such activities [Art. 15(1)(c)]. Where a consumer enters into a contract with a party not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the latter is deemed to be domiciled in that State regarding disputes arising out of the operations of the branch, agency or establishment [Art. 15(2)]. As a result, the special rules on consumer contracts may apply if the SFP’s contractual partner is commercially active in the State where the SFP has its domicile.

b. Exceptions

The special rules on consumer contracts do not apply to contracts of transport, with the exception of contracts that, for an inclusive price, provide for a combination of travel and accommodation [Art. 15(3)].²⁵ Thus, a travel seller or a tour operator who offers a holiday package, which includes e.g. transport to the spaceport, a three-day training course and hotel accommodation, falls in the ambit of the special rules.

It can be argued that contracts for suborbital flights as such are contracts of transport. Therefore, the forum-selection clauses that operators of suborbital vehicles have included in these contracts are not covered by the Regulation’s special provisions on consumers.

Nevertheless, it may also be supported that the reason for the exception of transport contracts is that jurisdiction over disputes arising therefrom is determined by international conventions²⁶, and the Regulation does not affect any conventions to which the Member States are parties and which determine jurisdiction in relation to particular matters (Art.71).²⁷ Hence, transport contracts have been excepted from the Regulation’s scope because they are governed by international conventions, which contain special provisions on jurisdiction and supersede the Regulation. Therefore, the Regulation aims only at the exclusion of transport contracts that are governed by international conventions. Nonetheless, suborbital flights are not being covered by international conventions at present. First, under current plans, they will not be international, as they will begin and end at the same State. Second, it is doubtful whether the international conventions on air transport cover suborbital flights, because it is highly uncertain if suborbital vehicles can be considered ‘aircraft’.²⁸ For these cases, the Regulation’s wording is broader than its purpose. Therefore, one could apply a teleological reduction of the Regulation’s wording, so

that the scope of the Regulation encompasses transport contracts not regulated by an international convention. As a result, jurisdiction over disputes arising from suborbital flights not covered by international conventions could be determined by the Regulation and the special rules on consumer contracts would be applicable.

The counter-argument to such teleological interpretation would be that the special rules on consumer contracts are meant to apply to everyday contracts, which are concluded on a massive scale and in which consumers with a weak bargaining power often contract with powerful well-established companies. However, the suborbital industry is currently at an infant, very fragile state. Suborbital flights are not conducted on a massive, everyday basis, like e.g. air travel. Furthermore, the high cost of such contracts entails that SFPs will be able to afford experienced legal support before entering into an agreement to fly. Hence, the reasons underlying the establishment of consumer-protection rules are not present in the case of manned commercial suborbital flights and the special rules of the Regulation on consumer contracts are inapplicable.

Hence, it is possible that a court decides in favour of the applicability of the special rules on consumer contracts.

B) Requirements for the validity of forum-selection clauses in consumer contracts

If the special rules on consumer contracts are found applicable, then the Regulation sets three alternative criteria for the validity of forum-selection clauses, in addition to the general requirements laid down in Art. 23. The Court of Justice of the European Union (ECJ) has added a fourth condition, which must be fulfilled in any case.

a. Rise of the dispute or concurrent jurisdiction or jurisdiction of the common residence

A deviation from the special rules on consumer contracts by an agreement between the parties is allowed only after the dispute has arisen [Art. 17 (1)], which means that the initial contract between operators and SFPs cannot contain any stipulations on the competent courts. In practice, this entails that operators will have to negotiate with SFPs on the possible place of litigation, which in turn could be part of a wider bargain on the issues of the dispute to be litigated.

For future disputes, a forum-selection clause is permitted if it allows the consumer to initiate proceedings before courts other than those indicated in the Regulation [Art. 17 (3)]. Combining the wording of this provision ('allow' as opposed to 'oblige') with the Regulation's purpose to protect consumers²⁹, the meaning of the provision is that such agreements are permitted if they allow consumers to bring proceedings before courts in addition to those indicated by the Regulation. A different interpretation would deprive consumers of the Regulation's protection.

In the alternative, agreements on jurisdiction before the conflict arises are permitted, if both the consumer and the other party to the contract are domiciled or habitually resident in the same Member State at the time of the conclusion of the contract, and the agreement confers jurisdiction to the courts of that Member State, provided that such agreement is not contrary to its law [Art. 17(3)]. In such cases, the Regulation is applicable despite the lack of internationality.

