



Consumer protection under the Brussels I bis and Rome I Regulations

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Abstract

The trend towards globalisation and the completion of the European Union's internal market has also led to an increase in the incidence of a foreign element in international trade. The topic of my paper is precisely consumer protection within the European Union under the limits of judicial cooperation, which is touched upon in the key Regulations – the Brussels I bis and Rome I Regulations. As the Covid-19 pandemic has led to an increase in online purchases, often from foreign shops, we consider this topic to be topical. This paper will focus on consumer protection under selected Regulations. Based on the judgments of the Court of Justice of the European Union, we will deal with some of the more general provisions in order to establish the scope of consumer protection under these Regulations in practice.

Keywords

consumer protection, the Brussels I bis Regulation, the Rome I Regulation, jurisdiction, applicable law.

Introduction

The completion of the European Union's internal market and the ever-deeper cooperation between the Member States are causing an increase in the incidence of relations with a foreign element within the European Union. The free movement of goods, services, capital, citizens and workers has ensured that consumers across the European Union have the opportunity to access goods and services from the other Member States under terms and conditions similar to those originating in their home countries. The COVID-19 pandemic and lockdowns with the temporary closure of retail boutiques have also translated into an increased interest in e-commerce (Eurostat, 2022). In the case of e-commerce, the borders between the Member States are further blurred and consumers shopping from the comfort of their home may not even realise that they are entering into a relationship with a foreign element. Overall, e-commerce makes it easier for consumers to access offers from foreign retailers without having to travel abroad. Consumer protection at the European Union level is quite wide-ranging. Through its legislation, the European Union has a positive impact on the consumer's inherently weaker position in consumer contracts, while respecting the rights of entrepreneurs.

The scope of the article does not allow a focus on consumer protection in its entirety, as it is an extremely extensive field. We have chosen consumer protection under the Brussels I bis¹ and Rome I² Regulations as the subject of this article. The selected Regulations are key instruments governing judicial cooperation in civil and commercial matters. They contain a general regime for determining the applicable law and jurisdiction in relationships with a foreign element. In their provisions, both Regulations provide protection for consumers in consumer contracts under certain conditions. As these are *lex generalis* provisions, we are of the opinion that, in the context of consumer contracts with a foreign element, knowledge of these provisions is crucial for a subsequent understanding of the other *lex specialis* provisions. This legislation aims to ensure that, under certain conditions, the consumer is protected by a system which allocates jurisdiction to the courts closest to them and which ensures that the consumer relationship is governed by law that is close to the consumer. The article deals with the determination of jurisdiction and applicable law in consumer contracts under the regime of the selected regulations.

The main objective of the present article is to analyse the key consumer protection provisions of the Rome I and Brussels I bis Regulations and to identify the problematic parts of this legislation. Subsequently, we will supplement the identified space and vague provisions with the relevant case-law of the Court of Justice of the European Union. At the end of the article, we will deal with the evaluation of the legal regulations discussed and the proposal for the improvement and clarification of these provisions.

1. General consumer protection regime under the selected regulations

This part of the article will deal with consumer protection in selected regulations in general. Under the Brussels I bis Regulation, we will focus on determining the jurisdiction of the courts in consumer contracts; in other words, how the consumer is protected when the courts of which state have jurisdiction over a consumer contract is determined. The Brussels I bis Regulation contains special provisions dealing with the determination of jurisdiction where the presence of a weaker party in the proceedings is identified. One of the weaker parties covered by the Brussels I bis Regulation is the consumer. The Regulation deals with the determination of jurisdiction in the case of consumer contracts, both in cases of prorogation of jurisdiction (whether explicit or tacit) and where there is a lack of this choice. The protection of the weaker party under the Brussels I bis Regulation is intended to help the weaker party to compensate for its *de facto* weaker position in the proceedings stemming from the relationship between the economically stronger party and the economically weaker and less legally experienced party. For this reason, it can also be referred to as protective or compulsory jurisdiction. The aim of the adjustment of this jurisdiction was, in particular, to make the weaker party more comfortable when participating in the proceedings, which should be allocated to his/her country of domicile. This means that the weaker party should be sued in the country of their domicile (passive standing) and also that the weaker party should be able to sue in the country of their domicile (active

