OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 2 July 2009 [1]

1. In these joined cases, the Court is asked by the Bundesgerichtshof (German Federal Court of Justice) and by the Handelsgericht Wien (Vienna Commercial Court, Austria) to clarify the distinction between the notions of 'delay' and 'cancellation' of a flight in Regulation (EC) No 261/2004 ('the Regulation'). [2] The Handelsgericht Wien also seeks guidance as to the meaning of the notion of 'extraordinary circumstances' in Article 5(3) of that Regulation.

Relevant legal provisions

The Montreal Convention [3]

2. The Montreal Convention, to which the Community is a party, modernises and consolidates the Warsaw Convention. [4] It seeks, inter alia, to protect the interests of consumers in international carriage by air and to provide equitable, restitutionary compensation. [5]

1 — Original language: English.

2 — Regulation of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

3 — Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999, approved on behalf of the Community by Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38). The convention came into force, so far as the Community is concerned, on 28 June 2004.

4 — Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929, 137 *League of Nations Treaty Series 11*.

5 — See the second and third recitals in the preamble.

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

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

The EC Treaty

4. Article 3 EC provides:

'1. For the purposes set out in Article 2, [6] the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

...

(t) a contribution to the strengthening of consumer protection;

...'

Regulation No 261/2004

5. The Regulation contains the following recitals:

'...

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

6 — 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community [a number of goals, including for example harmonious, balanced and sustainable development].'

…

(12) The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

…

(17) Passengers whose flights are delayed for a specified time should be adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions.

…'

6. Article 2(l) defines 'cancellation' for the purposes of the Regulation as 'the non-operation of a flight which was previously planned and on which at least one place was reserved'. There is no equivalent definition of the term 'delay'.

7. Article 5, entitled 'cancellation', provides:

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

(a) be offered assistance by the operating air carrier in accordance with Article 8; [7] and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2) [8], as well as, in event of re-

7 — See below, point 10.
8 — See below, point 11.

routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

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

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

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

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

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

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

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

8. Article 6, entitled 'Delay', provides:

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

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

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

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

passengers shall be offered by the operating air carrier:

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

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

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a). [10]

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

9. Article 7, entitled 'Right to compensation', provides:

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

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

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

9 — See below, point 11.

10 — See below, point 10.

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

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

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

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

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

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

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

…'

10. Article 8, entitled 'Right to reimbursement or re-routing', provides:

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

(a) — reimbursement within seven days … of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,

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

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

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

…'

11. Article 9, entitled 'Right to care' lists the types of care that passengers are entitled to:

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

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

(b) hotel accommodation in cases

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

or

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

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

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

3. …'

The main proceedings and the questions referred

Case C-402/07 Sturgeon

12. Mr Christopher Sturgeon and his wife booked a return flight with Condor Flugdienst GmbH ('Condor') from Frankfurt to Toronto for themselves and their two children. I shall refer to the family group collectively as 'the Sturgeons'.

13. The Sturgeons were due to return on a flight leaving Toronto on 9 July 2005 at 16.20. In fact, they did not depart until the following day. Consequently, they did not arrive in Frankfurt until 07.00 or 07.15 on 11 July 2005, some 25 hours after they were due to arrive.

14. The Sturgeons claim that at around 23.30 on 9 July 2005 the flight captain announced that the flight was being cancelled and the same information was shown on the departures board. The luggage, which had already been loaded, was returned to the passengers, who were then transferred to a hotel to spend the night, arriving there at 02.30. On the following day the passengers had to check in again at the counter of a different air carrier. They were allocated different seats, and had to go through security once again. However, the flight number of the flight back, now one day later, did correspond to the flight number on their booking.

15. The Sturgeons claim that, given those circumstances, in particular the 25-hour delay, their flight was in reality not delayed but cancelled and that they are thus entitled to EUR 600 per person as compensation for cancellation. [11]

16. Condor maintains that the flight was merely delayed.

17. The Amtsgericht Rüsselsheim considered that the flight had been delayed and not cancelled. It therefore rejected the Sturgeons' claims for compensation.

18. Their appeal was dismissed by the Landgericht Darmstadt which, however, granted leave to appeal on a point of law to the Bundesgerichtshof, on the basis that the

11 — In addition, they seek damages for loss of earnings, redundant seat reservations and train tickets. In the alternative, they claim that they should be reimbursed 30% of the price of their tickets. None of these matters are, however, relevant to the questions referred.

distinction between 'cancellation' and 'delay' is unclear, yet fundamental.

19. The Bundesgerichtshof took the view that the outcome of the Sturgeons' appeal depended on the interpretation of Article 2 (l) and potentially Article 5(1)(c) of the Regulation. It therefore stayed proceedings and referred the following questions to the Court of Justice:

'(1) Is it decisive for the interpretation of the term "cancellation" whether the original flight planning is abandoned, with the result that a delay, regardless of how long, does not constitute a cancellation if the air carrier does not actually abandon the planning for the original flight?

(2) If Question 1 is answered in the negative: in what circumstances is a delay of the planned flight no longer to be regarded as a delay but as a cancellation? Is the answer to this question dependent on the length of the delay?'

Case C-432/07 Böck and Lepuschitz

20. Mr Stefan Böck and Ms Cornelia Lepuschitz booked a flight from Vienna to Mexico City with Air France SA ('Air France'). Their journey was divided into the following legs: on 18 February 2005 from Vienna to Paris and from Paris to Mexico City; on 7 March 2005 from Cancún to Mexico City and from Mexico City to Paris; on 8 March 2005 from Paris to Vienna.

