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Smart consumer goods and digital content: international jurisdiction and law applicable to the claims of consumers

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RÉSUMÉ

La contribution porte essentiellement sur la compétence internationale et le droit applicable dans les cas où les consommateurs souhaitent faire valoir leurs droits en matière de défaillance d'objets connectés et de contenu numérique. Aux termes de cet article, les nouvelles directives sur le contenu numérique et les ventes aux consommateurs ne suscitent pas réellement de nouvelles difficultés en matière de compétence internationale des consommateurs ou de droit applicable. Toutefois, dans les cas où un contrat de vente d'un objet connecté est interconnecté avec un contrat de services numériques, la dichotomie des contrats se reflète dans la compétence et le droit applicable: il peut arriver que les juridictions compétentes et le droit applicable d'un contrat de vente d'un objet connecté soient différentes des juridictions compétentes et du droit applicable au contrat interconnecté de services numériques. Il est en outre avancé que les dispositions du droit national des contrats qui vont au-delà du contenu des directives sur le contenu numérique et les ventes aux consommateurs ne devraient pas, en règle générale, être considérées comme des lois de police au sens de l'article 9 du Règlement Rome I. L'article analyse également les règles européennes en matière de compétence et de loi applicable en matière de responsabilité du fait des produits et conclut que, dans la plupart des cas, la jurisprudence de la Cour de justice confère de facto la compétence aux juridictions du demandeur en faveur des consommateurs ayant subi un dommage physique ou à leur propriété en raison d'un objet connecté. Pour les atteintes à la vie privée – qui constituent également un risque important en matière d'objets connectés et de contenu numérique – la compétence des juridictions du demandeur découle également de l'article 79, 2., du RGPD.

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SAMENVATTING

Het artikel concentreert zich op de internationale bevoegdheid en het toepasselijk recht in gevallen waarin consumenten hun aanspraken op grond van gebrekkige smart goods en digitale inhoud willen doen gelden. Het toont aan dat de nieuwe richtlijnen inzake digitale inhoud en consumentenkoop niet veel nieuwe problemen opleveren met betrekking tot de internationale bevoegdheid of de toepasselijke rechtsregels. In gevallen waarin een verkoopovereenkomst van een smart good gekoppeld is aan een overeenkomst voor digitale diensten, komt de tweedeling van overeenkomsten echter tot uiting in de bevoegdheid en het toepasselijk recht: het kan gebeuren dat de bevoegdheid en het toepasselijk recht van een verkoopovereenkomst van een smart good afwijken van de bevoegdheid en het toepasselijk recht van de gekoppelde overeenkomst voor digitale diensten. Voorts wordt aangevoerd dat nationale bepalingen in het verbintenissenrecht die de regels van de richtlijnen inzake digitale inhoud en consumentenkoop vergulden, in de regel niet mogen worden beschouwd als bijzonder dwingend recht in de zin van artikel 9 van de Rome I-Verordening. Het artikel analyseert ook de Europese bevoegdheids- en collisieregels inzake productaansprakelijkheid en concludeert dat de rechtspraak van het Hof van Justitie in de meeste gevallen consumenten die gezondheids- of zaakschade hebben geleden als gevolg van een smart good de facto bevoegdheid verleent in hun eigen jurisdictie. Voor inbreuken op de privacy – ook een belangrijk risico in het geval van smart goods en digitale inhoud – vloeit diezelfde bevoegdheid ook voort uit artikel 79, 2. van de AVG.

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The article concentrates on international jurisdiction and applicable law in cases where consumers wish to assert their claims due to defective smart goods and digital content. It shows that the new digital content and consumer sales directives do not create many new problems concerning international consumer jurisdiction or applicable law rules. However, in cases where a sales contract of a smart good is interconnected with a digital services contract, the dichotomy of contracts is reflected in the jurisdiction and applicable law: it may happen that the jurisdiction and applicable law of a sales contract of a smart good deviates from the jurisdiction and applicable law of the interconnected contract for digital

services. It is further argued that domestic contract law provisions goldplating the rules of digital content and consumer sales directives should, as a rule, not be considered overriding mandatory norms within the meaning of Article 9 of Rome I Regulation. The article also analyses the European jurisdiction and conflict of law rules on product liability and concludes that in most cases the jurisprudence of the Court of Justice affords consumers who have suffered health or property damage due to a smart good a *de facto* plaintiff jurisdiction. For privacy infringements – also an important risk in case of smart goods and digital content – the plaintiff jurisdiction also derives from Article 79, 2. of GDPR.

1. INTRODUCTION

1. The adoption of the new digital content directive² (DCD) and consumer sales directive³ (CSD) in late spring 2019 have brought about intense academic discussion on the new rules on “digital contracts” and consumer protection. As contracts concerning smart consumer goods and digital content often have cross-border nature, it is logical to ask how private international law deals with such contracts. For instance, do the rules on “goods with digital elements” in the new directives raise new legal questions concerning jurisdiction and applicable law, and if yes, can they be reasonably solved under the existing regimes of the Brussels *Ibis* Regulation⁴ and the Rome I Regulation?⁵ Are

the provisions of the new directives to be considered mandatory norms within the meaning of Article 9 of Rome I and would the status of mandatory norms even be necessary for protecting European consumers?

2. The effective protection of consumers who have suffered bodily harm or property damage due to defective smart goods or digital content depends not only on their contractual claims but also upon whether, where and how they can assert claims against producers under product liability rules. Therefore, the second part of the article looks at the jurisdiction and applicable law rules in the area of product liability

² The research leading to this article was supported by the Estonian Research Council's grant no PRG124. Directive (EU) No. 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (*OJ L* 136, 22 May 2019, p. 1-27).
³ Directive (EU) No. 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods (*OJ L* 136, 22 May 2019, p. 28-50).
⁴ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ L* 351, 20 December 2012, p. 1-32).
⁵ 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 L* 177, 4 July 2008, p. 6-16).

under the existing EU law and the jurisprudence of the Court of Justice of the European Union (CJEU), mapping the possibilities of consumers to claim damages at the courts of their

habitual residence as well as to rely upon their “home law” while doing so.

2. INTERNATIONAL JURISDICTION IN CONSUMER CONTRACTS OVER SMART CONSUMER GOODS AND DIGITAL CONTENT OR DIGITAL SERVICES

3. As is well known, Brussels *Ibis* Regulation provides consumers with a privileged jurisdiction regime: in cases defined in Article 17, 1. of Brussels *Ibis*, a consumer may be sued only in the courts of the Member State of his domicile and he is also entitled to file a claim against the trader there.⁶ Pursuant to Article 19 of Brussels *Ibis*, jurisdiction agreements to the detriment of consumers are invalid, as a rule. Therefore, in these cases the trader bears the risk of ending up in litigation abroad. In addition to credit-financed consumer sales contracts, consumer contract jurisdiction rules are also applicable if “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”.⁷ The CJEU has given guidance on the interpretation of what constitutes “direction of trader’s activities to consumer’s Member State” in several judgments, starting with the famous *Alpenhof/Pammer* decision⁸ followed by *Mühlleitner*⁹ and *Emrek*¹⁰ judgments and has interpreted the concept of “direction of activities” remarkably widely.¹¹ The new digital content and consumer sales directives do not create many new problems concerning these international consumer jurisdiction rules of Brussels *Ibis* Regulation. Yet, one specific issue does arise, and this concerns buying goods with interconnected digital services, eg a smart car with a digital navigation system or a smart home system which consists of both hard- and software.

