OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 11 September 2008 [1]

I — Introduction

1. The two questions referred by the national court in this case are concerned with the interpretation of the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') [2] relating to jurisdiction over consumer contracts or, more specifically, with whether the jurisdiction of the courts to hear a claim made by a consumer seeking to obtain a prize ostensibly promised to him by a company is determined on the basis of those provisions. In the context of interpreting the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [3] ('the Brussels Convention'), [4] the Court has already adjudicated on the jurisdiction of the courts where a consumer had brought proceedings against a vendor established in another Member State to claim a prize ostensibly promised to him. Nevertheless, it has not yet adjudicated on that question in the context of Regulation No 44/2001. [5]

2. This case therefore also raises the issue of continuity as regards the interpretation of the Brussels Convention and Regulation No 44/2001. The latter was adopted with the objective of attaining the free movement of judicial decisions in civil and commercial matters, and replaced the Brussels Convention on 1 March 2002 in relations between the

1 — Original language: Slovenian.

2 — OJ 2001 L 12, p. 1.

3 — Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to that convention (OJ 1997 C 15, p. 1).

4 — Judgments in Case C-96/00 *Gabriel* [2002] ECR I-6367, and Case C-27/02 *Engler* [2005] ECR I-481.

5 — In Case C-234/04 *Kapferer* [2006] ECR I-2585, one of the questions referred, asked only in the alternative, was in every respect identical to that raised in this case. In that case, since the Court answered in the negative the first question referred, which concerned the obligation to review a final judicial decision contrary to Community law, it did not answer the question, asked in the alternative, concerning jurisdiction to give a ruling on the claim for a prize which had allegedly been promised (paragraph 25 of the judgment).

Member States, with the exception of the Kingdom of Denmark. [6] Accordingly, on the entry into force of Regulation No 44/2001, there also arose the question whether that regulation and the Brussels Convention were to be interpreted in every respect in the same way or whether, when interpreting them, it was possible to draw distinctions between them.

3. The two questions referred for a preliminary ruling were raised in the course of proceedings between Ms Renate Ilsinger, an Austrian national domiciled in Austria, and the mail-order company Schlank & Schick GmbH ('Schlank & Schick'), established in Aachen (Germany), in the context of an action seeking to obtain a prize ostensibly promised to Ms Ilsinger by Schlank & Schick.

6 — According to Articles 1 and 2 of the protocol on the position of Denmark, annexed to the Treaty on European Union (OJ 2006 C 321E, p. 201), Denmark is not to take part in the adoption by the Council of proposed measures pursuant to Title IV of the Treaty establishing the European Community. None of the provisions of that Title, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure is to be binding upon or applicable in Denmark. Consequently, as stated in the 21st recital in the preamble to Regulation No 44/2001, Denmark did not participate in the adoption of that regulation, and is therefore not bound by it nor subject to its application. It follows from the 22nd recital in the preamble to the same regulation that the Brussels Convention continues to apply in relations between Denmark and the Member States that are bound by Regulation No 44/2001.

II — Legal context

A — *Community law*

4. According to the 13th recital in the preamble to Regulation No 44/2001:

'In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.'

5. According to the 19th recital in the preamble to Regulation No 44/2001:

'Continuity between the Brussels Convention and [the r]egulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol should remain applicable also to cases already pending when [the r]egulation enters into force.'

6. According to Article 2(1) of Regulation No 44/2001, which appears in the section entitled 'General provisions':

'Subject to [the r]egulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

7. According to Article 5(1)(a) of Regulation No 44/2001, which appears in the section entitled 'Special jurisdiction':

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

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

…'

8. According to Article 15(1) of Regulation No 44/2001, which appears in the section entitled 'Jurisdiction over consumer contracts':

'In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

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

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.'

9. Article 16(1) of Regulation No 44/2001 provides:

'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.'

B — *Brussels Convention*

10. The first paragraph of Article 13 of the Brussels Convention provides:

'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.'

C — *Austrian law*

11. Paragraph 5j of the Konsumentenschutzgesetz (Austrian Consumer Protection Law) [7] provides:

'Undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that the consumer has won a particular prize, must give that prize to the consumer; it may also be claimed in legal proceedings.'

III — Facts, main proceedings and questions referred

12. In August 2002, Ms Ilsinger, an Austrian national domiciled in Austria, received an envelope from the mail-order company Schlank & Schick GmbH, established in Aachen (Germany). The envelope, on which the words 'important documents','please open immediately' and 'private' were written,

7 — Bundesgesetz vom 8. März 1979, mit dem Bestimmungen zum Schutz der Verbraucher getroffen werden (Konsumentenschutzgesetz — KSchG), BGBl. 140/1979 (Federal Law of 8 March 1979 adopting provisions for the protection of consumers, as amended).

contained a notification which was addressed personally to her, stating that she had won a prize of EUR 20 000. It was clear from that notification that Ms Ilsinger would obtain the prize 'if she had the identification number which authorised her to obtain the prize', and attached to her prize claim certificate a coupon containing the identification number and returned it to Schlank & Schick within seven days. It is also clear from the prize notification that the claim for payment of the prize was not made conditional upon ordering goods. Ms Ilsinger attached to the prize claim certificate the coupon containing the identification number and returned it to Schlank & Schick.

13. In December 2002, having failed to obtain payment of the prize from Schlank & Schick, Ms Ilsinger brought an action against the company before the Landesgericht St. Pölten, the court for the place where she is domiciled, under Paragraph 5j of the Austrian Consumer Protection Law in conjunction with Article 16(1) of Regulation No 44/2001, in order to obtain payment of the prize. In the context of those proceedings, Schlank & Schick claimed that the Austrian court lacked jurisdiction. By order of 15 June 2004, the Landesgericht St. Pölten simultaneously dismissed the objection of lack of jurisdiction and rejected the claims of the applicant in the main proceedings.

14. The two parties in the main proceedings appealed against the decision of the Landesgericht St. Pölten before the referring court, the Oberlandesgericht Wien. The latter stated in its order for reference that, in the case-law concerning the first paragraph of Article 13 of the Brussels Convention, the Court had already ruled that the actual conclusion of contract for the sale of goods or for the supply of services was a requirement for the application of that article. However, by comparison with the first paragraph of Article 13 of the Brussels Convention, Article 15(1) of Regulation No 44/2001 is, according to the referring court, drafted more broadly; the referring court therefore asks whether the Court's interpretation of the first paragraph of Article 13 of the Brussels Convention also applies to Article 15 of the regulation. The referring court also points out that the Austrian courts cannot have jurisdiction under Article 5(1)(a) of Regulation No 44/2001 even though that provision does not require the conclusion of a contract since, under both Austrian and German law, the debtor's permanent place of residence, that is to say Germany, constitutes the place of performance of monetary debts.

15. It is not clear from the facts provided by the referring court whether, when returning the prize claim certificate, Ms Ilsinger also placed a trial order. Ms Ilsinger claims that she did but Schlank & Schick disputes that claim and asserts that it received no order from Ms Ilsinger. The referring court points out that the Landesgericht St. Pölten indicated, in the statement of grounds of the order by which it

dismissed the objection of lack of jurisdiction and rejected Ms Ilsinger's claims, that the prize was not made conditional upon ordering goods and that, in that respect, whether or not Ms Ilsinger had placed a trial order when claiming the prize was irrelevant.

16. In those circumstances, by order of 29 March 2006, the Oberlandesgericht Wien stayed the proceedings and, under Articles 68 EC and 234 EC, referred the following two questions to the Court for a preliminary ruling:

'(1) Does the provision in Paragraph 5j of the Konsumentenschutzgesetz (Law on consumer protection; KSchG), BGBl. 1979/140, in the version of Paragraph 1(2) of the Fernabsatz-Gesetz (Law on distance selling), BGBl. I 1999/185, which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute, in circumstances where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, for the purposes of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the regulation'), a contractual, or equivalent, claim under Article 15(1)(c) of the regulation?

If the answer to question 1 is in the negative:

(2) Does a claim falling under Article 15(1)(c) of the regulation arise if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods?'

IV — Procedure before the Court

17. The order for reference was received at the Court on 7 April 2006. During the written procedure, observations were submitted by the Austrian, Spanish, Italian, Slovenian and Czech Governments and the Commission of the European Communities. At the hearing of 3 July 2008, the representative of the administrator of Schlank & Schick as well as the Austrian, Spanish and Czech Governments and the Commission submitted oral observations and answered the Court's questions.

V — Arguments of the parties

A — *First question referred*

18. With regard to the first question, the arguments of the parties may be divided into two main groups. On the one hand, there are those parties which claim that the right of action conferred on consumers by Paragraph 5j of the Austrian Consumer Protection Law is not a right connected with a contract for the purposes of Article 15(1)(c) of Regulation No 44/2001. On the other hand, there are those parties which take the view that the right of action which consumers derive from the Austrian law is a right connected with a contract on the basis of Regulation No 44/2001. In its written observations, the Commission supported the first position but stated at the hearing that, in its view, the second position was also acceptable.

19. The Commission, in its written observations, the Slovenian Government and the representative of the administrator of Schlank & Schick take the view that Article 15(1)(c) of Regulation No 44/2001 should be interpreted in the same way as Article 13, first paragraph, point 3 of the Brussels Convention, even though their respective wording is not wholly identical.

