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### **Abstract**

The connecting factor for internet-related consumer contracts in harmonized European conflict-of-laws rules can be described as from “specific invitation or advertising” to “international targeting”. The choice of law rules for consumer contracts must be clear, predictable and provide efficient protection for consumer who contracts electronically. According to Rome I Regulation the law of consumer’s habitual residence applies to all consumer contracts. Careful consideration should be given to term “directing such activities”. This connecting factor is of little use in electronic consumer contracts unless it is clearly defined. The analyzed hypothesis of this contribution is following: **The conditions upon which the choice of law rules for consumer contracts operates are not sufficient to consumer contracts concluded by means of electronic commerce.** This hypothesis will be analyzed on doctrinal approaches and current case-law concerning online consumer contracts.

### **Introduction**

Aim of this contribution is to analyze the recent case-law of the European Court of Justice (hereinafter ECJ) regarding internet-related cross border consumer contracts. Nowadays almost everyone has at least once concluded contract via internet. Thanks to globalization and growing use of Internet as mean of communication and electronic contracting, the consumers can generally access the website of professional anywhere in the world. The interpretation of “directing activity” should not be too narrow. This interpretation would mean that the creation of a website could mean that the professional directs its activities to the states of the consumer. The interpretation must find a balance between the protection of consumer entitled to special rules of jurisdiction and law applicable, and the consequences for the professional.

Consumer is considered to be a weaker party in the contractual process and should be protected by rules more favorable to his interests than the general rules provide for<sup>1</sup>. The consumer protection should not be absolute, it is necessary to find the borderline between protection of weaker party and legal certainty in the contracting process<sup>2</sup>. In cross-border relations (or relations with international element) many important legal questions are raised, e.g. where is the forum (which court can hear the case) and what is the law applicable. In the

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<sup>1</sup> Recital 13 Regulation Brussels I.

<sup>2</sup> Opinion of the Advocate General Trstenjak delivered on 18 May 2010 in Case Pammer and Alpenhof, para 2. See also TANG, Z., S. Review Article Private International Law in Consumer Contracts: A European Perspective. *Journal of Private International Law*. Vol. 6, No. 1, p.235 et seq.

online context rules for determining the law applicable and jurisdiction of courts are very problematic. These rules have to be adapted to “cyberspace” without physical borders between states<sup>3</sup>.

The most important European legal norms for determining law applicable and jurisdiction in consumer contracts are Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter cited as Regulation Brussels I) and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter cited as Regulation Rome I). Regulation Brussels I is the successor to the Convention on 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter cited as Rome Convention).

Regulation Rome I contains choice-of-law rules regarding consumer contracts is Article 6 paragraph 1 as follows: “... *a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or b) by any means, **directs such activities to that country or to several countries including that country.***” The wording of the Regulation Rome I is different from Rome Convention. The latter was based on “special invitation rule” from the professional to the consumer.<sup>4</sup> The consumer had to take in that State steps necessary for the conclusion of the contract. According to the changed rule in Regulation Rome I the professional must pursue its commercial activities in the Member State if the consumer’s domicile, or, by any means, direct such activities to that Member State or to several States including that State. This change is deemed to strengthen consumer protection.<sup>5</sup> It was made because of the development in online communication and electronic contracting<sup>6</sup>. The rule in Rome Convention was more difficult to determine the place where the steps necessary for the conclusion of the contract were made.

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<sup>3</sup> COTENAU, C. *Cyber Consumer Law and Unfair Trading Practices*. Aldershot : Ashgate, 2005. 240 p. ISBN 0-7546-2417-X.

<sup>4</sup> GILLIES, L. *Electronic Commerce and International Private Law. A Study of Electronic Consumer Contracts*. Aldershot : Ashgate, 2008. P. 131 et seq. ISBN 978-0-7546-4855-0.

<sup>5</sup> GILLIES, L. Choice-of-law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome Regulation. *Journal of Private International Law*. 2007, Vol. 3, No. 1, p. 89 – 112.

<sup>6</sup> Judgment Pammer and Aplehof, para 62.

