The Case Law Of The Court Of Justice Of The EU On Art. 17 Of The 1999 Montreal Convention: An Evaluation From A Comparative Perspective

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Recommended Citation

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ABSTRACT

This paper analyzes the case law of the Court of Justice of the European Union (CJEU) on Article 17(1) of the 1999 Montreal Convention (MC99) regarding the liability of international air carriers for death or bodily injury to passengers. The interpretational principles and methods applied by the CJEU are examined, accounting also for the particularities of the EU legal order. Furthermore, the results reached by the CJEU are compared with the case law of other jurisdictions, mainly the US, and doctrinal writings. Nonetheless, this paper does not explore the pertinent issues from a de lege ferenda perspective.

The paper concludes that the judgments of the CJEU on Art. 17(1) MC99 have interpreted the notions of “passenger,” “accident,” and “bodily injury” broadly, in a passenger-friendly way. Although the interpretation of ‘passenger’ does not differ from the established case law in other jurisdictions, some aspects of the interpretation of “accident” and the interpretation of “bodily injury” significantly depart from the view currently prevailing among courts internationally. The CJEU has yet to rule on the scope of the exclusivity of the MC99, under Art. 29 thereof, regarding personal injury of passengers. However, the expansive interpretations of “accident” and “bodily injury” by the CJEU limit the practical effect of Article 29 compared to other jurisdictions. Given the regulatory influence that the EU exercises worldwide, the CJEU judgments might guide courts also outside the EU. Although this would bolster passenger protection, it would exacerbate the already fragmented application of the MC99 internationally.

DOI: https://doi.org/10.25172/jalc.89.2.3

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The 1999 Montreal Convention (MC99) on the air carrier liability for the international carriage of persons, baggage and cargo replaced and modernized the 1929 Warsaw Convention (WC29) and its amending instruments (known as the Warsaw System), despite retaining many of its provisions. Among those instruments was the European Community Regulation 2027/1997 (EU2027) on the liability of Community air carriers.

The MC99 is also open for signature by Regional Economic Integration Organizations, such as the European Union (EU). The MC99 was signed by the (then) European Community on Dec. 9, 1999, and entered into force, regarding the European Community, on June 28, 2004. EU2027 was amended to clarify that the liability of air carriers would be hereinafter governed by the MC99 and would apply also to carriage within a single Member State (MS). Ever since, the MC99 provisions have been an integral part of the EU legal order, save for the provisions on cargo. As the EU is party to the MC99, the Court of Justice of the EU (CJEU) is competent for the interpretation of its provisions on passengers and luggage.

This article analyzes the judgments of the CJEU on Art. 17(1) MC99 and compares them with judgments in other jurisdictions, mainly in the US. It begins with some clarifications on the nature and function of preliminary rulings under EU law, alongside the role of the Vienna Convention on the Law of Treaties (VC) in the interpretation of the MC99 by the CJEU. It then proceeds with the analysis of the CJEU judgments on key notions of the

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4 MC99, supra note 1, at art. 53(2).
5 Case C-344/04, IATA v. Dep’t of Transp., ECLI:EU:C:2006:10; ¶ 36 (Jan. 10, 2006).
7 IATA, ECLI:EU:C:2006:10 ¶ 36.
8 Id.
MC99, i.e. “passenger” (section II), “accident” and its elements as the CJEU has determined them (section III), and “bodily injury” (section IV). These judgments are evaluated not only as such, but also compared with respective judgments in jurisdictions both inside and outside the EU. Section V attempts to shed some light on the issue of exclusivity of MC99 regarding personal-injury claims against air carriers, which the CJEU has not yet directly dealt with. Section VI conducts a wider analysis of the interpretational principles used by the CJEU in its judgments on Art. 17(1) MC99.

The conclusion is that the CJEU has, in many respects, chosen its own path when interpreting Art. 17(1) MC99. This has contributed to the creation of legal certainty within the EU but not to the uniform application of the MC99 globally. It would be interesting to watch the future influence of the CJEU judgments outside the EU.

II. PRELIMINARY RULINGS UNDER EU LAW, ARTICLE 17(1) MC99, AND THE VC

To begin with, we should elucidate the context of the CJEU judgments on Art. 17(1) MC99 by explaining two parameters: (a) the nature and function of preliminary rulings under EU law, and (b) the effect that the CJEU attributes to the Vienna Convention.

A. NATURE AND FUNCTION OF PRELIMINARY RULINGS UNDER EU LAW

Under Art. 19(3)(b) of the Treaty of the EU\textsuperscript{10} and Art. 267 of the Treaty on the Functioning of the EU\textsuperscript{11}, the CJEU can give preliminary rulings, at the request of courts in the EU, on the interpretation of Union law. Although such rulings are binding only on the referring national courts,\textsuperscript{12} in practice, national courts abide by the interpretation given by the Court.\textsuperscript{13}

\textsuperscript{10} Consolidated version of the Treaty on European Union art. 19(3)(b), 2020 O.J. (C202) 1, 27 (EU) [hereinafter TEU].

\textsuperscript{11} Consolidated Version of the Treaty on the Functioning of the European Union art. 267, July 6, 2016, 2020 O.J. (C 202) 47, 164 (EU) [hereinafter TFEU].


In its judgments regarding preliminary rulings, the CJEU merely interprets terms and concepts of EU law to ensure the uniform interpretation of EU law. The CJEU does not decide on the merits of the case; this falls under the competence of the referring national court. However, the CJEU may provide some guidance to facilitate the national court in its task.

Moreover, the CJEU decides only on issues that are necessary for the national court to deliver its judgment. It does not rule on theoretical issues or issues unconnected to the case at hand. Nevertheless, the CJEU has repeatedly held that the questions submitted before it by the national court enjoy a presumption of relevance: in the context of the cooperation between the CJEU and the national courts provided for in Article 267 TFEU, the national court determines, in the light of the particular circumstances of the case, both the need for a preliminary ruling, to enable it to deliver a judgment, and the relevance of the questions that it submits to the CJEU.

Thus, the judgments of the CJEU regard the interpretation of specific terms and concepts of the EU law, based on specific questions referred to the CJEU by national courts, as long as the answers to such questions are necessary for the national court to decide a particular case.

B. Article 17(1) MC99 and the VC

Article 17(1) MC99 provides:

“The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

Its wording is almost identical with the respective provision of Art. 17 WC29, which means that the case law developed by the courts of various jurisdictions under the previous regime remains of great practical importance.

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14 Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, 2019 O.J. (C 380) 1, ¶ 8, 11.
15 See, e.g., Case C-50/22, Sogefinancement SAS v. RW, ECLI:EU:C:2023:177, ¶ 17 (Mar. 9, 2023).
16 Id. ¶ 16.
17 MC99, supra note 1, at art. 17(1).
18 WC29, supra note 2, at art. 17.
The CJEU has repeatedly underlined that it applies the interpretational criteria of Art. 31 VC to the MC99, which codifies general international law binding on the EU, and stipulates that a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context, and in the light of its object and purpose.\(^{19}\)

Furthermore, the Court has stated that the concepts contained in the MC99 must be interpreted uniformly and autonomously, so that consideration is not taken to the various meanings that may have been given to them in the internal laws of the EU member states, but to the rules of interpretation of general international law, which are binding.\(^{20}\)

The following sections discuss the judgments of the CJEU on core elements of Art. 17(1) MC99, starting with the notion of “passenger.”

### III. “PASSENGER”

In *Wucher Helicopter*\(^{21}\) Mr. Sander, an occupant of a helicopter, was injured while flying on a flight operated by a contractor of his employer. The purpose of the flight related to Mr. Sander’s professional duties, which were to ensure the safety of a glacier area and the ski pistes. Mr. Sander flew as a “guide familiar with the terrain,” whose task was to open the helicopter door at the pilot’s direction and then hold it open in a particular manner and for a particular period of time. The question arose whether the event was an accident suffered by a “passenger.”

The Court observed that whether Mr. Santer is a “passenger” under MC99, entails ascertaining whether the purpose of the flight was the “carriage of passengers” under MC99. Such requirement was fulfilled, since the purpose of the flight was to carry employees to the places where they had to perform their usual tasks.\(^{22}\) The fact that no ticket had been issued did not exercise any influence, since under Art. 3(5) MC99, the existence or validity of the contract of carriage is not affected by the non-observance of the documentation requirements established in that

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\(^{21}\) See generally Case C-6/14 Wucher Helicopter v. Santer, ECLI:EU:C:2015:122 (Febur. 26, 2015).

\(^{22}\) *ibid.* ¶¶ 40–41.
Therefore, the Court ruled that there is a “passenger” within the meaning of Article 17 MC99, once that person has been carried on the basis of a “contract of carriage” within the meaning of Article 3 MC99.

This judgment is aligned with the prevailing view on the notion of “passenger,” which accepts that a “passenger” is any person, other than a crew member, carried on board the aircraft with the consent of the carrier. It suffices that that person does not contribute to the carriage of herself or other persons on board, even if the flight is related to the performance of duties in the course of her employment by someone other than the carrier.

In a similar case in Australia, it was found that an observer of power lines on board a helicopter, who could give directions as to where the aircraft should fly, but did not control its operation, was a “passenger.”

Thus, in clarifying the notion of “passenger” the CJEU did not depart from established case law.