To understand better the Regulation's provisions on choice-of-jurisdiction agreements for future disputes, suppose that Virgin Galactic contracts with a UK resident to fly from Kiruna, Sweden. The parties can agree that future contractual disputes can be resolved, apart from the courts of Sweden and UK, also

by French courts. They can also agree that competent will be UK courts in all cases, because both parties are domiciled in the UK. Yet, they cannot agree that future disputes will be resolved exclusively by French courts.

b. Clause not abusive

The ECJ has ruled³⁰ that a forum-selection clause in an adhesion contract is subject to abuse control according to the Directive 93/13³¹.

Pursuant to the above Directive, the court must refer to all the circumstances attending the conclusion of the contract and to all the other terms of the contract, and assess whether there is a significant imbalance in the parties' contractual rights and obligations to the detriment of the consumer, contrary to the requirement of good faith.³² The Directive provides that a forum-selection clause that has not been individually negotiated may be abusive, as long as it excludes or hinders the consumer's right to take legal action.³³ Hereto belongs also a clause that confers exclusive jurisdiction to the courts of the place where the consumer's contractual partner has its principal place of business.³⁴ Such clause is abusive if it deters the consumer to appear before the court of the place of the other party's principal place of business, because such appearance may be associated with high costs while the amount of the dispute could be relatively small.³⁵ Furthermore, the ECJ has clarified that the court has to determine of its own motion whether such clause is unfair.³⁶

It should also be noted that Directive 93/13 lays down minimum standards for the protection of consumers³⁷ and Member States may introduce more strict rules. In fact, many Member States consider as always abusive pre-formulated jurisdiction clauses that confer exclusive jurisdiction to the courts of the place where the consumer's contractual partner has its principal place of business.³⁸

Thus, under application of the special rules on consumer protection there are increased possibilities that forum-selection clauses are judged as abusive.

C) Consequences of an invalid forum-selection clause

If the court finds that a forum-selection clause is invalid, then the Regulation's provisions on jurisdiction for consumer contracts apply. The invalidity of a forum-selection clause as abusive does not affect the validity of the rest of the contract.³⁹ The Regulation stipulates that the courts of the place where the consumers are domiciled have concurrent jurisdiction to hear claims of the consumers against their contractual partners [Art. 16(1)], whereas they have exclusive jurisdiction to hear claims brought against the consumers [Art. 16(2)]. Consequently, SFPs could sue an operator of a suborbital vehicle also at the place of their domicile.

CONCLUSION

In conclusion, forum-selection clauses in space tourism contracts are going to play an important role. Under the general jurisdictional rules of EU law, such clauses may help operators of suborbital vehicles reduce the risk and cost of litigation by conferring exclusive jurisdiction to the designated court. Nevertheless, if the courts find the special rules on consumer contracts applicable, the effect of jurisdiction agreements for operators will be limited and SFPs will take advantage of the consumer-friendly EU rules. Consequently, operators have to be very careful when drafting forum-selection clauses in their contracts. In any case, national courts will determine the exact repercussion of jurisdiction agreements on suborbital flights, according to the circumstances of the particular case. *De lege ferenda* it would be useful to introduce uniform international rules on manned commercial suborbital flights, which would include rules on the

competent courts to strike a balance between the interests of SFPs and the interests of the nascent suborbital industry. However, the possibility of enacting such rules seems remote at present, given also that for the time being suborbital flights will not be international. It should be also noted that EU law supersedes national law,⁴⁰ which means that, even if special rules on suborbital flights were enacted at national level, they would not be able to set aside current EU rules. Therefore, the task of striking a

balance of interests between SFPs and industry falls on national courts. However, the final word on the application of consumer-protection rules to suborbital flights will have the ECJ, which interprets authoritatively EU law.⁴¹ In the meantime, under application of EU law, operators of suborbital vehicles should not be too confident about the effect of their forum-selection clauses on eventual litigation with SFPs.

¹ E.g. 'any action for a dispute in relation to the present contract can only be brought before the courts of Paris, France'.

² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16 Jan. 2001, p. 0001 – 0023.

³ Official Journal L 299 , 31 Dec. 1972, p. 0032 – 0042.

⁴ ECJ Case C-387/98 *Coreck Maritime v. Handelsveem BV and Others*, [2000] ECR 9337, para. 19.

⁵ Magnus/Mankowki/*Magnus*, Brussels I Regulation (2007), Article 23, para. 36.