20. In their written observations, the Commission and the Slovenian Government both point out that it is apparent that that is so if only from the actual wording of Article 15 of Regulation No 44/2001, since both the introductory sentence of Article 15(1) and Article 15(1)(c) of Regulation No 44/2001 are concerned solely with cases in which the consumer *concludes* a contract with another contracting party. Article 13, first paragraph, point 3 of the Brussels Convention is concerned, it is true, solely with contracts for the supply of services or goods, whereas Article 15(1)(c) of Regulation No 44/2001 also applies if, '*in all other cases*, the contract has been concluded with a person who pursues commercial or professional activities'. However, even in the other cases referred to

in Article 15(1)(c) of that regulation, the contract must have been *concluded* between a consumer and another contracting party. In their written observations, both the Commission and the Slovenian Government refer to the view put forward by Advocate General Tizzano, concerning that issue, in his Opinion in *Kapferer,* [8] in point 54 of which he stated that the changes made to Article 15 of Regulation No 44/2001 related only to the substantive scope of the provisions on consumer contracts, and that they did not in any way affect the requirement for a contract to have been concluded.

21. The representative of the administrator of Schlank & Schick also stated at the hearing that he concurred with Advocate General Tizzano's view, set out in his Opinion in *Kapferer*. He noted that, by comparison with Article 13, first paragraph, point 3 of the Brussels Convention, the wording of Article 15(1)(c) of Regulation No 44/2001 had been amended to include within the scope of that provision contracts concluded via the Internet. In his view, that article of the regulation is solely concerned with synallagmatic contracts under which both contracting parties assume obligations. He pointed out that, where a consumer did not enter into any obligation, it was not necessary for him to be able to exercise a right of action in the Member State in which he was domiciled.

22. Conversely, the Austrian, Spanish, Italian and Czech Governments take the view that Article 15(1)(c) of Regulation No 44/2001 should be interpreted differently from Article 13, first paragraph, point 3 of the Brussels Convention; the *Commission* also stated at the hearing that, in its view, another interpretation of that article of the regulation was acceptable.

23. The Austrian Government points out that Article 15(1)(c) of Regulation No 44/2001 is worded far more broadly than Article 13, first paragraph, point 3 of the Brussels Convention. It takes the view that Article 15(1)(c) of Regulation No 44/2001 is no longer limited solely to particular types of contracts, but applies on the contrary to all types of contracts concluded by consumers 'in all other cases'. A unilateral promise of financial benefit which a consumer accepts constitutes one such other case, resulting in a contractual relationship under which the consumer has no obligation. In support of that view, the

8 — Opinion of Advocate General Tizzano in *Kapferer* (judgment cited in footnote 5).

Austrian Government relies on the argument that the wording of the introductory sentence of Article 15(1) of Regulation No 44/2001 is based on Article 5(1) of the same regulation, which shows the broader scope of Article 15(1) of Regulation No 44/2001.

24. Similarly, the Czech Government takes the view that a unilateral promise of financial benefit must be understood as an offer and the claiming of that financial benefit as the acceptance of that offer. Accordingly, in the Czech Government's view a relationship of a contractual nature comes into being, a relationship which may be treated as the conclusion of a contract.

25. Likewise, the Italian Government takes the view that the promise of financial benefit which Ms Ilsinger accepted, by returning to Schlank & Schick the prize claim certificate with the coupon attached to it, constitutes a consumer contract for the purposes of Article 15(1)(c) of Regulation No 44/2001. According to the Italian Government, a contract for the purposes of that article may also be concluded where only one party is bound by the contract.

26. In support of its observations, the Spanish Government puts forward four arguments. First, it points out that the wording of Article 15(1)(c) of Regulation No 44/2001 differs from that of Article 13, first paragraph, point 3 of the Brussels Convention. Secondly, it notes that only a different interpretation of Article 15(1)(c) of Regulation No 44/2001 can ensure a high level of protection for the consumer, who is the weaker contracting party. Thirdly, in the Spanish Government's view it is appropriate to take into account the connection between the jurisdiction of the courts and the substantive law which those courts apply. For the purposes of consumer protection a consumer must be given a guarantee that the provisions of the Member State in which he is domiciled will apply to him. Finally, the Spanish Government takes the view that the application of Article 15 of Regulation No 44/2001 does not always result in a decision that the courts for the place where the consumer is domiciled have jurisdiction.

27. However, the Commission stated at the hearing that, in view of the requirement for a high level of consumer protection, it could also accept the argument that a consumer contract is concluded where a promise of

financial benefit is made to and accepted by a consumer and, accordingly, that jurisdiction was determined on the basis of Article 15(1)(c) of Regulation No 44/2001. It observed that, in the last few years, the practice of sending prize notifications to consumers had become considerably more widespread and that several companies had transferred their registered offices to other Member States to avoid possible actions brought by consumers who would not wish to initiate legal proceedings in another Member State. It also pointed out that that view was not contrary to that of Advocate General Tizzano in *Kapferer*; indeed, in the latter case, a consumer contract had not been concluded because the consumer had not accepted the terms and conditions stipulated in the prize notification, since he had not placed a non-binding trial order, upon which receipt of the prize was conditional.

B — *The second question referred*

28. As regards the second question referred, the parties — with the exception of the administrator of Schlank & Schick — agree that the Court should answer it in the affirmative. The Commission and the Slovenian and Czech Governments point out that, since *Gabriel*,[9] the Court has held that jurisdiction to hear a dispute concerning a promise of a cash prize must be determined according to the same rules as apply to determination of jurisdiction over a dispute concerning a contract for the sale of goods which the consumer had ordered from the vendor promising the prize. In the Italian Government's view, there is an inextricable link between the prize notification and the order of the goods, since the consumer ordered the goods as a result of the prize notification, the value of which far exceeds that of the goods ordered. Moreover, the Spanish and Italian Governments point out that, in *Besix*,[10] the Court held that it was necessary to avoid creating a situation in which a number of courts have jurisdiction over disputes relating to one legal relationship, or over several mutually and closely linked legal relationships. Having regard to the subsidiary nature of the second question referred, the Austrian Government gives no specific answer to that question.

29. At the hearing, the representative of the administrator of Schlank & Schick expressed the view that, even where a consumer had ordered goods, although the ordering of such goods was not a condition for being awarded the prize, the jurisdiction of the court must

9 — Case C-96/00 [2002] ECR I-6367.
10 — Case C-256/00 [2002] ECR I-1699.

not be determined according to the place in which the consumer is domiciled, since it was not the purpose of consumer protection to allow a consumer to enrich himself by seeking to recover the prize.

rules provide for. However, when interpreting special rules of jurisdiction, it must be taken into account that those rules must give rise to a strict interpretation which cannot go beyond the cases envisaged by Regulation No 44/2001. [11]

VI — The Advocate General's assessment

A — *Introduction*

30. By the two questions which it has referred, the national court requests the interpretation of provisions of Regulation No 44/2001 which relate to the jurisdiction over consumer contracts. The provisions on jurisdiction over consumer contracts derogate from the general principle of *actor sequitur forum rei*, set out in Article 2(1) of Regulation No 44/2001, according to which persons domiciled in a Member State are, whatever their nationality, to be sued in the courts of that Member State. As is clear from the 13th recital in the preamble to that regulation, since the consumer is the weaker party in consumer contracts, he must be protected by rules of jurisdiction more favourable to his interests than the general

31. By its first question, the referring court essentially asks whether Article 15(1)(c) of Regulation No 44/2001 should be interpreted as meaning that the right of action on the basis of which a consumer may bring legal proceedings against a mail-order company established in another Member State for payment of a prize which he has allegedly won is a right connected with a contract for the purposes of Article 15(1)(c) of Regulation No 44/2001, where the claiming of that prize was not made conditional upon actually ordering goods and the consumer has not ordered any goods. By its second question, the referring court asks whether a consumer's claim for payment of a prize is a right connected with a contract for the purposes of that article where entitlement to the prize is not made conditional upon ordering goods but the consumer has actually placed an order for goods.

11 — For example, judgments in Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 23; Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 35; and Case C-462/06 *Glaxosmithkline* [2008] ECR I-3965, paragraph 28. In the context of the Brussels Convention, see, for example, judgments in Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 13; Case C-99/96 *Mietz* [1999] ECR I-2277, paragraph 27; *Engler*, cited above in footnote 4, paragraph 43; and Case C-464/01 *Gruber* [2005] ECR I-439, paragraph 32.

32. With regard to the facts, it should be stated that it is not clear from the order for reference of the national court whether Ms Ilsinger actually placed an order for goods with Schlank & Schick. According to the referring court, the court of first instance based its decision on the fact that entitlement to the prize was not made conditional upon the ordering of goods and that it had considered that it was not necessary to ascertain whether Ms Ilsinger had ordered goods from that company. Consequently, the national court referred a question which covers both the case in which a consumer has ordered goods and that in which he has ordered none.

B — *First question referred*

33. By its first question, the referring court asks whether a right of action based on Article 5j of the Austrian Consumer Protection Law is a right connected with a contract for the purposes of Article 15(1)(c) of Regulation No 44/2001. Since, in the context of references for a preliminary ruling, the Court is limited to interpreting the provisions of Community law in order to provide the national court with the approach to adopt when giving a ruling in the main proceedings, [12] the first question referred should be reworded as follows:

Must Article 15(1)(c) of Regulation No 44/2001 be interpreted as meaning that the right of action by which consumers may, under the law of the Member State in which they are domiciled, claim in the courts, from undertakings established in another Member State, prizes ostensibly won by them where the undertakings send them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, is a right connected with a contract for the purposes of that article of the regulation in question?

34. Three conditions must be fulfilled in order for jurisdiction to be determined on

12 — For example, judgments in Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24, and Case C-390/99 *Canal Satélite* [2002] ECR I-607, paragraph 24.

the basis of Article 15(1)(c) of Regulation No 44/2001. [13] First, the consumer must be an individual not engaged in a trade or profession; secondly, the right of action must relate to a consumer contract concluded between a consumer and a person who pursues commercial or professional activities; and, thirdly, the person who pursues commercial or professional activities must exercise them in the Member State of the consumer's domicile or, by any means, direct such activities to that Member State or to several States including that Member State, and the contract must fall within the scope of such activities.