21. As Mr Böck and Ms Lepuschitz were checking in for flight AF439 departing from Mexico City on 7 March 2005 at 21.30, they were informed — before the check-in actually took place — that that flight had been cancelled because of a technical problem. In response to their request for an alternative flight, they were offered seats on a flight operated by Continental Airlines ('Continental'), under flight number CO1725Y, which left Mexico City on 8 March 2005 at 12.20.

22. Mr Böck and Ms Lepuschitz accepted that offer. In order to have tickets issued to them, they first had to request confirmation from Air France's office in Mexico City, which enabled them to obtain tickets from the Continental ticket counter. Air France offered them hotel accommodation, food and transfers to and from the hotel. Mr Böck and Ms Lepuschitz finally arrived in Vienna 21 hours after the scheduled time of arrival.

23. The remaining passengers who should have travelled on 7 March 2005 on flight AF439, and who were not rebooked onto the Continental flight, took a plane bearing registration FGSPV on 8 March 2005 from Mexico City to Paris. It departed at 19.35 with a slightly modified flight number (AF439A) and arrived back in Paris on 9 March 2005 at 13.09. The flight operated in parallel with the regular flight scheduled by Air France on 8 March.

24. Mr Böck and Ms Lepuschitz claim that Air France should pay each of them EUR 600 by way of compensation for the cancellation of their flight, pursuant to Article 5, read in conjunction with Article 7(1)(c), of the Regulation.

25. At first instance, the Bezirksgericht für Handelssachen Wien dismissed the application because it held that the flight scheduled for 7 March 2005 had been delayed, but not cancelled within the meaning of the Regulation, and that in the event of a mere delay, there is no right to compensation.

26. Mr Böck and Ms Lepuschitz appealed to the Handelsgericht Wien, which decided to refer the following questions to the Court of Justice:

'(1) Must Article 5, read in conjunction with Articles 2(l) and 6, of Regulation (EC) No 261/2004 …, be interpreted as meaning that a 22-hour delay in the time of departure constitutes a "delay" within the meaning of Article 6?

(2) Must Article 2(l) of Regulation (EC) No 261/2004 be interpreted as meaning that instances in which passengers are transported significantly later (22 hours later) on a flight operating under a longer flight number (original flight number supplemented by an "A") and carrying only an — albeit large — proportion of the passengers booked on the initial flight, but also additional passengers not booked on the initial flight, constitute "cancellations" rather than "delays"?

If Question 2 is to be answered in the affirmative:

(3) Must Article 5(3) of Regulation (EC) No 261/2004 be interpreted as meaning that technical problems with a plane and the resulting changes to the flight schedule represent extraordinary circum-

stances (which could not have been avoided even if all reasonable measures had been taken)?'

27. Written observations were submitted by the Sturgeons, Mr Böck and Ms Lepuschitz, Condor, Air France, the Austrian, French, Greek, Italian, Polish, Swedish and United Kingdom Governments, and by the Commission.

28. At the hearing, oral submissions were made on behalf of the Sturgeons, Mr Böck and Ms Lepuschitz, Condor, the Greek and United Kingdom Governments, and the Commission.

On the distinction between 'delay' and 'cancellation'

29. In its two questions, the referring court in *Sturgeon* seeks clarification on whether, for there to be a 'cancellation', it is essential that the original flight planning be abandoned and, if not, whether a delay may become a cancellation after a certain amount of time has elapsed. The first and second questions referred in *Böck and Lepuschitz* ask the Court whether a 22-hour delay is still a 'delay' within the meaning of Article 6 of the Regulation or whether such a delay, in conjunction with transporting the passengers on a flight operating under a different flight number and not carrying all passengers booked on the initial flight, may not rather constitute a cancellation.

30. Both referring courts therefore essentially ask how to distinguish a 'delay' from a 'cancellation' within the meaning of Article 2(1) of the Regulation, and whether a 'delay' may be treated as a 'cancellation' within the meaning of the Regulation after a certain amount of time has elapsed.

Preliminary observation — legislative history of the Regulation

31. In the explanatory memorandum to its original proposal for a regulation, [12] the Commission noted, at point 20, that '[c]ancellation by an operator … represents a refusal to supply the service for which it has contracted, except in exceptional circum-

12 — Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights COM(2001) 784 final ('Explanatory memorandum to the original Commission proposal').

stances beyond its responsibility, such as political instability, severe weather conditions, inadequate security and unexpected safety failures. For the passenger, cancellation in ordinary circumstances, for commercial reasons, causes unacceptable trouble and delay, particularly when not warned in advance.' At point 23, it stated: 'Although passengers suffer similar inconvenience and frustration from delays as from denied boarding or cancellation, there is a difference in that an operator is responsible for denied boarding and cancellation (unless for reasons beyond its responsibility) but not always for delays. Other common causes are air traffic management systems and limits to airport capacity. As stated in its communication on the protection of air passengers, the Commission considers that in present circumstances operators should not be obliged to compensate delayed passengers.'