4. Namely, as the starting point, the directives are based on the assumption that the sales contract of such a smart good also covers the ancillary/interconnected digital services. This is so if two cumulative conditions are met: a) the digital service is inter-connected with the good in such a way

that the absence of that digital service would prevent the good from performing its functions¹²; and b) the digital service is provided with the good under the sales contract.¹³ However, the recitals of the directives reveal that there is a great deal of room left for party autonomy with the consequence that in many cases the consumer will have one contract with the hardware seller and the other with the software/digital services producer.¹⁴

5. To start with, recital (15) CSD stresses that whether or not inter-connected digital service forms part of the sales contract depends upon the sales contract. And if the consumer concludes a contract for the supply of digital content or a digital service which does not form part of the sales contract, that contract should be considered to be separate from the sales contract, even if the seller acts as an intermediary of the digital services contract with the third-party supplier.¹⁵ Recital (16) CSD expressly allows for a situation where the consumer buys a smart phone without a specific operating system and the consumer subsequently concludes a contract for the supply of an operating system from a third party. We can also use the example brought by *Carvalho*: if the consumer buys a car with no GPS application installed and then “buys” the latest version of a GPS application over the Internet there are two contracts, one of which is a sales contract of the car and the other a digital services contract for the GPS application.¹⁶

6. This dichotomy of contracts is reflected also in the jurisdiction and applicable law: in specific cases it may happen that the sales contract of a smart good (eg a connected car) underlies jurisdiction and applicable law other than the inter-connected contract for digital services (eg a navigation and entertainment system of that car). For example, an Esto-

⁶ Art. 18 of Brussels *Ibis* Regulation.

⁷ Art. 17, 1., (c) of Brussels *Ibis* Regulation.

⁸ CJEU 7 December 2010, *Peter Pammer / Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH / Oliver Heller*, ECLI:EU:C:2010:740.

⁹ CJEU 6 September 2012, *Daniela Mühlleitner / Ahmad Yusufi and Wadat Yusufi*, ECLI:EU:C:2012:542.

¹⁰ CJEU 17 October 2013, *Lokman Emrek / Vlado Sabranovi*, ECLI:EU:C:2013:666.

¹¹ For an overview see F. M. WILKE, “Verbraucherschutz im internationalen Zuständigkeitsrecht der EU – Status quo und Zukunftsprobleme”, *Europäische Zeitschrift für Wirtschaftsrecht* 2015, Issue 1, p. 13 *et seq.*

¹² Art. 2, 5., (b) CSD.

¹³ Art. 3, 3. CSD.

¹⁴ K. SEIN and G. SPINDLER, “The new Directive on Contracts for the Supply of Digital Content and Digital Services. Scope of Application and Trader’s Obligation to Supply. Part 1”, *European Review of Contract Law* 2019, 15(3), p. 257-279.

¹⁵ Recital (16) CSD.

¹⁶ See J. MORAIS CARVALHO, “Sale of Goods and Supply of Digital Content and Digital Services. Overview of Directives 2019/770 and 2019/771”, *EuCML – Journal of European Consumer and Market Law* 5, 2019, p. 197.

nian consumer goes to Poland and decides to buy a new Mercedes from the local trader: here the consumer cannot rely upon his home jurisdiction as the contract does not fall under the scope of Article 17 of Brussels *Ibis*.¹⁷ Then he goes back to Estonia and concludes a contract for Mercedes MeConnect digital services package: as the trader (Mercedes-Benz) clearly directs its digital services to Estonia, the specific consumer contract jurisdiction (consumer's habitual residence) under Articles 17, 18 of Brussels *Ibis* is available to the consumer.¹⁸ The same is true if a consumer buys a smart home system or a smart watch from a Latvian department store but then installs it at home in Estonia and successfully concludes a "license agreement" there.

7. It can therefore happen that the jurisdiction for asserting claims over the defects of the good (the car or the smart home system) and the jurisdiction for defects in digital services deviate from each other. In many cases, however, it is hard to determine whether a particular problem is due to the defects of the car (or the watch) or that of the inter-connected digital service. The possibility of Article 8, 1. of Brussels *Ibis* to pursue connected claims against multiple co-defendants before the court of the state where any one of the co-defendants is domiciled does not offer real protection as it operates only upon general jurisdiction and not special jurisdiction such as Article 18, 1. of Brussels *Ibis*.¹⁹ Consequently the consumer faces an additional burden of filing two separate claims in two separate jurisdictions even though the claims are very much connected to each other. The risk of contradicting judgments is considerable as well.

8. In order to reduce these negative consequences, one could argue that the interpretation developed by the Court of Justice in the *Maletic*²⁰ case should be applied to such inter-connected contracts of consumer sales and digital services. In *Maletic* – still decided under the "old" Brussels I Regulation – the Court of Justice allowed consumers who had

booked a package holiday via a website intermediary to sue both the intermediary as well as the tour operator before the court of their domicile. The Court considered these two contracts to be "inseparably linked"²¹ – an argument that could be valid also for sales contracts with inter-connected digital services contracts. The CJEU also took notice of the objectives of protecting the consumer as the weaker party and of minimising the possibility of concurrent proceedings and therefore irreconcilable judgments and found that these objectives preclude a solution which would force the consumer to pursue parallel proceedings before different courts.²² However, it would be too far-reaching to apply it also to the sales of smart goods with digital content/services and to allow the consumer to sue both contract parties at his domicile. This would put the seller into a considerably worse jurisdictional position than he otherwise would have been. Moreover, the consumer's home jurisdiction would be totally unforeseeable to the seller. In order to avoid contradicting judgments, I would therefore argue that these contracts are inseparably linked but I would allow the consumer to sue both parties – the seller as well as the digital service provider – only in the courts of the country where he had bought the smart item and not in the country of his domicile where he had afterwards concluded the license agreement. True, this result cannot be based upon Articles 17, 18 of Brussels I Regulation as these provisions only regulate the jurisdiction of consumer's domicile. Therefore I would suggest to apply the concept of "inseparably linked contracts" developed in the *Maletic* case also in the context of Article 7, 1., (b) of Brussels I Regulation and allow both disputes to be settled at the place of performance of the "main" contract, ie the sales contract of a smart good. This solution would give the consumer a choice whether to go a) against different contracting parties in different countries (in Poland against the seller and in Estonia against the digital service provider) or b) to sue both parties in Poland.

3. LAW APPLICABLE TO CONSUMER CONTRACTS FOR SMART GOODS AND DIGITAL CONTENT OR DIGITAL SERVICES

3.1. General principles

9. The most important instrument determining the law applicable to international contracts in the European Union

is the Rome I Regulation. Under Rome I Regulation, the applicable law is first and foremost determined through the principle of party autonomy. This principle also applies to consumer contracts under Article 6, 1. of Rome I. However,

¹⁷. This of course only applies if the seller had not directed its activities to Estonia as under the *Emrek*-jurisprudence a consumer contract can fall within the scope of Art. 17 of Brussels I even if there is no causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile and the conclusion of the contract with that consumer. CJEU 17 October 2013, *Lokman Emrek / Vlado Sabranovi*, ECLI:EU:C:2013:666, para 32.

¹⁸. The arbitration clause in p 12 of Terms of Use is invalid at least under Estonian law. The Mercedes MeConnect Terms of Use are available www.mbusa.com/en/legal-notice/mobile-applications/mercedes-me-terms-of-use, retrieved 28 September 2020.

¹⁹. I. SAENGER (ed.), *Zivilprozessordnung*, 8th ed., Nomos, 2019, Brüssel Ia-VO, Art. 8, para. 3.

²⁰. CJEU 14 November 2013, *Armin Maletic, Marianne Maletic / lastminute.com GmbH, TUI Österreich GmbH*, ECLI:EU:C:2013:735.

²¹. CJEU 14 November 2013, *Armin Maletic, Marianne Maletic / lastminute.com GmbH, TUI Österreich GmbH*, ECLI:EU:C:2013:735, para. 29.