IV. “ACCIDENT”

The situation is more complicated as to the interpretation of “accident.” The notion of “accident” is not defined in the MC99, just as it was not defined in its predecessor, the WC29. However, there is extensive case law and doctrinal commentary from all over the world. Several judgments of the CJEU regarding the notion of “accident” are presented below. Afterwards, their aggregate result is examined and compared with the results reached in other jurisdictions.

A. NO CONNECTION WITH TYPICAL AVIATION HAZARDS NECESSARY

In Niki Luftfahrt, the CJEU was called to clarify whether the concept of the “accident” required an event caused by the

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23 Id. ¶¶ 37–39.
26 Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169, [94] (Basten JA), 189–92 (Sackville AJA) (Austl.).
materialization of a hazard typically associated with aviation.\textsuperscript{27} The case concerned bodily injury of a passenger caused by a crewmember spilling a cup of hot coffee.\textsuperscript{28} It could not be established whether the event was caused by a defect in the folding tray table or by a vibration of the aircraft.\textsuperscript{29}

The Court began with the ordinary meaning of the word “accident.”\textsuperscript{30} It determined such meaning as “an unforeseen, harmful and involuntary event.”\textsuperscript{31} At the same time, the Court referred to the third and fifth recitals of the MC99 preamble, which highlighted consumer protection and equitable compensation, based on the concept of restitution, as part of a balance of interests between passengers and air carriers.\textsuperscript{32}

Subsequently, the CJEU mentioned the preparatory works (travaux préparatoires) of the MC99.\textsuperscript{33} It observed that the concept of “accident” had been preferred to the wider concept of “event,” which could have led to excessive litigation.\textsuperscript{34} Moreover, it noted that the drafters of the convention had deleted a sentence that stated the carrier would not be liable in so far as the death or injury resulted from the passenger’s state of health.\textsuperscript{35} The Court attributed such deletion to an effort of the drafters to avoid distorting, to the detriment of passengers, the balance of interest struck by the Convention, given also the general exoneration clause of Art. 20 MC99.\textsuperscript{36}

The Court observed that, to safeguard such balance of interests, Art. 20 MC99 allowed the exoneration of the carrier, if the carrier proved that the damage was due to negligent behavior of the passenger, while Art. 21(1) MC99 prohibited the exoneration of the carrier for lack of negligence if the passenger’s damage did not exceed a certain amount.\textsuperscript{37} Thus, the MC99 enabled passengers to be compensated easily and swiftly, without imposing excessive burdens on carriers.\textsuperscript{38}

\textsuperscript{27} Niki Luftfahrt, ECLI:EU:C:2019:1127 ¶ 22.
\textsuperscript{28} Id. ¶ 14.
\textsuperscript{29} Id. ¶ 15.
\textsuperscript{30} Id. ¶ 35.
\textsuperscript{31} Id.
\textsuperscript{32} Id. ¶ 36.
\textsuperscript{33} Id. ¶ 37.
\textsuperscript{34} Id.
\textsuperscript{35} Id. ¶ 38.
\textsuperscript{36} Id.
\textsuperscript{37} Id. ¶ 39.
\textsuperscript{38} Id. ¶ 40.
Therefore, to require that the damage has been caused by a hazard typically associated with aviation or that there was a connection between the “accident” and the operation of the aircraft would be inconsistent with the ordinary meaning of “accident” and the objectives of the MC99.\textsuperscript{39} Besides, the existing mechanisms of limitation of the carriers’ liability were sufficient to avoid excessive compensation burdens to carriers.\textsuperscript{40} Consequently, the CJEU ruled that a connection of the “accident” with the operation of the aircraft was not required.

B. OCCURRENCE OUTSIDE THE NORMAL OPERATING RANGE OF THE AIRCRAFT

In \textit{Altenrhein Luftfahrt}, the Court was asked whether physical injury sustained during a harsh landing, yet within the normal operating range of the aircraft concerned, could be an “accident.”\textsuperscript{41} The Court referred to the ordinary meaning of the word “accident,” as determined in \textit{Niki Luftfahrt}, and stated that the main question in the present case was whether the unforeseeability of a harmful event, as a requirement of an “accident,” must be evaluated by reference to the passenger concerned (subjective interpretation) or to the normal operating range of the aircraft on which the event occurred (objective interpretation).\textsuperscript{42} The Court commented that the subjective interpretation would lead to paradoxical results, i.e. that the same event is foreseeable for some passengers but not for others.\textsuperscript{43} At the same time, it would distort, to the detriment of carriers, the equitable balance of interests laid down in the MC99 and mentioned in the Convention’s preamble.\textsuperscript{44}

Afterwards, the Court observed that a flight should be conducted in accordance with the aviation regulatory requirements, the Operations Manual of the aircraft and related technical requirements, considering also the rules of trade and best practice in aircraft operation. If an air carrier observes such requirements, then there can be no “accident” despite any unpleasant effects on some passengers, because there is no “unforeseeable” event.\textsuperscript{45}

\textsuperscript{39} \textit{Id.} ¶ 41.
\textsuperscript{40} \textit{Id.} ¶ 42.
\textsuperscript{41} Case C-70/20, YL v. Altenrhein Luftfahrt GmbH (\textit{Altenrhein Luftfahrt}), ECLI:EU:C:2021:379, ¶ 23 (May 12, 2021).
\textsuperscript{42} \textit{Id.} ¶ 34.
\textsuperscript{43} \textit{Id.} ¶ 35.
\textsuperscript{44} \textit{Id.} ¶ 36.
\textsuperscript{45} \textit{Id.} ¶¶ 37–40.
Under the facts of the case at hand, as laid down by the national court and subject to verification by that court, the carrier had abided by the aviation safety regulations, there was no observable pilot error, while harsh landings were considered safer for the particular airport. Thus, there was no “accident,” although the passenger experienced the harsh landing as an unforeseeable event.

C. The Role of Fault

In Austrian Airlines (Exoneration of air carrier from liability), a passenger was injured because she fell while disembarking the aircraft via an open, mobile stairway with a handrail on each side. The passenger was holding her handbag in her right hand, carrying her two-year-old son in her left arm and not using either of the handrails. The passenger’s husband was going before her, carrying one piece of luggage on each hand and almost fell at the point of the staircase where the claimant fell just moments later. The national trial court did not find any problems with the condition of the ladder. The court asked the CJEU whether there could be an “accident” under such circumstances and whether the carrier could be wholly exonerated under Art. 20 MC99.

The CJEU referred to the definition of “accident” in Niki Luftfahrt and to the MC99 objectives of ensuring protection of consumer interests while maintaining an equitable balance of interests. These revealed that the definition of the accident did not require any fault of the carrier. Accordingly, where, for no ascertainable reason, passengers fall on a mobile stairway set up for their disembarkation and injure themselves, there is an

46 Id. ¶¶ 41–42.
47 Id. ¶¶ 42–43.
48 Case C-589/20, JR v Austrian Airlines AG (Austrian Airlines (exoneration of air carrier from liability)), ECLI:EU:C:2022:424, ¶ 10 (June 2, 2022).
49 Id.
50 Id.
51 Id. ¶ 13.
52 Id. ¶ 17; MC99, supra note 1, at art. 20 (“If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.”).
53 Austrian Airlines (exoneration of air carrier from liability), ECLI:EU:C:2022:424 ¶¶ 20–21.
“accident” under Art. 17(1) MC99, although the carrier may have observed its diligence and safety duties.\textsuperscript{54}

The facts of the particular case, as established by the national court, indicated that there might be negligence of the claimant, since (a) she was not holding the handrails, (b) she saw her husband almost falling in front of her at the spot where she subsequently fell, and (c) she went to receive medical treatment several hours after the event.\textsuperscript{55} Nonetheless, the CJEU observed that the national court had to clarify these circumstances by adding that the delay in seeking medical treatment had to be evaluated in the light of the exact circumstances of the case, such as the apparent seriousness of the injuries at the time of the accident and any advice that medical staff gave her on the spot.\textsuperscript{56}

Furthermore, the Court observed that the possibility of exoner- ation under Art. 20 is part of the balance of interests of the MC99.\textsuperscript{57} The national court has to ascertain, under its own procedural rules (principle of procedural autonomy), whether the carrier has proved negligence or a wrongful behavior by the passenger and to assess the extent to which the passenger’s behavior caused or contributed to her damage, in order to exonerate respectively the carrier from its liability.\textsuperscript{58}

D. Closely Connected Sequence of Events

In the Austrian Airlines (First aid on board an aircraft) case, a passenger suffered scalds after a jug with hot coffee fell on him.\textsuperscript{59} The cabin crew administered first aid.\textsuperscript{60} Three years later, the passenger brought an action against the air carrier before the Vienna Commercial Court claiming damages not only for the burns he had suffered but also for insufficient administration of first aid by the cabin crew, which had aggravated his burns.\textsuperscript{61} Both the trial court and the appellate court dismissed his action as the two-year period under Art. 35(1) MC99 for bringing the claim had expired.\textsuperscript{62} The claimant appealed before the Austrian Supreme Court alleging that the administration of first aid was not cov-

\textsuperscript{54} Id. \textsuperscript{22–23.}
\textsuperscript{55} Id. \textsuperscript{25–26.}
\textsuperscript{56} Id. \textsuperscript{32–33.}
\textsuperscript{57} Id. \textsuperscript{28.}
\textsuperscript{58} Id. \textsuperscript{29–33.}
\textsuperscript{59} Case C-510/21 DB v. Austrian Airlines AG (Austrian Airlines (first aid on board an aircraft)), ECLI:EU:C:2023:550, \textsuperscript{9 (July 6, 2023).}
\textsuperscript{60} Id.
\textsuperscript{61} Id. \textsuperscript{10.}
\textsuperscript{62} Id. \textsuperscript{12.}
ered by the concept of “accident” under the Art. 17(1) MC99 and was thus governed by national law. The Austrian Supreme Court asked the CJEU whether the administration of first aid following an accident under Art. 17(1) MC99, which leads to further injury, can be considered as a single accident together with the triggering event. The national court also inquired, if, in case the two events are separate, a claim could be brought under national law, in view of the exclusivity of the Convention under Art. 29 MC99.