35. The first and third conditions are fulfilled in this case. It is indisputable that Ms Ilsinger is a consumer within the meaning of Article 15(1) of Regulation No 44/2001; in the context of the legal relationship at issue, she is an individual not engaged in a trade or profession. Similarly, Schlank & Schick pursues commercial activities which it directs, by means of mail-order selling, to the Member State in which Ms Ilsinger is domiciled. Moreover, it is possible to consider that the prize notification made to the consumer falls within the scope of that activity, since, by that notification, Schlank & Schick is seeking to induce the consumer to purchase goods. However, the second condition, namely whether the right of action relates to a consumer contract concluded between Ms Ilsinger and Schlank & Schick, is in dispute in this case. The designation of the court having jurisdiction over the right of action by which the consumer demands payment of a prize ostensibly promised depends on the decision whether, in this case, the prize notification made to the consumer resulted in the conclusion of a consumer contract.

36. On the issue of jurisdiction over a claim for payment of a prize ostensibly promised to a consumer, the Court has ruled solely in the context of the Brussels Convention, but has not yet addressed that issue in the context of

13 — With regard to the three conditions for the application of Article 13, first paragraph, point 3 of the Brussels Convention, see, by analogy, the judgments, cited above in footnote 4, in *Gabriel*, paragraphs 38 to 40 and 47 to 51, and *Engler*, paragraph 34.

Regulation No 44/2001. [14] When interpreting Article 13, first paragraph, point 3 of the Brussels Convention in *Engler,* [15] the Court has already answered a question identical to the first question referred in this case. In *Engler*, the Court held that that article of the Brussels Convention applied only where the vendor had sent the consumer a prize notification letter and the consumer had demanded payment of that prize without concluding with the vendor any contract for the supply of goods or services. In that case, the Court pointed out that, in that situation, 'the vendor's initiative was not followed by the conclusion of a contract between the consumer and the vendor for one of the purposes referred to in [that provision] and in the course of which the parties assumed reciprocal obligations'. [16] According to the Court, that finding cannot be invalidated by the objective of that provision, namely protection for the consumer as the party deemed to be economically weaker, or by the fact that the vendor had sent the consumer a letter to place a trial order, by which he sought to induce her to place an order for goods. [17]

37. Consequently, it is appropriate in this case to examine, in essence, whether it is necessary to ensure continuity between the two legal measures and, therefore, whether Article 15(1)(c) of Regulation No 44/2001 must be interpreted in the same way as Article 13, first paragraph, point 3 of the Brussels Convention or whether — in the light of its partially different wording — that article of the regulation must be interpreted differently. In that regard, I would point out that, when interpreting Regulation No 44/2001, which replaced the Brussels Convention from 1 March 2002, [18] it is necessary, in a general way, to work on the assumption that there is continuity. As is clear from the 19th recital in

14 — Nor does the legal literature provide a clear answer to that question. Staudinger, A., in Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht — Kommentar*, 2nd Edition, Sellier, European Law Publishers, Munich, 2006, p. 284, paragraph 9, has doubts as regards transposing to Article 15 of Regulation No 44/2001 the case-law relating to the Brussels Convention, since the wording of that article is similar to that of Article 5(1)(a) of that regulation. Geimer, R. in Geimer, R., and Schütze, R. A., *Europäisches Zivilverfahrensrecht — Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, Beck, Munich, 2004, p. 275, paragraph 17, states that prize notifications are covered by Article 15 of Regulation No 44/2001, but in that regard he cites *Gabriel*, with the result that that argument is very probably concerned with jurisdiction over prize notifications in cases where a consumer has ordered goods.

15 — Judgment cited above in footnote 4.

16 — Paragraph 36 of *Engler,* cited above in footnote 4. In paragraph 40, the Court expressly stated that Article 13 of the Brussels Convention 'clearly cover[ed] a "contract concluded" by a consumer "for the supply of goods"'.

17 — *Engler,* cited above in footnote 4, paragraph 39.

18 — It was in 1999 that the Commission presented to the Council a proposal for a regulation, but the Council adopted the regulation in December 2000. Generally, with regard to the origin of Regulation No 44/2001 and a comparison of the Brussels Convention with that regulation, see in the legal literature, for example, Micklitz, H.-W., and Rott, P., 'Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001', *Europäische Zeitschrift für Wirtschaftsrecht*, No 11/2001, p. 325 et seq.; Schoibl, N. A., 'Vom Brüsseler Übereinkommen zur Brüssel-I-VO: Neuerungen im Europäischen Zivilprozessrecht', *Juristische Blätter,* No 3/2003, p. 150; Storskrubb, E., *Civil Procedure and EU Law — A Policy Area Uncovered*, Oxford University Press, New York, 2008, p. 132 et seq.

the preamble to Regulation No 44/2001, it is necessary to ensure continuity between the Brussels Convention and that regulation, and that continuity applies also with respect to the Court's interpretation of the Brussels Convention. In its case-law, the Court has already adopted the principle of continuity in the context of the interpretation of Regulation No 44/2001. [19] However, for valid reasons and on the basis of the substantial amendment of the wording of Regulation No 44/2001 in relation to the Brussels Convention, the Court has already departed from that principle and interpreted the regulation in a different manner. [20] In this case, it is therefore necessary to assess whether the difference in the wording of Article 15(1)(c) of Regulation No 44/2001 and that of Article 13, first paragraph, point 3 of the Brussels Convention, combined with the requirement to ensure a higher level of consumer protection, justifies a different interpretation of that article of the regulation.

1. Conclusion of a consumer contract as a condition for the application of Article 15(1)(c) of Regulation No 44/2001

38. In order to analyse the first question referred, it is first of all appropriate to take into consideration that the wording of Article 15(1)(c) of Regulation No 44/2001 differs from that of Article 13, first paragraph, point 3 of the Brussels Convention. The introductory sentences of the first paragraph of Article 13 of the Brussels Convention and Article 15(1) of Regulation No 44/2001 state that jurisdiction is to be determined by the section relating to jurisdiction '[i]n matters relating to a contract concluded by a person, the consumer…' (according to the first paragraph

19 — Accordingly, in *Reisch Montage*, cited above in footnote 11, paragraphs 22 to 25, for example, the Court, in order to interpret Regulation No 44/2001, referred to its case-law concerning the Brussels Convention. Similarly, in Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 49, it stated that in the absence of any reason for interpreting Article 5(3) of the Brussels Convention and Article 5(3) of Regulation No 44/2001 differently, the need for consistency required that the two provisions be interpreted in an identical manner; the Court also pointed out that observance of that principle was all the more important given that the regulation had replaced the Brussels Convention — with the exception of Denmark.

20 — In *Glaxosmithkline*, cited above in footnote 11, the Court pointed out in paragraph 15 that the rules of jurisdiction over individual contracts of employment contained in Regulation No 44/2001 differed appreciably from the rules applicable in that field under the Brussels Convention. It stated in paragraph 24 of that judgment that that different interpretation was also supported by the 'travaux préparatoires' of Regulation No 44/2001. Consequently, it did not observe the principle of continuity when interpreting Regulation No 44/2001, and interpreted that provision differently from the Brussels Convention.

of Article 13 of the Brussels Convention, '[i]n proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer"'). However, Article 15(1)(c) of Regulation No 44/2001 is worded more broadly than Article 13, first paragraph, point 3 of the Brussels Convention. According to the latter provision, jurisdiction is to be determined by the section relating to consumer contracts in particular where 'any other contract for the supply of goods or a contract for the supply of services' is concerned. However, Article 15(1)(c) of Regulation No 44/2001 provides that jurisdiction is to be determined by the section if, '*in all other cases*, the contract has been concluded' with another contracting party who pursues his activities in the Member State in which the consumer is domiciled or if he directs his activities to that Member State. Whereas Article 13, first paragraph, point 3 of the Brussels Convention is limited solely to contracts for the supply of services or goods, Article 15(1)(c) of Regulation No 44/2001 covers all contracts concluded between a consumer and another contracting party, in the circumstances set out in that article.

39. As is apparent from the explanatory memorandum of the proposal for Regulation No 44/2001, the wording of Article 15(1)(c) of that regulation was amended in relation to Article 13, first paragraph, point 3 of the Brussels Convention primarily in order to include within its scope contracts entered into via an Internet site. [21] That is why Article 15(1)(c) of Regulation No 44/2001 was amended so as also to include cases in which a contract is concluded with a person who directs his commercial or professional activities to the Member State in which the consumer is domiciled. [22] However, that article also applies where the person pursues a commercial or professional activity in the Member State in which the consumer is domiciled. In the abovementioned circumstances, that article applies also, for example,

21 — See the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM/1999/0348 final, p. 12 of the French version of the explanatory memorandum). In the legal literature, see, for example, Schlosser, P., *EU-Zivilprozessrecht, Kommentar zur EuGVVO, EuEheVO, AVAG, HZÜ, EuZVO, HBÜ, EuBVO*, 2nd Edition, Beck, Munich, 2003, p. 117, paragraph 8a, who states that Article 15(1)(c) of Regulation No 44/2001 applies where a consumer places an order through an interactive Internet site, but not where he has access only to a passive Internet site. Tiefenthaler, S., in Czernich, D., Kodek, G. E., and Tiefenthaler, S., *Europäisches Gerichtsstands- und Vollstreckungsrecht EuGVO und Lugano-Übereinkommen — Kurzkommentar*, 2nd Edition, LexisNexis ARD ORAC, Vienna, 2003, p. 141, paragraph 25, explains that an interactive Internet site allows a contract to be concluded 'at the click of a mouse'. Generally, see also Reich, N., and Gambogi, A. P., 'Gerichtsstand bei internationalen Verbrauchervertragsstreitigkeiten im e-commerce', *Verbraucher und Recht*, No 8/2001, p. 269 et seq.; Stadler, A.,'From the Brussels Convention to Regulation 44/2001: Cornerstones of a European law of civil procedure', *Common Market Law Review*, No 6/2005, p. 1640 et seq.; Storskrubb, E., *Civil Procedure and EU Law — A Policy Area Uncovered*, Oxford University Press, New York, 2008, p. 139.