²². CJEU 14 November 2013, *Armin Maletic, Marianne Maletic / lastminute.com GmbH, TUI Österreich GmbH*, ECLI:EU:C:2013:735, paras. 30-31.

Rome I expressly states that the presumably weaker parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.²³ With regard to consumers, Article 6, 2. of Rome I stipulates that even if the parties have agreed that a particular system of law is to be applied to the contract, such choice may not deprive consumers of the protection afforded to them by the mandatory provisions of their state of habitual residence. Similarly to Article 17, 1. of the Brussels *Ibis* Regulation, this rule comes into play if the trader in a way or another directs his commercial activities to the Member State where the consumer has his habitual residence.²⁴

3.2. Directive-based domestic contract law norms as overriding mandatory norms under Rome I?

10. Previously, various consumer law directives obliged Member States to ensure that the consumer does not lose the protection granted by that consumer law directive by choosing the law of a non-EU-member country as applicable to the contract, if the contract has a close connection with the territory of the Member States.²⁵ By contrast, newer consumer contract law directives such as the new Digital Content Directive, Consumer Rights Directive²⁶ and the new Consumer Goods Directive no longer contain such provisions and refer all questions of determining whether the consumer retains the protection granted by the directive to Rome I Regulation.²⁷ Under Article 3, 4. of Rome I choice of the law of a third country cannot not prejudice the application of mandatory provisions of Community law, if all elements relevant to the situation at the time of the choice are located in one or more Member States. The standard of Article 3, 4. of Rome I is somewhat higher than the one in the private international law provisions of the older consumer law directives as the directives only required a “close link with the territory of one or more Member States”.

11. As indicated above, Rome I protects consumers as weaker contractual parties by virtue of Article 6. In addition

to Article 6, Rome I Regulation contains another correction mechanism: the doctrine of overriding mandatory rules in Article 9. Article 9, 1. of Rome I defines overriding mandatory provisions as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation. One can therefore wonder whether national implementation norms of the new consumer contract law directives not only constitute “provisions that cannot be derogated from by agreement” within the meaning of Article 6, 2. of Rome I but are also to be seen as rules crucial for safeguarding the forum’s public interests within the meaning of Article 9 of Rome I. Could, for instance, the rules on trader’s or seller’s liability of the new consumer contract law directives be considered not only mandatory but also as crucial for a Member State for safeguarding its public interests?

12. One must note, of course, that the question whether the norms of the new consumer contract law package should be considered overriding mandatory norms is a more general one: can directive-based consumer contract law provisions generally be considered overriding mandatory norms? It obviously needs very good reasons to consider some consumer contract law directives *loi de police* while rejecting such nature for others.

13. The question whether Article 6 should be considered *lex specialis* over Article 9, 2. of Rome I Regulation is controversial and not yet decided by the Court of Justice. Several prominent authors in the German legal literature see Article 6 as *lex specialis* over Article 9 for contracts which fall within the scope of Article 6 of Rome I, as in these cases there is usually no need for additional consumer protection under Article 9.²⁸ Before the adoption of Rome I Regulation the German High Federal Court took the position that German contractual consumer protection provisions can, in principle, be applied via the provision on internationally mandatory rules but only in cases where the contract has a close

²³ Recital 23 of Rome I Regulation.

²⁴ Art. 6, 1., (b) of Rome I Regulation.

²⁵ See for example, Art. 6, 2. of the Unfair Terms Directive, Art. 12, 2. of the Distance Marketing of Consumer Financial Services Directive, Art. 7, 2. of the Consumer Sales Directive, Art. 22, 4. of the Consumer Credit Directive. Council Directive No. 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (*OJ L* 95, 21 April 1993, p. 29-34); Directive No. 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 No. 90/619/EEC and Directives No. 97/7/EC and No. 98/27/EC (*OJ L* 271, 9 October 2002, p. 16-24); Directive No. 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (*OJ L* 171, 7 July 1999, p. 12-16); Directive No. 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive No. 87/102/EEC (*OJ L* 133, 22 May 2008, p. 66-92).

²⁶ Directive No. 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive No. 93/13/EEC and Directive No. 1999/44/EC of the European Parliament and of the Council and repealing Council Directive No. 85/577/EEC and Directive No. 97/7/EC of the European Parliament and of the Council (*OJ L* 304, 22 November 2011, p. 64-88).

²⁷ See eg recital 58 of the Consumer Rights Directive which states that: “Where the law applicable to the contract is that of a third country, Regulation (EC) No. 593/2008 should apply, in order to determine whether the consumer retains the protection granted by this Directive.”

²⁸ D. MARTINY in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Verlag C.H. Beck, 2018, Rom I-VO Art. 6, para. 68; A. STAUDINGER in F. FERRARI, E.-M. KIENINGER et al. (eds.), *Internationales Vertragsrecht. Kommentar*, 3rd ed., Verlag C.H. Beck 2018, Art. 6 Rom I-VO, para 7; K. THORN in *Palandt, Bürgerliches Gesetzbuch*, Verlag C.H. Beck, 2019, Art. 6 Rom I-VO, para 2.

connection with Germany.²⁹ In a later judgment – still decided under the national conflict of law provisions and not under Rome Convention or Rome I Regulation – the High Federal Court expressly stated that the conflict of laws provision on consumer contracts has no *lex specialis* character at least in cases where the contract does not fall within its scope.³⁰

14. In practice, the question does not become relevant too often as usually the forum of the dispute coincides with the habitual residence of the consumer under Article 18, 1. of the Brussels I Regulation and also the benchmark of Article 6, 2. of Rome I against which the legality of choice of law is tested. The problem could arise when we are outside the scope of Article 6 of Rome I, eg when the trader has not targeted its activities to the consumer's country of residence.³¹ For example, an Estonian consumer visits Poland and decides to buy a car from the local trader: if there is no choice of law then Polish law, including its unfair terms rules will be applicable under Article 4, 1., (a) of Rome I.³² If a defect shows up later, then Estonian consumer protection norms will not come into play as the trader had not targeted its sales activities to Estonia. It is also not likely that Estonian consumer protection norms could be applied as overriding mandatory norms as the forum of the dispute will most likely be Poland as well.³³ It could be different, however, if the trader had undertaken an obligation to deliver the car to Estonia which would open the jurisdiction of Article 7, (1), (b) of the Brussels I Regulation. In this case the Estonian consumer could sue the Polish trader in Estonia and the question of the applicability of Estonian implementation norms as overriding mandatory rules under Article 9, 2. of Rome I could become important.

15. A similar situation arises if an EU consumer buys a good in a third country, for instance when a Lithuanian consumer buys a consumer good on an excursion to neighbouring Belarus – provided that the Lithuanian domestic jurisdiction rules³⁴ allow him to file a claim in Lithuania.

Or, if a Lithuanian consumer makes the same transaction in Poland but for whatever reason Belarusian or Californian law is chosen. In the latter case the issue is solved by Article 3, 4. of Rome I³⁵ that would enable the application of Lithuanian consumer sales, digital content as well as unfair terms rules. Finally, the issue becomes relevant also in cases where the jurisdiction and applicable law do not coincide due to the exceptions in Article 6, 4. of Rome I – which would rarely be the case for consumer goods and digital services. Consequently, one may agree with Berndt von Hoffmann that the question of overriding mandatory norms in contract law is of great interest to scholars but of little practical importance.³⁶

16. While it is clear that the overriding mandatory norms have to be applied despite any choice of law clause in the contract and supersede the law applicable under the statutory conflict-of-law provisions, the relationship of consumer protection rules in Article 6 of Rome I to overriding mandatory provisions in its Article 9 is not uniformly solved neither in legal literature nor in the judicial practice of the Member States. The underlying question is whether the doctrine of overriding mandatory norms in Article 9 is meant to protect also weaker parties of the contract or whether its main function is to protect the more general public interests and values. And, of course, whether protection of weaker contractual partners could be seen as such general public interest. In short: while “non-mobile” consumers are protected by virtue of Article 6, 2. of Rome I Regulation, “mobile” consumers could be protected by its Article 9 and thereby reach the same level of protection, depending on the view of the national judge.