¹ 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 (hereinafter as “Regulation (EU) No 1215/2012”). <http://data.europa.eu/eli/reg/2012/1215/oj>

² 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) (hereinafter as “Regulation (EC) No 593/2008”). <http://data.europa.eu/eli/reg/2008/593/oj>

standing). Of course, all in such a way that the legitimate expectations of the entrepreneur are not undermined. As the Court of Justice of the European Union has also stated in its judgment, a genuine *forum actoris* is being established in favour of the weaker party to the contract - the consumer.³ The importance of protecting the weaker party is underlined by the fact that it is directly enshrined in the Recital 18 of the preamble to the Brussels I bis Regulation, as follows: “In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.”⁴ It follows that the provisions dedicated to the protection of the weaker party act as *lex specialis* to the general provisions. The aim of this legislation is in essence to ensure that, while respecting the principles of legal certainty and predictability, the consumer’s access to the courts is not hindered by the jurisdiction of courts in a country that is distant from his own. On the contrary, his inherently weaker position should be compensated for by the possibility of allocating the dispute to the courts of his own country, which he knows and which will clearly facilitate his access to court, whether technically, financially, economically, administratively or linguistically and so on.

The Rome I Regulation forms a complex together with the Brussels I bis Regulation by adding to it with the determination of applicable law. The Rome I Regulation, by specifically regulating consumer contracts, helps the consumer to compensate for his/her weaker position, which, as in Brussels I bis, results from an economic imbalance. In order to benefit the weaker party, the Rome I Regulation seeks to determine the applicable law, the provisions of which would be closer to the weaker party, which he would know or understand, and the consumer would have more comfortable access to the law.

In each case under consideration, we recommend first determining the jurisdiction of the courts and then the applicable law that will govern the entire relationship. It is therefore essential that these Regulations are interpreted and applied in a correlated manner so that interpretations do not contradict each other and so that they are dealt with uniformly throughout the European Union. Even in the Recital 24 of the preamble to Rome I Regulation itself, states that the Rome I Regulation shall be interpreted comprehensively with the Brussels I bis Regulation.⁵

We are of the opinion that the provisions on consumer protection are relatively clear in both Regulations, but the practice often brings situations that the legislator did not take into account when drafting the legal act. For this reason, it happens in practice that the interpretation of these provisions may not be clear. The number of questions for a preliminary ruling in this area referred by the Member States to the Court of Justice of the European Union suggests that some of the provisions may appear rather vague. That is why, also in the context of this article, it is necessary to work with the relevant case-law, from which we can extract a great deal of information that will help us to understand the selected provisions better.

Before dealing specifically with consumer protection in the selected Regulations, we would like to add that both Regulations are used to address relationships with a foreign element in the field of civil and commercial matters (*ratione materiae scope*).⁶ We can say that, in the case of consumer contracts, these are contracts for the sale of goods and services, but also license

³ See also Judgment of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, C-498/16, EU:C:2018:37.

⁴ Recital 18 of Preamble to the Regulation (EU) No 1215/2012.

⁵ Recital 18 of Preamble to the Regulation (EC) No 593/2008.

⁶ Unless they are negatively defined by other provisions of the Selected Regulations.

agreements for the use of software, which are nowadays concluded predominantly via the internet (Beek et al., 2016, 4). Both Regulations have territorial scope within the European Union, except Denmark in Rome I, which has made use of the opt-out clause and does not participate in this Regulation. As regards the *ratione personae scope*, it is given *erga omnes* in the case of Rome I Regulation and it is given under Brussels I bis if the defendant is domiciled in one of the Member States. *Ratione temporis* of the Brussels I bis is enshrined in Article 66, the Regulation shall apply only to legal proceedings instituted on or after 10 January 2015.⁷ The Rome I Regulation shall apply to contracts concluded after 17 December 2009.⁸ The following chapters will deal specifically with consumer protection under the provisions of the selected Regulations.