22 — For fuller details on that condition, see, for example, Geimer, R., in Geimer, R., and Schütze, R. A., *Europäisches Zivilverfahrensrecht — Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, cited above in footnote 14, p. 278, paragraph 35.

to what are referred to as package travel contracts, [23] to trust arrangements [24] and to other contracts. [25]

40. By wording Article 15(1)(c) of Regulation No 44/2001 more broadly, the Community legislature did not, in my view, have the intention of limiting that provision solely to synallagmatic contracts (*contractus bilaterales aequales*); its intention was, on the contrary, to extend the application of that article to all consumer contracts. Three arguments may be put forward to support that assertion. First, it is apparent from Article 15(1) of Regulation No 44/2001 that a consumer contract is one which is 'concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession'. Consumer contracts are therefore defined in the light of the contracting parties, and not with regard to their content or to the contracting parties' obligations. Secondly, Article 15(1)(c) expressly provides that that article applies 'in all other cases' in which the contract has been concluded in accordance with the conditions set out in Article 15(1)(c). If the Community legislature had wished to restrict Article 15(1)(c) solely to synallagmatic contracts, it would, by using suitable terminology, have made clear that Article 15(1)(c) applied solely to the cases provided for. However, since the Community legislature used the general concept of 'contract' in that regulation, it is appropriate to take the view that all types of contracts fall within that concept. [26] Thirdly, restricting the application of Article 15(1)(c) solely to synallagmatic contracts would thereby preclude the application of that article to certain contracts which bind only one contracting party, for example a contract of guarantee concluded by a consumer and under which he acts as guarantor for the debts of another consumer, [27] or a warranty contract concluded with a consumer.

23 — According to Article 15(3) of Regulation No 44/2001, the section on jurisdiction over consumer contracts 'shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation'. Contracts of transport are therefore, in principle, excluded from the determination of jurisdiction on the basis of the section applicable to consumer contracts, except what are known as package travel contracts. That is also clear from the explanatory memorandum of the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM/1999/0348 final, p. 13 of the French version of the explanatory memorandum). Similarly, Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht — Kommentar*, cited above in footnote 14, p. 283, paragraph 8.

24 — Similarly, Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht — Kommentar*, cited above in footnote 14, p. 283, paragraph 8.

25 — For example, time-share contracts, where they are concluded by consumers. See the explanatory memorandum of the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM/1999/0348 final, p. 12 of the French version of the explanatory memorandum). According to Article 22(1) of Regulation No 44/2001, in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated are to have exclusive jurisdiction. However, in the proposal for Regulation No 44/2001, the Commission explains that Article 15 of the regulation applies to time-share contracts concluded by consumers.

26 — Similarly, Advocate General Tizzano argued in point 35 of his Opinion in Case C-168/00 *Leitner* [2002] ECR I-2631, that where the Community legislature had wished to draw a distinction between damages for which the producer ought to be held liable on the basis of the directive and those which were to be regulated by the Member States, it had done so explicitly. On the other hand, where, in the Community directive, the legislature had used the general concept of damage, it was appropriate to take the view that all types of damage were included within that concept.

27 — Thus, with regard, for example, to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), the Court has already held that the furnishing of a guarantee could, in principle, fall within the scope of consumer contracts for the purposes of the directive. See C-45/96 *Dietzinger* [1998] ECR I-1199, paragraph 20. In the legal literature, see Staudinger, A., in Rauscher, T. (ed.), *Europäisches zivilprozessrecht — Kommentar*, cited above in footnote 14, p. 283, paragraph 8.

41. As regards Article 13, first paragraph, point 3, of the Brussels Convention, the Court has already held that that article was applicable 'in so far as … the legal proceedings relate[d] to a contract between that consumer and the professional vendor for the sale of goods or services which ha[d] given rise to reciprocal and interdependent obligations between the two parties'. [28] However, it is necessary in that regard to take into consideration the fact that contracts for the supply of goods and contracts for supply of services, to which Article 13, first paragraph, point 3, of the Brussels Convention is limited, are both synallagmatic contracts. I therefore take the view that the Court's reference, when interpreting that article, to the synallagmatic nature of contracts, served only as an explanation *in abstracto* of the specific features of contracts for the supply of goods and contracts for the supply of services. Consequently, I consider that it is not possible to apply the argument concerning synallagmatic contracts to the interpretation of Article 15(1)(c) of Regulation No 44/2001.

42. As Advocate General Tizzano has already pointed out in his Opinion in *Kapferer*, when determining jurisdiction to hear disputes concerning consumer contracts, it is necessary to take into account that the first paragraph of Article 13 of the Brussels Convention and Article 15(1) of Regulation No 44/2001 apply only where a *contract* has been *concluded* between a consumer and a business. [29] I must concur with the advocate general with regard to the fact that the changes brought in by Article 15 of Regulation No 44/2001 do not in any way affect the requirement for a contract to have been concluded, [30] as a condition for the application of that article. As the Advocate General pointed out, the changes brought in by Article 15 of Regulation No 44/2001 relate only to the substantive scope of the provisions on consumer contracts, [31] which means that they cover a larger number of consumer contracts. Admittedly, in that case, the Advocate General argued in favour of applying the Court's interpretation in *Engler* of Article 13, first paragraph, point 3 of the Brussels Convention to the interpretation of Article 15(1)(c) of Regulation No 44/2001, and stated that, in *Kapferer*, no consumer contract had been concluded. However, as the Commission rightly pointed out at the hearing, the claiming of the prize in *Kapferer* was made conditional upon ordering goods [32] and, in the light of the fact that it was not possible in that case to determine with certainty whether goods had been ordered, the Advocate General took the view that no contract for the supply of goods had been concluded.

28 — *Engler*, cited above in footnote 4, paragraph 34.

29 — Opinion cited above in footnote 8, point 52.

30 — Opinion cited above in footnote 8, point 54.

31 — Ibid.

32 — That follows from paragraph 9 of the judgment in *Kapferer*, cited above in footnote 5, and from point 11 of the Opinion of Advocate General Tizzano in the same case, cited above in footnote 8.

43. On account of the requirement for the conclusion of a contract in the context of Article 15 of Regulation No 44/2001, I cannot in this case support the argument, on which the Austrian Government relies, that Article 15(1) of Regulation No 44/2001 ought to be interpreted in the same way as Article 5(1)(a) of the regulation [33] because Article 5(1)(a) forms the basis of the wording of the introductory sentence of Article 15(1). Unlike Article 5(1)(a) of Regulation No 44/2001, Article 15(1) requires the *conclusion* of a contract in each case, which is an essential difference between the two articles. It is for precisely that reason that Article 5(1)(a) of that regulation may also be applied where no contract has been concluded. [34] Moreover, it is important to draw attention to the fact that an analysis of the different language versions of the two articles of that regulation indicates that — irrespective of the requirement for the conclusion of a contract laid down in Article 15(1) — the wording of those two articles is very similar only in some of the language versions, whereas, in most of the language versions, Article 5(1)(a) is worded more generally than Article 15(1). The wording of the above two articles is very similar in the German and English versions [35] whereas, in most of the other language versions, a broader concept — 'contractual matters' — is used in Article 5(1)(a) and the concept of 'contracts concluded by a consumer' is used in Article 15(1). [36]

2. Conditions for the conclusion of a consumer contract

44. It follows from the introductory sentence of Article 15(1) of Regulation No 44/2001 that a consumer contract within the meaning of that regulation is a contract which is concluded by a person, the consumer, for a

33 — The Austrian Government indeed relies on Article 5(1) in a general way, but refers in that regard to the wording of Article 5(1)(a).

34 — Thus, with regard to the Brussels Convention, see, by analogy, *Engler*, cited above in footnote 4, paragraph 36 and the operative part of the judgment, in which the consumer had not concluded with the vendor a contract for the purposes of Article 13, first paragraph, point 3 of that convention, and in which jurisdiction was determined on the basis of Article 5(1) thereof.

35 — The German version refers in Article 5(1)(a) to 'ein Vertrag oder Ansprüche aus einem Vertrag', and in Article 15(1) to 'ein Vertrag oder Ansprüche aus einem Vertrag, den … der Verbraucher … geschlossen hat'. In the English version of that regulation, Article 5(1)(a) refers to 'matters relating to a contract', and Article 15(1) to 'matters relating to a contract concluded by … the consumer'.

36 — Thus, for example, in the French version, Article 5(1)(a) refers to 'matière contractuelle', but Article 15(1) uses the phrase 'en matière de contrat conclu par … le consommateur'; in the Italian version, Article 5(1)(a) refers to 'materia contrattuale', but Article 15(1) refers to 'materia di contratti conclusi da … il consumatore'; in the Spanish version, Article 5(1)(a) refers to 'materia contractual', but Article 15(1) refers to 'materia de contratos celebrados por … el consumidor'; in the Portuguese version, Article 5(1)(a) uses the concept of 'matéria contratual', and Article 15(1) that of 'matéria de contrato celebrado por … o consumidor'; in the Romanian version, Article 5(1)(a) uses the phrase 'materie contractuală', but Article 15(1) uses the phrase 'ceea ce privește un contract încheiat de … consumatorul'; the Slovenian version refers in Article 5(1)(a) to 'zadevah v zvezi s pogodbenimi razmerji', but in Article 15(1) refers to 'zadevah v zvezi s pogodbami, ki jih sklene … potrošnik'.

purpose which can be regarded as being outside his trade or profession. However, Regulation No 44/2001 does not define when a consumer contract is concluded. Nor are there at the Community level any binding rules of civil law determining when and under what conditions a contract is concluded.