17. The Court of Justice has this far not given clear instructions on the issue. True, the Court has stressed that the notion of overriding mandatory norms must be interpreted strictly³⁷ and when determining them the judge has to take account not only of the exact terms of the law, but also of its general structure and of all the circumstances in which that law was

^{29.} Decision of German High Federal Court (BGH) of 19 March 1997, no VIII ZR 316/96.

^{30.} Decision of German High Federal Court (BGH) of 13 December 2005, no XI ZR 82/05.

^{31.} These are called mobile consumers, see L. M. VAN BOCHOVE, “Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law”, *Erasmus Law Review*, 2014/3, p. 147 et seq., para. 3.1.

^{32.} Again, this applies only if the seller had not directed its activities to Estonia as under the *Emrek*-jurisprudence there is no need for a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile and the conclusion of the contract with that consumer. Although *Emrek* case only concerned the international jurisdiction under Brussels Ibis Regulation, recital 24 of Rome I Regulation refers to the need to interpret the concept of directed activity harmoniously under both regulations.

^{33.} As the state of habitual residence of the trader (defendant).

^{34.} Which are applicable by virtue of Art. 4, 2. of Brussel Ibis Regulation. If, however, Belorussian company targets Lithuanian market, Lithuanian consumers can benefit from the Brussels Ibis regime despite the fact that the defendant is not domiciled in a Member State and file their claims in Lithuania under Art. 18, 1. of Brussels Ibis. See A. DICKINSON and E. LEIN (eds.), *Brussels I Regulation Recast*, Oxford University Press, 2015, para 6.68.

^{35.} Art. 3, 4. of Rome I stipulates: “Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.”

^{36.} Cited via H. J. SONNENBERGER, “Overriding Mandatory Provisions” in S. LEIBLE (ed.), *General Principles of European Private International Law*, The Netherlands, Kluwer, 2016.

^{37.} CJEU 31 January 2019, *Agostinho da Silva Martins / Dekra Claims Services Portugal SA*, ECLI:EU:C:2019:84, para. 29; CJEU 17 October 2013, *United Antwerp Maritime Agencies (Unamar) NV / Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para. 49.

adopted.³⁸ The Court has also ruled when interpreting the overriding mandatory norms provision of the Rome II Regulation³⁹ that a national rule which provides a three-year limitation period for actions seeking compensation for damage resulting from a car accident cannot be considered an overriding mandatory provision unless the national court finds a special justification for it.⁴⁰ Whether one can generally consider consumer contract law rules as overriding mandatory norms within the meaning of Article 9 of Rome I has, however, not yet been answered by the Court of Justice as the agency law cases *Ingmar*⁴¹ and *Unamar* are not about consumer contract law.

18. The views of national courts and doctrines differ on the issue. For instance, German doctrine⁴² and the High Federal Court⁴³ do not consider consumer protection rules overriding mandatory provisions if the protection of public interest is only reflected by the primary purpose of protecting private interests of the contract parties. By contrast, French⁴⁴ and Dutch⁴⁵ doctrine have taken a wider approach and consider also rules meant to protect the weaker party as overriding mandatory provisions, because avoiding the abuse of the weaker party as such is also of general public interest.

19. When asking whether the consumer protection norms of the new directives constitute overriding mandatory norms, one must first note that at least in principle, the new directives are maximum harmonizing⁴⁶ which clearly reduces the practical relevance of the question. In the Digital Content Directive only the question of time limits of the

trader's liability remains subject to minimum harmonization.⁴⁷ The new Consumer Sales Directive, by contrast, gives more discretion to Member States, allowing higher consumer protection standards not only concerning time limits of the seller's liability⁴⁸ but also concerning longer reversal of the burden of proof.⁴⁹ In certain questions it also allows Member States to reduce consumer protection standards, eg to opt for notification obligation of the consumer.⁵⁰ Finally, both directives also entitle Member States to extend the directives' regime to contracts⁵¹ and issues⁵² outside of their scope.

20. Therefore, as the legal regime concerning consumer contracts on digital content and consumer goods is still not totally harmonized across the EU, the question of so-called "goldplating"⁵³ arises. For example, could a French court dealing with a consumer sales contract between a mobile French consumer and Estonian trader apply French law (which does not foresee a notification obligation) instead of the otherwise applicable Estonian law containing a notification obligation? Or, can the French court apply the French rules on *vice caché* which are unknown to the Estonian law? The rulings of the Court of Justice do not give a direct answer as the *Unamar* case concerned agency directive which is outside of the scope of Article 6 of Rome I⁵⁴ and *Silva Martins* case concerned domestic rules on time limits of non-contractual claims that are not harmonized at all. The issue is also controversial in legal literature as eg van Bochove allows a national court to qualify a domestic rule based on a minimum harmonisation Directive but trans-

³⁸ CJEU 31 January 2019, *Agostinho da Silva Martins / Dekra Claims Services Portugal SA*, ECLI:EU:C:2019:84, para. 30; CJEU 17 October 2013, *United Antwerp Maritime Agencies (Unamar) NV / Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 50.

³⁹ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (*OJ L* 199, 31 July 2007, p. 40-49).

⁴⁰ CJEU 31 January 2019, *Agostinho da Silva Martins / Dekra Claims Services Portugal SA*, ECLI:EU:C:2019:84, para. 35.

⁴¹ But see H. J. SONNENBERGER, "Overriding Mandatory Provisions" in S. LEIBLE (ed.), *General Principles of European Private International Law*, The Netherlands, Kluwer, 2016, § 7.02. He correctly points out that the compensation norm of the agency directive in *Ingmar* case did not concern public interests at all and therefore should not have been given the status of overriding mandatory provision.

⁴² D. MARTINY in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Verlag C.H. Beck, 2018, Rom I-VO, Art. 6, para. 88 with further references; critical of this view A. STAUDINGER in F. FERRARI, E.-M. KIENINGER ET AL. (eds.), *Internationales Vertragsrecht. Kommentar*, 3rd ed., Verlag C.H. Beck, 2018, Art. 9 Rom I-VO, paras. 22-23.

⁴³ Bundesgerichtshof 13 December 2005, case I ZR 82/05.

⁴⁴ On the background of French doctrine to consider consumer contract law provisions as *loi de police*, see H.J. SONNENBERGER, "Overriding Mandatory Provisions" in S. LEIBLE (ed.), *General Principles of European Private International Law*, The Netherlands, Kluwer, 2016, § 7.02.

⁴⁵ L. M. VAN BOCHOVE, "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law", *Erasmus Law Review*, 2014/3, p. 147 *et seq.*, para. 2.3.

⁴⁶ Art. 4 of DCD and CSD.

⁴⁷ Art. 11, 2. DCD.

⁴⁸ Art. 10, 3. of CSD.

⁴⁹ Art. 11, 2. of CSD. See in more detail: K. LILLEHOLT, "A Half-built House? The New Consumer Sales Directive Assessed as Contract Law", *Juridica International* 2019, p. 3-8; I. BACH, "Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte", *Neue Juristische Wochenschrift* 2019, p. 1705-1711.

⁵⁰ Art. 12 of CSD.