2. Consumer protection under the Brussels I bis Regulation

As mentioned above, the whole purpose of the regulation of consumer contracts in the Brussels I bis Regulation is to ensure that the consumers have recourse to and be sued in the courts of their country. We note that this only works if certain conditions are met, as not every consumer automatically uses the protection that the Brussels I bis determines. We will also deal with this selection in the next few lines. The consumer, for the purposes of the protection of the Brussels I bis Regulation, is the person who concludes the contract pursuant to Article 17(1) “...for a purpose which can be regarded as being outside his trade or profession...”⁹ In the judgment *Bertrand v Paul Ott KG.*, the Court of Justice of the European Union stated that the jurisdictional advantage “applies to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that they are private final consumers”.¹⁰ The Regulation, therefore, protects the final consumer. In the light of the judgment of the Court of Justice of the European Union in *Francesco Benincasa v Dentalkit Srl.*, according to settled case-law, those provisions apply only to private final consumers who are not engaged in a trade or professional activity.¹¹

Another interesting judgment in the field of defining the consumer under Brussels I bis is *AU v Reliantco Investments*. AU opened a trading account with this company in order to trade financial instruments, using the domain name of a trading company and acting as the company’s development director. The revenue contract they entered into referred to their acceptance of the terms and conditions, which included a choice of jurisdiction clause in favour of the Cypriot courts. AU claimed that there was a loss on its trading account due to manipulation and sought, inter alia, the imposition of non-contractual civil liability for non-compliance with the consumer protection provisions. It referred to the Brussels I bis Regulation and invoked the jurisdiction of the Romanian courts. For the purposes of the present article, we are interested to know whether AU can at all act as a weaker party - a consumer - in the proceedings. The Court of Justice of the European Union has held that such a person could, in principle, act as a consumer but only in circumstances where the conclusion of the contract does not fall within the scope of that person’s professional or business activity. It has also said that it was for the national courts to verify

⁷ Article 66 of the Regulation (EU) No 1215/2012.

⁸ Article 28 of the Regulation (EC) No 593/2008.

⁹ Article 17(1) of the Regulation (EU) No 1215/2012.

¹⁰ Judgment of 21 June 1978, *Bertrand v Paul Ott KG.*, C- 150/77, EU:C:1978:137.

¹¹ Judgment of 3 July 1997, *Francesco Benincasa v Dentalkit Srl.*, C-269/95, EU:C:1997:337.

whether this condition was met.¹² An identical interpretation was given in the case of a resident of the Czech Republic, *Jana Petruchová v. FIBO Group Holdings Limited*, a Cypriot brokerage company. The contract provided for an agreement conferring jurisdiction on the Cypriot courts. According to this judgment, Mrs. Petruchová is classified as a consumer; again, if the condition that the contract does not fall within the scope of her professional activity is fulfilled.¹³

Thus, a party acting in the course of their business would not be able to benefit as a consumer from this provision. On the other side of the contract is the entrepreneur, who, for the purposes of this article, is referred to as the professional or seller.

Article 17(1) sets out the scope of protection for contracts for the sale of goods on instalment credit terms, contract for a loan repayable in instalments, or for any other form of credit, made to finance the sale of goods and for all other consumer contracts.¹⁴ While the first two categories fall here without an exception and regardless of whether the professional is doing business in the consumer's country or not, for all other contracts an additional condition has to be fulfilled. Brussels I bis Regulation requires that all other contracts must be cases of the professional pursuing commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State,¹⁵ in order to persuade the consumer to make a purchase from him. But what does it mean that the entrepreneur is directing activities to the consumer's country? This provision may be questionable and poses a wide scope for legal analysis, and even more so in an e-commerce context. In our view, this condition pursues the interests of the entrepreneur in a very appropriate way and pursues his legitimate expectations. Simply written, if a professional directs his activities to the consumer's country, he should be aware that, under Brussels I bis Regulation, he could find himself before the courts of that country. However, if the professional is not interested in a consumer from that country and does not direct his business to that country, the fact that he would be sued in the courts of that country would be in complete conflict with his legitimate expectations. Despite the fact that the consumer is referred to as the weaker party, we should not put entrepreneurs, as significant economic players, in an unpredictable legal position. At this point, we have to deal with the interpretation of what it means to direct activity to the consumer's country. The situation is the simplest in cases where the foreign entrepreneur operates his business and pursues commercial activities directly in the consumer's country. Here, we do not think that there is any doubt as to whether the activity is directed to that country. In the standard form of trading through bricks-and-mortar stores, we can argue that if the bricks-and-mortar store in the foreign country has undertaken activities to induce the consumer to purchase from its foreign bricks-and-mortar store, for example, by various marketing activities, we can say that it has directed the activity to the consumer's country and must be aware that it is thereby establishing the jurisdiction of the courts of that country. As an example, imagine a holiday in Greece, where an Austrian consumer bought a bracelet in a local beach shop. Naturally, the trader did not take any action to induce this consumer to buy the bracelet and it would therefore be inconceivable that he could be sued in an Austrian court. Conversely, suppose that a Hungarian consumer buys goods in the Austrian outlet centre in Parndorf. He was persuaded to buy by advertisements on