32. It is not all that easy to discern the logic behind the distinction that the Commission was there drawing. The explanatory memorandum first states that airlines are always responsible for cancellations except where exceptional circumstances exonerate them from such responsibility (a principle later reflected in the text of Article 5 of the Regulation as adopted, where the 'exceptional circumstances' referred to by the Commission are re-christened 'extraordinary circumstances').[13] The explanatory memorandum then identified a number of circumstances in which airlines are (objectively) not responsible for delays. These — like the 'exceptional circumstances' earlier identified in respect of cancellations — are circumstances for which (objectively) the airline is not responsible. In logic, one would expect the explanatory memorandum to go on to propose (for both cancelled flights and delayed flights) that airlines should not be required to pay compensation if, objectively, the delay or cancellation was not their fault. Instead, the explanatory memorandum contents itself with the bald statement that 'the Commission considers that in present circumstances operators should not be obliged to compensate delayed passengers'.

33. The compensation proposed in the Commission's proposal for cases of cancellation was the same as for cases of denied boarding, which was stated, at point 11 of the explanatory memorandum, to be fixed 'at a dissuasive level'. At point 14, the calculation was further explained: 'To deter operators from denying boarding to all passengers, whatever class they travel, the Commission proposes setting the fixed rate of compensation at twice the level of most business class fares.'

13 — See points 98 to 101 below.

34. It may be that the distinction between 'cancellation' and 'delay' which the Commission had in mind in its proposal was based not on the effect on passengers but on the degree of responsibility of the operator — the difference between a deliberate decision to cancel a flight for commercial reasons ('cancellation'), which should be discouraged by dissuasive levels of compensation, and a genuine attempt to get passengers to their destination, however late, in the face of external difficulties ('delay'), in which case operators should simply be required to provide a certain level of assistance. If so, there seems to be a degree of confusion between 'cause' and 'fault'. It is not difficult to imagine instances where a genuine attempt to get passengers to their destination as quickly as possible might imply cancelling the scheduled flight (because it is clear it can never leave on time) and then making sure that the passengers can leave on another flight. [14] Conversely, a delay to a flight on which only a few passengers are booked might be extended, for reasons that are in essence commercial, because the airline used the first available replacement plane to get a different flight, on which more passengers are booked, out of trouble first. [15] If the principle behind the Commission's proposal was, 'airlines should pay compensation if they are at fault, but not otherwise', one would expect it to have made some provision for identifying (and penalising) delays attributable to commercial decisions.

35. In the course of the legislative process, however, there does not appear to have been a strong focus on that distinction, particularly once the levels of compensation had been reduced. In the text as finally adopted, it is difficult to deduce the criteria for distinguishing between 'cancellation' and 'delay'.

Why is the distinction between 'delay' and 'cancellation' important?

36. Article 2(l) of the Regulation defines a 'cancellation' as 'the non-operation of a flight which was previously planned and on which at least one place was reserved'. The Regulation contains no equivalent definition of the term 'delay'. Nor is 'delay' defined in the Warsaw or Montreal Conventions. Article 19 of the Montreal Convention merely provides, in rather general terms, for the air carrier to be liable for damage occasioned by 'delay in the carriage by air of passengers, baggage or cargo'. That phrase appears to cover many — if not all — cases that fall under 'cancellation of a flight', and to be much broader than 'delay of a flight' in the Regulation.

37. Under the Regulation, however, the distinction between 'delay' and 'cancellation' matters. Article 5 of the Regulation gives passengers whose flight has been cancelled the right to specified compensation. Article 6

14 — Given that cancellation involves compensating the passengers under Article 7 of the Regulation, in this example the perverse result is produced that it is 'better' for the airline (but not for the passengers) 'merely' to delay the flight.

15 — See the facts that gave rise to the reference in Opinion in Case C-396/06 *Kramme*, set out in my Opinion in that case (available on the Court's website). The reference was withdrawn before judgment.

of the Regulation makes no equivalent provision for compensation for delays.

38. The Regulation has the considerable merit of granting automatic compensation to passengers whose flights have been cancelled. However, as the Polish Government notes in its written observations, the distinction the Regulation introduces between cancellation and delay may lead to passengers who find themselves in objectively similar situations being treated differently.

39. That unavoidably raises the (fundamental) question as to whether the Regulation violates the principle of equal treatment.

Impact of the principle of equal treatment

40. According to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [16]

41. The validity of Articles 5, 6 and 7 of the Regulation in the light of the principle of equal treatment was challenged in *IATA and ELFAA*, but from the perspective of the airlines, rather than the passengers.

42. There, ELFAA submitted that the low-fare airlines which it represented suffered discriminatory treatment since the measures prescribed in those articles impose the same obligations on all air carriers without drawing any distinction on the basis of their pricing policies and the services that they offer. ELFAA further submitted that Community law does not impose the same obligations on other means of transport and, by implication, that it was therefore discriminatory to single out the air transport sector in that way.

43. The Court held that the situation of undertakings operating in different transport sectors was not comparable and that passengers whose flights are cancelled or subject to a

16 — See, for example, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; and Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 39.

long delay are in an objectively different situation from that experienced by passengers on other means of transport in the event of incidents of the same nature. Moreover, the damage suffered by passengers of air carriers in the event of cancellation of, or a long delay to, a flight is similar whatever the airline with which they have a contract and is unrelated to the pricing policies operated by the airline. [17] The Court concluded that, 'if the Community legislature was not to infringe the principle of equality, having regard to the aim pursued by Regulation No 261/2004 of increasing protection for all passengers of air carriers, it was incumbent upon it to treat all airlines identically'. [18]

44. In *IATA and ELFAA*, the Court explicitly confirmed that the primary objective of the Regulation was to increase protection for all air passengers. Indeed, that statement forms the basis for the Court's analysis and rejection of ELFAA's arguments. ELFAA argued that air transport and other forms of transport are comparable. The Court said that, for passengers faced with cancellation or long delay, they are not. ELFAA argued that scheduled airlines and budget airlines are not comparable. The Court said that, for passengers faced with cancellation or long delay, they are. In short, ELFAA invited the Court to examine the Regulation from the airlines' perspective. The Court rejected that approach and examined ELFAA's argument (and the Regulation) from the *passengers' perspective*.