The CJEU observed that it is not always possible to attribute the occurrence of damage to an isolated event, where that damage is the result of a series of interdependent events. Thus, where there is a series of intrinsically linked, successive events, without interruption in space and time, that series of events must be regarded as constituting a single “accident” within the meaning of Article 17(1) MC99. In the case at hand, it could not be disputed that there was a causal link between the fall of the jug of coffee and the aggravation of the bodily injuries caused by it on account of inadequate first aid being administered.

The Court then referred to the balance of interests struck by the MC99 and noted that by establishing a system of strict liability of the air carriers and restricting the concept of “accident” to a series of intrinsically linked events that take place successively, without interruption in space and time, Art. 17(1) enables passengers to be compensated easily and swiftly, yet without imposing a very heavy compensation burden on air carriers. In this regard, it is unimportant whether the air carrier failed or not to fulfil its due diligence obligations. In the light of the above, the Court found it unnecessary to examine the scope of Art. 29 MC99.

E. Comparative Evaluation

In summary, the CJEU holds that an accident under the MC99 is “an unforeseen, harmful and involuntary event which does not require that the damage be due to the materialization of a hazard typically associated with aviation or that there be a connection

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63 Id. ¶ 13.
64 Id. ¶¶ 14, 18.
65 Id. ¶¶ 17–18.
66 Id. ¶ 23.
67 Id.
68 Id. ¶ 24.
69 Id. ¶¶ 25–26.
70 Id. ¶ 27.
71 Id. ¶ 29.
between the accident and the operation or movement of the aircraft.”72 Where there is a series of intrinsically linked events that take place successively, without interruption, in space and time, that series of events must be regarded as constituting a single “accident” within the meaning of Article 17(1) of the MC99.73 It is sufficient that the event which caused the death or bodily injury of a passenger took place on board the aircraft or in the course of any of the operations of embarking or disembarking, while it is immaterial whether the carrier fulfilled its diligence and care obligations.74 Nevertheless, there is no “accident” where the harmful event was due to the normal operation of the aircraft, in accordance with the regulatory safety requirements, the flight manual of the aircraft and taking into account the rules of the trade and best practice in aircraft operation.75

A comparison of the CJEU judgments with respective judgments in other jurisdictions reveals the following.

1. “Event”

An “accident” is a special “event.” According to the CJEU, an event may be comprised by a combination of closely connected acts and omissions of the air carrier.76 The US Supreme Court also held in Saks that an omission may constitute an event, if it forms a part of the causal chain that led to the injury.77 In the subsequent majority judgment in Husain, the same court found that there can be multiple interrelated factual events, including omissions, the combination of which led to the injury, thus making it difficult to distinguish a single event that caused the injury.78 This interpretation has been followed by some courts in other jurisdictions.79 Nonetheless, other courts and

73 Austrian Airlines (first aid on board an aircraft), ECLI:EU:C:2023:550 ¶ 23.
74 Id. ¶ 27; case C-589/20, JR v Austrian Airlines AG (Austrian Airlines (exoneration of air carrier from liability)), ECLI:EU:C:2022:424, ¶ 22 (June 2, 2022).
76 Austrian Airlines (first aid on board an aircraft), ECLI:EU:C:2023:550 ¶ 23.
part of the legal doctrine have held that bare omissions cannot be “events.” The CJEU has sided, in effect, with the former view.

2. “Unforeseen” but not Necessarily “External to the Passenger”

   a. Unforeseeability and Due Diligence

   Regarding the requirement of unforeseeability, the CJEU has rejected a subjective interpretation, i.e. an interpretation from the perspective of the affected passenger. Such an interpretation appears to contradict established case law in other jurisdictions and doctrinal writings, in which the standard for the “unforeseen” or “unexpected” are the expectations of the passenger.

   However, courts in other jurisdictions refer to the reasonable expectations of passengers, who often have ordinary experience in commercial air travel. This is actually an objective test, not a subjective one, in the sense that idiosyncratic expectations of the passenger are disregarded.

   Besides, the CJEU rejected the perspective of the passenger in favor of the technical rules of safety of flights and the ordinary and safe operation of the aircraft, taking into account the “rules of trade and best practice in aircraft operation.” Thus, regulatory compliance seems to pre-empt the application of Art. 17(1). Moreover, the reference to industry standards is reminiscent of

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83 See, e.g., Schmid, supra note 80, ¶ 13(a); Fabian Reuschle, Monteraler ÜBEREINKOMMEN, Art. 17, ¶ 13 (2nd ed., 2011).

84 See Moore, 32 F.4th at 119.

85 Id. (citing also the judgment of the CJEU in Altenrhein Luftfahrt); Ford [2013] EWCA (Civ) 1165 [26]–[28].


87 Harakas & Lawson, supra note 25, ¶ 17.51.
the grounds used in some US and UK judgments to evaluate the criterion of “unexpected and unusual.”

Hence, the objective approach of the CJEU to “foreseeability” is not essentially different from that of the courts in other jurisdictions. In practical terms, where statutory safety rules and industry standards are irrelevant or nonexistent, then the perspective of the passenger will be considered, but in an objective way, i.e. what could reasonably be expected in such circumstances by a passenger who has an ordinary travel experience.

Fears had been expressed that the Altenrhein Luftfahrt would introduce an element of negligence in the definition of “accident,” which could undermine the uniformity of application of the Convention, since courts might implement it with reference to national tort law cases. Such fears had been shared by the Advocate General in the Austrian Airlines (Exoneration of air carrier from liability) case, who underlined that the notion of accident is unrelated to any notions of negligence.

On this background, the CJEU in its subsequent judgment on the above case ruled that the cause of the passenger fall is immaterial for the establishment of an “accident,” thus clearly distinguishing between the “accident” under Art. 17(1) and the negligence as an exoneration ground under Art. 20(1).

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89 See also Opinion of the Advocate General Emiliou in JR v. Austrian Airlines (Austrian Airlines (exoneration of air carrier from liability)), ECLI:EU:C:2022:47, ¶ 59 (Jan. 20, 2022) (who favors the perspective of a disinterested bystander). Under Art. 19(2) TEU and Art. 252 TFEU, Advocates-General (AG) are impartial and independent, and assist the CJEU by making reasoned submissions on cases which require their involvement in accordance with the Statute of the CJEU. The Opinion of the AG is delivered as part of the hearing of the case, it is not binding to the Court, and it is separate from the Court’s judgment. See Arts. 82 and 87(k) of the Rules of Procedure of the Court of Justice, 2012 O.J. (L 265) 1, 22–23.


91 Opinion of AG Emiliou in Austrian Airlines (exoneration of air carrier from liability), ECLI:EU:C:2022:47 ¶¶ 40–41.

92 Austrian Airlines (exoneration of air carrier from liability), ECLI:EU:C:2022:424 ¶ 23.
distinction between an “accident” as a requirement of liability and (lack of) negligence as a potential exoneration ground of the air carrier is undisputed: as the US Supreme Court has ruled in *Sacks*, “to establish an ‘accident’ one has to inquire the nature of the event, not the care taken by the airline to avert it.”

b. No Externality

Perhaps the most distinguishing feature of the CJEU definition of “accident” is that it does not include the criterion of externality. The CJEU has deliberately refused to include such requirement in its definition, despite the proposals of the Advocate-General to the Court do so in two different cases. The CJEU referred to the decision of the Montreal Diplomatic Conference to delete the last sentence of the respective draft, which provided that the carrier would not be liable in so far as the death or injury had resulted from the passenger’s state of health. The CJEU traced such decision to the desire of the drafters of the MC99 to avoid unbalancing the interests at stake to the detriment of the passenger, while, in any event, the convention had already laid down a general exoneration clause in Article 20 thereof.

To evaluate such interpretation, one has to apply the interpretational criteria of the Vienna Convention. Under Art. 31(1) VC, the starting point is the ordinary meaning of the term “accident.” However, the ordinary meaning of a term is not to be determined in the abstract, but in the context of the treaty and in the light of its object and purpose. The context comprises the preamble of the treaty, while any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is also considered. The preparatory works

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93 *Air France*, 470 U.S. at 407; see also *Deep Vein Thrombosis & Air Travel Group Litigation* [2005] UKHL 313 [3]; *Parkes Shire Council v South West Helicopters Pty Ltd* [2019] HCA 14 ¶ 34 (Austl.).