45. Notwithstanding the fact that Regulation No 44/2001 does not lay down the conditions for the conclusion of a contract, it is possible to deduce those conditions from the Court's case-law, *mutatis mutandis* from certain measures of secondary Community law and from documents of panels of experts on European contract law, taking into account the relevant legal literature in the field. I shall therefore consider below the general conditions for the conclusion of a contract under Community law. Those conditions also apply *a maiori ad minus* to the conclusion of consumer contracts within the meaning of Regulation No 44/2001.

46. One of the basic conditions for the conclusion of a contract under Community law is that, on the basis of an offer and the acceptance of that offer, the two parties reach a concordance of intentions to conclude a contract.

47. The requirement for the existence of an offer and the acceptance of that offer, on the basis of which a concordance of intentions is reached, follows first of all from the case-law of the Court. Thus, in *Gabriel*, the Court stated that a contractual relationship had come into being between a consumer and a vendor once the consumer had ordered goods from the vendor, thereby demonstrating his 'acceptance of the offer' [37] and that that 'concordance of intention' between the two parties had given rise to obligations within the framework of a contract. [38]

48. The requirement for the existence of an offer and the acceptance of that offer as a condition for the conclusion of a contract also follows, implicitly, from a number of directives relating to Community consumer law.

37 — Judgment cited above in footnote 4, paragraph 48.
38 — Judgment cited above in footnote 4, paragraph 49.

Thus, for example, Directive 97/7/EC on the protection of consumers in respect of distance contracts [39] refers to 'offer' [40] and to 'acceptance of the offer'. [41] Directive 2002/65/EC concerning the distance marketing of consumer financial services [42] also contains the concept of 'offer' [43] and of 'acceptance of the offer'. [44]

49. Furthermore, it is apparent from an experts' document entitled *Draft Common Frame of Reference* ('the DCFR'), [45] which may in the future be the starting point for a uniform system of European private law, that a contract is concluded if the parties intend to enter into a binding legal relationship or bring about some other legal effect and reach a sufficient agreement (Article II.-4:101). [46] In the chapter on contracts, the DCFR also covers the offer (Article II.-4:201) and the acceptance of the offer (Article II.-4:204). According to Article II.-4:201(1), a proposal amounts to an offer if, first, it is intended to result in a contract if the other party accepts it and, secondly, it contains sufficiently definite terms to form a contract. [47] According to Article II.-4:204(1), any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer. [48] The Principles of European

39 — Directive of the European Parliament and of the Council of 20 May 1997 (OJ 1997 L 144, p. 19).

40 — Article 4(1)(h) of Directive 97/7 provides that, in good time prior to the conclusion of any distance contract, the consumer must be provided with information on the period 'for which the *offer* or the price remains valid' (emphasis added).

41 — Article 9 of Directive 97/7 provides that 'Member States shall take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting *consent*' (emphasis added).

42 — Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16).

43 — Accordingly, Article 3(1) of Directive 2002/65 provides, for example, that '[i]n good time before the consumer is bound by any distance contract or *offer*,' he is to receive certain information. Similarly, according to Article 5(1), the supplier must communicate to the consumer all the contractual terms and conditions and other information 'before the consumer is bound by any distance contract or *offer*' (emphasis added).

44 — Article 9 of the same directive provides that Member States are to take measures to ensure that in the event of unsolicited supplies of goods or services, a consumer is under no obligation, 'the absence of a reply not constituting *consent*' (emphasis added).

45 — Von Bar, C. et al. (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) — Interim Outline Edition; prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)*, Sellier, European Law Publishers, Munich, 2008.

46 — The wording of Article II.-4:101 of the DCFR ('Requirements for the conclusion of a contract') is as follows: 'A contract is concluded, without any further requirement, if the parties: (a) intend to enter into a binding legal relationship or bring about some other legal effect; and (b) reach a sufficient agreement'.

47 — The wording of Article II.-4:201(1) ('Offer') of the DCFR is as follows: 'A proposal amounts to an offer if: (a) it is intended to result in a contract if the other party accepts it; and (b) it contains sufficiently definite terms to form a contract'.

48 — The wording of Article II.-4:204(1) ('Acceptance') of the DCFR is as follows: 'Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer'.

Contract Law ('the PECL') [49] already contain similar provisions.

50. In the legal literature on European contract law, the concordance of intentions is also regarded as the most important condition for concluding a contract under European contract law; that concordance is reached when an offer has been made and that offer has been accepted. [50] From the perspective of comparative law, in the law of several Member States a concordance of intentions is also a prerequisite for concluding a contract. [51]

51. With regard to the conditions for the conclusion of a contract, I would also point out that knowledge as to whether an offer has been made is determined from the standpoint of the offeree. Thus, it is apparent, for example, from the DCFR that the intention

49 — The PECL were subsequently included, in a partially amended version, in the DCFR, which extends and covers in a more systematic way the basis for civil law rules within the European Union. With regard, more specifically, to the relationship between the PECL and the DCFR, see von Bar, C. et al. (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) — Interim Outline Edition*, cited above in footnote 45, p. 24 et seq. In the PECL, see, with regard to the conditions for the conclusion of a contract, Article 2:101 ('Conditions for the Conclusion of a Contract'); with regard to the offer, see Article 2:201 ('Offer'); with regard to acceptance of the offer, see Article 2:204 ('Acceptance').

50 — Schulze, R., 'Precontractual Duties and Conclusion of Contract in European Law', *European Review of Private Law*, No 6/2005, p. 850; Riesenhuber, K., *System und Prinzipien des Europäischen Vertragsrechts*, De Gruyter Recht, Berlin, 2003, p. 315 et seq.; Gandolfi, G. (ed.), *Code européen des contrats — Avant-projet*, Giuffrè Editore, Milan, 2004, p. 105. With regard to the requirement for an agreement in order to conclude a contract under Community law, see also Pfeiffer, T., 'Der Vertragsschluss im Gemeinschaftsrecht', in Schulze, R., Ebers, M., and Grigoleit, H.C., *Informationspflichten und Vertragsschluss im Acquis communautaire*, Mohr Siebeck, Tübingen, 2003, p. 109. Pfeiffer also points out that, in the case of consumer contracts, the phase of concluding the contract is often also followed by a phase during which the consumer may cancel. See Pfeiffer, T.,'New Mechanisms for Concluding Contracts', in Schulze, R., *New Features in Contract Law*, Sellier, European Law Publishers, Munich, 2007, p. 163. The importance of the offer and its acceptance for the conclusion of a contract is also emphasised by Van Erp, J.H.M., in Hartkamp, A. et al. (eds.), *Towards a European Civil code*, Kluwer Law International, Ars Aequi Libri, Nijmegen, 2004, p. 367. Schmidt-Kessel, M.,'At the Frontiers of Contract Law: Donation in European Private Law', in Vaquer, A. (ed.), *European Private Law Beyond the Common Frame of Reference — Essays in Honour of Reinhard Zimmermann*, Europa Law Publishing, Groningen, 2008, p. 84, points out that, in European contract law, donation is also defined as a contract. That means that a concordance of intentions, which is reached when an offer has been made and that offer has been accepted, is also necessary to give effect to a gift.

51 — With regard to Austrian law, see Paragraph 861 of the Allgemeines bürgerliches Gesetzbuch (general civil code), from which it is apparent that a contract comes into existence on the basis of a concordance of intentions; in the legal literature, with regard to Austrian law, see, for example, Koziol, H., and Welser, R., *Grundriss des bürgerlichen Rechts — Band I: Allgemeiner Teil — Sachenrecht — Familienrecht*, 11th Edition, Manzsche Verlags- u. Universitätsbuchhandlung, Vienna, 2000, p. 109 et seq. With regard to French law, see Article 1101 of the Civil Code, according to which a contract is an agreement by which one or several persons undertake, as regards one or several other persons, to give, to do or not to do something. With regard to Italian law, see Article 1321 of the Codice civile (Italian Civil Code) according to which a contract is an agreement between two or several parties, by which the parties establish, regulate or terminate a reciprocal legal relationship. In the Italian legal literature, see, for example, Gazzoni, F., *Manuale di diritto privato*, 12th Edition, Edizioni Scientifiche Italiane, Naples, 2006, p. 837 et seq. With regard to German law, see Paragraphs 145 et seq. of the Bürgerliches Gesetzbuch (German Civil Code,'the BGB'), from which it is clear that a contract comes into being on the basis of a concordance of express intentions, that is to say on the basis of an offer and its acceptance: in the legal literature, see Larenz, K., and Wolf, M., *Allgemeiner Teil des bürgerlichen Rechts*, 9th Edition, Beck, Munich, 2004, p. 551, paragraph 3. With regard to Slovenian law, see Article 15 of the Obligacijski zakonik (Slovenian Code of Obligations) which provides that a contract is concluded where the two contracting parties are in agreement as to its essential elements. In the legal literature, see Kranjc. V., in Juhart, M., and Plavšak, N. (eds.), *Obligacijski zakonik s komentarjem*, volume 1, GV založba, Ljubljana, 2003, commentary on Article 15, p. 207 et seq. With regard to Spanish law, see Article 1258 of the Código Civil (Spanish Civil Code), which requires a concordance of intentions for the conclusion of a contract. In the legal literature, see, generally, with regard to the conclusion of a contract under Spanish law, Cossío y Corral, A., Cossío y Martínez, M., and León Alonso, J., *Instituciones de derecho civil*, Civitas, Madrid, 1988, p. 387 et seq. I would also point out that a concordance of intentions is also necessary to conclude a gift; a gift must be accepted by the donee in order to conclude a contract of gift. In that regard, see, for example, in the Austrian legal literature, Koziol, H., and Welser, R., *Grundriss des bürgerlichen Rechts. Band II — Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, cited in this footnote, p. 178.

of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party (Article II.-4:102). [52] That view is also expressed in the legal literature. [53] Moreover, in comparative law, a similar system applies under the law of several Member States. [54]

52. I would also point out that, in order to conclude a contract under Community law, a special form is not generally necessary, except where it is expressly provided for in the case of particular contracts such as, for example, credit agreements for consumers, [55] or contracts to use immovable properties on a timeshare basis. [56] *A contrario*, if the requirements governing particular types of contracts do not specify a special form, a special form is not necessary for the valid conclusion of a contract. The fact that a special form is not, ordinarily, necessary for the conclusion of contracts is also apparent from the DCFR [57] and the legal literature; [58] moreover, as regards comparative law, in the law of several Member States a special form is generally not required for the conclusion of a contract, unless it is expressly provided for. [59]

52 — The wording of Article II.-4:102 ('How intention is determined') DCFR is as follows: 'The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party'. In the PECL, see Article 2:102 ('Intention').