45. It is moreover noteworthy that, throughout its analysis, the Court treated passengers whose flights are cancelled and passengers whose flights are subject to a long delay as forming part of a *single category*.

46. As the Court put it in *Arcelor Atlantique and Lorraine and others*, a 'breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them'. These elements, and hence their comparability, 'must in particular be determined and assessed *in the light of the subject-matter and purpose of the Community act* which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account.' [19]

17 — As to the nature of that damage, the Court held in paragraph 43 that any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everyone concerned (through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls). Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused. Such damage can consequently only be compensated subsequently on an individual basis.

18 — *IATA and ELFAA*, paragraphs 94 to 98; see also *Emirates Airlines*, paragraph 35.

19 — Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraphs 25 and 26 (emphasis added), referring to Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 823, paragraph 14; Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 8; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 74; and Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 83.

47. In the *IATA and ELFAA* judgment, the Court stated unequivocally that the objective of Articles 5 (cancellation) and 6 (delay) of the Regulation is apparent from the first and second recitals in the preamble, according to which action by the Community in the field of air transport should aim, inter alia, at ensuring a high level of protection for passengers and should take account of the requirements of consumer protection in general, inasmuch as cancellation of, or long delay to, flights causes serious inconvenience to passengers. [20]

48. Thus, the Court in *IATA and ELFAA* clearly identified protecting passengers as the 'immediate objective' or the 'direct objective explicitly set out by the Community legislature', whilst accepting that the Regulation may implicitly have other, secondary, objectives (such as that of reducing, through preventive action, the number of flights that are cancelled or subject to a long delay). [21]

49. This approach is borne out by the fact that, as the Court noted, the extent of the various measures chosen by the Community legislature varies 'according to the significance of the damage suffered by the passengers, its significance being assessed by reference either to the length of the delay and the wait for the next flight or to the time taken to inform them of the flight's cancellation'. [22] Although the reference point used for calculating time is different, both with regard to cancellation and long delay, significance of damage is assessed by reference to the passage of time.

50. The strengthening of consumer protection is, moreover, one of the activities explicitly mentioned in Article 3(1)(t) EC which the Community is to pursue for the purposes of the general objectives of the Community as set out in Article 2 EC. [23]

51. However, regardless of the seriousness of the inconvenience caused, the Regulation provides that the cancellation of a flight automatically triggers a right to compensation (under Article 7) while a delay never does. As the order for reference in *Sturgeon* suggests and as the Commission indicated at the hearing, the Regulation therefore appears to

20 — *IATA and ELFAA*, cited in footnote 16, paragraph 69; Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18. Recital 2 of the Regulation speaks in a single phrase of 'cancellation or long delay of flights', drawing no distinction between the two.

21 — *IATA and ELFAA*, citied in footnote 16, paragraphs 82 and 83 and the Opinion of Advocate General Geelhoed, points 121 and 122.

22 — *IATA and ELFAA*, cited in footnote 16, paragraph 85.

23 — See also the Opinion of Advocate General Geelhoed in *IATA and ELFAA*, cited in footnote 16, points 117 to 119, where the Advocate General refers to Article 153(2) EC (requiring the Community legislature to take consumer protection requirements into account in other policy areas) and Article 95(3) EC (requiring a high level of consumer protection) and concludes that consumer protection is undoubtedly a legitimate aim expressly provided for in the Treaty.

be based on the assumption that a cancellation necessarily causes more inconvenience to passengers, and hence merits a stronger form of protection, than a 'mere' delay. [24]

52. It is wholly unclear to me why this should be so. Indeed, the Commission in its written observations admits as much, accepting that cancellations do not in fact always cause more inconvenience than delays.

53. Suppose passenger A and passenger B have both booked flights from Brussels to New York with different air carriers, both leaving at 08.30. When passenger A arrives at the airport, he is told that his flight has been cancelled. He is offered a place on another flight to New York departing one day later at 08.30. Passenger B is told upon arriving at the airport that his flight has been delayed. His flight finally takes off at the same moment as Passenger A's new flight, that is to say one day after the scheduled time of departure. Both passenger A and B arrive in New York at the same time. The two passengers are, in effect, in identical situations. Yet only passenger A is granted a right to automatic compensation under the Regulation.

54. The distinction between cancellation and delay as it currently exists in the Regulation thus appears to be at odds with its purpose.

55. This is made even clearer when one considers that the Regulation may produce the (perverse) result that passengers who have suffered the greater inconvenience may be denied automatic compensation, while those who have suffered the lesser inconvenience may be granted it. Let us suppose that the same passengers A and B (clearly 'frequent flyers') have both booked flights from Brussels to New York with different air carriers, both departing at 10.30. When passenger A arrives at the airport, he finds that his flight has been cancelled. The air carrier, however, immediately proposes an alternative flight with a different carrier leaving at 11.00. When passenger B arrives at the airport, he is informed that his flight has been delayed. His flight finally takes off at 22.30, or 12 hours after the scheduled time of departure. Self-evidently, passenger B has suffered the greater inconvenience.