¹² Judgment of 2 April 2020, *AU v Reliantco Investments LTD and Reliantco Investments LTD Limassol Sucursala București*, C-500/18, EU:C:2020:264.

¹³ Judgment of 3 October 2019, *Jana Petruchová v FIBO Group Holdings Limited*, C-208/18, EU:C:2019:825.

¹⁴ Article 17(1) of the Regulation (EU) No 1215/2012.

¹⁵ Article 17(1) of the Regulation (EU) No 1215/2012.

Hungarian radio, magazines and other media, outdoor advertising on Hungarian territory and so on. In this case, it could already be said that the Austrian entrepreneur directed the activity to the consumer's country and was interested in that consumer concluding a consumer contract with him on that basis.

In the case of e-commerce however, these boundaries are not entirely clear. We therefore need to identify whether the mere availability of a web application is already considered to be directing activity into the consumer's country, or where the boundary is regarding when we can talk about this direction and when we cannot. This relatively brief provision raises many questions, particularly in the age of e-commerce. We can supplement this provision with the case-law of the Court of Justice of the European Union, which has dealt with this issue in a number of its judgments. We will look briefly at the other provisions of Article 17 of Brussels I bis Regulation and then turn to the case-law of the Court of Justice of the European Union.

Article 17(2) of Brussels I bis Regulation further deals with cases where an entrepreneur is not domiciled in a Member State but has an establishment, agency or another branch there and the contract relates to the activities of that structure; that entrepreneur would be deemed to be a party domiciled in that Member State. Article 17(3) further negatively excludes contracts of transport from its scope. An exception is made for transport contracts which, for an inclusive price, provide a combination of travel and accommodation.¹⁶ In such a contract, the consumer's position remains unchanged. From the whole of Article 17, the most crucial issue from our point of view remains dealing with the question of the direction of the activity to the consumer's country. Since the Rome I Regulation contains an identical clause with regard to consumers and the Regulations should be interpreted in conjunction with each other, this interpretation is equally applicable in the case of the Rome I Regulation.

We can extract a great deal of information from the judgment of the Court of Justice of the European Union in the *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* case. That judgment joined the cases of *Mr Pammer v Reederei Karl Schlüter* and *Mr Heller v Hotel Alpenhof*, and the Court of Justice of the European Union dealt with two questions for a preliminary ruling. First, the national court asked whether a contract for a voyage by cargo ship is part of a contract of carriage that combines transport and accommodation for a single price. The Court of Justice of the European Union, in view of the fact that the passenger's stay on the ship was also to be arranged, held that this contract is a contract which provides, for one price, accommodation together with transport as part of the carriage. The second question is key to understanding the direction of activity to the consumer's country. The national court asked whether the fact that a website is available on the internet in the consumer's country is sufficient to constitute consumer-directed activity within the meaning of the Brussels I bis legislation. The Court of Justice of the European Union has ruled that the mere accessibility of a web application is not sufficient to be able to speak of directing activity to that country. The fact that the language and currency of the consumer's country are used does not change the situation because, in this case, they were the same as the country of the entrepreneur. The Court of Justice of the European Union commented that these situations are examined on an *ad hoc* basis and we do not have a precise definition of what can and cannot be considered as direction. In each such case, the court is obliged to examine the case with regard to whether it involves the international nature of the activity, the use of a currency and language other than those pertaining to the country of the entrepreneur, advertising in the country of the consumer,

¹⁶ Article 17(2,3) of the Regulation (EU) No 1215/2012.

the use of a top-level domain that is not a top-level domain in the country of the entrepreneur, etc.¹⁷ On this basis, we can therefore say that the fact that we buy online from a website in another Member State does not automatically mean that we are protected by the Brussels regime. The key is to establish in each case whether the entrepreneur has taken action to prompt consumers from that country to buy from his site.