⁵¹ See, for example, recitals (16) and (17) of DCD and (21) of CSD.

⁵² For example, concerning hidden defects, see recital (18) of CSD.

⁵³ Is whether the forum can still apply provisions of its own law that exceed the level of protection foreseen by the directive via Art. 9 of Rome I, L.M. VAN BOCHOVE, "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law", *Erasmus Law Review*, 2014/3, p. 147 *et seq.*, para. 5.

⁵⁴ Cf. different opinion by A. STAUDINGER in F. FERRARI, E.-M. KIENINGER ET AL. (eds.), *Internationales Vertragsrecht. Kommentar*, 3rd ed., Verlag C.H. Beck, 2018. According to him, the principles derived by the CJEU in *Ingmar* and *Unamar* cases are applicable also to eg Consumer Rights Directive with the consequence that the consumer's withdrawal right should enjoy the status of an overriding mandatory norm.

gressing the level of protection as an overriding mandatory rule⁵⁵ whereas Lüttringhaus and van Calster reject the idea.⁵⁶

21. Yet, *Silva Martins* case may give a hint also concerning the limitation periods that are minimum harmonised under DCD and CSD: I would argue that national rules providing for longer limitation periods in consumer sales are not to be considered overriding mandatory norms under Rome I Regulation. Otherwise a state could impose their own law to traders who are not reckoning with it as they trust being outside the scope of Article 6, 2. of Rome I. Member States could also do so without the hard work of convincing other Member States during the EU legislative process. Therefore, in my view a domestic contract law provision goldplating the rules of digital content and consumer sales directives could be considered an overriding mandatory norm only in exceptional cases with compelling reasons – which, frankly, is very hard to imagine. The issues regulated by the Digital Content Directive and Consumer Sales Directive – consumer’s remedies for lack of conformity, guarantees and regress claim of the trader – are not likely to protect the public interest of the forum within the meaning of Article 9, 1. of Rome I. This position would be also in line with Recital (37) of Rome I which underlines that the concept of “overriding mandatory provisions” should be distinguished from the expression “provisions which cannot be derogated from by agreement” and be construed more restrictively.

22. The same applies if the consumer sales contract is subject to the law of a third country: either the consumer is protected via Article 6 of Rome I or via Article 3, 4. of Rome I Regulation. In the majority of cases additional protection under Article 9 of Rome I is not necessary – at least if one takes the position that the third-country producer of a consumer good does not constitute an element connecting it to the third country and thereby excluding the protection of Article 3, 4. of Rome I.⁵⁷ The situation is, however, somewhat more complicated in case of digital content or digital services: in many cases the contract party of an EU consumer is a trader outside the EU, often situated eg in California or some other US state. True, in the majority of cases the consumer is protected by Article 6, 2. of Rome I as he concludes the contract online and the US trader directs its activity to the state of consumer’s residence within the meaning of Article 6, 1., (b) of Rome I – leading to the applicability of the mandatory norms of the habitual residence of the con-

sumer. Yet, there can be cases where eg an Estonian consumer buys a videogame in Finland sold by a US trader under US law and the game is not available in Estonia: here the consumer is not protected by Article 6, 2. nor by Article 3, 4. of Rome I. In these exceptional cases the applicability of at least some of the provisions of the Digital Content Directive via Article 9, 2. of Rome I cannot be ruled out.

3.3. Incorrect transposition of directive-based conflict of law rules: the example of Estonia

23. In Estonia an additional issue arises from the fact that the directive-based conflict of law rules have been incorrectly transposed in the Estonian Law of Obligations Act (LOA).⁵⁸ Namely, Sections 36(2), 53(1), 237(2) and 403(6) of the LOA stipulate that the provisions determining the rights and obligations of the consumer and of the trader apply to contracts with consumers residing in Estonia or the EU, if the contract is entered into as a result of a public tender, advertising or other similar economic activities taking place in Estonia or if the contract is essentially linked to the territory of Estonia for any other reason, regardless of which state’s law applies to the contract. This raises a specific question of whether these norms are of an overriding mandatory nature, which their original language would suggest.

24. The incorrect transposition is evident from the fact that the scope of application of the Estonian consumer contract law provisions under the above-mentioned provisions is wider than foreseen by the consumer directives, since the directives only require them to apply if the law of a third country – and not of a Member State – has been chosen. The Estonian provisions as they stand now would also require precedence over a choice of law of another Member State, eg Belgian law. This would mean that consumers would be left without protection under Belgian law, if Belgian law offers a higher protection standard in a particular issue than the Estonian law does.⁵⁹ This would clearly contradict Article 6, 2. of Rome I Regulation as it allows the consumer to rely upon the provisions that are most favourable to him. Therefore, it is convincingly argued by Piir that Estonian national implementation provisions of the consumer-related directives should be considered subordinate to Article 6 of Rome I and should apply only in cases where the prerequisites for applying Article 6 of Rome I

55. L.M. VAN BOCHOVE, “Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law”, *Erasmus Law Review*, 2014/3, p. 147 *et seq.*, para. 5.

56. J.D. LÜTTRINGHAUS, “Eingriffsnormen im Internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar”, *IPRax*, 2014/2, p. 150; G. VAN CALSTER, *European Private International Law*, Oxford, Hart Publishing, 2016, p. 234.

57. But see M. TAMM, K. TONNER and T. BRÖNNECKE (eds.), *Verbrauchherrecht*, 3th ed., Nomos, 2019, p. 1427: foreign producer could constitute such an element excluding the applicability of Art. 3, 4. Rome I if the goods is sold in the EU via an intermediary. The applicability of Art. 3, 4. of Rome I is not excluded if the elements of the contract are connected to different Member States; D. MARTINY in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Verlag C.H. Beck, 2018, Rom I-VO, Art. 3, para. 96.

58. Law of Obligations Act, RT I, 8 January 2020, 10.

59. For example, under Estonian consumer sales law consumers must notify of a defect to the seller if they do not want to lose their contractual remedies; see § 220 of LOA.

are not met.⁶⁰ Moreover, the aforementioned conflict rules of the Estonian Law of Obligations Act are not to be considered overriding mandatory rules within the meaning of Article 9 of Rome I but only domestically mandatory.⁶¹ In

the end, the Estonian legislator would in my view be well advised to abolish § 237(2) LOA when transposing the new consumer sales directive⁶² which does not foresee a special conflict of law norm as did its predecessor.⁶³

4. INTERNATIONAL JURISDICTION FOR PRODUCT LIABILITY CLAIMS DUE TO DEFECTIVE CONSUMER GOODS AND DIGITAL CONTENT

25. After long reflexions over jurisdiction and applicable law for contractual claims let us now briefly touch upon international jurisdiction and applicable law concerning non-contractual claims of consumers who have suffered health or property damages due to defective smart goods or digital content. Whereas Rome II Regulation contains a specific conflict of law provision for product liability, jurisdiction for these claims is determined under the general tort jurisdiction of Article 7, 2. of Brussels *Ibis* Regulation. Apart from this provision, Brussels *Ibis* Regulation offers alternative jurisdictions, namely the defendant's domicile (Art. 4), the domicile of one of the defendants in case of joint tortfeasors (Art. 8) and the place chosen by the parties (Art. 25). In this article I only concentrate on the head of jurisdiction under Article 7, 2. of Brussels *Ibis*, the underlying rationale of which is not the protection of consumers but rather facilitating a predictable and close-to-court jurisdiction rule for sound administration of justice.⁶⁴

26. As is known, Article 7, 2. of Brussels *Ibis* provides for special jurisdiction “in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”. As is long established in the CJEU case law, the “place where the harmful event occurred” covers both the place where the damage occurred (*locus actus*) and the place of the event giving rise to it (*locus damni*), with the result that the defendant may be sued in the courts for either of those places.⁶⁵ In product liability cases

this ubiquity rule leads to the following consequences. In *Kainz* the CJEU held that *locus actus* is the place where the product was manufactured.⁶⁶ Apart from domestic situations, this is usually not a favourable option for the consumer who has suffered damage due to a defective consumer good. However, the alternative jurisdiction of *locus damni* may offer a possibility to sue in his habitual residence. Namely, in *Zuid Chemie*, the CJEU clarified that the *locus damni* “is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself”.⁶⁷ As in most product liability cases the damage manifests itself in the consumer's habitual residence, the consumer has a *de facto* plaintiff jurisdiction – exactly as in contractual claims under Article 18, 1. of Brussels *Ibis*.