56. Passenger A (who was barely affected) will be able to claim compensation under Articles 5(1)(c) and 7 of the Regulation. Passenger B will merely have been able, as the hours ticked by, to claim meals and refreshments; [25] a couple of free telephone

24 — Compare recitals 12 (cancellation) and 17 (delay) in the preamble to the Regulation. The different solutions they propose directly contradict recital 2, which recognises that both '[d]enied boarding and cancellation or long delay of flights' cause 'serious trouble and inconvenience to passengers'.

25 — Article 6(1)(c)(i), cross-referring to Article 9(1)(a). Given that the flight in my example is a transatlantic one, passenger B will have to wait for four hours before he gets any 'right to care' under Article 9.

calls (or telexes, faxes or e-mails); [26] and then (after five hours) the right to choose reimbursement if the wait no longer seems worthwhile. [27] Valuable though the right to care indubitably is, it is hardly equivalent to the compensation that passenger A will receive.

57. In the explanatory memorandum accompanying its proposal for the Regulation, against the background that the measure is intended to enhance consumer protection, the Commission offers the following comment on the distinction between cancellation and delay: 'Although passengers suffer similar inconvenience and frustration from delays as from denied boarding or cancellation, there is a difference in that an operator is responsible for denied boarding and cancellation (unless for reasons beyond its responsibility) but not always for delays.' [28]

26 — Idem, cross-referring to Article 9(2).
27 — Article 6(1)(c)(iii), cross-referring to Article 8(1)(a).
28 — Explanatory memorandum to the original Commission proposal, cited in footnote 12, paragraph 23.

58. That explanation does not withstand scrutiny.

59. The Commission explicitly acknowledges that the inconvenience suffered by passengers is similar, whether their flight is subject to long delay or cancellation. If that is right (as indeed it seems to be), one would expect the two categories of passenger to be treated in the same way, because both equally need and merit protection (but they are not). The Commission then says that the difference between cancellation and delay (and, implicitly at least, the justification for the difference in treatment) is that the operator is always responsible for cancellations (except when he is not); and that he is not always responsible for delays (except, presumably, when he is). That is a distinction without a difference.

60. It seems to me that the underlying logic (again, against the background of enhanced consumer protection) must have been that, where the operator is *not responsible* for the inconvenience (whether caused by cancellation or long delay), he should not have to pay compensation; and that, conversely, where he *is* responsible, he should pay. Put another way, the criterion for compensation is not causation, but fault (broadly defined) on the part of the operator.

61. If that is right, it still does not explain why passengers suffering the inconvenience of a cancellation and passengers suffering the inconvenience of a long delay are treated differently. Both long delay and cancellation may (or may not) be the operator's responsibility. However, the difference in treatment under the Regulation does not depend on fault on the part of the operator. It simply depends on whether what has happened is classified as a delay or as a cancellation. And no other, objective explanation for the difference in treatment is to be found in the *travaux préparatoires*.

62. The difference in treatment therefore appears to fall foul of the principle of equal treatment.

63. That is corroborated by the fact that in *IATA and ELFAA* the Court clearly and unambiguously held that consumer protection is the primary objective of the Regulation. Viewed from the perspective of the passengers, persons in a comparable situation are being treated in a different way, to the advantage of one category (passengers whose flights are cancelled) and the disadvantage of the other category (passengers whose flights are subject to long delay).

64. It also seems, at least on a first inspection, that the primary objective of the Regulation (enhanced consumer protection) could be achieved with measures that do respect the principle of equality. It is of course for the Community legislature to examine and decide upon such measures. [29]

65. In the present proceedings, save for a brief mention by the Polish Government, the Court has heard no argument as to the potential impact, on the questions referred, of the principle of equal treatment. The possibility that an examination of the distinction between delay and cancellation might lead to the conclusion that the way in which the Regulation treats these two concepts violates that fundamental principle of EC law has therefore not been dealt with in any adequate way. I am conscious that there may be counter-arguments that I have failed to identify. Both the institutions and the Member States should have the opportunity to comment on the analysis that I have advanced and to put forward arguments relating to objective justification.

29 — Purely by way of illustration: provision could be made to limit automatic compensation to cases of cancellation without re-routing within a specified period (for example, two hours), whilst providing automatic compensation in case of a delay longer than the same specified period. For cancellations (as presently), the air carrier would not be required to provide financial compensation if it could prove that the delay or cancellation was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. An equivalent provision would be needed to cover delays for which the airline could show that it bore no responsibility. If necessary and appropriate, the specified period could vary with the distance of the flight (as in the present Articles 6(1) and 7(2) of the Regulation). Such an arrangement would also, I think, satisfy the requirements of proportionality (expressly invoked in *IATA and ELFAA*, cited in footnote 16, paragraph 79).

66. I therefore propose that the Court should reopen the oral procedure and invite submissions on that matter from the Member States, the Commission, the European Parliament, and the Council.