96 *Id.*

97 See generally, VC, *supra* note 9.


99 VC, *supra* note 9, at art. 31(2).

100 *Id.* at art. 31(3)(b).
of the treaty and the circumstances of its conclusion are only supplementary means of interpretation.\textsuperscript{101}

The protection of passenger interests is one of the main purposes of the Montreal Convention, as mentioned in its preamble, but as part of a wider balance of interests. By rejecting the requirement of externality, the CJEU practically attributes to air carriers the role of a general-risk insurer of passengers during the flight\textsuperscript{102}—which heavily distorts the balance of interests in the Convention.\textsuperscript{103}

Besides, up to the point that the CJEU delivered its judgments, the externality criterion had been widely used in the definition of “accident” by courts at the highest level in many jurisdictions.\textsuperscript{104} Although there had been isolated instances in which judges had commented that externality may not be really necessary, the requirement of externality had not been rejected.\textsuperscript{105} Thus, the criterion of externality constituted an instance where there had been uniform application of the treaty, establishing agreement among the States parties to the MC99, and previously to the WC29, on this aspect of an “accident.” This is a factor that the CJEU should have considered, in view of VC Art. 31(3)(b), which provides that

\textsuperscript{101} Id. at art. 32.


\textsuperscript{103} See Opinion of the AG Emiliou in case C-589/20, JR v Austrian Airlines AG (Austrian Airlines (exoneration of air carrier from liability)), ECLI:EU:C:2022:47, ¶ 53 (Jan. 20, 2022) (observing that the “equitable balance of interests” is included in the purposes of the MC99 and that “national courts have rightly considered that the drafters of the Montreal Convention did not intend to make air carriers liable for the prior health issues of their passengers that happen to manifest themselves on board the aircraft or during the process of embarking or disembarking.”).


\textsuperscript{105} Deep Vein Thrombosis & Air Travel Group Litigation [2005] UKHL 313 [49]; Povey v Qantas Airways Limited (2005) HCA 33 [162]–[65] (Kirby, J) (Austl.).
any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account together with the context.\textsuperscript{106} Thus, it is no surprise that the view of the CJEU has attracted criticism for both undermining the uniformity of application of MC99\textsuperscript{107} and not providing extensive grounds for doing so.\textsuperscript{108}

As to the preparatory works of the Montreal diplomatic conference, the state of health of the passenger as a condition for the exculpation of the air carrier was deleted from the final text of the convention. This was part of a consensus package on various aspects of the air carrier liability for death or injury.\textsuperscript{109} Nonetheless, the consensus regarded the disagreement of the conference participants on the exact effect that the passengers’ pre-existing health conditions and sensitivities should have on the liability of air carriers\textsuperscript{110}—which is different from the internal reactions of the passenger to the normal aircraft operation. In other words, the parties in the Montreal Conference merely agreed that they disagreed, and the issue remained inconclusive.

c. The Relationship between Unforeseeability and Externality

Despite frequent references to “externality,” there have been judgments (mainly in the U.S.) which focus on the “unexpected or unusual” occurrence in relation to the normal operation of the aircraft, while not explicitly mentioning externality.\textsuperscript{111} It has also been found that, in a case involving a trip-and-fall, the issue of whether the incident was “external” to the passenger is largely

\textsuperscript{106} VC, supra note 9, at 31(3)(b). See Oliver Dörr & Kirsten Schmalenbach, Art. 31, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 598 ¶ 79 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018); Richard Gardiner, TREATY INTERPRETATION, 258 (2d ed. 2015).

\textsuperscript{107} Robert Lawson, Unusual but Perhaps Not Unexpected: The Lonely Furrow Ploughed by the CJEU in Respect of an Article 17 “Accident”, 48 AIR & SPACE L. 1, 6–7 (2023); Cyril-Igor Grigorieff, Case Laudamotion: The CJEU Rules that Severe Mental Injury Equals Bodily Injury Under the 1999 Montreal Convention, 48 AIR & SPACE L. 123, 129 (2023) [hereinafter Grigorieff, Case Laudamotion].

\textsuperscript{108} Lawson, supra note 107, at 10–11; Grigorieff, Case Laudamotion, supra note 107, at 127; see also Arthern v. Ryanair DAC [2003] EWHC (KB) 46 [34] (Eng.) (observing that the brief reasoning provides the judgment with low persuasive value).

\textsuperscript{109} ICAO MINUTES, supra note 102, at 167–68; see also Milde, supra note 102, at 848–55.

\textsuperscript{110} ICAO MINUTES, supra note 102, at 77–80, 118–20.

\textsuperscript{111} See, e.g., DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1196–97 (1978); Abramson v. Japan Airlines Co., 739 F.2d 130, 132–33 (1984); see also Barclay v. British Airways Plc [2008] EWCA (Civ) 1419, [35]–[36] (Eng.).
dependent on whether the impediment was “unexpected.”\footnote{Walsh v. Koninklijke Luchtaart Maatschappij, 2011 WL 4344158, at *4 (S.D.N.Y. 2011).} The CJEU has ruled that a passenger’s bodily injury sustained because of the passenger’s own reaction to the normal operation of the aircraft can be no accident—thus, arriving at the same conclusion as the US Supreme Court in \textit{Saks},\footnote{Air France v. Saks, 470 US 392, 406 (1985).} which had very similar facts. Consequently, in many cases, the requirement of externality is covered by the requirement of unexpectedness and the result is the same.

Nonetheless, by not referring to externality, the judgments of the CJEU create confusion. They can be understood to mean that there is no “accident” when a passenger sustains an injury caused by the normal operation of the aircraft, but there is an “accident” when a passenger sustains an injury despite the aircraft being normally operated. This hardly makes sense.\footnote{See also Opinion of AG Emiliou in the case C-589/20, JR v Austrian Airlines AG (\textit{Austrian Airlines} (exoneration of air carrier from liability)), ECLI:EU:C:2022:47, ¶ 56 (Jan. 20, 2022).} The only difference seems to be that in the former case the passenger was doing nothing, while in the latter case the passenger was doing something, when the event occurred. An explanation, but no justification, for such inconsistency could be that the CJEU is called to merely clarify concepts of EU law, in the factual context presented by the national referring court, without adjudicating the case. Therefore, it appears that the CJEU did not pay enough attention to the connection between these two cases with regards to the accepted criterion of “unexpected.”

From an evidentiary perspective, the CJEU judgments mean some cases will have a shift of the burden of proof from passengers, who have to prove the occurrence of “accident” under Art. 17(1) MC99, to the carriers, which have to prove negligence of the passenger to exonerate themselves under Art. 20 MC99. In occurrences involving the medical condition of the passenger, this may lead to more complex and costly litigation, as the carriers may ask permission to obtain the passenger’s medical records, to examine whether the passenger had been negligent in flying in the first place. It might even increase the cases of denied boarding, if carriers ask for medical clearance of passengers with obvious health problems or vulnerable health condition (pregnant women, infants, elders, etc.), alleging that the safety of flight is at risk.
3. “Involuntary”

The CJEU requires that the event must have been “involuntary,” which is not necessary under the internationally followed definitions in the vein of Saks. The requirement of “involuntary” can be found in some domestic definitions of accident and accords with the ordinary, everyday meaning of the term.

Involuntariness is a cumulative condition for an “accident” under the CJEU definition—there must be an unforeseen, harmful, and involuntary event. A similar approach has been adopted by UK courts, which refer to the “unintended and unexpected” qualities of the “event” that qualifies as an “accident.” This approach may lead to the negation of an “accident” in cases where the passenger consents to the “event,” especially in cases of on-board medical treatment, which in turn might result in outcomes unfair to the passenger, where the medical treatment has been inappropriate.

4. No Connection with Risks Inherent in Air Travel

In Niki Luftfahrt, the CJEU clarified that for an event to constitute an “accident,” there is no need to be connected with risks inherent in air travel.
This judgment resolved, concerning the EU member states, a long-standing dispute, thus creating a welcomed legal certainty. Especially in Germany, the prevailing view in courts and legal doctrine was that a connection with such risks was necessary, to avoid overextension of the carrier’s liability, since otherwise the carrier would have to bear the general risks of passengers. On the contrary, courts in the UK have rejected such requirement. The situation remains unclear in the U.S., where some courts have held that there must be a causal link between the event and the operation of the aircraft, while other courts have refused to impose such restriction.

V. “BODILY INJURY”

Alongside “accident,” “bodily injury” is the most important element in establishing liability under Art. 17(1) MC99.

In Laudamotion, the CJEU was called to clarify whether pure psychological injury, i.e., without connection to any bodily injury, could be recoverable under Art. 17(1) MC99. The case concerned a passenger who developed Post Traumatic Stress...

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123 E.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 28, 1978, 32 Neue Juristische Wochenschrift [NJW] 495 (Ger.); Edgar Ruhwedel, Der Luftbeförderungsvertrag, ¶ 331 (3rd ed. 1998). This view had been adopted by Austrian courts too, see, e.g., Oberster Gerichtshof [OGH] [Supreme Court of Justice] July 2, 2015, 2 Ob 58/15s, ¶ 6.4 [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=[J]T_20150702_OGH0002_0020OB00058_15S0000_000&Suchworte=RS0129127 [https://perma.cc/5ZXY-TNAE]]. Nevertheless, it was the Austrian Supreme Court that addressed the preliminary question to the CJEU in Niki Luftfahrt, ECLI:EU:C:2019:1127, expressing doubts as to whether a connection with risks inherent to air travel is a requirement under Art. 17 MC99.