27. One must stress, however, that under *Dumez*⁶⁸ and *Marinari*⁶⁹ case law the plaintiff's jurisdiction under Article 7, 2. of Brussels *Ibis* is only available to the consumer if he has suffered initial damage (and not only indirect or consequential damage) at his place of habitual residence. This turned out to be one of the crucial issues in the recently decided *Dieselgate* case⁷⁰ where the referring Austrian court wanted the Court of Justice to say whether mere purchase of the manipulated cars from car dealers established in Austria, and the delivery of those vehicles in Austria, is sufficient to establish its jurisdiction under Article 7, 2. of Brussels *Ibis* as the “place where the damage occurred”. The Austrian

⁶⁰ R. PIIR, *Mandatory Norms in the Context of Estonian and European International Contract Law: The Examples of Consumers and Posted Workers*, Tartu, Tartu Ülikooli Kirjastus, 2019, p. 21.

⁶¹ R. PIIR and K. SEIN, “Law Applicable to Consumer Contracts: Interaction of the Rome I Regulation and EU-directive-based Rules on Conflicts of Laws”, *Juridica International* 2016, p. 70; R. PIIR, *Mandatory Norms in the Context of Estonian and European International Contract Law: The Examples of Consumers and Posted Workers*, Tartu, Tartu Ülikooli Kirjastus, 2019, p. 26-27.

⁶² Differently R. PIIR, *Mandatory Norms in the Context of Estonian and European International Contract Law: The Examples of Consumers and Posted Workers*, Tartu, Tartu Ülikooli Kirjastus, 2019, p. 56. She suggests amending the wording so that it would only refer to cases where the law of a third state has been chosen. Cf. M. TAMM, K. TONNER and T. BRÖNNECKE (eds.), *Verbrauchherrecht*, 3th ed., Nomos, 2019, p. 1428, who consider the analogous German provision of Art. 46b EGBGB to be mostly obsolete.

⁶³ See Art. 7, 2. of the directive No. 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L. 171, 7 July 1999, p. 12-16).

⁶⁴ G. RISSO, “Product liability and protection of EU consumers: is it time for a serious reassessment?”, *Journal of Private International Law* 2019, p. 217.

⁶⁵ See eg CJEU 30 November 1976, *Handelskwekerij G. J. Bier B.V. / Mines de Potasse d'Alsace S.A.*, ECLI:EU:C:1976:166, para. 19; CJEU 16 July 2009, *Zuid-Chemie BV / Philippo's Mineralenfabriek NV/SA*, ECLI:EU:C:2009:475, para. 24; CJEU 29 July 2019, *Tibor-Trans Fuvározó és Kereskedelmi Kft. / DAF Trucks NV*, ECLI:EU:C:2019:635, para. 25.

⁶⁶ CJEU 16 January 2014, *Andreas Kainz / Pantherwerke AG*, ECLI:EU:C:2014:7, para. 29.

⁶⁷ CJEU 16 July 2009, *Zuid-Chemie BV / Philippo's Mineralenfabriek NV/SA*, ECLI:EU:C:2009:475, para. 27.

⁶⁸ CJEU 11 January 1990, *Dumez France SA, Tracoba SARL / Hessische Landesbank and others*, ECLI:EU:C:1990:8, para. 21.

⁶⁹ CJEU 19 September 1995, *Antonio Marinari / Lloyds Bank plc and Zubaidi Trading Company*, ECLI:EU:C:1995:289, para. 21.

⁷⁰ CJEU 9 July 2020, *Verein für Konsumenteninformation / Volkswagen AG*, ECLI:EU:C:2020:534.

court was also unsure whether the damage in the form of a reduction in the value of those vehicles constituted initial or *consequential* damage resulting from the defect of the cars – as only the former would establish the plaintiff’s jurisdiction under the above-mentioned case-law. Finally, it was also disputable whether such damage is not a pure financial damage which again under the established case law of the CJEU would not give rise to the plaintiff’s jurisdiction.⁷¹

28. The CJEU confirmed that the Austrian court had jurisdiction over Volkswagen AG under Article 7, 2. of Brussels *Ibis* as the place where the purchase took place is to be considered the place where the damage occurred. The Court reasoned that the damage in the form of reduction in value of the car constitutes initial damage and not only an indirect consequence of the harm suffered by others.⁷² Moreover, it also does not constitute purely financial damage because contrary to the situations in previous case law where the reduction in the financial assets of the persons concerned had no connection to a tangible asset, here the case concerns a defect that affects vehicles, which are tangible assets.⁷³

29. The reasoning of the Court which uses the tangibility of the asset as the main criterion for differentiating between purely financial damage and direct damage creates an interesting question concerning potential damages claims due to “defective” digital content. Could consumers who have bought manipulated (eg knowingly made non-secure) software use their home jurisdiction for claiming damages – that is, the reduction of the value of the software – from the soft-

ware producer? If one only stresses the tangibility aspect as the Court of Justice did then the answer could turn out to be negative. True, it is very much disputable whether software is a product within the meaning of the Product Liability Directive.⁷⁴ However, as far as is known, the claim of the VKI in the *Dieselgate* case was not a product liability one, either. I would argue that producers of manipulated software should anticipate to be sued at the plaintiff’s jurisdiction, ie at the place where the defective asset was bought, exactly as the producers of manipulated cars should.⁷⁵ Moreover, we should remember the competition law case *Hydrogen Peroxide* where the damages consisted of the additional cost that the plaintiff had to pay because of a cartel and where the CJEU accepted the plaintiff’s jurisdiction.⁷⁶ One can argue that in case of defective software the damages also consist of additional payment of the buyer as they have paid too much for the reduced value of the software and therefore the plaintiff’s jurisdiction should be available here as well.

30. Finally, it should of course be admitted that in many cases the problem described would be mitigated by the fact that in cases where the manipulation of the software has led to data breaches the affected data subject (the buyer) may use an alternative plaintiff’s jurisdiction under Article 79, 2. of the GDPR.⁷⁷ As the damages claim under Article 82 of GDPR encompasses not only immaterial but also material damages including financial loss⁷⁸, reduction of value of digital content due to violations against data protection standards can be claimed at the court where the data subject has his habitual residence.

5. LAW APPLICABLE TO PRODUCT LIABILITY CLAIMS DUE TO DEFECTIVE CONSUMER GOODS AND DIGITAL CONTENT

5.1. Applicability of Article 5 of Rome II Regulation

31. Contrary to the jurisdiction rules in Brussels *Ibis* Regulation, Rome II Regulation determining the law applicable to non-contractual claims contains a specific – but very complex – conflict of law provision on producer’s liability in

Article 5. Therefore, when a consumer has suffered damage due to digital content or (inter-connected or other) digital services, the much-debated issue of whether software or other digital content can be qualified as a product within the meaning of that provision becomes relevant. For example, a research lab has developed a digital contact lens for persons with diabetes which is able to measure blood sugar level in

^{71.} CJEU 9 July 2020, *Verein für Konsumenteninformation / Volkswagen AG*, ECLI:EU:C:2020:534, paras. 12-17.