67. Should the Court not agree with that approach, I offer the following observations on whether it is possible to interpret the Regulation in accordance with the principle of equality. [30]

Indications that a flight has been cancelled

68. Factors that have been cited before the Court and in national case-law and legal writing [31] as providing possible indications that a flight has been cancelled include: change of air carrier, change of aircraft, change of flight number, change of airport of departure or arrival, giving baggage back to passengers, new check-in for passengers, new seating assignment, allocation of all passengers to one or more other aircrafts, issuing new boarding passes, and the fact that the flight is described as 'cancelled' by the pilot (or other air carrier staff) or on the departures board.

69. Common sense suggests that all of these factors could be indications that a flight has been cancelled rather than merely delayed. The more factors that are present together, the more likely it becomes that there has indeed been a cancellation. By the same token, I do not think that any individual factor can be conclusive.

70. For example, withdrawing an aircraft from operation does not automatically lead to cancellation of the flight to which the aircraft was allocated. The flight can still go ahead if a replacement aircraft is brought into service. [32] It seems to me immaterial whether passengers are reassigned to a single replacement aircraft or several replacement aircrafts. [33]

71. A similar analysis can be applied to most of the other factors put forward. They are part and parcel of air travel. They can be present in

30 — Where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law. See, for example, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 174 and the case-law cited there.

31 — See, for example, R. Schmid, 'Die Bewährung der neuen Fluggastrechte in der Praxis — Ausgewählte Probleme bei der Anwendung der Verordnung (EG) Nr. 261/2004' (2006) *NJW* 26, p. 1843; E. Gaedtke, 'Fluggastrechte: Praktische Schwierigkeiten bei der Anwendung der Verordnung (EG) Nr. 261/2004', (2007) *Verbraucher und Recht*, pp. 203 and 204; B. Wagner, 'Verbesserung der Fluggastrechte durch die Verordnung (EG) Nr. 261/2004', (2006) *VuR*, pp. 338 and 339; and the case-law referred to in those articles.

32 — See my Opinion in *Kramme*, cited in footnote 15, point 39.

33 — A factor mentioned in the order for reference in *Böck and Lepuschitz*.

the context of an otherwise normal flight (not even, necessarily, a delayed flight).

72. The Commission, supported at the hearing by counsel for Mr Böck and Ms Lepuschitz, for Condor, and for the Greek Government, suggests in its written observations that a change of flight number [34] is a strong indication that a flight has been cancelled. [35] I agree.

73. That said, a new flight number is not an infallible guide to distinguishing delayed flights from cancelled flights. The flight number may have to be changed for purely technical reasons beyond the control of the air carrier, even though none of the other parameters of the flight change. [36] In such circumstances, the change of flight number cannot be conclusive proof of cancellation. Conversely, retention of the original flight number does not necessarily indicate that a flight has not been cancelled.

74. The same is true for statements by air carrier staff or other airport personnel that the flight has been cancelled. It is not difficult to imagine endless bickering before the national court as to whether the harassed staff member who told a passenger in a jostling group waiting for attention at an overcrowded desk that the flight was cancelled had the authority to make that statement (or indeed whether the staff member and passenger shared a common language sufficiently for whatever was said to bear an unequivocal meaning). An announcement by the pilot or official listing on the departures board would have more authority but would not necessarily be determinative.

75. Since none of the factors cited can be conclusive on its own, national courts must assess the importance of each of them, when they are present in combination, in each individual case. That may lead to significant problems with legal certainty. [37]

76. It is also evident that air carriers themselves have a significant influence over a number of the factors that may be used to

34 — Likewise mentioned as a factor in the order for reference in *Böck and Lepuschitz*.

35 — In its information document on the Regulation, the Commission likewise states that, in its view, a flight 'may generally be considered as cancelled when the flight number changes for the same route for which the passenger has a contract on a specific day and time schedule': Information Document of the Directorate-General for Energy and Transport: Answers to Questions on the application of Regulation No 261/2004, p. 3, available at http://ec.europa.eu/transport/air_portal/passenger_rights/doc/2008/q_and_a_en.pdf.

36 — For example, on a route on which a scheduled air carrier operates a daily service, it is fairly likely that Monday's flight and Tuesday's flight will bear the same flight number. If so, and if Monday's flight were delayed by 24 hours, it would be imperative to change its flight number to avoid potential confusion in air traffic control instructions, because the pilot of Monday's flight and the pilot of Tuesday's flight would be preparing for departure, requesting a takeoff slot, requesting permission to taxi (etc) at/near the same time.

37 — See points 89 and 90 below.

distinguish delay from cancellation. It is in those carriers' economic interest to take steps to ensure that an incident will be classified as a delay rather than a cancellation, however long the delay, and to contest (wherever possible) passengers' claims that the flight was really cancelled. [38]

Time as a factor in identifying cancellation

77. Unlike the factors listed above, the passing of time is not susceptible of manipulation. [39] Can an 'inordinately long' delay become a de facto cancellation, triggering the right to compensation under Article 5(1)(c) of the Regulation?

78. The Sturgeons, Mr Böck and Ms Lepuschitz, the Austrian, French, Greek, Italian, Polish, and Swedish Governments, and the Commission take the view that, after a certain time has elapsed, a delay may be classified as a cancellation. The United Kingdom Government, however, considers that only the Community legislature could properly introduce elapsed time as a means of distinguishing between these two events. Condor argues that Article 19 of the Montreal Convention gives passengers a right to damages if their flight is delayed. Considerations of passenger protection do not therefore require a long delay to be interpreted as a cancellation in the sense of Article 5 of the Regulation.