Disorder after disembarking via the emergency exit, during an evacuation process, and being hurled several meters through the air by the jet blast from the aircraft engine, which had not been shut down.\textsuperscript{128}

The CJEU first examined the ordinary meaning of “bodily injury.” It noted that “injury” refers to an impairment of an organ, tissue, or cell due to an illness or accident, whereas “bodily” refers to the physical part of a living entity, namely the human body.\textsuperscript{129} It then observed that pure mental injury cannot fall under bodily injury.\textsuperscript{130} Nevertheless, the fact that the concept of “bodily injury” was used in the wording of Article 17(1) does not necessarily presuppose that the authors of that convention intended to exclude such injuries from the ambit of MC99. The preparatory works of the Convention revealed that the concept of “bodily injury” was adopted bearing in mind that (a) in certain Member States, damages for psychological injuries can be recovered under certain conditions, (b) case-law develops in this area, and (c) it is not envisaged that there will be interferences with that development, which depends on case-law in areas other than international carriage by air.\textsuperscript{131}

Subsequently, the Court referred to the objective of the MC99 to ensure consumer protection and equitable compensation in the form of restitution, as apparent from its preamble.\textsuperscript{132} Such a need requires the equal treatment of passengers who have suffered injuries, whether bodily or psychological, of the same severity resulting from the same accident.\textsuperscript{133} Since a psychological injury may be as severe as a bodily injury, Art. 17(1) must be interpreted as allowing recovery for pure psychological injuries.\textsuperscript{134}

At the same time, the Court observed that equitable compensation of passengers needs to be reconciled with the interest of carriers to be protected from exaggerated claims and not to have their liability overextended.\textsuperscript{135} Therefore, the aggrieved passenger has to demonstrate, by means of a medical report and proof of medical treatment, the existence of an adverse effect on her psychological integrity, suffered as a result of an “accident” of such gravity or intensity that it affects her general state of health,

\textsuperscript{128} Id. ¶ 9.
\textsuperscript{129} Id. ¶ 23.
\textsuperscript{130} Id. ¶ 24.
\textsuperscript{131} Id. ¶ 26.
\textsuperscript{132} Id. ¶ 27.
\textsuperscript{133} Id. ¶ 27.
\textsuperscript{134} Id. ¶¶ 27–29.
\textsuperscript{135} Id. ¶ 30.
particularly in view of its psychosomatic effects, and that it cannot be resolved without medical treatment. Thus, CJEU held that even physical manifestations of mental injury suffice for a “bodily injury” to exist.

A. Comments on the Methodology of the CJEU

The CJEU in *Laudamotion* relied on a teleological (purposive) interpretation, which at its center has the protection of passengers as consumers. Teleological arguments are very common in the case law of the CJEU on consumer protection, which focuses on the principle of effectiveness. A corollary of effective protection is the principle of equal treatment of passengers, which the CJEU has used in a series of judgments on Regulation 261/2004 on passenger rights, to extend the right of passengers to receive compensation also for delayed flights—although the wording of the EU261 provides such right only for denied boarding and cancellation of flights.

In this regard, the CJEU has noted that all EU legal acts must be interpreted in accordance with EU primary law as a whole, including the principle of equal treatment. Equal treatment requires that comparable situations must not be treated differently, while different situations must not be treated in the same way unless such treatment is objectively justified. The fact that the CJEU considers the principle of equal treatment part of the EU primary

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136 *Id.* ¶¶ 31–32.
137 *Id.* ¶ 29.
141 See Sources of European Union Law, European E-Justice Portal, https://e-justice.europa.eu/content_eu_law-3-en.do [https://perma.cc/3WCW-XH2Q] (discussing EU primary law comprises mainly the Treaty on EU, the Treaty on the Functioning of the EU, and the Charter of the Fundamental Rights of the EU, while Regulations and Directives are secondary law).
law, which in the EU legal system is the functional approximation of a Constitution, entails that international agreements to which the EU is a party must abide by the basic constitutional tenets of the EU legal order.\footnote{Koen Lenaerts & Jose A. Gutierrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, 20 COLUM. J. EUR. L. 3, 40–41 (2014).}

In this context, it is also interesting that the Laudamotion judgment, by referring to the principle of equal treatment of passengers who have suffered physical and mental injury, implicitly refers to the fundamental right to physical and mental integrity under Article 3 of the Charter of Fundamental Rights in the EU,\footnote{Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, 396 [hereinafter CFREU] (“Everyone has the right to respect for his or her physical and mental integrity.”).} which is part of the EU primary law. This interpretational aspect is analyzed in the Opinion of the Advocate General, which the Court has followed.\footnote{Opinion of the Advocate General Richard de la Tour in Laudamotion, ECLI:EU:C:2022:224, ¶¶ 27, 46–47 (Mar. 24, 2022).} It is noteworthy that the CJEU often accounts in its judgments for the protection of fundamental rights under the CFREU in the relations between private persons.\footnote{Steven Greer, et al., Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges, 506–12 (2018).}

The protection of fundamental rights when interpreting an international treaty is sanctioned by international law. V.C. Art. 31(3)(c) provides that, alongside the context of the provision to be interpreted, there must be regard to any relevant rules of international law applicable in the relations between the parties. This provision lays down the principle of systemic integration, according to which international treaties are a creation of the international legal system and their operation is predicated upon that fact.\footnote{Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 17, U.N. Doc A/CN.4/L.702 (July 18, 2006).} This enables a coherent application of international law through the interpretational process.\footnote{Id. ¶¶ 18–19.} Systemic integration includes international customary law and general principles of law, thus also internationally recognized human rights,\footnote{Id. ¶ 20; Dörr & Schmalenbach, supra note 106, ¶¶ 99–100.} such as the rights to non-discrimination, to protection of dignity, and to an effective remedy for the protection of potential violations of...
human rights, which are enshrined in the Universal Declaration of Human Rights.\textsuperscript{150}

In addition, to support its interpretation of “bodily injury,” the CJEU referred to the preparatory works of the MC99,\textsuperscript{151} following the comprehensive analysis of the Advocate General.\textsuperscript{152} However, leaving aside that the preparatory works are a subsidiary means of interpretation,\textsuperscript{153} the discussions during the Montreal Diplomatic Conference were inconclusive.\textsuperscript{154} There were disagreements among the delegates on whether mental injury should be explicitly mentioned in the wording of the respective draft provision. The final wording of what became Art. 17(1) formed part of a consensus package, which included various aspects of the liability of the air carrier for death and injury of passengers and was a last-minute attempt to save the conference from failure. In this consensus package, the reference to mental injury was omitted and recovery for such injury was tacitly left to the national courts to decide.\textsuperscript{155} Hence, recourse to the preparatory works of the MC99 does not enable safe conclusions to be drawn.

After adopting a passenger-friendly interpretation of “bodily injury,” the CJEU attempted to consider the interests of the carriers by requiring strong proof of mental injury.\textsuperscript{156} This is again a teleological interpretation, to achieve an “equitable balance of interests,” as mentioned in the preamble of MC99. The CJEU tries to counteract the wide interpretation of “bodily injury” in two ways: First, it uses a wording\textsuperscript{157} which implies that minor mental injuries, such as mere anxiety and stress, will most likely not be recoverable. Second, it imposes a considerable burden of proof on passengers bringing a claim, who need to produce strong


\textsuperscript{151} Case C-111/21 BTv. LaudamotionGmbH (\textit{Laudamotion}), ECLI:EU:C:2022:808, ¶ 26 (Oct. 20, 2022).


\textsuperscript{153} VC, \textit{supra} note 9, at art. 32.

\textsuperscript{154} See Harakas & Lawson, \textit{supra} note 25, ¶¶ 17.02–17.03, ¶ 17.06; Cyril-Igor Grigorieff, \textit{Uniformity and Fragmentation of the 1999 Montreal Convention on International Air Carrier Liability} 133–38 (2022) [hereinafter Grigorieff, \textit{Uniformity and Fragmentation}].

\textsuperscript{155} ICAO Minutes, \textit{supra} note 102, at 201; see also Milde, \textit{supra} note 102, at 853 (advocating for judicial flexibility in the interpretation of “bodily injury” and recognizing that mental injury may be as debilitating as physical injury).

\textsuperscript{156} \textit{Laudamotion}, ECLI:EU:C:2022:808 ¶ 31.

\textsuperscript{157} Id. ("[T]he existence of an adverse effect on his or her psychological integrity . . . of such gravity or intensity such that it affects his or her general state of health . . . .").
evidence to prove their claim, such as medical reports and proof of medical treatment, and that medical treatment was necessary, not merely desirable or useful, to restore the passenger’s general state of health.\footnote{158} In any case, passengers have to prove mental injury “to the requisite legal standard,”\footnote{159} a formulation that can be seen as vague and unhelpful. However, under the principle of procedural autonomy in EU law,\footnote{160} national law governs the standard of proof and there are divergent provisions among EU Member States in this regard.