^{72.} CJEU 9 July 2020, *Verein für Konsumenteninformation / Volkswagen AG*, ECLI:EU:C:2020:534, para. 31.

^{73.} CJEU 9 July 2020, *Verein für Konsumenteninformation / Volkswagen AG*, ECLI:EU:C:2020:534, paras. 32-34.

^{74.} Directive No. 85/374/EEC of the Council of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (*OJ L* 210, 7 August 1985, p. 29-33).

^{75.} CJEU 9 July 2020, *Verein für Konsumenteninformation / Volkswagen AG*, ECLI:EU:C:2020:534, paras. 36-37.

^{76.} CJEU 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA / Evonik Degussa GmbH and others*, ECLI:EU:C:2015:335, paras. 54-56. In defamation cases, the CJEU has used the criterion of the centre of interests with the consequence of establishing jurisdiction at the habitual residence of the plaintiff. See joined cases CJEU 25 October 2011, *eDate Advertising GmbH / X and Olivier Martinez, Robert Martinez / MGN Limited*, ECLI:EU:C:2011:685, paras. 49-52.

^{77.} Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation) (*OJ L* 119, 4 May 2016, p. 1-88).

^{78.} Recital (75) of the GDPR.

tear fluid and send the data to a smartphone or a tablet.⁷⁹ Say, the consumer uses such a smart medical device (bought by another person so that no contractual claims are available) which has interconnected digital services and a defect in that digital service causes him health damage. Should the applicable law be determined according to Article 5 of Rome II or can only the general conflict of law norm of Article 4 be relied upon? The issue is obviously of most importance if the producer is situated outside the European Union.

32. Article 5, 1. of Rome II provides for a cascade of connecting factors which are to be applied in successive order: (a) the country of the consumer's habitual residence; (b) the country in which the product was acquired; and (c) the country in which the injury occurred. They all are subject to the condition that the product was marketed in that country. However, these connecting factors are not applicable if the defendant could not reasonably have foreseen the marketing of the product in the respective country. In such cases the law of the country of the habitual residence of the producer applies.⁸⁰ Finally, Article 5, 2. provides for a closer-connection-exception.⁸¹ And of course, all these connecting factors may be set aside in case of a choice of law under Article 14⁸² or a common place of residence of the parties (Art. 5, 1. and 4, 2. of Rome II).

33. When speaking about the claims of consumers, we should also recall that although the Product Liability Directive is based on a consumer protection rationale, Article 5 of Rome II Regulation as a specific conflict of law provision for product liability is not specifically aimed at the protection of weaker parties.⁸³ The European legislator regarded the general applicable law principles of Article 4 of Rome II inadequate for product liability and sought to establish a conflict-of-law rule which meets "the objectives of fairly spreading the risks inherent in a modern high-technology

society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade".⁸⁴ The creation of a cascade system of connecting factors, together with the foreseeability clause in Article 5, 1., was considered to be a balanced solution in regard to all these competing objectives.

34. When starting to apply the cascade provision of Article 5 of Rome II Regulation, we should first determine whether the concepts of "producer", "product" and "damages" used there must be interpreted in line with the ones of the Product Liability Directive. At least as far as the notion of "product" is concerned, the majority tend to answer in the affirmative⁸⁵, not least due to the referral to the Product Liability Directive in the original Commission's proposal for Rome II.⁸⁶

35. This, however, does not make it any easier as interpreting the concept of "product" under the Directive involves the unsolved debate of whether and under what conditions software can be considered a "product". First, it is clear – at least in principle, that services as such are outside the scope of the Directive: the Court of Justice denied the applicability of the Product Liability Directive to service providers in the *Besançon* case.⁸⁷ This should, at least in principle, exclude digital services from the scope of Article 5 of Rome II but when taking a closer look the issue becomes even more blurry. At least in German literature the discussion concentrates on the intangible nature of the software and considers software a product if it is on a tangible carrier.⁸⁸ However, one also tries to overcome the intangibility issue by saying that when a user downloads software from the Internet to the hard disk then it becomes tangible and, hence, a product.⁸⁹ Only software used online (eg software-as-a-service) would not be qualified as a product and therefore not be covered by Article 5 of Rome II.⁹⁰

^{79.} POHANG UNIVERSITY OF SCIENCE & TECHNOLOGY (POSTECH), "Smart contact lenses that diagnose and treat diabetes", *Science Daily*, 28 April 2020, www.sciencedaily.com/releases/2020/04/200428091502.htm, retrieved 28.09.2020.

^{80.} Art. 5, 1. last sentence of Rome II Regulation.

^{81.} See also the critical view on the complicated rules of Art. 5: A. JUNKER, "Die Rom II-Verordnung: Neues Internationales Deliktsrecht auf europäischer Grundlage", *Neue Juristische Wochenschrift* 2007, p. 3678.

^{82.} Such choice of law clauses are usually not valid in the case of consumer goods as they must be concluded only after the dispute has arisen; see Art. 14, 1., (b) of Rome II Regulation.

^{83.} See in depth G. RISSO, "Product liability and protection of EU consumers: is it time for a serious reassessment?", *Journal of Private International Law* 2019, p. 210-233.

^{84.} Recital (20) of Rome II Regulation.

^{85.} I. BACH in G. SPINDLER, F. SCHUSTER (eds.), *Recht der elektronischen Medien*, 4th ed., Verlag C.H. Beck, 2019, Rom II-VO, Art. 5, para 3; A. DICKINSON, *Rome II Regulation: the Law Applicable to Non-Contractual Obligations*, Oxford University Press, 2008, paras. 5.10-5.12.

^{86.} Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"). COM(2003) 427 final, p. 15.

^{87.} CJEU 21 December 2011, *Centre hospitalier universitaire de Besançon / Thomas Dutruieux, Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, para. 39.

^{88.} C. FÖRSTER in *Beck'sches Online-Kommentar*, 55th ed., Verlag C.H. Beck, 2020, ProdHaftG, § 2, paras. 22–23.

^{89.} I. BACH in G. SPINDLER and F. SCHUSTER (eds.), *Recht der elektronischen Medien*, 4th ed., Verlag C.H. Beck, 2019, Rom II, Art. 5, para. 4.

^{90.} C. FÖRSTER in *Beck'sches Online-Kommentar*, 55th ed., Verlag C.H. Beck, 2020, ProdHaftG, § 2, para. 23; critical G. WAGNER in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th ed., Verlag C.H. Beck, 2020, ProdHaftG, § 2, para. 22. In his view the product liability rules should be applied to software in general, including the software accessible in cloud.

36. At least software on or connected to a medical device delivering data to consumer's smartphone and leading to health damage should still be considered a product⁹¹ allowing us to determine the law applicable to the non-contractual liability under the cascade system of Article 5, 1. of Rome II Regulation. This would most probably be different if health damage is caused by software-as-service or a medical app such as a blood pressure tracking and analysis tool which is unrelated to a specific tangible product. These cases may fall out of the scope of Article 5 of Rome II as a specific product liability conflict of law provision and hence the law applicable to the claim of a harmed person must be determined under the general rule of Article 4 of Rome II Regulation – allowing us, as we soon will see, to come to an even more consumer-friendly result.

37. As the ubiquity principle does not come into play under Article 4 of Rome II, the law applicable to the non-contractual claim of the consumer is the law of the country in which the damage occurs (*lex loci damni*) irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. In cases of personal injury, the country in which the damage occurs is the country where the injury was sustained.⁹² This often coincides with the habitual residence of the injured person and hence his interests are more protected under the general conflict of law rule than under Article 5 of Rome I.