79. I can deal shortly with that last argument. The Montreal Convention is indeed applicable in the Community. It provides for compensation based on the principle of reparation. Such compensation, in a particular case, might be more advantageous for a particular passenger than the automatic flat-rate compensation, without proof of actual damage, for flight cancellation provided by Article 7(1) of the Regulation. The arrangement under the Regulation is different from, and complementary to, the system under Article 19 of the Montreal Convention. [40] Passengers whose flight has been cancelled receive compensation under Article 7(1) of

38 — In a report on the practical impact of the Regulation, the Commission noted a concern that airlines may be re-classifying cancellations as long delays in order to avoid claims for compensation payments, although it was unable to find clear statistical evidence (a drop in the number of cancellations and a corresponding increase in the number of delays) of this practice: see Communication from the Commission to the European Parliament and the Council pursuant to article 17 of Regulation (EC) No 261/2004 on the operation and the results of this Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, COM(2007) 168 final, paragraph 4.1.2. The present references are evidence of the potential problem.

39 — Compare the acute observation by Screwtape (a senior devil, instructing his nephew in the art of temptation) that human beings always claim to own 'their' time: 'The humans are always putting up claims to ownership which sound equally funny in Heaven and in Hell' (C.S. Lewis, *The Screwtape Letters* (1942), pp. 112 and 113).

40 — Article 12(1) of the Regulation makes it clear the flat-rate compensation in Article 7(1) is not intended to replace compensation under the Montreal Convention.

the Regulation 'without … having to suffer the inconvenience inherent in the bringing of actions for damages before the courts'. [41] If long delay and cancellation cause similar inconvenience to passengers, passenger protection indicates that both should similarly benefit from a convenient system of automatic flat-rate compensation. That is sufficient to dispose of Condor's argument.

80. What of the central argument that, after a certain time, delay becomes de facto cancellation?

81. As a matter of common sense, time is obviously a factor in identifying whether a flight has been cancelled. If a number of the factors listed above are present in combination and/or the flight has been delayed for an inordinate period of time, that is a very strong indication that the flight has in fact been cancelled.

82. Moreover, as the Commission submitted at the hearing, when a passenger books a flight, there is an implied contract with the air carrier for transportation at a certain time and between two points. If the departure time of the flight is inordinately delayed, it is hard to maintain that the flight is still the 'flight which was previously planned'. [42] Thus, for example, if a regular flight operates daily at the same time, under normal circumstances the fact that that flight still has not taken off after the next day's flight has departed is a strong indication that the first flight has been cancelled. [43]

83. In the absence of any definition, the term 'delay' must be interpreted in the light of the provisions of the Regulation as a whole and of its objectives. [44] Treating the passing of time as an important factor in identifying a cancellation would clearly reinforce the Regulation's objective of increasing passenger protection. However, there are two difficulties with this approach. First, what is meant by 'inordinate delay'? Second, is it permissible to interpret the Regulation in a way that classifies inordinate delay as de facto cancellation?

41 — See *IATA and ELFAA*, cited in footnote 16, paragraph 45, where the Court explained the difference between the system of the Montreal Convention and the automatic right to assistance with regard to delay under Article 6 of the Regulation.

42 — See the definition of 'cancellation' in Article 2(l) of the Regulation.

43 — I am not suggesting that, where a flight is operated weekly, application of this guideline should mean that compensation for cancellation can be claimed only after the following week's flight has taken off.

44 — See, by analogy, *Emirates Airlines*, cited in footnote 16, paragraphs 27 and 28.

When is a delay 'inordinate'?

84. The Commission rightly points out that the Regulation contains no basis for identifying any particular point in time after which a delay becomes classifiable as a cancellation. The Regulation makes it plain that a delay can last longer than 5 hours (Article 6(1)(iii)) and that it may extend at least to the next day, and perhaps beyond (Article 6(1)(ii) in combination with Article 9(1)(b), first indent).

85. The French Government notes that the Regulation contains a number of elements which may serve as pointers. Under Article 6(1) of the Regulation, the period of time triggering the obligation to offer specified forms of assistance varies with the length of the flight: two hours or more in the case of flights of 1 500 kilometres or less; [45] three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; [46] and four hours or more in the case of all other flights. [47] Thus, the Community legislature has made entitlement to the right to care depend on the distance of the flight — passengers travelling further have to wait longer before they have a right to care. [48]

86. An assessment of when a delay becomes 'inordinate' and thus classifiable as a cancellation could take account of the different periods of time indicated in those provisions. However, to be 'inordinate' a delay would necessarily be appreciably longer than each of those benchmarks. The question would then be: by how much?

87. It seems to me impossible to identify, with any acceptable degree of precision, exactly what period of time must elapse before a delay become 'inordinate'.

88. It would therefore be a matter for the national court, in each individual case, to evaluate the facts and reach a view — based on some mixture of national legal tradition, good sense and instinct rather than any precise Community legal norm — as to whether the delay in that instance had been 'inordinate'

45 — Subparagraph (a).
46 — Subparagraph (b).
47 — Subparagraph (c).