B. Comparative Perspectives

Currently, the prevailing view on recoverability of mental injuries\footnote{161} is based on the judgment of the US Supreme Court in Floyd, according to which there can be no compensation for purely mental injuries.\footnote{162} After Floyd some courts have ruled that mental injury could be compensated only if it resulted from bodily injury. This has been the majority view in the US\footnote{163} and has been followed by courts in the UK,\footnote{164} Australia,\footnote{165} Canada\footnote{166} and South Africa.\footnote{167} Other courts in the US and the UK have accepted that mental injury may be recoverable, if it results in proven physical manifestations.\footnote{168}

\footnotetext{158}{Id.}
\footnotetext{159}{Id.}
\footnotetext{160}{See, e.g., Case C-33/76 Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland, ECLI:EU:C:1976:188, ¶ 5 (1976); case C-168/05 Elisa María Mostaza Claro v Centro Móvil Milenium SL, ECLI:EU:C:2006:675, ¶ 24 (2006).}
\footnotetext{161}{See Schmid, supra note 80, ¶¶ 4–4b; Pablo Mendes de Leon, Introduction to Air Law, 209 (11th ed. 2022).}
\footnotetext{162}{Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534–52 (1991).}
\footnotetext{164}{King v. Bristow Helicopters, Ltd. [2002] UKHL 7 [128] (Lord Hope) (appeal taken from Scot. and Eng.). See also Stott v. Thomas Cook Tour Operators [2014] UKSC 15 [28].}
\footnotetext{166}{Plourde v. Service Aérien FBO, Inc. [2007] QCCA 739 [56]–[59].}
although the necessary standard of proof for the claimant could be high. Another interpretation of Art. 17(1) holds that mental injury is recoverable, provided that it is traceable to an “accident” that has caused bodily injury too, even if such injuries are unconnected.

It is noteworthy that in *Floyd* the US Supreme Court expressly declined to address the issue as not being subject to the case before it—thus not excluding the recovery of mental injuries, as long as there is a physical manifestation of them. Nonetheless, an obiter in the subsequent *Tseng* judgment indicates that the Supreme Court would be disinclined to allow recovery for such injuries.

Be that as it may, there was a significant line of US judgments before *Floyd* allowing recovery for pure mental injury that resulted from an “accident,” at least where there was a physical manifestation of such injuries. Recovery for pure mental injury has also been accepted by the Supreme Court of Israel, the Court of Appeals of Madrid and, reportedly, the Highest Court of

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*also* King v Bristow Helicopters, Ltd. [2002] UKHL 7 [3]–[4] (Lord Nichols), [8] (Lord Mackay), [143], [175], [178] (Lord Hobhouse) (accepting that physical impairment to the brain may qualify as “bodily injury”).

King, UKHL 7 [3]–[4] (Lord Nichols), [8] (Lord Mackay), [20] (Lord Steyn), [125]–[26], [128]–[29] (Lord Hope), [143], [181]–[82] (Lord Hobhouse); *see also* Ruwantissa Abeyratne, *Liability For Personal Injury and Death under the Warsaw Convention and its Relevance to Fault Liability under Tort Law*, XXI ANNALS OF AIR & SPACE L. 1, 21–22 (1996).


Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) (“We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. . . . [W]e express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.”).

El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 172 (1999) (“Tseng and El Al chose not to pursue in this Court the question whether an ‘accident’ occurred, for an affirmative answer would still leave Tseng unable to recover under the treaty; she sustained no ‘bodily injury’ and could not gain compensation under Article 17 for her solely psychic or psychosomatic injuries.”).


In Germany, legal doctrine required that mental injury should be connected with the bodily injury, but not necessarily flow therefrom.178

C. A GRADUAL SHIFT INTO A NEW PARADIGM UNDER THE MC99?

The Laudamotion judgment is of great importance, because it signals the departure from a long tradition—which many writers think has been overdue.

In legal writings, already under the regime of the WC29, there had been voices advocating for recoverability of damages for mental injury.179 These voices have increased under the regime of the MC99. They point to the fact that MC99 is a new, separate convention, developed to correspond to the modern needs of protection of passengers as consumers, as opposed to the WC29, whose main objective was to protect the then nascent aviation industry.180 They also refer to the view in medical science, which rejects the mind-body dichotomy and renders the view adopted by the courts as parochial.181

The practical effect of the CJEU judgment in Laudamotion is very similar to the line of case law that accepts that chemical alterations to the brain are physical brain injuries and can be

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178 Ruhwedel, Das Montrealer Úbereinkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr vom 28.5.1999, 24 Transporecht (TransR) 189, 198 (2001) [hereinafter Ruhwedel (TransR)]; Andreas Kadletz, Das neue Montrealer Übereinkommen vom 28.5.1999 über den internationalen Luftbeförderungsvertrag (“Neues Warschauer Abkommen”), 51 Versicherungsrecht (VersR) 927, 932 (2000); REUSCHE, supra note 83, at art. 17, ¶13; but see Schmid, supra note 80, ¶ 4a (arguing that mental injury must result from bodily injury and rejecting the ruling of Doe v Etihad Airways).
recoverable upon appropriate evidence.\textsuperscript{182} Furthermore, this line of thinking is similar to the view that mental injury can be recoverable, to the extent that it is caused by the same “accident” that has caused a bodily injury, even if these injuries are unrelated to each other.\textsuperscript{183} The common element of these approaches is twofold. First, despite the almost identical wording of Art. 17(I) in both the MC99 and the WC29, the objective of the MC99 is focused on effective passenger protection and is different that the objective of the WC29, which aimed at protecting the then young aviation industry.\textsuperscript{184} Second, the mental injury must be well documented and proven before the trial court.\textsuperscript{185}

The interpretation of “bodily injury” by the CJEU appears idiosyncratic, when compared to the judgments of courts in other signatories of the MC99. However, the regulatory influence of EU law is quite strong, especially regarding passenger protection. This is indicated by the fact that numerous countries have enacted passenger-protection rules, after EU261\textsuperscript{186} came into force.\textsuperscript{187} If such influence is combined with the above-mentioned views outside the EU on a broad meaning of “bodily injury,” then a new paradigm in the interpretation of “bodily injury” may be emerging.

Hence, since the CJEU judgment in\textit{ Laudamotion}, pure mental injury is recoverable in the EU MS.\textsuperscript{188} It would be interesting to see how this judgment will be received by courts outside the EU, especially by courts in non-common law jurisdictions, who may have less strong interpretational traditions in this regard.

\textsuperscript{182} Weaver v. Delta Airlines, Inc., 56 F. Supp. 2d 1190, 1192 (D. Mont. 1999); see also King v. Bristow Helicopters, Ltd. [2002] UKHL 7, at [3]–[4] (Lord Nichols), [8] (Lord Mackay), [143], [175], [178] (Lord Hobhouse) (accepting that physical impairment to the brain may qualify as “bodily injury”).

\textsuperscript{183} See, e.g.,\textit{ Doe v. Etihad Airways}, 870 F. 3d 406, 433–34 (6th Cir. 2017); Ruhwedel, TransR,\textit{ supra} note 178, at 193; Kadletz,\textit{ supra} note 178, at 932; Reuschle,\textit{ supra} note 83, at art. 17, ¶ 11.

\textsuperscript{184} See Weaver, 56 F. Supp. 2d, at 1192.

\textsuperscript{185}\textit{ Id}.

\textsuperscript{186} Regulation 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, 2004 OJ (L 46) 1, 1 (EC), repealing Regulation 295/91 (EEC).


\textsuperscript{188} Grigorieff, Case Laudamotion,\textit{ supra} note 107, at 129.
VI. “ACCIDENT” AND EXCLUSIVITY OF THE MONTREAL CONVENTION

Closely connected with the notion of “accident,” although not yet resolved by the CJEU, is the issue of exclusivity of the Montreal Convention. Art. 29 MC 99 reads as follows:

“Basis of claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

The wording of MC99 Art. 29 is similar to its predecessor, WC29 Art. 24, which provided that any action for damages, however founded, can only be brought subject to the conditions and limits set out in that convention. The purpose of MC99 Art. 29 is to ensure that the Convention’s provisions will not be circumvented through application of national law, which would undermine the harmonizing effect of the Convention’s rules.