38. True, the producer could still try to invoke the closer-connection rule in Article 4, 2. of Rome II and escape the “home law” of the consumer. This should, however, not be successful as such software is normally available on a contractual basis leading to the applicability of the mandatory consumer protection norms of the consumer's habitual residence under Article 6, 2. of Rome I Regulation. And even if the consumer using the software is not the contractual partner of the software producer, it does not seem unfair to subject the damages claim to the law of the consumer's habitual residence because the producer was aware of its software being used in that country and hence the applicable law is foreseeable to him.

5.2. The “marketed” and “foreseeability” criteria in Article 5 of Rome II Regulation in case of smart consumer goods

39. A closer look at Article 5, 1. of Rome II reveals that every connecting factor of this cascade provision is only to be applied if the product was marketed in the given country. The concept of “marketing of the product” is to be interpreted in line with the corresponding concept of “putting into circulation” in Article 7, (a) of the Product Liability Directive.⁹³ The Court of Justice has not yet given clear guidance on the interpretation of this issue, defining in the O'Byrne case mostly the time when (and not necessarily the place where) the product was put into circulation.⁹⁴ Advertising a specific product on the Internet targeting the particular country is deemed sufficient for “marketing” within the meaning of Article 5 of Rome II, provided that at least one product has also been sold there.⁹⁵

40. As described above, in case of smart consumer goods the defect leading to health damage may lay within the interconnected digital service or within embedded software. An obvious case would also be a connected car with an autonomous parking system: if a self-parking car causes bodily injury to a person due to a defect in the digital parking service, the relevant question when determining the law applicable to his damages claim should be whether the car (and not the parking software, eg the Mercedes McConnect digital service) was marketed in the country of the injured person's habitual residence (Art. 5, 1., (a) of Rome II). The same result could be reached via the closer connection rule of Article 5, 2. of Rome II. A contradicting view, ie to ask whether the parking software was marketed in the injured person's habitual residence, would lead to problems of whether the software was put into circulation at the place of the relevant server (or cloud?) or maybe even anywhere in the world where a consumer may access it.⁹⁶

41. In order to protect the interests of the producer as the potential tortfeasor, Article 5, 2. of Rome II declares that the applicable law cannot be determined under the cascade system of Article 5, 1. of Rome II if the person claimed to be liable could not reasonably foresee the marketing of the product in the respective country. Instead, the law of the country where the person claimed to be liable is habitually resident

^{91.} The Court of Justice has ruled that such software is a medical product within the meaning of the directive concerning medical devices even if that software does not act directly in or on the human body. CJEU 7 December 2017, *Syndicat national de l'industrie des technologies médicales (Snitem), Philips France / Premier ministre, Ministre des Affaires sociales et de la Santé*, ECLI:EU:C:2017:947, para. 39. Art. 2, 1. of the new EU regulation on medical devices also considers software a medical product; Regulation (EU) No. 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive No. 2001/83/EC, Regulation (EC) No. 178/2002 and Regulation (EC) No. 1223/2009 and repealing Council Directives No. 90/385/EEC and No. 93/42/EEC (OJ L. 117, 5 May 2017, p. 1-175).

^{92.} Recital (17) of Rome II Regulation.

^{93.} A. JUNKER in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 7th ed., Verlag C.H. Beck, 2018, Rom II-VO, Art. 5, para 29.

^{94.} CJEU 9 February 2006, *Declan O'Byrne / Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA*, ECLI:EU:C:2006:93, paras. 27, 32.

^{95.} A. DICKINSON, *Rome II Regulation: the Law Applicable to Non-Contractual Obligations*, Oxford University Press, 2008, para. 5.20; cf. I. BACH in G. SPINDLER and F. SCHUSTER (eds.), *Recht der elektronischen Medien*, 4th ed., Verlag C.H. Beck, 2019, Rom II-VO, Art. 5, para. 13.

^{96.} Cf. I. BACH in G. SPINDLER and F. SCHUSTER (eds.), *Recht der elektronischen Medien*, 4th ed., Verlag C.H. Beck, 2019, Rom II-VO, Art. 5, para. 13.

should be applied. Concerning the foreseeability element it is pointed out by van Calster that it requires certain activity of the producer towards the territory where the product ended up, thereby resembling the “targeting” concept for consumer contracts in Rome I and Brussels *Ibis* Regulations.⁹⁷ Surely, these concepts cannot be considered identical as directing its activities towards the country of consumer’s habitual residence requires somewhat stronger input by the trader than mere foreseeability that its products are marketed there. It is rightly stressed by Bach that the foreseeability requirement becomes problematic and should be interpreted restrictively especially in case of secondary markets on the

Internet, for instance in the case of selling second-hand products via online-auctions or digital platforms: these secondary distribution channels are often not foreseeable nor controllable for producers.⁹⁸ Thus, product liability claims for second-hand smart goods which were originally meant only for eg US markets but which have ended up in Europe via eBay are subject to the law of the residence of the producer. This should not, however, apply to cases where the producer allows a non-US consumer to activate the smart product over the Internet also in Europe: in this case the producer cannot rely upon the unforeseeability defence.

6. CONCLUSIONS

42. The new digital content and consumer sales directives do not create substantial new problems concerning international consumer jurisdiction or applicable law rules. Yet, in cases where a sales contract of a smart good is interconnected with another contract concluded with a digital services provider, the dichotomy of contracts is reflected in the jurisdiction and applicable law: it may happen that the jurisdiction and applicable law of a sales contract of a smart good (eg a connected car) deviates from the jurisdiction and applicable law of the interconnected contract for digital services (eg a navigation and entertainment system of that car). In many cases these contracts can be considered “inseparably linked” within the meaning of the *Maletic* case as the consumer would not be able to use the smart good without the digital service. However, in most cases a “mobile” consumer who has acquired the smart item from abroad but concluded a digital services contract later at his domicile should not be able to use his home jurisdiction for asserting claims both against the seller as well as the service provider.

43. Domestic contract law provisions goldplating the rules of digital content and consumer sales directives should, as a rule, not be considered overriding mandatory norms within the meaning of Article 9 of Rome I Regulation. The issues regulated by the Digital Content Directive and Consumer Sales Directive – consumer’s remedies for lack of conformity, guarantees and regress claim of the trader – are not likely

to protect the public interest of the forum within the meaning of Article 9, 1. of Rome I. Moreover, due to the interplay with jurisdiction rules, the question will only arise in specific circumstances and the discussion therefore remains mostly of theoretical nature.

44. Consumers who have suffered health or property damage due to a smart good can assert their product liability claims against producers at the place where the damage caused by the defective product actually manifests itself – which in most cases coincides with the habitual residence of the consumer. Hence, the jurisprudence of the Court of Justice has afforded them a *de facto* plaintiff jurisdiction. This plaintiff jurisdiction is also available for claiming the reduction of value of a defective smart good, (as recently clarified in the *Dieselgate* case) as well as for damage caused by privacy infringements under Article 79, 2. of the GDPR. The law applicable to the product liability claims due to defective smart goods is usually to be determined under the cascade system of Article 5 of Rome II Regulation. However, in cases where the harm was caused by a digital service such as a health application, we are back at the old dispute of whether software as such can be considered a product leading to product liability. Even if the answer were negative, in most cases the consumer could still rely upon the law of his habitual residence under Article 4 of Rome II.

^{97.} G. VAN CALSTER, *European Private International Law*, Oxford, Hart Publishing, 2016, p. 260.

^{98.} I. BACH in G. SPINDLER and F. SCHUSTER (eds.), *Recht der elektronischen Medien*, 4th ed., Verlag C.H. Beck, 2019, Rom II-VO, Art. 5, para. 18.