Here we would like to note that it is questionable whether one activity developed by an entrepreneur is sufficient to be able to talk about a direction of activity to this country. We are of the opinion that, in the context of consumer protection, it should be irrelevant how many activities were developed, because the consumer is not obliged to know whether the activity that convinced him was the only activity of the entrepreneur or was just one of the activities. As regards the direction itself, we are talking about direction using any means. “The idea is that the consumer must not be obligated to research whether the professional is in any qualified manner domiciled in the country where the consumer has his/her habitual residence or not.” (Bělohávek, 2010, 1146). We would also like to add that, in accordance with the *Lokman Emrek v Vlado Sabranovic* judgment, these provisions do “not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer’s domicile, namely an internet site, and the conclusion of the contract with that consumer. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity”.¹⁸

The Pammer judgment described above is followed by the judgment in the case *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*. This dealt with the purchase of a car in Germany, and the consumer had accessed the offer of cars from that company via the internet from her residence in Austria. Matters of fact were considered by the national court, which found that the condition of the activity being directed to the consumer’s country was within the meaning of the Pammer judgment to be satisfied. The question referred for a preliminary ruling was whether the clause on the direction of the activities to the country of the consumer was limited to contracts concluded at a distance. Although the Regulation does not impose such a condition, Recital 24 of the preamble to Rome I, which refers to distance contracts, can be confusing. The Court of Justice of the European Union therefore clarified and confirmed in this judgment that it is not required that the contract between the consumer and the trader be concluded at a distance for the purposes of the provision in question.¹⁹ As M. Mankowski points out, the methods of delivery abroad, the location of the establishment in a nearby border area, the advertising content and other factors may cause the entrepreneur’s intention to direct the activities to the consumer’s country. It is for the national court to assess this and determine whether there is such evidence of the direction of activity (Mankowski & Magnus, 2016). We would add, in passing, the conclusions of the *Rüdiger Hobohm v Benedikt Kampik Ltd & Co. KG and Others* judgment, where the Court of Justice of the European Union declared that, even if these provisions on the direction of activities “that may be applied to a contract concluded between a consumer and a professional which on its own does not come within the scope of the commercial or professional activity ‘directed’ by that professional ‘to’ the Member State of the consumer’s domicile, but

¹⁷ Judgment of 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09)*, C-585/08, EU:C:2010:740.

¹⁸ Judgment of 17 October 2013, *Lokman Emrek v Vlado Sabranovic*, C-218/12, EU:C:2013:666.

¹⁹ Judgment of 6 September 2012, *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*, C-190/11, EU:C:2012:542.

which is closely linked to a contract concluded beforehand by those same parties in the context of such an activity... It depends on the national court's assessment of whether the parties are identical, „whether the economic objective of those contracts concerning the same specific subject-matter is identical and whether the second contract complements the first contract in that it seeks to make it possible for the economic objective of that first contract to be achieved.”²⁰

Although Article 17(1) and the related case-law tell us quite clearly who is a consumer and what we consider to be a consumer contract within the meaning of the Regulation, the practice can bring cases where we can see that even a seemingly clear provision can have room for interpretation. This is the case, for example, in the judgment of the Court of Justice of the European Union in the case of *Renate Ilsinger v Martin Dreschers*. Mrs. Ilsinger from Austria received a notification from Schlank and Schick GmbH about the possibility of winning 20,000 EUR. In addition to sending the required certificate back to the company, which was to be a condition for payment of the prize in question, she also placed a non-binding order with the company for a trial order. The company contested the jurisdiction of this court on the ground that the action did not fall within the Brussels I bis Regulation consumer protection provisions. The Austrian court, therefore, referred the question for a preliminary ruling of whether the contract is a contract covered by the Brussels I bis Regulation's consumer protection. The Court of Justice of the European Union held that the payment of the prize was covered by the consumer protection article only if the company was legally obliged to pay the prize money to Mrs Ilsinger. In the absence of a legal obligation to do so, the contract would have consumer status under the regime of Brussels I bis Regulation only if Mrs Ilsinger had actually placed an order with Schlank and Schick GmbH company.²¹

An interesting judgment in this field is the case of *Johann Gruber v Bay Wa AG*. Mr Gruber, an Austrian farmer, lives on a farm which he occupies for both private purposes and for his business, as he also runs a livestock farm. The area that is used for private residential purposes is slightly more than 60%. The remaining part is intended for business purposes, for storing machines, feed and the like. Based on a magazine that was delivered to his home, he found an advertisement for a German near-border company called Bay Wa. The magazine did not directly advertise the roof tiles he was interested in, only other goods, so he called the shop directly to enquire about their availability. He visited the shop in person and mentioned to the vendor during the quotation that he owned a farm for agricultural production and wanted to cover it with roof tiles. He did not elaborate on whether he lived there or if it was all just for business. After purchasing and having the tiles laid in, Mr. Gruber was not satisfied with the roof due to unacceptably significant variations in colour despite the warranty that they would be uniform. For this reason, he invoked the warranty and sought a refund of the purchase price as well as coverage for all expenses associated with taking down the old roof tiles and laying the new ones, as well as other costs. He brought an action before the Austrian court, but Bay Wa contested its jurisdiction, in particular on the ground that it did not consider the contract to be a consumer contract. The details of the jurisdiction of the courts will not be of interest to us for the purposes of this paper, but the interpretation of this situation is however relevant for the purposes of the Rome I Regulation. The Court of Justice of the European Union stated that, in a contract that has both a private and a business purpose, the consumer cannot rely on protection

²⁰ Judgment of 23 December 2015, *Rüdiger Hobohm v Benedikt Kampik Ltd & Co. KG and Others*, C-297/14, EU:C:2015:844.

²¹ Judgment of 14 May 2009, *Renate Ilsinger v Martin Dreschers*, C-180/06, EU:C:2009:303.

unless the business purpose is only marginal and of negligible importance in the overall situation. That is a matter for the national court, which must take the facts of the case into account. It does not have to take the facts that the other party might have known at the time of contracting into account, except where the party claiming to be a consumer had expressed himself in such a way that the other party might have thought that he was dealing with an entrepreneur.²²

Another interesting case is *A. B. and B. B. v Personal Exchange International Limited*. In this judgment, the Court of Justice of the European Union also granted consumer status to an online poker player who makes substantial profits from his game but “has neither officially declared such activity nor offered it to third parties as a paid service”.²³

After correctly identifying in the present case whether the consumer protection of the Brussels I bis Regulation within the meaning of Article 17 is present, we move on to the following provisions of Article 18 or 19, depending on whether or not a prorogation of jurisdiction has been reached. If we had a prorogation of jurisdiction, we would determine jurisdiction in a consumer contract according to this agreement. Brussels I bis Regulation also emphasises consumer protection in this case, in that an agreement can only depart from the other provisions of this section if it is entered into after the dispute has arisen and if it allows the consumer to bring proceedings in courts other than those indicated in this Section, or if both parties are habitually domiciled in the same Member State and the agreement confers jurisdiction on those courts. However, this cannot be contrary to the law of that Member State.²⁴ As can be seen, the freedom of contract is also limited in this case so that the consumer cannot be disadvantaged. Someone qualifying as a legally lay consumer might not be aware of all the consequences of a prorogation of jurisdiction agreement. Consumer protection is also present in the so-called subordination to jurisdiction within the meaning of Article 26(1) of Brussels I bis Regulation. In this *sui generis* prorogation, the jurisdiction of the court is based on the defendant’s entering the proceedings (Slašťan, n.d.). However, Article 26(2) confers on the consumer the advantage that the court is obliged to ensure that the defendant is informed of his right to contest the jurisdiction.²⁵

According to Article 18, in the absence of such an admissible agreement between the parties, a consumer who satisfies the conditions for the protection of this Section of Brussels I bis Regulation may sue the other party either in the courts of the place of domicile of that party or in the courts of the State where the consumer is domiciled. Here, we can see that the fact that the entrepreneur has directed his activities to the consumer’s country means that he must accept the consumer’s option to sue him in the courts of his domicile. Even more protection is provided by the subsequent paragraph, which allows the entrepreneur to sue the consumer only in the courts of the Member State in which the consumer is domiciled. The last paragraph of this Article deals further with counter-claims.²⁶ As can be seen, Brussels I bis Regulation provides broad protection to the consumer in the sense that any dispute arising from a consumer contract shall be allocated to the consumer’s country of domicile. The legislator probably took into account the possibilities of the consumer as a weaker party to participate in proceedings in another Member State, possible language barriers, administrative burdens and other circumstances. In

²² Judgment of 20 January 2005, *Johann Gruber v Bay Wa AG.*, C-464/01, EU:C:2005:32.

²³ Judgment of 10 December 2020, *A. B. and B. B. v Personal Exchange International Limited*, C-774/19, EU:C:2020:1015.

²⁴ Article 19 of the Regulation (EU) No 1215/2012.

²⁵ Article 26(2) of the Regulation (EU) No 1215/2012.

²⁶ Article 18 of the Regulation (EU) No 1215/2012.

the next chapter, we will discuss the protection afforded to consumers by the Rome I Regulation in determining the applicable law. Much of the interpretation provided in this chapter is also applicable to the interpretation of the Rome I Regulation.

3. Consumer protection under the Rome I Regulation

The Rome I Regulation, as we have already mentioned, contains conflict-of-law rules through which we are able to determine the law applicable to contractual obligations falling within the scope of the Regulation. If it were a non-contractual obligation, for example, product liability, we cannot apply the Rome I Regulation and the applicable law would have to be determined on the basis of the Rome II Regulation.²⁷

In determining the applicable law, we must look for a match between the material freedom of choice of law and the substantive protection of consumers. Rome I Regulation preserves the autonomy of the contracting parties by determining the freedom of choice. In determining the applicable law, we must find a balance between the choice of law and consumer protection. Rome I preserves the parties' autonomy of choice. At the same time, the *lex specialis* regulation seeks to compensate for the factual inequality and the weaker position of the consumer *vis-à-vis* the entrepreneur, which is generally due to the consumer's relative inexperience and, more often than not, their inability to negotiate special terms and conditions (Slašťan & Siman, 2018). As with Brussels I bis Regulation, however, the fact that we have a consumer present as one party does not necessarily mean that this consumer is under the special protection of the Regulations. Since Rome I is interpreted comprehensively with Brussels I bis, we can also base the Rome I Regulation on the definition of the consumer as defined in Article 17 of the Brussels I bis Regulation and the aforementioned case-law. A consumer is a natural person who enters into a contract for a purpose that can be regarded as being outside his trade or profession. The other party to the contract, the professional, unlike the consumer, acts in the exercise of his trade or profession. Article 6(1) of the Rome I Regulation provides that the consumer contract "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,
- and the contract falls within the scope of such activities."^{28 29}

In the case of pursuing professional activities in the consumer's country directly, the situation is again more obvious. As A.J. Bělohávek states, "It is not relevant whether the business activity is pursued through the medium of the professional's principal registered office, business premises or otherwise" (Bělohávek, 2010, 1146). Referring to Recital 24 of the preamble to Rome I Regulation, a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 (amended by the new Brussels I bis) specifies that "to be applicable, it is

²⁷ 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). <http://data.europa.eu/eli/reg/2007/864/oj>.

²⁸ Article 6(1) of the Regulation (EC) No 593/2008.

²⁹ Paragraph 4 of the quoted Article excludes exhaustively enumerated contracts from the scope of this Article.

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 mere fact that an Internet site is accessible is not sufficient" to talk about a direction of activities; it is essential 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".³⁰ Again, as with Brussels I bis Regulation, we have a provision on the direction of activities to the country of the consumer, where we refer to the interpretation given above in the relevant chapter.

Consumer protection in the Rome I Regulation also focuses on the choice of law. This is an interesting element, particularly with regard to e-commerce, where it can be covered in particular by the provisions of general terms and conditions. Article 6(2) of Rome I Regulation provides that this choice cannot deprive the consumer of the protection which he would have been afforded by the mandatory provisions of the law which would have been applicable in the absence of the choice.³¹ It follows that, even assuming that we as consumers agree to a choice of law clause, we are guaranteed at least a basic range of core rights that would be available to us in the absence of a choice. Combined with the Brussels I bis jurisdiction regime, we would therefore find ourselves as consumers in a significantly more favourable situation guaranteed by this regime.

One of the key judgments dealing with consumer protection under the Rome I Regulation is the case of *Verein für Konsumenteninformation* ("VKI") v Amazon EU Sarl ("Amazon"), a Luxembourg company that sells online to a number of countries, including Austria. The general terms and conditions on the amazon.de website contained a number of points against which the VKI brought an action before an Austrian court to have them banned by the court. Among them, it referred to a choice of law clause in favour of Luxembourg law. In the preliminary ruling procedure, the national courts asked, among other things, whether a negotiated choice could constitute an unfair trading practice. In that case, the Court of Justice of the European Union held that the choice of law in the terms in question would only be an unfair practice if it misled the consumers into believing that only the agreed law applied to the contract and did not provide them with comprehensive information that they could also rely on the protection of Article 6(2) Rome I Regulation.³² A similar interpretation was given in the case of *Verein für Konsumenteninformation v TVP Treuhand*.³³

Conclusion

The aim of the present article was to analyse consumer protection under selected Brussels I bis and Rome I Regulations and to identify gaps in this legal regulation. We are of the opinion that gaps in regulation or some vague provisions can be covered by the relevant case-law of the Court of Justice of the European Union. Nevertheless, the consumers concerned are often not sufficiently well informed and we therefore think that a possible revision of these Regulations

³⁰ Recital 24 of Preamble to the Regulation (EC) No 593/2008.

³¹ Article 6(2) of the Regulation (EC) No 593/2008.

³² Judgment of 28 July 2016, *Verein für Konsumenteninformation v Amazon EU Sarl*, C-191/15, EU:C:2016:612.

³³ Judgment of 3 October 2019, *Verein für Konsumenteninformation v TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG*, C-272/18, EU:C:2019:827.

could also be more reflective of e-commerce and could incorporate the most important interpretations that we extract from the case-law of the Court of Justice of the European Union.

A major issue in the area of e-commerce appears to be the rather vague provision on directing activities to the consumer's country, which, especially in the online world, does not have strictly defined boundaries. In our view, the regulation in question is set up in the selected Regulations to strike an effective balance between consumer protection on the one hand and preserving legitimate expectations on the part of the entrepreneur. Simply stated, if a professional has actively taken steps to influence a consumer from another Member State to make a purchase on his website, he must automatically assume that he may find himself before the courts of that State and that the legal relationship between him and the consumer may be governed by the law of the country of the consumer's habitual domicile. Conversely, if a professional is only interested in selling within his own country and a foreign consumer looks up his web application on the internet and orders goods from it, it would not be fair, in our view, to expect the professional to count on the relationship being governed by the law of the consumer's country or that he/she may be sued/or sue in the courts of the consumer's country.³⁴

Although we respect and perceive the weaker position of the consumer in consumer contracts, with this article we would also like to draw attention to the position of the entrepreneur. Small enterprises have easier access to the market in some sectors because doing business online does not necessarily require a high initial investment. This small or yet inexperienced entrepreneur may not have all the information on consumer protection at his disposal and may also not have knowledge of the relevant case-law and may therefore find himself in a situation in practice that he did not foresee. This lack of knowledge may affect compliance with consumer protection in practice. We are of the opinion that, at the European Union level, in the framework of judicial cooperation, entrepreneurs should automatically be informed of the essentials of consumer protection under the discussed Regulations. We suggest that, when establishing companies with activities aimed at the sale of goods and services to final consumers, the relevant public authorities should provide entrepreneurs with a document or guidance on how core consumer protection is ensured. We are of the opinion that if entrepreneurs had a clearer understanding of this issue, they would not be surprised later on in practice if they are sued in the courts of another Member State or if a consumer contract is governed by law other than their own. Of course, we do not dispute the weaker position of the consumer, we just think that increased knowledge on the side of the entrepreneur would establish clearer rules and that entrepreneurs, especially in the e-commerce sector, would know how they must behave if they want the jurisdiction and applicable law of their state to be maintained.

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³⁴ We very much welcome the adoption of Regulation 524/2013 on consumer ODR, the subject matter of which is "facilitating the independent, impartial, transparent effective, fast and fair out-of-court resolution of disputes between consumers and traders online" especially with regard to the digital dimension of the internal market. As a *lex specialis*, this Regulation provides for a very effective out-of-court dispute resolution of online consumer disputes. For more details: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524>

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