A. DIVERGENT APPROACHES TO EXCLUSIVITY

MC99 Art. 29 has not been uniformly interpreted.189 Common-law jurisdictions had adopted an expansive view on the effect of Art. 24 WC29, following the judgment of the US Supreme Court in Tseng.190 According to this view, if a set of facts within the ambit of the Convention did not satisfy the conditions of liability provided in the Convention, then there was no cause of action whatsoever—even if the same set of facts would undoubtedly establish a cause of action under national law.191 Uniformity of application of the Convention’s rules and legal certainty for air carriers were paramount, when interpreting WC29 Art. 24.192 The same line of

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189 See Opinion of AG Emiliou in Case C-510/21 DB v. Austrian Airlines AG (Austrian Airlines (first aid on board an aircraft)), ECLI:EU:C:2023:19, ¶¶ 24–50 (Jan. 12, 2023) (providing a concise analysis); see also Laurent Chassot & Paul S. Dempsey, Art. 29, in THE MONTREAL CONVENTION, A COMMENTARY ¶¶ 29.10–29.11 (George Leloudas et al. eds, 2023) (providing an extensive analysis).
191 Tseng, 525 U.S. at 176.
192 Id. at 169–71.
interpretation has been followed regarding MC99 Art. 29. As a result, US courts have dismissed a wide variety of claims because the requirements of an “accident” and/or “bodily injury” were not fulfilled, such as claims for assault during security controls of passengers,\(^\text{193}\) racial discrimination,\(^\text{194}\) fraud,\(^\text{195}\) defamation,\(^\text{196}\) malicious prosecution,\(^\text{197}\) false imprisonment\(^\text{198}\) and other instances.\(^\text{199}\) Tseng has been followed by the courts of Canada,\(^\text{200}\) the UK,\(^\text{201}\) Australia\(^\text{202}\) and New Zealand\(^\text{203}\) for various claims, including violation of the Official Languages Act of Canada\(^\text{204}\) and violation of the rights of passengers with disabilities.\(^\text{205}\) Thus, under such interpretation, if a set of facts occurs during the flight or in the course of embarkation or disembarkation, then passengers may only recover under the conditions of the MC99—otherwise, there is no recovery at all.

Nonetheless, some jurisdictions in continental Europe have adopted a more restrictive approach. Under this approach, the WC29 and the MC99 do not preclude the application of national law for claims based on facts that occur during air carriage, but lie outside the Convention’s ambit, for example, claims brought under domestic provisions for denied boarding\(^\text{206}\) or for infringement of personality rights due to discriminatory and offensive

\(^{193}\) Id. at 160–161.


\(^{195}\) See generally Mbaba, 457 F.3d 496.

\(^{196}\) Eid v. Alaska Airlines, Inc., 621 F.3d 858, 873–74 (9th Cir. 2010) (clarifying only to the extent that the alleged facts occurred while the passenger was on board the aircraft or in the course of embarkation or disembarkation).

\(^{197}\) Thede v. United Airlines, Inc., 796 Fed. Appx. 386, 389 (9th Cir. 2020) (noting that, following Eid, the claim is preempted by the MC99 to the extent that the alleged facts occurred while the passenger was on board the aircraft or in the course of embarkation or disembarkation).

\(^{198}\) Dagi v. Delta Airlines, 961 F.3d 22, 34 (1st Cir. 2020).


\(^{201}\) Dagi v. Delta Airlines, 961 F.3d 22, 34 (1st Cir. 2020).


\(^{204}\) See generally Thibodeau, 3 S.C.R. 340.

\(^{205}\) See generally Stott, [2014] UKSC 15.

\(^{206}\) E.g., BGH NJW, supra note 123.
behavior of the air carrier. The practical challenge with this approach is the need to distinguish between the dismissal of the claim under the MC99 and the applicability of national liability rules: the former should not automatically lead to the latter, otherwise the harmonizing effect of the Convention would disappear. Thus, there should be a clear distinction between liability claims that do fall under the Convention’s scope and claims that do not. In Germany and Austria, this distinction had been based, in part, on the causal link between the passenger’s accident and the materialization of a risk typical to air travel, i.e., national liability law was applicable if the accident was not due to such risk. Nonetheless, this criterion has been rejected since the Niki Luftfahrt judgment of the CJEU.

At the same time, EU261 regulates passenger rights in the event of denied boarding, cancellation of flights and delay in flight departures. These rules include standardized compensation to passengers for denied boarding and cancellation, while the CJEU has extended the scope of these rules to include delays in arrivals. The CJEU has repeatedly held that such rights to compensation do not violate MC99 Art. 29, since they lie outside the Convention’s scope. Although these judgments have been


heavily criticized by aviation lawyers,\textsuperscript{213} national legislation on passenger rights for flight disruptions has been adopted in many jurisdictions worldwide.\textsuperscript{214}

B. **Ramifications of the CJEU Case Law on Art. 17**

So far, the CJEU has not ruled on the effect of MC99 Art. 29 on personal injuries. The *Austrian Airlines (First aid on board an aircraft)* judgment\textsuperscript{215} could have provided the opportunity to do so. However, the CJEU tacitly deemed it unnecessary in view of the particular facts and following the (non-binding) opinion of the Advocate General, who urged the Court to reserve such ruling for more opportune cases, such as discrimination claims.\textsuperscript{216}

If the CJEU is called to clarify the scope of Art. 29 in relation to personal injury claims of passengers, there are two possible scenarios.

Under the first scenario, the broad interpretation of the requirements of MC99 Art. 17(1) will result in rulings that damages are recoverable for personality-infringement type of claims, such as the ones that had been rejected in common-law jurisdictions. For example, discriminatory behavior of the air carrier or failure to protect the rights of passengers with reduced mobility may well be an “accident.” Since “bodily injury” is interpreted to cover pure mental injury, including the one caused by such behavior, then it is very likely that cases like *Thibodeau*,\textsuperscript{217} *Stott*,\textsuperscript{218} *King*,\textsuperscript{219} *Mbaba*,\textsuperscript{220} etc. will be decided in favor of the claimants. This scenario is more likely, because it would both represent a logical extension of


\textsuperscript{214} See supra note 187; see also Int’l Air Transp. Ass. v. Canadian Transp. Agency, 2022 FCA 211, at 42 (finding the Canadian rules on passenger rights compatible with the MC99, applying a reasoning similar to that of the CJEU in such cases. An appeal before the Canadian Supreme Court was pending when this article was written).


\textsuperscript{216} Opinion of AG Emiliou, ECLI:EU:C:2023:19, ¶¶ 53–54 (Jan. 12, 2023).


\textsuperscript{218} See generally *Stott* v. Thomas Cook Tour Operators [2014] UKSC 15.


\textsuperscript{220} See generally *Mbaba* v. Societe Air France, 457 F.3d 496 (5th Cir. 2006).
the CJEU case law and avoid complicated distinctions of liability claims of passengers. Besides, the reason that the courts in common-law jurisdictions have rejected such passenger claims lies in the narrower interpretation of “accident” and “bodily injury.”

The alternative, less likely scenario would be that the CJEU finds that such cases are not covered by MC99 Art. 17(1). Yet even then, the current case law of the CJEU renders it highly doubtful that the Court will adopt a broad interpretation of MC99 Art. 29. The CJEU lays particular weight on effective passenger protection, taking into account constitutional tenets of the EU legal order, such as the principle of equal treatment and the fundamental right to physical and mental integrity. Moreover, its judgments on the relation between MC99 and EU261 indicate that the CJEU would prefer a narrower approach to exclusivity, namely that domestic law would govern such cases.

VII. THE INTERPRETATIONAL PRINCIPLES APPLIED BY THE CJEU JUDGMENTS ON MC99

The analysis of the CJEU judgments on MC99 Art. 17(1) reveals two core construction elements: (a) the interpretational criteria of the Vienna Convention, and (b) the fundamental principles of the EU legal order, especially the equal treatment of passengers.

First, the CJEU applies the interpretational criteria laid down in the Vienna Convention on the Law of Treaties, starting from the wording of the provision and proceeding to its purpose and context, while also considering the preparatory works of the MC99. Yet the Court demonstrates a clear preference for the teleological interpretation of the MC99, apparently following the civil-law tradition, which often emphasizes the legislative purpose of the provisions under interpretation. The objective of effective consumer protection seems to be at the forefront of the Court’s argumentation, although the Court is also concerned with achieving a fair balance of interests between passengers and carriers.

Second, the Court underlines the need to respect fundamental principles of the EU legal order, especially the principle of equal treatment, as applied to passengers. At the same time, the Court accounts for fundamental-rights aspects of the provisions it is called to interpret, like the right to physical and mental integrity. As a result, it tends to interpret the wording of the MC99 in the light of such fundamental principles and rights, even if such

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221 See John Balfour & Tom van de Vij ngaart, Montreal Convention: To whom is the Carrier Liable in the Event of Delay?, 41 AIR & SPACE L. 511, 512 (2016).
interpretation would, in the eyes of some lawyers, contradict the clear wording of the Convention.

It is also noteworthy that the CJEU does not appear to pay particular attention to the issue of uniform interpretation of the MC99—an issue of special interest for the air carriers and their insurers. Contrary to the practice of courts in many other jurisdictions, the CJEU does not comment on foreign judgments, not even on judgments of courts within the EU. This may give the impression that the CJEU is not concerned about international uniformity of application and international comity. However, the main reason for such omission lies in that the Court interprets the MC99 autonomously both as an international convention and as part of the EU legal order, notwithstanding the different meanings given to MC99 concepts in the domestic laws of the States Parties to the MC99 and of the EU Member States. Moreover, as EU law belongs mostly to the legal family of civil law, the CJEU adheres to the tradition of civil-law countries, in which consideration of foreign judgments when interpreting the law is not very common. Besides, one might also argue that international comity motivates the Court to abstain from commenting on judgments of non-EU supreme courts, especially the US Supreme Court, since the CJEU has so far chosen to adopt its own, different views.

VIII. CONCLUSION

In conclusion, the judgments of the CJEU on MC99 Art. 17(1) have broadly interpreted the notion of “passenger,” “accident” and “bodily injury.” The interpretation of “passenger” does not differ from the established case law in other jurisdictions. However, some aspects of the interpretation of “accident” and the interpretation of “bodily injury,” which form the core of the air carriers’ liability for personal injury, depart significantly from the currently prevailing view among courts internationally.