53 — See, for example, Kötz, H., and Flessner, A., *European contract law — Vol. 1: Formation, Validity, and Content of Contracts; Contract and Third Parties*, Clarendon Press, Oxford, 1997, p. 19, who state that it is necessary to determine how a reasonable person in the position of the offeree would understand the offer.

54 — In English law, see, for example, *Smith* v *Hughes* (1871) L.R. 6 Q.B., p. 607; in Austrian law, see Paragraph 863 of the Austrian General Civil Code; in Italian law, see Article 1362 of the Civil Code; Slovenian law contains no express provision, but see Kranjc, V., in Juhart, M., and Plavšak, N. (eds.), *Obligacijski zakonik s komentarjem*, volume 1, cited above in footnote 51, commentary on Article 15, p. 211.

55 — Article 10(1) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p.66) provides that: 'Credit agreements shall be drawn up on paper or on another durable medium'.

56 — The first paragraph of Article 4 of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994 L 280, p. 83) provides that the Member States must make provision in their legislation to ensure 'that the contract, which shall be in writing, includes at least the items referred to in the Annex' to that directive.

57 — Under Article II.-1:107(1) (Form) of the DCFR: 'A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form'. In the PECL, see Article 2:101(2) ('Conditions for the Conclusion of a Contract').

58 — According to Riesenhuber, K., *System und Prinzipien des Europäischen Vertragsrechts*, cited above in footnote 50, p. 317, in contract law any requirement for a special form for the conclusion of a legal act is laid down separately.

59 — With regard to the formal requirement, in comparative law I would refer only to some Member States in which the law of obligations does not, in general, lay down any particular formal requirements for the conclusion of a contract; more specifically it lays down particular formal requirements solely for special contracts. In Austrian law, see Paragraph 883 of the General Civil Code, from which it is clear that there are no particular formal requirements for the conclusion of a contract, except in the cases provided for by law; in Italian law, see Article 1350 of the Civil Code, which provides that only special contracts are required to be in writing; in German law, see, by analogy, Paragraph 125 of the Bürgerliches Gesetzbuch (German Civil Code 'BGB'), from which it is apparent that a legal act which is not concluded in the form laid down by law is null and void; in Slovenian law, see Article 51 of the Code of Obligations, which lays down no formal requirements for the conclusion of a contract, except where the law provides otherwise; in Spanish law, see Article 1278 of the Civil Code, from which it is clear that contracts are binding where the fundamental conditions for their validity are satisfied, regardless of the form in which they are concluded.

53. Similarly, in order to determine whether a contract has been concluded in a given case, it is not necessary to specify what type of contract is at issue. Indeed, contracts may be nominated — thus, expressly defined by name as regards their type [60] — or innominate — in which case they are contracts having no express denomination. [61] That is also consistent with autonomy in private law. [62]

54. It should be stated, in that regard, that it is necessary to interpret the concepts contained in Regulation No 44/2001 independently, and to refer, in that regard, to the scheme and to the objectives of that regulation, with a view to ensuring its uniform application in all [63] Member States. [64] Consequently, when interpreting Regulation No 44/2001, knowing the legal classification under national law of a claim for payment of a promised prize will not be relevant. Nevertheless, I would point out — solely with regard to comparative law — that, in the German, Austrian and French legal literature and case-law, for example, there is no consistent view with regard to that classification.

55. The Austrian legal literature yields the view that a contract may be concluded on the basis of a prize notification, or that the impression given to consumers by promises to award prizes must be understood as an objective statement on the basis of which a

60 — For example, contract of sale, loan contract and lease contract.

61 — Thus, for example, the DCFR also contains, in Book II ('Contracts and other juridical acts') general provisions on contracts, and in Book IV ('Specific contracts and the rights and obligations arising from them') provisions on particular types of contracts. I would point out, in comparative law, that the legal systems of the Member States also recognise the distinction between nominate and innominate contracts. See, for example, in Austrian law, Rummel, P., in Rummel, P., *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit EheG, KSchG, MRG, WGG, WEG 2002, BTVG, HeizKG, IPRG, EVÜ*, Manzsche Verlags- u. Universitätsbuchhandlung, Vienna, 2000, commentary on Paragraph 859 of the General Civil Code, paragraph 21; in French law, Antonmattei, P.-H., and Raynard, J., *Droit civil: Contrats spéciaux*, 3rd Edition, Litec, Paris, 2002, p. 3; in German law, Kramer, E. A., in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 5th Edition, Beck, Munich, 2006, commentary on Paragraph 145, paragraph 4; in Slovenian law, Cigoj, S., *Teorija obligacij — Splošni del obligacijskega prava*, Uradni list Republike Slovenije, Ljubljana, 2003, p. 100.

62 — With regard to autonomy in private law, see, in comparative law, in the German legal literature, Larenz, K., and Wolf, M., *Allgemeiner Teil des bürgerlichen Rechts*, cited above in footnote 51, p. 2, paragraph 2; in the Austrian legal literature, Koziol, H., and Welser, R., *Grundriss des bürgerlichen Rechts — Band I: Allgemeiner Teil — Sachenrecht — Familienrecht*, cited above in footnote 51, p. 84; in the French legal literature, Starck, B., Roland, H., and Boyer, L., *Droit civil — Les obligations. 2. Contrat*, 6th Edition, Litec, Paris, 1998, p. 4 et seq.

63 — As I have already stated in footnote 6 of this Opinion, is apparent from the 21st recital in the preamble to Regulation No 44/2001 that Denmark did not participate in the adoption of that regulation and is therefore not bound by it nor subject to its application. It follows from the 22nd recital in the preamble to Regulation No 44/2001 that the Brussels Convention continues to apply in relations between Denmark and the Member States that are bound by that regulation.

64 — It is possible to ascertain that the concepts used in Regulation No 44/2001 must be interpreted independently by analogy with the case-law relating to the Brussels Convention in which the Court has repeatedly held that the concepts used in that convention must be interpreted independently, by reference principally to the system and objectives of that convention, in order to ensure that the convention is uniformly applied in all the Contracting States. See, to that end, Case 150/77 *Bertrand* [1978] ECR 1431, paragraphs 14 to 16; Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 13; *Benincasa*, paragraph 12; *Mietz*, paragraph 26, and the judgments, cited above in footnote 4, in *Gabriel*, paragraph 37, and *Engler*, paragraph 33. In the legal literature, see Schmidt-Kessel, M., 'Europäisches Vertragsrecht', in Riesenhuber, K. (ed.), *Europäische Methodenlehre — Handbuch für Ausbildung und Praxis*, de Gruyter Recht, Berlin, 2006, p. 395, paragraph 11, who points out that the requirements and concepts of European contract law must be interpreted independently and not from the standpoint of the national legal systems.

contract may come into being; [65] this also bears an affinity with the view that a prize notification and its acceptance — irrespective of whether goods are ordered — constitutes, *per se*, a contract. [66] Other legal writers assert that a claim for payment of a promised prize constitutes a right of action for damages, exercised on the basis of *culpa in contrahendo*. [67] Some Austrian legal writers have defined it as a *sui generis* right. [68] It is also asserted in the legal literature that it constitutes a right connected with a procedure similar to a reward notification. [69]

56. I would point out that the German legislation also contains in Paragraph 661a of the BGB a provision similar to Paragraph 5j of the Austrian Consumer Protection Law. [70] Moreover, in the German legal literature, legal writers take different views on the legal classification of a claim for payment of a promised prize. In that regard, one view is that it is a right derived from a unilateral legal act [71], and another view is that it is a right derived from a statutory obligation (gesetzliches Schuldverhältnis). [72] One possible classification also referred to is the right based on *culpa in contrahendo* [73] or on a procedure similar to a reward notification. [74]

65 — Krejci, H., in Rummel, P., *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit EheG, KSchG, MRG, WGG, WEG 2002, BTVG, HeizKG, IPRG, EVÜ*, volume 2, Manzsche Verlags- u. Universitätsbuchhandlung, Vienna, 2002, commentary on Paragraph 5j of the KSchG, p. 254, paragraph 8.

66 — Klauser, A, 'Gewinnzusagen sind einzuhalten!', ecolex 2002, p. 574 et seq. In that regard, I would point out that, prior to the publication of that article, Klauser held a different view: see Klauser, A., 'Der Anspruch nach § 5j KSchG in dogmatischer und kollisionsrechtlicher Hinsicht', ecolex 1999, p. 752 et seq.