48 — See similarly Article 7(2) and, by analogy, Article 5(1)(c)(ii) and (iii) of the Regulation. The recitals to the Regulation offer no explanation for the staggered entitlement to care, which may owe more to a pragmatic assessment of what would be an acceptable economic burden to impose on air carriers (given known patterns of delay for short-, medium- and long-haul flights) than to any deeper logic about passengers' relative needs.

and should therefore be regarded as a de facto cancellation. The case-law thus far suggests that national courts vary widely as to whether to take time into account in deciding whether there has been a cancellation and, if so, to what extent. [49] Apart from confirming that time may be an important factor in identifying a cancellation, and that the planned distance of the flight should be taken into account when assessing whether a delay has become inordinate, the Court can provide little by way of specific, helpful guidance to national courts.

89. The ensuing variability of results is likely to conflict with the principle of legal certainty.

90. According to settled case-law, the principle of legal certainty — which is one of the general principles of Community law — requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings. [50] Thus, the principles of the protection of legitimate expectations and legal certainty form part of the Community legal order and must accordingly be observed by the Community institutions. [51] It is clearly important that both passengers and air carriers should know the extent of their rights and liabilities. If national courts in the Member States are left to decide when a delay is 'inordinate', there will be little clarity, precision or predictability for either party as to the outcome.

Is it permissible to treat delay as a de facto cancellation?

91. If it were possible either to identify a precise point in time at which delay becomes inordinate or to draw up a set of criteria that could serve as effective guidance to the national court, answering this question would involve choosing between a very teleological approach to consumer protection and the plain and literal wording of the Regulation.

92. In the present instance, it seems to me that the choice is a simpler one to make.

49 — See, for example, the case-law referred to in the works cited in footnote 31.

50 — See Case C-337/07 *Altun* [2008] ECR I-10323, paragraph 60 and the case-law cited there. On that principle and on the principle of legitimate expectations generally, see, for example, S. Schønberg, *Legitimate Expectations in Administrative Law* (2000).

51 — Case C-256/07 *Mitsui & Co. Deutschland* [2009] ECR I-1951, paragraph 31 and the case-law referred to there.

93. Any numerical threshold for qualification for a right delineates two groups — the fortunate and the unfortunate — and in establishing that threshold the legislator must be careful not to infringe the principle of equal treatment. The legislator has the right to pick a figure and then defend it, to the extent that its choice is challenged as infringing that principle, as objectively justifiable. The actual selection of the magic figure is a legislative prerogative. To the extent that *any* figure is to some extent arbitrary, its arbitrariness is covered by that prerogative (the margin of legislative discretion).

94. Thus, the Community legislator can select a particular time-limit (23 and a half hours, 24 hours, 25 hours, or 48 hours — whatever it be) triggering a right to compensation. The Court cannot. Any figure one cared to pick would involve reading into the Regulation something it plainly does not contain and would be a judicial usurpation of the legislative prerogative.

95. More fundamentally, *whatever the threshold selected*, under the structure of the Regulation as it stands all passengers of cancelled flights would continue to have an automatic right to compensation, while only passengers of inordinately delayed flights (however the Court chose to define that concept) would have such a right. Some passengers in objectively similar situations would still be treated differently. Some passengers who had suffered only minor inconvenience would still get automatic compensation whilst others who had suffered much greater inconvenience would remain uncompensated. [52]

Conclusion on the questions relating to delay and cancellation

96. It seems to me that, in seeking to avoid Scylla (obvious discrimination against passengers whose flights are inordinately delayed when compared to passengers who obtain automatic compensation for their cancelled flight), one is immediately swept into Charybdis (legal uncertainty). Moreover, the underlying difficulties that I have identified earlier in relation to the principle of equal treatment are unfortunately not solved by adopting a teleological approach towards 'inordinate delay'. They appear to me to be inherent in the structure of the Regulation as it presently stands.

52 — See the examples given at points 53, 55 and 56 above.

97. It is because I do not think that the underlying problem can be 'fixed' by interpretation, however constructive, that I suggest that the Court should reopen the oral procedure pursuant to Article 61 of the Rules of Procedure of the Court of Justice and invite submissions from the Member States, the Commission, the European Parliament, and the Council on whether Articles 5 and 7 of the Regulation and Article 6 of the Regulation, and specifically the distinction they introduce between cancellation and delay, are invalid in the light of the principle of equal treatment.

On the concept of 'extraordinary circumstances'

98. The third question referred in *Böck and Lepuschitz* seeks clarification as to whether technical problems with an aircraft and the resulting changes to the flight schedule fall within the definition of extraordinary circumstances.

99. I dealt in detail with that question in my Opinion in *Kramme*, [53] but the reference was withdrawn before the Court gave judgment. A similar reference was subsequently made in *Wallentin-Hermann*. [54]

100. In its judgment, the Court held that Article 5(3) of the Regulation 'must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of "extraordinary circumstances" within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control'. [55]

101. The same answer must naturally be given to the third question in *Böck and Lepuschitz*.

53 — Cited in footnote 15.

54 — Cited in footnote 20.

55 — *Wallentin-Hermann,* cited in footnote 20, paragraph 34.

Conclusion

102. Accordingly, I suggest that:

(1) Before ruling on the questions posed by the Bundesgerichtshof and the first and second questions posed by the Handelsgericht Wien, the Court should reopen the oral procedure pursuant to Article 61 of the Rules of Procedure and invite submissions from the Member States, the Commission, the European Parliament, and the Council on whether Articles 5 and 7 and Article 6 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, inasmuch as they draw a distinction between cancellation and delay (irrespective of length), are invalid in the light of the principle of equal treatment.

(2) When judgment is given, the third question posed by the Handelsgericht Wien should be answered as follows:

Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.