⁶ Jenard, P., *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, OJ C 59/1, 5 March 1979, p. 37-38; Schlosser, Peter, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, OJ C 59, 5 March 1979, pp. 71- 151, para. 174; Magnus (*supra* note 5), paras 23-24, where he cites the various views regarding the exact requirements of internationality.

⁷ Schlosser (*supra* note 6), para. 176.

⁸ The issue is disputed. See on the opposing views Magnus (*supra* note 5), paras 61-63, with further citations, who also supports the view adopted in this paper.

⁹ ECJ Case C-24/76, *Estasis Salotti v RÜWA* [1976] ECR 1831, para. 7, Case C-25/76 *Segoura v Bonakdarian* [1976] ECR 1851, para. 6; Case C-106/95 *MSG v Gravières Rhénanes* [1997] ECR I-911, para. 15.

¹⁰ ECJ C-387/98 (*supra* note 4), para. 15.

¹¹ ECJ Case C-214/89 *Powell Duffryn plc v Wolfgang Petereit*, [1992] ECR I-01745, para. 31.

¹² ECJ C-269/95 *Francesco Benincasa v Dentalkit Srl*. [1997] ECR I-03767, paras 25-29.

¹³ See the decision of the German Supreme Court (BGH) of 22.02.2001, NJW 2001, p. 1730.

¹⁴ This becomes obvious from the text of the Regulation in other languages, e.g. 'verbalement avec confirmation écrite' in French, and 'mündlich mit schriftlicher Bestätigung' in German – see Magnus (*supra* note 5), para. 102.

¹⁵ ECJ C-24/76, (*supra* note 8), paras 9-10.

¹⁶ ECJ C-24/76, (*supra* note 8), para. 12.

¹⁷ ECJ C-159/97 *Transporti Castelletti SpA v Hugo Trumpy SpA*, [1999] ECR I-01597, paras 48-52.

¹⁸ ECJ C-25/79, *Sanicentral GmbH v René Collin*, [1979] ECR 03423, para.6.

¹⁹ Magnus (*supra* note 5), para. 60.

²⁰ Magnus (*supra* note 5), paras 53-54.

²¹ Schlosser (*supra* note 6), para. 177.

²² Magnus (*supra* note 5), para. 45.

²³ ECJ Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-1383, paras 37-46.

²⁴ ECJ Case C-116/02 *Erich Gasser GmbH v MISAT Srl*, [2003] ECR I-14693, paras 47-49.

²⁵ See Council Directive 90/314/EC of 13 June 1990 on package travel, package holidays and package tours,

Official Journal L 158, 23 June 1990.

²⁶ Schlosser (*supra* note 6), para. 160. Examples of such conventions are the International Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw on 12 October 1929; the Convention concerning International Carriage by Rail, signed at Berne on 9 May 1980; the Convention relating to the Carriage of Passengers and their Luggage by Sea, signed at Athens on 13 December 1974.

²⁷ See also Schlosser (*supra* note 6), paras 239-240, who clarifies that provisions on jurisdiction contained in special conventions are to be regarded as if they were provisions of the 1968 Convention itself; if a special convention contains no provisions directly governing jurisdiction, the jurisdiction provisions of the Brussels Convention apply.

²⁸ See on this question Hobe, Stephan, *Legal aspects of space tourism*, Neb.L.Rev. 2007, p. 439 (442-444).

²⁹ Indent 13 of the Regulation's preamble.

³⁰ See ECJ Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98), [2000] ECR p. I-04941.

³¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993, p. 0029 – 0034.

³² See Arts 3(1) and 4 of the Directive.

³³ Annex I, para. 1(q) of the Directive.

³⁴ ECJ, *ibid*, para. 22.

³⁵ ECJ Joined cases C-240/98 to C-244/98 (*supra* note 28), para. 24.

³⁶ ECJ, *ibid*, para. 29.

³⁷ See Art. 8 of the Directive.

³⁸ See Schulte-Nölke, Hans (ed.), *EC Consumer Law Compendium- Comparative Analysis*, Bielefeld 2007, p. 386.

³⁹ Art. 6(1) of Directive 93/13.

⁴⁰ ECJ Case 6-64, *Flaminio Costa v E.N.E.L.*, [1964] ECR English special edition, p. 00585.

⁴¹ Art. 267 of the Treaty on the Functioning of the EU.