67 — Such a view is held by Klauser, A, 'Der Anspruch nach § 5j KSchG in dogmatischer und kollisionsrechtlicher Hinsicht', cited above in footnote 66; Wukoschitz, M., concurs with that view: '*Grenzüberschreitende Gewinnzusagen — Was der Generalanwalt wirklich sagte… Replik zu Klauser in ecolex 2002, 80*', ecolex 2002, p. 423 et seq. On the definition of *culpa in contrahendo* in Austrian law, see, for example, Koziol, H., and Welser, R., *Grundriss des bürgerlichen Rechts — Band I: Allgemeiner Teil — Sachenrecht — Familienrecht*, cited above in footnote 51, p. 29. The two writers state, inter alia, that a contracting party is obliged to inform the other party in particular of circumstances which could hinder the valid conclusion of the contract; a person who fails to fulfil that obligation (*culpa in contrahendo*) must compensate the other party.

68 — Fenyves, A., 'Zur Deckung von Ansprüchen nach § 5j KSchG in der Rechtsschutzversicherung', *Verbraucherrecht*, 2003, p. 89 et seq.; Matt, A., 'Noch einmal § 5j KSchG', ecolex 2000, p. 494.

69 — Klauser, A., 'Der Anspruch nach § 5j KSchG in dogmatischer und kollisionsrechtlicher Hinsicht', cited above in footnote 66, p. 752 et seq. I would nevertheless point out that a reward notification is addressed to an indeterminate number of persons, unlike this case in which it is addressed personally to a specific consumer. With regard to reward notifications in the Austrian legal literature, see Rummel, P., in Rummel, P., *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit EheG, KSchG, MRG, WGG, WEG 2000, BTVG, HeizKG, IPRG, EVÜ*, volume 1, Manzsche Verlags- u. Universitätsbuchhandlung, Vienna, 2002, commentary on Paragraph 860 of the General Civil Code.

70 — Paragraph 661a of the BGB provides: 'An undertaking which sends prize notifications or similar communications to consumers, and by the wording of those communications gives the impression that the consumer has won a prize, must give that prize to the consumer'. In the original German, the wording of that provision reads as follows: 'Ein Unternehmer, der Gewinnzusagen oder vergleichbare Mitteilungen an Verbraucher sendet und durch die Gestaltung dieser Zusendungen den Eindruck erweckt, dass der Verbraucher einen Preis gewonnen hat, hat dem Verbraucher diesen Preis zu leisten'.

71 — Lorenz, S., 'Internationale Zuständigkeit deutscher Gerichte und Anwendbarkeit von § 661a BGB bei Gewinnmitteilungen aus dem Ausland: Erweiterungen des Verbraucher-gerichtsstands durch die "Brüssel I-Verordnung" (zu LG Braunschweig, 10.1.2002 - 10 O 2753/00)', *Praxis des Internationalen Privat- und Verfahrensrechts*, No 3/2002, p. 193.

72 — Thus, for example, Schulze, R., in Schulze, R., Dörner, H., and Ebert, I. (eds), *Kommentar zum Bürgerlichen Gesetzbuch*, 5th Edition, Nomos, Baden-Baden, 2007, commentary on Paragraph 661a, paragraph 1; Mansel, P., in Jauernig, O., *Kommentar zum Bürgerlichen Gesetzbuch*, 12th Edition, Beck, Munich, 2007, commentary on Paragraph 661a, paragraph 2.

73 — The judgment delivered on 10 January 2002 by the Landesgericht Braunschweig is often cited as an example that a prize notification is classified as *culpa in contrahendo*, *Praxis des Internationalen Privat- und Verfahrensrechts*, No 3/2002, p. 213; commentary on the judgment: Lorenz, S., 'Internationale Zuständigkeit deutscher Gerichte und Anwendbarkeit von § 661a BGB bei Gewinnmitteilungen aus dem Ausland: Erweiterungen des Verbraucher-gerichtsstands durch die "Brüssel I-Verordnung" (zu LG Braunschweig, 10.1.2002 - 10 O 2753/00)', cited above in footnote 71.

74 — Kotzian-Marggraf, K., in Bamberger, H. G., and Roth, H., *Kommentar zum Bürgerlichen Gesetzbuch (Beck'scher Online-Kommentar)*, 9th Edition, Beck, Munich, 2007, commentary on Paragraph 661a, paragraph 1.

57. The French case-law, however, places such prize notifications in the category of 'quasi-contracts'. [75]

58. In order to answer the first question referred it will therefore be of the utmost importance to determine whether, in the case in the main proceedings, a contract was concluded between Ms Ilsinger and Schlank & Schick.

3. The existence of a consumer contract in the case in the main proceedings

59. In order to determine whether a contract was concluded in the case in the main proceedings, first of all the question arises whether the two parties reached, on the basis of an offer and the acceptance of that offer, a concordance of intentions to conclude a contract. In that regard, it is first necessary to examine whether the prize notification may be understood as an offer made to the consumer. As already stated above, the question whether an offer has been made is determined from the standpoint of the offeree.

60. In determining whether a prize notification addressed to a consumer constitutes an offer, it is not possible, in my view, to provide a general answer. It will be necessary to determine in each specific case how an average consumer understood the vendor's prize notification, and whether it is possible to consider from the consumer's standpoint that the vendor has by its prize notification made him an offer. The national court must actually carry out that assessment of the facts. In proceedings for a preliminary ruling, which are based on a clear separation of functions between the national courts and the Court, any assessment of the facts in the case is a matter for the national court. [76]

61. In its assessment, the national court must therefore consider whether the offer was, for example, made subject to the condition that the offeree concludes another contract or is

75 — In the legal literature, see Reifegerste, S., 'Fondement de la responsabilité des sociétés organisatrices de loteries publicitaires', *La Semaine Juridique (Édition Générale)*, No 46/2002, p. 2023; Fages, B.,'L'annonce d'un gain à des fins publicitaires (comparaison franco-allemande sur fond de jurisprudence européenne)', in Coester, M., Martiny, D., and Prinz von Sachsen Gessaphe, K. A. (eds), *Privatrecht in Europa — Vielfalt, Kollision, Kooperation — Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag*, Beck, Munich, 2004, p. 230 et seq.; Dutoit, B., 'Le consommateur face aux promesses de gain non tenues: quel tribunal est compétent?: à propos des arrêts Gabriel et Engler de la Cour de justice des Communautés européennes', in *Études sur le droit de la concurrence et quelques thèmes fondamentaux: mélanges en l'honneur d'Yves Serra*, Dalloz, Paris, 2006, p. 154; Berrebi, J., 'ECJ judgment C-27/02, 20 January 2005, Engler v. Janus Versand GmbH — Entitlement of a consumer to whom misleading advertising has been sent to seek payment, in judicial proceedings, of the prize which he has ostensibly won (French case note)', *European Review of Private Law*, No 1/2006, p. 138 et seq.

76 — See, to that effect, judgments in Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 33; Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-9/02 *Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 41; Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraphs 31 and 32; Case C-441/04 *A-Punkt Schmuckhandels* [2006] ECR I-2093, paragraph 25; and Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, paragraph 37.

the holder of an identification number entitling him to the prize, and whether that condition was satisfied.

62. If the national court finds that in that particular case an offer has been made to the consumer, it must also determine whether the consumer has accepted that offer. It has to take into consideration the fact that the consumer must accept the offer clearly and unequivocally, for example by returning to the vendor who sent him the prize notification the required prize claim certificate to which he has attached the coupon containing the identification number.

63. The national court must therefore determine in each particular case whether there was an offer and whether the consumer accepted that offer, giving rise to a concordance of intentions and, thereby, to the conclusion of a contract. It must also take into account that a special form is not required for the conclusion of that contract and that the contract concluded may fall within the category of innominate contracts.

4. Requirement for a high level of consumer protection

64. Having noted that a prize notification made to a consumer may lead to the conclusion of a contract and, accordingly, to the finding that the courts of the Member State in which the consumer is domiciled have jurisdiction, I would point out that that view is also supported by the requirement for a high level of protection for consumers, who are deemed to be the weaker parties in consumer contracts.

65. As the Court has explained in its case-law, the aim of the special provisions on jurisdiction over consumer contracts is to 'protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, [who] must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled'. [77] The aim of the special provisions

77 — See, by analogy, with regard to the Brussels Convention, the judgment in *Shearson Lehman Hutton*, cited above in footnote 64, paragraph 18; see also the Opinion of Advocate General Jacobs in *Engler*, point 28 (judgment cited in footnote 4).

on consumer contracts is to remove the difficulties which a consumer might encounter in a dispute over a consumer contract if he were obliged to bring an action in another State. [78]

66. The provisions, set out in Regulation No 44/2001, concerning jurisdiction over consumer contracts, are drafted, as regards their content, more broadly than those contained in the Brussels Convention, with the result that the scope of consumer protection has also been extended. The substantive extension of the provisions on consumer contracts indicates the Community's general orientation towards improving consumer protection. Thus, for example, the requirement for a high level of consumer protection also follows from the Green Paper on the Review of the Consumer Acquis. [79] In that green paper, the Commission points out that 'consumers' confidence in the internal market must be stimulated by ensuring a high level of protection across the EU'. [80] The substantive requirements of Community law are also directed towards a higher level of protection for consumers, as demonstrated, for example, by the adoption of Directive 2005/29/EC on unfair commercial practices. [81] The requirement for a high level of consumer protection also follows from the recently adopted Regulation EC No 593/2008 on the law applicable to contractual obligations (Rome I). [82]

67. In the light of the foregoing, I therefore cannot accept the argument put forward at the hearing by the representative of the administrator of Schlank & Schick that consumer protection is not justified where a consumer does not enter into any obligation in the context of a consumer relationship. The purpose of the provisions on consumer protection is not solely to ensure protection for consumers where they enter into contractual obligations, but also to prevent consumer confusion where only a unilateral binding

78 — See, by analogy, with regard to the Brussels Convention, the Opinion of Advocate General Jacobs in *Engler*, cited above in footnote 77, point 29.