In defining “accident,” the CJEU has correctly rejected the connection of the harmful event with risks inherent in air travel, which corresponds to the prevalent view in most jurisdictions. Yet at the same time, the Court differentiated itself internationally by rejecting the requirement of externality and introducing the

222 Id. at 514; Lawson, supra note 107, at 7–8 (suggesting that the CJEU should have made such references).

requirement of unwillingness to the harmful event. The “externality” of the event was one rare aspect in MC99, on which there was almost undisputed international unanimity. Its abandonment is likely to lead to unfair results for air carriers, since it practically attributes the role of insurers of the passengers’ health to them. The “unwillingness” is a new element, which might produce unfair results for passengers, especially where they willingly receive medical treatment. Hence, the departure of the CJEU from the established definition of “accident” is not a very fortunate choice.

On the contrary, the broad interpretation of “bodily injury” to include pure mental injury of a considerable gravity is to be welcomed. What at first sight appears as a clear wording of Art. MC9917(1) becomes less clear, if it is read in the light of the objective of the MC99 as a modern treaty to regulate a highly developed industry and to protect the interests of passengers as the weaker party to the contract of carriage. The strict separation of the physical from mental injuries, as applied mainly by the majority of US trial and appellate courts after Floyd, has hardly any medical basis (which from a legal perspective renders it rather formalistic and, perhaps, anachronistic).²²⁴ Moreover, such separation of injuries, combined with the broad interpretation of MC99 Art. 29 on the exclusivity of the MC99, has occasionally resulted in outcomes that could be characterized as breaches of internationally protected fundamental human rights, such as the right to human dignity and the right to non-discrimination. In the context of systemic integration of international human rights in the interpretation of the MC99, as entailed by VC Art. 31(3)(c), outcomes of this kind are to be avoided.

The CJEU has not yet ruled on the scope of MC99 Art. 29 regarding the effect of the Convention’s exclusivity on personal injury claims of passengers. However, the broad interpretation of “accident” and “bodily injury” deprives the issue of exclusivity of most of its practical consequences, since these emerge under the narrower interpretation of these terms.

From a methodological perspective, the CJEU has a clear preference for a teleological interpretation of MC99 Art. 17(1). It emphasizes the objective of effective passenger protection and the equal treatment of passengers. Balancing the interests of passengers and air carriers is also a concern for the Court, but mostly as a kind of mitigation measure, after effective passenger protection

has been achieved. International uniformity of application is mentioned in the Court’s judgments, although the Court in practice focuses on the uniform application of Art. 17(1) within the EU.

The reduced emphasis of the CJEU on international uniformity has been criticized as creating international legal uncertainty and encouraging forum shopping. However, such criticism, with the exception of the “externality” requirement of an accident, is not well founded. Already before the CJEU rendered its judgments, there had been divergent views among courts internationally on the key notions of MC99 Art. 17(1), especially on the “accident” and the “bodily injury.” Even in the US, where the US Supreme Court has played a major unification role in the interpretation of Art. 17(1), there is no uniform application of these provisions. Besides, fragmentation and forum shopping are issues inherent in the MC99, given the multiple jurisdictions provided for under MC99 Art. 33 and the fact that some important legal issues, such as legal standing to bring a claim and the quantum of damages, are determined by national law.

In this regard, the CJEU judgments are contrasted with judgments in other jurisdictions, especially of the common-law tradition, which underline the need for uniformity, legal certainty and predictability, and could be more helpful to air carriers and their insurers. This reflects also different underlying policy priorities.

225 See Lawson, supra note 107, at 11; Grigorieff, Case Laudamotion, supra note 107, at 129.


227 MC99, supra note 1, at art. 33 (“Jurisdiction 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier’s aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. 3. For the purposes of paragraph 2, (a) ‘commercial agreement’ means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air; (b) ‘principal and permanent residence’ means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard. 4. Questions of procedure shall be governed by the law of the court seised of the case.”).
The EU, both at the legislative and judicial level, seems to have adopted a more protective (some might even say paternalistic) stance as to consumers, whereas the US and other common-law countries appear to favor a pro-business approach despite the risk of gaps in the passenger protection in some cases. Moreover, one should not underestimate the role of legal precedents in common-law jurisdictions, which had developed a rich body of case law under the Warsaw System. The situation in the EU is different, not only because it is a legal order of the civil-law tradition, but also because the CJEU had no jurisdiction to rule on the Warsaw System—factors that facilitate a fresh look at some key notions of the MC99.

Another notable difference between the judgments of the CJEU and those of supreme courts mainly in common-law jurisdictions is the length of their analysis. The judgments of the CJEU have been criticized for being too brief and not providing extensive analysis on core issues. Apart from differences in legal traditions, where the judgments of the highest courts in common-law jurisdictions tend to be more analytical compared with respective judgments in civil-law jurisdictions, there are practical reasons that explain, though not necessarily justify, the briefer analysis of the CJEU. The CJEU consists of 27 judges, plus 11 Advocates General issuing non-binding opinions, who decided 808 cases in 2022 and 772 cases in 2021. By comparison, the US Supreme Court consists of 9 Justices, who decided 58 cases in the term 2022–2023 and 66 in the term 2021–2022; in the UK, the UK Supreme Court (UKSC) and the Judicial Committee of the Privy Council (JCPC) is composed by 12 Justices, who decided 98 cases in 2022 (38 UKSC cases and 60 JCPC cases) and 94 cases in

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229 Arthern v. Ryanair DAC [2003] EWHC (KB) 46 [34] (Eng.) (observing that the brief reasoning of the CJEU in the Austrian Airlines (exoneration of the air carrier from liability) case provides a judgment with low persuasive value); Lawson, supra note 107, at 9–10.
232 See STATISTA, Number of cases decided by the Supreme Court of the United States from 2010 to 2023 by term, https://www.statista.com/statistics/1326129/number-supreme-court-cases-decided-term-us/#statisticContainer) [https://perma.cc/T388-ZDXB] (noting that it is estimated that around 7,000–8,000 are filed to the U.S. Supreme Court each term).
2021 (60 UKSC cases and 34 JCPC cases). Thus, the CJEU has a much heavier workload, which results in briefer reasoning of its judgments.

From a wider perspective, the CJEU judgments may become an alternative interpretational pole to the case law of the US Supreme Court. The impact of the US Supreme Court rulings, apart from their high quality, can be traced to the fact that they were rendered by the supreme court of a global superpower, which is both the biggest aviation market and a common-law jurisdiction—thus rendering them highly influential worldwide, especially in other common-law jurisdictions. One of the very few highest courts worldwide that can approximately match such qualities is the CJEU: in the domains of its jurisdiction, it is the highest authority within the EU, which is a major aviation market, while the national courts in the 27 EU MS jurisdictions will not deviate from its rulings, save for very special circumstances. These factors, combined with the great regulatory influence of the EU261 in air passenger protection, might render the interpretational views of the CJEU attractive to other courts worldwide. Such attractiveness is likely to be stronger in jurisdictions that adhere to the civil-law tradition and are generally influenced by the law of countries in continental Europe, such as jurisdictions in Latin America and certain jurisdictions in North and Central Africa, and Eastern Asia. However, even common-law jurisdictions are likely to be influenced at least indirectly, by adopting more passenger-friendly approaches.

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233 The Supreme Court and Judicial Committee of the Privy Council, Annual Report and Accounts 2022-2023, at 4, https://www.supremecourt.uk/docs/annual-report-2022-2023.pdf [https://perma.cc/2CPU-PQYM]. The Judicial Committee of the Privy Council originated as the highest court of civil and criminal appeal for the British Empire and still fulfils the same purpose for many Commonwealth countries, the UK’s overseas territories, crown dependencies, and military sovereign base areas. It is composed of normally five judges regarding Commonwealth appeals, and three for other matters, who are usually Justices of the Supreme Court. See The Judicial Committee of the Privy Council, https://www.jcpc.uk/about/judicial-committee.html [https://perma.cc/W49U-Z8E2].

234 See Int’l Civil Aviation Org., Sec. Gen., Assistance to Passengers In Case of Airport/ Airline Disruptions, C-WP/14804 (Sept. 13, 2018); see also Int’l Civ. Aviation Org., Database on Consumer Protection Rules at 187 (indicating that many passenger-protection statutes worldwide were enacted after the EU261 came into force and were influenced therefrom).

235 Cf. Deep Vein Thrombosis & Air Travel Group Litigation [2005] UKHL 313 [79] (appeal taken from Eng.) (“Unless cases emerge from other jurisdictions at the equivalent level of the Supreme Court in the United States of America, or the House of Lords here, it is difficult to envisage very many cases involving this aspect of Article 17 in which an expansive disquisition about the authorities would hereafter either be necessary or appropriate, whether from counsel in argument, or for that matter in the judgment of the court.”).
in the interpretation of Art. 17(1), although such approaches may still differ from the ones of the CJEU.

In all, the CJEU has taken its own stance in the legal discourse on the interpretation of Art. 17(1) MC99. This has created legal clarity within the EU, to the detriment of the uniform application of the MC99 globally, and has the potential to exert influence outside the EU. However, the wider effect of the CJEU judgments remains to be seen.