Regulation Brussels I contains rules on jurisdiction in consumer contracts in Article 15 paragraph 1 section c) “... *in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section ... 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.***”<sup>7</sup>

According to the Recital 7 in the Preamble to Regulation Rome I “*the substantive scope and the provisions of the Regulation should be consistent with the ... [Regulation Brussels I].* Recital 24 of the Preamble to the Regulation Rome I states: “*With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with [Regulation Brussels I] requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation Brussels I and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation Brussels I states that "for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities". The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."*

There is no case-law concerning conflict-of-law rules in consumer contracts in Regulation Rome I. However, to define the terms used in this Regulation, it is possible to use the ECJ's case-law to Regulation Brussels I. Interpretation of the term “directing” of such activities is important when such direction occurs through the Internet. This activity has very specific characteristics that must be taken into account.

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<sup>7</sup> For commentary on Article 15 of the Regulation Brussels I see MAGNUS, U., MANKOWSKI, P. (ed). *Brussels I Regulation on Jurisdiction and Recognition in Civil and Commercial Matters*. Sellier : European Law Publishers, 2007. 852 p. ISBN 978-3-935808-32-3.

On 7 December 2010 the ECJ rendered judgment in joined cases *Pammer* and *Alpenhof*<sup>8</sup>. The judgment concerned the interpretation of Article 15 paragraph 1 section c) of Regulation Brussels I. In case *Pammer* dispute arose between Mr. Pammer, consumer resident in Austria, and Reederei Karl Schlüter, a company established in Germany. Mr. Pammer concluded an electronic contract via internet. Later refused to pay the contract price due to alleged breach of this contract and filed an action to Austrian court. The Supreme Court of Austria then decided to stay proceedings and referred the following question for preliminary ruling: “... *is the fact that an intermediary’s website can be consulted on the internet sufficient to justify a finding that activities are being “directed” [to the Member State of the consumer’s domicile] within the meaning of Article 15 paragraph 1 section c) of the Regulation Brussels I?*” In the second case *Alpenhof* the dispute arose between Hotel Alpenhof, a company which operates in Austria, and Mr. Heller, consumer resident in Germany. Mr. Heller reserved and confirmed his stay in the hotel by email. Mr. Heller stated to have found fault in hotel’s service and have left without paying the bill. Hotel Alpenhof then brought an action before an Austrian court. Mr. Heller raised the plea that as consumer he may be sued only in the Member States of his domicile, before German courts. The Austrian Supreme court stayed proceedings and referred the question for preliminary ruling: “...*is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being “directed” within the meaning of Article 15(1)(c) of Regulation Brussels I?*” Because of the similarities between these two cases the ECJ joined them.

The most important question arising out of these two cases is what is (are) the criteria to consider activity presented on the website to be “directed” to this Member State. Consequently, whether the fact that those sites can be consulted on the internet is sufficient for that activity to be regarded as such. For example, if someone finds a website of some company that is accessible from his/her Member State, orders some goods. Is he/she under the consumer protection? In my opinion, the ECJ’s answer was very careful. It was for the first time that the ECJ was asked to interpret these questions.

ECJ did not state a clear rule. ECJ stated that Regulation Brussels I do not define the term “directing” of activities. This term must be interpreted independently and autonomously, “*by reference principally to the system and objectives of the regulation, in order to ensure*

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<sup>8</sup> Judgment of the Court (Grand Chamber) of 7 December 2010 in joined cases C-585/08 and C-144/09 Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09) [2010]. ECR 2010.

*that it is fully effective*".<sup>9</sup> As the Advocate General has stated in her Opinion<sup>10</sup>, European Union legislature did not intend to consider the mere existence of the website as condition of the "directing" such activities. Also the fact that the website is interactive or passive cannot be an important point. According to the joint declaration of the Council and the Commission to the adoption of Regulation Brussels I, the mere fact that a website is accessible from one Member State is not sufficient for Article 15 paragraph 1 section c) of the Regulation. According to the ECJ the professional must have manifested its intention to establish commercial relations with the consumer.<sup>11</sup> Therefore there must be sufficient evidence that the professional was envisaging doing business with consumer domiciled in other Member State. Such evidence does not include mention on the professional's website its email address, telephone number without an international code. That type of information is condition sine qua non according to the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').<sup>12</sup>

For the evidence required the ECJ created a non exhaustive list of such evidentiary matters. These are<sup>13</sup>:

- International nature of the activity at issue, such as certain tourist activities
- Telephone number with the international code
- Use of a top-level domain name other than that of the Member State in which the professional is established, or use of neutral top-level domain (.com, .eu)
- Description of itineraries from one or more other Member States to the place where the service is provided
- Mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.

The judgment in these two cases was very much awaited. It was presumed that the ECJ will give answers to many questions related to online consumer contracts. The presented judgment raises far more questions. The evidentiary materials are quite problematic and vague. As was stated in the Recital 24 of the Preamble to the Regulation Rome I, the language or currency used do not constitute relevant factors for the purpose of determining whether an activity is

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<sup>9</sup> Judgment Pammer and Alpenhof, para 55.

<sup>10</sup> Opinion of the Advocate General Trstenjak delivered on 18 May 2010 in Case Pammer and Alpenhof, para 64.

<sup>11</sup> Judgment Pammer and Alpenhof, para 75.

<sup>12</sup> See article 5 paragraph 1 section c) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

<sup>13</sup> Judgment Pammer and Alpenhof, para 83.

directed to one or more other Member States. It is worth mentioning that the majority of cross border transactions are made in U.S. dollars or Euros. It is difficult then to find the connection with a particular country. Also the language used nowadays is English or German. The Advocate General in her Opinion concluded that this is the case when if a website is presented in a given language, but this language can be changed. This is relevant because it is an indication that the professional directs its activity also to other Member States. Through the possibility to change languages, the merchant shows knowingly his wish that consumers from other Member States also conclude contracts with him. The international nature of the activity at issue or use of top-level domain name is also very problematic. It is possible to imagine for example Czech internet company with top-level domain name .cz. This website is accessible all over the world. If consumer for example from Hungary enters this website and orders some goods. Is he under the consumer protection? Did the Czech company aimed and directed its activities to Hungary? Also the use of telephone number with the international code seems to be redundant. Nowadays every telephone number has its international code. This cannot be considered as any decisive factor.

The opinion of Advocate General was in my opinion more suitable. It was based on four pillars<sup>14</sup>: The usual sense and interpretation<sup>15</sup> of the term “directing an activity”<sup>15</sup>; historical<sup>16</sup> and teleological<sup>17</sup> interpretation and the systematic interpretation of the concept. The Advocate General also proposed several criteria to determine whether a person who pursues commercial or professional activities directs them towards the Member State of domicile of the consumer. Some of these criteria were used in the judgment of the ECJ. Among others we can find: if the professional concludes traditionally distance contracts with consumers of a given Member State, there is no doubt that he directs its activities towards that Member State. On the contrary, the conclusion of one contract with one consumer of a particular Member State will not suffice for the direction of the activity to that Member State. If the professional explicitly includes/excludes the direction of his activity to some Member States (and actually behaves in accordance with this inclusion/exclusion)

## **Conclusion**

Growing number of internet-related consumer contracts requires clear and simple rule for determining the law applicable. The connecting factor used in Regulation Rome I quite

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<sup>14</sup> Opinion of the Advocate General Trstenjak delivered on 18 May 2010 in Case Pammer and Alpenhof, para 61.

<sup>15</sup> Opinion of the Advocate General Trstenjak delivered on 18 May 2010 in Case Pammer and Alpenhof, para 63.

<sup>16</sup> Opinion of the Advocate General Trstenjak delivered on 18 May 2010 in Case Pammer and Alpenhof, para 66.

<sup>17</sup> Opinion of the Advocate General Trstenjak delivered on 18 May 2010 in Case Pammer and Alpenhof, para 64.

confusing and causes many problems. Although the aim of this Regulation was to extend the consumer protection, in the online context it needs further changes. The ECJ has chance to define and made these rules more specific, but in the judgment Pammer and Alpenhof did not state clear rule. The proposed list of evidentiary factors in non-exhaustive. It is on the national courts to determine in every single case if these conditions are fulfilled. We can presume that in the near future more preliminary questions concerning internet-related consumer contracts will be raised to the ECJ.

The analyzed hypothesis of this contribution **The conditions upon which the choice of law rules for consumer contracts operates are not sufficient to consumer contracts concluded by means of electronic commerce** was confirmed.

### **Literature**

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