79 — Green Paper on the Review of the Consumer Acquis (presented by the European Commission) (COM/2006/0744 final). The Commission will prioritise the Common Frame of Reference work on issues related to consumer contracts, in order to ensure timely input into the review of the consumer acquis. See the Commission's Second Progress Report on the Common Frame of Reference (COM/2007/0447 final).

80 — Green Paper on the Review of the Consumer Acquis, p. 4.

81 — Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

82 — Article 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) provides that consumer contracts are to be 'governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities'. According to paragraph 2 of that article, the parties are to choose the [applicable] law; such a choice 'may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1'. According to Article 29 thereof, the regulation will be applicable from 17 December 2009.

contract has been concluded. A consumer is given a false impression by misleading prize notifications and his economic behaviour is accordingly affected. The prize notification may also cause harm to a consumer if he expected in good faith to receive the prize and had spent the sum of money ostensibly won or, under the influence of the ostensibly promised prize, taken economic decisions which were unfavourable to him.

68. It must also be taken into account that offering a consumer the possibility of bringing an action before the courts for the place in which he is domiciled is no guarantee to him that those courts will also rule in his favour as to the substance and that they will award him the prize which he is claiming by means of a legal remedy; he will merely be afforded procedural protection. A consumer would have the same procedural protection if, for example, he had made a minimal financial commitment when concluding a contract for the sale of goods. Moreover, in view of the fact that, faced with misleading prize notifications constituting unfair commercial practices, a consumer is also afforded substantive legal protection under Directive 2005/29 on unfair commercial practices, [83] it is reasonable that he is also protected in that regard from a procedural standpoint, provided, naturally,

83 — Directive 2005/29/EC also includes, under the heading 'Commercial practices which are in all circumstances considered unfair', in paragraph 31 of Annex I, the practice of creating 'the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost'. According to Article 5(1) of that directive, unfair commercial practices are to be prohibited.

that a contract has been concluded in that particular case.

5. Answer to the first question referred

69. It follows from the line of argument set out that the right of a consumer to payment of a prize ostensibly promised may be a right connected with a contract for the purposes of Article 15(1)(c) of Regulation No 44/2001 if the national court finds on the basis of all the circumstances of the case that a contract was concluded in the case in the main proceedings.

70. Accordingly, the answer to the first question referred should be that Article 15(1)(c) of Regulation No 44/2001 must be interpreted as meaning that the right of action by which consumers may, under the law of the Member State in which they are domiciled, claim in the courts, from undertakings established in another Member State, prizes ostensibly won by them where the undertakings send them prize notifications or other similar communications worded so as to give the impression that they have won a prize, where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the

communication is nevertheless seeking to claim the prize, may be a right connected with a contract for the purposes of that article of the regulation in question, if a consumer contract within the meaning of that article has been concluded in the case in the main proceedings. It is for the national court to determine whether a consumer contract within the meaning of that article has been concluded in the case in the main proceedings.

C — *Second question referred*

71. The referring court raises the second question only in the alternative, in the event that the answer to the first question is in the negative. By its second question, the referring court asks, in essence, whether a consumer's claim for payment of a prize ostensibly won is a right connected with a contract for the purposes of Article 15(1)(c) of Regulation No 44/2001 where the claim for payment of the prize is not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods. The issue is therefore whether the court having jurisdiction to adjudicate on the claim for payment of the prize is the same as that having jurisdiction over a contract concerning the ordering of goods.

72. Since the answer to the first question referred will depend on the final assessment carried out by the national court, I will set out below the analysis which must be taken into account by the national court if it answers the first question referred in the negative.

73. With regard to that question, it should be pointed out that in *Gabriel* [84] the Court held in the context of the Brussels Convention that, where a consumer had ordered goods from a vendor, there could be no doubt that the vendor and the consumer were in a contractual relationship, since, by ordering the goods, the consumer had accepted the offer sent to him by the vendor, including all the conditions attaching to that offer. [85] That concordance of intentions had given rise to reciprocal and interdependent obligations between the two parties within the framework of a contract for the supply of goods. [86]

74. In this case too, a contract for the sale of goods was concluded — if the consumer ordered those goods —, a contract which

84 — Cited above in footnote 4.
85 — Judgment cited above in footnote 4, paragraph 48.
86 — Judgment cited above in footnote 4, paragraph 49.

undoubtedly falls within the scope of Article 15(1)(c) of Regulation No 44/2001, since the conditions for the conclusion of a contract are satisfied. Consequently, jurisdiction of the courts to hear disputes relating to a contract for the sale of goods is determined on the basis of the provisions of Regulation No 44/2001 relating to consumer contracts. However, the second question in this case relates to whether jurisdiction to hear an action seeking to obtain payment of a prize is also determined on the basis of the same rules if the consumer ordered goods from the vendor when returning the prize claim certificate to which he attached the coupon containing the identification number.

75. In *Gabriel*, in relation to the Brussels Convention, the Court held that, where a consumer had ordered goods from a vendor, jurisdiction to hear a consumer's action claiming payment of the prize won also had to be determined on the basis of the provisions relating to consumer contracts. [87] It stated in its reasoning that the right of the consumer to bring an action seeking to obtain payment of the prize was intimately linked to the contract concluded between the two contracting parties, since the prize notification itself was also inextricably linked to the ordering of goods, which was at the same time the prerequisite for the grant of the prize. [88] The Court continued by noting that the consumer had ordered the goods essentially, if indeed not exclusively, because the financial benefits which had been promised to him were significantly greater than the minimum amount required for the order. [89]

76. Nevertheless, the factual circumstances in *Gabriel* were different from those in this case. In *Gabriel*, the company which had promised the prize had made payment of that prize subject to the ordering of goods by the consumer beforehand. In the present case, payment of the prize was not made conditional upon the ordering of goods. None the less, I take the view that it is appropriate to treat such a situation in the same way as that in which payment of the prize is made conditional upon the ordering of goods, and to determine jurisdiction to hear the action seeking to obtain payment of the prize in accordance with the same rules as apply in disputes concerning a contract ordering goods.

77. Even though ordering goods is not a condition for claiming the payment of a prize, that ordering is closely linked to the prize notification and, in that regard, the action by the consumer to claim payment of the prize is also closely linked to the contract for the sale

87 — Cited above in footnote 4, paragraph 53.
88 — Judgment cited above in footnote 4, paragraph 54
89 — Ibid.

of goods. As the referring court points out in its order, by promising a prize, Schlank & Schick sought to induce consumers to conclude contracts for the sale of goods. The prize notification is intended to attract the consumer's attention and to influence his decision concerning ordering goods and — as the Slovenian Government rightly points out — to increase that company's advantage over other suppliers of goods of the same type.

78. By promising a cash prize, a vendor may undoubtedly exercise considerable influence over a consumer's decision to order goods even though payment of the alleged prize is not made subject to such an order. It is possible that the prize notification did not state with sufficient clarity that payment of it was ostensibly not made conditional upon the placing of an order, and that will influence the consumer's decision to order goods. It is possible that the consumer may wrongly think that ordering goods ensures payment of the prize to him but it is also possible that, when faced with such a high-value prize, he will feel morally obliged to order goods. Although payment of the alleged prize is not made conditional upon ordering goods, nor is the consumer obliged to order goods for a minimum amount; he may, on the contrary, order an item of a value of his choosing, which may be an even greater inducement for him to place an order. Since the conclusion of a contract for the sale of goods is therefore very closely linked to the prize notification, it is appropriate to resolve disputes concerning the two legal relationships before the same court.

79. Furthermore, the Court has on many occasions already pointed out in its case-law that it is essential to avoid creating a situation in which a number of courts have jurisdiction in respect of one and the same contract, in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and enforcement of judgments in States other than those in which they were delivered. [90]

80. Consequently, the answer to the second question referred should be that the right of action by which consumers may bring legal proceedings against suppliers for payment of prizes ostensibly won is a right connected with a contract for the purposes of Article 15(1)(c) of the regulation if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods.

90 — With regard to Regulation No 44/2001, see *Gabriel*, cited above in footnote 4, paragraph 57. See, by analogy, with regard to the Brussels Convention, judgments in Case 14/76 *De Bloos* [1976] ECR 1497, paragraph 9; Case 266/85 *Shenavai* [1987] ECR 239, paragraph 8; Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 21; Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 18; Case C-420/97 *Leathertex* [1999] ECR I-6747, paragraph 31; and *Besix*, cited above in footnote 10, paragraph 27.

VII — Conclusion

81. In the light of all the foregoing considerations, I propose that the Court should answer the two questions referred by the Oberlandesgericht Wien as follows:

(1) Article 15(1)(c) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the right of action by which consumers may, under the law of the Member State in which they are domiciled, claim in the courts, from undertakings established in another Member State, prizes ostensibly won by them where the undertakings send them prize notifications or other similar communications worded so as to give the impression that they have won a prize, where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, may be a right connected with a contract for the purposes of that article of the regulation in question, if a consumer contract within the meaning of that article has been concluded in the case in the main proceedings. It is for the national court to determine whether a consumer contract within the meaning of that article has been concluded in the case in the main proceedings.

(2) The right of action by which consumers may bring legal proceedings against suppliers for payment of prizes ostensibly won is a right connected with a contract for the purposes of Article 15(1)(c) of the regulation if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods.